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.

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

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February 18, 2020

CERTIFICATE OF INTERESTED PERSONS
AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Eleventh Circuit Rule 26.1-1, Defendants-Appellees hereby certify that:

1. Defendants-Appellees Blue Cross and Blue Shield of Florida, Inc., Health Options Inc. and Florida Health Care Plan Inc. (collectively, "Appellees" or "Florida Blue") are, directly or indirectly, wholly owned subsidiaries of GuideWell Mutual Holding Corporation, and no publicly held corporation owns 10% or more of any of Appellees' stock.
2. To the best of Florida Blue's knowledge, the Certificate of Interested Persons and Corporate Disclosure Statement contained in the Opening Brief of Plaintiff-Appellant Oscar Insurance Company of Florida ("Oscar") constitutes a complete list of all persons and entities known to have an interest in the outcome of this case or appeal.

STATEMENT REGARDING ORAL ARGUMENT

Oral argument is not necessary because the district court's judgment should be affirmed based on binding, settled precedent. Appellant Oscar brought antitrust claims under the Sherman Act to challenge Florida Blue's use of exclusive agents to sell individual health insurance. Congress provided in the McCarran-Ferguson Act that conduct is exempt from the federal antitrust laws if it is (i) the "business of insurance"; (ii) regulated by state law (an element Oscar does not challenge); and (iii) does not qualify for a limited "boycott, coercion, or intimidation" exception. 15 U.S.C. §§ 1012–1013. Controlling precedent—in particular, *Thompson v. New York Life Insurance*, 644 F.2d 439 (5th Cir. Unit B May 4, 1981)[1]—dictates that Florida Blue's use of exclusive agents to sell individual health insurance is the "business of insurance" and is entitled to McCarran-Ferguson Act immunity. And other controlling precedent, including the Supreme Court's decision in *Hartford Fire Insurance Co. v. California*, 509 U.S. 764 (1993), demonstrates that the practice is not a "boycott, intimidation, or coercion."

[1] In *Bonner v. City of Prichard*, 661 F.2d 1206 (11th Cir. 1981) (en banc), this Court adopted as binding precedent all decisions of the former Fifth Circuit handed down before October 1, 1981.

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JURISDICTIONAL STATEMENT

The district court properly dismissed the complaint on September 20, 2019, because the McCarran-Ferguson Act presents a jurisdictional bar to Oscar's federal antitrust claims. *See Gilchrist v. State Farm Mut. Auto. Ins. Co.*, 390 F.3d 1327, 1330 (11th Cir. 2004). Oscar filed a timely notice of appeal on October 15, 2019. This Court has jurisdiction over this appeal pursuant to 28 U.S.C. § 1291.

PRELIMINARY STATEMENT

This appeal concerns Oscar's improper attempt to use the antitrust laws to halt Florida Blue's longstanding and lawful practice of selling individual health insurance through exclusive agents. The district court correctly determined that Oscar's suit is barred by the McCarran-Ferguson Act, which exempts the "business of insurance" from federal antitrust scrutiny. The decision below is supported by a long line of cases, including binding precedent in this circuit finding "that exclusive agency clauses have been deemed exempt from anti-trust scrutiny as part of the business of insurance." *Thompson v. New York Life Ins. Co.*, 644 F.2d 439, 443 (5th Cir. Unit B May 4, 1981). Oscar now asks this Court to disregard that controlling authority—along with a host of persuasive authority from other circuits reaching the same result—and reverse the district court's decision. The decision below is well-reasoned, well-supported and should be affirmed.

Florida Blue is a longtime provider of individual health insurance plans in Florida. Even as other insurers left the market following passage of the Patient Protection Affordable Care Act ("ACA"), Florida Blue has remained dedicated to serving individuals and families throughout the state. To serve consumers across every county in the state, Florida Blue has long relied on a network of exclusive agents—a practice authorized and regulated by Florida law. These exclusive agents guide consumers "through the complexities of the health insurance purchasing and enrollment, while ensuring they get the best policy at the most affordable price." (Doc. 75 at 15–16 (citation omitted).) The agents thus "play a crucial role in driving policy sales in Florida." (*Id.* at 15.)

