No. 19-14096

UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

OSCAR INSURANCE COMPANY OF FLORIDA,
Plaintiff-Appellant,

v.

BLUE CROSS AND BLUE SHIELD OF FLORIDA, INC., ET AL.,
Defendants-Appellees.

On Appeal from the United States District Court
for the Middle District of Florida, No. 6:18-cv-01944 (Byron, J.)

APPELLANT'S SUPPLEMENTAL BRIEF

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January 29, 2021

Oscar Insurance Co. of Fla. v. Blue Cross and Blue Shield of Fla., Inc., et al.
No. 19-14096

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

The undersigned hereby certifies that the certificates of interested persons and corporate disclosure statements in Appellant's Principal Brief (filed December 16, 2019) and Reply Brief (filed March 23, 2020) together constitute a complete list of persons and entities known to have an interest in the outcome of this case. *See* 11th Cir. R. 26.1-2(b).

Respectfully submitted,

/s/ Seth P. Waxman

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January 29, 2021

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INTRODUCTION

This supplemental brief responds to the Court's order of January 15, 2021, directing the parties to address "whether and how the Competitive Health Insurance Reform Act of 2020 [('CHIRA')] applies to Oscar Insurance's claims for injunctive relief, damages, and any other relief."

CHIRA applies without any impermissible retroactive effect to Oscar's claims for prospective injunctive relief and to Oscar's claims for damages that accrued on or after the date of CHIRA's enactment, confirming that the McCarran-Ferguson Act supplies Florida Blue no defense to those claims. Those claims should therefore be allowed to proceed, regardless of whether Florida Blue's challenged practices are the "business of insurance" or "coercion."

Whether CHIRA also applies to Oscar's claims for damages preceding CHIRA's enactment likely depends on whether Florida Blue is correct that the McCarran-Ferguson Act is jurisdictional. Although an intervening change in substantive law ordinarily does not apply retroactively if it would increase a party's liability for pre-enactment conduct, *Landgraf v. USI Film Prod.*, 511 U.S. 244, 280 (1994), that analysis does not apply to jurisdictional statutes, *id.* at 274; *see also Scheerer v. United States Att'y Gen.*, 513 F.3d 1244, 1252-1253 (11th Cir. 2008). Rather, "intervening statutes conferring or ousting jurisdiction" are "regularly applied" regardless of whether the court had jurisdiction when the

challenged conduct occurred or when the suit was filed. *Landgraf*, 511 U.S. at 274. Here, citing *Gilchrist v. State Farm Mutual Auto. Insurance Co.*, 390 F.3d 1327 (11th Cir. 2004), Florida Blue contends that the McCarran-Ferguson Act "presents a jurisdictional bar" to Oscar's claims. Florida Blue Br. 1; *see also id.* at 17-19 (arguing that, under *Gilchrist*'s "binding jurisdictional holding," "antitrust immunity under the McCarran-Ferguson Act deprives a court of subject-matter jurisdiction"). If that were correct, then CHIRA would render McCarran-Ferguson inapplicable even to Oscar's claims for past damages, and the district court's dismissal of those claims would have to be reversed along with the other claims, regardless of the proper resolution of the issues that have been briefed.

Oscar's view has been and remains that the McCarran-Ferguson Act is not jurisdictional and that this Court erred in *Gilchrist* to the extent it held otherwise. *See* Oscar Br. 19-20 n.3; Reply 14 n.4. To this point in the appeal, it has been unnecessary for this Court to resolve this dispute or to reconsider *Gilchrist*'s characterization of McCarran-Ferguson. And it would remain unnecessary to do so if this Court agrees with Oscar as to either of the principal issues that have been briefed and submitted.

