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U.S. DISTRICT COURT
N.D. OF ALABAMA

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

IN RE: **BLUE CROSS BLUE SHIELD** **ANTITRUST LITIGATION** **(MDL NO. 2406)**	**Master File No. 2:13-CV-20000-RDP** **This Document Relates to** **Provider Track Cases**

PROVIDER PLAINTIFFS' MEMORANDUM OF LAW IN FURTHER SUPPORT OF THEIR MOTION FOR FINAL APPROVAL OF PROPOSED CLASS SETTLEMENT

The Court has requested that the Settling Parties address whether it is permissible for the Defendants' Exclusive Service Areas and the BlueCard program to remain in place even though no objection has been raised about this issue. The answer is clearly yes for at least three reasons. First, the Court addressed the issue of ESAs when it approved the Subscriber Settlement. The Court of Appeals affirmed this Court, and the Supreme Court denied certiorari. Second, the Court addressed ESAs and BlueCard when it ruled on the motions for summary judgment on the standard of review after the Subscriber Settlement was approved. Third, this Settlement, unlike the Subscriber Settlement, does not have a mandatory Rule 23(b)(2) component. Of course, if the opt-out plaintiffs attempt to have ESAs or BlueCard declared per se illegal, they will have to overcome this Court's rulings, but they are not bound in any respect by this Settlement.

First, this Court has already ruled as part of the Subscriber settlement that ESAs could remain in place. After this Court preliminarily approved the Subscriber Plaintiffs' settlement, some objectors asserted that the settlement agreement violated public policy because it would permit the Blues to perpetuate conduct that is unlawful *per se*. The Court overruled that objection, noting that the Subscriber Settlement would eliminate the National Best Efforts rule, which was part of the "'aggregation of a market allocation scheme *together with certain other output restrictions*'" that must be analyzed under the *per se* standard. Doc. No. 2931 at 46 (quoting Doc. No. 2063 at 59).

For that reason, the illegality of the Blues' conduct going forward was not a "'legal certainty,'" and the settlement could be approved. Doc. No. 2931 at 46–48 (quoting *Bennett v. Behring Corp.*, 737 F.2d 982, 987 (11th Cir. 1984)). The Eleventh Circuit affirmed. *In re Blue Cross Blue Shield Antitrust Litigation*, 85 F.4th 1070, 1089–90 (11th Cir. 2023) ("So long as the conduct perpetuated under a settlement agreement does not per se violate antitrust law, the settlement may be approved . . . ."). The Supreme Court denied a petition for a writ of certiorari. *Home Depot U.S.A., Inc. v. Blue Cross Blue Shield Ass'n*, 144 S. Ct. 2687 (2024).

The Provider Plaintiffs' settlement agreement, like the Subscribers' agreement, contains a release that covers claims relating to the factual predicates of the Provider Actions, including the Blues' use of Exclusive Service Areas. Doc. No. 3192-2 ("Provider Agreement") ¶ 1(xxx). The Providers' settlement was preliminarily approved, and no Class Member objected that such a release is impermissible because it violates public policy. Because the release is substantively identical to the Subscribers' release, *see* Doc. No. 3311-1 at 24–25, it does not violate public policy.

Above and beyond the changes already made through the Subscribers' settlement agreement, the Provider Agreement contains additional provider contracting opportunities by expanding the Contiguous Area rule, further distancing the rules going forward from the ones this Court previously concluded were subject to the *per se* standard. Contiguous Area contracting will be available not only to Anchor Hospitals but also their Eligible Affiliates, and Contiguous Area Contracts will be accessible to all of the contracting Blue Plan's state membership, regardless of whether those Members live or work in the Blue Plan's Service Area. Provider Agreement ¶¶ 11–12. The provision relating to affiliates and all products clauses will help Providers benefit from the

expanding "Green" business competition that the Subscriber Settlement permits. With these changes, it is even clearer that the release in the Provider Agreement does not violate public policy.

Second, in its rulings on motions for summary judgment after the approval of the Subscriber Settlement, the Court has ruled that the ESAs and BlueCard are not per se illegal, but rather are subject to the default rule of reason. While the Subscribers' motion for final approval was pending, the Blues moved for summary judgment against the Providers on the standard of review for conduct after the elimination of the National Best Efforts Rule in April 2021, Doc. No. 2728, and the Providers moved for summary judgment on the standard of review for their group boycott claims, which were based on the BlueCard program, Doc. No. 2729. Shortly after approving the Subscribers' settlement, the Court ruled in the Blues' favor on both motions. As to ESAs, the Court concluded that "the appropriate standard of review under which the court will evaluate ESAs alone is the Rule of Reason." Doc. No. 2933 at 11. The Court held that stand-alone ESAs were different from the agreements held to be per se unlawful in *United States v. Sealy, Inc.*, 388 U.S. 350 (1967), and *United States v. Topco Associates, Inc.*, 405 U.S. 596 (1972), and that the Blues' trademark rights could provide additional justification for ESAs. Doc. No. 2933 at 6–11. As to BlueCard, the Court determined "that Providers' alleged Boycott Conspiracy is not a 'naked restraint of trade with no purpose except stifling competition.' Therefore, the court reaffirms its conclusion that it must apply the rule of reason analysis to Providers' Boycott Conspiracy claim." Doc. No. 2934 at 9 (citations omitted).

Third, the Provider Settlement, unlike the Subscriber Settlement, is not a mandatory settlement under Rule 23(b)(2). When Home Depot objected that Subscriber Settlement violated public policy by releasing claims for future antitrust violations, it emphasized that class members could not avoid that release by fully opting out of the settlement. This release, Home Depot

claimed, would insulate the Blues from antitrust enforcement. The Eleventh Circuit rejected this argument: "The government may also enforce the antitrust laws against companies like Blue Cross. 15 U.S.C. §§ 15a, 15c, 15f. And the settlement agreement does not bar the Department of Justice or state attorneys general from pursuing civil claims or criminal charges against Blue Cross." *In re Blue Cross Blue Shield Antitrust Litig.*, 85 F.4th 1070, 1089 (11th Cir. 2023). In the Provider Settlement, there is no concern because class members were allowed to opt out completely, and many of them have filed claims challenging the legality of the Blues' conduct, despite this Court's rulings that this conduct is governed by the rule of reason standard.

CONCLUSION

For the foregoing reasons, and the reasons stated in the Provider Plaintiffs' brief in support of their motion for final approval, Doc. No. 3311-1, the Provider Agreement does not violate public policy, and the Providers' settlement should be approved.

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