Oscar entered the Orlando individual market in 2018 (*see id.* at 2–3), and immediately resorted to litigation. It commenced the underlying action less than two weeks into its first open enrollment period (in which it ultimately captured 13% of the market), asserting that Florida Blue's exclusive arrangements with agents violate the antitrust laws. Oscar also sought a preliminary injunction to enjoin immediately Florida Blue's use of exclusive agents.

Following an evidentiary hearing, the district court denied Oscar's motion for preliminary injunction and dismissed its initial complaint with leave to replead. (Docs. 72, 73.) Florida Blue then moved to dismiss Oscar's Amended Complaint ("Complaint") on a number of grounds, including that Oscar's federal

antitrust claims are barred by the McCarran-Ferguson Act. (Doc. 81.) The district court agreed and dismissed Oscar's Complaint. (Doc. 113.) Oscar now appeals.

The McCarran-Ferguson Act establishes that, with limited exception, the "business of insurance" is exempt from federal antitrust scrutiny. The Act was enacted in the wake of *United States v. South-Eastern Underwriters Association*, 322 U.S. 533 (1944), in which the Supreme Court held—for the first time—that anticompetitive conduct on the part of insurance companies could be subject to the federal antitrust laws. *Id.* at 535. Within a year, Congress passed the McCarran-Ferguson Act, clarifying that the federal antitrust laws do *not* reach the "business of insurance," provided that the challenged conduct is "regulated by State law" and does not amount to "boycott, coercion, or intimidation." 15 U.S.C. §§ 1012–1013. The Act's exception is narrow and must be understood in light of the egregious misconduct at issue in *South-Eastern Underwriters*, which involved a wide-scale conspiracy of nearly 200 insurance companies to engage in a boycott. 322 U.S. at 534–35. All elements of the Act are satisfied here, and the limited exception does not apply.

The first question under the McCarran-Ferguson Act is whether the conduct at issue constitutes the "business of insurance." As set forth above, that question has already been answered in this circuit: "exclusive agency clauses have been deemed exempt from anti-trust scrutiny as part of the business of insurance."

Thompson, 644 F.2d at 443. The *Thompson* decision is binding on this Court and conclusively settles the matter. (*See* Argument, Section I.A, *infra*.)

Even apart from *Thompson*, this element is satisfied because Florida Blue's exclusive agency agreements go to the heart of what insurers do: sell insurance policies and spread risk. *See, e.g.*, *SEC v. Nat'l Secs., Inc.*, 393 U.S. 453, 460 (1969) ("The selling . . . of policies and the licensing of companies and their agents are also within the scope of the [McCarran-Ferguson] statute." (internal citation omitted)). Indeed, it is difficult to imagine how the exclusive agents' activities could be anything other than the "business of insurance": by Oscar's own admission, the agents expand the pool of insureds by bringing new consumers into the market, help sell the right policies to the right individuals and prevent siphoning of Florida Blue customers to other insurers. (*See* Doc. 75 at 3, 15–17; Appellant 42.) This is the hallmark of the "business of insurance"—selling policies to consumers and spreading risk across those policyholders. *See, e.g.*, *Union Labor Life Ins. Co. v. Pireno*, 458 U.S. 119, 130 (1982); *Group Life & Health Ins. Co. v. Royal Drug Co.*, 440 U.S. 205, 211 (1979). It is thus no surprise that "most courts have held that routine dealings between insurers and brokers or agents do constitute the business of insurance." *Sanger Ins. Agency v. HUB Int'l, Ltd.*, 802 F.3d 732 (5th Cir. 2015). The district court's decision falls squarely within this authority. (*See* Argument, Section I.B, *infra*.)

The second question under McCarran-Ferguson is whether the conduct is regulated by state law. The district court found this element readily satisfied (Doc. 113 at 18–20), and Oscar does not challenge that conclusion on appeal.

The third and final consideration is whether the challenged conduct constitutes a "boycott, coercion, or intimidation" and, therefore, falls outside the protection of the Act. Oscar contends that it has adequately pleaded "coercion" because it has alleged that Florida Blue exercises "economic pressure" over the agents. For each of two independent reasons, Oscar is wrong.

