For Opinion See 319 Fed.Appx. 615

United States Court of Appeals,
Ninth Circuit.
Sarah PEREZ, Michelle Lackney, Rachel Stewart, and Rachel Hardyck, Plaintiffs-Appellants,
v.
STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, Allstate Indemnity Company, Geico General Insurance Company, Certified Automotive Parts Association, and Liberty Mutual Fire Insurance Company, Defendants-Appellees.
No. 06-16965.
January 30, 2007.

Appeal from an Order and Judgment Entered October 5, 2006 by the United States District Court for the Northern District of California (San Jose Division), Case No. C 06-01962 JW The Honorable James Ware

Brief of Plaintiffs/Appellants

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JURISDICTIONAL STATEMENT

The district court has original subject matter jurisdiction under 28 U.S.C. § 1332(d)(2) (diversity jurisdiction over class claims) because the matter in controversy exceeds the sum of $5,000,000, exclusive of interest and costs, and members of the California Classes alleged herein are citizens of California, whereas at least one Defendant is a diverse citizen. *See* 28 U.S.C. § 1332(c)(1), (d)(2). This Court has appellate jurisdiction under 28 U.S.C. §§ 41, 1291, and 1294. The district court entered Judgment in this case on October 5, 2006, and the Notice of Appeal was filed on October 13, 2006. This appeal is therefore timely under Fed. R. App. P. 4(a)(1).

ISSUES PRESENTED

Whether the district court erred in holding, as a matter of law, that Plaintiffs could not have standing to pursue claims that they were injured by Defendants' unlawful exclusion of competition.

STATEMENT OF THE CASE

On March 14,2006, Plaintiffs-Appellants ("Plaintiffs") brought this case under the Cartwright Act, Cal. Bus. & Prof. Code § 16720, and the Unfair Competition Law, Cal. Bus. & Prof. Code § 17200 *et seq.,* alleging that Defendants-Appellees ("Defendants") have excluded competition from higher quality auto insurance policies, thereby restraining the market for automobile insurance and injuring proposed class members who had purchased insurance policies from Defendants that were both higher-priced and lower-value than would have been the case in a competitive market. Specifically, Plaintiffs alleged that Defendants coordinated their policies to require the use of lower-quality imitation crash parts in auto repairs; to exclude competition based on the quality of crash parts; and to establish a supposedly neutral third-party arbiter, Defendant Certified Automotive Parts Association ("CAPA"), that is actually purely an instrumentality of the conspiracy. Docket No. 1 (Complaint), Docket No. 82 (Second Amended Complaint ("SAC")); ER 1, 12-17.

Defendants filed two Motions to Dismiss. In their Joint Motion to Dismiss Plaintiffs' First Amended Complaint for Lack of Standing, they contended that Plaintiffs lacked standing because they could not have suffered any injury upon purchasing the policies at issue, but could only have suffered injury if faulty crash parts were used in repairing their automobiles after a claim was made. Docket No. 54, 55. In their Joint Motion to Dismiss Plaintiffs' First Amended Complaint, they contended that insurance companies' conduct relating to rates was immune from challenge under the Cartwright Act and the Unfair Competition Law. Docket No. 49, 50. Both Motions to Dismiss were made applicable by stipulation to Plaintiffs' Second Amended Complaint. Docket No. 81. In addition, CAPA filed a motion to dismiss on the grounds of lack of personal jurisdiction. Docket No. 37, 38.

On October 5, 2006, the district court granted Defendants' Joint Motion to Dismiss for Lack of Standing and entered judgment for Defendants. Docket No. 112, 113. The district court did not reach Defendants' other Joint Motion to Dismiss or CAPA's individual motion to dismiss. Excerpts of Record ("ER") 35-36 (Order at 6-7).

STATEMENT OF FACTS

Crash parts are parts used to repair automobiles, typically after an accident. These crash parts include outer-body stamped sheet metal and plastic car components as well as other parts that need to be replaced after collisions. Plaintiffs alleged that Defendants have unlawfully conspired, in violation of the Cartwright Act, Cal. Bus. & Prof. Code § 16720, and the Unfair Competition Law, Cal. Bus. & Prof. Code § 17200 *et seq.*, (a) to deceive their California policyholders by passing off their insurance coverages as providing high-quality repair capable of restoring a vehicle to its pre-loss condition, when in fact they provide far inferior and less costly crash parts; and (b) to prevent competition among insurance companies based on the quality of crash parts. ER 1 (SAC ¶¶ 1-2).

As part of this deceptive campaign the conspirators have established, financed, and directed the Certified Automotive Parts Association ("CAPA"). This Association promotes inferior crash parts as acceptable substitutes for crash parts originally provided by OEM manufacturers in part by the use of sham certifications of quality. CAPA publicizes itself as "objective," "independent," "non-profit," "third party," and "a regulatory body." Conspirators use CAPA repeatedly in their advertising. CAPA was intended to provide an "aura of independence and credibility" to use of inferior, imitation crash parts. ER 12-13 (SAC ¶¶ 48-50).

But CAPA's own internal documents show that this is a sham exercise. Far from being "independent," CAPA has been completely controlled by the conspirators who occupy key positions on the board of directors and the technical committee. Although it counts others as "members," the *only* members that pay dues are insurance companies, which provide substantial finding - in some years nearly half a million dollars from State Farm alone. CAPA's only other source of income is selling "CAPA" stickers to the inferior part manufacturers - so that the more parts CAPA "certifies," the more money it makes. Although it claims to have a "consumer group" on its board, that "consumer group" is actually controlled by the Defendant Insurers. The only reason for CAPA's existence is a public relations effort to silence competitors that do not use inferior crash parts - or make it more difficult for them to be heard. ER 13 (SAC ¶¶ 51-55).

Defendants, including CAPA, have been well aware that the parts it was "certifying" were systematically inferior. This was not a mere matter of individual parts not being similar in quality to OEM parts; rather, the parts were grossly inferior, because of the manufacturers' total lack of quality control programs. ER 14-15 (SAC ¶¶ 56-67).

For example, one manufacturer of inferior parts, Keystone Automotive Industries - which is also the largest U.S. distributor of CAPA parts -- has had no quality control program and was found liable for fraud for claiming that its parts were of like kind and quality to OEM parts. Indeed, CAPA-certified parts have "failed all tests" when examined at conventions, do not conform to original manufacturers' specifications, and use substandard materials, such as non-galvanized metal that rusts more easily. ER 14-15 (SAC ¶¶ 57, 60, 63-64).

CAPA submitted an affidavit in support of State Farm that "CAPA certified parts do not have safety ramifications," even though CAPA was well aware that CAPA parts posed serious safety problems, including CAPA hoods going through windshields in crashes or crash tests. Despite this, CAPA rejected its own testing laboratory's "urgent[]" plea that CAPA "dynamically test[]" hoods because of safety concerns. ER 15 (SAC ¶ 64).

Similarly, CAPA claimed that it was a "myth" that "CAPA parts rust easily." Yet CAPA's own internal documents showed that CAPA-certified parts were made of non-galvanized metal and did corrode more quickly. ER 15 (SAC ¶ 65).

