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EUROPEAN ANTITRUST "BLOCK EXEMPTION" FOR INSURANCE UNDER REVIEW

James M. Burns

In the United States, the McCarran Ferguson Act (15 USC 1011-1015), enacted by Congress in 1945, provides the insurance industry with a limited exemption from the federal antitrust laws. The Act applies to all conduct that constitutes "the business of insurance," provided that the conduct is "regulated by state law" and is not an act of "boycott, coercion or intimidation." While the Act has been the subject of controversy over the years, and calls for its repeal have been frequent, including most recently during the debate that ultimately led to the enactment of the Affordable Care Act, the Act remains in place and provides a significant defense to potential antitrust liability for a wide range of insurer activity.

In Europe, the insurance industry also enjoys a limited exemption from the E.U. competition laws (specifically Article 101), by virtue of the "Insurance Block Exemption." This exemption currently shields insurers from liability when they engage in (1) an exchange of information considered reasonably necessary for calculating insurance risk, including the exchange of joint compilations, joint tables and studies; and (2) the creation of co-insurance and co-reinsurance pools, provided that the market share of the pool does not exceed a certain level.

However, unlike in the U.S., the Block Exemption must be renewed every seven years for it to remain in place. Last renewed in 2010, the European Commission is now beginning its review of the exemption to assess whether it should be renewed in 2017. And, as the process in 2010 confirms, renewal is not guaranteed, as the Commission, over insurer objections, chose at that time to eliminate a provision in an earlier version of the Block Exemption that permitted insurers to implement "standard policy conditions" in their policies, finding that an exemption for this activity was not necessary to the proper functioning of insurance markets.

In connection with its review of the Block Exemption, in early August the Commission issued a notice inviting insurers to offer their comments on the continuing need for the exemption. Submissions can be made until November 4, and the Commission will ultimately submit a report to the European Parliament with its recommendation concerning the exemption in early 2016. Stay tuned.

MDL PANEL CONSOLIDATES AUTO INSURANCE ANTITRUST CASES IN FLORIDA
James M. Burns

On August 8, the Judicial Panel on Multidistrict Litigation issued an order consolidating a collection of antitrust cases filed against numerous auto insurers and transferring the cases to the Middle District of Florida as *In re Auto Body Shop Antitrust Litigation*, MDL 2557. In reaching that decision, the Panel rejected the plaintiffs' request that the cases be transferred to either the Southern District of Mississippi or the Eastern District of Louisiana.

Each of the cases centers upon a claim by the repair shop plaintiffs that more than thirty five auto insurers (including Allstate, State Farm, Geico and Nationwide) conspired to suppress reimbursement rates for collision repairs, in violation of Section 1 of the Sherman Act and various state laws. The first case, *A&E Auto Body v. 21st Century Centennial Insurance et al.*, was filed in the Middle District of Florida in February. Subsequently, cases containing similar allegations against the insurers were filed by repair shops in Indiana, Mississippi, Tennessee and Utah.

In June, plaintiffs' counsel, located in Jackson, Mississippi, filed a motion with the Judicial Panel requesting that all of the cases be consolidated in the Southern District of Mississippi. However, the Panel rejected that request, choosing instead to transfer the cases to the Middle District of Florida, which was the location where the first case had been filed. In reaching its decision, the Panel held that transferring the cases would "offer the benefit of placing all related cases before a single judge who can structure pretrial proceedings to accommodate all parties' legitimate discovery needs while ensuring that common witnesses are not subjected to duplicative discovery demands."

That Panel's decision appears to be a favorable one for the insurers, at least for the moment, given that Judge Presnell, to whom the consolidated case is being transferred, previously held that plaintiffs' allegations in the *A&E Auto Body v. 21st Century Centennial Insurance* case had failed to state a claim. Now that the matter has been sent back to Judge Presnell, plaintiffs will undoubtedly be filing a new, consolidated complaint that both incorporates the claims of the consolidated cases and attempts to address the deficiencies in the original *A&E Auto Body* complaint identified by Judge Presnell. Once filed, the insurers will likely file new motions testing the allegations of the new complaint before the matter proceeds into discovery.

Shortly after the Panel's initial ruling, the Panel issued a supplement order conditionally transferring two additional cases to Judge Presnell, one from the Northern District of Illinois and another from the Western District of Louisiana. Unless successfully opposed by the plaintiffs, these matters will also become part of the MDL proceeding.

LOUISIANA ATTORNEY GENERAL FILES SUIT AGAINST STATE FARM ALLEGING MONOPOLIZATION AND "DECEPTIVE TRADE PRACTICES"
James M. Burns

On August 19, Louisiana Attorney General Buddy Caldwell announced that his office had filed a lawsuit against State Farm, accusing the insurer of violating Louisiana's Unfair Trade Practices Act (LSA-R.S. 51:1401 *et seq.*) and its Monopolies Law (LSA-R.S. 51:121 *et seq.*).

