New York Glass Repair Shop Alleges Insurer Preferred Provider Network Violates Antitrust Laws

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A recently filed action in New York, *Harner v. Allstate Insurance Company, et al.*, Case No. 11-CV-2933 (S.D.N.Y.), shines the antitrust spotlight on the use of preferred provider networks by auto insurers. The plaintiff, an independent auto glass repair shop, alleges that the defendants – fourteen auto insurers and third party claims administrators Belron and Pittsburgh Glass Works – conspired to steer repair business away from plaintiff's shop and/or failed to reimburse him for the full cost of repairs he made to the vehicles of the insurers' insureds. While several states prohibit the "steering" of insureds to preferred auto repair and/or glass repair shops, and legislation is frequently introduced addressing the legality of such conduct, the use of the antitrust laws to address such action is somewhat less common, and the legal principles governing such claims somewhat less well defined.

In *Harner*, in addition to a host of common law claims, the plaintiff alleges that the insurers' agreements with Belron (and/or its subsidiary, Safelite) and Pittsburgh Glass Works (and/or its subsidiary Lynx) constitute an unlawful conspiracy to "set, fix or stabilize" repair prices, in violation of Section 1 of the Sherman Act and New York General Statute 340 (the Donnelly Act – New York's antitrust law). In addition, plaintiff also alleges that defendants have conspired to convince customers not to patronize his shop through misrepresentations about the quality of his services and/or his prices.

On June 13, the defendants filed a position paper with the Court outlining their arguments supporting the dismissal of plaintiff's antitrust claims. With respect to plaintiff's federal antitrust claims, defendants contend that plaintiff's complaint fails to allege antitrust injury or antitrust standing, two necessary elements of plaintiff's claim. Instead, defendants argue, the sole harm alleged by plaintiff is to his own business, not competition generally. Defendants also maintain that the claims should be dismissed because the complaint lacks any specifics concerning the time or place where the alleged agreements were hatched, citing the Supreme Court's decision in *Bell Atlantic Corp. v. Twombly*, 127 S.Ct. 1955 (2007). Finally, defendants assert that plaintiff's claims are "rule of reason" claims, not per se claims, and thus they fail because plaintiff has not sufficiently alleged the contours of the markets that plaintiff claims have been restrained. As to plaintiff's state antitrust claims, defendants assert that the Donnelly Act "is construed in light of federal precedent," citing *Clorox Co. v. Winthrop*, 836 F. Supp. 983 (E.D.N.Y. 1993), and thus those claims fail as well.

Plaintiff's response to defendants' contentions is due on July 5, and a hearing on defendants' motion to dismiss is currently scheduled for July 11 before District Court Judge Cathy Seibel. The court's action on plaintiff's claims, regardless of the outcome, is likely to create important new guidance on how the

antitrust laws apply to insurer practices in this frequently contentious area. Stay tuned.

REPRESENTATIVE DEFAZIO INTRODUCES McCARRAN REPEAL BILL

On May 23, Representative Peter DeFazio (D-Or) introduced the “Health Insurance Industry Fair Competition Act,” (H.R. 1943). The bill would repeal the antitrust exemption that health insurers currently enjoy under the McCarran Ferguson Act (15 USC 1011 et seq.) and also make non-profit health insurers subject to Section 5 of the Federal Trade Commission Act, which prohibits unfair methods of competition.

Representative DeFazio has long advocated the repeal of the McCarran Ferguson Act’s antitrust exemption, having introduced such legislation in every Congress for the last 8 years. His efforts came closest to fruition last Congress, when his repeal bill was passed in the House by a vote of 406 to 19, but was not acted on by the Senate before the close of the session. (DeFazio’s McCarran repeal language was also included in the health care reform bill that ultimately became the Affordable Care Act, but was dropped during the negotiations with the Senate prior to passage of the bill into law).

