Using “Old Cases,” District Court Applies Per Se Standard of Review to Blue Cross Blue Shield’s Restrictive Practices in Antitrust MDL

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Since 2013, the Blue Cross Blue Shield Association has faced a series of purported class actions consolidated in the U.S. District Court in Alabama. In a recent decision focused upon the appropriate standard of review, the court ruled that certain allegedly restrictive practices should be analyzed under the per se standard rather than the more lenient rule of reason standard.[1] Notably, the court’s decision is grounded upon two arguably dated Supreme Court decisions, United States v. Sealy, and United States v. Topco, the continuing relevance of which is unclear. In so holding, the court rejected the defendants’ arguments that, because the restrictions are related to a valid trademark license agreement, the restrictions should be analyzed under the rule of reason.

With the application of the per se rule declining in recent decades, and with the application of the rule of reason on the rise, this decision (and the likely eventual appeal of this decision) will provide an interesting test of the per se rule’s application to modern business relationships that include both horizontal and vertical features.

Summary of Complaints

In 2013, two class action complaints were filed against the Blue Cross Blue Shield Association (“BCBSA” or the “Association”) and various individual Blue health plans (the “Blue Plans”) and affiliated companies by (1) providers of health care services (including ambulatory service centers and other facilities where medical or surgical procedures are performed), as well as suppliers of health care equipment and supplies, and (2) subscribers (i.e., individual customers and employers) of the Blue Plans. The cases were consolidated in federal court in Alabama.

Together, these complaints allege that the Association is owned and controlled by the 36 independent health insurance plans (the Blue Plans) that operate under the Blue Cross trademark and trade name. The Association operates as a licensor for the Blue Plans and is governed by a board of directors, two-thirds of which must be composed of either chief executive officers or board members of the various Blue Plans.

The plaintiffs allege that the Blue Plans competed vigorously with each other until the 1980s, when they began to enter into a series of trademark licensing agreements with the Association that forced them to consolidate and severely restricted their ability and incentive to compete. The plaintiffs contend that the Blue Plans are actual or potential competitors and are using the Association to unlawfully allocate markets by entering into per se illegal agreements. These agreements allegedly direct the Blue Plans in one or more of the following ways:

- Prohibit the Blue Plans from competing against each other using the Blue name by allocating territories among the individual Blues[2];
- Limit the Blue Plans from competing against each other, even when they are not using the Blue name, by mandating the percentage of their business that they must do under the Blue name, both inside and outside each Plan’s territory; and
- Restrict the right of any Blue Plan to be sold to a company that is not a member of BCBSA, thereby preventing new entrants into the individual Blues’ markets.

The plaintiffs argue that these agreements have subjected health care providers who contract with the Blue Plans to less favorable terms than they would have achieved absent the conspiracy. The complaint filed on behalf of employers makes similar assertions, but alleges, among other things, that as customers, they are being forced to pay inflated premiums due to BCBSA’s illegal market division and other anticompetitive actions by the Association.

Brief Overview of Procedural History

The District Court previously denied a motion to dismiss and allowed the case to proceed, noting that the plaintiffs had “alleged a viable market-allocation scheme.”[3] The motions addressed in the April 5 decision included (1) the parties’ respective motions for partial summary judgment on the standard of review applicable to the plaintiffs’ claims under Section 1 of the Sherman Act, and (2) subscriber plaintiffs’ motion for partial summary judgment on the defendants’ “single entity” defense.[4]

The court emphasized that it would analyze the Blues’ agreement as a whole to determine the appropriate standard of review, rather than analyze each alleged restraint independently. It stated, “the court declines to examine the Blues’ [Exclusive Service Areas or ESAs], best efforts rules,[5] or brand restrictions in isolation where the Rule 56 evidence...
reveals that the Blues, through the Association, enacted new and unique aggregate competitive restrictions on top of the ESAs during the 1990s and 2000s. However, the court stated that it would analyze the BlueCard program separately.

The Per Se Standard vs. The Rule of Reason

Section 1 of the Sherman Act addresses anticompetitive conduct that results from concerted action. It prohibits "[e]very contract, combination in the form of trust or otherwise, in restraint of trade or commerce among the several States ..." Because an agreement is required — unilateral activity by a single firm cannot be reached under Section 1. Thus, a plaintiff must show concerted action between two or more persons in order for Section 1 to apply. If an agreement is proven, the resulting conduct can violate Section 1 if it unreasonably restrains trade. Particularly egregious agreements, such as price-fixing, market allocation, or group boycotts, are viewed as per se unlawful. As such, an actual price increase or output reduction need not be proven but will be presumed to result from the conduct itself.

