

Insurance Antitrust

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Insurer Antitrust Exemption in Europe in Jeopardy

By [James M. Burns](#)

In the United States, the McCarran Ferguson Act provides insurers with an exemption from the federal antitrust laws. Enacted in 1945, the Act provides that conduct that constitutes the “business of insurance” is outside the scope of the federal antitrust laws to the extent that the conduct is (1) subject to state regulation and (2) does not constitute an act of “boycott, coercion or intimidation.” While there have been frequent calls for the Act to be repealed (particularly with respect to health insurance), the exemption continues to provide the insurance industry with significant protections from antitrust scrutiny.

In Europe, insurers enjoy a somewhat similar industry-specific exemption called the “Insurance Block Exemption.” First adopted in 1992, the exemption currently exempts insurers from the EU competition laws when they are (1) exchanging data in furtherance of the creation of joint compilations, tables and studies, or (2) participating in co-insurance or reinsurance pooling agreements. However, unlike the

McCarran Ferguson Act, which has no “sunset” clause, the Insurance Block Exemption must be renewed by the European Commission on a periodic basis to remain in effect. Most recently renewed in 2010, the Insurance Block Exemption will sunset in 2017 absent an affirmative decision for it to be renewed.

With this in mind, the Commission began a review of the Block Exemption in 2014, seeking to determine whether it had outlived its usefulness. On March 17, the Commission issued its initial views on the subject, stating that its “preliminary view is that it is no longer necessary to maintain a sector-specific block exemption in insurance.” In support of that conclusion, the Commission explained that guidelines issued by the Commission since the Block Exemption was last renewed now offer guidance on how to assess data exchanges generally, and thus the need for a blanket exemption for insurer data exchanges was “questionable.” Moreover, the Commission

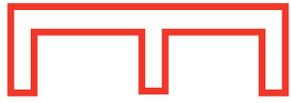


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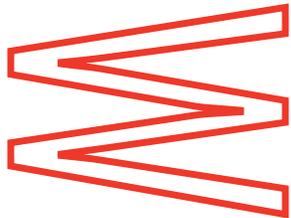
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Insurer Antitrust Exemption in Europe in Jeopardy, *continued*

indicated that, if necessary, it could provide “complementary specific guidance” on data exchanges specifically for the insurance industry, and that this would be “more flexible than a Block Exemption” and “could more easily be adapted to changing circumstances.” With respect to pooling agreements, the Commission stated that its investigation had determined that few pools currently avail themselves of this exemption, and that in any event, it was not clear that an exemption for these pools was either (1) necessary, or (2) resulted in consumer benefit.

While the Commission’s preliminary report may signal the beginning of the end for the Block Exemption, on April 26, the Commission offered the insurance industry an opportunity to express its views on whether the Block Exemption should be renewed. The Commission’s final report and recommendation is due later this year in advance of the current March 2017 sunset date for the Block Exemption. Should the Block Exemption not be renewed, critics of the McCarran Ferguson Act will undoubtedly add this development to the list of reasons why they contend McCarran should be repealed. Stay tuned.



DOJ Antitrust Leader William Baer Departs to Take No. 3 Position in Justice Department

By [James M. Burns](#)

On April 11, U.S. Attorney General Loretta Lynch announced that William Baer, Assistant Attorney General (AAG) and head of the DOJ Antitrust Division, would resign from the Antitrust Division and be appointed acting Associate Attorney General, the number three position in the Justice Department. Baer replaces Stuart Delery, who resigned a few weeks earlier and held the position since September of 2014.

insurance industry, Baer’s Antitrust Division is currently engaged in a significant review of the Anthem/Cigna and Aetna/Humana deals. In criminal antitrust matters, under Baer’s stewardship, the Antitrust Division increased criminal fines from \$1.02 billion in 2013 to \$3.63 billion in 2015.

Baer served as AAG for the Antitrust Division since December 2012 and is credited with implementing President Obama’s pledge to step up antitrust enforcement at the Division. Within a month of his appointment, Baer moved to block Anheuser-Busch InBev’s proposed acquisition of Grupo Modelo. He is also credited with bringing the high profile “e-books” antitrust action against Apple and actions against financial institutions for alleged antitrust violations. In the

Several days later, on April 15, Attorney General Lynch announced that Renata Hesse would replace Baer at the Antitrust Division, becoming acting AAG for Antitrust. Hesse previously served as Baer’s principal deputy. In announcing the appointment, Lynch stated that she was “confident that under [Hesse’s] guidance, the Antitrust Division will continue to excel in its work to ensure free and fair markets and to protect American consumers.”



