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COURT DENIES BLUES' MOTION TO DISMISS *IN RE BLUE CROSS BLUE SHIELD ANTITRUST LITIGATION* (MDL 2406)

James M. Burns

On June 18, United States District Court Judge David Proctor (Northern District of Alabama) issued his highly anticipated ruling in the *In re Blue Cross Blue Shield Antitrust Litigation*, declining to dismiss the action prior to the commencement of discovery. The multidistrict litigation, in which the plaintiffs contend that the Blue Cross Blue Shield Association and its 38 member Blues have utilized trademark licensing agreements to limit competition between them, was consolidated and transferred to Judge Proctor by the Judicial Panel on Multidistrict Litigation in 2013.

In his first significant ruling in the matter, Judge Proctor considered three overarching arguments that the insurers had advanced in support of dismissal: (1) that the licensing agreements challenged by the plaintiffs have procompetitive benefits, and thus are not "horizontal market allocation agreements" that should be judged under *per se* (rather than rule of reason) principles; (2) that the Blues' alleged conduct, regardless of classification, is exempt from the antitrust laws pursuant to the "Filed Rate Doctrine;" and (3) that the defendants' conduct is also independently exempt from antitrust scrutiny based upon the insurance industry's McCarran-Ferguson Act exemption.

Judge Proctor began his analysis by focusing on the Blue trademarks, and the licensing agreements between the Blue Cross Blue Shield Association and its member Blues. Summarizing the defendants' contentions, Judge Proctor stated that the Blues "argue that the licensing agreements do not restrain trade, but merely adopt pre-existing rights to local geographic exclusivity acquired either independently by operation of trademark law, or vertically through lawful licenses granted by the American Hospital Association or the American Medical Association." Judge Proctor also noted that "defendants contend that the service areas have procompetitive benefits," and that *per se* condemnation of the agreements is unwarranted on that basis.

Judge Proctor, however, rejected defendants' argument, at least for now, holding that "at this early stage of the proceedings" the plaintiffs' allegations, taken as true, are sufficient as a matter of law. Specifically, Judge Proctor held that plaintiffs had plausibly alleged that the Blues' agreements "do more than merely recognize pre-existing trademarks," because, among other things, the plaintiffs had alleged that the agreements also restrict competition under non-Blue or nontrademarked brands, and that "plaintiffs have alleged that prior to the alleged agreements, but after the alleged formation of common law trademark rights, defendants actually engaged in competition."

Significantly, Judge Proctor also deferred his decision on whether plaintiffs' allegations potentially give rise to *per se* condemnation, rather than "rule of reason" treatment, a decision that not only impacted his decision on the Blues' motion to dismiss, but will also have significant repercussions for how the case proceeds.

As Judge Proctor noted, whether the defendants' alleged agreements should be judged under *per se* principles turns, in large measure, on whether the United States Supreme Court's 1972 decision in *United States v. Topco Associates* remains good law. In Topco, the Supreme Court held that horizontal market allocation agreements are generally subject to *per se* condemnation, and thus any procompetitive benefits achieved through such agreements are irrelevant in determining whether the conduct violates the antitrust laws. The Blues maintained, however, that since *Topco*, the Supreme Court has moved away from *per se* condemnation for such conduct in some circumstances, including where intellectual property rights are involved, and for that reason *per se* treatment was not appropriate in this case. The plaintiffs, in response, countered by noting that *Topco* "has never been overruled and, in fact, the Court has never expressly called [it] into question." Ultimately, Judge Proctor decided that "it is simply too early to assess which standard of review should be applied to plaintiffs' allegations," because "while the mode of analysis is certainly a question of law, underpinning that purely legal decision are numerous factual questions" that have not yet been resolved. Judge Proctor will undoubtedly face this issue again after discovery, at the summary judgment phase of the proceeding.

Turning next to the Blues' Filed Rate Doctrine defense, Judge Proctor first observed that the doctrine "generally operates to bar antitrust suits that are based upon challenges to rates that have been filed with regulatory agencies." However, because the Filed Rate Doctrine would only bar, at most, some of plaintiffs' claims for damages, and would not in any circumstance bar plaintiffs' claims for declaratory and injunctive relief, Judge Proctor held that "a decision about whether to apply the Filed Rate Doctrine at this time, even only to claims against those Blues who filed rates in the jurisdictions in which they were required to file rates, would be premature." Judge Proctor continued: "Some inquiry is needed into which defendants have filed rates and in which jurisdiction, and discovery may also be required concerning the extent of administrative oversight defendants were subjected to in each jurisdiction in which they filed rates." Accordingly, this issue will also likely be revisited at the summary judgment stage of the proceeding.

Finally, the Court also addressed the Blues' contention that their alleged conduct was exempt from the federal antitrust laws based upon the McCarran Ferguson Act, which exempts "the business of insurance" from the federal antitrust laws to the extent such conduct is "subject to state regulation" and does not constitute an act of "boycott, coercion or intimidation."