First, conduct falls within the "boycott, coercion, or intimidation" exception only where "unrelated transactions are used as leverage to achieve the terms desired." *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 803 (1993). Simply "obtaining and exercising market power by concertedly exacting terms like those which a monopolist might exact" does "not constitute coercion." *Id.* at 802, 808 n.6. At best, Oscar's Complaint alleges the latter—that Florida Blue uses its purported monopoly power to impose and enforce exclusivity upon agents. But enforcement of a lawful contract is not "coercive" within the meaning of the Act, as the district court correctly held. (*See* Argument, Section II.A, *infra*.)

Second, to constitute "coercion," conduct must involve concerted action between two or more entities; unilateral conduct is not enough. *See, e.g.*, 91

Cong. Rec. 480–81 (1945); *Feinstein v. Nettleship Co. of L.A.*, 714 F.2d 928, 933 (9th Cir. 1983). Oscar has not pleaded concerted action, and has not even attempted to argue on appeal that it has satisfied this standard. Although the district court found it unnecessary to reach this element because "the challenged activity . . . does not meet the definition of coercion even assuming concerted action is not required" (Doc. 113 at 23 n.19), this Court may affirm on this independent ground as well. *See Lawson v. Life of the S. Ins. Co.*, 648 F.3d 1166, 1170 n.3 (11th Cir. 2011). (*See* Argument, Section II.B, *infra*.)

STATEMENT OF THE ISSUE

Whether the district court properly held that Florida Blue's use of exclusive agents in the sale of its individual health insurance plans is exempt from federal antitrust laws because (i) it is part of the "business of insurance," 15 U.S.C. § 1012(b), and (ii) it does not satisfy the "boycott, coercion, or intimidation" exception to the Act's broad grant of immunity, *id.* § 1013(b).

Although the McCarran-Ferguson Act also requires that the challenged practice be "regulated by State law," 15 U.S.C. § 1012(b), Oscar no longer contests this element. (*See* Appellant 47 n.7.) Oscar's fleeting reference in a footnote to potential en banc review of this point (*id.*) is insufficient to preserve it, *Tallahassee Mem'l Reg'l Med. Ctr. v. Bowen*, 815 F.2d 1435, 1446 n.16 (11th

Cir. 1987), and amici cannot raise the argument on Oscar's behalf (Gov't 24 n.7), *Day v. Persels & Assocs., LLC*, 729 F.3d 1309, 1325 (11th Cir. 2013).

STATEMENT OF THE CASE

I. Course of Proceedings

Less than two weeks into its first ACA open enrollment period in the state of Florida, Oscar commenced this lawsuit. (Doc. 1.) In it, Oscar alleged that it was foreclosed from competing in the market for the sale of individual health plans because Florida Blue uses exclusive agents. (*Id.*)

Oscar moved for a preliminary injunction the following week. (Doc. 11.) After a six-hour evidentiary hearing, in which Oscar admitted to having secured 13% of the market in its first enrollment cycle, the district court denied Oscar's motion on the grounds that Oscar had not demonstrated irreparable harm or a substantial likelihood of success on the merits. (Doc. 72 at 11, 16.) The court subsequently dismissed Oscar's first complaint as a shotgun pleading. (Doc. 73.)

After Oscar repleaded, Florida Blue moved to dismiss the Complaint because, among other reasons, Oscar's federal claims are barred by the McCarran-Ferguson Act. (Doc. 81.) The U.S. Department of Justice (the "Government") filed a statement of interest and argued against McCarran-Ferguson immunity. (Doc. 89.) After hearing arguments from Florida Blue, Oscar and the Government (Doc. 111), the district court dismissed all claims. (Doc. 113.) Oscar now appeals.

II. Statement of Facts

A. Oscar's Allegations[2]

Florida Blue is a longtime provider of health insurance to individuals and families in Florida. (*See* Doc. 75 at 2.) While many insurers exited the individual insurance market following passage of the ACA, Florida Blue has remained committed to offering individual health insurance plans in every county in the state—including the most rural areas of Florida that other insurers have ignored. (*See id.* at 4.) Consumers have rewarded this commitment, and Florida Blue now sells a large portion of ACA plans in Florida. (*Id.* at 2.)

