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Insurance

Antitrust Alert

Marsh Settlement of Insurance Brokerage Antitrust Lawsuit Approved by Court

On Feb. 17, Judge Garrett Brown, Jr., chief judge for the District of New Jersey, approved the settlement of all claims against Marsh & McLennan in the *In re Insurance Brokerage Antitrust Litigation* action. The $69 million settlement resolves the private party actions brought against Marsh following the New York attorney general's high-profile "contingent commission" investigation in 2005. Both the investigation and the follow-on suits, which were consolidated before Judge Brown, alleged that Marsh orchestrated a conspiracy to rig bids for excess insurance policies and that Marsh steered customers to certain preferred insurers. Marsh settled the New York attorney general's investigation in 2005 by agreeing to pay $850 million in restitution for its actions.

Notably, Marsh's settlement of the New Jersey action comes despite having prevailed on a motion to dismiss plaintiffs' claims in the District Court. In August of 2007, Judge Brown ruled that plaintiffs' antitrust allegations failed to satisfy the requirements of *Twombly v. Bell Atlantic*, which require a plaintiff to present "factual allegations that are enough to raise a right to relief above the speculative level" to avoid dismissal of a claim. Plaintiffs appealed the decision to the Third Circuit Court of Appeals, and that appeal remains pending as to the other defendants in the case despite Marsh's settlement. (Plaintiffs withdrew their appeal with respect to Marsh in June of 2008, after inking their agreement with Marsh.)

In approving the settlement, Judge Brown found that all of the factors for consideration set forth by the Third Circuit in *Girsh v. Jepson*, 521 F.3d 153 (3d Cir. 1975), supported approval of the settlement. In reaching this conclusion, Judge Brown noted that the case had been "vigorously litigated" for nearly four years, with the parties having deposed nearly 200 persons and produced over 60 million pages of documents, at significant cost to all parties. Moreover, had the case continued, plaintiffs' likelihood of establishing liability (another factor to be considered in assessing the propriety of the settlement), was, in Judge Brown's assessment, suspect. Judge Brown specifically noted that "though plaintiffs have appeals pending before the Third Circuit, plaintiffs themselves recognize the difficulty of establishing the Marsh defendants' liability under these circumstances." Accordingly, Judge Brown concluded that the settlement amount ($69 million) was reasonable in the circumstances. In addition, in a separate order, Judge Brown approved an award of $19 million in attorney fees for plaintiffs' counsel.

Also in this edition:

Significantly, the Marsh settlement amount is considerably less than the $121.8 million settlement that plaintiffs reached with co-defendant Zurich Financial in February of 2007. That settlement, however, was reached before Judge Brown's August 2007 ruling that plaintiffs' antitrust allegations failed to state a claim. Similarly, the attorneys fees awarded in the Zurich settlement were also higher — $29.95 million as opposed to $19 million.

While additional settlements remain a possibility, it appears that the remaining defendants have chosen not to seek a "discounted" settlement while plaintiffs' appeal is pending, and are instead counting on an affirmance of Judge Brown's decision. Should defendants prevail on appeal, the case is likely over (barring a successful Supreme Court appeal). However, should the Third Circuit overturn Judge Brown's decision and breathe new life into plaintiffs' claims, the "price" of settlement will undoubtedly increase for those defendants. Stay tuned.

Optional Federal Charter Legislation to be Introduced

Representatives Melissa Bean (D- Ill.) and Ed Royce (R-Cal.) are expected to introduce legislation in the coming days that would permit insurers to opt out of state insurance regulation in favor of federal oversight. The legislation, which will be introduced as the "National Insurance Consumer Protection and Regulatory Modernization Act," is expected to be very similar to the "optional federal charter" legislation introduced last Congress (S.40/H.R. 3200). Like the prior legislative proposals, the bill will require an insurer that opts for federal, rather than state, regulation to relinquish its McCarran-Ferguson Act antitrust exemption.

While the provisions of the bill remain largely unchanged, its prospects for passage are expected to improve considerably in the new Congress, given the current economic climate and the new Democratic majority in both the House and Senate. Notwithstanding that, the insurance industry response to the proposed legislation remained largely unchanged. For example, the American Insurance Association, which has been a strong supporter of optional federal chartering legislation in the past, hailed the new bill as "a very positive development." In contrast, the Independent Insurance Agents and Brokers of America, which has historically opposed the legislation, characterized the new bill as "the same old tired idea that has garnered little support in past Congresses." Similarly, the National Association of Professional Insurance Agents (PIA) colorfully declared that the new bill "is still a bad idea, and applying perfume and lipstick to it will not make it acceptable."

