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LEGISLATION PERMITTING HEALTHCARE PROVIDERS TO NEGOTIATE JOINTLY WITH HEALTH INSURERS INTRODUCED IN CONGRESS

by James M. Burns

Legislation was recently introduced by Representative John Conyers (D. Michigan) that would permit healthcare providers to negotiate jointly with health insurers concerning contract terms without running afoul of the antitrust laws. The bill, the "Quality Health Care Coalition Act of 2014," (H.R. 4077), has been referred to the House Judiciary's Subcommittee on Regulatory Reform, Commercial and Antitrust Law for further action.

In introducing the legislation, Representative Conyers stated that "over the last several decades, the health insurance market has become exceedingly concentrated, dominated by a few large insurers offering a limited number of health insurance plans. This has occurred in large part because of insurers' immunity from federal antitrust laws. In contrast, our nation's physicians and health care providers are afforded no comparable protections. This unbalanced playing field ultimately means consumers lose out with higher healthcare costs and poorer care. H.R. 4077 allows for physicians to negotiate with insurers on a level playing field, ensuring heightened quality standards for patient care."

Notably, Representative Conyers has introduced similar legislation in the past, without success. However, the legislation enjoys a degree of bipartisan support this Congress, with Republicans in both the House and Senate having also introduced legislation containing provisions similar to those in Representative Conyers's bill. Specifically, H.R. 2300, which was introduced by Representative Tom Price (R. Georgia) last June, would permit healthcare providers to negotiate jointly with insurers, as does S. 1851, which was introduced by Senator John McCain (R. Arizona) last December. However, both H.R. 2300 and S. 1851 are much larger bills that also seek to repeal the Affordable Care Act, and thus those bills are unlikely to garner Democrat support in the House or Senate.

Nonetheless, the fact that these Republican-sponsored bills contain language that is virtually identical to that in Representative Conyers's bill suggests that the prospects for H.R. 4077 are probably brighter this year than they have been at any time since 2000, when similar legislation was passed in the House but failed to get acted upon in the Senate. Will Representative Conyers's legislation finally "cross the finish line" this Congress? Time will tell; stay tuned.

AETNA TERMINATES ITS PROPOSED "INGENIX" CLASS ACTION SETTLEMENT

by James M. Burns

On March 13, Aetna announced that it would not finalize its proposed settlement of *In re Aetna UCR Litigation*, a class action proceeding in the District of New Jersey that focused on Aetna's use of a database of "usual and customary" reimbursement rates that plaintiffs alleged had improperly lowered member reimbursements for out of network claims. The private action followed an earlier New York Attorney General investigation into the manner in which Ingenix, at the time a data collection subsidiary of UnitedHealth, calculated usual and customary rates for several insurers, including Aetna. The New York Attorney General ultimately contended that the database had unfairly reduced reimbursements to insureds, leading to settlement with over a dozen health insurers that had used the database. UnitedHealth, Ingenix's parent company, ultimately paid $350 million to resolve the matter.

The *In re Aetna UCR Litigation* focused solely on Aetna's potential private-party liability for its use of the Ingenix database. After several years of litigation, Aetna announced that it was settling the case in December of 2012 for $120 million. However, only days before the final hearing at which the settlement would be approved, Aetna backed out, announcing that the number of plaintiffs "opting out" of the proposed settlement exceeded the cap set forth in the parties' settlement agreement. With the settlement terminated, the litigation now resumes in the New Jersey District Court before Judge Katherine S. Hayden.

INSURANCE AGENT'S ANTITRUST CLAIMS AGAINST FORMER EMPLOYER DISMISSED

by James M. Burns

On April 10, United States District Court Judge Michael Baylson (S.D.N.Y.) dismissed antitrust claims brought by a former AXA Equitable Life Insurance agent against AXA, holding that AXA's refusal to permit plaintiff to continue to sell AXA products through his new employer, an independent broker dealer, did not state a claim under the antitrust laws.

