

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

BLUE CROSS AND BLUE SHIELD)
OF OHIO,) Civil No. 1:94CV 2297
)
Petitioner and)
Cross Respondent,) Judge Ann M. Aldrich
)
v.)
)
UNITED STATES OF AMERICA and) **[FILED 3/17/95]**
ANNE K. BINGAMAN,)
Assistant Attorney General)
U.S. Department of Justice)
Antitrust Division,)
)
Respondents and)
Cross Petitioners.)

MEMORANDUM OF THE UNITED STATES IN
OPPOSITION TO MOTION FOR PROTECTIVE ORDER

Blue Cross and Blue Shield of Ohio ("Blue Cross") has asked this Court for a protective order placing restrictions on the manner in which the Antitrust Division of the United States Department of Justice ("Antitrust Division") can conduct its investigation into the anti-competitive effects of Most Favored Nations Clauses ("MFN"). Specifically, Blue Cross wants this Court to order the Antitrust Division to obtain its consent before contacting certain employees, to notify it in advance prior to contacting "certain former employees" of Blue Cross, and to give those former employees specific warnings "prior to the commencement of such interview." Motion at 1-2. Blue Cross does not claim that its corporate counsel has contacted all of the

current and former employees that are within the scope of its proposed protective order and that those employees have agreed to be represented by corporate counsel. Rather, it argues that it needs a protective order to protect its attorney-client privilege.

Blue Cross has not presented any evidence justifying the extraordinary relief that it seeks. Its claim that the Antitrust Division violated ethical rules by contacting one of its former employees is frivolous because the primary purpose of the contact was to determine if that former employee was represented by counsel in order to schedule a CID deposition. No ethical rule prohibits a contact with an individual to determine if that individual is represented by counsel. Moreover, the Antitrust Division has not violated and has no intention of violating Blue Cross' attorney-client privilege. The Antitrust Division is well aware of its obligations. Consequently, the proposed restrictions on the Antitrust Division's investigation are inappropriate and the order should be denied.

The Antitrust Division Has
Conducted Its Investigation Ethically

The Antitrust Division has not violated any ethical rules. Further, the Antitrust Division has done nothing to warrant the extraordinary relief requested. Although Blue Cross complains of "disturbing investigative tactics," it has not identified and cannot identify any ethical violation or any invasion of

attorney-client privilege by the Antitrust Division.

First, Blue Cross claims that the Antitrust Division "revealed its intent to seek information protected by the attorney-client privilege" when it served a Civil Investigative Demand ("CID") which required the production of attorney-client information. Even if Blue Cross has privileged information that is responsive to the CID, the instructions which accompany the CID recognize that possibility and include a mechanism for claiming the privilege. See CID No. 11466, Instruction No. 8 (attached at Exhibit A). Either Blue Cross failed to read the CID instructions, or it failed to tell the Court about the instructions.

Blue Cross next implies that the Antitrust Division's contact with a former employee is the equivalent of contacting a represented party and violates the ethical rules. The Antitrust Division, however, contacted this individual, who is an attorney, principally to find out if he was represented by counsel. The Antitrust Division attorney called the individual, identified himself and his purpose to schedule a CID deposition at a mutually agreeable time, asked what the individual's position had been at Blue Cross/Blue Shield of Toledo and his later position at Blue Cross and Blue Shield Mutual of Ohio (to confirm that he was speaking to the correct individual), and asked if he was represented by counsel and the identity of the attorney. The Antitrust Division's contact with the individual was brief and

not a substantive interview. No other contacts were made with the individual, but later contacts were made with his attorney. The Antitrust Division was scrupulously careful during its contact with this individual and did not ask about any "attorney-client" communications.

Blue Cross has not cited, and no ethical rule has been found that prohibits a contact designed to determine if an individual is represented by counsel. Because the Antitrust Division has not engaged in any conduct prohibited by ethical rules, Blue Cross' lengthy attack (Mem. at 10-20) on the Department of Justice's regulations concerning Communications With Represented Persons (see 28 C.F.R. §§ 77.1 through 77.12 (1994)) is irrelevant. There is currently no case or controversy concerning those regulations because the Antitrust Division has not engaged in any conduct that both violates some ethical rule and is expressly authorized by the Department's regulations. Accordingly, while the Antitrust Division believes that the Department's regulations are valid (see 59 Fed. Reg. 39,910-39,928 (1994)), there is no need for a response to Blue Cross' arguments concerning those regulations. If, of course, a genuine case or controversy concerning the validity of the department's regulations subsequently arises, the Antitrust Division will submit a brief to the Court at that time defending the regulations.

Further, despite Blue Cross' lengthy discussion about

contacts with its current employees, the Antitrust Division has made no attempt to contact current Blue Cross employees. The Antitrust Division, therefore, has not violated any ethical rules in this regard, and the Court has no reason to assume it will.

Finally, Blue Cross characterizes Kevin Culum's letter of February 14, 1995 to Kimberly Oreh (attached as Exhibit B) as a refusal to observe ethical parameters. Mr. Culum indicated that the Antitrust Division would conduct its investigation in accordance with all applicable laws and regulations. What Mr. Culum refused to do, however, was to accede to the restrictions that Ms. Oreh sought to impose by her letter of February 10, 1995 (attached as Exhibit C). No ethical rule required the Antitrust Division to agree to the restrictions sought in that letter.

The Antitrust Division Is Not Required To
Contact Blue Cross Before Interviewing Former Employees

No ethical rule requires the Antitrust Division to notify Blue Cross before contacting its former employees. DR 7-104 of the Code of Professional Responsibility adopted by the Supreme Court of Ohio has been consistently construed to permit ex parte contacts with former employees of an opposing party. Cram v. Lamson & Sessions Co., 148 F.R.D. 259, 261-62 (S.D. Iowa 1993) (cases cited therein). Likewise, a majority of courts interpreting the scope of Model Rule 4.2, the corollary of DR 7-104, have held that it does not apply to former employees. Cram, 148 F.R.D. at 262.

