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Under the Hood of Boies Schiller's $2.7 Billion Blue Cross Blue Shield MDL

Bruce Love

There has never been a settlement of its kind this big in the history of the courts—at least in antitrust outside a government investigation. But it might not have ever happened if not for a novel theory that many antitrust lawyers found unlikely to pass muster.

Boies Schiller Flexner partner Hamish Hume is well-known in Beltway circles and courts across the country as a smart litigator who brings novel cases. Early in his career, he focused on tax law, and then constitutional law before becoming a generalist litigator. The two disciplines are likely part of the reason he seems to excel at drilling into complex factual and legal issues and extracting simple, compelling, and novel arguments. As well as an impressive number of multibillion-dollar tallies on his win sheet, he has also made law in several areas, including government contract bid protests and constitutional litigation.

But the recent multidistrict litigation (MDL) against Blue Cross Blue Shield might just prove to be his crowning glory—at least from the perspective of creative legal argument.

While the decade-long Blue Cross Blue Shield MDL has ranged far and wide across the country, involving literally hundreds of lawyers at dozens of firms, it all started with a kernel of curiosity in Hume's mind.

The Blue Cross Blue Shield Association is an organization that is controlled by the 35 separate health insurance companies that use the Blue Cross and Blue Shield trademarks. A few of them are for-profit, but the vast majority have traditionally been organized as "nonprofit" under state law—yet pay federal taxes as if they were for-profit companies. It is a unique structure not used by any other organization in the United States. The BCBSA's primary asset is the Blue Cross and Blue Shield trademarks, which it licenses to the 35 insurance companies around the U.S. for specific and exclusive geographic service areas. It was the terms of those licenses which piqued Hume's interest.

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Hume first became aware of Blue Cross Blue Shield's general business structure in the course of doing research on another health insurance matter in which he was involved.

Courtesy photo

Hamish P. M. Hume of Boies Schiller Flexner.

"I wasn't focused on the structure, but it struck me as curious," he said. "Eventually, I realized that there could be an argument that it was inconsistent with the antitrust laws, albeit based on precedent many antitrust lawyers thought was no longer good law."

What Hume was remembering were two U.S. Supreme Court antitrust cases from the 1960s and '70s that had fallen out of favor with most antitrust lawyers.

"Unless you were an antitrust lawyer that was really in the weeds, you wouldn't really think about these

cases," he said. "And if you did, you'd probably say, 'oh, but those aren't good law—the courts would analyze those kinds of agreements differently now.'"

The decisions he was thinking about were *United States v. Sealy* in 1967 and *United States v. Topco Associates* in 1972.

In *Sealy*, SCOTUS held that when a group of competitors creates an organization that they own and control, then put a trademark into that organization and license it back to themselves with exclusive territories for each of them, that is equivalent to a horizontal agreement to divide and allocate markets—and when those restraints include an aggregation of other restraints, they are illegal, per se.

The Supreme Court then articulated in *Topco* that allocating territories to minimize retail competition was a violation of the Sherman Act, which outlines antitrust behavior and prohibitions.

"Basically, a bunch of competitors put a trademark into a company that they all control. Then they license the trademark back to each other in segregated and exclusive geographic areas," Hume explains. "No one would dispute that if those competitors got together and agreed to have different exclusive geographic areas, that's market allocation and per se illegal. But the key here was the competitors control the company with the trademark."

At its simplest, *Sealy* and *Topco* mean you can't do something indirectly that you clearly cannot do directly.

Of course, nothing is that simple. Fast food chains like Burger King and McDonald's have been operating franchises and trademarks with geographic exclusivities for decades. Yet Hume felt the Blue Cross Blue Shield structure was different enough to fall under the tests laid out by *Sealy* and *Topco*. And the more he dug, the more he realized there were other anti-competitive behaviors baked into BCBSA's organizational structure.

For one, BCBSA severely limited the ability of members to compete even by using independent, non-Blue trademarks.

For another, it forbade more than one Blue Cross Blue Shield entity from submitting bids for corporate health insurance contracts—even if the organization was a big corporation with employees in multiple states, therefore operating in the exclusive service areas of more than one Blue Cross Blue Shield entity.