In the action, *Moody v. AXA Advisors*, the plaintiff claimed that AXA retaliated against him for resigning from AXA by seeking to harm plaintiff's business opportunities with his new employer, The Leaders Group, an independent securities broker dealer. In addition to alleging that AXA had defamed him and committed other business torts, Mooney claimed that AXA had refused to consent to his sale of AXA annuities at his new employer, which was required to obtain such consent from AXA pursuant to its contract with AXA, for anticompetitive purposes, thus violating federal and state antitrust laws.

AXA moved to have the antitrust claims dismissed, claiming that plaintiff's complaint failed to allege competitive harm to any relevant market. In response, plaintiff argued that by preventing AXA-affiliated agents from selling AXA-affiliated products if they choose to leave AXA, the AXA restriction "chills insurance agents from leaving AXA." However, the Court rejected plaintiff's argument, finding that the relevant market was not limited to just AXA agents, and that "the restriction encourages former AXA-affiliated agents to sell non-AXA products," which "increases competition, not diminishes it." Accordingly, the Court dismissed plaintiff's antitrust claims, with prejudice, while permitting plaintiff's breach of contract and tort claims to proceed into discovery.

INDIANA AUTO REPAIR SHOPS BRING ANTITRUST ACTION AGAINST AUTO INSURERS

by James M. Burns

An Indiana trade association of auto repair shops, together with a group of its members, have filed an antitrust action against over twenty five auto insurers in Indiana, alleging that the insurers' direct repair programs violate the antitrust laws by artificially depressing repair rates for the services plaintiffs offer and by "steering" insureds away from plaintiffs' businesses. The action, *Indiana AutoBody Association v. State Farm Mutual Automobile Insurance*, was commenced on April 2 in the United States District Court for the Southern District of Indiana. Notably, the case follows a similar action filed by a collection of Florida repair shops against many of the same insurers only two months ago, including State Farm, entitled *A & E Auto Body v. 21st Century Centennial Insurance*.

As in the Florida case, the Indiana plaintiffs allege that State Farm's vendor agreement requires shops that desire to participate in its direct repair program to accept the "market rate" for such services, and that State Farm calculates the "market rate" in a manner that keeps them artificially low and not representative of the "true" market rate. Plaintiffs also allege that the other insurer defendants have all advised plaintiffs that they will pay no more than State Farm pays for their services. As in the Florida case, plaintiffs allege that the defendants' conduct constitutes a conspiracy to restrain their repair rates, in violation of Section 1 of the Sherman Act, and that the alleged "steering" conduct constitutes an unlawful "group boycott" of plaintiffs' services. The defendant insurers have not yet responded to plaintiffs' complaint.

Meanwhile, in the Florida action, on March 26 the insurers filed a motion seeking to have plaintiffs' antitrust claims dismissed for failure to state a claim. They maintain that the Florida shops have not adequately alleged any anticompetitive agreement, and have at most alleged "consciously parallel" conduct by the defendants, insufficient to plead conspiracy under the Supreme Court's *Twombly* decision. Specifically, the insurers assert that "plaintiffs' core allegation is simply the self-defeating generalization that after State Farm, the purported market leader, 'unilaterally' adopted a price structure for labor rates, the other defendants asked plaintiffs to give them the same prices given to State Farm. Following a price leader, however, does not suffice to prove the existence of agreement." As to plaintiffs' boycott claim, the insurers maintain that "not only have [plaintiffs] failed properly to allege concerted action, but do not allege that any defendant cut

off business from any plaintiff or refused to reimburse insureds who patronized a plaintiff, much less that all defendants refused to deal with any particular body shop."

Plaintiffs filed a response to the defendants' motion on April 17, contending that defendants' motions fail because they do not acknowledge other allegations in the plaintiffs' complaint, and that in any event dismissal of their claims at this juncture, prior to discovery, would be premature. The Court has not yet ruled on the insurers' motion.

Turning back to Indiana, given the similarity between the two cases, the defendants in Indiana are likely to file a motion similar to the motion filed in Florida, seeking to have that case dismissed as well. As we move into the summer, both matters are now "cases to watch" for the auto insurance industry. Stay tuned.