Bloomberg BNA

Antitrust & Trade Regulation Report™

VOL. 108, NO. 2691 APRIL 10, 2015

RESTRAINTS OF TRADE

Insurance

Contingent Commissions and the Antitrust Laws: What Can We Learn from the *In re Insurance Brokerage Antitrust Litigation*?

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In 2014, the last of the tag-along actions were settled in the long-running *In re Insurance Brokerage Antitrust Litigation*,[1] a massive multidistrict litigation in which the plaintiffs alleged that most of the major commercial insurance companies and major insurance brokers had conspired to allocate customers in exchange for contingent commission payments in violation of both the federal antitrust laws and RICO.

That litigation challenged business practices that are common throughout the insurance industry and, in particular, called into question the dual role insurance brokers play as intermediaries who act both as producers for the insurers and as advisors to their policyholder clients.

Now that both the criminal and civil litigation has finally been concluded after more than a decade, this is a good time to review how these business practices will be treated under the antitrust laws going forward and what broader applicability the Third Circuit's decision may have in other industries where intermediaries play an important role in matching sellers and buyers.

I. The Role of Insurance Brokers

In the market for commercial insurance, insurance brokers match companies seeking insurance coverage with insurers that will provide them with policies. Insurance brokers often receive some or all of their compensation from commissions paid by the insurers that underwrite the policies in question. During the period covered by the *In re Insurance Brokerage* case, commissions took the form of either ''standard'' commissions, usually simple percentages of the premiums generated by the policy the insurer sells through the broker, or ''contingent'' commissions, which are based on some aggregate measure of the volume of business generated for the insurer by the broker. Contingent commissions vary among insurers: some have a tiered bonus structure in which the broker can earn additional

[1] 618 F.3d 300 (3d Cir. 2010).

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compensation by reaching certain volume thresholds; some offer bonuses based on retention of renewal business; some base commissions on the percent increase in the book of business or in the amount of profits generated by the book of business placed with the insurer by the broker over a certain period of time; and some combine multiple criteria.

Standard commissions are widely accepted in the insurance industry (and indeed were not challenged in the *In re Insurance Brokerage* litigation), but contingent commissions have been criticized for creating a conflict of interest for brokers. Unlike insurance agents, who owe fiduciary duties to insurance companies, insurance brokers are agents of the policyholder. Since contingent commissions to the broker are based on the profitability or value of a book of business to the insurer, some worry that the incentive structure results in insurance companies competing with each other on the attractiveness of their contingent commissions to the broker, rather than solely on the attractiveness of their policies to the policyholder. Critics such as Daniel Schwarcz argue that these incentives introduce inefficiency into the insurance markets, even where their existence is disclosed to sophisticated insurance buyers.[2] In particular, Schwarcz notes that buyers using intermediaries have a limited capacity to assess the insurers' strengths and weaknesses, that intermediaries can discriminate among buyers and take advantage of those who are less sophisticated, and that the relationship of trust between buyer and intermediary leads buyers not to scrutinize the advice they receive from the broker.[3] In the *In re Insurance Brokerage* litigation, plaintiffs alleged that the defendant brokers manipulated relationships in just this way to steer business to preferred insurers improperly.

Defenders of the practice of contingent commissions argue that contingent commissions do not necessarily create a conflict of interest for insurance brokers. In their view, the different structures of contingent commission agreements provide incentives that—in some cases—are diametrically opposed to each other: ''For example, incentives created by an agreement that required an incumbent insurer to pay if it retained a given percentage of its business would conflict with incentives created by an agreement with another insurer that rewarded growth in new business.''[4] In a leading article on the economics of insurance intermediaries, Cummins and Doherty argue that profit-based contingent commissions, for example, align the interests of brokers and insurers such that they can share information about the risk of prospective policyholders and make markets more efficient by alleviating adverse selection.[5] The increased confidence insurers will have regarding estimated risk will lead to more aggressive bidding by insurers for policyholders' business. In this way, contingent commissions actually stimulate competition in insurance markets. Those who take this view of contingent commissions argue that a robust disclosure regime informing potential policyholders of contingent commissions and ''preferred provider'' schemes is all that is needed to alleviate the risk of anticompetitive behavior within the framework of the insurance markets.