The most efficient way forward is therefore for the Court to decide the issues that were briefed on appeal without regard for CHIRA. If this Court agrees with Oscar either that Florida Blue's challenged conduct is not the "business of

insurance" or that it constitutes "coercion," then Florida Blue's McCarran-Ferguson defense would fail regardless of CHIRA, and the Court should reverse the district court's judgment and remand for further proceedings on all of Oscar's claims. But if the Court agrees with Florida Blue as to both of those issues, then the Court should vacate the district court's judgment and remand to the district court with instructions to reinstate Oscar's claims for injunctive relief and post-CHIRA damages and to evaluate in the first instance CHIRA's effect on Oscar's claims for past damages.

BACKGROUND

Appellant Oscar Insurance Company of Florida ("Oscar") brought this suit against appellees (collectively, "Florida Blue") for monopolization, attempted monopolization, and unreasonable restraint of trade under the Sherman Act and parallel state-law causes of action. *See* Doc. 75 at 47-53. At issue are Florida Blue's exclusive-dealing arrangements with brokers in certain Florida-area markets for individual health insurance. *See id.* at 2, 22-26, 29, 30-31. Oscar seeks (1) a permanent, prospective injunction against Florida Blue's broker-exclusivity practices and (2) treble antitrust damages. *See id.* at 53-54; 15 U.S.C. § 15(a).

After denying Oscar's motion for a preliminary injunction, the district court granted Florida Blue's motion under Rule 12(b)(6) and dismissed the case with prejudice on the ground that Oscar's claims are barred by the McCarran-Ferguson

Act. Doc. 113. The McCarran-Ferguson Act provides narrow antitrust immunity for conduct that constitutes the "business of insurance," 15 U.S.C. § 1012(b), unless, among other things, that conduct also constitutes "boycott, coercion, or intimidation," *id.* § 1013(b). The district court did not reach Florida Blue's arguments for dismissal under substantive antitrust law. Doc. 113 at 2 n.2.

The parties briefed and argued this appeal on two principal issues: (1) whether Florida Blue's alleged broker-exclusivity practices constitute the "business of insurance," § 1012(b); and (2) whether those practices constitute "coercion," § 1013(b). The United States filed an amicus brief in support of Oscar. The case was submitted after oral argument on November 20, 2020.

On January 13, 2021, the President signed into law the Competitive Health Insurance Reform Act of 2020, which significantly limits McCarran-Ferguson immunity as applied to the business of health insurance. CHIRA amends the McCarran-Ferguson Act to read: "Nothing contained in this Act shall modify, impair, or supersede the operation of any of the antitrust laws with respect to the business of health insurance." Pub. L. No. 116-327, § 2(a), 134 Stat. 5097, 5097 (to be codified at 15 U.S.C. § 1013(c)(1)).[*]

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[*] CHIRA leaves McCarran-Ferguson immunity in place for certain core health insurance functions not at issue here: collecting and analyzing historical loss data, performing actuarial services, and developing standard policy forms. *See* Pub. L. No. 116-327, § 2(a) (to be codified at 15 U.S.C. § 1013(c)(2)).

On January 15, 2021, the United States filed a letter notifying the Court of CHIRA and arguing that CHIRA provides an additional reason to reverse the district court's judgment with respect to Oscar's claims for injunctive relief. The United States took no position as to whether CHIRA applies to Oscar's other claims. The Court directed the parties to file supplemental briefs responding to the United States and addressing "whether and how [CHIRA] applies to Oscar Insurance's claims for injunctive relief, damages, and any other relief."

ARGUMENT

I. CHIRA ELIMINATES ANY MCCARRAN-FERGUSON DEFENSE TO OSCAR'S CLAIMS FOR INJUNCTIVE RELIEF AND POST-ENACTMENT DAMAGES

CHIRA amends the McCarran-Ferguson Act to say that "[n]othing contained in this Act shall modify, impair, or supersede the operation of any of the antitrust laws with respect to the business of health insurance." Pub. L. No. 116-327, § 2(a), 134 Stat. 5097, 5097 (to be codified at 15 U.S.C. § 1013(c)(1)).