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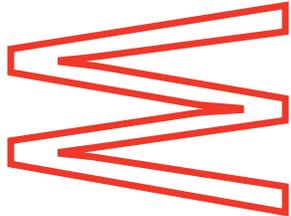
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Insurers Gain Additional Dismissals in the Florida Auto Body Action

By [James M. Burns](#)



In early 2014, a group of Florida auto body shops sued the leading auto insurers in their state, alleging that the insurers had conspired to suppress the amounts the auto body shops received in reimbursement rates. The case, *A&E Auto Body v. 21st Century Centennial Insurance*, was followed by the filing of similar class action proceedings by auto body shops in other states, until there were 24 cases in all. Late in 2014, all of the cases were consolidated into a multidistrict litigation proceeding (*In Re Auto Body Shop Antitrust Litigation*) before Judge Gregory Presnell in the Middle District of Florida.



In September of 2015, Judge Presnell dismissed the A&E plaintiffs' antitrust claims, finding that they had failed adequately to allege that the insurers had entered into any unlawful agreement, or that they had participated in a concerted refusal to deal with the plaintiffs. Since that ruling, Judge Presnell has carefully worked his way through the allegations of conspiracy contained in each of the other complaints, in each case dismissing the claims on the grounds that the plaintiffs had failed adequately to allege any insurer conspiracy.

Most recently in March, Judge Presnell ruled on the sufficiency of the complaints filed by a class of Louisiana auto body shops (*Parker Auto Body v. State Farm et al.*) and a class of Utah auto body shops (*Alpine Straightening Systems v. State Farm et al.*). Consistent with his prior rulings, Judge Presnell concluded that antitrust claims alleged by the Louisiana and Utah plaintiffs were also insufficient as a matter of law.

In each decision, Judge Presnell began his analysis by noting that "the crucial question is whether the challenged anticompetitive conduct stems from independent decision or from an agreement, tacit or express (citing *Twombly*)." Judge Presnell further noted that because the plaintiffs lack any direct evidence of agreement, they are required to allege "plus factors" that suggest that the defendants' parallel conduct is suggestive of a collusive agreement to restrain trade. As to the *Parker* plaintiffs' allegations, Judge Presnell held that an assertion that the insurers possess market power was insufficient, because "the fact that a group of alleged price-fixers possess power in a particular market does not, standing alone, make it more likely that the members of that group have entered into an agreement to fix prices." In addition, Judge Presnell observed that merely participating in a trade association similarly "provides no indication of a conspiracy." As to plaintiffs' boycott claim, the court stated that "there are no allegations in the Second Amended Complaint that any defendant (much less all of them) has ever refused to do business with plaintiffs." Instead, the plaintiffs alleged only that the insurers would not deal with plaintiffs on the terms plaintiffs sought, which the court held was insufficient.

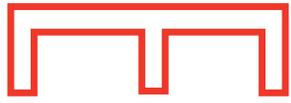


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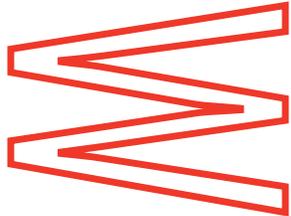
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Insurers Gain Additional Dismissals in the Florida Auto Body Action, *continued*



Similarly, in *Alpine Straightening*, Judge Presnell found plaintiffs’ allegation that all of the insurers had taken a similar position on reimbursement issues inadequate. He explained that plaintiffs offer “no explanation” as to how the practice of refusing to pay for repair procedures that other insurers won’t pay for is any more suggestive of collusion than independent conduct, and that such conduct is nothing more than a “refusal to pay more than one’s competitor pays, which is not a violation of the Sherman Act.” Finally, as to the Utah plaintiffs’ boycott claim, Judge Presnell again observed that the plaintiffs had failed to allege a refusal by the insurers to do business with them, only that the insurer would not do so on the terms plaintiffs preferred.