The *In re Insurance Brokerage* litigation represents the ultimate legal clash between those views. In order to properly contextualize the Third Circuit's decision in that case, it is necessary first to review the recent history of legal attacks on contingent commissions generally.

II. Eliot Spitzer's Attack on Contingent Commissions

In the late 1990s and early 2000s, the largest insurance broker, Marsh & McClennan Companies (''Marsh''), began entering into ''Placement Service Agreements'' (''PSAs'') with insurers that entitled Marsh to additional payments if it directed a certain volume of business to an insurer, regardless of the profitability of that business.''[6] In early 2004, two letters urging investigation into these types of contingent commissions spurred then-Attorney General of New York Eliot Spitzer to begin an investigation of contingent commissions paid to property and casualty insurance brokers. By May of that year, Mr. Spitzer had expanded his investigation to include insurance companies, and by the fall, the investigation had uncovered emails suggesting Marsh had conspired with certain insurers to rig bids by obtaining false quotes.[7]

Relying on these emails, Mr. Spitzer filed a complaint (the ''Marsh Complaint'') against Marsh on October 14, 2004, alleging both that Marsh had orchestrated a bid-rigging scheme to steer its clients to the insurers that would pay it the largest contingent commissions and that Marsh conspired with insurance companies to restrain trade by providing its clients with false bids, allocating the opportunity to sell insurance to its clients, and creating a scheme to pay itself for implementing the conspiracy.[8]

[2] Daniel Schwarcz, *Beyond Disclosure: The Case for Banning Contingent Commissions*, 25 Yale L. & Pol'y Rev. 289, 295 (2007).

[3] *Id.* at 294.

[4] Brief of Appellees at 5–6, *In re Ins. Brokerage Antitrust Litig.*, 618 F.3d 300 (3d Cir. 2010) (No. 07-4046), 2008 WL 4005068 at *5–6.

[5] *See* J. David Cummins & Neil A. Doherty, *The Economics of Insurance Intermediaries*, 73 J. Risk & Ins. 359 (2006), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=928728.

[6] Sean M. Fitzpatrick, *The Small Laws: Eliot Spitzer and the Way to Insurance Market Reform*, 74 Fordham L. Rev. 3041, 3044 (2006).

[7] *Id.* at 3045–46.

[8] Complaint ¶¶ 43–74, 80–83, *State v. Marsh & McLennan Cos.*, No. 04-403342 (N.Y. Sup. Ct. Oct. 14, 2004). The complaint also alleged fraud and violations of New York state security laws. *Id.* ¶¶ 79, 84–85.

Attorney General Spitzer's efforts to eliminate contingent commission payments to the largest brokers were initially successful. Almost immediately after the Marsh Complaint was filed, Marsh, Aon Corporation (''Aon''), Willis Group Holdings Limited (''Willis''), and other large brokers announced that they would stop accepting contingent commissions.[9] In January 2005, Marsh agreed to settle the Spitzer lawsuit and a related suit by the New York Department of Insurance for $850 million.[10] In March 2005, Spitzer filed a lawsuit against Aon and (along with the attorneys general of Connecticut and Illinois) announced a $190 million settlement with that firm.[11] In April, Willis, the third largest insurance broker, agreed to settle for $50 million.[12] As part of these settlements, each broker agreed it would no longer accept contingent commissions.[13]

Attorney General Spitzer's efforts to attack bid rigging and contingent commissions were not limited to civil actions against brokers. The same day the Attorney General's office filed its civil complaint against Marsh, two AIG insurance executives pleaded guilty to criminal charges of rigging bids with Marsh.[14] In the wake of Spitzer's lawsuit, dozens of brokers and insurance company employees pleaded guilty to criminal antitrust charges, while dozens more resigned, including Marsh's chairman and CEO, Jeffrey Greenberg.[15]