Furthermore, in March 1991, the American Bar Association Committee on Professional Ethics and Professional Responsibility concluded in its Formal Opinion 91-359 that:

[A] lawyer may, without violating Model Rule 4.2, communicate about the subject of the representation with an unrepresented former employee of the corporate party without the consent of the corporation's lawyer.

ABA Committee on Professional Ethics and Professional Responsibility, Formal Opinion 91-359 at 3 (1991). The ABA Committee was responding to concerns expressed by courts about the significance of the words "any other person" in the Comment to Rule 4.2. The ABA Committee wanted to clarify that the "any other person" language did not include former employees.

Shearson Lehman Brothers, Inc. v. Wasatch Bank, 139 F.R.D. 412, 417 (D. Utah 1991).

The courts and the ABA Committee recognize significant policy considerations that weigh against prohibiting contact with a corporation's former employees. Contacting former employees can expedite discovery and reduce discovery costs. Polycast Technology Corp. v. Uniroyal, Inc., 129 F.R.D. 621, 628 (S.D. N.Y. 1990); Oak Industries v. Zenith Industries, 1988 WL 79614 (N.D. Ill. 1988) (attached as Exhibit D). The former employee's interest and the corporation's interest are not necessarily the same. Therefore, the decision on whether to contact the corporation is in the hands of the former employee and that former employee's attorney. In this case, the order proposed by

Blue Cross would undermine these policy considerations.

The Antitrust Division Has Not Asked and Will
Not Ask About Any Attorney-Client Communications

The Antitrust Division is well aware that the attorney-client privilege limits the areas which it can explore, whether in an interview, a deposition, or a grand jury. The Antitrust Division can probe facts, but is prohibited from inquiring into communications between the attorney and the client. Upjohn Co. v. United States, 449 U.S. 383, 395-96 (1980).

The Antitrust Division is aware that its attorneys may not delve into privileged communications. Blue Cross has offered no evidence that the Antitrust Division has made or intends to make any improper inquiries. Without some indication of improper conduct, the proposed protective order is inappropriate. Polycast, 129 F.R.D. at 627-29; (requiring the defendant to come forward with evidence that privileged communication might be in jeopardy as a condition to granting a protective order); Sequa Corp. v. Lititech, Inc., 807 F. Supp. 653, 660-61 (D. Colo. 1992)(holding that if a party seeks only non-privileged information, the opposing attorney's consent is not required); Dubois v. Gradco Systems, Inc., 136 F.R.D. 341, 346 (D. Conn. 1991).

Attempts to achieve a blanket ban on contacts with former employees based on the assertion that there may be an inadvertent disclosure of attorney-client information have been denied.

The interest in preventing inadvertent disclosure of privileged material . . . does not justify a blanket ban on communications with the opposing party's former employees. (citation omitted) Plaintiffs are, of course, barred from exploring these communications or other privileged matters with the witnesses. As plaintiffs' counsel are officers of the court, no ruling or order is necessary to hold them to this standard.

BreedLove v. Tele-Trip, 1992 WL 202147 (N.D. Ill. 1992)(attached as Exhibit E); Action Air Freight Inc., v. Pilot Air Freight Corp., 769 F. Supp. 899, 903-4 (E.D. Pa. 1991); Polycast, 129 F.R.D. at 629. On page 4 of its paper, Blue Cross states that "inadvertent disclosure by employees can constitute a waiver of the privilege" and cites "Id." for its authority. Neither Upjohn nor Sequa Corp. stands for that proposition on those pages or elsewhere.

Blue Cross' Proposed Order Would Impose Undue
Restrictions On the Antitrust Division's Investigation

The proposed protective order should not be entered because it would place restrictions on the Antitrust Division's investigation that go far beyond any protection afforded by the ethical rules or the courts. In particular, Blue Cross' demand in its proposed order that it be informed before any contact with any former employee could inhibit the investigation.

Courts have expressed concern over this possibility. Extending the ethical rules to prohibit communications with a corporation's former employees could deter the disclosure of information.

Former employees often have emotional or economic ties to

their former employer and would sometimes be reluctant to come forward with potentially damaging information if they could only do so in the presence of the corporation's attorney.

Polycast, 129 F.R.D. at 628.

Furthermore, restricting the Antitrust Division's ability to contact former employees during the investigatory stage of a proceeding inhibits effective law enforcement. In re United States Dep't of Justice Antitrust Investigation CIDs Nos. 9683, 1992-2 Trade Cas. (CCH) ¶ 69,933 (D.Minn. 1992) ("A potential for abuse of Rule 4.2 exists if it is used to inhibit government investigations"). See also United States v. Western Elec. Co., 1990-1 Trade Cas. (CCH) ¶ 68,939 (D.D.C. 1990); United States v. Western Elec. Co., 1990-2 Trade Cas. (CCH) ¶ 69,148 (D.D.C. 1990).

Additional restrictions on the Antitrust Division's investigation will not further protect any endangered attorney-client communications. Such restrictions will only serve to slow the investigation and hinder the information-gathering process.

CONCLUSION

Because Blue Cross has offered no evidence that the Antitrust Division has violated or will violate its attorney-client privilege, its proposed order is inappropriate. Further, the entry of the proposed order will only hinder the Antitrust Division's investigation. Consequently, the motion of Blue Cross should be denied.

Respectfully submitted,

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"/s/"

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Dated: March 17, 1995