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Insurance Antitrust LEGALNEWS

STATE EFFORTS TO RESTRICT HEALTH INSURER USE OF "MOST FAVORED NATION" CLAUSES IN PROVIDER CONTRACTS CONTINUE TO MULTIPLY

by James M. Burns

Over the last several years, several states have considered legislation that prohibits health insurers from including "most favored nation" clauses – provisions that guarantee the insurer is receiving as favorable a reimbursement rate from the provider as it offers any other insurer – in their provider contracts. The frequency with which such legislation has been introduced is rather surprising, given that the underlying justification for banning such provisions remains quite controversial. While proponents of such legislation claim that MFN clauses are being used by insurers for anticompetitive purposes, and thus a ban is both justified and necessary, supporters claim that MFN clauses simply ensure that an insurer obtains the lowest possible price from a provider, reducing insurer costs and, ultimately, premiums for insureds.

Despite this lingering controversy about the competitive implications of MFN clauses, Connecticut passed such legislation in 2011, and Maine did so in 2012. More recently, Michigan joined the list of states restricting insurer use of MFN clauses in provider contracts when, on March 18, Michigan Governor Rick Snyder signed Senate Bill 62 into law. Even more recently, on April 29, the North Carolina Assembly passed similar legislation (H.B. 247), which, if signed by the Governor, will bring to approximately twenty the number of states with such prohibitions.

In Michigan, the new law, which is effective beginning on January 1, 2014, will (1) ban any clause that prohibits a provider from contracting with another party to provide health care services at a lower rate than the payment or reimbursement rate specified in the contract; (2) bar clauses that require the provider to accept a lower reimbursement rate if it subsequently enters into an agreement with another insurer at a lower rate; (3) prohibit provisions requiring the provider to renegotiate the terms of its agreement with the insurer if it subsequently enters into an agreement with a lower rate with another insurer; or (4) require the provider to disclose its rates with other insurers to the contracting insurer. Notably, these provisions are virtually identical to those in the legislation that was passed in Maine last year. The new Michigan law also restricts the use of MFN clauses this year, providing that they may not be utilized unless they have been reviewed and approved by the Michigan Insurance Commissioner.

In North Carolina, the MFN legislation is similar to the new law in Michigan, but contains some notable differences. The North Carolina

bill not only bans contract provisions that prohibit a provider from contracting with another health insurer at a rate that is lower than the payment specified in the contract, but it also prohibits clauses that seek to ensure that the contracting insurer's rate is "equal to" those of other insurers. This "equal to" language appears to be patterned after the Connecticut MFN law, and is significantly more restrictive than the language adopted in Michigan and Maine. If signed by the Governor, the new law will become effective beginning October 1, 2013. The legislation does provide, however, that the change in the law shall not be construed to affect any litigation pending at the time the new law becomes effective.

GEORGIA FEDERAL COURT SEEKS GUIDANCE FROM THE GEORGIA SUPREME COURT ON THE APPLICATION OF THE "FILED RATE DOCTRINE" TO RATE FILINGS MADE PURSUANT TO A "FILE AND USE" REGULATORY SCHEME

by James M. Burns

On March 27, in *Roberts v. Wells Fargo N.A.*, District Court Judge Avant Edenfield (Southern District of Georgia) certified a question of first impression for decision by the Georgia Supreme Court. The issue concerns the application of the "Filed Rate Doctrine" to insurance rates filed with the Georgia Insurance Commissioner pursuant to the state's "file and use" rate filing system. Courts in other states have split on the issue of whether the Filed Rate Doctrine applies to rates filed under a "file and use" system, with significant implications for any antitrust claims against insurers that challenge the rates charged to insureds.

The Filed Rate Doctrine issue in *Roberts* arises in the context of a plaintiff's class action challenge to a mortgage company's "force placing" flood insurance on the plaintiff's behalf when the plaintiff's own coverage lapsed. The plaintiff contends that the flood insurer chosen by the mortgage company charged rates that were well above "market" rates, and sought damages under a variety of legal theories.

In assessing plaintiff's claims, Judge Edenfield noted that all of them were potentially covered by the Filed Rate Doctrine, which generally bars the assertion of any claim that would require the court to second guess the reasonableness of a rate that has been approved by the State. However, as Judge Edenfield observed, the "Georgia courts have never said that when an insurance rate is filed with the Commissioner such a filing is . . . entitled to the deference accorded by the filed rate doctrine." In addition, the fact that the Georgia courts have held that the Filed Rate Doctrine applies to rates filed with the Georgia Public Utility Commission was not dispositive, because the Public Utility Commission "not only has the clear grant of authority to set utility rates, but also has full power and authority to make rules and regulations to effectuate . . . all laws conferring powers and duties on the commission."

Accordingly, after speculating that "perhaps the power to require insurers to file their rates with the Commissioner is sufficiently analogous to the Public Utility Commission's authority to determine what a reasonable utility rate is," Judge Edenfield instead decided to certify the issue for the Georgia Supreme Court to decide. The Georgia Supreme Court's decision will be significant not only for the *Roberts* case but also to subsequent cases, in Georgia and elsewhere, where a plaintiff brings antitrust claims challenging an insurer's rates that have been filed in a "file and use" state. Stay tuned.