Despite these early successes, the Attorney General's gains from attacking contingent commissions as anticompetitive or otherwise illegal quickly eroded.[16] In September 2007, the Appellate Division of the First Department in New York dismissed four causes of action based on a failure to disclose the existence of a contingent commission agreement by holding that ''[c]ontingent commission agreements between brokers and insurers are not illegal, and, in the absence of a special relationship between the parties, defendant[s] ha[ve] no duty to disclose the existence of [a] contingent commission agreement.''[17] In February 2008, two former Marsh managing directors who had declined to plead guilty with their colleagues were convicted on only a single charge of restraining trade contrary to New York state antitrust law and acquitted of the remaining charges. In the summer of 2009, however, the judge overturned both men's convictions because the prosecutor had failed to disclose documents containing evidence that undermined the court's confidence in the verdict.[18] The decision to throw out the conviction was not appealed.[19] The judge subsequently vacated the convictions of those individuals who had previously pleaded guilty to similar charges.[20]

Though at the time of Attorney General Spitzer's lawsuit against Marsh widespread changes in the operation of the insurance industry due to increased regulation also seemed inevitable, state legislative and regulatory reactions to contingent commissions have been mild. While the 2005 settlements signed by Marsh, Aon, and Willis banned those three largest insurance brokers from accepting contingent commissions, by 2010, the New York State Insurance Department had decided to lift the ban in favor of a consistently applied regime of disclosure standards.[21] At that time, large insurance brokers signaled that they would voluntarily refrain from accepting contingent commissions,[22] but by 2013 the insurance industry had by and large returned to its pre-2005 practices, suggesting that the Attorney Gener-

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[9] *See* Schwarcz, *supra* note 3, at 291–92.

[10] *See* Joseph B. Treaster & Terence Neilan, *Marsh to Pay $850 Million to Settle Charges*, N.Y. Times, Jan. 31, 2005, *available at* http://www.nytimes.com/2005/01/31/business/31cnd-insu.html.

[11] *See* Joseph B. Treaster, *Aon Will Pay $190 Million to Settle Complaints on Bids*, N.Y. Times, Mar. 5, 2005, *available at* http://www.nytimes.com/2005/03/05/business/05insure.html.

[12] The Associated Press, *Insurance Broker Settling Inquiry for $50 Million*, N.Y. Times, Apr. 9, 2005, *available at* http://www.nytimes.com/2005/04/09/business/09willis.html.

[13] *See* Agreement Between the Attorney General of the State of New York and the Superintendent of Insurance of the State of New York, and Marsh & McLennan Companies, Inc., Marsh Inc. and their subsidiaries and affiliates (collectively ''Marsh'') ¶ 10 (Jan. 30, 2005), http://www.dfs.ny.gov/insurance/dept_inv/oag050130.pdf; Agreement Among the Attorney General of the State of New York, the Superintendent of Insurance of the State of New York, the Attorney General of the State of Connecticut, the Illinois Attorney General, the Director of the Division of Insurance, Illinois Department of Financial and Professional Regulation, and Aon Corporation and its subsidiaries and affiliates (collectively ''Aon'') ¶ 10 (Mar. 4, 2005), http://www.ag.ny.gov/sites/default/files/press-releases/archived/aonsettlement.pdf; Assurance of Discontinuance Pursuant to Executive Law § 63(15), at ¶ 9, *In the Matter of Willis Group Holdings Ltd.* (Apr. 7, 2005), http://www.dfs.ny.gov/insurance/dept_inv/oag0504072.pdf.

[14] *See* Joseph B. Treaster, *Broker Accused of Rigging Bids for Insurance*, N.Y. Times, Oct. 15, 2004, *available at* http://www.nytimes.com/2004/10/15/business/15insure.html.

[15] *See, e.g.*, Joseph B. Treaster, *Insurance Chief Quits in Inquiry Led by Spitzer*, N.Y. Times, Oct. 26, 2004, *available at* http://www.nytimes.com/2004/10/26/business/26insure.html.

