

## Blue Shield Says Lab Testing Monopoly Suit Falls Short

By **Ben James**

*Law360, New York (March 28, 2013, 3:00 PM ET)* -- An antitrust suit accusing Blue Shield of California Life & Health Insurance Co. of engaging in a scheme to allow Quest Diagnostics Inc. to monopolize certain diagnostic testing services fails to allege a plausible conspiracy, Blue Shield told a California federal court Wednesday.

Blue Shield of California and fellow defendants Quest, Aetna Inc., and trade federation Blue Cross and Blue Shield Association lodged reply papers in San Francisco urging U.S. District Judge John Tigar to grant dismissal bids they lodged in February, and panning a March 7 opposition filing from the four diagnostic clinics behind the lawsuit.

All the plaintiffs' allegations showed was that the Blue Shield of California entered into a selective contract with Quest to get a better deal, Blue Shield said, adding that the plaintiffs' opposition hadn't addressed "numerous fatal defects" in their claims that Blue Shield's dismissal bid had highlighted.

"Rather, plaintiffs ignore the relevant pleading standard, recycle the complaint's conclusory allegations, and misconstrue the case law, all in a futile attempt to salvage their claims. In the end, plaintiffs have alleged nothing more than that Blue Shield shifted business from one competitor [plaintiff Hunter Laboratories LLC] to another, Quest, to obtain a lower price for its enrollees," Blue Shield said in Wednesday's reply brief.

The suit, filed in November, accuses the insurers of entering into sweetheart deals for testing services with Quest, in return for conspiring with Quest to refuse to negotiate with its rivals and locking Quest rivals out of their insurance networks.

Those deals, combined with the alleged termination of in-network access deals with a host of Quest's regional rivals by the insurers, had increased Quest's dominance in several diagnostic testing service markets in California, especially northern California, the complaint says.

The Blue Cross trade association conspired with Quest to put together an exclusionary licensing agreement that harms competition among labs and makes doctors more likely to steer business to Quest, the plaintiffs allege.

The trade association ripped into the lawsuit Wednesday, calling it precisely the kind of case that the U.S. Supreme Court and Ninth Circuit want to see thrown out at the pleading stage, and faulting the plaintiffs' "hodgepodge" response to the group's dismissal motion.

“Parties such as BCBSA should not be hauled into court and forced to undergo the potentially massive investment necessary to defend against antitrust claims when presented with pleadings as skimpy and implausible as these are against BCBSA,” the trade association said.

Aetna also hit back at the plaintiffs, saying that conspiring to give monopolistic power to Quest, as alleged, would be contrary to Aetna's interests as a payor for Quest's services.

The plaintiffs said they were prevented from competing because of a de facto exclusive arrangement between Aetna and Quest, but even if the complaint adequately alleges an exclusive arrangement, such deals are lawful unless they foreclose a big chunk of the market — more than the 9 percent of the population they allege Aetna serves — to competitors, according to Aetna.

Quest's Wednesday filing said the plaintiffs never laid out a viable theory of harm to competition. The complaint and the plaintiff's opposition merely describes a market in which competing labs do battle on price and quality to gain in-network status with major health plans, which lowers costs for plan subscriber-patients, Quest said.

“While plaintiffs claim to have lost business in this process, their story is at most one of harm to them from competition, rather than of harm to competition itself,” according to Quest.

Attorneys for the plaintiffs and for Blue Shield and Aetna were not immediately available for comment Thursday. An attorney for Quest declined to comment.

The plaintiffs are represented by Niall P. McCarthy, Anne Marie Murphy, Justin T. Berger and Eric J. Buescher of Cotchett Pitre & McCarthy LLP.

Aetna is represented by Robert A. Mittelstaedt, Craig A. Waldman, David C. Kiernan and Lin W. Kahn of Jones Day.

Blue Cross Blue Shield is represented by Kenneth K. Lee, Jean M. Doherty, John J. Hamill and Jason M. Bradford of Jenner & Block LLP. Blue Shield of California is represented by Robert E. Bloch, Scott P. Perlman and Christopher J. Kelly of Mayer Brown LLP. Quest is represented by Richard D. Raskin, Scott D. Stein, Allison W. Reimann, Samuel R. Miller, Ryan M. Sandrock and Naomi A. Igra of Sidley Austin LLP.

The case is Rheumatology Diagnostics Laboratory Inc. et al. v. Blue Shield of California Life & Health Insurance Co. et al., case number 3:12-cv-05847, in the U.S. District Court for the Northern District of California.

--Additional reporting by Daniel Wilson. Editing by Lindsay Naylor.