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.
April 9, 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

Plaintiffs/Appellants' Reply Brief

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I. *THE DISTRICT COURT COULD NOT PROPERLY HAVE CONCLUDED AS A MATTER OF LAW THAT PLAINTIFFS LACK STANDING*

A. *Defendants' Own Concessions As To The Facts Show That Dismissal Was Inappropriate*

The district court made clear that its dismissal was based on two interpretations of the complaint -- that Plaintiffs "do not allege that Defendants conspired to ... maintain artificially high premiums," and that Plaintiffs do not "complain of the rate charged to every customer". Excerpts of Record ("ER") 34-35 (Oct. 5, 2006 Order at 5-6). The court itself asserted that both of these distinctions were "critical" to its "analysis of standing." *Id.*

Dismissal was inappropriate so long as Plaintiffs' complaint *could* be interpreted as stating the contrary. *See, e.g., Conley v. Gibson*, 355 U.S. 41, 45-46 (1957) (dismiss only if it is beyond doubt that plaintiff can prove no set of facts justifying relief); *O'Loghlin v. County of Orange*, 229 F.3d 871, 874 (9th Cir. 2000) (construe allegations in light most favorable to plaintiffs); *Big Bear Lodging Assn. v. Snow Summit, Inc.*, 182 F.3d 1096, 1101 (9th Cir. 1999) (same).

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Moreover, even if Plaintiffs' complaint could only be interpreted in such a way, dismissal *with prejudice* was clearly unwarranted so long as Plaintiffs could amend their complaint to spell out the other interpretation. *See* Orion Tire Corp. v. Goodyear Tire & Rubber Co., Inc., 268 F.3d 1133, 1137 (9th Cir. 2001). Indeed, Defendants did not even request dismissal with prejudice in their motion to dismiss for lack of standing. *See* DN 54, DN 55. Thus, Plaintiffs do not need to show that the district court's interpretation was baseless, only that other interpretations are also reasonable or that amendment was not futile.

In any event, however, Defendants' own brief shows that the district court misinterpreted the complaint. In the second part of their brief- in which they claim that the federal "filed rate doctrine" should be applied to rates filed with California state agencies -- Defendants seek to show that Plaintiffs' claims are simply garden-variety overcharge claims, "challenging as excessive the premiums that the defendants charge" (Appellees' Brief at 35). They succeed in showing that the district court misinterpreted the complaint.

First, the court erred in claiming that Plaintiffs did not allege that Defendants conspired to maintain artificially high premiums.[FN1] To the contrary, Plaintiffs allege that the entire point of the conspiracy was, in the district court's words, to "maintain artificially high premiums" (ER 34). Thus, Defendants themselves quote language from the Complaint that "[b]y conspiring to deceive, and not to compete as to the quality of their repair services, the conspirators have been able to charge premiums substantially above those competitively warranted", Appellees' Brief at 35, quoting ER 2 ¶ 4; that "[t]he conspiracy has had the effect of raising and maintaining premiums", Appellees' Brief at 36, quoting ER 20 ¶ 91; and that "Defendants' anticompetitive conduct has restrained and injured competition ... and, as a consequence, has caused the premiums or prices charged to the members of the California Classes to be above competitive premiums", Appellees' Brief at 36-37, quoting ER 20 ¶ 96.

> FN1. The district court's language was "to *set and* maintain artificially high premiums." ER 34 (emphasis added). As discussed in Appellants' Brief, price-fixing claims do not require agreement to set specific prices, but also include conduct that excludes competition and thereby maintains prices. *See* Appellants' Brief at 26-29; *In re Linerboard Antitrust Litigation*, 305 F.3d 145, 159 (3d Cir. 2002) ("an agreement on output ... is equivalent to a price-fixing agreement").

