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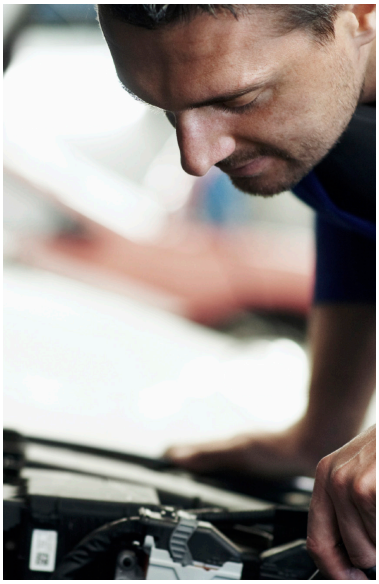
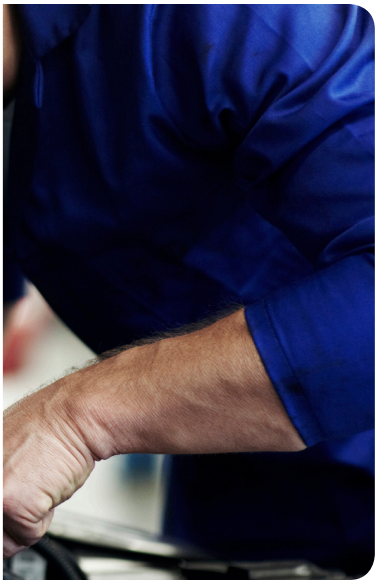

Strike Three: Antitrust Claims in Florida Auto Insurer Proceeding Dismissed With Prejudice

By James M. Burns

On September 23, District Court Judge Gregory Presnell (Middle District of Florida) dismissed the antitrust claims asserted by a class of auto body shops in *A&E Auto Body v. 21st Century Centennial Insurance*, this time *with* prejudice. Noting that this was the plaintiffs' third attempt to allege their claims against the auto insurer defendants with the precision required by the Federal Rules, Judge Presnell concluded that "the problems identified in response to [plaintiffs'] initial complaint – shotgun pleading, vagueness, and implausibility – have persisted in their subsequent efforts," and dismissed the claims on that basis.

The *A&E* action was the earliest filed of more than 20 antitrust actions filed by auto body shops across the country against the majority of the auto insurers offering policies in the states where the plaintiffs do business. The cases were subsequently consolidated by the Judicial Panel for Multidistrict Litigation before Judge Presnell as *In re Auto Body Shop Antitrust Litigation* (MDL 2557), with the *A&E* case being the most advanced case in the proceeding. In each case, the plaintiffs, typically a class of auto body shops, alleged that the auto insurer defendants in their states utilized market surveys designed to determine "market rates" and then used these rates as a mechanism to reduce their payments for covered services and steer business away from plaintiffs, who refuse to accept the "market rates" for their services.

In dismissing the *A&E* plaintiffs' antitrust claims, Judge Presnell began by noting that "the alleged behavior of the defendants – i.e., paying the same rates, refusing to pay for the same list of procedures, requiring lower-quality parts – is not enough, on its own, to violate Section One of the Sherman Act." The "crucial question," according to Judge Presnell, is "whether the conduct stems from independent decision or from an agreement, tacit or express." *Bell Atlantic v. Twombley*, 550

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Strike Three: Antitrust Claims in Florida Auto Insurer Proceeding Dismissed With Prejudice *continued*

US 544, 553 (2007). To state a claim, plaintiffs "must provide enough factual matter, taken as true, to show that defendants took steps that would otherwise have been against their economic self-interest or that tends to show collusion." As Judge Presnell found, the *A&E* plaintiffs' allegations did not meet this standard.

First, the auto body shops had not adequately alleged that the insurers had acted against their self-interest. As Judge Presnell observed, "paying as little as possible for repairs is clearly in the self-interests of automobile insurers, as it improves their bottom lines." Second, Judge Presnell also found that plaintiffs had failed to allege sufficient "plus factors" to support their claim of collusion. As to plaintiffs' "market power" plus factor, Judge Presnell held that "the fact that a group of alleged price-fixers possess power in a particular market does not, standing alone, make it more likely that the members of that group have entered into an agreement to fix prices." Next, addressing plaintiffs' "motive" plus factor, the court held that "the defendants' desire to make a profit cannot constitute a plus factor, because conscious parallelism (which is not unlawful) is itself a profit-maximizing behavior." In addition, the "opportunity to conspire" that plaintiffs also attempted to characterize as a plus factor was also insufficient, as "a number of the defendants are not members of any of the [trade] organizations" and mere "participation in trade organizations 'provides no indication of conspiracy.'" Accordingly, having still failed adequately to allege any actionable conspiracy – on their third attempt – Judge Presnell held that plaintiffs' conspiracy claim should be dismissed with prejudice.