As noted above, the *Parker* and *Alpine* decisions are only two of the most recent decisions in this matter, and several of the 24 complaints remain for Judge Presnell’s review. However, plaintiffs in five of the earlier decided cases – *Quality Auto Painting*, *Ultimate Collision Repair*, *Campbell County Auto Body*, *Lee Pappas Body Shop* and *Concord Auto Body* – have already filed an appeal with the 11th Circuit, challenging Judge Presnell’s dismissal of their antitrust claims. In a unified brief filed in early April, the plaintiff/appellants contend that Judge Presnell “disregarded the relevant pleading standard and disregarded or disbelieved the facts asserted in the complaints,” and urge the 11th Circuit to overturn Judge Presnell’s dismissals. The insurers’ response to appellants’ brief is due in early May. Stay tuned.



California Insurance Commissioner Approves Centene/Health Net Merger

By [James M. Burns](#)

Since the summer of 2015, a great deal of attention has focused on whether the proposed Anthem/Cigna and Aetna/Humana mergers will be approved by federal and state antitrust regulators. These transactions have been the subject of Congressional hearings and state insurance department hearings, and to date, while some states have approved the transactions, the DOJ Antitrust Division’s examination of the Anthem/Cigna and Aetna/Humana mergers remains ongoing, without any indication regarding how or when it will ultimately be completed.

In the meantime, the proposed merger of Centene and Health Net, which was announced at approximately the same time as the Anthem and Aetna deals, has received less attention. This notwithstanding, the Centene/Health Net deal would itself be considered a “blockbuster” deal based upon its size (valued at more than \$7 billion), if not for the even larger Anthem/Cigna and Aetna/Humana deals. In addition, unlike Anthem and Aetna, Centene and Health Net quickly received antitrust approval from federal regulators for their deal (in August of 2015), and by January of this year the only remaining approval they required was from the California Department of Insurance.



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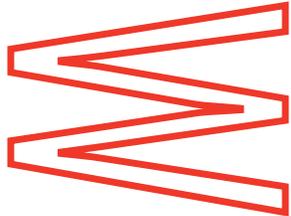
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California Insurance Commissioner Approves Centene/ Health Net Merger, *continued*



Nearing their regulatory “finish line,” Health Net and Centene appeared at a public hearing before California Insurance Commissioner Dave Jones in late January to make their case for approval. (Notably, the California Department of Insurance has oversight over this deal because Health Net is domiciled in California. While the California Insurance Department does not have oversight over the Anthem and Aetna deals – because neither insurer is domiciled in California – those transactions require approval from the California Department of Managed Health Care, which has concurrent authority over the Centene deal with the Insurance Department).

opportunity to bring new capital and resources from a major national health insurer largely outside of California (Centene) to enable a California health insurer (Health Net) to continue to compete and offer consumers additional choices in California’s individual, small group and large group commercial health insurance markets.”



At what turned out to be a six-hour public hearing, Commissioner Jones heard from the parties, their economic experts and various consumer groups regarding the proposed transaction. Commissioner Jones expressed some potential concerns about the transaction and noted that he had the authority to disapprove the transaction in its entirety if he believed it was not in the public’s interest – a result that could potentially have rendered moot all of their prior regulatory successes.

Despite his approval, Commissioner Jones explained that his approval was coupled with “strong conditions to protect California’s consumers.” Specifically, these conditions include an obligation that the costs of the merger not be imposed on California policyholders, that Centene continue to maintain and grow Health Net’s business in California (including continuing to offer products through Covered California) and the parties’ commitment to continue to improve the quality of healthcare in the state. In addition, Centene is also required to make a \$200 million infrastructure investment in California by establishing a California call center, an additional \$30 million investment in California’s low and moderate income neighborhoods through investments in health facilities in those areas and may not seek to “re-domesticate” Health Net out of state.

At the close of the January hearing, Commissioner Jones promised that his review of the deal would be swift, and he lived up to his pledge, providing his answer on March 22. In a public announcement on that date, Commissioner Jones revealed that he was approving the parties’ transaction, permitting Centene to obtain control of Health Net. In explaining his decision, Commissioner Jones stated that the transaction “provides an

Having now obtained this last, necessary approval, the Centene/Health Net deal closed on March 24. For Anthem and Aetna, however, whether, when and under what conditions they may be permitted to consummate their deals remains uncertain.

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