UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

BLUE CROSS AND BLUE SHIELD OF OHIO, Petitioner, v. UNITED STATES OF AMERICA and ANNE K. BINGAMAN, Assistant Attorney General, U.S. Department of Justice, Antitrust Division, Respondents and Cross Petitioners.	)	Civil Action No. 1:94 CV 2297 Hon. Ann Aldrich

MEMORANDUM OF THE UNITED STATES IN OPPOSITION TO BLUE CROSS & BLUE SHIELD OF OHIO'S MOTION FOR STAY PENDING APPEAL

The United States opposes Blue Cross & Blue Shield of Ohio's ("BCBSO") motion for a stay pending appeal of this Court's June 24, 1996, Order directing BCBSO to comply with Civil Investigative Demand ("CID") No. 11466. It does so on the grounds that: (1) there is no likelihood that the Court of Appeals will reverse the finding of the District Court that CID No. 11466 is "reasonably related to a legitimate government investigation"; (2) BCBSO will not be irreparably harmed in the absence of a stay pending appeal; and (3) the public interest in free and open competition and the government's interest in a speedy and efficient resolution of this investigation outweigh any possible harm to BCBSO from providing the information sought.

STATEMENT OF FACTS

On October 17, 1994, the Antitrust Division served BCBSO with CID No. 11466, calling for the production of documents and responses to interrogatories. The CID was issued as part of an investigation of possible anticompetitive practices in the hospital, medical services, and health insurance markets in Ohio. On November 7, 1994, BCBSO petitioned this Court to set aside the CID on the ground that it "seeks documents and information which are relevant to conduct which is outside the scope of and does not violate Section 1 or 2 of the Sherman Act." More particularly, BCBSO argued that the Antitrust Division cannot legitimately investigate BCBSO's use of "most favored nations" ("MFN") clauses because the use of such clauses "is indisputably legal under the Sherman Act." On January 5, 1995, the United States responded, and cross-petitioned for enforcement of the CID.

On June 24, 1996, this Court filed its Memorandum and Order, denying BCBSO's petition to set aside the CID and granting the United States's cross-petition. In doing so, the Court rejected BCBSO's claim that MFN clauses "do not violate the Sherman Act" and cannot be the basis for a legitimate investigation. Memorandum and Order at 12. The Court then concluded that regardless of whether the government can ultimately prove that BCBSO's use of MFN clauses violates the Sherman Act, "this Court cannot find that BCBSO's use of MFN clauses is so clearly legal as to foreclose the government's investigation of that use, or to require this Court to set aside CID #11466." Id.

On July 15, 1996, BCBSO filed a notice of appeal and requested that this Court grant it a stay pending appeal pursuant to Fed. R. Civ. P. 62(d) or, in the alternative, Fed. R. Civ. P. 62(c).

ARGUMENT

The factors for determining whether a court should grant a motion for a stay pending appeal are the same under either Fed. R. Civ. P. 62(c)[1] or Fed. R. App. P. 8(a): (1) whether the applicant has made a strong showing that it is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure other interested parties; and (4) where the public interest lies. Michigan Coalition of Radioactive Material Users, Inc. v. Griepentrog, 945 F.2d 150, 153 (6th Cir. 1991), citing Hilton v. Braunskill, 481 U.S. 770, 776 (1987).

A. BCBSO Has Failed To Demonstrate A Likelihood Of Success On The Merits

While a court is not required to find that the movant's ultimate success "is a mathematical probability" before granting a stay, Ohio Edison Co. v. Ohio Edison Joint Council, 771 F. Supp. 1476 (N.D. Ohio 1990), BCBSO's argument that all it need show is that the appeal "involves unusual facts or novel issues of law . . . or . . . involves a serious legal question," BCBSO's Memorandum in Support, at 3, misstates the rule.