Turning next to plaintiffs' boycott claim, which focused on whether defendants "steered actual and potential customers away [from plaintiffs] by disseminating false statements about the quality, timeliness, and/or price of the work done by the plaintiff shops," the court concluded that plaintiffs' allegations also failed to state an actionable claim under this antitrust theory. Specifically, the court held that "even accepting the allegations as true, they in no way suggest that the defendants have engaged in a *concerted* refusal to deal" with plaintiffs. Instead, because "there are no allegations that at any time any of these steering incidents occurred, the other defendants were also preventing their insureds from utilizing that particular plaintiff's services," concerted activity – necessary element of the claim – had not been adequately alleged. Accordingly, Judge Presnell also dismissed this antitrust claim as well.

After dismissing both of plaintiffs' antitrust claims, the court also dismissed plaintiffs' tortious interference and quantum meruit claims, and concluded that "plaintiffs' pleadings have not come remotely close to satisfying the minimum pleading requirements as to any of the claims asserted." In addition, with language that may have been a signal that the entire MDL proceeding may soon be coming to an end, Judge Presnell stated that the other "20 odd cases" in the MDL "almost all share the same shortcomings" as the A&E case. Motions by the defendants as to the claims in those cases have not yet been ruled upon by the court. Stay tuned.

5th Circuit Affirms the Dismissal of *Federal* Antitrust Claims Against Insurance Broker on McCarran-Ferguson Act Grounds While Permitting the Plaintiff's *State* Antitrust Claims to Proceed

By James M. Burns

On September 23, the Fifth Circuit Court of Appeals issued its opinion in *Sanger Insurance Agency v. HUB International*, affirming the dismissal of plaintiff's federal antitrust claims based upon the McCarran-Ferguson Act (15 USC 1011 et seq.) but reversing the dismissal of plaintiff's state antitrust claims. The decision serves as a good reminder that the McCarran-Ferguson Act's antitrust exemption applies only to federal antitrust claims and, while some states have state law equivalents to the McCarran-Ferguson Act, Texas is not among them.

In the action, Sanger, an upstart insurance broker angling to broker insurance policies in the veterinary insurance market in North Texas, alleged that HUB International had impeded Sanger's ability to enter the market by inking exclusive brokerage relationships with several large insurers to keep Sanger out of the market. HUB successfully moved to have Sanger's federal and state antitrust claims dismissed at the trial court level, as the court ruled that Sanger lacked standing to assert its claims and that the alleged conduct was also within the scope of the McCarran-Ferguson Act's antitrust exemption.

On appeal, Sanger challenged both rulings, and achieved a split decision from the appellate court. First, as to standing, in a 2-1 decision (Judge Edith Jones dissenting), the court ruled that Sanger had antitrust standing to assert its claims. The court noted that, needing to demonstrate that it had taken substantial steps towards competing in the veterinarian insurance brokerage market, Sanger had "begun selling Continental professional liability policies to approximately ten equine and large-animal veterinarians before HUB purportedly forced Continental to stop issuing the policies." This effort, ultimately derailed by HUB's conduct – if proved – was sufficient for standing purposes.

Turning to the lower court's McCarran ruling, the appellate court began its analysis by noting that the McCarran-Ferguson Act exempts from antitrust scrutiny conduct that is (1) the business of insurance, (2) regulated by state law, and (3) does not constitute an act of boycott, coercion or intimidation. *Union Labor life Insurance v. Pireno*, 458 US 119, 124 (1982). On appeal, Sanger argued that the alleged conduct did not constitute "the business of insurance," relying upon the Third Circuit's 2010 decision in *In re Insurance Brokerage Antitrust Litigation*. There, the court held that the marketing of insurance products is not necessarily within the scope of McCarran's exemption. The Fifth Circuit, however, declined to follow *In re Insurance Brokerage Antitrust Litigation*, noting that "most courts have held that routine dealings between insurers and brokers or agents do constitute the business of insurance, even if that relationship may not be distinctively different from ordinary relationships with dealers marketing a product or service." Accordingly, after finding that Sanger's federal antitrust claims were also subject to state regulation, and did not constitute an act of boycott, coercion or intimidation, the court affirmed the dismissal of Sanger's federal antitrust claims.