Second, the court erred in claiming that Plaintiffs did not complain about the rate charged to every customer. ER 35. To the contrary, the Complaint specifically alleged that "*[a]ll* these persons [class members] have been injured in their business and property by the conspiracy," ER 3 ¶ 9 (emphasis added), and that "[t]he Class Representative and the members of the Class are similarly or identically harmed by the same systematic and pervasive concerted action." ER 6 ¶ 26; *see also* ER 8 ¶ 32; ER 10 ¶ 38; ER 12 ¶ 44. Defendants' own quotations from the Complaint show the same. *See, e.g.,* Appellees' Brief at 35, quoting ER 2 ¶ 4 ("These premium overcharges have unfairly and unlawfully harmed the four Classes"), ER 3 ¶ 9 ("price-overcharge injury can be shown in a common, formulaic manner allowing class treatment of all claims"), and ER 6 ¶ 25(b) (issues in case include whether conduct "has caused at least some price or premium injury to members of the Class"); Appellees' Brief at 36, quoting ER 18 ¶ 80 (conduct "caus[ed] members of the four California Classes ... to pay above-competitive premiums"); Appellees' Brief at 36-37, quoting ER 20 ¶ 96 ("Defendants' anticompetitive conduct ... has caused the premiums or prices charged to the members of the California Classes to be above competitive premiums").

This is because the district court failed to recognize that Plaintiffs' complaint is not about Defendants' subsequent performance of the contracts, but about the fact that they excluded competition in the market for those contracts and inflated the premiums up front. Indeed, Defendants themselves assured the court that "plaintiffs are challenging the *rates and premiums charged* by the defendant insurers, *not* their repair practices." Supplementary Excerpts of Record 2 n. 1 (DN 50) (Memorandum of Points and Authorities in Support of Defendants' Joint Motion to Dismiss Plaintiffs' First Amended Complaint (May 5, 2006) at 2 n.1) (emphasis added). Defendants themselves assert that there can be no complaint about the *performance* of the contract so long as the terms of the contract permit use of inferior parts. Appellees' Brief at 25 ("[i]f the terms of the policy allow the company to repair with non-OEM parts, there is no overcharge.").

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Rather, the complaint is that Defendants excluded higher-quality policies from the market. This is shown, again, by Defendants' numerous quotations from the Complaint, which reflect that Plaintiffs allege that prices were inflated for the *coverages* (policies) provided, not for the way the policies were performed subsequently. *See, e.g.,* Appellees' Brief at 36, quoting ER 18 ¶ 80 (conduct "caus[ed] members of the four California Classes ... to pay above-competitive premiums for the inferior insurance repair *coverages* they have actually received") (emphasis added); ER 18 ¶ 81 (class members "receive substantially inferior repair *coverage* which would command substantially lower premiums 'but for' the conspiracy") (emphasis added); Appellees' Brief at 36-37, quoting ER 20 ¶ 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).

As Plaintiffs explained in their initial Brief, in antitrust cases it is quite common to measure the competitive price of a contract or service using the same types of economic expert testimony that is used to measure the competitive price of a tangible good. *See* Appellants' Brief at 18-19, 21. It is not necessary -- as Defendants suggest -- to measure the "actual value" (Appellees' Brief at 31); rather, the only issue is measuring the competitive price, and this is no more difficult for intangible than for tangible goods. The prices of insurance products are measured all the time even though performance is "contingent" -- indeed, there are entire *reinsurance* markets under which existing insurance policies are in effect resold, *see. Hartford Fire Insurance Co. v. California*, 509 U.S. 764, 772-73 (1993), which would be impossible unless a value could be placed on such policies. At the least, it is terribly premature to resolve these issues at the pleadings stage.

B. *Defendants' Own Concessions As To The Law Show That Dismissal Was Inappropriate*

In its dismissal order, the district court suggested that Plaintiffs could have shown standing if they had alleged that Defendants had agreed to maintain artificially high premiums. ER 34 (Order at 5). Following on this, Defendants now concede that:

Where price-fixing is concerned, it indeed makes no difference whether the affected prices are for tangible or intangible products.

Appellees' Brief at 21 (emphasis added).

Similarly, they concede:

Anticompetitive conduct that directly affects the price, such as bid-rigging, is actionable at the time of purchase.

Appellees' Brief at 28-29 (emphasis added).

These concessions completely undercut Defendants' arguments that the ERISA cases they cite apply equally to this antitrust case. As discussed in Plaintiffs' Brief, the only cases Defendants -- or the district court -- cite in support of their view of standing are ERISA cases, involving a specific statutory scheme in which the courts at issue concluded that the claims were akin to those in breach of contract cases. Appellants' Brief at 22-26.

