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Insurance

Antitrust Alert

DOJ Antitrust Division Approves Creation of Insurance Consortium

On Nov. 24, the Department of Justice Antitrust Division announced that it had approved the formation of an entity that would permit multiple insurers to jointly insure large commercial property insurance risks on a single policy form. The announcement was made in a Business Review letter response to Ivy Capital Group,* which proposed the creation of the entity, Concepta Services. (Under the Antitrust Division's Business Review procedure, an entity may submit a proposed business plan and the Division indicates whether it intends to challenge the proposed conduct, if implemented, under the antitrust laws).

As explained in Ivy's Business Review request, Concepta's proposed members would be insurers who, due to capacity restraints, are currently handicapped in their ability to individually offer commercial property insurance policies with high coverage limits. Concepta would therefore aggregate the capacity of several such insurers in a single policy form, permitting the insurers to satisfy an insured's coverage requirements without the need for facultative reinsurance or layered policies, thus permitting the insurers to compete on a more equal footing with larger commercial insurers that offer such policies on their own.

In approving Ivy's proposal, acting Assistant Attorney General Deborah Garza wrote, "Because Concepta's prospective participants currently have minimal involvement in the sale of large commercial insurance policies, the formation and operation fall well within the 'safety zone' set forth in the [DOJ] Competitor Collaboration Guidelines." Accordingly, Assistant Attorney General Garza concluded, "The formation of Concepta is not likely to reduce competition in the sale of large commercial insurance policies" and would instead "provide a competitive new option for those looking to purchase these types of policies."

In a press release issued after the DOJ announcement, Ivy announced that it expects Concepta will be in a position to start operations during the second quarter of 2009.

* Williams Mullen was counsel to Ivy Capital Group in this matter.

Also in this edition:

Hurricane Katrina Antitrust Lawsuit Dismissed

On Dec. 17, U.S. District Court Judge Jay Zainey dismissed an antitrust case against several insurers accused of conspiring to underpay insureds for property damage claims arising from Hurricane Katrina. The ruling brings to a close a rather contentious litigation that, in the space of a little more than a year, went from state court, to federal court, to the Fifth Circuit and back again before finally being dismissed.

The action was filed in October 2007, in state court, by former Louisiana Attorney General Charles Foti. The filing came only days before Foti left office, having failed in his bid for re-election. At the time, questions were raised about whether the action was politically motivated and the incoming Attorney General, James "Buddy" Caldwell, announced that he would have to study the case before determining whether he intended to continue to pursue it. Ultimately, he decided to do so.

The complaint accused the insurers of conspiring with a consulting company, McKinsey & Co., and a claims management software company, Xactware Solutions, to undervalue property damage claims arising from Hurricane Katrina. The defendants removed the case to federal court, and in April 2008 Attorney General Caldwell sought to have the case remanded to the state court. When that request was denied, Caldwell appealed the decision to the Fifth Circuit, but the appeal was also denied, returning the case to Judge Zainey for an examination of its merits.

In dismissing the case, Judge Zainey concluded that the plaintiffs had failed to present sufficient evidence of conspiracy to permit the case to go forward, finally bringing the matter to a close.

6th Circuit Affirms Dismissal of Antitrust Case Against Health Insurer

On Dec. 22, the Sixth Circuit Court of Appeals in Cincinnati affirmed the dismissal of an antitrust case against Anthem Blue Cross and Blue Shield* and a collection of Cincinnati-area insurance brokers and agents.

In the action, *Total Benefits Planning Agency v. Anthem Blue Cross and Blue Shield*, the plaintiff, an insurance broker whose relationship with Anthem had been terminated, alleged that the defendants had conspired to boycott and blacklist him in violation of Section One of the Sherman Act. The conspiracy was allegedly designed to impede the plaintiff's ability to offer an "innovative strategy for controlling health care costs" that allegedly reduced insureds' premiums without any reduction in coverage. Defendants denied plaintiff's claims and moved to dismiss the complaint for failure to state a claim.

The District Court initially denied defendants' motion to dismiss the plaintiff's complaint, holding that the plaintiff's vertical boycott allegations, if proved, constituted a *per se* antitrust violation. However, the defendants sought reconsideration of the District Court's decision, arguing that the Supreme Court's decision in *NYNEX Corp. v. Discon* required that the vertical conspiracy alleged by the plaintiff be assessed under the rule of reason, not *per se* principles. In 2007, the District Court agreed, modifying its decision and thereafter dismissing the plaintiff's case for failure to allege a rule of reason violation in accordance with the Supreme Court's 2007 decision in *Twombly*.

On appeal, the plaintiff argued that the dismissal was unwarranted, and that even if warranted the District Court should have granted the plaintiff leave to amend the complaint. However, the Sixth Circuit disagreed, affirming the district court in all respects.

First, the court affirmed that the lower court had applied the correct standard to the claim - plaintiff's allegations did not set forth a *per se* violation. Next, the court proceeded to examine the plaintiff's allegations under the rule of reason, and concluded that the plaintiff had failed adequately to allege antitrust injury, had failed to define the appropriate product market and had failed to meet the pleading requirements of *Twombly*. Finally, as to the plaintiff's contention that it should have been granted leave to amend (which would have been plaintiff's third amended complaint), the court held that plaintiff's failure to request leave to amend in the district court rendered that argument insufficient on appeal.

Second Marsh Bid Rigging Trial Begins

Alert readers may recall that, earlier this year, two senior Marsh executives were tried on criminal bid rigging charges arising from their alleged roles in steering excess casualty insurance business to favored insurance companies. The high profile trial was a byproduct of the New York Attorney General "contingent commission" investigation, in which their employer, Marsh, ultimately agreed to pay $850 million in restitution to insureds to

*Williams Mullen was counsel for Anthem Blue Cross in this matter.

resolve the matter. The executives, whose criminal trials lasted over ten months, were ultimately found not guilty of criminal fraud, but guilty of having violated the Donnelly Act, New York's antitrust law. While they potentially faced years in jail for having violated the Donnelly Act, they were ultimately sentenced to only 16 weekends in prison. (The executives have appealed their convictions to the New York Appellate Division.)

On Dec. 1, a second set of Marsh executives began trial, facing the same charges as the earlier Marsh executives, before the same judge, in a New York City courtroom. While prosecutors contended that these executives also actively participated in the unlawful conduct, defense counsel maintain that these defendants were "not going along with the [unlawful] program" that had led to the conviction of their colleagues back in February. The trial is likely to last for several months.

FTC Orders Insurers to Provide Information on the Use of Credit-Based Insurance Scoring in Homeowners Insurance

On Dec. 23, the Federal Trade Commission (FTC) announced that it had ordered nine insurers to provide information about the use and effect of credit-based insurance scores in homeowners insurance. The orders require the nine largest providers of homeowners insurance in the United States (State Farm, Allstate, Fire Insurance Exchange, Nationwide Mutual, Travelers, USAA, Liberty Mutual, Chubb and American Family) to respond to the FTC request for information.

While the insurance industry is not typically the focus of FTC studies (The FTC's authority to engage in such studies of the insurance industry is limited by the McCarran-Ferguson Act), this study was expressly authorized under Section 215 of the Fair and Accurate Credit Transactions Act (FACTA), 15 USC Section 1681. The insurers have until April 24, 2009 to respond to the request.

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

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