AUTO INSURER TRADE GROUPS APPLAUD THE INTRODUCTION OF THE "PARTS ACT" AS A STEP TOWARDS GREATER COMPETITION IN THE COLLISION PARTS REPLACEMENT INDUSTRY AND REDUCED INSURER COSTS

by James M. Burns

In late April, Congressman Darrell Issa (R-CA) and Congresswoman Zoe Lofgren (D-CA) in the House of Representatives, and Senators Orrin Hatch (R-UT) and Sheldon Whitehouse (D-RI) in the Senate, announced that they were introducing the "Promoting Automotive Repair, Trade and Sales (PARTS) Act of 2013" (H.R. 1663). The legislation would amend patent law to reduce the length of a design patent issued on the external automotive parts used in collision repairs (bumpers, headlights, door panels, etc.), from 14 years to 30 months. As such, if enacted, parts manufacturers would be free to copy the design of such parts much sooner, without fear of a claim of patent infringement from the patent holder arising from the design of the part. For this reason, proponents of the legislation claim that it would increase competition in the repair parts market, potentially lowering insurer costs and insurance premiums for insureds.

Not surprisingly, several insurance trade groups voiced their strong support for the bill. The Property Casualty Insurers Association applauded the legislation as "good for consumers, businesses and the U.S. economy," claiming that "it will encourage greater competition among parts suppliers." Similarly, a spokesman for the National Association of Mutual Insurance Companies stated that the PARTS Act "provides for a reasonable amount of exclusivity for auto manufacturers while still ensuring reasonable pricing through competition over the long term," and stated that the Act "would simply ensure consumers will have more choices in the marketplace." NAMIC has also stated that aftermarket parts can cost up to 50% less than those made by original equipment manufacturers and that, consequently, the use of aftermarket parts (which currently only constitute a small portion of the parts market and would presumably increase if the bill was passed) already saves consumers over $1.5 billion per year.

Despite the bipartisan introduction of the legislation, its prospects for passage are uncertain at this time. While Senator Hatch announced that he was "hopeful we can get this legislation passed by both the House and Senate and signed into law soon," similar legislation was introduced in the 112th Congress (H.R. 3889) but failed to advance out of committee. Moreover, at a hearing on H.R. 3889 last year, several Representatives voiced concerns about whether the legislation would reduce manufacturer incentives to innovate and invest in research and development. Those opposing the legislation included Congresswoman Maxine Waters (D-CA), who stated that she just "did

not like the idea of investing in a patent, and then all of sudden it is not yours after a short period of time."

The new bill, H.R. 1663, has been sent to the House Judiciary Committee for further action.

CALIFORNIA COURT HOLDS THAT THE MCCARRAN FERGUSON ACT DOES NOT "REVERSE PREEMPT" PLAINTIFF'S RICO CLAIMS AGAINST INSURER

by James M. Burns

In early March, Central District of California District Court Judge Christina Snyder issued a significant McCarran-Ferguson Act decision in *Negrete v. Allianz Life Insurance*. Siding with the Third, Fourth and Tenth Circuits on an issue that has split the circuits, Judge Snyder held that the plaintiffs' class action RICO claims against Allianz were not barred by the McCarran-Ferguson Act's "reverse preemption" principles.

While the McCarran-Ferguson Act is perhaps best known for the limited antitrust exemption that it provides to insurers in Section 1013(b) of the Act, the exemption from federal law provided to insurers by McCarran extends beyond just antitrust claims. Section 1012(b) of the Act provides that "No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance . . . unless such [federal] Act specifically relates to the business of insurance." As the courts have explained, under this provision, federal law is preempted by state law (thus "reverse preemption') whenever (1) the federal law does not specifically relate to insurance; (2) the purpose of the state enactment is to regulate the business of insurance; and (3) the application of the federal law to the case might invalidate, impair or supersede the state law.

Numerous courts have considered whether the federal RICO statute is "reverse preempted" by McCarran, reaching conflicting conclusions. Because the RICO statute clearly does not "specifically relate to insurance," the answer to that question typically turns on a court's determination of whether permitting a RICO claim would "impair or invalidate" a state's regulatory scheme for insurers. As Judge Snyder observed, some courts have held that where a state's insurance laws do not expressly provide a private right of action for the conduct that forms the basis of the plaintiff's claim, applying federal law to such conduct would "impair" a state regulatory scheme and therefore the federal law is preempted. Other courts, however, have held that the absence of a private right of action under state insurance laws is not dispositive, and the proper test is to see whether any state law proscribes the conduct challenged in the complaint. If so, the federal statute is not preempted and can be applied to the challenged conduct (either in addition to or instead of the state law claims).

Declaring that the "better view," as adopted by the Third, Fourth and Tenth Circuits, is to find that the absence of a private right of action under state insurance law should not be dispositive of the issue, Judge Snyder examined whether the challenged conduct in *Negrete* – the making of allegedly fraudulent statements to prospective annuity purchasers by the defendant, Allianz – would violate any state law in each of the 17 states at issue in the case. Using Florida law as the model for her analysis, Judge Snyder held that under Florida law "plaintiffs would have numerous common law claims available to them" based upon Allianz's alleged conduct, and thus that it would not "impair" Florida's regulatory scheme over insurers to permit plaintiffs' RICO claims to proceed. After ultimately concluding that a similar analysis yielded the same result in each of the other states as well, Judge Snyder denied Allianz's motion for judgment based upon the McCarran-Ferguson Act, permitting the case to proceed into discovery.