Now Defendants concede that if this case involves "price-fixing" or "[a]nticompetitive conduct that directly affects the price," there is standing. At a minimum, this calls for the Court to ask whether the case is so clearly like a breach of contract action that it is "beyond doubt" (*Conley v. Gibson*, 355 U.S. at 45-46) that there is no standing, or whether it is sufficiently possible that the case involves "[a]nticompetitive conduct that directly affects the price" that dismissal is unjustified.

The district court could not conclude as a matter of law that the anticompetitive conduct alleged here did not directly affect the price. To the contrary, by the laws of supply and demand, Defendants' exclusion of high-quality policies

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can be expected to increase the price of low-quality policies. As the Third Circuit said *in Linerboard*, "[t]he economic laws of supply and demand run in tandem with the tenets of logic. A reduction in supply will cause prices to rise." 305 F.3d at 152. *See also* Appellants' Brief at 26-29.

Indeed, Defendants concede this: they point out that the court in *National Macaroni Manufacturers Association v. FTC*, 345 F.2d 421 (7th Cir. 1965) found that agreements to "ward off price competition" are "a form of price-fixing" even though the parties did not agree to set specific prices. Appellees' Brief at 30-31. While the application of these principles to this case may be disputed by expert testimony, it is clearly unwarranted to decide them on a motion to dismiss.

Defendants appear to suggest that Plaintiffs are suddenly alleging on appeal that there was a restriction on supply. Appellees' Brief at 29. It may be that Defendants misconstrue Plaintiffs as arguing that Defendants limited the total number of policies *sold.*

Plaintiffs did not allege this in the district court and do not allege it now. Instead, Plaintiffs allege that the total number of policies *available* - and the *types* of policies available -- was limited. Far from being a new argument, this is what Plaintiffs alleged in their Complaint and their brief in the district court. In the Complaint, Plaintiffs alleged that Defendants "agree[d] not to compete based on parts quality," ER 15 (Complaint) ¶ 68, and "ma[de] it more difficult and costly for ... competitors challenging the conspiracy to compete on the merits." ER 17 (Complaint) ¶ 77. Plaintiffs also alleged that this exclusion of competition led to artificially high prices. *See* Appellees' Brief at 35-37 (quoting Complaint).

Moreover, as Defendants recognize (in somewhat overstated form), the output restriction argument has as its "premise ... that there is a market for 'high quality' OEM part insurance and a separate market for 'low quality' non-OEM part insurance." Appellees' Brief at 29-30.[FN2] Plaintiffs raised the very same argument in their brief in the district court:

> FN2. More properly, there can be separate *demand* for high-quality and low-quality policies, which is not the same thing as saying that they are in different relevant economic markets.

the basis of the complaint is the exclusion of competition. In a competitive market, insurance companies could compete on quality. Thus, some insurance companies would offer policies that included restoring the insured's car to pre-crash condition; while other policies would not. 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. The reason is that the value of the insurance would be higher -just as a life insurance policy with a $100,000 payout is worth more than one with a $50,000 payout, regardless of whether the amount is ever collected. What the insurance companies in this case conspired to do was to exclude such competition on quality by excluding the higher-quality policy, providing only the lower-quality policy, and yet charging the market rate for the higher-quality policy.

Supplementary Excerpts of Record at 4 (DN 85) (Plaintiffs' Opposition to Motion to Dismiss for Lack of Standing (Corrected) (July 17, 2006) at 1.[FN3]

> FN3. Of course, Defendants' contention that there cannot be separate demand for high-quality policies because the parts it provides are "of like kind and quality" under California regulations (Appellees' Brief at 30) is a pure merits argument that cannot be decided on a motion to dismiss.

C. *Defendants' Brief Confirms That The District Court's Theory Would Immunize Defendants From Antitrust Liability*

The entire point of Plaintiffs' case is that Defendants' policies do *not* provide coverage guaranteeing high-quality repair, but rather they have conspired to provide policies that by their terms authorize repair with the cheapest parts

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available while charging as if the policies guaranteed the highest quality repairs.