In introducing the legislation this Congress, Representative DeFazio stated that “Right now, it is legal under federal law for insurance companies to collude to drive up prices, limit competition, conspire to underpay doctors and hospitals, and price gouge consumers,” and reiterated his view that “Insurance companies should play by the same rules as virtually every other industry in America.” He continued: “If 406 members could support this last year, there’s no reason to not pass it again this year.” Representative Louise Slaughter (D-NY), a co-sponsor of the bill, added that “It’s well past time that Congress act to strike this sweetheart deal. The last Congress knew this to be a bipartisan and sensible proposition. I hope this Congress knows that as well.”

H.R. 1943 has been referred to the House Judiciary Committee for further action, and joins H.R. 1150,a similar McCarran repeal bill that was introduced by Representative Paul Gosar of Arizona in March. Representative Gosar’s bill is now pending before the Judiciary Committee’s Subcommittee on Intellectual Property, Competition and the Internet, having been referred there for further study on June 1. Notably, Representative Gosar is a Republican, so with McCarran repeal bills now having been introduced from both sides of the aisle, the likelihood that McCarran repeal will once again advance this Congress is greatly increased. In short, it appears that the McCarran repeal ride has begun again, and where it ends is, again, highly uncertain.

UNITEDHEALTH FINED $1 MILLION FOR BREACH OF MERGER CONSENT DECREE

On June 23, the Nevada Attorney General’s office announced that it had fined UnitedHealth $1 million for breaching the terms of an antitrust Consent Decree that UnitedHealth had agreed to in 2008 to close its acquisition of Sierra Health, a rival health insurer. The Consent Decree had resolved an investigation of the deal by both the DOJ Antitrust Division and the Nevada Attorney General, each of which contended that the merger would have anticompetitive effects in certain Nevada insurance markets. To resolve the DOJ/Nevada AG concerns, UnitedHealth agreed to certain divestitures, made certain contributions to various Nevada health care organizations, and agreed not to proceed with a planned acquisition of another smaller rival, Fiserv Nevada, both at that time or in the future.

Notwithstanding the terms of the Consent Decree, the Nevada Attorney General’s office determinedthat UnitedHealth had subsequently acquired all but one of Fiserv’s active customers, office space and equipment through a series of indirect assignments. As a result of these transactions, Attorney General Catherine Cortez Masto stated that “Fiserv Nevada ceased to do business, as demonstrated by Fiserv Nevada surrendering its license to perform third party administration of insurance in the state of Nevada,” which Attorney General Masto contended constituted a clear violation of the Consent Decree. UnitedHealth disputed the State’s contentions, but agreed to pay the fine to resolve the dispute, issuing a statement indicating that “While we disagree with the allegations because UnitedHealth did not

acquire an interest in, or engage in a joint venture with Fiserv Nevada, we felt it was important to reach a mutual agreement on this issue." The remaining terms of the Consent Decree remain in effect.

COURT PERMITS DOJ "MOST FAVORED NATION" SUIT AGAINST BLUE CROSS OF MICHIGAN TO PROCEED

On June 7, District Court Judge Denise Hood issued her highly anticipated ruling on Blue Cross of Michigan's motion to dismiss the antitrust complaint filed against it by the DOJ Antitrust Division and the State of Michigan (*United States of America v Blue Cross Blue Shield of Michigan*, Case No. 2:10-cv-14155). The case challenges BCM's use of "most favored nation" clauses in its provider contracts. Judge Hood denied BCM's motion to dismiss the complaint, and at the same time denied as moot BCM's motion to stay discovery pending her ruling on the motion to dismiss. As such, discovery in the matter – which is expected to be extensive, as the DOJ previously indicated an intention to take up to 100 depositions – will now commence.

Judge Hood's decision was announced in open court at a hearing in a related case, *City of Pontiac v. Blue Cross Blue Shield of Michigan*, and later memorialized in a Minute Order that provided no explanation of the basis for her ruling. Judge Hood indicated during the hearing, however, that she intends to issue a written ruling that reflects her analysis of BCM's motion, but that the ruling has not yet been finalized. In the interim, as indicated above, discovery in the case will commence. Judge Hood's analysis, once it issues, is likely to receive considerable scrutiny, given that over the last several months the DOJ has now reportedly commenced investigations of several *other* Blue Cross entities as well concerning their use of "most favored nation" clauses.

For more information about this topic, please contact the author or any member of the Williams Mullen Antitrust Team.

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