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DICKINSON WRIGHT'S

Insurance Antitrust LEGALNEWS

CONGRESS BEGINS WITH RENEWED EFFORTS TO REPEAL INSURERS' ANTITRUST EXEMPTION

James M. Burns

Early into the 114th Congress, multiple bills have already been introduced that would repeal the insurance industry's limited antitrust exemption granted by the McCarran-Ferguson Act (15 USC 1011 *et seq.*).

On January 6, Representative John Conyers (D-Mich) introduced the "Health Insurance Industry Antitrust Enforcement Act of 2015," (H.R. 99). The legislation would amend the McCarran-Ferguson Act, which currently provides the insurance industry with an exemption from the federal antitrust laws for conduct that is "the business of insurance," is "subject to state regulation," and does not constitute "an act of boycott, coercion or intimidation," (15 USC 1013), by removing the exemption for health insurers and medical malpractice insurers. Notably, the bill would not eliminate the exemption with respect to other lines of insurance, and is similar to McCarran repeal bills that Representative Conyers has introduced in prior sessions of Congress. Representative Conyers has previously stated that his bill would "end the mistake Congress made in 1945 when it added an antitrust exemption for insurance companies."

Subsequently, on January 22, Representative Paul Gosar (R- Ariz.), who was a practicing dentist for many years, introduced similar McCarran repeal legislation, entitled the "Competitive Health Insurance Reform Act of 2015" (H.R. 494). Representative Gosar's bill would only eliminate the exemption as to health insurers. In introducing his legislation, Representative Gosar stated that "Since the passage of Obamacare, the health insurance market has expanded into one of the least transparent and most anti-competitive industries in the United States," and that there is "no reason in law, policy or logic for the insurance industry to have a special exemption" from the antitrust laws.

Both H.R. 99 and H.R. 494 have been referred to the House Judiciary Committee for further action. Whether these bills will gain traction this Congress remains to be seen, but the fact that the bill has supporters on both sides of the aisle certainly increases the chances that the legislation will, at a minimum, be considered by the House Judiciary Committee (which failed to take up similar legislation in the 113th Congress).

ANTITRUST CLAIMS IN AUTO REPAIR SHOP ANTITRUST MDL CASE COME TO A CRASHING HALT AS COURT GRANTS INSURERS' MOTION TO DISMISS; PLAINTIFFS RESPOND BY FILING SECOND AMENDED COMPLAINT

James M. Burns

On January 21, 2015, Judge Gregory Presnell, the presiding Judge in the *In re Auto Body Shop Antitrust Litigation* (M.D. Fla), a consolidated proceeding that brought together over a dozen antitrust cases against a large number of auto insurers, issued an order dismissing the plaintiffs' complaint in the lead case, *A& E Auto Body v. 21st Century Centennial Insurance Company*. While Judge Presnell's decision does not terminate the litigation – because he granted plaintiffs leave to replead their claims – it does constitute a significant early victory for the insurance industry defendants in the closely-followed litigation.

As Judge Presnell explained in his ruling, the *A&E* case centers around claims by approximately 20 Florida auto body shops that approximately 40 auto insurers in the state conspired to depress the price of auto repairs through the use of direct repair programs, and that the defendants also unlawfully "steer" insureds to preferred shops and away from the plaintiffs. Similar claims have been asserted by auto shops in other states, and over the last six months all of the cases have been consolidated before Judge Presnell in the Middle District of Florida for further action.

In ruling on defendants' motion to dismiss the *A&E* complaint, Judge Presnell began his analysis of plaintiffs' price fixing claim by noting that plaintiffs pled that all of the defendants agreed to "conform to State Farm's unilaterally imposed payment structure." For this reason, the "crucial question," the Court explained, is whether "the challenged anticompetitive conduct stems from independent decision or from an agreement, tacit or express," and noted that plaintiffs are required to plead "enough factual matter (taken as true) to suggest that an agreement was made." Otherwise, the claim fails as a matter of law. Examining plaintiffs' complaint, Judge Presnell held "plaintiffs' allegations in this case fall far short of meeting this standard."

Specifically, Judge Presnell concluded that "aside from conclusory allegations that it exists, plaintiffs offer no details at all . . . about the alleged agreement, such as how the defendants entered into it, or when. While not fatal to their Sherman Act claims, this bears noting." Judge Presnell then explained that "The defendants' statements about paying no more than State Farm pays for labor do nothing to demonstrate that the plaintiffs are entitled to relief. It is not illegal for a party to decide it is unwilling to pay a higher hourly rate than its competitors have to pay, and the fact that a number of defendants made statements to this effect does not tip the scales toward illegality." Finally, Judge Presnell concluded that "the fact that a number of defendants have indicated an unwillingness to pay more than State Farm has to pay does not, itself, raise Sherman Act concerns [because] in the words of the Supreme Court, lawful parallel conduct fails to bespeak unlawful agreement. *Bell Atlantic v. Twombly*, 550 U.S. 544, 556 (2007)."