While CAPA purported to have a program to "decertify" parts, it did nothing about such parts that had already been installed on cars, and routinely re-certified them without any improvement being made. CAPA awarded its "Top Quality Manufacturer" award to seven companies, *four* of which had numerous parts decertified in the previous year. As one State Farm executive noted at a CAPA meeting, "if the parts were high quality a public relations campaign would not be necessary." ER 15 (SAC ¶¶ 66-67).

As a consequence of their agreement not to compete based on parts quality, and their agreement to coordinate their use of inferior aftermarket crash parts, Defendants require and have required automobile repair shops to use a variety of inferior quality crash parts on their insured's automobiles. These include (a) CAPA-certified imitation parts, (b) non-CAPA-certified imitation parts, and (c) parts salvaged from wrecked or totaled (including flood-damaged) automobiles, which raise significant issues of adequacy, corrosion, fit, and safety. For example, such salvage parts are not routinely tested for structural integrity (such as by x-rays) or disinfected. Defendants have arrangements with companies that provide untested salvaged parts, such as LKQ Corporation, from junkyards or elsewhere to provide such parts for installation on their insured's automobiles. ER 15-16 (SAC ¶ 68).

Insurance companies are important anticompetitive partners for the manufacturers and distributors of inferior crash parts. The insurance companies have used their substantial leverage on class members and auto repair shops. They can require the shops not only to use low-quality parts, but to pressure them not to disclose any doubts to customers about the quality of such parts. Defendants reportedly terminate or steer business away from auto repair shops that are unwilling or reluctant to use inferior parts in repairs. ER 16, 17 (SAC ¶¶ 69, 73).

The advertising and other misinformation disseminated by the conspirators, through the expenditure of millions of dollars, as to the quality of their inferior crash parts makes it more difficult and costly for insurance and manufacturing competitors challenging the conspiracy to compete on the merits. To do so, they must cure market-wide misinformation disseminated by the conspirators as to the quality of their crash parts. Thus, the conspirators' conduct has had the effect of maintaining and enhancing the named and un-named insurance conspirators' market power over automobile insurance, allowing them to raise premiums to levels that would not be sustainable for such coverage in a more competitive market. ER 17 (SAC ¶¶ 76-77).

SUMMARY OF ARGUMENT

Plaintiffs allege (and such allegations are to be taken as true on a motion to dismiss) that Defendants have successfully conspired to exclude competition from automobile insurers on the basis of the quality of coverage provided. Defendants have agreed only to provide lower-quality coverage (under which an insured's cars are repaired using the cheapest parts available, regardless of quality) and have taken numerous steps to prevent others from competing on the basis of quality - notably, the establishment of CAPA, a supposedly neutral third-party arbiter that is in fact completely funded and controlled by Defendants and other insurers and has falsely represented that the parts used by Defendants are equal in quality to OEM parts.

Standard antitrust and economic theory holds that when competition on the basis of quality is excluded, demand for

lower-quality products goes up because there are no higher-quality competitors (just as, for example, demand for black and white televisions would go up if color televisions were excluded from the market).

Standard antitrust and economic theory also holds that when demand for a product goes up, price goes up as well. Under long-standing antitrust case law, the prices commanded by the lower-quality insurance policies on offer were higher than they would have been in a competitive market. Thus, Plaintiffs' claims of injury are not novel and they naturally arise out of the application of standard, well-established legal principles to the automobile insurance market.

The district court, however, found as a matter of law that there was no possible set of facts under which Plaintiffs could show injury, and dismissed for lack of standing. The district court found that there could be no injury unless a plaintiff had an accident and made a claim and the insurance company then required the use of inferior parts in repairing the plaintiffs automobile. Under this view, even if(as the district court was required to assume on a motion to dismiss) Defendants *had* excluded quality competition and had thereby elevated price, nobody purchasing an insurance policy at an inflated price could claim injury; instead, only customers who made claims and received substandard repairs could sue.

The district court's ruling was apparently based at least in part on a misunderstanding of Plaintiffs' claims, and in part on reliance on non-antitrust cases in which courts found no injury where there was no breach of contract because the cause of action at issue was believed to be analogous to a contract claim.

The district court therefore erred in finding that there was no standing; at a minimum, the question of injury was one for factual development and expert economic testimony, not a decision on the pleadings.

The district court stated no other grounds for dismissal, and there was no other proper basis for dismissal. Defendants also argued that they were completely immune from civil liability because they had filed their rates with the California Insurance Commissioner. California's Insurance Code, however, expressly provides without limitation that Cartwright Act and unfair business practice claims apply to "the business of insurance," Calif. Ins. Code § 1861.03(a) - and courts have found that "the business of insurance" necessarily includes setting the price of insurance. If California had intended to carve out such a large part of the business of insurance, it would have done so expressly.

Defendants also argued that two specific provisions of the Insurance Code immunized their conduct. One of them, Calif. Ins. Code § 1860.2 specifically applies only "[e]xcept as provided in this chapter," so by its own terms it is explicitly subordinate to the provisions of § 1861.03(a) and therefore cannot immunize Defendants from Plaintiffs' claims. The other provision, Calif. Ins. Code § 1860.1, provides that actions taken "pursuant to the authority conferred by this chapter" are not "a violation of or grounds for prosecution or civil proceedings under any other law ... which does not specifically refer to insurance." The violation and grounds for proceedings here, however, was Defendants exclusion of competition from the automobile insurance market, which was not achieved pursuant to any authority conferred by the Insurance Code and was not approved by the Insurance Commissioner.

Moreover, *Cellular Plus, Inc. v. Superior Court,* 14 Cal. App. 4th 1224 (Cal. App. 4th Dist. 1993), makes clear that simply because rates are approved by a public regulatory body does not mean that such rates cannot be used to measure damages, even when a statute provides that a court cannot second-guess the regulatory body's approval of those rates, because that would severely undermine California public policy. The holding of *Cellular Plus* is even more applicable here, because here (unlike in *Cellular Plus*) Section 1861.03(a) specifically provides that causes of action such as Plaintiffs' shall apply to the business of insurance.

ARGUMENT

Standard of Review: The standard of review on a decision granting a motion to dismiss is *de novo. O'Loghlin v. County of Orange,* 229 F.3d 871, 874 (9th Cir. 2000). Standing is a question of law that is also reviewed *de novo. S. D. Myers, Inc. v. City and County of San Francisco,* 253 F.3d 461, 474 (9th Cir. 2001).

I. PLAINTIFFS HAVE PROPERLY ALLEGED THAT THEY SUFFERED INJURY AT THE TIME OF PURCHASE AND THAT THEY THEREFORE HAVE STANDING TO SUE

A motion to dismiss may be granted only if "it appears *beyond doubt* that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson,* 355 U.S. 41,45-46 (1957) (emphasis added); *O'Loghlin,* 229 F.3d at 874. When ruling on a motion to dismiss, the Court should take all material allegations of fact as true, and should construe them in the light most favorable to the nonmoving party. *O'Loghlin,* 229 F.3d at 874; *Big Bear Lodging Assn. v. Snow Summit, Inc.,* 182 F.3d 1096, 1101 (9th Cir. 1999).

