

PUBLICATION

5th Circuit Affirms the Dismissal of Federal Antitrust Claims Against Insurance Broker on McCarran-Ferguson Act Grounds While Permitting the Plaintiff's State Antitrust Claims to Proceed

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On September 23, the Fifth Circuit Court of Appeals issued its opinion in *Sanger Insurance Agency v. HUB International*, affirming the dismissal of plaintiff's federal antitrust claims based upon the McCarran-Ferguson Act (15 USC 1011 et seq.) but reversing the dismissal of plaintiff's state antitrust claims. The decision serves as a good reminder that the McCarran-Ferguson Act's antitrust exemption applies only to federal antitrust claims and, while some states have state law equivalents to the McCarran-Ferguson Act, Texas is not among them.

In the action, Sanger, an upstart insurance broker angling to broker insurance policies in the veterinary insurance market in North Texas, alleged that HUB International had impeded Sanger's ability to enter the market by inking exclusive brokerage relationships with several large insurers to keep Sanger out of the market. HUB successfully moved to have Sanger's federal and state antitrust claims dismissed at the trial court level, as the court ruled that Sanger lacked standing to assert its claims and that the alleged conduct was also within the scope of the McCarran-Ferguson Act's antitrust exemption.

On appeal, Sanger challenged both rulings, and achieved a split decision from the appellate court. First, as to standing, in a 2-1 decision (Judge Edith Jones dissenting), the court ruled that Sanger had antitrust standing to assert its claims. The court noted that, needing to demonstrate that it had taken substantial steps towards competing in the veterinarian insurance brokerage market, Sanger had "begun selling Continental professional liability policies to approximately ten equine and large-animal veterinarians before HUB purportedly forced Continental to stop issuing the policies." This effort, ultimately derailed by HUB's conduct – if proved – was sufficient for standing purposes.

Turning to the lower court's McCarran ruling, the appellate court began its analysis by noting that the McCarran-Ferguson Act exempts from antitrust scrutiny conduct that is (1) the business of insurance, (2) regulated by state law, and (3) does not constitute an act of boycott, coercion or intimidation. *Union Labor Life Insurance v. Pireno*, 458 US 119, 124 (1982). On appeal, Sanger argued that the alleged conduct did not constitute "the business of insurance," relying upon the Third Circuit's 2010 decision in *In re Insurance Brokerage Antitrust Litigation*. There, the court held that the marketing of insurance products is not necessarily within the scope of McCarran's exemption. The Fifth Circuit, however, declined to follow *In re Insurance Brokerage Antitrust Litigation*, noting that "most courts have held that routine dealings between insurers and brokers or agents do constitute the business of insurance, even if that relationship may not be distinctively different from ordinary relationships with dealers marketing a product or service." Accordingly, after finding that Sanger's federal antitrust claims were also subject to state regulation, and did not constitute an act of boycott, coercion or intimidation, the court affirmed the dismissal of Sanger's federal antitrust claims.

As the court then noted, however, the McCarran-Ferguson Act exemption applies only to federal, and not state antitrust claims. And, while many states also exempt conduct that is exempt under McCarran from their antitrust laws (either by statute or case law interpretations), not all states do. As the court observed, Texas is one such state. Indeed, the Texas legislature had specifically made clear that no exemption exists for "the

business of insurance" under Texas law. See *Tex. Bus. & Com. Code* 15.05(g) ("[T]he McCarran-Ferguson Act does not serve to exempt activities under this Act."). For this reason, Sanger's state antitrust claims were required to be reinstated, and the court remanded the case to the lower court for further proceedings.