> While the probability of success that must be demonstrated is inversely proportional to the amount of irreparable injury plaintiffs will suffer absent a stay . . . this relationship . . . is not without its

[1] Blue Cross's argument that it is entitled to a stay pending appeal as a matter of right under Fed. R. Civ. P. 62(d) by posting a supersedeas bond is simply incorrect. The automatic stay provision of Rule 62(d) has been held to be applicable only where the judgment appealed from was a "money judgment." See Donovan v. Fall River Foundry Co., Inc., 696 F.2d 524, 526-27 (7th Cir. 1982); NLRB v. Westphal, 859 F.2d 818, 819 (9th Cir. 1988)(rejecting United States v. Neve, 80 F.R.D. 461 (E.D. La 1978), and refusing to apply Rule 62(d) to an appeal of an order directing compliance with administrative subpoena); and EEOC v. Quad/Graphics, Inc., 875 F. Supp. 558, 559 (E.D. Wis. 1995)(same).

> limits; the movant is always required to demonstrate more than the "mere" possibility of success on the merits.

Griepentrog, 945 F.2d at 153(emphasis supplied). Thus, "even if a movant demonstrates irreparable harm that decidedly outweighs any potential harm to the defendant if a stay is granted, he is still required to show, at a minimum, serious questions going to the merits." Id. at 154; In re DeLorean Motor Co., 755 F.2d 1223, 1229 (6th Cir. 1985). It is precisely this requirement that BCBSO fails to satisfy.

There is simply no likelihood that the court of appeals will reverse this Court's denial of BCBSO's petition to set aside CID No. 11466. The issue on review is not whether BCBSO has violated the Sherman Act by its use of an MFN clause; it is whether the CID is "reasonably related to a legitimate government investigation." As this Court noted,

> A challenge to the relevance of a Grand Jury subpoena, and therefore to the relevance of the CID, "must be denied unless the District Court determines there is no reasonable possibility that the category of materials the government seeks will produce information relevant to the general subject of the Grand Jury's investigation."

Memorandum and Order at 4, quoting United States v. R. Enterprises, Inc., 498 U.S. 292, 300-01 (1991). To succeed then, BCBSO must convince the court of appeals that the CID "could not possibly serve any investigative purpose that the [Antitrust Division] could legitimately be pursuing." Id. (emphasis supplied). Thus, even assuming arguendo that CID No. 11466 was limited to the investigation of BCBSO's MFN clause, BCBSO would have to demonstrate that MFN clauses can not, under any circumstance, violate the antitrust laws. There is no likelihood that BCBSO will be able to do so.

First, as this Court noted, Memorandum and Order at 10, an inquiry into whether a particular practice violates the Sherman Act is fact specific, and the broad type of rule advocated by BCBSO is disfavored. See Maple Flooring Mfrs. Ass'n v. United States, 268 U.S. 563, 579 (1925) ; Eastman Kodak Co. v. Image Tech. Serv., Inc., 504 U.S. 451, 466-67 (1992) ("Legal presumptions that rest on formalistic distinctions rather than actual market realities are generally disfavored in antitrust law").

Second, the very cases involving MFN clauses cited by BCBSO in support of its claim "that MFN clauses (of the type being here scrutinized by the DOJ) are legal under both section 1 and section 2 of the Sherman Act," Motion at 4, do not, as this Court recognized, hold -- or even imply -- that MFN clauses can never violate the antitrust laws. Indeed, the case on which BCBSO most heavily relies, Ocean State Physicians Health Plan v. Blue Cross and Blue Shield of Rhode Island, 883 F.2d 1101 (1st Cir. 1989), cert. denied, 494 U.S. 1027 (1990), did not address whether an MFN clause might violate section 1, and expressly left open the possibility that MFN clauses may violate section 2 when their use is predatory. Id. at 1110. Thus, even under the cases relied upon by BCBSO, there can be no question that its conduct, depending on the facts, might violate the antitrust laws. This fact alone is sufficient grounds for concluding that BCBSO has no likelihood of success on its appeal.

In any event, BCBSO's reading of the cases misses the point. Although BCBSO correctly points out that no court has yet invalidated the use of an MFN under the Sherman Act,

it ignores the fact that many courts, including the Supreme Court, have recognized their anticompetitive potential.[2]

Two recent decisions have come to the same conclusion. In Blue Cross & Blue Shield United of Wisconsin v. Marshfield Clinic, 65 F.3d 1406, 1415 (7th Cir. 1995), cert. denied, 116 S.Ct. 1288 (1996), the Seventh Circuit rejected a blanket immunity for MFN clauses and acknowledged that they are potentially anticompetitive. In United States v. Delta Dental of Rhode Island, No. 96-0113P (D. RI), slip op. at 20-27 (July 26, 1996)(attached hereto), the magistrate issued his Report and Recommendation that defendant's motion to dismiss be denied, a motion brought on the theory that MFN clauses are, as a matter of law, not an unreasonable restraint:

> Such a blanket condonation of MFN clauses would . . . run counter to the Sherman Act's preference for fact-specific inquiries, implausibly reject the premise that MFN clauses produce substantial anticompetitive effects in particular circumstances and contradict the Sherman Act's animating concern for low consumer prices.

