

**When the “Business of Insurance” and the State Action Doctrine
Burden the Public Adjuster:
Stripping Away Antitrust Immunity in the Insurance Field**

by Julie Galbo

Introduction

Public adjusters are accustomed to facing down large corporate insurance bureaucracies on behalf of policyholders. A recent development, however, has served as an excruciating reminder of the insurance industry's economic dominance and its ability to influence not only the marketplace for insurance, but the commercial transactions encircling it: the proliferation of endorsements for loss preparation services. These anticompetitive commercial endorsements agree to pay policyholders for loss adjustment expenses as long as the services are not performed by a public adjuster:

This policy is extended to include expenses incurred by the Insured . . . for preparing and certifying details of a claim resulting from a loss which would be payable under this policy. However, this Company shall not be liable under this clause for expenses incurred by the Insured in utilizing the services of a public adjuster.

Thus, while accountants, brokers, agents and restoration contractors may get their fees paid when insureds opt for this additional coverage, public adjusters may not. Such endorsements will necessarily place public adjusters at a material disadvantage in the commercial loss adjustment market by financially inducing these insureds to employ other professionals over public adjusters to perform identical work. In states that mandate licensing for public adjusters, such endorsements provide an additional perverse incentive for insureds to obtain loss adjustments services from anyone *but* the individuals properly licensed to perform this task. Indeed, certain individuals have relinquished their public adjusting licenses in order to qualify for reimbursement under these endorsements.¹

As these endorsements covertly influence the loss adjustment market by providing a financial incentive for insureds not to hire public adjusters, members of the public adjusting profession naturally question whether these policy provisions violate federal antitrust laws. The

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Sherman Act provides that “[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States . . . is declared to be illegal.”² The actions of insurers contain the raw materials of an antitrust claim alleging a concerted refusal to deal; indeed, certain courts have found such arrangements a per se violation of the federal antitrust laws.³ Public adjusters, however, may never have the opportunity to advance an antitrust claim should insurers successfully invoke the McCarran-Ferguson antitrust exemption as well as the state action doctrine as shields to safeguard these anticompetitive policy terms from federal scrutiny.

I – The Birth of the McCarran-Ferguson Antitrust Exemption

The McCarran-Ferguson Act emerged out of concern for state sovereignty. State regulation of insurance in the United States became entrenched after the Supreme Court held in *Paul v. Virginia* that insurance transactions were not interstate commerce and therefore subject to federal regulation under the Commerce Clause.⁴ When the Court’s subsequent reversal of this

² 15 U.S.C. § 1 (1970).

³ See *Northwest Wholesale Stationers, Inc. v. Pacific Stationery and Printing Co.*, 472 U.S. 284, 290 (1985) (per se rule appropriate in group boycott cases that have “generally involved joint efforts by a firm or firms to disadvantage competitors by ‘either directly denying or persuading or coercing suppliers or customers to deny relationships the competitors need in the competitive struggle’); *Harlem River Consumers Co-op, Inc. v. Associated Grocers of Harlem, Inc.*, 408 F.Supp. 1251, 1284 (D.C.N.Y. 1976) (“In group boycott cases ‘[t]he touchstone of per se illegality has been the purpose and effect of the arrangement in question. Where exclusionary or coercive conduct has been present, the arrangements have been viewed as ‘naked restraints of trade’, and have fallen victim to the per se rule.”). See also *Consolidated Farmers Mut. Ins. Co. v. Anchor Sav. Ass’n.*, 480 F.Supp. 640, 652 (D.C. Kan. 1979) (asserting that “‘influenc[ing] the trade practices’ of boycott victims” constitutes one of three group boycott categories of potential per se Sherman Act violations). If an agreement is deemed a per se violation, no evidence of antitrust injury need be furnished. *Radiant Burners, Inc. v. Peoples Gas Light & Coke Co.*, 364 U.S. 656 (1961). More often, courts examine agreements under the rule of reason standard, which necessitates an agreement or conspiracy resulting in an unreasonable restraint of trade, causing antitrust injury. *Rickards v. Canine Eye Registration Foundation*, 783 F.2d 1329, 1332 (9th Cir. 1986); *Standard Oil Co. v. United States*, 221 U.S. 1 (1911). In this case, the potential agreement would consist of insurers adopting similarly exclusionary loss adjustment endorsements in their respective policies; the competitive disadvantage to public adjusters would constitute an unreasonable restraint on trade and the threat to public adjusters’ livelihoods would give rise to injury.

