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Blue Cross plans must prove trademark rights to avoid strict antitrust test

An Alameda County judge ruled Blue Cross Blue Shield plans must show historical trademark rights tied to hospitals' locations to avoid strict antitrust treatment of their exclusive territories.

By Alicia Alvarez
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An Alameda County judge ruled late Tuesday that whether Blue Cross Blue Shield plans face strict antitrust treatment for dividing the country into exclusive territories will depend on whether they can show their predecessors held trademark rights in those areas before the 1950s.

Judge Somnath Raj Chatterjee's order sets the standards for Cartwright Act claims brought by Verity Health System, Prime Healthcare and Children's Hospital Los Angeles against more than 40 Blue Cross and Blue Shield plans and the Blue Cross Blue Shield Association. The hospitals opted out of related federal multidistrict litigation in Alabama to sue under California law. Eight other health care provider suits are coordinated with theirs.

Under 1991 license agreements with the association, each plan may use the Blue brand only in its exclusive service area and may not contract under the brand with hospitals outside that area. The hospitals contend the territories constitute per se illegal market allocation and group boycott. The Blues argue the agreements settled trademark rights developed by the original local plans, requiring the more flexible rule of reason.

The distinction matters because the per se rule treats certain restraints as inherently anticompetitive, while the rule of reason allows consideration of their competitive effects and justifications.

"This opinion has broad implications across the entire United States, both state and federal court alike," plaintiffs' attorney Patrick M. Ryan of Bartko Pavia LLP said before the hearing.

"In general, in a horizontal conspiracy case like this, procompetitive justifications like trademarks are inadmissible. Here, the Court recognized a very narrow exception, requiring the Defendants to come forward with specific evidence to show how they can meet specific elements of trademark protection in every jurisdiction where there are plaintiff hospitals," Ryan said.



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The Blues are represented by Karin A. DeMasi of Cravath, Swaine & Moore LLP, among others. DeMasi thanked Chatterjee for the time he spent on the order during a hearing Wednesday and did not otherwise comment. Trial is set for March 29, 2027. *VHS Liquidating Trust v. Blue Cross of California*, JCCP 5398, No. RG21106600 (Alameda County Super. Ct., filed July 27, 2021).

Chatterjee rejected both sides' positions on the trademark issue. He declined to accept the Blues' argument that no showing of prior trademark rights is necessary or the hospitals' contention that such rights must be shown nationwide.

Instead, the Blues must show that an early plan had a reasonable factual and legal basis to believe it held common-law trademark rights in an area rationally related to each hospital's location. The showing must reach back to before the rights were assigned to the association's predecessors.

If the Blues cannot make that showing, the per se rule will apply to that hospital's claims. Chatterjee will decide the issue hospital by hospital and service area by service area.

"A showing of antecedent trademark rights is necessary under the facts of this case for the jury to find that the Licensing Agreements are not merely auxiliary to an illegal agreement to divide markets," the order stated.

Ryan said the ruling clarified the standards for group boycott and market allocation claims beyond this case.

The order also resolved which antitrust test will govern two other challenged Blue Cross practices.

Chatterjee applied the per se standard to market allocation and price-fixing claims involving the National Best Efforts rule, which required each plan to earn at least two-thirds of its national health revenue under the Blue brand. The rule was lifted in 2021 as part of a settlement in the federal litigation.

"The Blues have not provided an adequate procompetitive justification based on the circumstances, details, and logic of the NBE restraint. The NBE restraint falls on the per se end of the In re Cipro spectrum," the order stated.

By contrast, Chatterjee applied the rule of reason to price-fixing claims involving the BlueCard program, under which plans pay out-of-area providers at rates negotiated with the local Blue plan. Although he found the program "literally fixes prices," he treated it like a joint purchasing arrangement, as the federal court had, because it may produce economies of scale.

"If the Blues fail to meet that burden, and we are confident they will fail, the case's primary focus will be all about the size of the damage award. And that ask will be in the billions of dollars across all of our hospital clients," Ryan said.

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