Defendants themselves concede that "there is not ... any allegation here that any of the defendants' insurance contracts require the use of OEM parts." Appellees' Brief at 25. Such contracts are therefore less valuable *up front* than policies that guarantee high-quality repair; but the class members have no claim for breach of contract if the insurers later use inferior parts and make no such claim.

It therefore makes no sense for the district court to require Plaintiffs to wait and show that "Plaintiff has received replacement parts of inferior quality upon filing a claim". ER 35 (Order at 6). If Plaintiff waited to receive an inferior replacement part and complained, Defendants could show that they were doing nothing other than what they were permitted by the insurance contract. Defendants themselves recognize this: "If the terms of the policy allow the company to repair with non-OEM parts, there is no overcharge." Appellees' Brief at 25.

Rather, as antitrust law uniformly recognizes, the damage occurs at the time of purchase, when Plaintiffs and Class members had to purchase a lesser value policy authorizing inferior parts at an inflated, above-competitive price, because higher-value policies were excluded from the market by the conspiracy.

Defendants seek to distinguish *In re Domestic Air Transportation Litigation*, 137 F.R.D. 677 (N.D. Ga. 1991), on the ground that "[t]here was nothing future or conditional about the services for which plaintiffs paid -- airline tickets -- and they suffered harm immediately upon paying inflated ticket prices." Appellees' Brief at 27. In fact, and to the contrary, the services were entirely in the future -- air transportation is not provided until after (often long after) the tickets are purchased. Moreover, the services were also conditional on weather and on the customer showing up on time and getting through security. Yet Defendants concede that purchasers "suffered harm *immediately* upon paying inflated ticket prices." *Id.* (emphasis added). Here, Plaintiffs allege that they suffered harm immediately upon paying inflated *insurance* prices.

Let us grant for purposes of argument that it is impossible to measure the "value" of an insurance policy before a claim is made. Still, insurance policies (whatever their "value") have *a price.* This price is not "speculative," "contingent," or "intangible," because Defendants insist that it be paid up font in very tangible dollars. The levels of this price are determined by the workings of competition in the marketplace. And by excluding competition, it is possible to inflate that price. That is what is alleged here.

These effects *can* be measured. Expert testimony can measure the impact of exclusion of competition on prices by well-established benchmarking techniques comparing the behavior of the restrained market to competitive markets, and the analysis of insurance prices does not depend at all on whether any particular purchaser ends up making a claim. At a minimum, the district court could not conclude as a matter of law that overpayment due to the exclusion of competition would be impossible to estimate. Are insurance purchasers alone to be barred from an antitrust remedy on the ground that insurance contracts are "contingent" and that paying an inflated price is -- uniquely in insurance -- not enough to show antitrust injury?

Under Defendants' view, if a swindler were to put ads in the newspapers saying that he was "Acme Life Insurance" and offering completely phony life insurance policies, nobody could sue until a purchaser had died, because performance was "contingent" and there would be no standing until a claim is made. Or, to paraphrase the district court in this case, "Plaintiffs' claim is based solely on the anticipated [death] such that Plaintiffs' injuries are speculative and insufficient to confer standing under Article III." ER 35 (Order at 6).

Similarly, if in *Domestic Air* plaintiffs had alleged that defendant airlines had conspired not to sell tickets to Hawaii, to exclude any competitor that sold tickets to Hawaii, and *only* to sell tickets to Pittsburgh, it would probably have the effect of inflating the price of tickets to Pittsburgh, because vacationers could no longer go to Hawaii. But under Defendants' theory, no plaintiffs could sue unless they got on the plane, went to Pittsburgh, and then sued on the

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ground that the airplane should have gone to Hawaii. Otherwise, even though they paid money for the ticket, their injury is "contingent" or "speculative."[FN4]

> FN4. Perhaps the closest analogy is to first-class and coach-class tickets on airplanes. If the airlines conspired to exclude first-class competition and instead to raise the price of coach, they could be liable for charging inflated prices. By contrast, in *Avery v. State Farm*, 835 N.E.2d 801 (Ill. 2005) (Appellees' Brief at 21-22), it was necessary (as Defendants state) to show repairs were made with non-OEM parts, but that was because the claim was precisely for damages for making repairs with non-OEM parts, *not* (as here) for inflated premiums.