⁴ 75 U.S. 168 (1869).

long-standing precedent⁵ left the insurance industry exposed to federal antitrust law, Congress responded swiftly to widespread concern that state insurance regulatory regimes would be federally preempted by passing the McCarran-Ferguson Act.⁶ The Act exempts “the business of insurance” from antitrust enforcement as long as it is state-regulated⁷ and does not constitute a boycott under the Sherman Act.⁸ In enacting McCarran-Ferguson, Congress desired not only to preserve the traditional role of the states in regulating insurance transactions but also to protect cooperative ratemaking efforts from antitrust scrutiny.⁹

II – The “Business of Insurance” Requirement

While the McCarran-Ferguson Act exempted “the business of insurance” from federal antitrust regulation, subsequent caselaw has shaped and refined the meaning of that phrase. To begin with, the Supreme Court has established that what constitutes the business of insurance is a

⁵ See *United States v. South-Eastern Underwriters Ass’n*, 322 U.S. 533 (1944).

⁶ 15 U.S.C. §§ 1011-13.

⁷ 15 U.S.C. § 1012(b) (1947) (“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 Act specifically relates to the business of insurance.”).

⁸ 15 U.S.C. § 1013(b) (1947) (“Nothing contained in this chapter shall render the said Sherman Act inapplicable to any agreement to boycott, coerce, or intimidate, or act of boycott, coercion, or intimidation.”). See also *St. Paul Fire & Marine Ins. Co. v. Barry*, 438 U.S. 531 (1978). In addition to alleging a conspiracy in restraint of trade under § 1 of the Sherman Act, public adjusters could also allege that the loss adjustment endorsements constitute a boycott within the meaning of § 3(b) of the McCarran-Ferguson Act, which would prevent insurers from claiming antitrust immunity for their practices as the “business of insurance.” A § 3(b) boycott action, however, will involve additional difficulties absent from a typical antitrust claim. In *Hartford Fire Ins. Co. v. California*, the Supreme Court distinguished between a conditional boycott – which the Court defined as a refusal to engage in other transactions unrelated to the targeted objective – and a concerted agreement to seek more favorable contractual terms in a specific, targeted transaction. 509 U.S. 764, 801-2 (1993). The Court held that only the former constitutes a boycott within the meaning of § 3(b), although the latter may violate the Sherman Act “outside the exempted insurance field.” *Id.* at 802-3. Thus, it was not a boycott for reinsurers to withhold reinsurance coverage until the insurers made the requested changes to policy forms; however, claims that reinsurers denied coverage for both desirable and undesirable forms until terms were met properly alleged a § 3(b) boycott. *Id.* at 806, 810. Applying this reasoning to loss adjustment endorsements, courts may characterize the refusal to include public adjusters in these policy provisions as merely exacting favorable terms in a particular insurance transaction.

⁹ *Group Life & Health Ins. Co. v. Royal Drug Co.*, 440 U.S. 205, 217-21 (1979).

matter of federal law,¹⁰ and determined that exemptions from the antitrust laws must be “narrowly construed.”¹¹ The Court also coined the maxim that antitrust exemption applies to the “business of insurance,” not the “business of *insurers*” to emphasize that the Act does not afford the States regulatory authority over the activities of insurance *companies*, but instead refers to state laws regulating the *business* of insurance.¹² In *Securities & Exchange Commission v. Variable Annuity Life Insurance Co.*, the Court further defined “the business of insurance” to exclude variable annuity contracts offered by life insurance companies, which were therefore subject to federal securities regulation.¹³ Although state law regulated the annuities as insurance and the contracts involved actuarial projections of mortality, the Court reasoned that “the concept of ‘insurance’ involves some investment risk-taking on the part of the company,” while the variable annuities guaranteed the annuitant no fixed returns and therefore shifted the investment risks onto the annuitant.¹⁴ With this conclusion, the Court identified the “true underwriting of risk” as a hallmark of the business of insurance.¹⁵

The Supreme Court further narrowed its definition of “the business of insurance” in *Group Life & Health Insurance Co. v. Royal Drug Co.* when it held that the provider agreements between a health insurance company and various pharmacies did not constitute “the business of insurance” and thereby warrant antitrust exemption under the McCarran-Ferguson Act.¹⁶ The

¹⁰ *Securities & Exch. Com’n v. Variable Ann. Life Ins. Co.*, 359 U.S. 65, 69 (1959).

¹¹ *Royal Drug*, 440 U.S. at 231.

¹² *Id.* at 211 (citing *SEC v. National Securities, Inc.*, 393 U.S. 453, 459-60 (1968)).

¹³ *Securities & Exch. Com’n v. Variable Ann. Life Ins. Co.*, 359 U.S. 65, 71-72 (1959).

¹⁴ *Id.* at 71.

¹⁵ *Id.* at 73.