In analyzing this issue, Judge Proctor focused his attention on whether the alleged conduct constituted "the business of insurance." As Judge Proctor noted, the Supreme Court has articulated a three part test for determining whether conduct constitutes the business of insurance – (1) does the practice have the effect of transferring or spreading a policyholder's risk; (2) whether the practice is an integral part of the policy relationship between the insurer and the insured; and (3) whether the practice is limited to entities in the insurance industry. *United Labor Life Insurance v. Pireno*, 458 U.S. 119,129 (1982). Here, Judge Proctor held, the alleged conduct did not satisfy these requirements.

Specifically, Judge Proctor concluded that defendants' contention that "plaintiffs' market allocation theory is 'an attack on premiums,'" and thus barred by McCarran, was misplaced. The Court noted that the Supreme Court has observed that "at least in some manner, every business decision by an insurance company has some impact" on its rates, and thus, because the Blues' alleged conduct did not *directly* concern the spreading of risk, it was outside the scope of the exemption. In reaching this decision, the Court embraced a decision from the Third Circuit (*In re Insurance Brokerage Antitrust Litigation*) in which the court had reached a similar conclusion, and distinguished an 11th Circuit decision (*Gilchrist v. State Farm*) in which the court had viewed "the business of insurance" test more expansively. Unlike the prior two issues, which Judge Proctor is likely to face again later in the action, it appears that this ruling takes the McCarran Ferguson Act issue out of the case (at least until any possible appeal).

As the foregoing analysis makes clear, Judge Proctor *deferred* reaching a decision on many of the Blues' arguments, rather than rejecting them, and denied the Blues' motion on that basis. However, by doing so, Judge Proctor has authorized a massive case to proceed into discovery. The impact of that decision will likely not be known for many months, as discovery progresses. Stay tuned.

AUTO REPAIR SHOP ANTITRUST ACTIONS MAY BE CONSOLIDATED INTO MULTIDISTRICT LITIGATION
James M. Burns

Over the course of the last several months, auto body repair shops in five states (Florida, Mississippi, Indiana, Utah and Tennessee) filed antitrust actions against a collection of auto insurers, alleging that the insurers' direct repair programs violate the antitrust laws. In each case, the plaintiffs alleged that the manner in which the insurers set reimbursement rates for covered repairs artificially depressed the compensation plaintiffs received for their services, and that the insurers also "steered" insureds away from plaintiffs' businesses to those shops that are participants in the insurers' direct repair programs.

With all of the cases having been filed by the same Jackson, Mississippi attorney, it was not particularly surprising that, in late May, plaintiffs filed a motion with the Judicial Panel on Multidistrict Litigation seeking to have the cases consolidated and transferred to the Southern District of Mississippi. In support of the request, the plaintiffs noted that the first filed case (*Capitol Body Shop v. State Farm Mutual Automobile Insurance*) was filed in Mississippi, that the actions all involve "common questions of fact," and that transfer would "serve the convenience of the parties and witnesses." Plaintiffs also noted in their motion that "all of the actions are at the same early stage of litigation."

In June, the insurers filed oppositions to plaintiffs' request, contending that "while the general theory of liability alleged in each case is the same, the factual allegations underlying each plaintiff's claims are highly individualized." The insurers also noted that plaintiffs' assertion that the cases are all at the same, early stage of litigation was no longer correct, because, subsequent to plaintiffs' filing of their motion, the court in the Florida action (*A&E Auto Body v. 21st Century Centennial Insurance Co.*) dismissed plaintiffs' claims, albeit with leave to amend, finding that plaintiffs' complaint lacked the necessary factual detail required for plaintiffs' claims. Perhaps not surprisingly, the insurers also maintained that if the Judicial Panel does consolidate the cases, they should be transferred to the Middle District of Florida, before the judge presiding in the *A&E Auto Body* case, because it is the "most procedurally advanced case."

On June 16, the Judicial Panel set plaintiffs' motion for oral argument on July 31. In the interim, however, the defendants have filed motions to dismiss the Mississippi case, arguing that the allegations in that complaint, like the allegations in the Florida case, are similarly insufficient as a matter of law. While that motion is unlikely to be decided prior to the Judicial Panel's ruling on the motion for consolidation and transfer, it could have an impact on the Panel's decision whether to consolidate the cases, and where. The matter is clearly one to watch going forward.

UPTICK IN DOJ ANTITRUST DIVISION CRIMINAL FINES
James M. Burns

The DOJ Antitrust Division obtained over $1 billion in criminal fines in fiscal year 2013 (October 1, 2012 – September 30, 2013). This was one of the highest totals ever obtained by the Division. However, the Antitrust Division is currently on track to exceed that level in fiscal year 2014. For the first six months of the new fiscal year, the Antitrust Division has already obtained fines totaling $709 million, including the fourth-largest criminal antitrust fine ever imposed – a $425 million fine against Bridgestone. A fine of $325 million was also levied against Rabobank in connection with the DOJ's LIBOR interest rate antitrust investigation.

While the Antitrust Division's recent criminal enforcement activities have not focused on the insurance industry, the Division has devoted considerable civil enforcement attention to the use by insurers of "most favored nation" clauses in provider contracts. Consequently, given both the increase in criminal antitrust enforcement generally, and the recent civil antitrust enforcement interest in insurance industry practices, it almost goes without saying that having an effective antitrust compliance program is as important today as it has ever been. Is your antitrust compliance program as current and effective as it could/should be?