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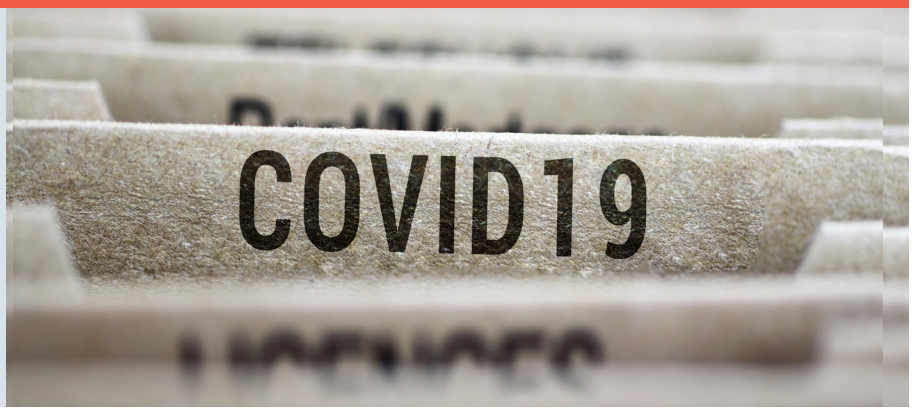
Collaboration Among Insurers on Responses to COVID-19

by Thomas F. Bush

A FREEBORN & PETERS LLP CLIENT ALERT

The unprecedented challenges that COVID-19 presents to insurers will lead many to seek consultation and collaboration with other insurers facing the same challenges. Some may hesitate, out of a concern for the risks of an antitrust violation.

To address that concern, we offer the following guidelines for insurers subject to the antitrust laws of the United States.



Petitioning the Government

Many regulators and legislators are actively considering measures to assist policyholders seeking coverage for losses arising from the pandemic. Such measures range from applying public pressure on insurers to pay claims that are subject to coverage defenses to adopting new laws and regulations that expand the coverage under existing policies. Insurers need to engage with law makers, regulators and other public officials on these measures and understand that collaboration with other insurers will strengthen their position.

This form of collaboration should not raise antitrust risks. Under a doctrine known as "Noerr Pennington," actions undertaken to influence government bodies and officials are deemed outside of the scope of the antitrust laws, even if the actions have the effect of harming competition. The collaboration must, however, be undertaken with the intention of influencing a governmental decision. If the goal is to obtain an advantage that does not depend on the governmental decision, for example by burdening a competitor with the cost and distraction of a regulatory investigation, and favorable action by the government is not an actual objective, the protection of Noerr-Pennington is lost.

Collaboration on Claims

Insurers often wish to collaborate on claims, particularly where they co-insure the same risks, through information sharing and occasionally by joint decisions on paying claims. Policyholders occasionally regard such collaboration as anticompetitive collusion, but the conduct has not led to antitrust liability in the past and should not in the future.

Cooperation among competitors will raise potential antitrust liability when its purpose or effect is to restrain competition, usually in the form of higher prices or lower output. By the time that a claim is presented for payment, the competitive process has been completed. The premium, coverage and other terms of the policy have been set. Whether a claim is paid, and for how much, is determined by the policy, not by competition among insurers.

Insurers have encountered antitrust issues when their collaboration on claims expands to affect the premium or terms for renewal or new coverage. So long as the communications and the collaboration is limited to claims under covers already bound and terms already set, the insurers should not face a serious antitrust risk.

Antitrust Immunity

A federal statute, known as the McCarran-Ferguson Act, provides insurers with immunity from antitrust laws, but the immunity is subject to some significant limitations. First, the immunity is applicable only to the "business of insurance," a term that the courts have interpreted narrowly. Not every activity carried out by an insurance company is immune. Second, the immunity is only from federal antitrust laws. Almost all of the states have their counterparts to the federal antitrust laws, and many of the states provide either much narrower or no immunity for insurance activities. Third, insurers domiciled outside of the United States offering surplus lines coverage might not benefit from the immunity, depending upon the circumstances of the claim.

Due to these limitations, prudent insurers do not rely on the immunity of the McCarran-Ferguson Act for the purpose of ensuring compliance with the antitrust laws, except in specific cases where antitrust counsel determines that the immunity is clearly applicable. The immunity might prove to be valuable to an insurer facing an antitrust claim or subject to a government investigation, but an insurer seeking to avoid antitrust litigation and investigations should conduct itself as if no immunity is available.

If you have questions, please contact Thomas Bush and stay tuned for more developments on Freeborn's COVID-19 webpage.

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Tom has extensive experience in complex litigation involving antitrust, insurance and reinsurance matters, and, in particular, has been very actively involved in the representation of significant lawsuits and arbitrations for global reinsurers in disputes arising from large scale losses. Tom also represents and counsels insurance companies and investment firms on antitrust compliance and on competition issues arising in mergers and acquisitions.

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