¹⁶ *Group Life & Health Ins. Co. v. Royal Drug Co.*, 440 U.S. 205, 233 (1979).

provider agreements induced insureds to patron participating pharmacies, which agreed to charge only two dollars for prescription drugs; if insureds chose a non-participating pharmacy, they paid full price and would be reimbursed for only a part of their payment.¹⁷ The Court reiterated that the underwriting of the policyholder’s risk formed the principal component of an insurance contract, and held that rather than spreading risk, the provider agreements merely arranged for the purchase of goods and services.¹⁸ Rejecting the argument that through the provider agreements, the insurer assumed the risk that the policyholder would incur financial loss by purchasing drugs, the Court reasoned that the insurance policies – not the provider agreements – insure against such financial risk to the policyholder.¹⁹ While the agreements may minimize costs to the insurer, the Court concluded that the insured is “basically unconcerned” with how the insurer fulfills its underwriting obligation.²⁰ Next, the Court identified the contract between the insurer and the insured as an additional feature of “the business of insurance,” and determined that the provider agreements were separate contractual arrangements distinct from this relationship.²¹ Finally, the Court observed that the provider agreements involved nonexempt parties – the pharmaceutical companies – “wholly outside the insurance industry.”²²

In *Union Labor Life Insurance Co. v. Pireno*,²³ the Supreme Court crystallized the criteria applied in *Royal Drug* into a three-part factor test defining “the business of insurance” as

¹⁷ *Id.* at 209.

¹⁸ *Id.* at 211.

¹⁹ *Id.* at 213.

²⁰ *Id.* at 214.

²¹ *Id.* at 215-16.

²² *Id.* at 231.

²³ 458 U.S. 119 (1982).

a practice that 1) has the effect of transferring or spreading the policyholder’s risk, 2) is an integral part of the policy relationship between the insurer and the insured, and 3) is limited to entities within the insurance industry.²⁴ The Court stressed that none of the factors “is necessarily determinative in itself.”²⁵ In *Pireno*, chiropractors challenged a health insurer’s use of a peer review committee to evaluate policyholder claims for chiropractic treatments; the committee would reimburse the policyholder if it determined that the treatments were necessary and the charges reasonable.²⁶ Applying the factors, the Court concluded that the insurer’s peer review practices were not “the business of insurance” and therefore subject to examination under the federal antitrust laws.²⁷ The peer review committee, the Court reasoned, did not concern risk spreading since the transfer of risk already occurred when the insured purchased insurance coverage for chiropractic treatment.²⁸ The Court also determined that the peer review committee was a separate contractual relationship distinct from the policy relationship between the insurer and the insured; like the provider agreements in *Royal Drug*, the use of the peer review process “is a matter of indifference to the policyholder, whose only concern is *whether* his claim is paid, not *why* it is paid.”²⁹ Finally, the Court noted that the peer review committee consisted of practicing chiropractors, third parties outside the insurance industry; since Congress intended to shield intra-industry cooperative ratemaking, the presence of third parties “may prove contrary to

²⁴ *Id.* at 129.

²⁵ *Id.*

²⁶ *Id.* at 122-23.

²⁷ *Id.* at 134.

²⁸ *Id.* at 130.

²⁹ *Id.* at 132.

the spirit as well as the letter of § 2(b) . . . [by] restrain[ing] competition in noninsurance markets.”³⁰

While the federal courts have duly applied the *Pireno* factors when evaluating whether a practice constitutes “the business of insurance,” the resulting caselaw varies depending on the jurisdiction. While some courts cling to a broader conception of “the business of insurance,” other courts have interpreted Supreme Court precedent to espouse a more focused definition, thereby creating a judicial backdrop that may be favorable to an antitrust claim on behalf of public adjusters opposing anticompetitive loss adjustment endorsements.

A. The First *Pireno* Factor: Risk Spreading

Federal courts have recognized that the underwriting and spreading of risk remains the trademark characteristic of “the business of insurance.” In *State of Maryland v. Blue Cross and Blue Shield Ass’n*,³¹ the court held, however, that because Congress intended the antitrust exemption to facilitate cooperative ratemaking, insurers must demonstrate “more than a mere relationship to risk spreading” to satisfy this criterion.³² Instead they must show that the challenged practice “is related positively to underwriting and ratemaking.”³³ Federal courts have specifically found no risk-related basis for insurers to discriminate between professionals who perform identical services. In *Hahn v. Oregon Physicians Service*,³⁴ the Ninth Circuit concluded that the defendant health care organizations failed to produce evidence of “any bona fide risk-related reasons for an insurer to distinguish between the services of M.D.s and podiatrists, much

³⁰ *Id.*

³¹ 620 F.Supp. 907 (D. Md. 1985).

³² *Id.* at 917.

