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Antitrust Alert

Title Insurers Secure Two Big Wins in Defense of Price Fixing Claims

Last year, the title insurance industry was hit with a flurry of class action lawsuits accusing them of conspiring to raise rates for title insurance. The initial action, *Dolan v. Fidelity National Title Insurance*, was filed in the Eastern District of New York, and alleged that the largest title insurers in the state had conspired to obtain approval from the State Insurance Department (ìDepartmentî) for title insurance rates that were excessive. Subsequently, cases were filed in other states making the same type of claim ó that state regulators had been misled by the title insurers about their true costs when approving the title insurersí rates. Later, cases were also brought in states in which the title insurersí rates were not subject to regulatory approval, with the plaintiffs contending that the title insurers had agreed on rates for those other states when participating in rate setting activities authorized in those states in which their rates had to be approved. However, two recent favorable rulings for the defendants, one in New York and another in California, may spell the end for this industry-shaking litigation.

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The most significant ruling was issued on June 17 in the *Dolan* case, by Judge Thomas Platt, District Judge for the Eastern District of New York. Judge Platt ruled that plaintiffsí claims were barred, as a matter of law, by the filed rate doctrine. As Judge Platt explained, ìThe filed rate doctrine is a principal of federal and state law that recognizes the unsuitability of a court in determining ëreasonableí rates, giving deference to regulatory agencies that have been designed by legislatures for the specific purpose of setting uniform rates.î The doctrine traces its origin to the U.S. Supreme Courtís 1922 decision in *Keogh v. Chicago & Northwestern Railway*, 260 U.S. 156 (1922). As Judge Platt further explained, the doctrine serves two objectives: first, it serves to ensure that the courts do not ìsubstitute their judgment as to reasonable rates for that of an agency with specialized knowledge in the area;î and second, it prevents regulated companies from engaging in price discrimination between ratepayers.

As Judge Platt noted, under New York law, title insurers are required to file their rates with the Department, which reviews and approves the rates before they can become effective. New York law also authorizes the creation of rate service organizations, and permits title insurers to make their filings through such organizations, which is what had occurred. Judge Platt further noted that the rates challenged by the plaintiffs had been expressly approved by the state as being not ìexcessive, inadequate or unfairly discriminatory.î

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Plaintiffs maintained, in response, that the defendants had provided the Department with skewed information about their costs, causing the Department to approve rates that would not have been approved had they known the full facts and circumstances. Specifically, plaintiffs alleged that the title insurers had inflated the costs they had reported to the Department by paying excessive referral fees to affiliated companies and that, for this reason, the Department was unable to determine whether the title insurersí proposed rates were actually reasonable. In support of that claim, plaintiffs alleged that New York residents paid some of the highest rates for title insurance in the country.

Notwithstanding plaintiffsí argument, Judge Platt unequivocally sided with the defendants. Judge Platt noted that, regardless of plaintiffsí allegations about defendantsí misconduct, ìfraud or other unlawful conduct by the defendant does not preclude the application or effect of the filed rate doctrine.î Moreover, as Judge Platt explained, a fraud exception to the filed rate doctrine ìwould be inconsistent with the policy behind the filed rate doctrine,î because it would ìbe the equivalent of a court deciding what rates are reasonable, which in turn would unduly subvert the regulating agencies authority.î Accordingly, finding that the filed rate doctrine controlled, Judge Platt dismissed plaintiffsí claims with prejudice.

Adding to defendantsí good fortune, only weeks earlier they had obtained a favorable result from Judge Jeffrey White of the Northern District of California on related price fixing claims. In that case, *In re California Title Insurance Antitrust Litigation*, the plaintiffs alleged that the defendantsí participation in the rate setting activities on the east coast (where their rates were required to be filed and approved) had provided defendants with an opportunity to discuss setting title insurance rates in California (where rates are not approved by the state), and that defendantsí rates in California were set at a level that was consistent with a claim of unlawful conspiracy.

However, Judge White rejected plaintiffsí argument in that case too, holding that plaintiffsí allegations failed to satisfy the pleading requirements set forth by the Supreme Courtís 2007 decision in *Bell Atlantic Corporation v. Twombly*, 550 U.S. 544 (2007), which require ìenough facts to state a claim for relief that is plausible on its face,î and not merely conceivable. Specifically, Judge White held that defendantsí participation in rate setting organizations in other states ìmay have provided defendants the opportunity to discuss setting rates in California, but opportunity, without more, is not a plausible basis to suggest a conspiracy.î Judge White also noted that plaintiffsí allegation of parallel conduct by the defendants was similarly insufficient, by itself, because ìit is a common reaction of firms in a concentrated market.î Thus, because that plaintiffsí complaint failed to allege any details about specific meetings at which California rates were allegedly discussed (including, for example, who attended such meetings, when they took place, and what was discussed), plaintiffsí ìallegations regarding the rate setting organizations, taken together with the ëplus factorsí identified by plaintiffs, do not nudge their claims across the line from conceivable to plausible.î Consequently, Judge White dismissed plaintiffsí claims but, unlike in the New York case, Judge White granted plaintiffs leave to amend their complaint. Whether plaintiffs will continue to pursue these claims, on appeal to the Second Circuit in New York or through an amended complaint in California, remains to be seen. However, in any event, these recent rulings are a big win for the title insurance industry, likely derailing plaintiffsí challenge to the title insurance industryís activities.

With President Obama Now Supporting the Creation of a Federal Office of National Insurance, Can "Optional Federal Chartering" and the Repeal of the McCarran-Ferguson Act Antitrust Exemption be Far Off?

