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CONNECTICUT AUTO BODY SHOPS AWARDED MILLIONS IN CONNECTICUT UNFAIR TRADE PRACTICES ACT CLASS ACTION AGAINST THE HARTFORD

by James M. Burns

In a closely-watched Connecticut state court action that has dragged on for almost ten years, on June 5, Waterbury Superior Court Judge Alfred Jennings ordered The Hartford to pay $20 million in punitive damages to a class of auto body shops, finding that the insurer had "knowingly and purposefully" violated the Connecticut Unfair Trade Practices Act. The punitive damages award is in addition to an award of $14.7 million in compensatory damages awarded to the plaintiffs during a jury trial in the matter conducted in 2009, and is reportedly the largest award ever under the Connecticut Unfair Trade Practices Act.

The case, *Artie's Auto Body v. The Hartford*, centered upon a claim that The Hartford had influenced insurance appraisers, who are required by statute to provide unbiased estimates of repair costs, to utilize below-market hourly labor rates in their calculations. The appraisers' conduct resulted in a reduction in the compensation paid to the plaintiffs when making repairs for the insurer's insureds. Plaintiffs alleged that the Hartford's conduct violated public policy and thus was unlawful under the Connecticut Unfair Trade Practices Act.

The court's punitive damages ruling comes approximately four years after a jury found that The Hartford's efforts to induce the appraisers to violate the "code of ethics" that Connecticut law imposes upon them constituted "unfair" conduct under the Connecticut Unfair Trade Practices Act. Notably, pretrial, the court had rejected The Hartford's argument that because the Connecticut Unfair Trade Practices Act is based upon Section 5 of the FTC Act, and the FTC has issued enforcement guidelines indicating that a Section 5 violation should require a showing of "substantial injury to consumers," this requirement should be implied into the Connecticut statute as well. (The FTC's modification to its Section 5 enforcement guidelines occurred almost twenty years after the Connecticut statute was enacted; no corresponding change to the Connecticut statute was subsequently made.)

The Hartford filed a series of post-trial motions and motions for reconsideration seeking to have the 2009 jury verdict vacated, ultimately without success. In May of this year, Judge Jennings issued his final ruling on the motions, setting the stage for the court's consideration of plaintiffs' request for punitive damages. Finding that The Hartford had exhibited a "heavy dose of control" over the erstwhile independent appraisers and that The Hartford's acts reflected a "knowing and

purposeful disregard" of the Connecticut statute prohibiting efforts to influence them, in a June 5 opinion Judge Jennings awarded plaintiffs $20 million in punitive damages. In deciding upon this amount, Judge Jennings explained that he was taking into account "the large net worth of The Hartford" and that the award needed to be large enough to have meaningful "deterrent motivation" going forward.

In response to the court's ruling, The Hartford immediately filed an appeal with the Connecticut appellate court. In its appeal, The Hartford is likely to renew the argument that, because the Connecticut Unfair Trade Practices Act is patterned on Section 5, it should be interpreted in a manner that is consistent with current Section 5 jurisprudence (a view that has been embraced by the courts in several other states in similar circumstances). Given the significance of the case, and the issue generally, it can be expected that the matter will ultimately be required to be heard by the Connecticut Supreme Court. Stay tuned.

CALIFORNIA SUPREME COURT TO DECIDE WHETHER INSURERS ARE SUBJECT TO THE CALIFORNIA UNFAIR COMPETITION LAW

by James M. Burns

In early May, the California Supreme Court heard oral argument in *Zhang v. Superior Court*. The case will likely resolve a significant issue for insurers doing business in California – are they potentially subject to a private action under the California Unfair Competition law (Cal. Bus. & Prof. Code §17200) for conduct that violates California's Unfair Insurance Practices Act (Cal. Ins. Code §790 *et seq.*).

In Zhang, the plaintiff sued her insurer, California Capital Insurance, over a dispute arising from a fire at her business, contending that the insurer's handling of her claim was inadequate. Among the various claims asserted by Zhang in her complaint, she maintained that by promising to make timely and proper payment on claimed losses, her insurer had engaged in "false and misleading advertising" in violation of the California Unfair Competition Law.