"They allocated who would bid and made sure only one of the Blue Cross Blue Shield entities answered the request for proposal. That obviously reduces the amount of competition. Put it all together and, to me, it was a pretty convincing case of anti-competitive behavior and a violation of the Sherman Act," Hume said.

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Even with a case formulated, Hume was struck that no one had thought of this before.

As it turns out, they had.

Hang On, Something's Not Right Here…

Hume found out that the U.S. Department of Justice had looked at BCBSA's structure, but the federal government never moved forward on any prosecution.

"There was evidence of people who'd gone to Justice before and complained, but the department never took action," he said.

What's more, there had been at least three previous cases. One was brought by the state of Maryland in the early 1980s. It survived a motion to dismiss and then settled for confidential terms. A second case was actually between two Blue Cross entities, where one was crossing state lines and complained that the geographic exclusivity imposed on them was illegal. That one also settled. A third was in the Louisiana State Court, involving a small insurance provider.

Hume naturally can't be entirely sure, since the settlement terms of those early cases were confidential. But he believes these cases—while much smaller—nonetheless argued along similar lines to his own reasoning. Yet even in the face of multiple lawsuits, the organization had not seemed to address its alleged anticompetitive behavior.

"No not at all," said Hume emphatically. "In fact, subsequent to those cases, I think some of these practices were enhanced and strengthened—particularly the use of non-Blue trademarks."

Since previous lawsuits seemed to have not gone very far toward

unearthing BCBSA's potential antitrust nature, and there was the question of whether *Sealy* and *Topco* would hold, Hume said it took him and his firm a while to develop the case and decide if they wanted to go forward.

Hume approached his longtime trial partner, well-known litigator Bill Isaacson (who has since moved to Paul, Weiss, Rifkind, Wharton & Garrison), who had made a career doing plaintiff-side antitrust cases—especially class actions.

"I said, 'Look, you've done these kinds of cases, what do you think? Do you think we might have something bigger here?'," Hume recalled.

Isaacson agreed the claims were worth pursuing.

And that was the start of the MDL.

"We had a number of small businesses that were interested in challenging it, and we eventually filed the first case in North Carolina in 2010. Then we filed two or three others," said Hume.

Boies Schiller filed that first case with co-counsel, with whom it had worked on other cases, including both Michael Hausfeld and Megan Jones of Hausfeld, and Cy Smith of Zuckerman Spaeder.

"Then the flood gates opened, and people started filing all over the place," said Hume.

With the matter suddenly becoming serious multidistrict litigation, Hume and Isaacson thought it prudent to involve firm founder and legendary trial lawyer David Boies.

The Judicial Panel on Multidistrict Litigation sent all of the cases to federal court in Birmingham, Alabama. While the judge was a George W. Bush-appointed Republican conservative from the South, the team thought he would nonetheless appreciate Boies—a nationally famous progressive firebrand litigator.

"David's style is well received by judges who want to get things right on the law, and who will appreciate well-crafted arguments that are meticulous yet to the point," said Hume. "Our judge was an intellectually curious and engaged judge, who was alert and engaged, asking questions to help him understand the case."

Boies himself—the lawyer who successfully prosecuted Microsoft for antitrust violations, represented presidential candidate Al Gore in the infamous *Bush v. Gore*, enshrined the constitutional right to same-sex marriage in *Hollingsworth v. Perry*, and brought a sexual assault case against Britain's Prince Andrew—counts the BCBSA MDL as one of his most satisfying cases.

"Ten years from the first filing, the final $2.7 billion payload is the largest antitrust settlement in a case where the government had not itself prosecuted, investigated or been part of the case at all."

"It was something that has made a difference—directly—to individual people," he said. "Hundreds of millions of people will be affected by this, through improved competition in the health care market."

The case also "duly demonstrated the power of private enforcement," said Boies.

And private enforcement is no small accomplishment in Boies' eyes. Most cases like this, he pointed out, happen after the government has already conducted an investigation and brought charges.

"When you're following on from a government investigation, the government has already tilled the ground for you. Here, we were doing it all ourselves—from the initial analysis, the fact gathering, development of legal theories, depositions, and document production," he said. "The government has enormous resources. They have the FBI. They have Civil Investigative Demands [government subpoenas]. We were doing all this ourselves, up against some of the most powerful law firms in the country. The sheer number of lawyers involved was staggering."

