INSURANCE ANTITRUST **LEGAL**NEWS

6TH CIRCUIT HOLDS MCCARRAN-FERGUSON ACT BARS ANTITRUST CLAIMS AGAINST TITLE INSURERS

by James M. Burns

On July 17, the Sixth Circuit Court of Appeals issued its long awaited decision in *Katz v. Fidelity National Title Insurance Company*, a class action proceeding in which the plaintiffs alleged that a collection of title insurers had unlawfully conspired to set unreasonably high title insurance premiums. In ruling for the defendants and affirming the dismissal of plaintiffs' claims, the court joins a host of other courts around the country that have found similar allegations defective as a matter of law. Unlike in those other cases, however, in which the courts found that plaintiffs' claims failed based upon the Filed Rate Doctrine (most prominently the Third Circuit's recent decisions in *In re New Jersey Title Insurance Antitrust Litigation* and *McCray v. Fidelity National Title Insurance*), in Katz the Sixth Circuit held that the claims failed based upon the McCarran-Ferguson Act.

Specifically, the plaintiffs in *Katz* alleged that title insurance rates that had been filed and approved by the Ohio Department of Insurance were still subject to challenge because it was "impossible for the Department of Insurance to review, regulate or supervise the reasonableness of the rates collectively set by defendants," given that they were "principally based on undisclosed costs." At the trial court level, the court held that plaintiffs' claims failed under both the Filed Rate Doctrine and the McCarran-Ferguson Act. Plaintiffs appealed.

Unlike the Third Circuit, which chose to focus on the Filed Rate Doctrine issue, the Sixth Circuit focused on whether the McCarran-Ferguson Act provided a complete defense to plaintiffs' claims. After acknowledging the three prong test for McCarran's applicability – (1) is the conduct at issue "the business of insurance;" (2) is the conduct "regulated by state law;" and (3) is the conduct not an act of "boycott, coercion or intimidation" - - the Sixth Circuit waded into the parties' arguments.

Plaintiffs' principal contention on appeal was that McCarran did not apply to the alleged conduct because the "business of insurance" requirement of the Act was not satisfied. Specifically, the maintained that title insurance policies typically result in "at most, 3.4% premium loss," and argued, therefore, that title insurance involved an insufficient amount of real "risk spreading" to constitute insurance. Citing the Supreme Court's 1959 decision in *SEC v. Variable Annuity Life Insurance*, in which the court held that the business of insurance requirement was not met where the conduct at issue included no risk spreading, plaintiffs argued that the court should similarly find that title insurance failed to meet the requirements of McCarran. The court, however, rejected plaintiffs' argument, holding that it is not the *amount* of risk spreading that is important, but whether *any* risk spreading occurs in the context of the challenged conduct. Because plaintiffs conceded that title insurance contains at least some amount of risk spreading, the business of insurance requirement had been met. With plaintiffs unable to mount much of an argument on the second and third prongs of McCarran, the court held that plaintiffs' federal antitrust claims were barred.

September 2012 • Volume 1, Number 3

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Turning next to plaintiffs' claims under state law, the Sixth Circuit first noted that McCarran only provides an exemption from the federal antitrust laws, and does not bar state antitrust claims. Those claims, however, were also barred, the court held, because "the Ohio Insurance Code acts as an exception to the Valentine Act (Ohio's antitrust law)" and "Section 3935.06 of the Insurance Code permits appellees' allegedly collusive behavior." Accordingly, the court affirmed the district court's dismissal of these claims as well, concluding that "The McCarran-Ferguson Act and Title XXXIX of the Ohio Revised Code are complete bars to appellants' federal and state antitrust claims," and that "in light of this holding, we need not consider whether the filed rate doctrine applies in this case.".

IOWA SUPREME COURT RULES CHIROPRACTOR ANTITRUST CLAIMS AGAINST WELLMARK BLUE CROSS ARE NOT BARRED BY THE STATE ACTION DOCTRINE

by James M. Burns

On July 27, the Iowa Supreme Court reversed a lower court ruling in *Mueller v. Wellmark Blue Cross*, holding that the lower court erred in granting summary judgment to Wellmark on claims that its payment of lower rates to chiropractors than to medical doctors under its preferred provider contracts violated the Iowa antitrust laws. In reversing the lower court ruling, the Iowa Supreme Court held that the State Action Doctrine – on which the lower court had relied in granting summary judgment to Wellmark – did not immunize the alleged conduct.

