American Chiropractic Ass'n, Inc. v. Trigon Healthcare, Inc. (May 6, 2004): **The Fourth Circuit's Attempt to Achieve a Balance Between the Policies Reflected in the McCarran-Ferguson Act and RICO**

Brian Gudmundson and Jeffrey E. Grell

The American Chiropractic Association ("American Chiropractic") brought suit against Trigon Healthcare, Inc. ("Trigon"), a for-profit health insurance corporation, who allegedly inhibited disbursements of insurance proceeds for chiropractic treatment. American Chiropractic brought suit under §1964(c) of the Racketeer Influenced and Corrupt Organizations Act (RICO) and various other theories of relief. American Chiropractic American claimed that Trigon had engaged in a pattern of mail and wire fraud by misrepresenting its intended level of reimbursement for chiropractic treatment.

The district court dismissed American Chiropractic's RICO claim, holding that, under the McCarran-Ferguson Act, the RICO claim was preempted by Virginia's insurance regulations. American Chiropractic appealed to the United States Court of Appeals for the Fourth Circuit.

RICO CLAIM NOT BARRED BY MCCARRAN-FERGUSON

Pursuant to the McCarran-Ferguson Act, "[no] Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance." 15 U.S.C. § 1012(b). A state law preempts federal legislation when (1) the state law was enacted for the purpose of regulating the business of insurance; (2) the federal legislation does not specifically relate to the business of insurance; and (3) the federal law invalidates, impairs, or supersedes the state law. *Humana, Inc. v. Forsyth*, 525 U.S. 299, 307 (1999). Federal legislation directly relating to the insurance industry supersedes state law and is not preempted by the McCarran-Ferguson Act.

The Fourth Circuit held that the first two elements of the McCarran-Ferguson standard were easily met by Trigon. First, Virginia's complex statutory code relating to insurance regulation, "creates a comprehensive network of statutory provisions aimed at controlling and managing the business of insurance." Likewise, "[t]he second factor [was] easily satisfied because the Supreme Court has held that 'RICO is not a law that specifically relates to the business of insurance." quoting *Humana*, 525 U.S. at 307.

As for the third element, the Fourth Circuit relied on the Supreme Court's reasoning in *Humana* and held that RICO does not "invalidate" or "supersede" the Virginia code, which does not provide for private recourse against insurers, because RICO does not provide a substitute rule of law but merely an additional means of recovery. Similarly, RICO does not "impair" the Virginia code because RICO "furthers Virginia's interest in policing insurance fraud and misconduct and does not frustrate any declared state policy. Although RICO's damage provisions are admittedly more severe than many state laws, RICO does not interfere with Virginia's administrative scheme." *See BancOklahoma*

Mortgage Corp. v. Capital Title Co., 194 F.3d 1089 (10th Cir. 1999). Moreover, the Fourth Circuit noted that the Virginia code provides for private causes of action in other contexts and, therefore, inferred that Virginia's legislature had contemplated the existence of a private action in the realm of insurance misconduct. *See Id*.

In sum, the Fourth Circuit held that American Chiropractic's RICO claim was not preempted by Virginia's insurance regulatory scheme and the McCarran-Ferguson Act merely because RICO provides for a private cause of action.

MAIL AND WIRE FRAUD: NO DETRIMENTAL RELIANCE

Although the Fourth Circuit determined that American Chiropractic's RICO claim was not barred by the McCarran-Ferguson Act, the Fourth Circuit nonetheless affirmed the district court's dismissal on the basis that American Chiropractic had failed to allege a "pattern of racketeering activity."

American Chiropractic alleged a pattern of racketeering that consisted primarily of mail and wire fraud. To establish the predicate acts of mail and wire fraud one need only prove the defendant intended to defraud and caused the mails and/or wires to be used in furtherance of the scheme to defraud. Moreover, given that civil RICO plaintiffs have standing to bring suit under section 1964(c) only if they have been injured "by reason of" the defendant's pattern of racketeering, a civil RICO plaintiff must allege and ultimately prove reliance on the defendant's representations. In particular, according to the Fourth Circuit, "a plaintiff must *plausibly* allege that [he] detrimentally relied in some way on the fraudulent mailing [or wire] … and that the mailing [or wire] was a proximate cause of the alleged injury to [his] business or property." (emphasis in original) quoting *Chisolm v. TranSouth Fin. Corp.*, 95 F.3d 331, 337 (4th Cir. 1996).

Trigon's allegedly fraudulent statements were made in its brochure outlining its reimbursement policies. American Chiropractic claimed that Trigon's brochures falsely stated that it reimbursed chiropractic claims at rates promulgated by the Medicare administration, when in fact Trigon's chiropractic reimbursement rates were far less.