In a competitive automobile insurance market, providers could compete on the basis of quality and price. Some insurance companies would offer policies that restored the insured's car to its pre-crash condition; some would offer policies that provided lower-quality, but less expensive, repair with inferior parts that would not restore the insured's cars to pre-crash condition. Different customers would prefer different types of policies: for example, customers who had a new, more expensive automobile may have a different preference from customers who own older and used vehicles.

In that case, the competitive, market price of the first type of policy can be expected to be higher than that for the second type of policy because the value of the insurance would be higher - just as a homeowner's insurance policy with full replacement coverage is worth more than one with cash value coverage, regardless of whether the insured ever collects on the policy. Here, the insurance companies conspired to exclude quality and price competition by excluding the higher-quality policy, providing only the lower-quality policy, and yet charging the market rate for the higher-quality policy.

Defendants inflicted direct and immediate injury on Plaintiffs at the time the Plaintiffs purchased their lower-quality policies and paid the prices for the higher-quality policies. With competition, they would have had well-informed, competitive choice as to the quality of their policies and paid the price appropriate to their choice.

In the district court, Defendants set up a straw man in characterizing Plaintiffs' claims as sounding in breach of contract (such that the injury would occur only when inferior repair parts were actually provided after a crash). Under the actual Cartwright Act and unfair competition claims alleged, the injury does not await a claim - it is immediate and direct as soon as above-competitive premiums are paid.

The district court found, as a matter of law, that any possible injury caused at the time of purchase was too "speculative" and that Plaintiffs therefore lacked standing. ER 34-35, Order (Oct. 5, 2006) at 5-6. But (as discussed below) this is contrary to long-standing antitrust precedent and widely accepted economic theory, which shows that the exclusion of such higher-quality policies (if proven) necessarily had the effect of elevating the price of the lower-quality policies. Moreover, because both the pricing and the terms are determined up front, before any repairs are needed, the injury to Plaintiffs necessarily occurred when they entered into the insurance contracts - when they either paid money, or entered into an obligation to pay it, in return for specified rights. As discussed below, courts have accepted evidence, including expert economic testimony, measuring the same kind of overcharges in many other cases.

Here, however, the district court did not give Plaintiffs the opportunity to develop the facts and provide economic expert testimony to show that the injury occurs when the insurance contract is obtained. Instead, the court granted Defendants' motion to dismiss on the pleadings, in effect finding "beyond doubt" that there was no possible set of facts that could show injury at the time of purchase and entitle Plaintiffs to relief. *See Conley,* 355 U.S. at 45-46. As

a matter of law, the court found that the only conceivable injury to Plaintiffs - even if they were overcharged or provided inferior policies at the start - could only occur when a Plaintiff's car is damaged, the Plaintiff makes a claim under the policy, and the Defendant then provides inferior repair parts.

Although dispositive of the claims of millions of putative class members, the district court's discussion was brief and can be reproduced virtually in its entirety here:
With respect to standing, the Court of Appeal in *Cellular Plus* [, *Inc. v. Superior Court*, 14 Cal. App. 4th 1224 (Cal. App. 4th Dist. 1993)] found that cellular telephone service consumers who alleged payment of artificially inflated prices by reason of unlawful price fixing sufficiently stated an antitrust injury. *Id.* at 1233. However, unlike *Cellular Plus*, the Plaintiffs in this case do not allege that Defendants conspired to set and maintain artificially high premiums. Rather, Plaintiffs allege that Defendants conspired not to compete as to the quality of crash parts such that, in some instances, a policy holder will not receive the full value of the premium. (*See* SAC ¶ 48.) Additionally, the plaintiffs in *Cellular Plus* complained of the rate charged to every customer, whereas the Plaintiffs in this case do not complain of the rates charged by Defendants in situations where high quality or OEM replacement parts are used. These differences are critical to an analysis of standing. First, other courts have held that diminution in value is insufficient to establish standing absent a showing of individual loss. Second, because Plaintiffs' claim is necessarily limited to diminished value of the policy in a specific situation, Plaintiffs have failed to state an antitrust injury based on unlawful price fixing.
The Court finds that Plaintiffs have failed to make the requisite showing of individual losses because their Second Amended Complaint does not allege that any single named Plaintiff has received replacement parts of inferior quality upon filing a claim with his or her [insurer]. Plaintiffs' claim is based solely on the anticipated use of inferior crash parts such that Plaintiffs' injuries are speculative and insufficient to confer standing under Article III.

ER 34-35 (Oct. 5, 2006 Order at 5-6) (citations omitted).

A. Contrary To The District Court's Characterization, Plaintiffs Allege That Injury To All Purchasers Occurs At The Time Of Purchase, Not When A Repair Is Made

First, the district court mischaracterized the nature of Plaintiffs' claims. It states that "Plaintiffs allege that Defendants conspired not to compete as to the quality of crash parts such that, *in some instances*, a policy holder will not receive the full value of the premium." ER 34-35, Order at 5-6 (emphasis added). Similarly, the court asserts that Plaintiffs "do not complain of the rates charged by Defendants *in situations where high quality or OEM replacement parts are used.*" ER 35, Order at 6 (emphasis added).

In other words, the court misunderstood Plaintiffs as claiming that customers were shortchanged only if and when they received inferior crash parts. In fact, Plaintiffs' Complaint extensively relates that the injury alleged comes *up front* for all Plaintiffs, because Defendants' unlawful exclusion of higher-quality competition allows them to charge higher prices and provide inferior policies *at the time of sale. See, e.g.*, ER 18 (SAC ¶¶ 80-81) (injury is "pay [ing] above-competitive *premiums* for the inferior insurance repair *coverages* they have actually received .... Instead, they receive substantially inferior repair *coverage* which would command substantially lower premiums 'but for' the conspiracy") (emphasis added) (emphasis added); ER 20 (SAC ¶ 96) ("Defendants' anticompetitive conduct ... has caused the *premiums or prices* charged to the members of the California Classes to be above competitive premiums for the actual inferior repair *coverages* provided by Defendants") (emphasis added). These allegations were ignored by the district court.[FN1]

> FN1. The Court - purportedly in support of its view that customers were only injured "in some instances" - cited only paragraph 48 of the Second Amended Complaint. ER 35-35 (Order at 5-6). This paragraph, however, states that Defendants have "conspired to provide inferior crash parts to meet their insurance repair obligations" in order to "reduce dramatically their repair costs and realize *premiums* significantly above those warranted by the quality of crash part *coverages* provided". ER 12 (SAC ¶ 48) (emphasis added).

Not only did the court disregard the allegations of the complaint, it simply assumed at the pleading stage, without the benefit of any factual development or economic analysis, that the effect of excluding competition on premiums was purely "speculative" and that the only real injury occurs when an actual part is put on an actual car after a crash.