Defendants also argue that the ERISA decisions they rely upon -- for the view that there can be no standing for intangible goods -- can be imported wholesale into antitrust and unfair competition because they were decided under "Article III" and therefore involve "standing" in the abstract. Appellees' Brief at 19-20. But Article III standing necessarily depends on the nature of the claim that is being asserted. For example, a person who cannot show reliance on a fraudulent statement will not be able to show Article III standing for fraud; but that has nothing to do with whether the person can show Article III standing for breach of contract. Similarly, Plaintiffs here have not alleged standing to show breach of contract, but that does not affect whether they have adequately alleged standing for antitrust.[FN5]

> FN5. Defendants argue that *Gilchrist v. State Farm Mutual Insurance*, U.S. District Court (N.D. Fla.), Case No. 1:00cv66 MMP (Nov. 17, 2000) (pertinent excerpts in ER 23-29), *case dismissed on other grounds*, 390 F.3d 1327 (11th Cir. 2004), lacks precedential value because the court lacked subject matter jurisdiction (Appellees' Brief at 22) -- but they rely heavily on the appellate decision in that case, in which the court also lacked subject matter jurisdiction. *See* Appellees' Brief at 35, 44-46. In any event, Plaintiffs do not contend that the district court's *Gilchrist* decision was binding precedent in this Circuit in any event.

II. *DEFENDANTS' "FILED RATE DOCTRINE" ARGUMENT IGNORES PROPOSITION 103 AND IS FORECLOSED BY THE KNEVELBAARD AND CELLULAR PLUS DECISIONS*

As anticipated, Defendants argue that the district court's order can also be upheld on the alternative grounds that Defendants are immune from antitrust liability under an alleged California state version of the "filed rate doctrine." Much of this part of Defendants' brief is based entirely on arguing that the insurance code should be viewed as "analogous" (Appellees' Brief at 38) to the federal regulatory schemes involved in the filed rate doctrine.

A. *There Is No State Filed Rate Doctrine, And No Justification For Extending The Federal Doctrine To State-Filed Rates*

First, this Court has already made clear that there is no filed rate doctrine applicable to rates filed with California state agencies. *Knevelbaard Dairies v. Kraft Foods, Inc.*, 232 F.3d 979, 992-93 (9th Cir. 2000); *see also Cellular Plus, Inc. v. Superior Court*, 14 Cal. App. 4th 1224, 1241, 1243, 1246-49 (Cal. App. 4th Dist. 1993). Indeed, virtually all of the arguments Defendants raise here in support of the filed rate doctrine -- such as the unique expertise of the Commissioner and the risks of second-guessing rate determinations -- were equally applicable *in Knevelbaard* and *Cellular Plus* and have already been addressed in Plaintiffs' initial Brief at 29-42.

Like the "comprehensive rate regulation scheme" Defendants allege here (Appellees' Brief at 32), the statutory regime in *Knevelbaard* was explicitly "a comprehensive scheme for the regulation of marketing milk." Calif. Food & Agric. Code § 61808. In *Cellular Plus*, the PUC had "jurisdiction ... in determining the reasonableness of rates," *id.* at 1243, the rates "were determined to be 'reasonable' by a regulatory agency," *id.* at 1241, and they "were ... duly approved and legal under [agency] regulations," *id.* at 1242.

Even in the federal context, the filed rate doctrine has been much criticized and a major reason why it remains in

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effect is that it has been settled for so long, and the Supreme Court therefore views Congress as the most appropriate venue for overturning it. In *Square D Co. v. Niagara Frontier Tariff Bureau*, 760 F.2d 1347 (2d Cir. 1985), *affd.*, 476 U.S. 409 (1986), Judge Friendly -- in an opinion the Supreme Court called "characteristically thoughtful and incisive" (476 U.S. at 423) -- pointed out that the reasons for the filed rate doctrine are no longer valid. "The fear that recovery of antitrust damages would operate 'like a rebate' to produce discrimination among shippers ignores the difference between a [regulated company's] passing money under the table to a favored [customer] and a court's deciding that a [customer] had suffered antitrust injury." 760 F.2d at 1352. Moreover, the argument that damages are equivalent to a forbidden discriminatory rate refund "is scarcely applicable to class actions". *Id.* Judge Friendly also noted that, "in the years after *Keogh [v. Chicago and Northwestern Railway*, 260 U.S. 156 (1922), the original filed rate decision] was decided, implied exemptions to the antitrust laws fell into strong disfavor." *Id.* at 1362.