[16] Spitzer himself seemed conflicted about whether contingent commissions were problematic on their own or only in conjunction with bid rigging or other questionable practices. While he frequently referred to the payment of contingent commissions as ''kickbacks,'' he indicated on more than one occasion that they may be appropriate in some parts of the insurance industry. *See* Press Release, Nat'l Ass'n of Prof'l Ins. Agents, PIA National Encouraged by Remarks Made by NY Attorney General Eliot Spitzer on Contingent Commissions (Jan. 31, 2005), http://www.pianet.com/news/press-releases/2005/pia-national-encouraged-by-remarks-made-by-ny-attorney-general-eliot-spitzer-on-contingent-commissions.

[17] *Hersch v. DeWitt Stern Grp., Inc.*, 43 A.D.3d 644, 645 (N.Y. App. Div. 2007) (internal citations omitted).

[18] Reuters, *Bid-Rigging Convictions Overturned*, N.Y. Times, July 7, 2010, *available at* http://www.nytimes.com/2010/07/08/business/08insure.html?_r=0.

[19] After their convictions were thrown out, Gilman and McNenney sued Marsh, alleging they were terminated without cause and demanding payment of their severance packages and other damages. *See* Susanne Craig, *Former Executives Claim Marsh 'Colluded' With Spitzer*, N.Y. Times Dealbook, June 27, 2011, http://dealbook.nytimes.com/2011/06/27/former-executives-claim-marsh-colluded-with-spitzer/. More recently, Gilman and McNenney filed a defamation suit against Mr. Spitzer for statements he made in an article in Slate Magazine. *See* Jeremy W. Peters, *Spitzer and Slate Face Defamation Lawsuit*, N.Y. Times, Aug. 22, 2011, *available at* http://www.nytimes.com/2011/08/23/business/media/spitzer-and-slate-face-lawsuit-over-column-on-wall-street.html?_r=0.

[20] *See* Karen Freifeld, *Cuomo Drops Effort Over Marsh Executives' Convictions*, Bloomberg, Dec. 16, 2010, http://www.bloomberg.com/news/2010-12-16/cuomo-drops-appeal-to-restore-marsh-mclennan-executives-convictions.html.

[21] Andrew G. Simpson, *Large Brokers Freed to Go After Contingent Commissions But Will They?*, Insurance Journal, Feb. 17, 2010, *available at* http://www.insurancejournal.com/news/national/2010/02/17/107441.htm.

[22] *Id.*

al's attack on the insurance industry was, at the end, much ado about very little.[23]

III. Ensuing Private Antitrust Actions

In late 2004, as soon as Attorney General Spitzer filed the Marsh Complaint, private litigants began suing brokers and insurers in federal and state courts across the country. Many of the cases were styled as class actions and contained federal antitrust claims as well as RICO and common law claims.[24] The Judicial Panel on Multidistrict Litigation consolidated the majority of civil suits related to the payment of contingent commissions in the United States District Court for the District of New Jersey under the name *In re Insurance Brokerage Antitrust Litigation*.[25] The cases transferred to New Jersey proceeded on two dockets, one for cases arising from commercial property and casualty insurance and the other for cases arising from employee benefit insurance.

In their antitrust claims in those cases, the plaintiffs principally alleged a series of broker-centered ''hub and spoke'' conspiracies, in which each broker allegedly colluded with partner-insurers to steer customers to those preferred insurers in exchange for contingent commission payments. If an insurer refused to pay contingent commissions, it was not eligible for partner status, and could not gain access to that broker's lucrative book of business. The plaintiffs also alleged a global conspiracy wherein, while engaging in their separate ''hub and spoke'' conspiracies, the ''hub'' brokers simultaneously agreed not to compete by agreeing not to disclose the contingent commission arrangements of other brokers. The plaintiffs claimed that, as a result of these alleged agreements, they ''paid inflated prices for their insurance coverage and were . . . denied the benefits of a competitive market.''[26]