To assist in the marketing and sale of its individual health insurance plans, Florida Blue relies on a network of exclusive insurance agents throughout the state. These agents work for Florida Blue's Contracted General Agencies ("CGAs"), which contractually commit to sell Florida Blue's, but no other insurer's, individual health insurance products. (*Id.* at 22.) These exclusive arrangements are one of the many ways that insurers in Florida can choose to sell their policies to consumers. *See, e.g.*, 45 C.F.R. § 155.205(a) (call center); 45 C.F.R. § 155.405(c) (Exchange website); 45 C.F.R. § 156.265(b)(3) (insurers' own websites). And exclusive arrangements are recognized, authorized and

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[2] Florida Blue takes as true the facts alleged in Oscar's Complaint, as this appeal arises from the district court's grant of Florida Blue's motion to dismiss.

regulated by Florida law. *See, e.g.*, *Essex Ins. Co. v. Zota*, 985 So. 2d 1036, 1046 (Fla. 2008); *accord Almerico v. RLI Ins. Co.*, 716 So. 2d 774, 776 (Fla. 1998).

Florida Blue "makes no secret of its exclusivity policy," and in fact displays the policy on its website so that competitors, regulators, agents and the public at large understand that Florida Blue's agents sell individual health insurance solely on behalf of Florida Blue. (Doc. 75 at 3, 22.) Agents who fail to abide by their contractual exclusivity risk losing their appointment to sell Florida Blue insurance. (*Id.* at 3.) Because Florida law prohibits agents from selling insurance on behalf of an insurer without a valid appointment, *see* Fla. Stat. § 626.112(1)(a), an agent whose appointment is terminated for violating exclusivity loses the right to sell any Florida Blue health insurance in the state (Doc. 75 at 4), although such an agent can be freely appointed by another insurer.

Oscar admits that agents and brokers (whom Oscar refers to interchangeably as "brokers") "help millions of consumers by guiding them through the complexities of health insurance purchasing and enrollment, while ensuring that they get the best policy at the most affordable price." (*Id.* at 15–16 (citation omitted).) "Brokers do so," according to Oscar, "by 'seek[ing] to understand each personal situation to create recommendations that complement a client's financial and medical security needs.'" (*Id.* (citation omitted).)

Consumers thus "rely" on insurance brokers "to advise them of their insurance options." (*Id.* at 3.)

Guidance from agents and brokers is important because consumers must consider many factors when selecting an individual health insurance plan. Although all ACA-compliant plans must offer certain "essential health benefits" and although premium rates *within* a plan may vary along only four dimensions (family size, geography, age and tobacco use), 42 U.S.C. § 300gg(a)(1), ACA plans can differ significantly. For instance, plans may offer different premiums, copayments and coinsurance, provider networks, customer experience, and quality of benefits. (*See* Doc. 75 at 13, 20–21.) By helping consumers understand these differences and select the right plan, brokers and agents "play a crucial role in driving policy sales in Florida." (*Id.* at 15.) As Oscar put it, brokers are "an indispensable path to insurance customers," and "Oscar and other new insurers" require "access to brokers" in order to compete in the state. (*Id.* at 43–44.)

In November 2018, Oscar began selling individual health insurance in the Orlando metropolitan area. (*Id.* at 2, 40.) Well aware of Florida Blue's exclusivity policy, Oscar attempted to lure away Florida Blue's exclusive agents in the months leading up to open enrollment. (*Id.* at 36.) Some agents opted to switch to Oscar, but others declined. (*Id.* at 6.) Oscar was also free to appoint, and did appoint, its own brokers to sell Oscar plans. (*Id.* at 36.) Notably, in its very

first enrollment period, Oscar gained approximately 13% market share in the four-county Orlando metropolitan area. (*Id.* at 38.)

Nevertheless, two weeks into open enrollment, Oscar sued Florida Blue, alleging that its use of exclusive agents constitutes monopolization and alleged monopolization in violation of Sherman Act § 2 and unreasonable restraint of trade in violation of Sherman Act § 1, and also violates related state laws. Florida Blue moved to dismiss Oscar's Complaint arguing that (i) the district court lacked subject-matter jurisdiction over the federal antitrust claims because they are barred by the McCarran-Ferguson Act, and (ii) Oscar's complaint failed to state a claim. (Doc. 81.) In dismissing the Complaint, the district court reached only the McCarran-Ferguson ground.