Other restrictive conduct is analyzed under the rule of reason. Pursuant to this analysis, the court will consider all of the facts and circumstances surrounding the conduct and engage in a balancing test to determine if the anticompetitive effects of the conduct outweigh the procompetitive benefits. Generally speaking, the vast majority of conduct in antitrust litigation is analyzed under the rule of reason. As such, the court’s decision to subject the Blue Cross restrictions to the per se rule is surprising, particularly since the opinion relies heavily on two Supreme Court cases that, while not overturned, predate most modern antitrust jurisprudence and have been criticized for their overly restrictive application of the per se rule to restraints that were ancillary to arguably legitimate joint ventures.

The Court’s Analysis

1. The Precedential Value of Sealy and Topco

The crux of the court’s analysis turned largely on the proper application of United States v. Sealy, Inc., 388 U.S. 350 (1967) ("Sealy"), and United States v. Topco Associates, Inc., 405 U.S. 596 (1972) ("Topco"). The plaintiffs argued that "this case is on all fours with Sealy" and that "the Blues’ agreements are even more anticompetitive than the ones found to be unlawful per se in Sealy and Topco." The defendants disagreed, arguing (1) that the market allocation schemes in those cases could not be compared to the trademark licenses issued by the Association, and (2) that "Sealy and Topco should be limited to their precise facts" because they are "inconsistent with modern antitrust jurisprudence." The court sided with the plaintiffs.

In Sealy, the government challenged Sealy’s policy of granting exclusive territories to its licensees, a group of mattress manufacturers. The licensees agreed not to sell Sealy-branded products outside of their allotted geographic areas but could sell private label products in any geographic market area. The government argued that, because the licensees controlled the Sealy board of directors, the arrangement constituted a per se illegal horizontal market division. Sealy argued that the rule of reason should be applied since it was in a vertical relationship with its licensees. The Supreme Court disagreed, concluding that Sealy was "an instrumentality of the licensees for purposes of the horizontal territorial allocation." The Court characterized Sealy’s conduct as an aggregation of trade restraints and viewed its organizational structure as an instrumentality of the individual manufacturers. In that case, what appeared at first blush to be a vertical restraint, was viewed by the Supreme Court as a horizontal restraint because horizontal competitors (the licensees) controlled the vertical relationship (i.e., they comprised the Sealy board of directors).

In Topco, several regional supermarket chains created and marketed the Topco private-label brand canned goods. The supermarkets owned all of Topco’s stock and divided the association’s voting rights equally. The Topco association allocated exclusive territories to its members. The government challenged the association’s exclusive territory policy as a per se illegal horizontal division of markets. Rejecting Topco’s claim that the policy was a reasonable way to prevent freereiding and to build the Topco brand as a competitor to national store brands, the Supreme Court held that the territorial restraints instituted by Topco were horizontal restraints, and, thus, per se violations of the Sherman Act. As in Sealy, Topco’s members owned all of its stock and controlled the board of directors.

The court recounted that the Supreme Court is its own keeper of the viability of its jurisprudence and noted that both cases were cited as recently in 2010 in American Needle, which focused upon the single entity issue. Although no Supreme Court merits rulings has been grounded upon Sealy or Topco in decades, the court believed that the holdings in both Sealy and Topco remain viable and have been recently cited by the Supreme Court “without in any way indicating that either case had been overruled or abrogated by later developments in antitrust law.” According to the court, the Supreme Court has cited recent precedent “as authority for the application of the per se rule to horizontal market allocations.”

2. Treatment of the Single Entity Defense

The defendants argued that the plaintiffs’ Section 1 claims fail as a matter of law because defendants operate as a single entity with respect to the governance of the Blue Marks. The defendants admit that the Blue Plans are separate entities for operational purposes, but assert that they should be viewed as a single entity because the Association now owns the Blue Marks and is responsible for licensing and protecting those Marks.

