Antitrust Exposure For Insurers And Reinsurers

Law360, New York (February 14, 2011, 2:39 PM ET) -- A recent decision in Global Reinsurance Corp. v. Equitas Ltd. (N.Y. App. Div. Jan. 18, 2011) highlights the potential antitrust exposure faced by insurers and reinsurers amid the broader context of private antitrust lawsuits by policyholders, state attorney general enforcement actions, and efforts to repeal the McCarran-Ferguson Act’s exemption of the insurance and reinsurance industries from federal antitrust regulation.

In Global Re, the New York Appellate Division ruled that a retrocedent, Global Re, may assert that the centralization of claims-handling obligations by its retrocessionaire, Lloyd’s of London Names, in a single entity, Equitas, violated New York state antitrust law.

This case is significant because antitrust exposures — with their prospect of treble damages and injunctive relief — could present significant concerns for the industry. Insurers and reinsurers should assess their potential antitrust exposures under existing U.S. antitrust law, and federal antitrust exemptions to such liabilities, and ensure that their existing antitrust compliance programs will minimize such exposures.

Global Re v. Equitas

In Global Re v. Equitas, Global Re claimed that Lloyd’s of London Names’ centralization of claims-handling obligations with respect to pre-1993 obligations in a single entity, Equitas, restrained competition in violation of New York’s Donnelly Act, N.Y. Gen. Bus. L. § 340. Specifically, Global Re alleged that Equitas:

- Refused to permit Lloyd’s underwriters to pay Global Re unless it released the underwriters of future liabilities for claims, in contravention of the parties’ treaties and industry custom and practice.
- Required Global Re to submit additional documentation as a condition of making payments, contrary to the retrocessionaire’s duty to follow the settlements of its retrocedent under the treaties and industry custom and practice.
- Suppressed payments by Lloyd’s underwriters to Global Re, to pressure a Global Re affiliate to offer more attractive terms to underwriters on a separate deal.
- Delayed payment of outstanding balances due under the treaties, to leverage discounts in payments.
Global Re asserted that prior to Equitas’ formation, individual syndicates competed on claims service. It argued that Equitas had the market power to impose these requirements only because a “single, combined entity ... replaced the previously independent economic actors (the syndicates).” Id. 105. Global Re sought compensatory and treble damages, and injunctive relief.

The Court’s Holding

The Court Concluded that Global Re Sufficiently Alleged Antitrust Injury

The Appellate Division reversed the trial court’s dismissal of Global Re’s complaint, allowing Global Re to assert its antitrust claims against Equitas. The court held that Global Re “sustained antitrust injury because the quality of what it purchased, retrocessional coverage with the attendant claims-handling service, was adversely affected by an agreement eliminating competition over claims handling.” Id. at **12.

The court rejected the argument that Global Re simply alleged breach of contract. It reasoned that Global Re’s “position is that certain of the practices arose because of competition among the retrocessionaires, not because they are required by contract law, and that antitrust law bars the retrocessionaires from agreeing to stop engaging in any of the practices, not just those that are required by contract law.” Id. at **8-9.

The court also concluded that Global Re was a proper antitrust plaintiff even though, as a runoff company, it had not purchased retrocessional cover after the restraint of trade went into effect. The court held that “[a] post-purchase horizontal restraint that deprives the purchaser of economic benefits it otherwise would obtain affects the quality of the product or service purchased, thereby causing economic injury just as real as a pre-purchase horizontal restraint that increases the price the customer pays.” Id. at **12.

The Court Concluded that Global Re Sufficiently Alleged Lloyd’s Had Market Power

The court concluded that Global Re sufficiently alleged that Lloyd’s had market power in the worldwide market for retrocessional coverage. The court noted that market power is “the ability to raise prices significantly above the competitive level without losing all of their business.” Id. at **18.

The court noted that Global Re alleged that Lloyd’s was “the single most significant seller of most forms of non-[life] retrocessional coverage to reinsurers worldwide,” and provided “the benchmark for prices, terms and conditions for most forms of nonlife retrocessional coverage.” Id. at **17. The court held that Global Re’s allegations of market power were sufficient to withstand a motion to dismiss.

The court also held that Global Re’s claims were not barred by the Donnelly Act’s four-year statute of limitations; that the court had jurisdiction because Global Re alleged that Equitas’s conduct had a “direct, substantial and reasonably foreseeable effect” in New York; and that comity did not require dismissal. Id. at **20-24.
Broader Efforts to Increase Insurance and Reinsurance Industry’s Exposure to Antitrust Liability

The Global Re decision comes at a time of efforts — through litigation and legislation — to increase the insurance industry’s exposure under the antitrust laws.

State Attorney General Enforcement Actions

State attorneys general have recently investigated U.S. insurers and reinsurers for alleged anti-competitive conduct, and several such investigations have resulted in sizable settlements. See, e.g., “AIG Settles Ohio Antitrust Lawsuit For $9M,” Business Ins. (Apr. 7, 2010).

Private Antitrust Actions

Private plaintiffs have also asserted antitrust claims against insurers and reinsurers. In one recent example, the Third Circuit Court of Appeals held that purchasers of commercial insurance policies stated a claim under Section 1 of the Sherman Act that insurers entered into a horizontal bid-rigging agreement not to compete for the insurers’ existing customers. See In Re: Insurance Brokerage Antitrust Litig., 618 F.3d 300 (3d Cir. 2010).

The plaintiffs alleged that insurers agreed to provide purposefully uncompetitive sham bids to brokers, to steer business to other insurers, with the understanding that the other insurers would later reciprocate. Id. at 336. The court concluded that “[t]his agreement to divide the market, if proven, would be a naked restraint of trade subject to per se condemnation” under the Sherman Act. Id. at 362.

The court further held that the alleged bid-rigging was not exempt from federal antitrust scrutiny under the McCarran-Ferguson Act, 15 U.S.C. §§ 1011-15. The court held that the alleged horizontal bid-rigging agreement did not constitute “the business of insurance” to qualify for exemption under the statute. Id. at 361.

Efforts to Repeal the McCarran-Ferguson Act

Finally, several bills have recently been introduced in Congress to repeal the McCarran-Ferguson Act’s exemption of insurance from federal antitrust regulation. For example, the Health Insurance Industry Fair Competition Act, H.R. 4626, which was passed by the U.S. House of Representatives in 2010 but not by the Senate, would have provided that the antitrust laws apply to the business of health care insurance.

The Insurance Industry Competition Act of 2009, H.R. 1583, which was passed by neither house of Congress, would have eliminated the federal antitrust exemption for the insurance industry. The U.S. Department of Justice currently advocates repeal of the act, but for now the McCarran-Ferguson Act’s exemption remains law.

Conclusion

Global Re highlights the potential antitrust exposure faced by insurers and reinsurers, against the backdrop of increasing state attorney general antitrust enforcement actions, private federal antitrust law actions and efforts to repeal the McCarran-Ferguson Act’s exemption of the insurance industry from federal antitrust regulation.
It is unclear how Global Re will be resolved on the merits, or whether the decision will apply beyond the unique facts relating to Equitas. It is also unclear what form antitrust actions might take against insurers and reinsurers, and what the applicable rules will be. In this shifting landscape, insurers and reinsurers should watch for further developments, should assess their potential antitrust exposures, and should ensure that their existing antitrust compliance programs minimize such exposures.

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