B. The McCarran-Ferguson Act

Before the Supreme Court's decision in *South-Eastern Underwriters*, "it had been assumed . . . that the issuance of an insurance policy was not a transaction in interstate commerce and that the States enjoyed a virtually exclusive domain over the insurance industry." *St. Paul Fire & Marine Ins. Co. v. Barry*, 438 U.S. 538–39 (1978). But in 1944, the Supreme Court held in *South-Eastern Underwriters* that certain allegedly anticompetitive conduct by insurance companies—there, a boycott by nearly 200 insurance companies acting in concert—was subject to the federal antitrust laws. *Id.* at 534–35, 539.

Spurred by "widespread concern that the States would no longer be able to engage in taxation and effective regulation of the insurance industry," Congress "moved quickly" to rein in the decision. *Id.* at 539. Within a year, Congress passed the McCarran-Ferguson Act, 15 U.S.C. §§ 1012–13, which (i) reaffirmed the States' role in regulating and taxing insurers, and (ii) exempted "the business of insurance" from federal antitrust scrutiny, provided that such business is "regulated by state law." *Royal Drug Co.*, 440 U.S. at 217–19. These goals were achieved through 15 U.S.C. § 1012(b), which reads:

> 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, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance: *Provided*, That after June 30, 1948, the Act of July 2, 1890, as amended, known as the Sherman Act, and the Act of October 15, 1914, as amended, known as the Clayton Act, and the Act of September 26, 1914, known as the Federal Trade Commission Act, as amended, shall be applicable to the business of insurance to the extent that such business is not regulated by State Law.

In passing this Act, Congress was specifically "concerned with the type of state regulation that centers around the contract of insurance." *Nat'l Secs.*, 393 U.S. at 460. It wanted to ensure "that the activities of insurance companies in dealing with their policyholders would remain subject to state regulation" and not federal oversight. *Id.* at 459.

Nevertheless, Congress did not wish to immunize the type of flagrant misconduct that was at issue in *South-Eastern Underwriters*—*i.e.*, the far-reaching scheme by an association of nearly 200 fire insurance companies to fix prices, and to "employ[] boycotts together with other types of coercion and intimidation to force non-member insurance companies into the conspiracies, and to compel persons who needed insurance to buy only from [the association's] members on [the association's] terms." 322 U.S. at 535. Congress therefore carved out from its broad grant of federal antitrust immunity a narrow category of conduct, codified in 15 U.S.C. § 1013(b): "Nothing contained in this chapter shall render the said Sherman Act inapplicable to any agreement to boycott, coerce, or intimidate, or act of boycott, coercion, or intimidation."

Since then, courts have routinely invoked the Act to immunize dealings between insurance companies and their agents or brokers. *See, e.g.*, *Sanger*, 802 F.3d at 744–45; *Arroyo-Melecio v. Puerto Rican Am. Ins. Co.*, 398 F.3d 56, 68 (1st Cir. 2005); *Owens v. Aetna Life & Cas. Co.*, 654 F.2d 218, 226 (3d Cir.), *cert. denied*, 454 U.S. 1092 (1981); *Thompson*, 644 F.2d at 444; *Card v. Nat'l Life Ins. Co.*, 603 F.2d 828, 834 (10th Cir. 1979); *Black v. Nationwide Mut. Ins. Co.*, 429 F. Supp. 458 (W.D. Pa. 1977), *aff'd*, 571 F.2d 571 (3d Cir. 1978).

III. District Court Opinion

Recognizing that McCarran-Ferguson immunity constitutes a threshold question in the case (Doc. 111 at 42–43), the district court turned to that jurisdictional issue first.