After three successive rounds of pleadings, the New Jersey court granted the defendants' motions to dismiss the plaintiffs' complaints with prejudice.[27] District Court Judge Garret E. Brown, Jr. concluded that since Plaintiffs had alleged only *vertical* agreements by brokers to allocate customers to their preferred insurers in exchange for contingent commission payments, they ''face[d] the problem of the 'rimless wheel' – a situation in which various defendants enter into separate agreements with a common defendant, but where the defendants have no connection with one another, other than the common defendant's involvement in each transaction.''[28] But, the court explained, while vertical restraints may be challenged under the rule of reason, without agreement among the vertical partners, there is nothing *per se* unlawful about such relationships.[29] The decision was appealed to the Third Circuit, which delivered its opinion in 2010.

IV. The Third Circuit's Opinion

This article will review the two lines of argument the Third Circuit considered with regard to contingent commissions. First, it will consider the Third Circuit's treatment of the McCarran-Ferguson Act's insurance exemption to the antitrust laws and its application to contingent commissions. Second, it will then turn to the Third Circuit's treatment of the antitrust law claims and the sufficiency of pleadings under the standard set out in *Bell Atlantic Corp. v. Twombly*.[30]

A. The McCarran-Ferguson Exemption

The defendant insurance companies argued that regardless of the adequacy of the plaintiffs' pleadings of their antitrust claims, those claims were barred by the McCarran-Ferguson Act, which exempts the ''business of insurance'' from the Sherman Act where it is regulated by state law. The Third Circuit panel disagreed. It found that the alleged misconduct did not fall within the ''business of insurance'' for the purposes of the Act's antitrust exemption. The antitrust claims, therefore, were not barred by the McCarran-Ferguson Act, and analysis of the antitrust pleadings would be dispositive in the case.

The McCarran-Ferguson Act provides that ''[n]o 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,''[31] with the exception that ''[n]othing 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.''[32] In practice, the Act provides a statutory antitrust exemption for activities that fit three criteria: (i) they constitute the ''business of insurance,'' (ii) they are regulated under state law, and (iii) they do not constitute acts of ''boycott, coercion, or intimidation.''[33] The panel's analysis focused exclu-

[23] Alistair Gray, *Insurers' contingent commissions attacked*, The Financial Times, Jan. 13, 2013, *available at* http://www.ft.com/intl/cms/s/0/bb834a80-5c42-11e2-ab38-00144feab49a.html#axzz2pct7GNJ3.

[24] Many copied liberally from the Marsh Complaint.

[25] Fifty-one suits were eventually transferred to the District of New Jersey.

[26] *In re Ins. Brokerage Antitrust Litig.*, 618 F.3d at 308.

[27] The plaintiffs were given two opportunities to re-plead and to submit additional detailed factual allegations to support their claims. *See* Memorandum Opinion at 2–6, ECF No. 1298, *In re Ins. Brokerage Antitrust Litig.*, MDL No. 1663, Civ. No. 04-5184 (D.N.J. Aug. 31, 2007).

[28] *See* Memorandum Opinion, *supra* note 28, at 33–34.

[29] *Id.* at 29–30 (''Plaintiffs have not established a plausible scheme for the first part of the alleged conspiracy, namely, the consolidation of the Broker Defendants' business with a few preferred partner insurers. Plaintiffs have not set forth facts to support the theory that the Insurer Defendants agreed with each other, either expressly or impliedly, to pay the Broker Defendants contingent commissions in order to receive the benefit of lessened competition by some discernable method. Plaintiffs' explanation of this purported conspiracy has not significantly changed since the Court initially dismissed the First Amended Complaints. The allocation of premium volume in exchange for contingent commission payments consists of a vertical relationship among the Broker Defendants and the Insurer Defendants.''). Vertical agreements between entities operating at different levels of a distribution chain, such as an insurer and a broker, are not *per se* illegal under the Sherman Act, but are subject to rule of reason analysis. *See Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 907 (2007) (vertical price restraints); *Cont'l T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36, 59 (1977) (vertical non-price restraints).

[30] 550 U.S. 544 (2007).