On appeal, the Supreme Court called Judge Friendly's opinion "characteristically thoughtful and incisive," 476 U.S. at 423, and agreed that the filed rate doctrine may be "unwise as a matter of policy". *Id.* at 420. Nonetheless, it was "settled law" and "Congress did not see fit to change it" over many decades, so the Court did not feel free to overturn it. *Id. See also, e.g., Town of Norwood, Mass. v. New England Power Co.*, 202 F.3d 408,420 (1St Cir. 2000) ("the law on the filed rate doctrine is extremely creaky"); *Utilimax.com, Inc. v. PPL Energy Plus, LLC*, 273 F. Supp.2d 573, 580 (E.D. Pa. 2003) (noting that leading commentators believe the doctrine lacks policy justification).

Here, of course, there is no such settled law: to the contrary, *Knevelbaard* holds that there is no filed rate doctrine applying to California-filed rates. Thus, the question is whether this much-criticized doctrine should be *expanded* into the new area of state-filed rates in contravention of existing California and Ninth Circuit precedent.

B. *Proposition 103 Makes Still Clearer That There Is No "State Filed Rate Doctrine" In Insurance, Yet Defendants Almost Wholly Ignore It*

Not only is the filed rate doctrine inapplicable to rates filed with state agencies; there is even less reason to apply the filed rate doctrine in insurance, because Proposition 103 specifically provided 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).

Furthermore, numerous cases make clear that "the fixing of rates is the 'business of insurance.' " *Group Life & Health Insurance Co. v. Royal Drug Co.*, 440 U.S. 205, 224 n.32 (1979). *Gilchrist v. State Farm Mutual Insurance Co.*, 390 F.3d 1327 (11 Cir. 2004), much cited by Defendants, found that rate regulation was "fundamental to the business of insurance." *Id.* at 1331. Thus, *Gilchrist* strongly supports jurisdiction here, because (like other cases) it places Defendants in the unenviable position of explaining how California voters, in enacting § 1861.03(a), somehow implicitly intended to carve out a "fundamental" part of "the business of insurance" as *not* subject to the Cartwright Act and other laws.

Defendants have a ready -- if unpersuasive -- response to Proposition 103: they ignore it. Section 1861.03(a) is not even included in their table of statutes, and they refer to it only in passing, on page 42 of their Brief. Even then, they do not attempt any analysis of the language, merely contenting themselves with quoting the statement in *Walker v. Allstate Indemnity Co.*, 77 Cal. App.4th 750, 756 (2000), that notwithstanding § 1861.03(a), Calif. Ins. Code § 1860.1 "must bar claims based upon an insurer's charging a rate that has been approved by the commissioner".

Walker, however, was *not* an antitrust or unfair competition case, but a case based entirely on the claim that the Insurance Commissioner had wrongly approved a rate in violation of the Insurance Code itself, 77 Cal. App. 4th at 753 (plaintiffs' claims based on allegation that rates were "excessive" under Insurance Code § 1861.05(a)), and had wrongfully failed to comply with "generic factors" regulations promulgated under the Code. *Id.* at 753, 756. Indeed, plaintiffs had named the Insurance Commissioner as a defendant. *Id.* at 752.

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Under these circumstances, the court found that
[w]e need not determine the outer contours of any such modifications [by § 1861.03(a) of §§ 1860.1 and 1860.2] ... to conclude that these latter sections retain more than enough vitality to bar appellants' *present* claims.