The court began by considering whether the challenged conduct constitutes the "business of insurance." In concluding that it does, the district court analyzed the three factors articulated by the Supreme Court in *Royal Drug* and applied by this Court in *Gilchrist*: "first, whether the practice 'has the effect of transferring or spreading a policyholder's risk'; second, whether the practice is 'an integral part of the policy relationship between the insurer and the insured'; and third, whether the practice is 'limited to entities within the insurance industry.'" (Doc. 113 at 6 (quoting *Gilchrist*, 390 F.3d at 1331).)

On the first element, the Court determined that the challenged conduct transfers or spreads risk. The Court noted that "[t]he Supreme Court instructs the trial court to focus on the relationship between the insurance company and the policyholder." (*Id.* at 8.) Citing Oscar's numerous allegations that "Florida Blue's brokers help consumers by guiding them through the complexities of health insurance purchasing and enrollment" and "ensure consumers get the best policy at the most affordable price," the district court found it "hard to imagine a relationship more squarely at the core of the business of insurance than the one

described by Oscar as existing between Florida Blue's brokers and ACA consumers." (*Id.*) Oscar's own pleadings "concede[]" that Florida Blue's exclusivity arrangements are "fundamental to the type of policy which could be issued, its reliability, interpretation, and enforcement"—core elements of the "business of insurance" under Supreme Court precedent. (*Id.* at 15 (citing *Royal Drug*, 440 U.S. at 215–16).) This conclusion was compelled by binding precedent in *Thompson*, 644 F.2d at 444, and further supported by persuasive out-of-circuit case law. (Doc. 113 at 8–12.)

In so holding, the district court rejected Oscar's two main arguments. *First*, the district court disagreed with Oscar that *Thompson* was implicitly overruled by the Supreme Court's decision in *Pireno*. (*Id.* at 12 n.14.) As the district court noted, the Fifth Circuit has relied on *Thompson* since *Pireno* was decided, and did not "criticize [*Thompson*'s] reasoning." (*Id.*) *Second*, the district court rejected Oscar's argument that a federal statute, 42 U.S.C. § 18063, eliminates risk spreading under the ACA. (Doc. 113 at 13–15.) That statute provides that the Secretary of Health and Human Services, in consultation with the States, will establish criteria and methods for insurers with lower-risk enrollees to transfer funds to insurers with higher-risk enrollees. Nothing in the "plain wording of § 18063" indicates that "spreading risk is no longer a concern for insurers

selling ACA coverage"; nor, the district court observed, did Oscar plead any facts in its Complaint compelling an alternate conclusion. (Doc. 113 at 13–15.)

With respect to the second "business of insurance" factor, the district court concluded that Florida Blue's exclusive agency relationships are "an integral part of the policy relationship between the insurer and the insured" precisely because of what Oscar alleges the agents do: "provide invaluable services to customers" that "are neither logically nor temporally unconnected to the transfer of risk accomplished by procuring a diverse pool of insureds." (*Id.* at 15–16.) The court noted that this conclusion was consistent with *Thompson*, as "Florida Blue did not force its brokers to engage in activities unrelated to insurance." (*Id.* at 16.)

Regarding the third factor, the district court applied authority from the Supreme Court, this Court and other circuits to find that "Florida Blue's activities are limited to entities within the insurance industry." (*Id.* at 17 (citing *Sanger*, 802 F.3d at 744; *Thompson*, 644 F.2d at 439).) The court rejected Oscar's argument that "exclusive relationships can be found in businesses unrelated to insurance" as inconsistent with Supreme Court precedent and Oscar's own admission that these brokers "play an instrumental role in the sale of health insurance." (*Id.* at 18.)

Next, the district court concluded that Florida Blue's use of exclusive agents is regulated by state law: "Florida law comprehensively regulates the

insurance industry, including the relationship between principles and their agents." (*Id.*)

Having thus established that the conduct at issue falls within § 1012(b) of the McCarran-Ferguson Act, the district court considered whether the narrow exemption of § 1013(b) applies. The court held that Florida Blue's agency relationships do not amount to a "boycott, coercion or intimidation" because, "[s]tripped of argument and advocacy," Oscar's Complaint asserts only that "Florida Blue's brokers entered into exclusivity agreements, and Florida Blue enforced those agreements." (*Id.* at 20.) As the district court reasoned, "[i]f a contractual relationship is lawful, a party may enforce the agreement without those efforts morphing into coercion." (*Id.* at 22.) "The brokers agreed to work exclusively for Florida Blue in exchange for access to all of Florida Blue's product lines. The consequences of violating the agreement is the broker's inability to sell insurance for Florida Blue. There is nothing coercive about enforcing the contractual relationship." (*Id.*)

The district court thus dismissed Oscar's Complaint in full, without reaching whether Oscar had stated a claim under the antitrust laws. (*Id.* at 2 n.2.)