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5th Circuit Affirms the Dismissal of *Federal* Antitrust Claims Against Insurance Broker on McCarran-Ferguson Act Grounds While Permitting the Plaintiff's *State* Antitrust Claims to Proceed *continued*

As the court then noted, however, the McCarran-Ferguson Act exemption applies only to federal, and not state antitrust claims. And, while many states also exempt conduct that is exempt under McCarran from their antitrust laws (either by statute or case law interpretations), not all states do. As the court observed, Texas is one such state. Indeed, the Texas legislature had specifically made clear that no exemption exists for "the business of insurance" under Texas law. *See Tex. Bus. & Com. Code* 15.05(g) ("[T]he McCarran-Ferguson Act does not serve to exempt activities under this Act."). For this reason, Sanger's state antitrust claims were required to be reinstated, and the court remanded the case to the lower court for further proceedings.

Congress Takes Long Look at Proposed Health Insurance Mergers

By James M. Burns

While the Department of Justice Antitrust Division is responsible for reviewing the proposed Anthem/Cigna and Aetna/Humana mergers for any potential competitive concerns, Congress jumped into the process with both feet in September, holding no less than three hearings focused on the mergers. Whether these hearings will ultimately influence the DOJ's views of the mergers, which would transform the current "big five" national health insurers into a "big three" – with United Healthcare being the other insurer – remains to be seen; at a minimum, however, the hearings provided an opportunity for both the merging parties and those opposed to the deals to make their views known to Congress and the public.

The first hearing was held September 10, by the House Judiciary Subcommittee on Regulatory Reform, Commercial and Antitrust Law, and was ostensibly intended to cover a wide range of health care antitrust issues, not just the proposed mergers. However, the focus of the hearing quickly changed, as representatives of the American Hospital Association (AHA) and the American Medical Association (AMA) seized the opportunity to express their views of the insurance deals. Summarizing arguments the AHA and AMA had advanced in detailed written submissions made to the committee members earlier in September, AHA CEO Richard Pollock stated that the AHA had "serious concerns" about the deals. With respect to the Anthem deal, Pollock contended that the deal "threatens to reduce competition in markets serving 45 million consumers," and claimed that the Aetna deal would "further concentrate Medicare Advantage markets that are already suffering from a lack of competitive alternatives." A representative of AHIP (America's Health Insurance Plans), who also

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Congress Takes Long Look at Proposed Health Insurance Mergers *continued*

testified at the hearing, challenged those views, but it quickly became clear that Congress would want to hear from the merging parties themselves, and the second and third hearings provided just that opportunity.

Accordingly, when the second hearing was conducted (by the Senate Judiciary Committee's Subcommittee on Antitrust, Competitive Policy and Consumer Rights) on September 22, the witnesses included Aetna Chairman Mark Bertolini and Anthem CEO Joseph Swedish. Richard Pollack, from the AHA, also returned to express the AHA's views to the Senate subcommittee members. Opening the hearing, Senator Grassley, who chairs the Judiciary Committee, stated that he would be "listening carefully to learn how these transactions will benefit ordinary, hard-working Americans," and Ranking Member Senator Leahy made clear that the Judiciary Committee's "efforts augment the detailed review that will be taken by the antitrust authorities."

First up was the Aetna Chairman, Mark Bertolini, to address the competitive implications of the proposed Aetna/Humana deal. Responding to claims that the deal would leave Aetna with market power in the Medicare Advantage market, Bertolini contended that only 8 percent of all Medicare beneficiaries would get coverage from a combined Aetna/Humana, given that two out of three seniors continue to receive their benefits through the traditional fee-for-service Medicare plan. Similarly, Anthem's CEO disputed the claims that the Anthem/Cigna deal would have anticompetitive effects, stating that "every service [Anthem] provides distills down to a local arrangement," and that the transaction would "uniquely benefit consumers" by expanding access to care and generating significant cost savings and synergies at local levels. In addition, in response to a statement from Senator Richard Blumenthal (D-CT) about perceived "barriers to entry" in insurance markets, both witnesses pointed to Oscar Health Insurance Corp., a start-up health insurer in New York that has attracted 40,000 members in that state, had recently announced plans to expand to California, and had also recently gained a significant financial investment from Google.

Perhaps not surprisingly, Bertolini and Swedish were subsequently called back for a return engagement, this time before the House subcommittee that had considered the mergers without them on September 10. In a hearing on September 29, the Aetna and Anthem executives largely repeated the claims that they had made a week earlier to the Senate subcommittee members, focusing on the potential benefits of the transactions for consumers.

Since the hearings, the DOJ Antitrust Division has not provided any further information regarding the status of its review, and the merging parties themselves have announced that they don't anticipate regulatory approval until sometime in 2016. However, on October 20, Aetna and Humana announced that their shareholders had "overwhelmingly" approved the proposed transaction. With this development, it is likely that all parties have settled in for a long review of the transaction. Stay tuned.

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