³³ *Id.*

³⁴ 689 F.2d 840 (9th Cir. 1982).

less that such a distinction is at the core of what is commonly understood to be the ‘business of insurance.’”³⁵ Plaintiff podiatrists in *Hahn* challenged a requirement that insureds obtain certain podiatric services only from medical doctors; health plans also reimbursed for podiatrist treatment only if the policyholder was referred by an M.D., and refused to admit podiatrists into the health care associations as members.³⁶ The inability of the insurers to furnish any actuarial justification for the distinction between podiatrists and M.D.s engendered doubt as to whether the practice legitimately related to the underwriting and spreading of risk.³⁷ Therefore, insurers must likewise proffer a genuine, risk-related rationale to similarly deny reimbursement to policyholders who obtain loss adjustment services from public adjusters. The fact that insurance companies and public adjusters have by definition an adversarial relationship will not answer, particularly if the insured incurs comparable costs regardless of whose services he benefits from.

Moreover, courts have continued to distinguish between the willingness to underwrite a specific risk³⁸ and decisions or practices – such as the provider agreements in *Royal Drug* and the peer review committee in *Pireno* – ancillary to whatever peril the insurer has chosen to cover in the policy agreement.³⁹ In *Virginia Academy of Clinical Psychologists v. Blue Shield of*

³⁵ *Id.* at 843.

³⁶ *Id.* at 841.

³⁷ *Id.* at 843.

³⁸ See *Slagle v. ITT Hartford*, 102 F.3d 494 (11th Cir. 1996) (holding that property insurers’ refusal to issue windstorm insurance to certain Florida coastal areas entitled to antitrust exemption as “the business of insurance”). *But see Nurse Midwifery Associates v. Hibbett*, 549 F.Supp. 1185, 1187, 1193-94 (M.D. Tenn. 1982) (holding that nurse midwives properly stated a claim that health insurer conspired to restrain competition by canceling the malpractice insurance of a physician who sought to contract with midwives. Although the practice in question involved a denial of coverage – an act traditionally related to the underwriting of risk – the court nevertheless refused to dismiss the complaint in light of the midwives’ allegations of anticompetitive behavior in a noninsurance market for maternity services).

³⁹ See *infra* Part II.

Virginia,⁴⁰ clinical psychologists objected to the health insurers' refusal to pay for psychotherapy services unless the treatment was billed through a physician.⁴¹ While reissued insurance policies stipulated this new payment requirement, the health plans continued to cover mental and nervous disorders as well as psychotherapy as an approved method of treatment and had done so for over twenty years.⁴² The Fourth Circuit held that this "decision regarding psychologists was not whether to underwrite the risk of those disorders or even the need for psychotherapy; rather it was a question of who they would pay for such services. The coverage remained the same."⁴³ Thus, the Fourth Circuit differentiated between an insurer's decision to assume a specific underwriting obligation – the provision of mental health coverage or psychotherapy treatment – and ancillary agreements or conditions with which the insured is "basically unconcerned"⁴⁴ as long as the insurer fulfills its commitment to bear the risk by providing coverage.

Public adjusters find themselves in analogous circumstances, in which insurers decide to underwrite a risk – the need for loss adjustment services – but stipulate who they will pay to perform these services: precisely the type of decision or practice the Fourth Circuit held does not meet the risk-spreading aspect of the "business of insurance." An insurer may contend that the services provided by a public adjuster go beyond the loss adjustment services contemplated in the commercial endorsements at issue; however, while an actuarial decision regarding *which* loss adjustment services to cover may be the "business of insurance," under *Virginia Academy* the practice of specifying who can provide them is not.

⁴⁰ 624 F.2d 476 (1980).

⁴¹ *Id.* at 478.

⁴² *Id.*

⁴³ *Id.* at 484.

⁴⁴ *Group Life & Health Ins. Co. v. Royal Drug Co.*, 440 U.S. 205, 214 (1979).

B. The Second *Pireno* Factor: The Relationship between the Insurance Company and its Policyholder

Courts have repeatedly acknowledged the significance of the second *Pireno* factor – the insurer-insured relationship – to the McCarran-Ferguson exemption; by limiting antitrust immunity to “the business of insurance,” the Supreme Court stated, Congress intended to protect state regulation of “the relationship between the insurer and insured, the type of policy which could be issued, its reliability, interpretation, and enforcement – these were the core of the ‘business of insurance.’”⁴⁵ In *Royal Drug*, the Court narrowed the scope of this inquiry by rejecting the insurer’s argument that the provider agreements at issue “so closely affect[ed] the ‘reliability, interpretation and enforcement’ of the insurance contract” by generating cost savings for the insurer to pass onto the policyholder in lower premiums, since “every business decision made by an insurance company has some impact” on these factors.⁴⁶ The *Pireno* Court further clarified that the challenged practice must be “an integral part” of the insurer-insured relationship.⁴⁷ Certain federal courts, however, reflexively categorize a challenged practice as the “business of insurance” if it involves a contractual provision in an insurance policy.⁴⁸

While the practice at issue for insurance adjusters – anticompetitive loss preparation endorsements – is written into the insurance policy itself, not all federal courts have found this

⁴⁵ *Securities and Exchange Commission v. National Securities, Inc.*, 393 U.S. 453, 460 (1969).