The court acknowledges that when the defendants merged the Associations, they formed a single entity to license the Blue Marks. However, the court did not view this fact as dispositive stating, "competitors are not allowed to make an
otherwise horizontal agreement vertical by merely setting up a licensing corporation to ‘impose’ market-dividing agreements on its licensee-stockholders.”[17] Citing the Supreme Court’s decision in American Needle, the court notes that “[Courts] have repeatedly found instances in which members of a legally single entity violated § 1 when the entity was controlled by a group of competitors and served, in essence, as a vehicle for ongoing concerted activity.”[18] According to the court, the plaintiffs had also presented sufficient evidence to create a genuine issue of material fact as to the validity, enforceability — or both — of the Marks. Thus, the court denied the parties’ respective motions for summary judgment on the single entity issue because it could not say as a matter of law whether the defendants’ conduct can be shielded by the single entity defense. It found genuine issues of fact material fact as to whether the defendants are, in fact, a single entity.

3. Treatment of the Geographic Market Allocations

Both the provider and subscriber plaintiffs argue that the defendants’ geographic market allocations constitute per se anticompetitive conduct under Sealy and Topco. The plaintiffs argued that the defendant Blue Plans committed a per se violation by agreeing to allocate geographic markets for the sale of commercial health insurance, commercial health care financing services, or both. The provider plaintiffs also argue that the Blue Plans allocated markets for the purpose of contracting with health care service providers.

The defendants presented the following arguments in support of their assertion that the geographic market distributions should be analyzed under the rule of reason:

i. The Association’s rules, including the ESAs, have plausible procompetitive benefits because they have facilitated the creation of a new and unique product;

ii. The ESAs are procompetitive because they incentivize Blue Plans to focus on the local needs of their members and providers;

iii. Courts lack experience with the types of service areas at issue in the case because the service areas arose organically from the predecessors to the current Plans’ use of common law trademarks;

iv. Topco and Sealy are distinguishable from the service areas at issue; and

v. The challenged restraints are not purely horizontal because some restraints are historically the product of vertical arrangements between insurance plans and the American Hospital Association or the American Medical Association.

Rejecting the defendants’ arguments, the court concluded that it need not determine whether the Blue Plans’ service area allocations alone constitute a per se violation of Section 1 because, “Plaintiffs have presented evidence of an aggregation of competitive restraints — namely, the adoption of ESAs and, among other things, best efforts rules — which, considered together, constitute a per se violation of the Sherman Act.”[19] The court explained several reasons for its decision.

First, the court viewed the Association as a licensee-controlled entity and not a vertical licensor. The Association bylaws state that the Association is funded and controlled by the Blue Plans, which receive licenses to use the Blue Marks. The Association’s board of directors consists of the CEOs of all licensee Plans and the president of the Association, and the Association describes itself as an organization controlled by the Blue Plans. The Blue Plans control the terms of each Blue’s License Agreement and must act collectively to amend the License Agreement’s basic brand principles. The court found the Association comparable to the licensee-controlled entities in Sealy and Topco, which dictated that the ESAs established by the Association be examined as horizontal allocations rather than vertical ones. According to the court, the allocation of the areas was the result of the Association’s plan to (1) consolidate Blue Plans, and (2) issue new licensing agreements reflecting the competitive restraints agreed to by a majority of the Blue Plans.

Second, the court rejected the defendants’ argument that the Supreme Court’s American Needle opinion limited the application of Topco and Sealy to licensor entities that are formalistic shells or sham entities. The court explained that American Needle discussed Sealy and Topco in relation to the single entity defense, not in the context of the per se rule established in those cases. It also reiterated that the Supreme Court has not expressly limited the scope of Sealy’s and Topco’s development of the per se rule in market allocation cases to instances where the licensor firm merely acts as a formalistic shell.

Third, the court found that the license conditions between the Association and the individual Blue Plans to be directly comparable to the license conditions enacted by the defendants in Sealy and Topco. The court highlighted the fact that the Blue Plans had instituted at least two additional restraints besides the ESAs — they limited the output of non-branded health insurance and related health financing products by the licensees within the licensee’s service area(s), and they limited the output of non-branded health insurance and related health financing products by the licensees nationwide. As such, it found that “the restraints of trade created by the Licensing Agreements, and the Association’s rules appear even more restrictive than those at issue in Topco and Sealy because the licensees in those cases remained free to sell any amount of non-branded products.”[20]

