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Contents

Preface

Global Competition Review (GCR) is a leading source of news and insight on competition law, economics, policy and practice, allowing subscribers to stay apprised of the most important developments around the world.

Alongside the daily content sourced by our global team of reporters, GCR also offers deep analysis of longer-term trends provided by leading practitioners from around the world. Within that broad stable, we are delighted to include the third iteration of the *US Courts Annual Review*, which takes a very deep dive into the trends, decisions and implications of antitrust litigation in the world's most significant jurisdiction for such cases.

The content is divided by court or circuit around the United States, allowing our valued contributors both to analyse important local decisions and to draw together national trends that point to a direction of travel in antitrust litigation. Both oft-discussed developments and infrequently noted decisions are thus brought to the surface, allowing readers to gain a comprehensive understanding of how judges from around the country are interpreting antitrust law, and its evolution. New for this digital-only third edition, the Review also includes exclusive data from Docket Navigator for the first time. In-depth tables drill down into the raw data – from average case duration to most popular courts – to give readers primary insights from the front line.

In producing this analysis, GCR has been able to work with some of the most prominent antitrust litigators in the United States, whose knowledge and experience have been essential in drawing together these developments. That team has been led and compiled by Rosanna McCalips and Peter Julian of Jones Day, whose insight, commitment and know-how have been fundamental to fostering the analysis produced here.

We thank all the contributors, and the editors in particular, for their time and effort in compiling this report. Thanks also go to Paula W Render, formerly of Jones Day, as co-editor of the inaugural edition.

Although every effort has been made to ensure that all the matters of concern to readers are covered, competition law is a complex and fast-changing field of practice, and therefore specific legal advice should always be sought. Subscribers to GCR will receive regular updates on any changes to relevant laws during the coming year.

If you have a suggestion for a topic to cover or would like to find out how to contribute, please contact insight@globalcompetitionreview.com.

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Part 2

Court Decisions

Third Circuit: Non-Pharmaceutical Cases

Barbara T Sicalides, Daniel N Anziska and Daniel J Boland
Troutman Pepper

LifeWatch Services, Inc v Highmark, Inc

In this case,[1] the US Court of Appeals for the Third Circuit addressed one of the exemptions to the antitrust laws. Specifically, the court examined the scope of the McCarran-Ferguson Act,[2] which established a limited exemption for insurance companies from federal antitrust laws.

LifeWatch sells telemetry heart monitors used primarily to detect arrhythmias. Defendant Blue Cross Blue Shield Association licenses the Blue Cross/Blue Shield trade name to approximately 36 separate, locally operated health insurers called Blue Plans. LifeWatch alleges that the Association and Blue Plans have a horizontal agreement not to cover telemetry and that this agreement violates the Sherman Act.[3] Based on the McCarran-Ferguson exemption, the Third Circuit affirmed the district court's dismissal of LifeWatch's complaint.

Prior to the passage of the McCarran-Ferguson Act, federal regulations, including federal antitrust laws, generally were seen as inapplicable to insurance companies because the business of insurance did not constitute interstate commerce.[4] In *United States v South-Eastern Underwriters Association*,[5] the court held that a fire insurance

1 *LifeWatch Services, Inc. v. Highmark, Inc.* 2021 WL 5492811, 2021-2 Trade Cases ¶ 81,883 (3d Cir. Nov. 17, 2021).
2 15 U.S.C. §§ 1011 to 1013 (the Act).
3 2021 WL 5492811, at *1.
4 See *Paul v. Virginia*, 75 U.S. 168 (1869) (holding that issuance of insurance policy did not constitute interstate commerce although insurer and insured were domiciled in different states); see also *Commander Leasing Co. v. Transamerica Title Ins. Co.*, 477 F.2d 77, 82 (10th Cir. 1973) (observing that, in the wake of *Paul*, it was 'thereafter generally assumed that the Sherman Act and other federal antitrust laws were inapplicable to the insurance business').
5 322 U.S. 533 (1944).

company that conducted a substantial part of its business across state lines was indeed subject to the Sherman Act.[6] That decision prompted concern in Congress that the traditional regulation of insurance companies by the states was being eroded, and that application of the antitrust laws to insurance would hinder insurance companies from conducting joint risk assessments, under state regulation.[7] As a result of these concerns, Congress enacted the McCarran-Ferguson Act.