To the contrary, the entire insurance industry is based on the premise that insurance policies can be valued and priced before any claim is made, and that they have measurable value to customers even if those customers never end up having an accident. At a minimum, the issue of whether overcharge can be shown at the time of purchase is a matter for evidence and expert testimony, and dismissal was unjustified.

B. Plaintiffs Assert Standard Overcharge Claims

Far from being novel, Plaintiffs' claims are standard overcharge claims. It is well-established that the antitrust and unfair competition laws apply to services just as much as to products. *See Marin County Board of Realtors, Inc. v. Palsson,* 16 Cal.3d 920, 925-28 (1976) (finding that Cartwright Act applies to services); *Cellular Plus,* 14 Cal.App. 4th at 1233 (cell phone services); Cal. Bus. & Prof.Code § 17024; Cal. Bus. & Prof. Code § 17200 (any "business act or practice"). Indeed, in another federal case brought against many of the same Defendants on very similar claims, the court ruled that

[t]he plaintiffs have adequately alleged a conspiracy to charge premiums at an anticompetitive rate by concerted refusals to use anything but inferior less-expensive parts while refusing to lower premiums. ... The Court agrees with the plaintiff that the antitrust injury occurs when an insured pays a supra-competitive premium rather than only when a loss occurs.

ER 27-28 (Nov. 17, 2000 Order at 12, 12-13, *Gilchrist et al. v. State Farm Mutual Insurance et al.,* U.S. District Court (N.D. Fla.), Case No. 1:00cv66 MMP, *case dismissed on other grounds*, 390 F.3d 1327 (11th Cir. 2004)).[FN2]

> FN2. The case was later dismissed under the McCarran-Ferguson Act, 15 U.S.C. § 1012 *et seq.*, which bars federal subject matter jurisdiction over the "business of insurance." *Gilchrist v. State Farm Mutual Automobile Insurance Co.,* 390 F.3d 1327, 1330-35 (11th Cir. 2004).

Antitrust and competition claims generally involve manipulation of a market in which products or services are purchased. Thus, injury to purchasers occurs at the time of purchase, not during subsequent performance, and whether a defendant breached its contract is beside the point. In the area of both antitrust and fraud, cases recognize that "injury" occurs as soon as the product is purchased even if it is an intangible good such as a contract; there is no need for any showing of subsequent contractual breach or performance or for any allegation that the contract was breached. *See, e.g., In re Visa Check/MasterMoney Antitrust Litigation,* 280 F.3d 124, 139-41 (2d Cir. 2001) (services); *Amey, Inc. v. Gulf Abstract & Title, Inc.,* 758 F.2d 1486, 1501 (11th Cir. 1985) (inflated legal fees); *In re Auction Houses Antitrust Litigation,* 193 F.R.D. 162 (S.D.N.Y. 2000) (auction services); *Collins v. International Dairy Queen,* 186 F.R.D. 689 (MD. Ga. 1999) (franchising agreements); *Image Technical Services v. Eastman Kodak Co.,* 1994 Westlaw 508735 (N.D. Cal. Sept. 2, 1994) (service contracts); *Image Technical Services, Inc. v. Eastman Kodak Co.,* 1994 WL 508735, *3 (N.D. Cal. Sept. 2, 1994) (service contracts); *In re Domestic Air Transportation Litigation,* 137 F.R.D. 677 (N.D. Ga. 1991) (airline transportation contracts).

Indeed, when an antitrust plaintiff enters into a contract at an allegedly higher-than-competitive price, all antitrust injury typically accrues, and the limitation period begins to run, at the time the contract is entered into - *not* when it is performed (or breached) - because it is at that initial point that rights and liabilities under the contract are fixed. *Amey, Inc.,* 758 F.2d at 1500-01; *Kaiser Aluminum & Chemical Sales, Inc. v. Avondale Shipyards, Inc.,* 677 F.2d 1045, 1054-55 (5th Cir. 1982); *City of El Paso v. Darybshire Steel, Inc.,* 575 F.2d 521, 523 (5th Cir. 1978). Thus, antitrust conspirators can be found to have excluded competition in a market for contractual services regardless of whether the contracts are ultimately fulfilled. Even if no contract is breached, that does not mean that competition

was not excluded or that consumers were not injured at the time they purchased the services at issue. Accordingly, the complaint alleges "overpayment of premiums" (ER 19 (SAC ¶ 86)) and does not allege any breach of contract. The overcharge occurs when the plaintiff pays or agrees to pay an inflated premium in a market from which competing policies have been excluded.

The district court's assertion, that the actual use of inferior parts in repair is the only possible injury, is tantamount to saying that there can be no antitrust violation caused by excluding competition (and thereby raising prices) in *any* service market, not just the market for automobile insurance. Under the district court's approach, all claims against insurance providers inevitably must be breach of contract claims, and consumers cannot be injured by insurance companies unless and until they make a claim.

This misconception ignores the basic economic reality that insurance policies are things of value whether or not a claim is ever made under them - as shown by the fact that consumers pay for such policies *before* knowing whether they will make a claim - because what consumers purchase is not the actual payments that the insurer may or may not have to make, but the insurer's *obligation* to make those payments if necessary. That is why insurance companies do not have to refund premiums received during the life of a policy under which no accidents occur, and it is also why consumers are injured when this up-front payment for the insurer's obligation is artificially inflated.

C. Notwithstanding The Court's Conclusion That Injury Was Too "Speculative," Courts Have Allowed Proof Of Overcharges On Service Contracts As Of The Time Of Purchase

While the district court believed it could decide up front - and contrary to the pleadings - that it was too "speculative" to determine overcharge injury as of the time of purchase, case law is full of instances in which courts have approved methods of measuring antitrust damages in services markets without determining whether there was any breach of contract. *See, e.g., In re Visa Check/MasterMoney Antitrust Litigation,* 280 F.3d at 139-41 (measuring overcharge for services); *Image Technical Services, Inc. v. Eastman Kodak Co.,* 1994 WL 508735 at *3 (service contracts); *In re Domestic Air Transportation Litigation,* 137 F.R.D.at 688-89 (airline tickets); *cf. In re NASDAQ Market-Makers Antitrust Litigation,* 169 F.R.D. 493, 522 (S.D.N.Y. 1996) (securities).

Rather than deciding this issue of fact on the pleadings, Plaintiffs should have been allowed to show, using expert economic testimony, that injury occurred when they entered into contracts with higher prices than would have obtained for the same contracts in a competitive market. Indeed, in *Gilchrist,* a federal district court found that damages based on such injury could be validly measured on a class-wide basis. *See Gilchrist,* 390 F.3d at 1329 (noting that district court certified damages class based on similar claims).

D. The District Court Relied On Non-Antitrust Cases, Which Led It To Err In Analogizing The Case To A Breach Of Contract Action

The district court characterized Plaintiffs' claim as one for "diminished value" and held that this diminished value can be shown only when a repair is made to an automobile. As discussed above, Plaintiffs' claim of overcharge follows the standard approach of antitrust cases, where the injury occurs when a plaintiff is overcharged as a result of purchasing in a market from which competition has been excluded. Thus, insofar as the claim is one for "diminished value," the proper measure of the diminished value occurs at the time of purchase.