4. Treatment of the National Best Efforts Rule

The National Best Efforts rule requires a Blue Plan to derive at least sixty-six and two-thirds percent (66 2/3%) of its national health insurance revenue from its Blue brand. Thus, it effectively limits the health insurance revenue any Blue Plan...
may generate from any non-Blue brand. The court characterized this rule as an output restriction on a Blue Plan's non-Blue branded business. The defendants argued that the rule promoted collaboration among Blue Plans, encouraged Plans to invest in the Blue Marks, and prevented the transfer of "the immense goodwill" associated with the Blue Marks to other brands. The court found that the National Best Efforts restrictions on non-Blue branded business clearly unnecessary for the product to be "available at all," noting that health insurance is made available to consumers without such restraints. Accordingly, the court found that the rule constituted a per se violation of the Sherman Act, particularly when layered on top of other anticompetitive restrictions imposed on licensees by the defendants.[21]

5. Treatment of the BlueCard Program, Boycotts, and Other Restraints

The court also analyzed the competitive impact of the BlueCard program, both as a potential price-fixing vehicle and as a group boycott. The court recognized that the Blue Plans integrated certain assets to create the BlueCard program and found similarities between the integrative aspects of the BlueCard program and a traditional joint venture. These facts, among others, weighed "in favor of applying the rule of reason to Provider Plaintiffs’ price-fixing claims."[22] In addition, the court concluded that it would review the alleged boycott of health care providers and services outside of a particular Blue Plan’s service area under the rule of reason.

Conclusion

In light of the continued uncertainty regarding health insurance markets, the various mergers involving insurance companies, and various policy proposals that insurance companies should be permitted to sell health insurance across state lines, this has always had the potential to be a very important case — both as a matter of antitrust law and for its market implications. The defendants have already announced their intention to appeal. It is questionable whether this application of Sealy and Topco can survive the appellate gauntlet, including potentially the Supreme Court; however, even if the defendants successfully overturn the application of the per se rule, they will still face continued litigation under the rule of reason standard. It will be an important case to follow, and it will be interesting to see whether the Department of Justice or any state attorneys general become involved in any appeals.

Endnotes


2 The plaintiffs contend that the defendants have accomplished this by dividing U.S. health care markets for insurance among themselves by dividing the nation into exclusive service areas allocated to individual Blue Plans. Through the license agreements, guidelines, and membership standards enforced by the Association, each Blue Plan licensee agrees that neither it nor its subsidiaries will compete under the licensed Blue Cross trademarks and trade names outside of a designated "Service Area."

3 In re Blue Cross Blue Shield Antitrust Litig., 26 F. Supp. 3d 1172 (N.D. Ala. 2014).

4 The court found it necessary for the parties to conduct discovery before deciding the appropriate standard of review for the Sherman Act claims.

5 Under the Local Best Efforts Rule, at least 80% of a Blue Plan’s annual health revenue from within its designated service area must be derived from services offered under the Blue Marks, which refers to the Blue Cross organization and its trademarks. Under the National Best Efforts Rule, a Blue Plan was required to derive at least 66 2/3 % of its national health insurance revenue under its Blue brand.

6 Blue Cross Blue Shield Antitrust Litig., 2018 U.S. Dist. LEXIS, at *32.

7 The BlueCard Program required Blue Plans to make their local provider discounts available to all Blue members, even if they lived in another Blue Plan’s service area. Participation in the BlueCard program is a requirement of the License Agreement between the Association and each individual Blue Plan.

8 Under the Uncoupling Regulations, once a Blue Plan chooses to use a name in connection with the Blue Marks, it cannot thereafter "uncouple" that name from the Blue Marks.


10 See 11 HOVENKAMP, ANTITRUST LAW, ¶ 1910c2 (criticizing the Topco Court’s application of a per se rule against horizontal territorial restraints).

11 Id. at 354.

12 Id. at 354-55.

13 Id. at 608.


15 Blue Cross Blue Shield Antitrust Litig., 2018 U.S. Dist. LEXIS, at *44.
The court rejected the defendants' attempts to argue that the ESAs, along with other restrictions, facilitate the creation of new health insurance products. According to the court, the plan to go to ESAs constituted not a new marketing/sales strategy, but a new product. The products—commercial insurance and insurance services—remain the same.

It also concluded that the rule of reason was appropriately applied to the Trademark Uncoupling Rules.