The key provision of the Act is Section 1012:

> *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, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance: Provided, That after June 30, 1948, [the Sherman Act, the Clayton Act, and the Federal Trade Commission Act] shall be applicable to the business of insurance to the extent that such business is not regulated by State law.*[8]

Despite this exemption, Section 1013 states that '[n]othing contained in this Act shall render the said Sherman Act inapplicable to any agreement to boycott, coerce, or intimidate, or act of boycott, coercion, or intimidation'.[9]

It should be noted, at the outset, that the exemption contained in the McCarran-Ferguson Act is very limited in scope. It does not apply merely because a defendant is an insurance company; rather, it applies to the business of insurance – a concept that may not necessarily encompass actions that are challenged in an antitrust claim. Although the exemption is statutorily derived, it is to be construed narrowly.[10]

6 *South-Eastern Underwriters*, 322 U.S. at 552–61.
7 See *Commander Leasing*, 477 F.2d at 82.
8 *Id.* § 1012(b).
9 *Id.* § 1013(c).
10 *Group Life & Health Ins. Co. v. Royal Drug Co.*, 440 U.S. 205, 231–34 (1979); see also *Union Labor Life Ins. Co. v. Pireno*, 458 U.S. 119, 126 (1982).

In sum, the McCarran-Ferguson exemption has three requirements. First, the activity in question must pertain to the 'business of insurance'. Second, the business of insurance must be regulated by state law. Finally, the challenged activity must not be an act of boycott, coercion, or intimidation, nor constitute an agreement to boycott, coerce, or intimidate.[11]

In *LifeWatch*, only the first and second requirements of the McCarran-Ferguson exemption were at issue. To determine whether an insurance practice constitutes the business of insurance under the first prong, a court must examine three factors: (1) 'whether the practice has the effect of transferring or spreading a policyholder's risk'; (2) 'whether the practice is an integral part of the policy relationship between the insurer and the insured'; and (3) 'whether the practice is limited to entities within the insurance industry'.[12]

LifeWatch alleged that a medical policy panel created a model medical policy containing directions for the Blue Plans on which claims to cover. The model medical policy is voted on by each Blue Plan. The Association and Blue Plans then 'agree to require substantial conformity' by Blue Plans with the model medical policy. LifeWatch asserted that the Blue Plans had 'repeatedly voted on the model medical policy that requires blanket denial of telemetry coverage', and that the enforcement of this decision does not constitute the business of insurance.

The Third Circuit rejected LifeWatch's argument and found that the Association and Blue Plans' medical policy qualified, under the three-part test, as the 'business of insurance'.[13] The court found: 'The arrangement 'keeps the risk of the cost for telemetry services with the insured when it would otherwise become the risk of an insurer as "medically necessary," and thus transfers the policyholder's risk. It is precisely the intra-industry cooperation in underwriting Congress contemplated.'[14] The court further noted that the defendants were entities within the insurance industry and that the arrangement between the Association and Blue Plans is an integral part of the policy relationship between the Blue Plans and their insureds.

11 See *Travelers Ins. Co. v. Blue Cross of Western Pennsylvania*, 481 F.2d 80, 82 (3d Cir. 1973) (outlining same three elements); see also *Ocean State Physicians Health Plan, Inc. v. Blue Cross & Blue Shield*, 883 F.2d 1101, 1107 (1st Cir. 1989) (same).

12 2021 WL 5492811, at *1 (quoting *Union Lab. Life Ins. Co. v. Pireno*, 458 U.S. 119, 124 (1982)).

13 *Id.* at *2–3.

14 *Id.* at *2.

