INSURANCE
Antitrust Alert

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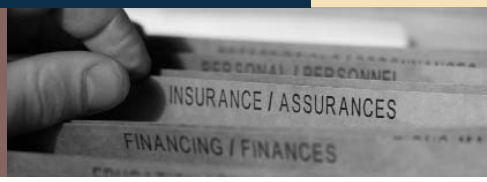

Insurance Executives Convicted of Criminal Antitrust Violations

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On Feb. 22, two former executives of insurance broker Marsh Inc. were found guilty of violating the Donnelly Act, New York's state antitrust law. The convictions of William Gilman, formerly the executive director of Marsh's global brokering unit, and Edward McNenney, a former global placement director at Marsh, follow a 10 month trial in state court in New York. The felony convictions, which carry a potential prison term of up to four years, highlight, once again, the incredibly serious consequences of violating federal or state antitrust laws.

Gilman and McNenney were indicted in 2005, in connection with the "contingent commission" investigation that the New York Attorney General's Office first launched in 2004. They were accused of colluding with executives from several conspiring insurers to rig bids and steer insurance placements to those preferred insurers. By the time that Gilman and McNenney went to trial, more than a dozen insurance industry executives alleged to have been involved in the conspiracy had agreed to plead guilty to criminal charges, with most of them receiving sentences of approximately six months. Gilman and McNenney, however, were accused of playing a central role in the conspiracy and were each charged with 21 separate criminal counts (one count of criminal fraud, 19 counts of grand larceny and the Donnelly Act claim). Consequently, they each faced the possibility of imprisonment for up to 25 years and, rather than seeking to negotiate a plea agreement, decided to fight the charges at trial.

The executives opted to have their case heard by Judge Yates, rather than a jury, and the proceedings dragged on for almost 10 months. However, at the close of the evidence, Gilman and McNenney were acquitted on 20 of the 21 counts against them. The only count on which they were found guilty was the Donnelly Act antitrust claim, but because that claim is a felony, they each still face the possibility of up to four years imprisonment. Sentencing in the case is scheduled for April 30, and will be closely watched not only by those following the progress of the case generally but also by the several remaining insurance executives who are awaiting their trials on similar charges. In the interim, Gilman and McNenney have announced that they will appeal their convictions of the Donnelly Act claim to the New York Appellate Division.

Title Insurers Face Antitrust Challenge in New York

On Feb. 1, a class action antitrust complaint was commenced against a large number of title insurers and the Title Insurance Rate Service Association (TIRSA) in the U.S. District Court for the Eastern District of New York. The action, *Dolan v. Fidelity National Title Insurance, et. al,* alleges that the title insurers

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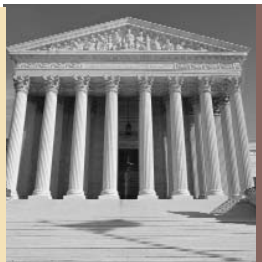

have engaged in a *per se* horizontal price fixing agreement that has resulted in consumers in New York paying "among the highest title insurance rates in the country."

Notably, the New York insurance law expressly permits title insurance rates to be set collectively through an authorized rate setting organization, like TIRSA. These proposed rates must then be approved by the Insurance Department prior to being utlized by the title insurers operating in the state. This process is designed to comply with the Supreme Court's 1992 decision in *FTC v. Ticor Title Insurance Co., 504 US 621 (1992)*, which explained the degree of state regulatory oversight necessary for such a process to be shielded from antitrust challenge under the State Action Doctrine.

Addressing this issue head-on in their complaint, the plaintiffs contend that because TIRSA "calculates a single rate that comprises both risk and agency commission costs," and "the Insurance Department has neither the authority nor the ability to assess" agency commission costs, the Insurance Department has been denied any meaningful ability to assess the proposed rates. For this reason, the plaintiffs maintain, the defendants have no protection from an antitrust challenge and their collective action constitutes horizontal price fixing.