As noted above, the entire insurance industry is based on the premise that the value of insurance policies can be measured at the time they are entered into (if insurance companies could not do so, they would have no idea what to charge), so there is no reason to treat insurance any differently from the many other intangibles or services that have been the subject of antitrust overcharge claims.

The district court appears to have been misled by its reliance on non-antitrust cases involving factual claims that

were much closer to breach of contract actions. The Court relied on three cases in support of its decision: Horvath v. Keystone *Health Plan East, Inc.*, 333 F.3d 450 (3d Cir. 2003); *Impress Communications v. Unumprovident Corp.*, 335 F.Supp.2d 1053 (CD. Cal. 2003); and *Doe v. Blue Cross Blue Shield of Maryland, Inc.*, 173 F.Supp.2d 398 (D.Md. 2001).

None of these cases involved antitrust or unfair competition claims. Instead, all three involved the Employee Retirement Security Act ("ERISA"), 29 U.S.C. § 1001 *et seq.*, a specialized statutory regime that includes special standing and injury requirements not present in this case. These cases make clear that they were based on the peculiarly limited nature of ERISA standing and a policy against broad, remedial construction of ERISA remedies. *See Horvath*, 333 F.3d at 457 ("the reticulated nature of ERISA discourages the creation of new causes of action"); *Doe*, 173 F. Supp.2d at 404 ("ERISA case law consistently has tied the issue of standing to the denial of specific benefits"); *id.* at 405 ("There is a consistent reluctance to recognize new causes of action under ERISA," which is a "comprehensive and reticulated statute").

Moreover, in both *Horvath* and *Doe*, the plaintiffs clearly could not have suffered injury prior to a contractual breach because they were not the purchasers of the products at issue. In ERISA cases, the employer is the purchaser. As a result, until there is a breach of contract, the employee's only claim would "rest ... on the notion that the firm would have passed these savings on to its employees in the form of a higher salary or additional benefits," which the court understandably found "far too speculative". *Horvath*, 333 F.3d at 457; *see also Doe*, 173 F. Supp.2d at 403 n.8 ("because it was Plaintiffs' employers who negotiated the insurance policies in question, it is unclear whether a cash award to Plaintiffs would redress the alleged injury").

The third case relied upon by the court, *Impress Communications*, involved claims under both ERISA and the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1961 et seq. In that case, however, plaintiffs based their claims on "a scheme ... to breach the contracts," 335 F. Supp.2d at 1060 (quoting plaintiffs' complaint and brief), and "assert[ed] Defendants must have breached the contract." *Id.* at 1061. Since the scheme in that case was solely to breach the contracts, the court concluded that no injury occurred until the scheme had succeeded - that is, when the contract was breached. In the present case, by contrast, the scheme was to exclude competition based on quality, a scheme that *had* succeeded by the time Plaintiffs purchased their policies. ER 17 (SAC ¶¶ 76-77).

Although the district court did not rely on it, Defendants also relied on an additional case, *Maio v. Aetna, Inc.*, 221 F.3d 472 (3d Cir. 2000), which involved RICO claims. In that case, the court suggested that there could never be injury for "diminished value" when the case involved an "intangible" asset rather than "a tangible property interest, like a plot of land or a diamond necklace." *Maio v. Aetna, Inc.*, 221 F.3d 472, 488-89 (3d Cir. 2000), quoted in *Doe*, 173 F. Supp.2d at 404.

Any attempt to import this view into antitrust or unfair competition, however, is contrary to the case law cited above, in which service contracts are treated the same as products. Moreover, even in the RICO context, the court in In re *Managed Care Litigation*, 150 F. Supp.2d 1330 (S.D. Fla. 2001), *reconsid. denied*, 185 F. Supp.2d 1310, 1318 (S.D. Fla. 2002), recognized that *Maio's* sharp distinction between tangible and intangible products could not be sustained:

The *Maio* court drew a dichotomy between property interests and contracts and concluded that the subscriber plaintiffs in that case possessed only contractual rights rather than a property interest in their insurance coverage.... Yet it is apparent that the Plaintiffs do not allege that the Defendants breached their contracts.

The proper dichotomy in this case is breach of contract versus claims sounding in tort. ... In sum, the *Maio* court took an overly restrictive view of property rights and overlooked the distinction between business-related torts and contract breaches. ... As the Supreme Court has observed, money is a form of property. *Reiter v. Sonotone Corp.*, 442 U.S. 330, 338 (1979). Furthermore, '[a] person whose property is diminished by a payment of money wrongfully induced is injured in his property.' *Id.* at 340....

150 F. Supp.2d at 1338. The court's reasoning in *Managed Care* is still more compelling in this context, when De-

fendants' position would revolutionize antitrust and unfair competition law by limiting injury either to breaches of contract or to tangible commodities. No such limitation can be found in California law. To the contrary, the district court itself noted that in *Cellular Plus,* the court allowed plaintiffs to put forward evidence of overcharges of cellphone services regardless of whether there was any breach of contract. ER 34 (Order at 5), citing 14 Cal. App. 4th at 1233.

E. The District Court Distinguished *Cellular* Plus Because It Involved Price-Fixing, But The Claims Here Are Tantamount To Price-Fixing Under The Case Law

The district court suggested that the claims here could have been valid under *Cellular Plus* if Plaintiffs' claims involved "price-fixing." ER 34-35, Order at 5-6. The court distinguished *Cellular Plus* on the ground that the Plaintiffs here "do not allege that Defendants conspired to set and maintain artificially high premiums," but rather that they "conspired not to compete as to the quality of crash parts". ER 34, Order at 5.[FN3]

> FN3. In addition, the court also distinguished *Cellular Plus* on the ground that the Plaintiffs here supposedly do not allege injury as to "every customer," *id.* at 6, but as discussed above this is incorrect.

This distinction is not to be found in *Cellular Plus,* in which the court nowhere suggests that its conclusion would be any different if the plaintiffs had alleged a different agreement affecting price rather than a direct price-fixing agreement. In any event, the United States Supreme Court has made clear in several cases that agreements to limit supply (as alleged here) *are* price-fixing, because they necessarily elevate prices; they are simply another, no less effective means of fixing prices. " '[C]onstriction of supply is the essence of 'price-fixing,' whether it be accomplished by agreeing upon a price, which will decrease the quantity demanded, *or by agreeing upon an output, which will increase the price offered.*' " *Federal Trade Commission v. Superior Court Trial Lawyers Association,* 493 U.S. 411, 423 (1990) (quoting Court of Appeals) (emphasis supplied). Further, an agreement among competitors to restrict supply is " 'unquestionably a 'naked [per se] restraint' on price and output.' " *Id.* (citing *National Collegiate Athletic Assn. v. Board of Regents of Univ. of Okla.*, 468 U.S. 85, 110 (1984)). The natural effect of a restriction on output is an increase in price. *See, e.g., FTC v. Superior Court Trial Lawyers,* 493 U.S. at 423; *United States v. Andreas,* 216 F.3d 645, 667 (7th Cir. 2000); *General Leaseways, Inc. v. National Truck Leasing Assn.,* 744 F.2d 588, 594-95 (7th Cir. 1984). It therefore makes no difference whether a plaintiff alleges a direct agreement to fix prices, as in Cellular Plus, or an agreement to do the same thing by restricting supply, as here.