Boies recalled the number of lawyers on the case even impacting where meetings and conferences could be held.

"There were few places we could bring everyone from all sides together, because we couldn't find meeting rooms big enough," he said.

I Know We Already Have a Lot of Lawyers, but…

The MDL proceedings have been hard fought, lasting several years, and along the way, the plaintiffs' team was faced with new and novel arguments at every turn. One such issue was the so-called "file rate doctrine," which in principle can block state and federal courts from invalidating a rate approved by a regulatory agency (like an insurance industry regulator) or awarding damages by finding that another rate would have been charged "but for" the antitrust violations—in other words, blocking the plaintiffs from recovering damages.

"We had a big fight over that," Hume said.

The settlement proceedings have also lasted several years and required specialist expertise.

Hume had spent time early in his career at D.C.-based litigation shop Cooper & Kirk. And when things turned tricky in the Alabama federal courts, he knew where to go.

"We'd already been at it for six or seven years, and were already in settlement discussions," he recalled. "But I said to David Boies, 'David, I know we have a lot of lawyers—maybe too many lawyers—on this case already. But we're in Alabama. Chuck Cooper's from Alabama. I think he could be a good addition.'"

David replied: "Well, I agree. We have too many lawyers, but I still think you're right. It would be nice to have Chuck."

A former attorney in the Justice Department's civil division and the mind behind the landmark *United States v. Winstar* decision, Cooper had built a reputation as a strong trial and appellate advocate who shone in difficult situations and could handle novel arguments.

"Bringing in Chuck worked really well," said Hume. "He was extremely effective. His courtroom presence is incomparable, and his appellate expertise was invaluable."

A huge issue in the case for both sides related to what "standard of review" would apply to the challenged restraints imposed by the BCBSA trademark licenses.

After extensive briefing and argument, the team won a ruling that the standard should be the "per se" standard, subject to an affirmative defense if BCBSA could show that they operated as a single economic enterprise with respect to the trademarks. At the request of BCBSA, and recognizing the significance of the issue, Judge R. David Proctor certified his decision for interlocutory appeal to the Eleventh Circuit. BCBSA and the plaintiffs then submitted briefs to the Eleventh Circuit on whether the court of appeals should take the interlocutory appeal or not.

"Chuck and his team led the briefing on blocking that," said Hume. "The court of appeals declined to take the appeal."

As well as David Boies and Cooper, of the attorneys who worked with him on this war of attrition, Hume praises the Hausfeld team with much credit for getting the MDL across the line.

"David and Michael Hausfeld created a formidable team, ensuring that the class was well represented at every stage of this case. And Megan Jones at Hausfeld deserves enormous credit for her tenacious and persistent leadership," said Hume. "This victory was years in the making with many talented attorneys involved, and certainly these three are at the top of that list."

Ten years from the first filing, the final $2.7 billion payload is the largest antitrust settlement in a case where the government had not itself prosecuted, investigated or been part of the case at all.

That the government never chose to get involved is noteworthy, in Hume's view. He's convinced Justice must have known about the organization's structure, and its potential anti-competitive nature, but their knowledge never seems to have risen to the level of deciding to investigate.

"For whatever reason, the government has never chosen to pursue the organization for potential breaches of the antitrust laws," he said.

Delighted for his clients—and his firm, which will receive a substantial, if hard-earned fee—Hume nonetheless muses about just how far he could have taken this case.

"We would have won at trial, but they would have probably appealed. That appeal would have created risk, including conceivably the risk of it going all the way to the Supreme Court to revisit *Topco* and *Sealy*," he said. "Settlements never make you completely happy, but it seemed like a reasonable compromise."

The settlement is likely to add several hundreds of millions to Boies Schiller's 2022 revenue, likely skyrocketing annual earnings for the firm. Last year Boies Schiller shed 8% in total revenue, falling to $230 million in 2021 from $250 million the year prior. The same day he approved the settlement, Judge Proctor also approved $667 million in attorney fees. Boies will receive the lion's share of those fees.

And a Supreme Court appearance might still be on the cards. While the settlement has been approved, it's possible some parties might appeal it.

"An objector might still appeal, though we don't think there's merit to what the objectors have said. But they might try, sure. You never know."