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Eleventh Circuit Denies Blue Cross Blue Shield's Interlocutory Appeal Challenging Application of Per Se Rule In Multidistrict Litigation In Alabama

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On December 12, 2018, the Eleventh Circuit Court of Appeals denied defendants Blue Cross Blue Shield Association's interlocutory appeal of a District Court decision to analyze BCBS's geographic market distribution system under the *per se* rule rather than the rule of reason. Judge R. David Proctor of the Northern District of Alabama certified BCBS's interlocutory appeal back in June because his decision to proceed under the *per se* standard of review "involves a controlling question of law as to which there is substantial ground for difference of opinion." But rather than resolve the substantive legal issue at hand, the Eleventh Circuit issued a one sentence order denying "Defendants' petition to appeal." The parties did not seek to stay the case pending appeal and the underlying action has been moving forward.

Of course, this is not a decision on the merits. The Circuit Court's refusal to hear the interlocutory appeal leaves open the possibility of defendants petitioning the Eleventh Circuit to rehear the issue *en banc*, and eventually seeking certiorari in the Supreme Court. Finally, the parties obviously can also appeal any final determination that relies, in whole or in part, on Judge Proctor's ruling.

The case is *In re Blue Cross Blue Shield Antitrust Litigation*, Case No. 13-cv-2000, MDL 246 (N.D. Ala.). The appeal case number is 18-90020 (11th Cir. Dec. 12, 2018).

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