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[2] See Connell Construction Company, Inc. v. Plumbers and Steamfitters Local Union No. 100, 421 U.S. 616, 623 and n.1&2 (1975). See also, Reazin v. Blue Cross and Blue Shield of Kansas, 899 F.2d 951, 971 (10th Cir.), cert. denied, 497 U.S. 1005 (1990), in which the Tenth Circuit noted the potential anticompetitive effects of an MFN clause, stating that there was "considerable testimony on the effect of Blue Cross's most favored nations clause, and the court could reasonably have concluded that the MFN clause contributed to Blue Cross's power over price"; Blue Cross and Blue Shield of Michigan v. Michigan Association of Psychotherapy Clinics, et al., 1980-2 Trade Cas. ¶ 63,351 (E.D. Mich. 1980), in which the court, while granting a motion to dismiss a challenge to an MFN clause as per se illegal price-fixing, acknowledged that had plaintiffs alleged that the MFN clause had demonstrable anticompetitive effects it would have applied the rule of reason; Williamette Dental Group, P.C. v. Oregon Dental Service Corporation, 882 P.2d 637, 642 (Or. App. 1994), where the court, while granting defendant's motion for summary judgment, expressly acknowledged that "in some circumstances, the enforcement of most favored nation clauses can have severe anticompetitive effects."

Id. at 20. In his Report, the magistrate carefully analyzed the broad language found in Ocean State Physicians Health Plan v. Blue Cross and Blue Shield of Rhode Island, 883 F.2d 1101 (1st Cir. 1989), cert. denied, 494 U.S. 1027 (1990), language cited by BCBSO in support of its petition:

> Blindly extending . . . Ocean State's broad language to the instant case in the form of a per se rule, where the government's driving allegations rest on market foreclosure of reduced fee plans, the inability of existing plans from offering lower fee alternative options and the sustenance or increase of consumer prices, would eviscerate much of the persuasive rationale of . . . [the] decision[]. Moreover, such validation, without regard to the effects on the consumer, would be an overly simplistic and rigid approach to an area of vast complexity, ignore the realities of the perpetual evolution of modern business practices and contradict the Sherman Act's animating concern of protecting consumers from high prices.

Id. at 25-26.

There is simply no likelihood that the court of appeals will hold, as it must for BCBSO to prevail, that MFN clauses can never violate the antitrust laws. BCBSO's failure to demonstrate "serious questions going to the merits" requires denial of its motion for stay. Griepentrog, 945 F.2d at 153.

B. BCBSO Has Failed To Establish Irreparable Harm In The Absence of A Stay

Blue Cross similarly misapprehends the second prong of the standard governing motions for a stay pending appeal. It is not enough simply to assert injury:

> In evaluating the harm that would occur, depending upon whether or not the stay is granted, we generally look to three factors: (1) the substantiality of the injury alleged; (2) the likelihood of the occurrence; and (3) the adequacy of the proof provided.

Griepentrog, 945 F.2d at 154. "Mere injuries, however substantial, in terms of money, time, and energy necessarily expended in the absence of a stay, are not enough," Sampson v. Murray, 415

U.S. 61, 90 (1974); to justify a stay, the injury "must be both certain and immediate, rather than speculative or theoretical." Griepentrog, 945 F.2d at 154.

BCBSO fails to offer any plausible basis for a finding of "irreparable harm." It does not suggest that its rights are being violated, that its business will be damaged, that the documents sought are privileged, that its reputation will be harmed, or that the information demanded would be disseminated to its detriment. The only injury BCBSO suggests is that its appeal would be rendered moot if it was required to produce the information sought. It is now well established, however, that compliance with a subpoena or administrative process does not render an appeal moot:

> While a court may not be able to return the parties to the status quo ante . . . a court can fashion some form of meaningful relief in circumstances such as these . . . . When the government has obtained . . . materials as a result of an unlawful summons . . . a court can effectuate relief by ordering the government to return the records.