⁴⁶ *Group Life & Health Ins. Co. v. Royal Drug Co.*, 440 U.S. 205, 216-17 (1979).

⁴⁷ *Union Labor Life Ins. Co. v. Pireno*, 458 U.S. 119, 129 (1982).

⁴⁸ *See Mulhearn v. Rose-Neath Funeral Home, Inc.*, 512 F.Supp. 747, 750-51 (1981) (rejecting claim that funeral service insurance policy provisions offering only 75 per cent of the policy’s face value should insureds choose an “unauthorized” funeral home financially induced policyholders to frequent “authorized” homes; claims merit antitrust immunity as the “business of insurance” “inasmuch as they are solely concerned with provisions contained in an insurance policy” and involve an integral part of the contract, i.e. payment for funeral services).

factor dispositive. When health insurers in *Virginia Academy* revised their insurance contracts⁴⁹ to preclude payment for psychotherapy unless the services were billed through a physician, the Fourth Circuit held that these payment policies were “only tangential” to the relationship between the insurance company and its policyholder, since the practice “does not affect the benefit conferred upon the subscriber.”⁵⁰ As the *Pireno* Court noted, such a practice “is a matter of indifference to the policyholder, whose only concern is *whether* his claim is paid, not *why* it is paid,” or in this case, *how* it is paid.⁵¹ The Fourth Circuit also evokes the Supreme Court’s dismissal of the insurer’s claim in *Royal Drug* that the provider agreements at issue constituted an essential component of the insurer-insured relationship simply because the insurance policies themselves guaranteed the terms and amounts contracted for in the provider agreements.⁵²

Similarly, excluding public adjusters from commercial endorsements for loss adjustment preparation coverage does not affect the reimbursement benefits promised to the policyholder, and the Fourth Circuit would probably not consider such a provision an integral part of the policy relationship between the insurer and the insured. Indeed, a bright-line rule automatically designating any policy provision “the business of insurance,” whether or not it facilitates risk-spreading, constitutes an integral part of that policy or involves third parties outside the insurance industry would render the three-factor *Pireno* analysis hollow and elevate form over substance by sheltering under § 2(b) anticompetitive practices that would otherwise be subject to

⁴⁹ 624 F.2d at 478. While the court does not dwell on whether the language appears in the policy itself, it indicates that “[b]y the time the case was tried . . . most Roanoke Plan *contracts* [once more] allowed direct payment to psychologists.” *Id.* at 479 (emphasis added).

⁵⁰ *Id.* at 483.

⁵¹ *Union Labor Life Ins. Co. v. Pireno*, 458 U.S. 119, 132 (1982).

⁵² *Virginia Academy*, 624 F.2d at 484 (citing *Group Life & Health Ins. Co. v. Royal Drug Co.*, 440 U.S. 205, 216-18 n.14 (1979)).

federal scrutiny, as long as the insurer has had the foresight to include these provisions in a contract of adhesion.

C. The Third *Pireno* Factor: Whether the Activity Involves Members of the Insurance Industry

In assessing the third *Pireno* factor – whether the practice at issue involves third parties outside the insurance industry – federal courts have heeded the Supreme Court’s warning in *Pireno* that third party involvement “may prove contrary to the spirit as well as the letter of § 2(b) . . . [by] restrain[ing] competition in noninsurance markets.”⁵³ In *Hahn*, the Ninth Circuit found the alleged anticompetitive impact of a billing practice in the market for podiatrist services dispositive: “[a]lthough the Supreme Court did not hold that effect on non-insurance markets was in itself sufficient to negate the applicability of the McCarran-Ferguson exemption, arrangements whose primary impact is on competition in markets other than that for insurance *do not fall within the exemption.*”⁵⁴ Similarly, the court in *Nurse Midwifery Associates v. Hibbett* heavily weighed the challenged practice’s alleged impact on the health care market for maternity services when denying a motion to dismiss; the court subsequently refused antitrust immunity under McCarran-Ferguson despite the fact that the practice at issue involved a denial of coverage, which courts have traditionally considered closely related to the underwriting of risk.⁵⁵

⁵³ *Pireno*, 458 U.S. at 132.

⁵⁴ *Hahn v. Oregon Physicians Service*, 689 F.2d 840, 844 (1982) (emphasis added).

⁵⁵ 549 F.Supp. 1185, 1193-94 (1982). *See also* Health Care Equalization Comm. of the Iowa Chiropractic Soc’y v. Iowa Medical Soc’y, 851 F.2d 1020 (1988) (dismissing claim by chiropractors that insurers conspired to monopolize the health *insurance* market by refusing to include chiropractors in health plans as conduct falling within the ambit of the “business of insurance,” but dismissing claim under § 1 of the Sherman Act that insurers refused to deal with chiropractors, thereby affecting the *provider* market for chiropractic services under the state action doctrine).

