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CALIFORNIA SUPREME COURT HOLDS INSURERS ARE SUBJECT TO UNFAIR COMPETITION CLAIMS IN ZHANG CASE

by James M. Burns

On August 1, the California Supreme Court issued its highly-anticipated decision in *Zhang v. Superior Court*, holding that the California Unfair Insurance Practices Act (Ins. Code §790 et seq.) does not necessarily preempt an action against an insurer under the California Unfair Competition Law (Bus. & Prof. Code §17200 – the "UCL"). The decision greatly expands an insurer's potential exposure in California to private actions arising from conduct that, for over twenty five years, had been considered to be subject solely to the California insurance law (which does not provide for a private right of action).

In *Zhang*, the plaintiff sued her insurer, California Capital Insurance, over a dispute arising from a fire at her business. Zhang contended that the insurer's claim handling had been inadequate, in violation of the California Unfair Insurance Practices Act. However, recognizing that the Unfair Insurance Practices Act does not authorize a private right of action, Zhang's complaint, alleged that the insurer's advertising (in which it promised timely and proper payment of insurance claims), was "false advertising" potentially actionable under the California UCL.

Before the California Supreme Court, California Capital Insurance (as well as several amici) maintained that the plaintiff's action was, in essence, a claims handling dispute, and that the court's 1988 decision in *Moradi-Shalel v. Fireman's Fund* acted as a bar to any private cause of action for conduct that is also covered by the Unfair Insurance Practices Act. However, the court rejected that argument, holding that "*Moradi-Shalel* does not preclude first party UCL actions based on grounds independent from section 790.03, even when the insurer's conduct also violates section 790.03." The court continued: [W]hile a plaintiff may not use the UCL to 'plead around' an absolute bar to relief, the [Insurance law] does not immunize insurers from UCL liability for conduct that violates other laws in addition to the [Insurance law]." In reaching this decision, the California Supreme Court further noted that *Moradi-Shalel* had been intended to protect against the adverse consequences of permitting a broad implied right of action for *damages* under the Insurance law, and that this concern should not apply because UCL remedies are more limited in scope (generally extending only to injunctive relief and restitution.)

Whether the limited remedies afforded by the UCL noted by the Court will temper plaintiff interest in bringing UCL claims against insurers remains to be seen, particularly given that UCL claims can give rise to

punitive damages and, in some circumstances, an award of attorney fees to a prevailing plaintiff (under a "private attorney general" theory). Time will tell; these "limited" remedies do not seem to have had any significant chilling effect on UCL actions against other entities. For now, what is clear is that plaintiff Yanting Zhang's false advertising-based UCL claim returns to the trial court for further proceedings, and that future plaintiffs have just been granted a new avenue for challenging insurer conduct in the California courts.

BLUES GET BIG EARLY VICTORY IN ANTITRUST MDL PROCEEDING

by James M. Burns

Round one of the *In re Blue Cross Blue Shield Antitrust Litigation* (MDL 2406), a multi-district antitrust action brought against 38 Blue Cross & Blue Shield entities and the Blue Cross Blue Shield Association that is currently pending in Birmingham, Alabama, before District Judge David Proctor, has gone to the Blues, courtesy of a ruling from another District Court Judge more than 800 miles from Birmingham. Specifically, on August 22, Judge Frederico Moreno, District Court Judge for the Southern District of Florida, held that a series of settlement agreements between the Blues and over 600,000 doctors that resolved a prior litigation over which Judge Moreno had presided (*In re Managed Care Litigation*), barred the doctors from asserting their antitrust claims in the new MDL proceeding.

The prior case, *In re Managed Care Litigation*, which was commenced in 2000, concerned a challenge by a group of physicians to the level of reimbursements they received from managed care companies, including the Blues, for covered medical services. The litigation was ultimately resolved through a series of settlements reached by the parties from 2005-2007. As Judge Moreno noted in his recent decision (*Musselman v. Blue Cross Blue Shield of Alabama*), to settle that litigation the defendants "agreed to make substantial payments to the class members and their counsel and to implement numerous business practice initiatives" and, in exchange, the defendants "received broad releases from the plaintiffs and an injunction from the Court barring releasing parties from bringing released claims" in the future.

Recognizing that these releases presented a possible obstacle to plaintiffs' claims in the *In re Blue Cross Blue Shield Antitrust Litigation*, earlier this year the physician plaintiffs filed a declaratory judgment action in Miami, before Judge Moreno, requesting that he find that their antitrust claims were not released by their earlier settlement (or that the decision should await further discovery, and then be decided by Judge Proctor in Birmingham). In support of their position, the plaintiffs maintained that the claims in the new case were materially different than those in the earlier case, with the earlier case focusing on whether the managed care companies had engaged in business practices that had delayed or reduced their reimbursements, while the new case involves a claim that the Blues' trademark licensing agreements act as an unlawful agreement among the Blues not to compete with one another, thus reducing the reimbursement levels received by the physicians for their services. Defendants responded to plaintiffs' action by filing a motion to dismiss the complaint, maintaining that the earlier settlements barred plaintiffs from asserting the claims in their new action.

Siding with the Blues, Judge Moreno rejected plaintiffs' arguments in all respects, ruling that (1) the issue was properly before him, because he had retained jurisdiction in the earlier matter to hear any dispute about the interpretation, administration and consummation of the settlement agreement and (2) that plaintiffs' new claims "share the same operative nucleus of fact" with those previously raised by plaintiffs, and thus fell within the scope of the plaintiffs' release. In addition, Judge Moreno noted that the plaintiffs had agreed to release any claim that involved "any aspect of any fee for service claim," and held that plaintiffs' new antitrust claims were covered under this provision of the release as well. Finally, Judge Moreno also rejected plaintiffs' argument that, because their claims also involved post-settlement conduct, the release was ineffective, stating that "Both this Court and the 11th Circuit Court of Appeals have consistently rejected the argument that claims involving post-settlement conduct cannot be enjoined by the settlement agreements."