Id. at 756 (emphasis added). Thus, the *Walker* court was not purporting to address the effect of Proposition 103 *generally*, but merely held that Proposition 103 (which preserves the effect of *other* laws upon the business of insurance) does not preserve attacks on rates pursuant to the Insurance Code itself. Defendants are therefore wrong to interpolate the gloss that *Walker's* holding was intended to apply -- as Defendants say in boldface and italics -- *"regardless of the underlying theory."* Appellees' Brief at 42 (emphasis in original).[FN6]

> FN6. Similarly, the federal filed rate decision *H. J. Inc. v. Northwestern Bell Telephone*, 954 F.2d 485,486 (8th Cir. 1992), relied upon by Defendants (Appellees' Brief at 41 n.7), involved the claim that the regulator had acted improperly in approving rates. *Karlin v. Zalta*, 154 Cal. App.3d 953 (1984) (Appellees' Brief at 41), was decided before Proposition 103 was passed, and therefore has nothing to say about the "interplay" between the statutory provisions. *Cel-Tech Communications, Inc v. Los Angeles Cellular Telephone Co.*, 20 Cal.4th 163, 182 (1999), *and Rubin v. Green*, 4 Cal.4th 1187, 1201 (1993) (Appellees' Brief at 40), did not involve antitrust or Cartwright Act claims, and addressed only the limits to the Unfair Competition Law when there is an "absolute barrier [] to relief" *in another statute*. Appellees' Brief at 40, quoting *Rubin*, 4 Cal.4th at 1201. No such barrier is present here, as Proposition 103 specifically preserves the applicability of other laws to insurance, Calif. Ins. Code § 1861.03(a), and *Cellular Plus* makes clear that rate-payers' damage claims for anticompetitive conduct are not the same as challenges to filed rates themselves.

C. *A Court's Analysis Of Antitrust Damages Is Inherently Different From The Insurance Commissioner's Determination Of Whether Rates Are Reasonable, And Damages Do Not Constitute A "Refund"*

Defendants argue that Plaintiffs are complaining that the premiums charged were "excessive" and that the Insurance Commissioner alone can determine if rates are "excessive" (Appellees' Brief at 43-44). But the Commissioner is not supposed to investigate whether there has been an antitrust conspiracy affecting rates. It would undermine the purposes of the Insurance Code to require the Commissioner to become a roving antitrust enforcer, required to satisfy itself that there has been no antitrust violation before approving any rate; antitrust conspiracies by their nature are typically discovered only long after they have already caused damage through higher prices.

In *Cellular Plus*, as noted above, the PUC had "jurisdiction ... in determining the reasonableness of rates," *id.* at 1243, the rates "were determined to be 'reasonable' by a regulatory agency," *id.* at 1241, and they "were ... duly approved and legal under [agency] regulations," *id.* at 1242.

But as that court held, these facts do *not* bar claims for antitrust damages, which involve an inherently different analysis: courts look not at the economic reasonableness or affordability of the rates or their relation to costs, like regulators, but at whether they were "artificially maintained". *See id.* at 1245 n.5, 1248, 1249. *Cellular Plus* also makes clear that the determination of whether prices are anticompetitive is traditionally a matter for *courts*, not agencies. *See id.* at 1247.

The same misconception is shown in Defendants' argument that providing antitrust damages is equivalent to retroactively revising and refunding rates (Appellees' Brief at 35,37,38,49). Here, too, *Cellular Plus* notes that compensatory damages are not the same thing as a rate refund. *Id.* at 1249-50. Similarly, Judge Friendly in *Square D* recognized that the two were inherently different. 760 F.2d at 1352.

This is therefore hardly a matter of providing a mere "antitrust overlay" to claims based on the Insurance Code, as Defendants suggest (Appellees' Brief at 40-41): antitrust claims really do involve a different analysis than the one mandated by the Insurance Code. Moreover, because of Proposition 103, this argument is *stronger*, not weaker, in the insurance context, because in *Cellular Plus* the statutory scheme provided that the agency's determinations could

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not be second-guessed by courts, *id.* at 1245, and did not include any provision (comparable to § 1861.03(a)) specifically preserving the applicability of the Cartwright Act and the unfair competition laws to the business in question.[FN7]

FN7. Defendants seek to distinguish *Cellular Plus* on the basis that the defendants in that case allegedly acknowledged that the agency's rate-making authority did not immunize them from Cartwright Act liability. Appellees' Brief at 46. But the defendants in that case argued that any Cartwright Act claims had to be brought as part of a rate proceeding before the Public Utilities Commission, 14 Cal. App.4th at 1243, 1244, which is not significantly different from the position taken by Defendants here. *See* Appellees' Brief at 32-33 (detailing procedure for protesting rates before the Insurance Commission).