[31] 15 U.S.C. § 1012(b) (2013).

[32] *Id.* § 1013(b).

[33] *In re Ins. Brokerage Antitrust Litig.*, 618 F.3d at 351 (*quoting Ticor Title Ins. Co. v. FTC*, 998 F.2d 1129, 1133 (3d Cir. 1993)).

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sively on the first criterion, and looked primarily to three earlier cases to define ''the business of insurance'' for these purposes: *Group Life & Health Insurance Co. v. Royal Drug Co.*,[34] *Union Labor Life Insurance Co. v. Pireno*,[35] and *Owens v. Aetna Life & Casualty Co.*[36]

In *Royal Drug*, independent pharmacies challenged a Blue Cross ''participating pharmacies'' plan, which allowed insured persons to purchase discounted prescriptions from participating pharmacies while policyholders who went to non-participating pharmacies had to pay retail price. In ruling for the plaintiffs, the Supreme Court cautioned that an overly expansive interpretation of ''the business of insurance'' risked bringing all activities of insurance companies within the antitrust exemption, a result that it found would be ''plainly contrary'' to the statutory language.[37] In *Pireno*, the Supreme Court extended the *Royal Drug* analysis to name three criteria that must be met for activity to come within the ''business of insurance'' for purposes of the McCarran-Ferguson Act: ''*first*, whether the practice has the effect of transferring or spreading a policyholder's risk; *second*, whether the practice is an integral part of the policy relationship between the insurer and the insured; and *third*, whether the practice is limited to entities within the insurance industry.''[38]

The Third Circuit considered these precedents along with *Owens*, a Third Circuit case, in determining how to characterize the defendants' conduct.[39] The panel found that the second and third *Pireno* criteria were clearly met: the alleged agreement was an integral part of the policy relationship between the insurer and the insured ''insofar as it would affect the insurers from which a prospective purchaser could obtain coverage,''[40] and all of the parties were clearly entities within the insurance industry. However, the panel held that the alleged conduct did not meet the first *Pireno* factor because the alleged agreement did not have the effect of transferring or spreading policyholders' risk: the agreement involved ''not *whether* or *to what extent* a prospective insurance purchaser would transfer its risk to an insurer, but merely to *which* insurer that risk would be transferred.''[41] In addition, the court concluded that the alleged misconduct did not fall into any of the categories of the business of insurance named in *Owens*. Although the conduct involved what *Owens* described as ''accepting or rejecting coverages tendered by brokers,'' the panel understood *Owens* to be referring to discrimination between the types of policies tendered, not a simple division of the market.[42] Therefore, the court concluded, the defendants' conduct did not constitute the business of insurance for the purposes of the antitrust exemption in the McCarran-Ferguson Act, and the Act did not bar the plaintiffs' antitrust claims.

Since 2010, one case has analyzed the Third Circuit's McCarran-Ferguson Act conclusions. In June 2014, the Northern District of Alabama adopted the Third Circuit's reasoning in a factually analogous case: *In re Blue Cross Blue Shield Antitrust Litigation*.[43] In *Blue Cross*, provider and subscriber plaintiffs alleged that the defendant Blue Cross/Blue Shield plans engaged in a conspiracy to horizontally allocate geographic markets by agreeing to carve the United States into ''service areas'' in which only one plan was permitted to sell health insurance to subscribers and contract with providers.[44] The court analogized the defendant plans' alleged conduct to the defendant insurance companies' alleged conduct in the *Insurance Brokerage* litigation and found that the defendant plans' alleged conduct was ''similarly unrelated to the spreading of risk.''[45] The court therefore concluded that the alleged conduct did not constitute the ''business of insurance,'' but rather involved the ''business of insurance companies,'' and that the McCarran-Ferguson Act did not bar the plaintiffs' claims.[46]