The suit, which was filed in Louisiana state court, alleges that State Farm, the state's largest auto insurer, steers Louisiana consumers to its direct repair shops, and then pressures those shops to perform vehicle repairs with inferior parts and/or too quickly, without regard to consumer safety and vehicle manufacturer performance standards. The complaint states that State Farm's alleged conduct constitutes an "attempt to monopolize" the repair market in Louisiana, in violation of the Louisiana state antitrust laws, and that State Farm's alleged "steering" of insureds to the direct repair shops constitutes deceptive conduct under the Louisiana Unfair Trade Practices Act. Attorney General Caldwell also contends that State Farm's alleged conduct violates a 1963 Consent Decree between the DOJ and many insurers, including State Farm, that settled an investigation into insurer influence in the auto repair industry. The Consent Decree is often cited by repair shops challenging insurer direct repair programs, because its terms include a prohibition on directing that an insured utilize a particular repair shop or seeking to "control automobile material damage repair costs."

In announcing the action, Attorney General Caldwell stated that alleged conduct is "a national problem," and that while State Farm is the only defendant in the suit, "State Farm is not the only one" engaged in the allegedly unlawful practices. However, the Attorney General has not filed similar suits against any other insurer, at least as of now, nor have similar claims been brought by other state Attorneys General. (Private actions by repair shops have repeatedly been brought challenging insurer direct repair programs and alleged "steering" practices, but typically have been rejected by the courts. *See, e.g., Harner v. Allstate*, (S.D.N.Y. 2012)). Needless to say, the Louisiana action is one that every auto insurer operating in Louisiana will want to follow closely.

U.S. SENTENCING COMMISSION WEIGHING RECOMMENDATION TO INCREASE IN CRIMINAL ANTITRUST PENALTIES
James M. Burns

In June, the United States Sentencing Commission, which is appointed by the President to make recommendations to Congress on the criminal penalties for the violation of federal law, issued a request for comments regarding whether the guidelines for calculating antitrust fines should be modified. Currently, corporate fines for cartel price fixing are calculated on a sliding scale, tied to the amount of the "overcharge" imposed by the violators, with the standard maximum

fine under the Guidelines for a corporation capped at $100 million and, for an individual, capped at $1 million. The deadline for such comments was July 29, and the views expressed on the issue varied considerably.

Contending that the current Guidelines do not provide an adequate deterrent to antitrust violations, the American Antitrust Institute urged the Commission to recommend an increase in the fines for cartel behavior. The AAI stated that the presumption in the Guidelines that antitrust cartels, on average, "overcharge" consumers for goods by 10% is greatly understated, and thus should be corrected to reflect more accurate levels. Pointing to economic studies and cartel verdicts, the AAI suggests that the median cartel "overcharge" is actually in excess of 20%, and therefore the presumption should be modified in the Guidelines. If adopted, the AAI's proposal would double the recommended fines under the Guidelines for antitrust violations.

Perhaps surprisingly, the DOJ responded to the Commission's Notice by stating that it believes that the current fines are sufficient, and that no increase in antitrust fines is warranted at this time. The DOJ indicated that the 10% overcharge presumption provides a "predictable, uniform methodology" for the calculation of fines in most cases, and noted that the Guidelines already permit the DOJ to exceed the fine levels calculated using the 10% overcharge presumption in some circumstances. Specifically, the DOJ noted that the alternative sentencing provisions of 18 USC 3571 already permit it to sidestep the standard guidelines and seek double the gain or loss from the violation where appropriate. Notably, the DOJ utilized this provision in seeking a $1 billion fine from AU Optronics in a 2012 action, although the court declined the request, characterizing it as "excessive. The court did, however, impose a $500 million fine, an amount well in excess of the cap under the standard antitrust fine guidelines.

Finally, D.C. Circuit Court of Appeals Judge Douglas Ginsburg and FTC Commissioner Joshua Wright offered a completely different view on the issue in comments that they submitted to the Sentencing Commission. Suggesting that fines imposed on corporations seem to have little deterrent effect, regardless of amount, they encouraged the Commission to instead recommend an increase in the *individual* criminal penalty provisions for antitrust violations. Notably, they encouraged the Commission not only to consider recommending an increase in the fines to which an individual might be subjected (currently capped at $1 million), but also to recommend an increase in the prescribed range of jail sentences for such conduct (which currently permit for imprisonment of up to 10 years).

The Commission will now weigh these comments and ultimately submit its recommendations to Congress by next May. If any changes are adopted by Congress, they would likely go into effect later next year. Stay tuned.