Efforts to Repeal the Insurance Industry's Antitrust Exemption Are Reintroduced in the House of Representatives

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On March 17, Congressman Paul Gosar of Arizona introduced the "Competitive Health Insurance Reform Act of 2011," a bill that would repeal the McCarran Ferguson Act's antitrust exemption for health insurers. The legislation (H.R. 1150) is similar in many respects to the McCarran repeal legislation that was introduced last Congress, which was passed twice by the House of Representatives (once as part of the House's original health care bill and subsequently as a stand-alone bill), but was not acted on by the Senate. Whether H.R. 1150 will enjoy similar success in the House this Congress remains to be seen, particularly given that the Republicans (who traditionally have opposed McCarran repeal) now control that chamber. However, with Congressman Gosar -- himself a Republican -- as the legislation's sponsor, the unexpected Republican support for the stand-alone McCarran repeal bill last Congress, and the continued support by long-time McCarran repeal advocates on the other side of the aisle (most notably Congressman John Conyers in the House and Senator Patrick Leahy in the Senate), it would likely be a mistake to dismiss the bill's prospects for passage at this time.

Despite its uncertain prospects, Congressman Gosar was quite spirited in his support of the legislation. Gosar, a licensed dentist, issued a press release claiming personally to have experienced anticompetitive harm as a result of the exemption, and announced that "The Competitive Health Insurance Reform Act of 2011 [will] open up competition in the health insurance marketplace and finally put an end to the unfair advantage that the insurance industry has over the patient." He continued: "Almost all industries in the United States are subject to the federal antitrust laws, and there is no rational reason to exempt the insurance industry" Echoing these sentiments in his bill, its text provides that "Congress should not play favorites with certain industries or special interest groups by exempting one group from the general application of the law," and that "there is no factual basis supporting any exemption of the insurance industry from federal antitrust and unfair competition laws."

Like the McCarran repeal legislation that was passed by the House last Congress, H.R. 1150

would eliminate the McCarran Ferguson Act's antitrust exemption only as to health insurance, retaining the exemption for other lines of insurance. Congressman Gosar's bill differs from prior proposals, however, in that it would prohibit the filing of antitrust class actions against health insurers. In announcing the bill, Congressman Gosar stated that the prohibition on antitrust class actions was appropriate "to protect insurance companies as they adjust to the repeal of the McCarran Ferguson Act," and that such suits "often benefit only the lawyers who bring the suit and result in little or no tangible benefit to consumers."

The legislation has been referred to the House Judiciary Committee for further action. As of this time the Judiciary Committee has not taken any further action on the bill, and, despite statements by Senator Leahy in January indicating his intention to make the repeal of McCarran a focus of his attention this Congress, as yet no similar legislation has been introduced in the Senate. Presumably that is only a matter of time; stay tuned.

California Court Permits Plaintiffs' "Aftermarket Parts" Antitrust Action Against Auto Insurers to Proceed After Five Year Delay

In late March, a long-simmering antitrust action filed against several auto insurers and the Certified Automotive Parts Association ("CAPA") in the Northern District of California, in which the defendants are accused of conspiring to promote the use of inferior quality repair parts for insured repairs, was finally cleared to begin discovery by District Court Judge James Ware. Judge Ware's ruling in *Perez v. State Farm Mutual Auto Insurance et al,* finally permits the plaintiffs' action to move forward into discovery, a full five years after the case originally was filed and after two prior dismissals of the case by the district court were reversed by the Ninth Circuit.

Unlike Judge Ware's earlier rulings in the case (that plaintiffs lacked Article III standing to assert their claims -- reversed by the Ninth Circuit in 2009 -- and a subsequent ruling that plaintiffs' claims fell under the exclusive authority of the Insurance Commissioner, reversed in 2010), the defendants' most recent motion to dismiss plaintiffs' action focused on more pedestrian legal theories -- whether plaintiffs' Third Amended Complaint alleged sufficient facts to satisfy the pleading requirements of the Supreme Court's *Twombly* decision and whether the alleged agreement, even if proved, actually constituted a restraint of trade.

Turning first to defendants' *Twombly* argument, Judge Ware noted that plaintiffs had alleged that the defendants had "conspired to suppress competition on the basis of the quality of repair parts," and that the alleged conspiracy had been furthered by "an agreement to create, finance and direct CAPA as a sham organization whose true purpose is to certify inferior-quality parts." Acknowledging that "at this stage of the litigation, the Court does not determine whether actual proof of these facts is probable," but only "whether a plaintiff has done more than offer a bare assertion of conspiracy," Judge Ware ruled that plaintiffs had sufficiently alleged a conspiracy to suppress competition and denied defendants' *Twombly* argument.

Next, Judge Ware assessed whether defendants' alleged agreement, if proved, constituted a restraint of trade under the Cartwright Act, the California antitrust law under which plaintiffs' action was brought. (Notably, plaintiffs' claims were pled under the Cartwright Act, and not the federal

antitrust laws, because similar claims - brought by the same plaintiff's attorney - were found to be McCarran-exempt by the 11th Circuit Court of Appeals in 2004 in *Gilchrist v. State Farm Automobile Insurance*). Judge Ware noted that "the Cartwright Act, like the Sherman Act, makes a conspiracy among competitors to restrict output unlawful *per se*," and that "output reduction does not simply refer to the number of units produced, but also involves a qualitative judgment." Applying this principle, Judge Ware concluded that plaintiffs' allegation of an agreement "to restrict output to a product of inferior quality counts as an output restriction," and thus plaintiffs had stated an actionable antitrust claim under the Cartwright Act. Accordingly, after five years in the California courts, the case will now proceed into full merits discovery.