Since the *Dolan* case was filed, several similar cases have been filed making similar claims. The cases will likely be consolidated, and the parties will then get down to the business of litigating whether plaintiffs' allegations do, in fact, state an antitrust claim. Given the stakes involved and the novel issues presented by the plaintiffs' allegations, the case is likely to be closely watched over the next year. Stay tuned.

UnitedHealth/Sierra Merger Permitted to Proceed, With Conditions

On Feb. 25, the Department of Justice Antitrust Division announced that it would permit UnitedHealth to acquire Nevada-based Sierra Health Services, provided that UnitedHealth divests its existing Medicare Advantage business in the Las Vegas area to Humana, a rival health insurer. On the same day, the Nevada Attorney General's office announced that it had reached a similar deal with the parties, thus paving the way for the transaction to close.

The parties' deal with the DOJ, memorialized in a proposed consent judgment filed in the U.S. District Court for the District of Columbia, should bring to a close a merger investigation that has been pending since May 2007. As the months passed, the transaction faced increasingly fierce opposition, as state and federal physician groups, Nevada legislators and several members of Congress in Washington, all denounced the transaction as being anticompetitive. Consequently, as time went by, the prospects for the transaction's approval began to dim considerably.

However, only days before some of the other regulatory approvals of the transaction that the parties had previously obtained were set to expire, the parties agreed that UnitedHealth would divest its existing Medicare Advantage plan in the Las Vegas area to Humana to gain approval of the deal. The DOJ insisted on this condition because, absent the divestiture, the DOJ contended that UnitedHealth would control 94 percent of this market (Sierra was the largest, and UnitedHealth as the second largest provider of this service in the market pre-merger.) However, the divestiture solved this problem, as Assistant Attorney General Thomas Barnett explained, stating "This divestiture ensures that senior citizens and others willl continue to benefit from competition between sellers of Medicare Advantage products" in Las Vegas. In addition, to help Humana gain a degree of traction in the market, thus enhancing its ability to compete, UnitedHealth is required to facilitate an agreement between certain providers and Humana to ensure that current UnitedHealth insureds continue to have access to substantially all of UnitedHealth's current provider networks and that this access is provided on terms no less favorable than those presently offered by UnitedHealth.

On the same day as the DOJ announcement, Nevada Attorney General Catherine

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Cortez Masto filed a complaint in the U.S. District Court in Las Vegas, also contending that the transaction would have anticompetitive effects. Echoing the allegations in the DOJ suit, the Nevada Attorney General complaint focused on the Medicare Advantage health insurance market in the Las Vegas area, and maintained that the merger would lead to "higher prices, fewer choices, and a reduction in the quality of Medicare Advantage plans purchased by senior citizens in the Las Vegas area." However, in addition to requiring the divestiture to Humana, as the DOJ had required, Nevada imposed additional conditions on the deal. Specifically, the proposed settlement with the State requires that UnitedHealth contribute $15 million to various Nevada health care organizations and agencies. In announcing the settlement, Attorney General Cortez stated that "this cash contribution will make a difference in the lives of many Nevadans because it will restore needed medical and social services that have been affected by the latest series of budget cuts."

Accordingly, assuming that the proposed consent judgments are approved by the courts, the transaction will finally be completed, almost a year after it was initially announced.

Insurer Settles Contingent Commission Investigation with Several States

On Jan. 29, Texas Attorney General Greg Abbott announced that American International Group (AIG) had reached an agreement with Texas, the District of Columbia and eight other states a to resolve any potential charges against it for failing to disclose its payment of "contingent commissions" to insurance brokers, including Marsh. AIG agreed to pay a total of $12.5 million to conclude investigations commenced by Texas, Florida, Hawaii, Maryland, Massachusetts, Michigan, Oregon, Pennsylvania, West Virginia and the District of Columbia. AIG had previously reached a separate settlement with New York, Illinois and Connecticut over the same charges, agreeing to pay over $300 million in fines and restitution to insureds.

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