INSURANCE ANTITRUST **LEGAL**NEWS

July 2012 • Volume 1, Number 2

TITLE INSURERS GAIN BIG ANTITRUST VICTORY IN THE THIRD CIRCUIT

by James M. Burns

On June 14, the title insurance industry received good news from the Third Circuit Court of Appeals, as the court affirmed the dismissal of two high-profile antitrust cases that have been in litigation for several years – *In re: New Jersey Title Insurance Litigation* and *McCray v. Fidelity National Title Insurance Company*. In separate opinions that, in most respects, tracked each other in terms of analysis, the appellate court affirmed lower court rulings that the Filed Rate Doctrine barred plaintiffs from asserting claims that they had overpaid for title insurance.

Specifically, plaintiffs alleged that insurers' rate filings with the New Jersey and Delaware Insurance Departments included "hidden costs" that were not disclosed to the state regulators, and that had the Insurance Departments known of these costs – which allegedly included kickbacks and rebates – the regulators would not have approved the rates. Accordingly, plaintiffs argued that the regulators had not engaged in any "*meaningful*" review of the rates, and therefore the Filed Rate Doctrine – which otherwise precludes antitrust suits for damages based on rates filed and approved by federal or state agencies – did not apply to their claims.

On appeal, plaintiffs renewed their argument that because there had been no *meaningful* rate review by the agencies, no deference to the agencies' rate-making expertise was required and that the Filed Rate Doctrine should not bar their claims. The Third Circuit, however, disagreed, holding that "the federal courts are ill-equipped to engage in the rate making process" in all circumstances, and the application of the doctrine "does not depend on whether agencies actually use their superior expertise." Because plaintiffs' antitrust claims "would require the District Court to determine the reasonable rate absent the alleged conspiracy – a function that regulatory agencies are more competent to perform," plaintiffs' damages claims were properly dismissed. In reaching this decision, the court noted that the 1st and 7th Circuits have similarly found that "meaningful" agency review of rates is not a requirement for the application of the Filed Rate Doctrine.

Turning to plaintiffs' claims for injunctive relief, which are not barred by the Filed Rate Doctrine, the Third Circuit noted that "Absent Article III standing, a federal court does not have subject matter jurisdiction to address a plaintiff's claims" and that Article III standing requires that "injury-in-fact" be established. Accordingly, because the plaintiffs had not alleged that they "intend to re-purchase title insurance" at some later time or - in the Delaware case - that the Delaware Title Insurance Rating Bureau intends to file new rates in the future that would be similarly infirm, plaintiffs' alleged injury was "merely speculative." For this reason, the court concluded that it lacked appellate jurisdiction to decide plaintiffs' claims for injunctive relief and affirmed that lower court ruling as well.

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With the Third Circuit's affirmance, absent an appeal to the Supreme Court, these high-profile antitrust challenges to title insurance rates finally come to a close after four years of hard-fought litigation.

MCCARRAN REPEAL LEGISLATION INTRODUCED BY CONGRESSMAN JOHN CONYERS

by James M. Burns

On May 18, Representative John Conyers (D) of Michigan introduced the "Health Insurance Industry Antitrust Enforcement Act of 2012," a bill that would repeal the McCarran-Ferguson Act's antitrust exemption for health and medical malpractice insurers.

Representative Conyers has long been a leader in advocating the repeal of the McCarran-Ferguson Act, and his new bill (H.R. 5838) tracks McCarran repeal language he has introduced in prior sessions of Congress. Specifically, the bill provides that "Nothing in the McCarran-Ferguson Act shall be construed to permit health insurance issuers or issuers of medical malpractice insurance to engage in any form of price fixing, bid rigging or market allocations in connection with the conduct of the business of providing insurance coverage." The bill would also make Section 5 of the Federal Trade Commission Act, which prohibits "unfair methods of competition," applicable to health insurers (currently the McCarran-Ferguson Act immunizes insurers from Section 5 enforcement actions as well). Finally, the bill would make Section 5 applicable to health insurers even if they are non-profit entities, another potential obstacle to enforcement of Section 5 against some health insurers.

Representative Conyers' decision to introduce H.R. 5838 so late in the legislative session is somewhat surprising, particularly given that McCarran repeal legislation already passed in the House as part of H.R. 5 back in March of this year. H.R. 5, however, was a Republican-sponsored bill that principally focused on medical malpractice reform, which many Democrats did not support. Moreover, the McCarran repeal language in H.R. 5 is different in some material respects from that proposed by Representative Conyers. For example, the repeal provisions of H.R. 5 apply only to health insurance, while the Conyers bill would repeal the exemption for both health and medical malpractice insurers. In addition, while H.R. 5 would prohibit private class action antitrust cases against health insurers, no such limitation is found in Representative Conyers' bill.

With Congress's August recess rapidly approaching, it seems unlikely that either Representative Conyers' new bill, or H.R. 5 for that matter, will be enacted into law before Congress adjourns for the year. However, it seems equally unlikely that a Congressional veteran like Representative Conyers would have introduced his bill, at this late date, if he had no intention to try to move it forward in some fashion. That being the case, at this juncture all that can be said with certainty is that time will tell. Stay tuned.

LEGISLATION PERMITTING PHYSICIANS TO NEGOTIATE COLLECTIVELY WITH INSURERS ON FEES INTRODUCED IN NEW YORK

by James M. Burns

In early June, legislation was introduced in the New York Senate (S7615) that would permit independent health care providers in some New York counties to negotiate collectively with insurers over the terms and conditions (including fees) of their provider contracts. Absent such a statute, joint negotiation of fees by independent providers would constitute unlawful collective action that violates Section 1 of the Sherman Act.

The proposed New York legislation would permit healthcare providers in a limited number of northeastern New York counties (those in and around Albany) to engage in such conduct as part of a "demonstration" project that would be carefully monitored by the State for possible expansion in the future. Under the proposal, the right to negotiate collectively on fees would be permitted only where the health care plan has a "substantial market share," but that term is defined so broadly as to sweep in a large number of insurers. Specifically, joint negotiation would be permitted with any health insurer that covers in excess of ten percent of the total covered lives in the service area or over twenty-five thousand lives (regardless of market share) or, in the alternative, whenever the Insurance Commissioner has otherwise determined that the bargaining power of the insurer "significantly exceeds" that of the providers acting individually.

The New York legislation is only the most recent of several "physician collective negotiation" bills that have been recently introduced at both the federal and state levels. See, e.g., the "Quality Healthcare Coalition Act of 2011," H.R. 1409 (federal bill authorizing joint fee negotiation by independent physicians); Connecticut House Bill 6343 (2011) and Texas Senate Bill 8 (2011) (similar state law proposals). All such legislation has been consistently opposed by the Federal Trade Commission, which has taken the position that the enactment of such legislation at either a federal or state level would have anticompetitive effects and, rather than "balancing the playing field" between providers and insurers, would result in increased healthcare costs for consumers. *See, e.g.,* FTC letter to Connecticut State Senators Coleman and Kissel regarding Connecticut House Bill 6343, June 8, 2011, available at http://www.ftc.gov/os/2011/06/110608chc.pdf (encouraging the Connecticut legislature not to enact legislation permitting providers to negotiate collectively). Despite such opposition, legislation permitting providers to negotiate collectively with insurers has been enacted in a few states, and is currently in effect in Alaska and Washington. Similar legislation was previously enacted in Texas and New Jersey over ten years ago, but more recently was permitted to "sunset" by the state legislatures in those states.