After scrutiny of the brochure's actual text, the Fourth Circuit determined it was impossible for American Chiropractic to detrimentally rely on Trigon's statements. First, Trigon's brochure stated that "***[m]ost*** Trigon fees are based upon external benchmarks of relative value, for example, the [Medicare published rates]" (emphasis added). The brochure also stated "Trigon's fee schedules represent the ***maximum*** allowable charge for each covered service…" (emphasis added). According to the Fourth Circuit, Trigon's use of the words "most" and "maximum" indicated that ***some*** treatments – but not all -- were reimbursed according to Medicare rates. The qualified language employed by Trigon could not have fraudulently induced American Chiropractic to believe that it would always receive full reimbursement under the published Medicare rates. In addition, Trigon's reimbursement schedule explicitly differed from Medicare's schedule with regard to chiropractic treatment. For example, where Medicare reimbursed for each of several "manipulations" of the spine on a given occasion, Trigon reimbursed a flat rate

regardless of how many spinal regions were manipulated. Given these factors, the Fourth Circuit held it was simply not plausible for American Chiropractic to allege that it provided care based on reasonable expectation that Trigon's reimbursement rates would always achieve the maximum Medicare rates.

American Chiropractic also alleged acts extortion as part of the pattern of racketeering. The Fourth Circuit held, however, that without any actionable mail or wire fraud, the alleged extortion (without more) was insufficient to constitute a pattern.

GOOD LAW vs. BAD LAW

Good Law: Anyone who practices law or who knows anything about politics must admit that McCarran-Ferguson is a strange law. How is it that an entire industry was able to get a law passed that generally insulates the industry from federal regulation? Preemption usually runs the other way, i.e., federal law preempts state law – but not in the field of insurance. The existence of the McCarran-Ferguson Act is prima facie evidence of the extraordinary political power wielded by insurance companies in the United States. For whatever reasons, the insurance industry obviously prefers to be regulated by 50 state governments rather than one federal government and has used its political influence to perpetuate its preferred state-by-state regulatory scheme.

Moreover, like most administrative agencies, one must presume that there is a revolving door between the state insurance regulatory agencies and the insurance industry through which the great insurance minds of our country go back and forth. In the insurance industry, like any other, there is always the danger that, by virtue of this revolving door, the regulatory agency will become the captive of the industry – the tail will wag the dog. If a state insurance regulatory agency is the captive of the insurance industry, we cannot expect that such agencies' edicts will significantly deter abuses within the industry. Moreover, if the agency is the only entity with the right to seek recourse against insurance companies – and chooses not to because it is the captive of the very insurance companies it is supposed to regulate – then where can consumers / providers go?

Rather than adopting a blanket prohibition on RICO claims against insurance companies, the Fourth Circuit wisely analyzed the particular circumstances before it and its determination was based on those circumstances. This case-by-case approach to the application of McCarran-Ferguson to civil RICO claims maintains an appropriate check on the activities of insurance companies and the state regulatory agencies that may (for all practical purposes) be under their control. Without the threat of a RICO claim in federal court (as opposed to an administrative claim before a captive agency), there may be little to deter unscrupulous insurance companies from engaging in abusive practices. In essence, under McCarran-Ferguson, it may not be an exaggeration to say that the fox generally guards the henhouse, but so long as RICO claims are reviewed on a case-by-case basis vis-à-vis the McCarran Ferguson Act, the farmer (i.e., the federal courts) can stop by whenever the chicken begins to squawk and make sure they are okay.

Bad Law: The Fourth Circuit may have misinterpreted the requirement under section 1961(5) that a "pattern of racketeering activity" must be comprised of "at least two acts of racketeering activity." The court dismissed American Chiropractic's RICO claim for want of such a pattern because American Chiropractic alleged only one *type* of predicate act, extortion, after the court rejected its assertions of mail and wire fraud. The court did not even address the merits or extent of any extortion potentially committed by Trigon.

The Fourth Circuit's interpretation that § 1961(5) requires a plaintiff plead two separate ***types*** of predicate activities, e.g., extortion ***and*** mail fraud, contradicts the express language of the statute, which requires "at least two ***acts*** of racketeering activity" (emphasis provided). A plain reading suggests one may violate RICO by committing any two discrete acts deemed racketeering by the statute, and it is a fundamental principle that related and continuous acts of extortion can constitute a pattern of racketeering.

The Fourth Circuit may have had good reason for not giving much weight to American Chiropractic's allegations of extortion, but that reasoning is not reflected in the opinion. As written, this opinion could cause practitioners and courts to believe that a pattern must be comprised of various types of racketeering activity. There is no support for this proposition. Any acts of racketeering that are related and continuous may constitute a pattern, and it makes no difference whether the acts are limited to extortion, mail fraud, murder, or arson. RICO does not require proof of multiple types of racketeering activity. The Fourth Circuit should have spent more time explaining why American Chiropractic's extortion allegations were insufficient to support a claim.

The full opinion is published at: *American Chiropractic Ass'n, Inc. v. Trigon Healthcare, Inc.*, 367 F.3d 212 (4th Cir. 2004).