The court concluded, “It is not the business of insurance to use coverage ‘as a coercive lever . . . in order to compel certain dealings in a non-insurance product or service.’”⁵⁶

The practice of excluding public adjusters from loss adjustment endorsements in commercial contracts likewise “impinges upon the competition within the [loss adjustment market] . . . not upon the competitive forces within the insurance industry.”⁵⁷ The loss adjustment market is distinct from the market for insurance and consists of accountants, brokers, agents, restoration contractors, public adjusters and other professionals, who all compete to provide loss adjustment services to an insured. More risk adverse, affluent corporations may tend to opt for this additional coverage in their commercial contracts, and the provisions function as a financial inducement for these insureds *not* to hire public adjusters, thereby giving other professionals a competitive advantage by cutting public adjusters out of a lucrative portion of the loss adjustment market. Because of this impact on a non-insurance market, courts in the Ninth Circuit may therefore consider such a practice to have exceeded the business of insurance as contemplated by the McCarran Ferguson Act due to this factor alone. Therefore, with respect to all three components of the “business of insurance” exemption, public adjusters may successfully maintain a claim in the Fourth or Ninth Circuits, which contain the favorable precedent discussed.

III – The State Action Doctrine of *Parker v. Brown*

While state law has limited utility when defining the “business of insurance,” which is a federal question, state law may figure prominently in an antitrust action should insurance

⁵⁶ *Nurse Midwifery Associates v. Hibbett*, 549 F.Supp. 1185, 1194 (1982) (citing *Zelson v. Phoenix Mutual Life Ins. Co.*, 549 F.2d 62, 67 (8th Cir. 1977) (refusing to dismiss complaint by broker-dealer in both insurance and securities alleging that employer insurance company threatened to cancel his insurance agency contract unless he consented to only sell securities through a designated securities corporation)).

⁵⁷ *Zelson*, 549 F.2d at 66.

companies invoke the “state action” doctrine of *Parker v. Brown*.⁵⁸ This doctrine emerged after the Supreme Court in *Parker* found an anticompetitive raisin marketing program created by the state legislature immune from antitrust attack because the program “derived its authority and its efficacy from the legislative command of the state.”⁵⁹ Subsequent Supreme Court decisions established a two-prong analysis to apply to private parties alleging state action immunity: 1) the restraint on competition must be “clearly articulated and affirmatively expressed as state policy” and 2) “the policy must be ‘actively supervised’ by the state itself.”⁶⁰ Courts consider the active supervision prong of the test satisfied as long as state officials “have and exercise power to review particular anticompetitive acts of private parties and disapprove those that fail to accord with state policy.”⁶¹ In an action on behalf of public adjusters challenging the anticompetitive nature of loss adjustment endorsements, courts will likely consider the authority customarily granted a state insurance commissioner to pre-approve or reject insurance contracts sufficient to fulfill the second prong of the *Midcal* inquiry.⁶² However, in bringing an antitrust claim, public adjusters may successfully maintain under the first prong of *Midcal* that the state action doctrine does not immunize insurance companies that include these endorsements in their policies.

⁵⁸ 317 U.S. 341 (1943).

⁵⁹ *Id.* at 350.

⁶⁰ *California Retail Liquor Dealers Ass’n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 105 (1980) (rejecting claim that state legislated wine pricing program qualifies for antitrust immunity as state action due to insufficient State control over price setting and lack of a review mechanism); *see also* *Southern Motor Carriers Rate Conference, Inc. v. United States*, 471 U.S. 48, (1985) (extending the two-prong analysis in *Midcal* to private parties acting under the auspices of a state regulatory program).

⁶¹ *Patrick v. Burget*, 486 U.S. 94, 101 (1988) (holding that the state does not actively supervise the challenged peer review process because Oregon law does not authorize a state official to review peer review decisions and to veto resolutions that fail to promote state policy).

⁶² *See Southern Motor Carriers*, 471 U.S. at 65 (holding that authority granted to the Public Service Commissions to accept, reject, or modify rate proposal recommendations constitutes active supervision by the state).

The Supreme Court has held that to meet the first prong of *Midcal*, a state policy need not compel anticompetitive conduct nor be specifically delineated in state legislation; rather, as long as the State “clearly intends to displace competition in a particular field with a regulatory structure,” the practice merits antitrust immunity.⁶³ In *Southern Motor Carriers*, the Court accordingly determined that Mississippi intended to adopt a permissive policy with regard to collective ratemaking, since state law granted the regulatory agency discretion to set common carriers’ rates at “just and reasonable” levels.⁶⁴ Therefore, in administrative spheres habitually designed to replace competition with regulation such as the insurance field, federal courts have likewise found the first prong of the *Midcal* inquiry fulfilled when a state adopts a permissive policy with respect to that particular practice.⁶⁵ When insurance companies implement practices that operate contrary to state law, however, federal courts have found such activities ineligible for antitrust exemption under the state action doctrine.⁶⁶ The Fourth Circuit in *Ballard v. Blue Shield* declined to award state action immunity to defendants allegedly conspiring to refuse insurance coverage for chiropractic services; the court reasoned that West Virginia law in fact authorized insurers to offer such coverage and defendants chose to omit these benefits from their policies.⁶⁷ In *Virginia Academy*, when health care plans denied payment for psychotherapy unless the services were billed through a physician, this practice similarly contravened Virginia’s

⁶³ *Id.* at 64.