Next, the Third Circuit considered the exemption's second requirement that the business of insurance be regulated by state law. The court rejected LifeWatch's argument that the defendants' conduct was not covered by the McCarran-Ferguson Act because 'the business of insurance is exempt only "to the extent that" it is controlled, by rule or restriction, by state law'.[15] The court concluded that the Association and Blue Plans' arrangement was regulated by the states within the meaning of the Act because each state in which it is challenged regulates its health insurance industry by permitting and proscribing certain conduct. Accordingly, the challenged arrangement is accorded McCarran-Ferguson immunity from federal antitrust liability.[16]

Federal Trade Commission v Hackensack Meridian Health, Inc

In 2021, the US Federal District Court for the District of New Jersey found that a proposed hospital merger violated Section 7 of the Clayton Act. Although the district court's opinion was not for publication, the Third Circuit affirmed in early 2022.[17]

On 15 October 2019, Hackensack Meridian Health, Inc (HMH), the largest healthcare system in New Jersey, announced plans to merge with Englewood Healthcare. HMH owns two of six hospitals in Bergen County. Englewood is the third-largest provider of inpatient general acute care services in Bergen County, and owns one hospital in the area. After a lengthy investigation, in December 2020, the Federal Trade Commission (FTC) filed an administrative complaint challenging the merger, and a lawsuit in New Jersey district court seeking a preliminary injunction against the merger pending the outcome of the administrative complaint. The FTC alleged that the proposed acquisition would reduce competition for general acute-care services in Bergen County and would enable HMH to increase prices and reduce the quality of care available to patients. Following a seven-day evidentiary hearing, in August 2021, the New Jersey district court preliminarily enjoined the merger.[18]

At the preliminary injunction stage, the FTC 'need only show that there is a reasonable probability that the challenged transaction will impair competition'.[19] The court summarized the burden-shifting analysis that applied in Clayton Act Section 7 cases. First, the government must establish a prima facie case of (1) a proper relevant

15 *Id.* at *3–4.

16 *Id.* at *4.

17 *Federal Trade Commission v. Hackensack Meridian Health, Inc.*, 2021 WL 4145062, 2021-2 Trade Cases P 81,763, aff'd.

18 *Id.*

19 Id. at *14 (quoting *FTC v. Sysco Corp.*, 113 F.Supp. 3d 1, 22 (D.D.C. 2015)).

market, and (2) the effect of the merger in that market that is likely to be anticompetitive.[20] Establishment of a prima facie case creates a presumption in favor of preliminary relief. To rebut such a presumption, the merging parties must demonstrate that either the transaction 'would not have anticompetitive effects or that the extraordinary effects of the merger will be offset by extraordinary efficiencies resulting from the merger'.[21] If the defendants rebut the prima facie case, the burden shifts back to the FTC.

The FTC defined the relevant geographic market as no broader than commercially insured patients in Bergen County.[22] Post-transaction, HMH would be one of only three general acute care providers in Bergen County. The complaint alleged that the transaction would increase concentration in the relevant market to a presumptively unlawful level. Specifically, post-closing, the Herfindahl-Hirschman Index would increase by 841 points to 2,835, well beyond the post-transaction market concentration level of 2,500 points and an increase of 200 points, which is the threshold for presumptive illegality under the 2010 Horizontal Merger Guidelines.[23] The defendants argued that small shifts to the geographic market eliminated the presumption of illegality, but the district court was not persuaded. The court pointed to, among other things, internal ordinary course business documents of the insurers and the defendants as evidence of the nature of the competition between them, and concluded ultimately that the FTC had established its prima facie case.

Next, the district court examined the evidence offered by the defendants' to rebut the high market share and other evidence of purported anticompetitive effects. The defendants focused on procompetitive effects that they contended would flow from the merger. Specifically, the defendants claimed that the transaction would result in upgrades, increased capacity, and enhanced tertiary and quaternary services at certain medical facilities and service optimization among the entities.[24] The court either did not credit the defendants' claimed efficiencies or found they did not rise to the level of 'an adequate procompetitive benefit'. Rather, the court concluded that 'the benefits do not amount to extraordinary efficiencies that offset the likely anticompetitive effect

20 *Id.* at *15 (citing *FTC v. Penn State Hershey Med. Ctr.* 838 F.3d 327, 337–38 (3d Cir. 2016)).
21 *Id.* at *14 (quoting *Penn State Hershey Med. Ctr.* 838 F.3d 327, 337 (3d Cir. 2016)).
22 *Id.* at *16.
23 *Id.* at *20.
24 *Id.* at *25.

of the merger'.[25] Having failed to rebut the FTC's prima facie case, the district court concluded that the FTC established a likelihood of success in demonstrating that the merger violated Section 7 of the Clayton Act.[26]