B. The Court's Antitrust Analysis

Having disposed of the McCarran-Ferguson issue, the Third Circuit began its analysis of the plaintiffs' antitrust claims by reviewing the legal standards applicable to antitrust claims. In the consolidated class action complaints, the plaintiffs had pleaded only *per se* violations of antitrust laws, meaning that in order to prevail on a motion to dismiss they would need to show the existence of a horizontal agreement among partner insurers.[47] The panel applied the *Twombly* standard, which requires a complaint to allege enough facts to ''state a claim for relief that is plausible on its face,'' in order to defeat a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6).[48] Just as the Supreme Court had done in *Twombly*, the panel held that in order to state a claim for relief based on a *per se* violation of Section 1, a plaintiff must allege sufficient facts to plausibly imply a horizontal agreement among insurers, not simply a series of parallel vertical agreements between each individual insurer and a single broker that they may have entered into for their own independent business interests.[49] To meet this requirement, the plaintiffs were required to have alleged either direct evidence of an agreement or to have alleged facts to show that parallel vertical agreements would have been contrary to the business interests of each insurer absent an agreement among the insurers.[50]

The Third Circuit then examined the facts plaintiffs had alleged to meet this requirement and to show that the ''spokes'' in their alleged hub-and-spoke conspiracies were, in fact, connected.[51] The plaintiffs argued, first, that the essential nature of contingent commission

[34] 440 U.S. 205 (1979).
[35] 458 U.S. 119 (1982).
[36] 654 F.2d 218 (3d Cir. 1981).
[37] 440 U.S. at 217.
[38] 458 U.S. at 129.
[39] *Owens* named several activities that fall within the ''business of insurance'' due to their relationship to risk-spreading or the contract between insurer and insured: preparing and filing a rating schedule, deciding on rating classification differences between individual policies and group marketing plans, authorizing agents to solicit policies, and accepting or rejecting coverage tendered by brokers. 654 F.2d at 225–26.
[40] *In re Ins. Brokerage Antitrust Litig.*, 618 F.3d at 356.
[41] *Id.* at 357.
[42] *Id.* at 358.
[43] MDL No. 2406, Civ. No. 2:13-CV-20000-RDP, 2014 WL 2767360 (N.D. Ala. June 18, 2014).
[44] 2014 WL 2767360, at *1.
[45] *Id.* at *13.
[46] *Id.* at *10.
[47] *In re Ins. Brokerage Antitrust Litig.*, 618 F.3d at 318.
[48] *Id.* at 319.
[49] *Id.* at 321.
[50] *Id.* at 323.
[51] *Id.* at 326.

agreements implies agreements among the insurers, and second, that certain aspects of the alleged customer steering schemes—particularly methods used to ensure that business was placed with a certain insurer—implied agreements among the insurers.[52] The Third Circuit rejected both arguments.

As to the nature of contingent commission agreements, the court noted that ''each insurer had sound, independent business reasons to pay contingent commissions to become and remain a 'preferred insurer.' ''[53] The panel also considered that ''plaintiffs' argument proves too much. If the parallel decisions by several insurers to pay contingent commissions imply a horizontal agreement, then it is difficult to see why parallel decisions to pay standard commissions . . . would not also imply an agreement.''[54]

As to the specific features of the alleged customer steering schemes, the court ruled that while the conduct alleged might give rise to claims under state law for deception or unfair trade practices, the allegations failed to state conduct prohibited by the Sherman Act.[55] In the panel's view, the alleged ''incumbent protection racket,'' including ''first look'' and ''last look'' bidding practices meant to ensure that a certain policy was placed or remained with a certain insurer, involved only practices that were vertical in nature (between the broker and the insurer), and ''the complaints themselves provide[d] obvious reasons to conclude that the brokers were able to steer clients to preferred insurers without the need for any agreement among the insurers.''[56] For these reasons, the Third Circuit held that the plaintiffs had failed to state a claim of a *per se* violation of the Sherman Act with respect to their broad customer allocation claims tied to the payment of contingent commissions, and the claims were dismissed.