In light of Judge Moreno's ruling, the size and scope of the *In re Blue Cross Blue Shield Antitrust Litigation* – a potentially massive piece of litigation that is still in its earliest stages - has been materially reduced, with the claims of over 600,000 potential physician class members being resolved in favor of the Blues. Notwithstanding this significant development, however, the new case will undoubtedly continue, at least for now, because Judge Moreno's ruling has no apparent impact on the claims asserted by the hospital provider plaintiffs in the new case or those of the subscribers/insured class. Accordingly, the case now returns to Birmingham, and Judge Proctor, presumably for a ruling on defendants' expected motions to dismiss the claims asserted by these plaintiffs, which are expected to be filed early this fall and likely decided closer to year's end, or early next year. Stay tuned.

IN RE INSURANCE BROKERAGE ANTITRUST LITIGATION FINALLY CONCLUDES

by James M. Burns

After almost nine years of litigation, on August 1, New Jersey District Court Judge Claire Cecchi finally brought to a close one of the highest profile antitrust cases of the new millennium – *In re Insurance Brokerage Litigation* - with her approval of the final settlement in the action.

The case, a consolidated multi-district litigation commenced in 2005 against insurance broker Marsh & McLennan and approximately two dozen of the nation's largest insurers and brokers, was the outgrowth of an action brought by then-New York Attorney General Eliot Spitzer against Marsh for allegedly soliciting payments from the insurers to steer business from their clients to those insurers. Shortly after Marsh announced a settlement of the matter with the State (which included the elimination of undisclosed "contingent commissions"), numerous private actions were filed, all ultimately consolidated in the District of New Jersey before District Judge Faith Hochberg. As Judge Cecchi,

who was the third district court judge to handle the matter, observed in approving the settlement, during the case class counsel had reviewed over 60 million pages of documents and taken over 300 depositions, and the matter had generated over 2400 docket entries. The case had also gone up to the Third Circuit Court of Appeals (on plaintiffs' appeal of an earlier dismissal of the case granted by Judge Garrett Brown), where it had been reversed by the appellate court and returned for further proceedings.

While the final settling defendants, which included Ace, Chubb and Munich Re, agreed to pay $10.5 million to resolve the case (with over $3 million going to plaintiffs' counsel), prior settlements in the case with Marsh, Zurich Insurance, AIG and several other insurers had netted plaintiffs over $250 million, with plaintiffs' counsel receiving over $50 million in attorneys' fees in those settlements. In approving both the settlement and the award of counsel fees, Judge Cecchi noted that she had not received any objections to the proposed settlement from any class members, and that had the case continued to trial, plaintiffs faced a significant hurdle in establishing damages that would likely result in the case becoming a "battle of the experts."

CONNECTICUT SUPREME COURT HOLDS THAT INSURER LIABILITY FOR VIOLATIONS OF THE CONNECTICUT UNFAIR TRADE PRACTICES ACT ARE LIMITED BY THE CONNECTICUT UNFAIR INSURANCE PRACTICES ACT

by James M. Burns

On August 27, the Connecticut Supreme Court issued a ruling in *State v. Acordia, Inc.*, reversing a lower court decision that had held insurance broker Acordia liable for violating the Connecticut Unfair Trade Practices Act. The action was brought by the Connecticut AG's office, which had accused Acordia of entering into agreements with several insurers (Travelers, Hartford, Chubb, Atlantic Mutual and Royal & Sun Alliance) to steer Acordia's broker clients to these insurers in return for the insurers' payment of 1% of the premium amount to Acordia.

At trial, the State alleged that Acordia's failure to inform its insured clients that it was receiving the additional commission from the insurers was a breach of its fiduciary duty, which the State maintained violated "public policy" and thus constituted unlawful conduct under the Connecticut Unfair Trade Practices Act (the "UTPA"). The State also alleged that Acordia's conduct violated the Connecticut Unfair Insurance Practices Act (the "UIPA"), arguing that it constituted "misleading conduct" on the part of the broker, which the UIPA expressly prohibits. The trial court ruled for the State on both claims, and Acordia appealed.

In a ruling likely to be applauded by insurers everywhere, the Connecticut Supreme Court reversed the lower court decision, holding that a UTPA claim against an entity subject to the UIPA (generally insurers and brokers) *must* be based upon conduct that constitutes a violation of the UIPA. Thus, because the State had failed to establish that Acordia's breach of fiduciary duty also constituted a violation of the UIPA (as opposed to the UTPA), the State's UTPA claim failed as a matter of law. (Notably, this ruling by the Connecticut Supreme Court differs considerably from the recent ruling by the California Supreme Court in *Zhang v. Superior Court*, which took a more expansive view and held that, under California law, an unfair competition law claim *can* be asserted against an insurer independently from, and without regard to, whether such conduct also violates the California insurance law.) Moreover, the Connecticut Supreme Court also held that the State's UIPA claim was insufficient as well, because the evidence presented at trial failed to show that the Acordia employees that had dealt with the broker clients were aware that Acordia had negotiated the additional payment from the insurers and thus there was no basis to conclude that their conduct was influenced by the additional payments.

Accordingly, for all of these reasons, the Connecticut Supreme Court reversed the lower court decision in all respects, and directed that judgment be entered for Acordia in the case.