⁶⁴ *Id.* at 63-64.

⁶⁵ See Health Care Equalization Comm. of the Iowa Chiropractic Soc’y v. Iowa Medical Soc’y, 851 F.2d 1020, 1026 (1988) (examining the regulatory structure of the health care service industry as a whole and concluding that Iowa intended to displace competition with regulation; then specifically studying the state’s statutory treatment of chiropractors and concluding that the legislative decision not to authorize inclusion of chiropractic services in health care plans until 1986 indicated that the state intended to prohibit coverage of chiropractic treatment).

⁶⁶ *Alonzo v. Blue Cross of Greater Philadelphia*, 611 F.Supp. 310, 314 (1984).

⁶⁷ 543 F.2d 1075, 1079 (1976).

“Freedom of Choice Statute,” which required such plans to directly reimburse licensed psychologists.⁶⁸ The Fourth Circuit declared that “the state does not even permit the challenged policy; A fortiori it is not state action.”⁶⁹

Therefore, to counteract the universal contention of insurance companies that every state has intended to displace competition in the insurance field with a regulatory structure, public adjusters considering an antitrust action should carefully select for their forum a state that has clearly articulated through legislation a specific policy concerning the public adjusting profession. State licensing statutes afford compelling evidence of a “clearly articulated and affirmatively expressed” state policy.⁷⁰ While many states have instituted regulatory policies mandating licensing for public adjusters, fewer states have enshrined similar licensing requirements in a legislative enactment. The Supreme Court has emphasized that an administrative agency acting under its own auspices cannot excuse the anticompetitive actions of a private party; such a policy must emanate from the state itself through its legislature or State Supreme Court.⁷¹ Therefore, in order to offset the general authorization of an anticompetitive insurance regulatory regime commonly embodied in state insurance statutes, public adjusters must initiate an antitrust action in a state that has passed specific legislation to mandate licensing for public adjusters. For a claim to more readily withstand a state action challenge, the legislation of the forum state should not only require adjuster licensing, but should also broadly define the term “public adjuster” to encompass any person who performs loss adjustment

⁶⁸ *Virginia Academy of Clinical Psychologists v. Blue Shield of Virginia*, 624 F.2d 476, 478 (1980).

⁶⁹ *Id.* at 482 n.10.

⁷⁰ *Cf. Alonzo*, 611 F.Supp. at 314 (holding that refusal to reimburse for psychotherapy was state action because state law only authorized licensed professionals to participate in health plans and psychotherapists were not licensed in Pennsylvania).

⁷¹ *Southern Motor Carriers*, 471 U.S. at 62-63.

services for an insured. The more inclusive the definition of “public adjuster,” the greater the indication of a statewide policy to monitor via licensing requirements the activities of anyone engaging in loss preparation services: including accountants, brokers, agents and contractors. Endorsements that financially encourage insureds to employ unlicensed individuals contrary to such a legislative decree accordingly cannot constitute state action.

Several states in the Fourth and Ninth Circuits – jurisdictions containing precedent somewhat less sympathetic to insurers claiming antitrust immunity under *McCarran-Ferguson* – have enacted statutory licensing schemes explicitly for public insurance adjusters that embrace a more expansive definition of that term. In the Fourth Circuit, Maryland requires proper licensing before a person “acts as a public adjuster,” by accepting compensation for “investigating, appraising, evaluating, or otherwise giving advice or help to an insured in the adjustment of claims.”⁷² South Carolina also stipulates that only licensed public adjusters “may solicit business from an insured who has sustained an insured loss” and that such business includes “investigating, appraising or evaluating, and reporting to an insured in relation to a first party claim.”⁷³ Should unlicensed individuals provide these services, South Carolina regards this practice the “unauthorized transaction of insurance business” and imposes penalties.⁷⁴

⁷² MD. CODE ANN., INS. §§ 10-401 – 10-403 (West 2008). The Maryland Code also deems violation of these licensing requirements a misdemeanor and proscribes a maximum penalty of a \$500 fine or six months imprisonment, further evincing a state policy in favor of licensed professionals performing loss adjustment services.

⁷³ S.C. CODE ANN. §§ 38-48-10 – 38-48-20 (2007).

