SUTHERLAND

LEGAL ALERT

May 3, 2011

Tenth Circuit Rules That Title Insurers Did Not Violate Antitrust Laws Even If They Allegedly Conspired to Bribe the State Superintendent of Insurance

On April 26, 2011, the U.S. Court of Appeals for the Tenth Circuit affirmed, on the basis of the filed rate doctrine and other grounds, a lower court's decision to dismiss putative class claims asserted against Insurer Defendants[1] for allegedly conspiring with the New Mexico Insurance Superintendent to establish an unreasonably high premium rate. In New Mexico, all title insurers use the same policy form and charge the same premium rate, both of which are approved by the Insurance Superintendent. Plaintiffs claim title insurers bribed the Insurance Superintendent to approve an excessive premium rate. Because this case was decided on a motion to dismiss, the allegations in the complaint were presumed to be true, even though there was no known basis for such bribery allegations.

Plaintiffs in *Coll v. First American Title Insurance Co.*, 08-2174, 2011 U.S. App. LEXIS 8486 (10th Cir. Apr. 26, 2011), alleged that the New Mexico Title Insurance Act violated numerous state constitutional and statutory provisions precluding price fixing because it purportedly authorized defendants to engage in anticompetitive price fixing.[2] Plaintiffs alleged the following five causes of action against both Insurer Defendants and State Defendants: (1) violations of the New Mexico Antitrust Act; (2) violations of the New Mexico Unfair Insurance Practices Act; (3) violations of the New Mexico Unfair Practices Act; (4) violations of the New Mexico Price Discrimination Act; and (5) violations of the New Mexico state constitution. Plaintiffs sought both monetary damages and declaratory relief. On April 21, 2008, the United States District Court for the District of New Mexico granted Insurer Defendants' motion to dismiss for failure to state a claim upon which relief could be granted. However, the district court remanded Plaintiffs' claims against the State Defendants to the state court. Plaintiffs appealed the district court's dismissal of their claims against Insurer Defendants. In its April 26 Order, the Tenth Circuit affirmed the lower court's decision to dismiss all claims against Insurer Defendants. (Please click here for the opinion.)

The Tenth Circuit first addressed all of Plaintiffs' claims to the extent plaintiffs sought monetary damages. The court agreed with the district court that "New Mexico's 'filed rate' doctrine precluded Plaintiffs' claims against Insurer Defendants to the extent Plaintiffs sought money damages as relief for excessive title insurance premiums." 2011 U.S. App. LEXIS 8486 at *17. The court noted that the "filed rate" doctrine provides that "any filed rate—that is, one approved by the governing regulatory agency—is per se reasonable and unassailable in judicial proceedings brought by ratepayers." *Id.* (citations omitted). Regarding the damages claims based on allegations that Insurer Defendants conspired with and bribed the Superintendent of Insurance, the court noted, "[e]ven so, the 'filed rate' doctrine still barred Plaintiffs' claims against the Insurer Defendants for damages." *Id.* at *22-23. According to the court, "the underlying conduct does not control whether the filed rate doctrine applies." *Id.* at 23. The controlling question is whether the court's decision will impact the agency's rate determinations and, if the answer is yes, the

[1] Sutherland represented several Insurer Defendants in the district court and before the U.S. Court of Appeals for the Tenth Circuit.

[2] New Mexico's Title Insurance Act requires the state Superintendent of Insurance to establish premium rates that insurers can charge for title insurance. The Act also requires the Superintendent to establish the types of coverage that insurers can offer along with the forms that they can use. *See* N.M. Stat. § 59A-30 *et seq.*

claim is barred under the doctrine. *See id.* Because Plaintiffs' claims, if successful, would impact the insurance division's authority to establish title insurance premium rates, they were barred by the doctrine.

The court held that while determinative as to damages claims, the filed rate doctrine would not necessarily preclude Plaintiffs' statutory claims for declaratory or injunctive relief. The court thus proceeded to address these claims in light of other asserted defenses.

With respect to claims under the New Mexico Antitrust Act, Plaintiffs contended that Insurer Defendants violated the Antitrust Act by (1) complying with the Title Insurance Act and (2) conspiring to bribe the Superintendent of Insurance. The court first noted that the Antitrust Act specifically exempts from its coverage any action "clearly and expressly authorized by any state agency or regulatory body acting under a clearly articulated and affirmatively expressed state policy to displace competition with regulation." N.M. Stat. § 57-1-16. Based on § 57-1-16, the court concluded that the district court did not err in dismissing Plaintiffs' antitrust claims against Insurer Defendants for complying with the Title Insurance Act. 2011 U.S. App. LEXIS 8486 at *39.