Tenth Circuit Affirms Dismissal of Antitrust Case Against Title Insurers

On April 26, the 10th Circuit Court of Appeals provided the title insurance industry with another antitrust victory in *Coll v. First American Title Insurance.* Adopting the same reasoning embraced by several other district and appellate courts over the last several years, the 10th Circuit concluded that any challenge to a title insurer's rates is exempt from antitrust challenge under the "filed rate" doctrine.

Seeking to avoid the fate suffered by other plaintiffs in similar cases over the last several years, the plaintiffs in *Coll* contended that the filed rate doctrine did not apply to the New Mexico antitrust laws (the doctrine is a federal antitrust doctrine), and that in any event it should not apply to their claim because they alleged that the insurers had bribed the New Mexico Superintendent of Insurance to set excessive rates for title insurance. The 10th Circuit, however, was not persuaded, stating that New Mexico law makes clear that "any filed rate - that is, one approved by the governing regulatory agency - is *per se* reasonable and unassailable in judicial proceedings." Moreover, with respect to plaintiff's bribery argument, the 10th Circuit explained that "the underlying conduct does not control whether the filed rate doctrine applies. Rather, the focus for determining whether the filed rate doctrine applies is the impact the court's decision will have on agency procedures and rate determinations." Thus, "The dispositive question is whether, if plaintiffs succeed on their damages claims, the court's determination will impact the agency's rate determinations. If so, the "filed rate" doctrine will bar the claim. That is clearly the case here." Accordingly, the court affirmed the dismissal of plaintiffs' claim for damages based upon filed rate doctrine principles.

Because the filed rate doctrine does not bar claims for injunctive relief (only damages), the 10th Circuit's work was still not done. Plaintiffs, however, fared no better with their arguments for injunctive relief. As to plaintiff's challenge to the defendants' rates, the 10th Circuit explained that plaintiff's admission that the defendants had complied with the New Mexico Title Insurance Act (by charging the rates that the Superintendent of Insurance had set), rendered the conduct non-actionable under state action principles. Finally, as to plaintiff's assertion that the defendants had bribed the Superintendent to approve those rates, the court concluded that, under the federal antitrust laws, the Noerr-Pennington Doctrine would bar such a claim, and that the New Mexico Supreme Court would likely apply the Noerr Pennington Doctrine to the New Mexico antitrust act if called upon to consider the issue.

Several Insurers and Brokers Reach a Settlement with Plaintiffs in the In re Insurance

Brokerage Antitrust Litigation

In late March, several of the insurer and broker defendants in the *In re Insurance Brokerage Antitrust Litigation* announced that they had reached an agreement to settle the matter with plaintiffs for approximately $37 million. If approved by the court, the settlement would resolve all claims in the case against AIG, Travelers, Liberty Mutual, XL Group CNA Financial, Hartford and Crum & Forster, as well as brokers Aon and Willis Group Holdings.

This closely watched case, which arose as a result of the New York Attorney General's 2004 "contingent commission" investigation against Marsh and other insurance brokers, involves claims that the defendants agreed amongst themselves not to compete for each other's business placed through the insurance brokers. Last August, after the 3rd Circuit Court of Appeals reversed United States District Court Judge Garrett Brown's earlier dismissal of the case for failure to state a claim, the matter returned to the district court for further proceedings. Rather than engaging in costly discovery, the parties instead engaged in an extensive mediation process that ultimately led to a settlement - at least for some of the defendants. Under the terms of the parties' proposed agreement, AIG, Liberty Mutual, Travelers and XL Group will each contribute $9.75 million to a common fund, and the remaining settling defendants (Aon, CNA, Crum & Forster, Hartford and Willis) will contribute a total of $9.75 million. The settlement still must be approved by the court. Should the court approve the settlement, only a handful of defendants will remain, notably Ace and Chubb. Several other defendants, including Marsh and Zurich Insurance, settled the case with plaintiffs prior to the 3rd Circuit's ruling.

Public Hearings Scheduled on Proposed Highmark/Blue Cross Blue Shield of Delaware Affiliation Agreement

In late April, the Delaware Department of Insurance announced that it would hold a series of hearings on the proposed affiliation between Blue Cross Blue Shield of Delaware and Highmark (the Blue Cross licensee in Western Pennsylvania). The hearings will be conducted on May 16, 17 and 19 at various locations throughout the state of Delaware.

The hearings continue the close scrutiny of the insurers' proposed affiliation, which was first announced back in August. At the time, Blue Cross Blue Shield of Delaware claimed that an affiliation with Highmark was necessary because BCBSD lacked sufficient resources, on its own, to undertake needed computer enhancements. In return for Highmark's investment in BCBSD, Highmark would receive three seats on the BCBSD board.

The Insurance Department's decision to hold public hearings on the proposed affiliation follows earlier action by the Delaware Attorney General's office. In January, Delaware Attorney General Beau Biden requested detailed information from the parties to determine whether the transaction amounts to a "conversion" under Delaware law and whether the affiliation is in "the best interests of the public." The Attorney General has not yet announced the results of his investigation.

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

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