⁷⁴ Remedies for performing public adjusting services without a license include the disgorgement of any fees paid. S.C. CODE ANN. § 38-48-20 (2007). The remaining states located in the Fourth Circuit have adopted narrower definitions of “public adjuster” that do not as clearly encompass the loss preparation activities engaged in by other professionals compensated by the endorsements at issue. *See* N.C. GEN. STAT. ANN. § 58-33-5 (West 2007) (“a personal shall not sell, solicit or negotiate insurance” without a license); W. VA. CODE ANN. §§ 33-12B-1 – 33-12B-4 (West 2008) (mandating licensing for anyone who “investigates and settles claims” for a fee). Virginia has not enacted statutory provisions for licensing public adjusters.

In the Ninth Circuit, California has enacted the most comprehensive statutory licensing scheme through its Public Insurance Adjusters Act, which governs any person who “acts on behalf of or aids in any manner, an insured in negotiating for or effecting the settlement of a claim.”⁷⁵ The hefty civil penalties levied by the Act for operating as a public adjuster without a license – a maximum of ten thousand dollars or twenty-five thousand for a willful violation – illustrate the seriousness of California’s licensing policies.⁷⁶ In *Building Permit Consultants Inc. v. Mazur*, California courts affirmed the expansive scope of the term “public adjuster” under the Act when it held that adjusting services performed by an unlicensed agency, which potentially included work accomplished by general building construction contractors, engineers, and other consultants in preparing cost estimates, reports, plans and other data compilation tasks constituted “public adjusting” in violation of the statute.⁷⁷

Under any of these statutory provisions, public adjusters can persuasively contend that the anticompetitive practice of incorporating loss adjustment endorsements into insurance policies that exclude licensed public adjusters cannot reflect a “clearly articulated and affirmatively expressed” state policy within the meaning of *Midcal* in Maryland, South Carolina,

⁷⁵ CAL. INS. CODE § 15006 – 15007 (West 2008). Other statutory enactments in the Ninth Circuit either proffer a narrower definition of “public adjuster” or fail to focus specifically on public adjusters and instead institute general licensing requirements for all insurance adjusters or adjusters representing insurers. See ALASKA STAT. § 21.27.010 (2008) (mandating licensing for independent adjusters); ARIZ. REV. STAT. ANN. §§ 20-321 – 20-321.01 (2008) (requiring licensing of adjuster who “adjusts, investigates or negotiates settlement of claims); HAW. REV. STAT. §§ 431:9-105 – 431:9-203 (West 2008) (compelling licensing for adjuster or independent bill reviewer who “investigates for, reports to, or adjusts” insurance claims); MONT. CODE ANN. §§ 33-17-102 – 33-17-301 (2008) (defining adjuster as a person who “investigates and negotiates the settlement of [insurance] claims”); NEV. REV. STAT. ANN. §§ 684A.020-684A.040 (West 2008) (defining “public adjuster” as any person who “investigates and settles” insurance claims for an insured); OR. REV. STAT. ANN. § 744.001 (West 2008) (governing general licensing of adjusters); WASH. REV. CODE ANN §§ 48.17.060 (West 2008) (effective July 1, 2009) (requiring licensing for persons who “sell, solicit or negotiate” insurance). Idaho has not enacted statutory provisions for insurance adjuster licensing.

⁷⁶ CAL. INS. CODE § 15006 (West 2008).

⁷⁷ 19 Cal. Rptr. 3d 562, 565 (Cal. Ct. App. 2004) (finding the contract voidable on account of the company’s failure to acquire a public adjuster’s license under the statute). The court further indicated that “[t]he terms of the statute are broad, and concern all persons . . . whose conduct or involvement impacts the resolution of the insurance claim. . . [and] [w]e assume that the Legislature in using such broad language did so advisedly.” *Id.* at 569.

or California. On the contrary, these states have specifically adopted broadly sweeping licensing schemes for public adjusters that evince a state policy to supervise the spectrum of professionals that may supply loss adjustment services to insureds. Such a policy directly conflicts with contractual provisions that financially induce insureds to hire unlicensed professionals to adjust their claims; therefore, insurers that use such endorsements may not qualify for antitrust exemption by invoking the state action doctrine in any of the above-mentioned states.

Conclusion

In conclusion, should the public adjusting profession decide to challenge insurance policy endorsements for loss adjustment services that specifically disallow reimbursement to licensed public adjusters, they will want to initiate their antitrust claim in Maryland, South Carolina, or California. This choice of forum will enable them to simultaneously benefit from favorable federal precedent as well as advantageous state law, and subsequently evade both the Scylla and Charybdis of antitrust proceedings in the insurance field: the “business of insurance” and state action doctrine antitrust exemptions. Employing this strategy will hopefully strip away this antitrust immunity and expose the anticompetitive practices that burden professions such as public adjusting to a potential legal remedy.