Addressing Plaintiffs' antitrust claims based on the alleged conspiracy to bribe the Superintendent of Insurance, the court "predict[ed] that the New Mexico Supreme Court would adopt the *Noerr-Pennington* doctrine when applying the New Mexico Antitrust Act" and concluded that the doctrine would preclude Plaintiffs' claims. The court reasoned that the New Mexico antitrust law is patterned after its federal antitrust counterpart and that New Mexico courts look to federal case law in the absence of state court decisions directly on point, which was the case here. *See id.* at *42.* The court cited to the Supreme Court's holding that the federal Sherman Act's proscription of anti-competitive conduct did not apply to "private citizens' conduct undertaken to influence government action, even if that conduct involved conspiracy or bribery." *Id.* at *51 (*citing City of Columbia v. Omni Outdoor Adver., Inc.*, 499 U.S. 365 (1991)).[3]

With respect to Plaintiffs' claims against Insurer Defendants based on the Unfair Practices Act (UPA), the court found that the UPA does not "apply to actions or transactions expressly permitted under laws administered by a regulatory body of New Mexico . . . ." (N.M. Stat. § 57-12-7) and held that the New Mexico Title Insurance Act "expressly permitted" the conduct at issue. Regarding Plaintiffs' claims against Insurer Defendants under the Unfair Insurance Practices Act (UIPA), the court noted that the UIPA "applies to title insurance only to the extent it does not conflict with the New Mexico Title Insurance [Law]." *Id.* *62 (*citing* N.M. Stat. § 59A-30-14(M)). Finally, for claims based on the Price Discrimination Act (PDA), the court observed that Plaintiffs mentioned the PDA claims "only in the prayers for relief" and not in the cause of action. Therefore, the court concluded that the district court was proper in dismissing Plaintiffs' UPA, UIPA, and PDA based claims against Insurer Defendants.

---

[3] The *Noerr-Pennington* doctrine is a federal antitrust doctrine that exempts from antitrust liability "the conduct of private individuals in seeking anticompetitive action from the government." *City of Columbia*, 499 U.S. at 379-80. The plaintiffs here did not bring any Sherman Act claims. Had they done so, the Defendants would no doubt have asserted, in addition to defenses based on the filed rate and *Noerr Pennington* doctrines, additional defenses based on: (i) the state action exemption, which is generally applicable to conduct that is actively supervised by a state agency acting pursuant to a clearly articulated policy to displace competition (*see California Retail Liquor Dealers Association v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980)), and (ii) the McCarran-Ferguson Act exemption, which generally exempts the business of insurance from the federal antitrust laws to the extent that such business is regulated by state law. 15 U.S.C. § 1012(b).

This decision provides strong support for upholding rate approval decisions of insurance departments in the face of allegations that the rate decisions were improperly obtained.

■ ■ ■

If you have any questions about this Legal Alert, please feel free to contact any of the attorneys listed below or the Sutherland attorney with whom you regularly work.

Authors

Phillip E. Stano	202.383.0261	phillip.stano@sutherland.com
Steuart H. Thomsen	202.383.0166	steuart.thomsen@sutherland.com
Srikanth Vadakapurapu	202.383.0828	srikanth.vadakapurapu@sutherland.com

Related Attorneys

Thomas R. Bundy, III	202.383.0716	thomas.bundy@sutherland.com
Nicholas T. Christakos	202.383.0184	nicholas.christakos@sutherland.com
Thomas W. Curvin	404.853.8314	tom.curvin@sutherland.com
Neil S. Lang	202.383.0277	neil.lang@sutherland.com
David P. Langlois	212.389.5007	david.langlois@sutherland.com
Allegra J. Lawrence-Hardy	404.853.8497	allegra.lawrence-hardy@sutherland.com
Joshua A. Mayes	404.853.8055	joshua.mayes@sutherland.com
James R. McGibbon	404.853.8122	jim.mcgibbon@sutherland.com
Kent C. Sullivan	713.470.6122	kent.sullivan@sutherland.com
Gail L. Westover	202.383.0353	gail.westover@sutherland.com
Lewis S. Wiener	202.383.0140	lewis.wiener@sutherland.com