In June, President Obama announced his long-awaited proposal for reform of the financial services sector. While the proposal focused predominantly on regulatory modifications to the banking and securities markets, changes to the insurance industry were also proposed. While these proposed changes are not expected to have any immediate effect on the manner in which the insurance industry is regulated (given that, at least for now, President Obamaís proposal would not replace the statesí role as the primary regulators of insurance), the steps he has announced could very well, over time, lead to federal regulation of insurance and, with it, the elimination of the insurance industryís McCarran-Ferguson Act (ìMcCarranî) antitrust exemption.

Notably, President Obamaís proposal stopped short of calling for either the federal regulation of the insurance industry or the adoption of the ìoptional federal charteringî proposal that some insurers have actively supported over the last several years. However, President Obama directly endorsed the creation of an Office of National Insurance, which would ìgather information, develop expertise, negotiate international agreements and coordinate policy in the insurance sector.î The creation of an Office of National Insurance was, of course, previously proposed by Rep. Paul Kanjorski, chair of the House Financial Services Subcommittee on Capital Markets, Insurance and Government Sponsored Enterprise earlier this year as H.R. 2609. At the time of its introduction, the legislation was widely seen ó and likely with good reason ó as a ìfirst stepî towards potential federal regulation of the insurance industry. Further fueling that sentiment, the Executive Office ìwhite paperî issued in conjunction with

President Obamaís announcement states that ìfor over 135 years, insurance has primarily been regulated by the states, which has led to a lack of uniformity and reduced competition across state and international boundaries resulting in inefficiency, reduced product innovation and higher costs to consumers,î and concludes that, to address these concerns, ìit is important that we establish a federal Office of National Insurance to develop a modern regulatory framework for insurance.î Not surprisingly, Rep. Kanjorski expressed his strong support for President Obamaís proposal, and stated that ìWith the administrationís support, I now expect that this common sense idea will become law. î

The proposal also announced six overarching objectives for insurance regulatory reform: (1) effective systemic risk regulation of insurers; (2) strong capital standards for insurers; (3) meaningful consumer protection standards for insureds; (4) increased national uniformity in the regulation of insurance; (5) coordination in the regulation of insurers that engage in both traditional and non-traditional insurance businesses; and (6) international cooperation. Notably, the fourth objective, which calls for an ìincrease in national uniformity in the regulation of insurance,î has been identified as a clear signal that if the statesí current efforts to coordinate the regulation of the insurance industry fail (or do not progress with sufficient speed), federal regulation ó either through an optional federal charter or a complete transfer of authority from the states to the federal level ó is on the horizon. In short, President Obama appears to have provided the states with a final opportunity to ìget their houses in orderî or lose regulatory control over the insurance industry.

While a transfer of regulatory control from the states to the federal government has been something that some segments of the insurance industry have been advocating for the last several years, often overlooked in this analysis is the fact that a transfer of regulatory authority from the states to the federal government would eliminate the underlying rationale for the insurance industryís antitrust exemption. Thus, a move to optional federal chartering or mandatory federal regulation of insurers would usher in an entirely new approach to antitrust enforcement for the insurance industry, undoubtedly requiring the reexamination of many industry practices that have, by now, been commonly accepted for over 50 years. In short, while a transfer of regulatory authority over insurance from the states to the federal level may ultimately be of benefit both to the industry and the nation (depending upon how it is implemented), it will certainly not occur without significant new obstacles and legal hurdles. Stay tuned, big changes may soon be on the way!

New Law Extends the Benefits Provided to Entities Obtaining Antitrust Amnesty from the DOJ

In 2004, Congress passed the Antitrust Criminal Penalties Enforcement Act, which significantly increased the criminal penalties for violating the antitrust laws. The top corporate fine was increased from $10 million to $100 million (or, in the alternative, twice the harm caused by the violation), and the penalty for individuals was increased from $350,000 to $1 million, and up to 10 years in prison. The legislation also included a provision encouraging participation in the DOJ Antitrust Divisionís (ìDivisionî) leniency program; specifically, an entity that self-reported an antitrust violation and obtained amnesty from criminal prosecution (an incentive offered only to the first entity to do so) would also be liable for only single damages in any follow-on civil suit. This provision eliminated a significant disincentive to participation in the leniency program ó that the reporting entity would still face treble damages in private antitrust actions. Over the last five years, the Division has seen a significant increase in the number of entities seeking leniency, and attributed this increase in no small part to this added incentive. However, this provision of the 2004 legislation, unlike the criminal penalties, was implemented for only a five-year period, and thus was set to sunset on June 22 of this year.

In early June, at the urging of the Division, legislation was hastily introduced to extend the leniency program incentive. On June 3, Rep. Johnson of Georgia introduced H.R. 2675, extending the cap on civil damages for those obtaining amnesty for an additional year. Less than a week later, Sen. Kohl of Wisconsin introduced similar legislation in the Senate (S. 1219), specifically noting that the provision was ìset to expire later this month, so we must act quickly to extend it,î and that ìotherwise, the Justice Department will lose an important tool that it uses to investigate and prosecute criminal cartel activity. î

Moving with a speed rarely seen in Congress, on June 17 the legislation was passed by both the House and Senate, and sent to President Obama for his signature. President Obama signed the legislation as Public Law 111-30 on June 19, permitting the legislation to go into effect just before the prior provision would sunset. The provision will now remain in effect until June 22, 2010.

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