Cases hold that suppressing quality competition is equivalent to price-fixing: if higher-quality products are excluded from the market, it has the effect of increasing demand (and, as a result, price) for lower-quality substitutes (just as, for example, black-and-white television sets would be in greater demand if color televisions were excluded from the market). In *National Macaroni Manufacturers Assn. v. Federal Trade Commission,* 345 F.2d 421, 423, 427 (7th Cir. 1965), macaroni product manufacturers had agreed not to use higher-quality wheat so as "to eliminate quality competition in macaroni products." 345 F.2d at 423-24. The Court of Appeals found that this was price-fixing by another name, and that it was illegal *per se.* 345 F.2d at 427. *See also United States v. American Radiator & Standard Sanitary Corp.,* 433 F.2d 174 (3d Cir. 1970) (criminal price fixing verdicts upheld in part due to agreement to discontinue the manufacture of lower-priced plumbing fixtures to raise prices).

Consistent with this, courts have also found that a presumption of impact to class members in justified when horizontal competitors engage in *perse* conduct that *has the effect* of raising or stabilizing prices, whether or not specific prices are agreed to. In *In re Master Key Antitrust Litigation,* 528 F.2d 5 (2d Cir. 1975) - the original case applying a presumption of impact - the court pointed out that the presumption would apply whenever defendants engaged in "an unlawful national conspiracy that had *the effect* of stabilizing prices above competitive levels." *Id.* at 12 (emphasis added).

The cases cited above support the view that, far from having a merely "speculative" impact, output suppression is so

inherently likely to affect prices that it constitutes a *per se* antitrust violation and justifies a presumption of impact to purchasers. Here, however, the issue is much more limited: whether, assuming all facts and drawing all inferences in favor of Plaintiffs (*O'Loghlin*, 229 F.3d at 874), the district court could properly shut this case down at the pleadings stage, and refuse to allow Plaintiffs even to try to prove injury.

II. THERE IS NO OTHER BASIS ON WHICH THE DISTRICT COURT'S DISMISSAL ORDER CAN BE UPHELD

Defendants also sought dismissal, in a separate motion, on the ground that the Insurance Code immunizes insurance companies from liability for any conduct relating to rates. The district court did not address these contentions, and they do not provide a viable alternative basis on which the court's dismissal order can be upheld.

On this issue, Defendants must satisfy not only the stringent standard on motions to dismiss, but also the rule that "exemptions to the antitrust laws are strictly construed and strongly disfavored." *Square D Co. v. Niagara Frontier Tariff Bureau, Inc.*, 476 U.S. 409, 421 (1986); *United States v. Philadelphia National Bank*, 374 U.S. 321, 350-51 (1963); *Manufacturers Life Insurance Co. v. Superior Court*, 10 Cal.4th 257, 267 (1995).

Fatally to Defendants' argument, the Insurance Code expressly preserves claims under the Cartwright Act and the Unfair Competition Law relating to "the business of insurance":
The business of insurance shall be subject to the laws of California applicable to any other business, including, but not limited to ... the antitrust and unfair business practices laws (Parts 2 (commencing with Section 16600) and 3 (commencing with Section 17500) of Division 7 of the Business and Professions Code).

Calif. Ins. Code § 1861.03(a). Despite this, Defendants argued before the district court that even though California expressly made the entire business of insurance subject to Cartwright Act and Unfair Competition claims, it implicitly intended to carve a vast part of that business from such claims: in other words, that Section 1861.03(a) should be read to provide that other laws only apply to "the business of insurance, *except* as to insurance rates."

A. Under *Cellular Plus,* Plaintiffs' Claims Do Not Challenge Any Determination Of The Insurance Commissioner; Instead, Their Claims Challenge Defendants' Conspiracy To Suppress Competition Outside Of California's Regulatory Scheme

While Defendants argued that the case should also be dismissed because insurance rates are exclusively within the province of the Insurance Commissioner, a fair reading of the Complaint makes clear that this case is not about regulation of rates, but about *non*-rate activities that reduced the choices available to Plaintiffs and therefore required them to accept inferior quality policies to those that they otherwise could have obtained. Defendants held themselves out as insuring for - that is, providing coverage guaranteeing - OEM-quality repair, and the rates they charged were for policies that guaranteed such repair. Instead, Defendants furnished policies that provided coverage permitting repair with crash parts that were grossly inferior to OEM-quality parts.

In an unrestrained market, Defendants would have lost business to competitors that provided true OEM-quality policies, at least unless they cut prices for their policies, which would be known to be inferior. To prevent this, entirely *outside* the rate process, California's largest insurance companies conspired together and with third parties to disseminate false information and exclude effective quality-based competition from insurers that would have provided true OEM-quality repair policies.

Most notably, Defendants established and maintained the Certified Automotive Parts Association (CAPA), a supposedly independent organization that certified imitation crash parts as equivalent to OEM parts. Defendants put forward CAPA as an authoritative, impartial arbiter, outside the insurance industry, of their claims to provide OEM-quality crash parts; but behind the scenes, Defendants controlled both the funding and the Board of CAPA such that

CAPA-" certified" parts were grossly inferior to OEM-quality parts. This third-party association, which does not offer insurance policies or purport in any way to take part in the insurance industry, is central to the collusion. ER 12-15 (SAC ¶¶ 48-67).

In addition, the conspiracy pressured others outside the insurance industry, particularly auto repair shops, to cooperate and engaged in a concerted refusal to deal with yet other parties outside the insurance industry, the OEM parts manufacturers, whenever other parts (however inferior) were available. ER 16, 17 (SAC ¶¶ 68, 69, 73). If Defendants had limited their conduct to rate-making, or to entities within the insurance industry, they would not have been able to accomplish their ends of providing inferior-quality policies without competition from higher-quality policies.

Courts recognize that a claim that non-rate activities excluded competition is not the same as a challenge to filed rates, even if the rates are considered in measuring damages. In *Cellular Plus, Inc. v. Superior Court,* 14 Cal. App. 4th 1224 (Cal. App. 4th Dist. 1993), the court-in upholding a price-fixing claim under which prices were artificially elevated - recognized that a claim that non-rate activities resulted in overcharge damages did not implicate filed rates:

Cellular Plus does not argue the rates charged were not duly approved and legal under PUC regulations, but it focuses on the alleged wrongful act in fixing prices.

We do not ignore the jurisdiction of the PUC in determining the reasonableness of rates. However, at most, the fact of approval of rates by the regulatory agency should be a factor in determining the amount of damages awarded and not whether a cause of action exists at all under the Cartwright Act.

