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DRUG AND DEVICE BULLETIN

SHOOK HARDY & BACON

Third Circuit Sides with Device Manufacturer in Antitrust Claims against Blue Plans

In a significant decision affecting the pharmaceutical and medical device industries, the U.S. Court of Appeals for the Third Circuit has reversed a district court's dismissal of antitrust claims brought against a number of Blue Cross Blue Shield insurance plans for denying coverage for specific treatments and tests. *LifeWatch Services, Inc. v. Highmark Inc., et al.,* No. 17-1990 (3d Cir. 2018).

The reversal opens the door for any drug or device supplier whose products have been rejected by Blue Cross plans to make an antitrust claim against the insurer. Shook, Hardy & Bacon represented LifeWatch, a medical device manufacturer and health monitoring service provider later acquired by BioTelemetry, in the underlying litigation and appeal.

The lawsuit filed by LifeWatch alleged that certain insurance plans that are members of the Blue Cross Blue Shield Association (Blue Plans) work together through a Medical Policy Panel to determine which treatments and tests should be covered by the constituent plans. Shook argued that the Blue Plans have adopted a rule that requires the plans to adhere to the recommendations of the Medical Policy Panel or face material consequences, up to expelling the insurer from the Blue Cross Blue Shield Association.

According to the complaint, the Medical Policy Panel decided not to cover LifeWatch's telemetry heart monitor, despite the fact that the monitor is covered by Medicare, Medicaid, Aetna, and other large insurers, and despite a number of studies demonstrating that telemetry monitoring is better for certain patients with

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certain conditions. The complaint cited a number of cases in which individual patients appealed the decision not to cover telemetry and won.

The U.S. District Court for the Eastern District of Pennsylvania initially granted the Blue Plans' motion to dismiss, which contended that LifeWatch (i) had not adequately alleged an anticompetitive conspiracy; (ii) did not plead sufficient anticompetitive effects to sustain a claim under the Sherman Act; and (iii) did not have antitrust standing. The Blue Plans also argued that the claims were barred under the McCarran-Ferguson Act, which exempts some parts of the health insurance industry from antitrust law.

Pharmaceutical and medical device companies that offer products and services not covered by Blue Cross may have similar antitrust claims. To determine whether these claims are actionable, we recommend consulting with a Shook attorney to review the relevant products or services and, if merited, begin discussions with the relevant Blue Plans regarding a tolling agreement and settlement.

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