The Iowa Supreme Court began its analysis by noting that the Iowa antitrust laws are to be "construed to complement and be harmonized with the applied laws of the United States which have the same or similar purpose." Accordingly, the same state action principles that apply under the federal antitrust laws – that to be exempt conduct must be (1) undertaken pursuant to a "clearly articulated and affirmatively expressed" state policy and (2) "actively supervised" by the state – would be applied to plaintiffs' claims.

In reversing the judgment for Wellmark on the issue, the court concluded that Wellmark could not meet the "active supervision" requirements of the state action doctrine. Specifically, the court held that the provisions that Wellmark pointed to in the Iowa Insurance Code as evidence of active supervision were designed to regulate conduct different than the conduct at issue in the case. As the court explained, "Wellmark has not established that the Insurance Division reviews preferred provider agreements in order to regulate the rates paid to different classes of health care providers such as doctors or chiropractors." Instead, according to the court, "the review is designed to assure fair and equitable access to the preferred provider network and to protect nonparticipants in the network." And, because "there is no indication that the Insurance Division reviews the rates and approves the actual rates of payment or regulates the specific terms of access to chiropractors as opposed to physicians," the "active supervision" of chiropractor rates necessary for the State Action Doctrine to apply to plaintiffs' claims had not occurred. Accordingly, the Iowa Supreme Court reversed the lower court ruling for Wellmark on this issue, sending the case back to the trial court for further proceedings.

ANTITRUST "WHISTLEBLOWER" LEGISLATION INTRODUCED

by James M. Burns

On July 31, in the waning days of the 112th Congress, Senator Patrick Leahy of Vermont introduced the "Criminal Antitrust Anti-Retaliation Act," designated as S. 3462. The bill is designed to protect employees, contractors, subcontractors and agents from retaliation for providing information to the federal government about possible violations of the antitrust laws.

Specifically, the bill would make it unlawful for an employer to "demote, suspend, threaten, harass or discriminate against" an individual who assists the Department of Justice in connection with an antitrust investigation. As a remedy, the whistleblower will be permitted to bring an action seeking (1) reinstatement with the same seniority status the whistleblower would have had absent the discrimination; (2) back pay, with interest; and (3) compensation for any special damages sustained, including litigation costs, expert witness fees and reasonable attorney's fees. Notably, however, "whistleblower" status will not be afforded to any individual found to have "planned and initiated" the violation or attempted to do so.

As yet, no action has been taken on the bill since its introduction (not surprising, given that Congress has been on its summer recess almost since the date of introduction). Given the largely noncontroversial nature of the bill, however, it would not be surprising if it gets attached to some other piece of legislation that Congress needs to take up before the end of the session as an amendment and gets enacted through that process. Stay tuned.

DOJ ISSUES "SECOND REQUEST" IN WELLPOINT/ AMERIGROUP MERGER

by James M. Burns

On July 9, WellPoint and Amerigroup announced plans to merge, in a deal reportedly valued at approximately $5 billion. The parties' merger plans were delayed, however, at least for now, when the DOJ Antitrust Division issued a "Second Request" to the parties on August 22. In accordance with the provisions of the Hart-Scott-Rodino Antitrust Improvements Act (the "HSR Act"), the DOJ's issuance of the Second Request requires the parties to produce additional documents to the DOJ and to delay closing their deal until after the DOJ has an opportunity to more fully assess the potential competitive implications of the transaction. Thirty days after producing all of the additional information required by the Second Request, the DOJ must either permit the transaction to close, challenge it in court or seek a negotiated resolution of any concerns it may have with the parties.

Significantly, in a recent filing with the Securities and Exchange Commission, Amerigroup has disclosed that the DOJ's competitive concerns focus solely on Amerigroup's Virginia Medicaid business, and that no concerns have been raised with respect to any of the other states in which the combined company would operate. Perhaps based upon the limited nature of the DOJ's focus, Amerigroup has also announced that it continues to anticipate that the transaction will close by year's end. Whether that prediction will prove correct – either after DOJ approval of the transaction as proposed, an unsuccessful court challenge by DOJ, or a negotiated divestiture of some portion of the combined company – remains to be seen. In the interim, however, DOJ's workload was increased even more when, on August 20, Aetna and Coventry announced their own merger, in a deal even larger than the WellPoint/Amerigroup transaction. The Aetna/Coventry merger, valued at over $7 billion, will likely face similarly intense scrutiny from DOJ and state regulators. Stay tuned.