The insurer sought to have the UCL claim dismissed, arguing that the California Supreme Court's 1988 decision in *Moradi-Shalel v. Fireman's Fund* bars a private cause of action for any conduct that is covered under the California Unfair Insurance Practices Act, which itself provides no private right of action to insureds. In rejecting the insurer's argument, the California Fourth District Court of Appeals held that while the California Supreme Court's *Morahi-Shalel* decision bars private rights of action arising from claims handling conduct covered under the Unfair Insurance Practice Act, it does not bar a claim that is otherwise actionably under some other legal theory. Accordingly the court held that because false advertising is independently actionable under the UCL law, and because "the Legislature has clearly stated that the remedies and penalties under the UCL are cumulative to other remedies and penalties," Zhang's claim was not barred by *Moradi-Shalel*.

Having now heard oral argument in the matter, the California Supreme Court is required to issue its decision in *Zhang* no later than August 6. Should the Supreme Court affirm the lower court decision, insurers will now be exposed to a wide variety of potential new private actions arising from claims handling disputes, claims that for over twenty five years been presumed to be subject only to regulatory oversight. Accordingly, the court's ruling is clearly one to watch for all insurers operating in the state.

HEALTH INSURERS IN RHODE ISLAND AND WESTERN NEW YORK SUED BY PROVIDERS FOR ALLEGED ANTITRUST VIOLATIONS

by James M. Burns

In the last two months, two new antitrust actions have been filed against health insurers that raise interesting issues about an insurer's obligation to contract with a health care provider that it chooses not to deal with, and whether a refusal to do so can give rise to antitrust liability.

In the first case, filed in early June, Steward Health System, a Massachusetts-based health system, commenced an antitrust case against Blue Cross Blue Shield of Rhode Island in the federal district court in Rhode Island. Steward contends that BCBS-RI derailed Steward's proposed acquisition of Landmark Medical Center, a Woonsocket, Rhode Island hospital that was in financial distress, for anticompetitive reasons. Specifically, Steward alleges that it has a reputation for providing low-cost health care in Massachusetts, and does so by partnering with low cost health insurers who offer consumers lower cost, limited network insurance products. According to Steward, BCBS-RI, the dominant insurer in Rhode Island, feared that Steward's entry into the Rhode Island market would jeopardize BCBS-RI's market position, and therefore BCBS-RI refused to negotiate an in-network contract with Landmark at "reasonable" rates, knowing that the absence of such a contract would ensure that Steward could not go forward with its announced acquisition. Steward's complaint further alleges that BCBS-RI also terminated an existing network contract that it had with St. Anne's, a Steward hospital located near the Massachusetts/Rhode Island border that served both Rhode Island and Massachusetts patients, despite Steward's offer to continue the relationship on terms that were favorable to BCBS-RI, maintaining that this conduct was taken in furtherance of the alleged anticompetitive scheme to ensure that Steward would not make inroads into the Rhode Island market. As this summary of the allegations makes clear, the case raises interesting issues about how the antitrust laws treat an alleged monopolist's refusal to deal with third parties, and thus will be a closely watched case going forward.

The second case, filed in the Western District of New York on June 25, raises similar issues, albeit in a different context. In *Insource Development Services v. HealthNow*, the plaintiff, an urgent care center, alleges that health insurer HealthNow, the dominant insurer in the region, conspired with United Memorial Health Center to ensure the demise of Insource. (United operates the only competing urgent care centers in the area, and has network contract with HealthNow for both its hospital services and the urgent care centers it operates.) According to the plaintiff, after Insource had engaged in extensive discussions with HealthNow about a network contract, United

reached an anticompetitive agreement with HealthNow to terminate the negotiations and exclude Insource from the HealthNow network. Insource further alleges that United and HealthNow engaged in similar conduct against another potential rival urgent care center, Lakeland, which was successful in keeping Lakeland out of the market. The case, like the *Steward* case, will require the court to consider what obligations, if any, the antitrust laws impose upon a dominant insurer that chooses not to contract with a provider. Stay tuned.

ITALIAN AUTO INSURERS BEING INVESTIGATED FOR POTENTIAL ANTITRUST VIOLATIONS

by James M. Burns

On June 12, the Italian Antitrust Authority announced that it was commencing an investigation into possible price fixing conduct by a collection of Italian auto insurers. The insurers reportedly being investigated include Assicurazioni Generali, Fondiari SAI, Unipol, Allianz, Reale Mutua, Cattolica Assicurazioni, AXA and Groupama. Collectively, they provide auto insurance for approximately 80% of the Italian auto insurance market.

The investigation is expected to be completed by June 2014.