Church of Scientology of California v. United States, 506 U.S. 9, 13 (1992); United States v. Florida Azalea Specialist, 19 F.3d 620, 622 (11th Cir. 1994)(appeal from order enforcing administrative subpoena not rendered moot by compliance where return or destruction of documents possible); USEPA v. Alyeska Pipeline Service Co., 836 F.2d 443, 445 (9th Cir. 1988)(compliance with administrative subpoena does not render appeal moot where documents could be returned), citing Casey v. FTC, 578 F.2d 793, 796 (9th Cir. 1978), and FTC v. Browning, 435 F.2d 96, 97-8 (D.C.Cir. 1970).[3] BCBSO's failure to establish that it will suffer

[3] To the extent BCBSO can demonstrate that it will be harmed by the Division's temporary possession of documents or interrogatory answers, the court may obviate such harm by fashioning appropriate relief if and when the Division seeks to employ that information, or information derived from that information. See Church of Scientology, 506 U.S. at 13-14 n.6; FTC v. Invention Submission Corp., 965 F.2d 1086, 1089 (D.C. Cir. 1992).

irreparable harm "is alone sufficient ground" for denying the stay. Dataphase Sys., Inc. v. CL Sys., Inc., 640 F.2d 109, 114 n.9 (8th Cir. 1981) (en banc); accord, Wisconsin Gas Co. v. FERC, 758 F.2d 669, 674 (D.C. Cir. 1985)(per curiam).

C. The Interest of the Public and of the United States in the Prompt and Efficient Enforcement of the Antitrust Laws Strongly Favors the Denial of BCBSO's Motion

In contrast to BCBSO's failure to demonstrate irreparable harm from denial of a stay, the injury to the public from delaying completion of this investigation is substantial. See United States v. First Nat. Bank of N.J., 469 F.Supp 612 (D.N.J. 1979)(in denying a stay pending appeal, court held that a delay in enforcement would unduly hamper public and government interest in prompt investigation of wrongdoing), modified on other grounds, 616 F.2d 668 (3d Cir.), cert denied, 447 U.S. 905 (1980); United States v. Clark, 1980 WL 1502, 80-1 USTC 9246 (M.D.N.C. 1980)(same). In particular, a stay will inflict on consumers additional and unnecessary competitive harm if, as the Division has reason to belive, BCBSO's use of an MFN clause constitutes unlawful anticompetitive conduct, a harm which manifests itself in higer prices paid by consumers, significant barriers to entry or expansion by competitors, and increased difficulties in the development of innovative health care financing.[4] Additionally, prolonging the period during which the investigation remains uncompleted impedes the employment of enforcement resources elsewhere, thereby harming the public interest in the efficient enforcement of the antitrust laws.

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[4] This case thus stands in contrast to United States v. Leach, 1990 U.S. Dist. LEXIS 12728 (D. Kan. Sept. 14, 1990), in which the court could not "sense" that the public interest would be harmed from denial of a stay. Id. at *3.

Even if BCBSO had made some showing of irreparable harm, which it has not, that interest would be outweighed by the substantial harm to the public interest. Where, as here, BCBSO does not even claim to be able to meet the "heavy burden in demonstrating that [it] is likely to prevail on the merits" that applies when issuance of a stay will harm the public interest, Dataphase Sys., Inc. v. C L Sys., Inc., 640 F.2d 109, 113 (8th Cir. 1981) (en banc); see also United States v. Nutrition Serv., Inc., 234 F. Supp. 578, 579 (W.D. Pa. 1964) (delay should not be tolerated when the public interest will be harmed), aff'd, 347 F.2d 233 (3d Cir. 1965), its motion should be denied.

CONCLUSION

BCBSO has established neither a likelihood of success on the merits nor irreparable harm, and a failure to do either is alone a sufficient basis for denying its motion. Even if BCBSO had demonstrated irreparable harm, the countervailing harm to the public interest, in light of BCBSO's plain inability to make a strong showing on the merits, warrants denial of a stay. For all these reasons, BCBSO's motion for a stay pending appeal should be denied.

Respectfully submitted.

_____/S/_____
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