This language eliminates McCarran-Ferguson immunity as a defense to any of Oscar's claims to which CHIRA applies. Although Florida Blue's exclusive-dealing conduct is not properly considered the "business of insurance" in the first place, *see* Oscar Br. 22-47, to the extent the conduct *is* the "business of insurance," it is also the "business of *health* insurance." After all, the only challenged conduct pertains to individual-health-insurance markets. *See* Doc. 75 at 29-30. CHIRA

thus deprives the challenged conduct of any McCarran-Ferguson immunity that would otherwise apply.

This Court applies the law in effect at the time of its decision unless Congress has clearly directed otherwise or the application would have "an impermissible retroactive effect." *Rendon v. United States Att'y Gen.*, 972 F.3d 1252, 1258 (11th Cir. 2020); *see Landgraf v. USI Film Prod.*, 511 U.S. 244, 273 (1994). Because the text of CHIRA does not clearly speak to whether Congress intended it to apply retroactively, the operative question is whether applying CHIRA to Oscar's claims would create an impermissible retroactive effect—that is, whether it would "impair rights a party possessed when [it] acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed." *Landgraf*, 511 U.S. at 280.

There is no impermissible retroactive effect in applying CHIRA to Oscar's claims for prospective injunctive relief. "When the intervening statute authorizes or affects the propriety of prospective relief, application of the new provision is not retroactive." *Landgraf*, 511 U.S. at 273; *see also Miccosukee Tribe of Indians of Fla. v. United States*, 619 F.3d 1286, 1288 (11th Cir. 2010) (same).

There is likewise no retroactive effect in applying CHIRA to Oscar's claims for damages accruing on or after January 13, 2021. Those claims involve no retroactivity because they arise from conduct postdating CHIRA's enactment. *See*

Landgraf, 511 U.S. at 273 (application not retroactive unless the statute was "enacted *after* the events in suit" (emphasis added)).

Accordingly, Oscar's claims for prospective relief should be allowed to proceed without regard to whether Florida Blue's conduct is the "business of insurance" or "coercion."

II. The Court Should Decide The Appeal As Briefed And Remand For The District Court To Resolve Any Remaining CHIRA Issues

Whether CHIRA applies to Oscar's claims for damages that accrued before January 13, 2021, is less clear. Because CHIRA does not "expressly prescribe[]" its temporal reach, its relevance here depends on whether applying it to Florida Blue's pre-enactment conduct would have impermissible retroactive effect. *Landgraf*, 511 U.S. at 280. That question in turn likely depends on whether the McCarran-Ferguson defense is a jurisdictional bar to suit, such that CHIRA merely confers jurisdiction that might not previously have existed. If the McCarran-Ferguson Act constitutes a substantive defense to liability—and if the district court were correct that the Act shields Florida Blue's challenged conduct here—then applying CHIRA to eliminate that defense would arguably "increase [Florida Blue]'s liability for past conduct," thereby imposing an impermissible retroactive effect. *Id.*; *see, e.g.*, *Rutland v. Moore*, 54 F.3d 226, 230 (5th Cir. 1995). On the other hand, "[j]urisdictional statutes … are generally not considered impermissibly retroactive." *Scheerer v. United States Att'y Gen.*, 513 F.3d 1244, 1252-1253

(11th Cir. 2008) (citing *Landgraf*, 511 U.S. at 274). "Even absent specific legislative authorization, application of new statutes passed after the events in suit is unquestionably proper in many situations," including where the intervening statute "confer[s] or oust[s] jurisdiction." *Landgraf*, 511 U.S. at 273-274. Such a law affects no substantive rights or liabilities, but merely "speak[s] to the power of the court" to hear the suit. *Id.* at 274 (quotation marks omitted).