Once introduced, the bill is expected to be sent to the House Financial Services Subcommittee on Financial Markets, Insurance and Government Sponsored Enterprises. Further action on the bill is expected this spring.

Health Insurers Granted Summary Judgment in Pharmacy's Merger-Related Antitrust Challenge

On Jan.16, Judge Rebecca Pallmeyer, district judge for the Northern District of Illinois, granted summary judgment to UnitedHealth and Pacificare Health System, derailing an antitrust challenge brought by Omnicare that arose in connection with UnitedHealth's merger with Pacificare in 2005. The case is *Omnicare Inc. v. UnitedHealth Group Inc.*, 2009 U.S. Dist. Lexis 3170 (N.D. Ill. 2009).

In the action, Omnicare, a provider of pharmacy services to nursing homes, contended that UnitedHealth and Pacificare had conspired to saddle it with an unfavorable contract that provided Omnicare an insufficient reimbursement rate for its services. Specifically, Omnicare alleged that while UnitedHealth and Pacificare were in merger discussions they agreed to have Pacificare negotiate a low reimbursement rate contract with Omnicare, ostensibly only to cover the Pacificare/Omnicare relationship, but that the defendants intended all along to apply the terms of the contract to both Pacificare and UnitedHealth post-merger (thus permitting UnitedHealth to escape from a preexisting contract between Omnicare and UnitedHealth that was more favorable to Omnicare).

In granting summary judgment to UnitedHealth, Judge Pallmeyer concluded that the defendants' pre-merger interactions were insufficient to support Omnicare's claim of antitrust conspiracy. Citing several scholarly articles discussing the appropriate limits of pre-merger coordination by merging parties, Judge Pallmeyer concluded that nothing about the defendants' pre-merger conduct was remarkable or unlawful under the antitrust laws. Instead, despite the fact that the merging parties had engaged in some discussions about their respective Medicare Part D business pre-merger, and their merger agreement called for Pacificare to obtain UnitedHealth's pre-approval before entering significant new contracts

while the merger was pending, these facts alone were insufficient to defeat defendants' motion for summary judgment. Judge Pallmeyer further noted that the particular contract at issue appeared to have been carved out of the pre-approval provisions in the parties' merger agreement, and thus the provision did not require Pacificare to obtain approval of the contract from UnitedHealth.

Finally, Judge Pallmeyer also noted that there was no evidence that the merging parties had specifically discussed how they would deal with Omnicare. Accordingly, while Omnicare's allegations of agreement had been sufficient to defeat defendants' earlier motion to dismiss the complaint, Omnicare's failure to develop any additional evidence of unlawful agreement in discovery warranted the entry of summary judgment for defendants.

Shortly after Judge Pallmeyer's ruling, Omnicare vowed to appeal the decision, stating that "there are valid and compelling grounds for appeal and the company will do so promptly." Thus, the case now moves on to the Seventh Circuit Court of Appeals for further action.

Pennsylvania Blues Give Up Merger Plans

Despite twice receiving approval from the DOJ Antitrust Division for their proposed merger, in late January Pittsburgh-based Highmark Blue Cross Blue Shield and Philadelphia-based Independence Blue Cross announced that they were calling off their proposed merger in the face of opposition from the Pennsylvania Insurance Commissioner. The merger was first announced in April of 2007, and approval by the Pennsylvania Insurance Department was the last remaining hurdle to consummation of the merger.

In a joint statement issued on Jan. 21, the parties announced that "despite the well-documented advantages of the consolidation for our customers and communities, the Insurance Department would not approve the transaction because of its belief that there would be an adverse impact on competition." While this was a conclusion with which they "fundamentally disagreed," the parties stated that they were reluctantly discontinuing their efforts to merge. Notably, Pennsylvania Insurance Commissioner Joel Ario responded to the Blues' announcement by stating that "We welcome the applicants' decision to withdraw their proposed consolidation" and that the Department was "prepared to issue a disapproval order on Jan. 27" had the parties not withdrawn their application.

By all accounts, the merging parties' dispute with the Insurance Department principally focused on the Department's view that, absent the merger, Highmark would enter Southeastern Pennsylvania (Independence's core market), resulting in competitive benefits for consumers. Highmark maintained that such expansion would not occur, and that this hypothetical expansion should not be used as a basis for rejecting the merger. To resolve its concerns, the Insurance Department sought the merging parties' agreement to relinquish either their Blue Cross or their Blue Shield brand, providing the opportunity for another entity to operate as a "Blue" provider in the region. However, the merging parties refused to relinquish either brand as a condition of gaining regulatory approval, ultimately dooming the merger.

For more information on these topics, please contact James M. Burns at 202.327.5087 or jmburns@williamsmullen.com.

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