The *In re Insurance Brokerage* plaintiffs had more success with their bid-rigging allegations—namely, that one Marsh entity, Marsh Global Broking, had conspired with a subset of the insurer defendants to rig bids by having those insurers submit false bids in order to direct business to certain insurers while maintaining a veneer of competition. The Third Circuit found that the willingness of the insurers involved in the specific incidents of bid-rigging alleged in the complaint to submit protective bids and actively assist in deceptive practices plausibly suggested collusion and horizontal agreements among those insurers not to compete for each other's incumbent business.[57] The court, therefore, reversed the district court with regard to these antitrust claims and remanded to the lower court for consideration of the sufficiency of those allegations under Rule 9(b) of the Federal Rules of Civil Procedure, which requires that allegations of fraudulent conduct be pleaded with particularity.[58]

[52] *Id.* at 327.
[53] *Id.* (quoting Brief of Appellees, *supra* note 5, at 38).
[54] *Id.* at 328.
[55] *Id.* at 334.
[56] *Id.* at 334–35.
[57] *Id.* at 339–40, 347–48.
[58] The District Court never spoke on the 9(b) issue, as the many parties settled between 2011 and 2013.

V. Ultimate Denouement

After the remaining federal and state law claims were remanded to the district court, the plaintiffs in the consolidated class action and in various tag-along individual and class actions reached settlements with all of the remaining defendants while the claims in their complaint were still at the motion to dismiss stage. The terms of the class action settlements are all public. Those terms indicate that the plaintiffs settled the remaining claims for a small fraction of the amounts of the settlements Attorney General Spitzer had earlier extracted from Marsh and some of the other major broker and insurer defendants or that the class action plaintiffs had extracted from those brokers and insurers who settled early in the litigation before the Third Circuit's ruling.[59]

The Third Circuit's opinion and the ensuing settlements provide two major takeaways for those practicing antitrust in the insurance industry. First, the opinion, along with the *Blue Cross* decision adopting the Third Circuit's opinion, show that, in line with other exemptions from the antitrust laws, courts will construe the McCarran-Ferguson Act narrowly. Only those activities that meet the indicia set out in *Pireno*, or that fall within the specifically enumerated categories as described in *Owens*, will fall within its carve-out from the antitrust laws. Consequently, those who have concerns about the antitrust implications of certain actions should be wary of depending on the shelter of the McCarran-Ferguson Act if they are not directly related to risk-spreading activities.

Second, the *In re Insurance Brokerage* opinion should assuage concerns that contingent commission payments to insurance brokers via ''preferred-partner'' arrangements with insurance companies are *per se* anticompetitive. Although the Third Circuit opinion left open the possibility that such practices could be challenged under a ''rule of reason'' analysis, the settlement of the tag-along cases, several of which sought to allege rule of reason claims, at the motion to dismiss stage, and the growing acceptance of contingent commissions by state insurance regulators subject to a disclosure regime suggests that there is little room for actions challenging these vertical arrangements on a rule of reason theory either. The Third Circuit's opinion suggests that these parallel vertical agreements—be they structured as contingent commissions or ''preferred partner'' agreements—will not fall afoul of antitrust laws without evidence of actual collusion among the insurers, or of other traditionally anticompetitive practices such as bid-rigging.

[59] *See In re Ins. Brokerage Antitrust Litig.*, MDL No. 1663, Civ. No. 04-5184, 2009 WL 411877 (D.N.J. Feb. 17, 2009) (approving $69 million settlement with Marsh Defendants); *In re Ins. Brokerage Antitrust Litig.*, 579 F.3d 241, 248, 252, 254–55 (3d Cir. 2009) (affirming district court's approvals of $121.8 million settlement with Zurich Defendants and $28 million settlement with Gallagher Defendants); *In re Ins. Brokerage Antitrust Litig.*, 282 F.R.D. 92, 101, 118 (D.N.J. 2012) (approving $41 million Global Settlement with eleven of the fourteen defendants remaining after the Third Circuit's decision); *In re Ins. Brokerage Antitrust Litig.*, 297 F.R.D. 136, 143, 147 (D.N.J. 2013) (approving $10.5 million settlement resolving the consolidated class action as to the final three remaining defendants).

ISSN 0003-6021