IV. Standard of Review

In this circuit, antitrust immunity under the McCarran-Ferguson Act deprives a court of subject-matter jurisdiction. *Gilchrist*, 390 F.3d at 1335.

Dismissals of a complaint for lack of subject-matter jurisdiction are reviewed de novo. *Sierra v. City of Hallandale Beach*, 904 F.3d 1343, 1347 (11th Cir. 2018). Although the well-pleaded allegations must be taken as true when deciding whether the motion to dismiss was correctly granted, *see Lawrence v. Dunbar*, 919 F.2d 1525, 1529 (11th Cir. 1990), the Court is not required to accept plaintiff's legal conclusions or "unwarranted deductions of fact" as true, or to draw the precise inferences that plaintiff seeks, *Aldana v. Del Monte Fresh Produce, N.A., Inc.*, 416 F.3d 1242, 1248 (11th Cir. 2005).

Additionally, because the McCarran-Ferguson Act implicates the Court's subject-matter jurisdiction, Oscar carries the burden of pleading facts sufficient to overcome the grant of immunity. *Grady v. United States*, 702 F. App'x 929, 930 (11th Cir. 2017). Hoping to avoid this burden, Oscar calls McCarran-Ferguson immunity a "nonjurisdictional affirmative defense[]" that Florida Blue must establish. (Appellant 19 n.3.) Oscar's position is incorrect under this Court's decision in *Gilchrist*. In *Gilchrist*, this Court granted leave to appeal a class certification order but learned during oral argument that the suit might be barred by the McCarran-Ferguson Act. 390 F.3d at 1329–30. As this Court explained, "[s]ince we are powerless to enter a judgment in a matter over which we have no jurisdiction, we are required, even *sua sponte*, to initiate an inquiry into our subject-matter jurisdiction whenever we become concerned that it

may not exist." *Id.* at 1330 (internal citation omitted). The Court ultimately dismissed the appeal because "the McCarran-Ferguson Act remove[d] [plaintiff's] claim from [its] jurisdiction." *Id.* at 1335.

Oscar cites a string of cases to suggest that *Gilchrist* was wrongly decided. (Appellant 19 n.3.) But none of those cases addresses the McCarran-Ferguson Act. *See Hosanna-Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C.*, 565 U.S. 171, 195 n.4 (2012) (Americans with Disability Act); *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 514 (2006) (Title VII of the Civil Rights Act of 1964); *FTC v. Morton Salt Co.*, 334 U.S. 37, 44–45 (1948) (Clayton Act). Therefore, none of those cases overrules *Gilchrist*'s binding jurisdictional holding. *See United States v. Vega-Castillo*, 540 F.3d 1235, 1236 (11th Cir. 2008).[3] Oscar thus bears the pleading burden here, which it has failed to satisfy.

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[3] Oscar also wrongly suggests that Florida Blue failed to raise McCarran-Ferguson immunity as a jurisdictional issue below. In fact, Florida Blue's motion to dismiss argued precisely that "McCarran-Ferguson creates a jurisdictional bar on federal antitrust claims exempt under the Act." (Doc. 81 at 6.) Because Oscar's jurisdictional allegations are deficient on their face, Florida Blue presented a facial challenge that did not require the district court to weigh evidence. *See Douglas v. United States*, 814 F.3d 1268, 1274 (11th Cir. 2016) (defendant made a facial challenge to subject-matter jurisdiction when it "expressly moved to dismiss based on Rule 12(b)(6)"). Regardless, "[s]ubject-matter jurisdiction can never be waived or forfeited." *Gonzalez v. Thaler*, 565 U.S. 134, 141 (2012).