Cellular Plus does not dispute that the PUC has jurisdiction over rates, nor does it seek any relief requiring the PUC to change any rates it has approved. Cellular Plus is merely seeking treble damages and injunctive relief for alleged price fixing under the Cartwright Act.

14 Cal. App. 4th at 1241, 1243, 1246; *see also id.* at 1250 (making clear that the court's decision applies to individual customer plaintiffs). Here, too, as in that case, Plaintiffs are not second-guessing any determination by the Insurance Commissioner but measuring the effect of exclusion.

It should be emphasized that *Cellular Plus* involved a statutory scheme under which courts could not second-guess the Commission's determinations, including rate determinations. 14 Cal. App. 4th at 1245. Moreover, because the statutory scheme in *Cellular Plus* (unlike the Insurance Code in § 1861.03(a)) did not explicitly preserve Cartwright Act and UCL claims, the preemption claim was actually stronger in that case.

Cellular Plus was endorsed by the Court of Appeals for the Ninth Circuit in *Knevelbaard Dairies v. Kraft Foods, Inc.,* 232 F.3d 979,992-93 (9th Cir. 2000), which is binding authority in this Circuit. Similarly, in *Lower Lake Erie Iron Ore Antitrust Litigation,* 998 F.2d 1144 (3d Cir. 1993), the court -considering the federal filed rate doctrine, which is similar to Defendants' argument here - found that

it is fully consistent with [federal filed rate doctrine] ... *to accept these rates as lawful* and nonetheless to conclude that through *non-rate activities,* particularly ... the refusal to deal with potential competitors, the railroads effectively retarded entry of lower-cost competitors to the market. The instrument of damages ... was the absence of the lower-cost combination. ... [T]he plaintiffs showed that the railroads conspired to protect their stronghold in the one transport market by blocking entry by low-cost competitors, *not that the railroads charged an unlawful rate.*

Id. at 1159 (emphasis added). Thus, "the railroads' anticompetitive behavior involved *far more than the assessment of rates.* The mere measure of damages, which begins with an ICC-approved rate, does not define the nature of the conspiracy." *Id.* at 1160 (emphasis added).[FN4]

> FN4. Similarly, in *City ofKirkwood v. Union Electric Co.,* 671 F.2d 1173 (8th Cir. 1982), the court held that it did not violate the filed rate doctrine for a court to examine "anti-competitive effects resulting from the interaction of rates which, taken separately, may be reasonable." *Id.* at 1179. The federal filed rate doc-

> trine applies only to rates filed with federal agencies, and therefore does not apply to rates filed with California agencies. *Knevelbaard*, 232 F.3d at 992-93.

Here, as in *Cellular Plus* and *Lower Lake Erie*, Plaintiffs do not seek to overturn a regulatory body's determination of a proper rate, but rather claim injury from conduct occurring outside the rate-making process.

This conclusion is further buttressed by the fact that antitrust and unfair competition claims are inherently different from the "reasonableness" determinations entrusted to the Department of Insurance. "The courts have primary, if not exclusive, jurisdiction over antitrust causes of action." *Cellular Plus*, 14 Cal. App. 4th at 1247 (emphasis added). Moreover, "[u]nder the Cartwright Act, a court does not look at the economic reasonableness of the prices. Rather, a court looks at whether the prices were in fact artificially maintained at a uniform level, whether 'reasonable' or not." *Id.* at 1245 n.5. *See also Id.* at 1248 ("The 'reasonableness of rates' ... is not the crux of" antitrust complaint); id. at 1249.

By contrast, the main case on which Defendants rely - *Walker v. Allstate Indemnity Co.*, 77 Cal. App. 4th 750 (2000) - did not address the issue of whether plaintiffs could assert claims relating to rates when those claims are authorized by statutes external to the Insurance Code. Rather, *Walker* involved a plaintiff who alleged that rates were excessive *under the Insurance Code itself;* in other words, the plaintiff claimed in effect to have an independent right of action to enforce the Insurance Code to challenge rates under the same criteria that the Insurance Commissioner was charged with enforcing. *See Walker*, 77 Cal. App. 4th at 753 (plaintiffs' claims based on allegation that rates were "excessive" under Insurance Code § 1861.05(a)). In that situation, the court concluded that the only proper way to enforce the Code was through the Commissioner; it did not address whether (contrary to § 1861.03(a)) plaintiffs would only have recourse through the Commissioner to enforce other, independent statutes.

B. The Insurance Code Specifically Preserves Antitrust And UCL Claims Against Insurers And Therefore Does Not Immunize Defendants' Conduct

Before the district court, Defendants pointed to two provisions of the Insurance Code as support for their claim of immunity. Insurance Code § 1860.1 provides:

> No act done, action taken or agreement made pursuant to the authority conferred by this chapter shall constitute a violation of or grounds for prosecution or civil proceedings under any other law of this State heretofore or hereafter enacted which does not specifically refer to insurance.

Calif. Ins. Code § 1860.1. Insurance Code § 1860.2 provides:

> The administration and enforcement of this chapter shall be governed solely by the provisions of this chapter. Except as provided in this chapter, no other law relating to insurance and no other provisions in this code heretofore or hereafter enacted shall apply to or be construed as supplementing or modifying the provisions of this chapter unless such other law or other provision expressly so provides and specifically refers to the sections of this chapter which it intends to supplement or modify.

Calif. Ins. Code § 1860.2.

These provisions were both enacted as part of the McBride-Grunsky Act in 1947. They are relied upon by the court in *Karlin v. Zalta*, 154 Cal. App. 3d 953 (1984) - which is the major decision on which the court relied in *Walker*, the main case relied upon by Defendants.

These provisions, however, do not affect Plaintiffs' claims in this case.

(1) Section 1861.03(a) specifically provides for antitrust and UCL claims notwithstanding other provisions of the Insurance Code. In 1989, five years *after* the *Karlin* decision, McBride-Grunsky was amended by Proposition

103. Among other things, Proposition 103 enacted Section 1861.03(a), which specifically provides that "[t]he business of insurance *shall be subject to ... the antitrust and unfair business practices laws*" of California. Calif. Ins. Code § 1861.03(a) (emphasis added). The wording of the provision is absolute and without limitation; it does not say "except as otherwise provided," or contain any similar restriction. As Sections 1860.1 and 1860.2 were already part of the Code when Proposition 103 was enacted, the natural reading of Section 1861.03(a) is that it was intended to govern notwithstanding those provisions.

The court in *Walker* found that Section 1861.03(a) did not override Sections 1860.1 and 1860.2 in the context of that case. However, *Walker* did not involve antitrust or price-fixing claims, or any claim of misconduct occurring outside of the rate-setting process; rather, the only claims in *Walker* were that the defendant had charged an "excessive" (but approved) rate in violation of Insurance Code § 1861.05(a) (which authorizes the Insurance Commissioner to disapprove "excessive" rates). *See* 77 Cal. App. 4th at 753. Similarly, *Karlin* (on which the court in *Walker* relied) only involved claims under the Insurance Code itself. *See* 154 Cal. App. 3d at 963-64.