On appeal, the merging medical providers argued that Bergen County is not an appropriate relevant geographic market in view of evidence that commercial health plans and employers do not treat Bergen County as a distinct market, and did not view Hackensack University Medical Center and Englewood as substitutable facilities for networks or plans. Additionally, they asserted that the FTC had not demonstrated 'price discrimination' to customers, as required to establish anticompetitive harm under the Horizontal Merger Guidelines.[27] According to the defendants, managed care plans negotiate their contracts on a broader regional basis, thereby disallowing the prospect of discriminatorily high rates for Bergen County subscribers. Because the FTC could not establish price discrimination as the result of the transaction, the defendants argued, its prima facie case of anticompetitive effects failed. Further, the medical provider defendants claimed that the lower court committed an error by using patients' willingness to pay in the economic analysis, which allegedly has no bearing on insurers' willingness to pay and, therefore, was not the correct metric to use.[28]

The Third Circuit Court of Appeals heard argument in late 2021, rejected the medical providers' arguments, and affirmed the district court's decision in March 2022.

25 *Id.* at *30.

26 *Id.*

27 *FTC v. Hackensack Meridian Health, Inc.*, 30 F.4th 160, 167-71 (3d Cir. 2022).

28 *Id.* at 171–75.

BARBARA T SICALIDES
Troutman Pepper

Barbara T Sicalides focuses her practice on antitrust litigation and counseling and class action cases. Her antitrust litigation experience includes a wide range of industries and antitrust claims under the Sherman Act, Robinson-Patman Act, Clayton Act and numerous state statutory and common laws. She has extensive experience in responding to government investigations of alleged cartel activity, including price-fixing and market allocation. For example, she represented companies targeted by the US Department of Justice in investigations of the resistors and capacitors industries, as well as other non-public criminal and civil proceedings. Her practice also involves counseling international and domestic companies to minimize or avoid antitrust liability and assisting them to implement effective compliance programs. Barbara is a thought leader in the antitrust space and is regularly sought out by reporters for her insights on antitrust matters. She speaks regularly, and has authored numerous articles and book chapters, on competition-related issues. She has been recognized in *Who's Who Legal: Competition* since 2017. She is highly ranked for antitrust law by *Chambers USA: America's Leading Lawyers for Business*.

DANIEL N ANZISKA

Troutman Pepper

Dan Anziska focuses his practice on antitrust and related regulatory issues. Dan has litigated a wide range of antitrust lawsuits, on both the plaintiff and defense side, in the construction, modeling, sports, publishing, energy, energy storage, security and healthcare industries. He is also a leading practitioner on antitrust and intellectual property convergence issues and litigates cutting-edge antitrust and patent misuse claims in this space. His practice also focuses on counseling parties on antitrust issues with respect to mergers and acquisitions, including assessing potential competitive impacts of transactions, drafting relevant deal provisions and managing the substantive antitrust approval process with US and foreign competition agencies. To that end, Dan routinely advises clients on competition and national security issues concerning China and Taiwan businesses, including coordination with China's Ministry of Commerce. Dan similarly counsels clients on distribution, joint venture, licensing and trade association issues. Dan is on the Executive Committee of the New York State Bar Association's Antitrust Section and routinely speaks on panels addressing competition issues.

DANIEL J BOLAND

Troutman Pepper

Dan Boland represents clients in complex commercial litigation with a particular focus on antitrust and competition law, accounting related litigation, securities litigation, and director and officer liability. Drawing on his experience as a certified public accountant (inactive status) and former auditor with Ernst & Young LLP, Dan provides significant value to clients dealing with matters involving complex accounting, financial, and economic issues. He has considerable experience litigating antitrust matters in the pharmaceutical and manufacturing industries and regularly advises clients on antitrust compliance.

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875 Third Avenue
New York, NY 10022
United States
Tel: +1 212 704 6000

3000 Two Logan Square
18th and Arch Streets
Philadelphia, PA 19103
United States
Tel: +1 215 981 4000

401 9th Street, NW
Suite 1000
Washington, DC 20004
United States
Tel: +1 202 274 2950

www.troutman.com

Daniel N Anziska
daniel.anziska@troutman.com

Daniel J Boland
daniel.boland@troutman.com

Barbara T Sicalides
barbara.sicalides@troutman.com

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