Turning to plaintiffs' boycott claim, Judge Presnell found that plaintiffs' allegations here were equally insufficient. Judge Presnell stated that "plaintiffs allege (in conclusory fashion) that the defendants 'steer customers away" by badmouthing shops that seek to charge higher prices," but held that "there is no allegation that any defendant refused to allow any of its insureds to obtain a repair from such a shop, or refused to pay for repairs performed at such a shop." In addition, Judge Presnell added that to state a "boycott" claim under the antitrust laws, plaintiffs are also required to allege agreement, and "plaintiffs offer even less evidence of an agreement to boycott than they did of an agreement to fix prices." Accordingly, Judge Presnell dismissed this claim as well.

Undeterred by Judge Presnell's ruling, on February 11, plaintiffs filed a Second Amended Complaint, again asserting antitrust claims for price fixing and "boycott." Seeking to bolster the claims that had previously been held to be insufficient, plaintiffs' new complaint now contains numerous allegations concerning defendants' alleged "opportunity" and "motive" to conspire, including allegations about interactions at various trade association meetings. Whether plaintiffs' new allegations will suffice remains to be seen. Defendants will undoubtedly file a new motion seeking to dismiss these amended claims as well. A ruling on that motion will likely not issue until this summer. When it does, depending on the ruling, it will likely either put an end to the litigation, once and for all, or it will lead to the beginning of discovery which, in this matter, would likely be both far-reaching and expensive for the defendants. Stay tuned.

MICHIGAN CONGRESSMEN INTRODUCE BILL PERMITTING HEALTHCARE PROVIDERS TO NEGOTIATE COLLECTIVELY WITH HEALTH INSURERS

James M. Burns

On January 6, two Michigan Congressmen – Representative John Conyers (D-Mich) and Representative Dan Benishek (R-Mich) – introduced the "Quality Health Care Coalition Act of 2015." The bill (H.R. 105) would permit independent healthcare professionals to engage in joint negotiations with health insurers over fees and other contract terms. Currently, such conduct raises significant antitrust risk – i.e., claims of price fixing - under Section 1 of the Sherman Act.

Representative Conyers has introduced similar legislation numerous times in the past. Most recently, last year Representative Conyers partnered with Representative Benishek on similar legislation (H.R. 4077) in the 113th Congress, but that legislation failed to get enacted. When introducing that legislation, Representative Conyers stated that it would "allow physicians to negotiate with insurers on a level playing field," and Representative Benishek stated that the legislation would "improve patient care and lower healthcare costs."

Notably, Representative Benishek, who is also a physician, also signed on as a cosponsor to legislation that was recently introduced by Representative Paul Gosar that would repeal the health insurance industry's antitrust exemption. Representative Gosar was a practicing

dentist for many years. That legislation, the "Competitive Health Insurance Reform Act of 2015" (H.R. 494) has also been viewed – at least by Representatives Conyers, Benishek and Gosar – as a mean of "leveling the playing field" between health insurers and healthcare providers.

Both H.R. 105 and H.R. 494 have been referred to the House Judiciary Committee for further action. Despite the fact that the legislation has support on both sides of the aisle, the prospects for passage of either bill are unclear at this time.

CRIMINAL ANTITRUST FINES IN 2014 AMONG HIGHEST EVER

James M. Burns

On January 22, the DOJ Antitrust Division issued a press release detailing the results of its criminal antitrust enforcement program for fiscal year 2014 (which ended September 30, 2014). The Antitrust Division announced that during that period it collected a total of $1.861 billion in criminal fines and penalties arising from antitrust violations. This total, one of the highest ever for the Antitrust Division, included five fines of over $100 million, and a $425 million fine that constitutes the fourth largest fine ever collected by the Division. (The largest fines ever imposed were $500 million, on Hoffman LaRoche in 1999 and AU Optronics in 2012.) In the same press release, the Antitrust Division also announced that during the past year it obtained jail terms for antitrust violations from 21 individual defendants, with an average sentence of 26 months. This was the third highest average ever under this statistic.

In announcing these figures, Assistant Attorney General William Baer, who leads the DOJ Antitrust Division, stated that "the size of these penalties is an unfortunate reminder of the powerful temptation to cheat the American consumer and profit from collusion," and that the Antitrust Division "remains committed to ensuring that corporations and individuals who collude face serious consequences for their crimes."

The uptick in criminal antitrust enforcement is only one component of an overall increase in antitrust enforcement over the last several years, at both the federal and state levels. Accordingly, it has never been more important for every entity in the insurance industry to revisit its antitrust compliance protocols, and to refresh and reinvigorate their training programs and audits.