Here, by contrast, the conduct complained of occurred entirely outside the ratemaking process. This is therefore exactly the sort of claim that Section 1861.03 must allow if the statutory provision is not to be a nullity. While Defendants claimed this would put insurers in an "untenable" position, Section 1861.03(a) recognizes that holding them to compliance with the antitrust laws is not untenable for them any more than it is for anybody else.

(2) By its express terms. Section 1860.2 yields to Section 1861.03(a). Section 1860.2 specifically provides that it applies only "[e]xcept as provided in this chapter" - so that by its own terms, it yields precedence to § 1861.03 (since both sections are part of Chapter 9).

(3) California specifically provides that its antitrust and UCL laws apply to "the business of insurance," of which rate-making is a central part. Section 1861.03 specifically provides that "the business of insurance" is subject to the antitrust and unfair business practices laws. Numerous cases, however, have held that rate-making is central to the business of insurance. *Group Life & Health Insurance Co. v. Royal Drug Co.*, 440 U.S. 205, 224 n.32 (1979) ("the fixing of rates is the 'business of insurance' "); *Gilchrist*, 390 F.3d at 1331 ("fundamental to the business of insurance"). It would make no sense to conclude that California, in specifically including all of the business of insurance, implicitly intended to exempt what is arguably the single most important part of that business.

(4) A challenge to non-rate activities does not implicate the filed rate even if the rate is considered in measuring damages. Even if Proposition 103 had never been passed, Sections 1860.1 and 1860.2 would not bar Plaintiffs' claims. Section 1860.1 provides that "[n]o act done, action taken or agreement made pursuant to the authority conferred by this chapter shall constitute a violation of or grounds for prosecution or civil proceedings under any other law of this State ... which does not specifically refer to insurance." First, the conduct complained of here -- Defendants' exclusion of quality-based competition as well as their wrongful use of third parties such as CAPA to further their scheme - was certainly not "pursuant to the authority conferred by this chapter."

Second, the "violation" and the "grounds for ... civil proceedings" in this case is not the use of any particular rate, but rather the *non*-rate activities that excluded competition. As discussed above, both *Cellular Plus* (endorsed by the Ninth Circuit in *Knevelbaard*) and *Lower Lake Erie* recognize that a challenge to non-rate activities does not constitute a challenge to a filed rate, even if the measure of damages includes consideration of the filed rate. The same reasoning shows that by attacking Defendants' non-rate conduct, Plaintiffs are not pointing to any "act done, action taken or agreement made pursuant to the authority conferred" as the violation or grounds for their suit.

Third, the Insurance Code specifically sets forth particular types of concerted activity that insurers may engage in. *See Donabedian v. Mercury Insurance Co.*, 116 Cal. App. 4th 968, 990-991 (Cal. App. 2d Dist. 2004) (citing provisions). The most reasonable interpretation of § 1860.1 is that it protects insurers who engage in such specific authorized conduct - not that it is intended to provide a blanket immunity for any otherwise unlawful conduct that could

affect rates.

Fourth, the Insurance Commissioner's task with regard to filed rates is to determine whether they are excessive, inadequate, unfairly discriminatory, or in violation of Chapter 9 of the Insurance Code, Calif. Ins. Code 1861.05(a) - not whether they are in violation of any other statute. As *Cellular Plus* found, this is substantially different from the measuring of antitrust damages. 14 Cal. App. 4th at 1245 n.5, 1248, 1249. The Insurance Commissioner is not charged with enforcing the Cartwright Act or the Unfair Competition Law - still less with being the *sole* enforcer of such statutes against insurers. As a practical matter it is unreasonable to charge the Insurance Commissioner with sole responsibility as the policeman for the enforcement of statutes under which he has no statutory authority. To hold that claims involving non-rate-making conduct are immunized simply because they affect rates would vastly increase and complicate the Insurance Commissioner's responsibilities, requiring him to scrutinize every proposed rate for antitrust implications and to exercise a roving warrant to evaluate all of the insurer's *non*-rate conduct before approving a rate. Far from furthering the purposes of the Insurance Code, such a broad reading would undermine them and make the rate filing system much more cumbersome.

Fifth, as Defendants acknowledged before the district court, the federal "filed rate doctrine" is largely analogous to Defendants' expansive reading of Section 1860.1. However, there is no filed rate doctrine under California law. *Knevelbaard*, 232 F.3d at 992; *Cellular Plus*, 14 Cal. App. 4th at 1241-42. This further supports the view that a broad reading of Section 1860.1 that effectively creates a "filed rate doctrine" should be rejected. Moreover, while Defendants argued that Section 1860.1 and 1860.2 puts insurance in a unique position that justifies the creation of a "filed rate doctrine" to insurance policies, schemes requiring the filing of rates typically include similar provisions and yet are not viewed in California as justifying such a doctrine. *See Cellular Plus*, 14 Cal. App. 4th at 1245 (Public Utilities Code provides that courts shall not "have jurisdiction to review, reverse, correct, or annul any order or decision of the commission"). Thus, there is no reason to assume that Sections 1860.1 and 1860.2 were intended to provide immunity above those provided in other rate-filing schemes; and since the enactment of Section 1861.03(a), the Insurance Code clearly states that it is *not* meant to immunize insurers from the antitrust laws.

Finally, such a broad reading of Section 1860.1 would both require an unduly narrow reading of Section 1861.03 and would encourage anticompetitive conduct. As the court held in *Cellular Plus* (and as was endorsed in *Knevelbaard*), "the strong public policy of the Cartwright Act encouraging free and open competition ... applies even to companies regulated by the PUC. If we were to deny Cellular Plus a cause of action merely because the PUC had approved the prices as 'reasonable' while ignorant of the alleged price fixing agreement, we would implicitly be encouraging regulated companies to engage in anticompetitive price fixing activities by reason of denying plaintiffs the major private enforcement threat of treble damages under the Cartwright Act." 14 Cal. App. 4th at 1243. The same public policy supports Plaintiffs' claims here - all the more strongly because here, unlike the regulatory scheme in *Cellular Plus*, the Insurance Code specifically provides that the laws that authorize Plaintiffs' claims shall apply to the business that Defendants claim is exempt.

CONCLUSION

The district court erred in holding that it was impossible under any set of facts for Plaintiffs to show - clearly and repeatedly alleged - that they were injured at the time they purchased the policies at issue in a market from which competing policies had been excluded. In addition, there are no other grounds on which the district court's dismissal can be upheld. Plaintiffs therefore respectfully request that the district court's decision be reversed and remanded.

Appendix not available.

Sarah PEREZ, Michelle Lackney, Rachel Stewart, and Rachel Hardyck, Plaintiffs-Appellants, v. STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, Allstate Indemnity Company, Geico General Insurance Company, Certified Automotive Parts Association, and Liberty Mutual Fire Insurance Company, Defendants-

Appellees.
2007 WL 894958 (C.A.9) (Appellate Brief)

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