Here, Florida Blue has taken the position that McCarran-Ferguson is a jurisdictional statute that "deprives a court of subject-matter jurisdiction" to hear suits where the statute applies. Florida Blue Br. 17; *see id.* at 1, 17-19. In support, Florida Blue cites this Court's decision in *Gilchrist v. State Farm Mutual Auto. Insurance Co.*, 390 F.3d 1327 (11th Cir. 2004), which stated that the McCarran-Ferguson Act "removed" the claim at issue "from [the Court's] jurisdiction," leaving the Court "powerless to enter a judgment." *Id.* at 1330, 1335. Oscar has contended that the McCarran-Ferguson Act is not jurisdictional and that *Gilchrist*'s statements should not be treated as controlling of that issue. Oscar Br. 19-20 n.3; Reply 14 n.4. But if Florida Blue were correct, then applying CHIRA to the claims in this case would simply confer jurisdiction where the Court previously had no power to hear the suit, and the McCarran-Ferguson Act would not bar Oscar's claims for past damages even assuming that Florida Blue's challenged conduct is the "business of insurance" and not "coercion."

In these circumstances, the most efficient course would be for the Court to decide this appeal on the issues presented by the briefs, without regard for CHIRA's effect. If the Court agrees with Oscar either that Florida Blue's conduct is not the "business of insurance" or that Florida Blue's conduct constitutes "coercion," then there would be no need to account for CHIRA—and no need for the Court (including, potentially, the en banc Court) to determine whether McCarran-Ferguson is jurisdictional or to reevaluate *Gilchrist*—because McCarran-Ferguson would be inapplicable in any event. The proper disposition in that case would be to reverse and remand for further proceedings on all of Oscar's claims, including the claims for past damages on the ground that Florida Blue was not immune from liability under the McCarran-Ferguson Act even before CHIRA.

Conversely, if the Court decides both the "business of insurance" and "coercion" issues in Florida Blue's favor, a remand would still be necessary—both to allow Oscar's claims for prospective relief to proceed under CHIRA (as discussed above), and to allow the district court to evaluate in the first instance CHIRA's effect on Oscar's claims for past damages in light of the parties' dispute over the McCarran-Ferguson Act's jurisdictional character.

Either way, simply vacating the district court's judgment without first deciding the "business of insurance" and "coercion" issues would create needless inefficiency. Those issues will remain relevant to any of Oscar's claims to which

CHIRA does not apply, *see, e.g., First Nat. Bank of Lamarque v. Smith*, 610 F.2d 1258, 1262-1263 (5th Cir. 1980), and the parties and the Court have already invested substantial time and resources toward resolving them. In contrast, it may never be necessary to decide CHIRA's application to the claims for past damages if Florida Blue's conduct is not immune under McCarran-Ferguson in the first place.

CONCLUSION

The Court should decide the issues that have been briefed on appeal. If the Court determines, as Oscar contends, either (1) that Florida Blue's challenged conduct is not the "business of insurance" or (2) that Florida Blue's challenged conduct is "coercion," the Court should reverse the district court's judgment and remand for further proceedings on all of Oscar's claims for relief on the ground that the McCarran-Ferguson Act does not immunize Florida Blue from antitrust liability. But if the Court agrees with Florida Blue that its conduct is the "business of insurance" and not "coercion," the Court should vacate the district court's judgment and remand to the district court with instructions to reinstate the claims for prospective relief in light of CHIRA and to determine in the first instance CHIRA's effect on Oscar's other claims.

Respectfully submitted,

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January 29, 2021

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(g), the undersigned hereby certifies that this brief complies with the page limitation in this Court's order of January 15, 2021.

1. Exclusive of the exempted portions of the brief, as provided in Fed. R. App. P. 32(f) and 11th Cir. R. 32-4, the brief contains ten pages.

2. The brief has been prepared in proportionally spaced typeface using Microsoft Word for Office 365 in 14 point Times New Roman font.

/s/ Seth P. Waxman
SETH P. WAXMAN

January 29, 2021

CERTIFICATE OF SERVICE

I hereby certify that on this 29th day of January, 2021, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Eleventh Circuit using the appellate CM/ECF system. Counsel for all parties to the case are registered CM/ECF users and will be served by the appellate CM/ECF system.

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