D. *Defendants' Conduct Was Not Authorized By The Insurance Code*

Defendants suggest that they have an absolute right under § 1860.1 to engage in antitrust violations, and to reap the benefit of such violations, because once the

Commissioner approves a rate -- based on Defendants' own submissions, and when there is no way that the Commissioner could know that there has been an antitrust violation -- Defendants then must charge that rate. Appellees' Brief at 33-34. This is because, in Defendants' view, such rates are charged "pursuant to the authority conferred by this chapter" under § 1860.1.

In a competitive market, in which high-quality policies were allowed to compete, Defendants would lose business if they charged that rate -- but, precisely by excluding competition, Defendants have protected themselves from such losses. Secure in their gains, Defendants assert that "the 'act' of charging and collecting premiums based on rates that have been approved by the Commissioner is done 'pursuant to the authority conferred by' Chapter 9." Appellees' Brief at 34.

But the anticompetitive, exclusionary conduct -- by which alone any Defendant can overcharge anticompetitively for a policy without losing business to competitors offering higher-quality policies at better prices -- is clearly *not* pursuant to any legitimate regulatory authority, and that is the crux of and the necessary basis for Plaintiffs' complaint. The mere fact that, at the end of a course of anticompetitive conduct, Defendants then charge an approved rate does not immunize them here any more than in *Cellular Plus.*

Moreover, Defendants' broad interpretation of what constitutes conduct "pursuant to the authority" of the chapter proves far too much. Under Defendants' reasoning, if they had engaged in extortion -- threatening to burn down people's homes unless they bought auto insurance from Defendants -- the victims of that extortion could not get damages, because Defendants' charging for the policies was "pursuant to the authority" of the Insurance Code and those victims must not be given a "prohibited premium refund" (Appellees' Brief at 35).

In addition, Section 1860.1 nowhere mentions rates, addressing only "act[s] done, actions] taken or agreement[s] made". Defendants cannot even sell insurance at all in California without licensing and permission from the Insurance Commissioner, so under Defendants' interpretation, virtually everything insurance companies -- no matter how violative of other laws -- do can be considered "pursuant to the authority conferred by this chapter" and therefore protected. The proper interpretation is that when the entire conduct complained of is nothing more than what is specifically authorized, there is no liability; but the mere fact that clearly unauthorized conduct inflicted damage in the form of an approved rate as the result of an *unauthorized antitrust* conspiracy does not transform such conduct into conduct "pursuant to ... authority." Defendants' broad reading, by contrast, would invariably place their customers outside the protection of the law.

Other than § 1860.1, the only statutory authority on which Defendants rely in Calif. Ins. Code § 1860.2, which they say provides that enforcement by the Commissioner is "exclusive". Appellees' Brief at 34 (emphasis added). But §

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1860.2 itself provides that it applies only "[e]xcept as provided in this chapter" -- a chapter that includes § 1861.03(a). Thus, by its own terms, § 1860.2 is subordinate to Proposition 103.

CONCLUSION

Defendants' Brief provides further support for the view that the district court erred. Defendants concede that Plaintiffs have standing if they have alleged conduct that directly affects the price, and their own quotations from the Complaint demonstrate that the district court misinterpreted Plaintiffs' claims. With regard to Defendants' "filed rate doctrine" argument, Defendants ignore the fact that the filed rate doctrine does not apply to rates filed with state agencies, and are apparently unable to provide a satisfactory explanation of the impact of Calif. Ins. Code § 1861.03(a) in preserving the viability of Plaintiffs' claims. Plaintiffs therefore respectfully request that the district court's decision be reversed and remanded.

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 1475657 (C.A.9) (Appellate Brief)

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