SUMMARY OF THE ARGUMENT

The McCarran-Ferguson Act immunizes state-regulated conduct within the "business of insurance" from federal antitrust scrutiny, so long as the conduct does not amount to boycott, coercion or intimidation. *Gilchrist*, 390 F.3d at 1330. Here, the district court properly determined that Florida Blue's use of exclusive agents meets that standard.

First, Florida Blue's use of exclusive agents plainly constitutes the "business of insurance." Exclusive agents are the very means by which Florida Blue sells its individual policies to consumers and thus underwrites and spreads risk. And spreading risk is the touchstone of the "business of insurance," as the Supreme Court has repeatedly recognized. *See, e.g.*, *Pireno*, 458 U.S. at 130; *Royal Drug*, 440 U.S. at 211. Moreover, this Court has already held that exclusivity arrangements are exempt from the federal antitrust laws as the "business of insurance" in *Thompson*—a binding decision that governs here. *See* 644 F.2d at 443–44. Oscar's own pleadings also establish that Florida Blue's use of exclusive agents implicates the transfer and spreading of risk, is integral to the policyholder relationship and is limited to entities within the insurance industry and, therefore, constitutes the "business of insurance."

Second, as Supreme Court and circuit court authority make clear, the "coercion" exception is limited to conduct that involves both improper leveraging

of an unrelated transaction and concerted action. Oscar's Complaint, which challenges Florida Blue's efforts to enforce the lawful terms of its contractual obligations with agencies, fails to plead facts sufficient to satisfy either requirement.

ARGUMENT

I. The District Court Properly Determined that Florida Blue's Use of Exclusive Agents Is the "Business of Insurance."

Three factors determine whether conduct falls within the "business of insurance": (i) whether the activity has "the effect of transferring or spreading a policyholder's risk"; (ii) whether the activity is "an integral part of the policy relationship between the insurer and the insured"; and (iii) whether the activity is "limited to entities within the insurance industry." *Gilchrist*, 390 F.3d at 1331 (citation omitted). The district court properly found that Florida Blue's use of exclusive agents meets this standard. Indeed, following clear guidance from the Supreme Court, this Court has already found that "exclusive agency clauses" are "exempt from anti-trust scrutiny as part of the business of insurance." *Thompson*, 644 F.2d at 443. *Thompson* controls here. (*See* Argument, Section I.A, *infra*.) Moreover, even apart from *Thompson*, Florida Blue's exclusivity arrangements readily satisfy the three criteria. (*See* Argument, Section I.B, *infra*.)

A. *Thompson* Dictates that Florida Blue's Exclusive Agency Relationships Constitute the "Business of Insurance."

The Supreme Court has long observed that "activities of insurance companies in dealing with their policyholders" are at the core of the "business of insurance." *See Nat'l Secs.*, 393 U.S. at 459–60. Indeed, Congress's "focus" in enacting the Act "was on the relationship between the insurance company and the policyholder" and ensuring that the States were in charge of "protecting or regulating that relationship, directly or indirectly" without interference from the federal antitrust laws. *Id.* The Supreme Court has thus recognized that "[t]he selling . . . of policies and the licensing of companies and their agents are . . . within the scope of the [McCarran-Ferguson] statute." *Id.* at 460 (internal citation omitted); *see also Royal Drug*, 440 U.S. at 215–216.

Not surprisingly then, this Court (like many others) has already found that exclusivity between an insurer and its agent is the business of insurance for purposes of the Act. In *Thompson*, an insurer had entered into an agreement with its agent that contained "a number of conditions" on the agent's employment. 644 F.2d at 441. Among those conditions was an exclusivity clause, providing that "[t]he agent 'must not represent any other insurance company nor place any application for life or any other type of insurance or annuity with any other insurer during the Contract Year." *Id.* The agreement also required the agent: (i) to operate "continuously during the Contract Year"; (ii) not to "engage in any other

business . . . for remuneration or profit during the Contract Year"; and (iii) to write $50,000 of new business during the Contract Year. *Id.* The question before the Court was "whether the challenged provisions of the . . . agency contract are exempt from anti-trust liability as being the 'business of insurance' under the provisions of the McCarran-Ferguson Act." *Id.* at 442.

The Court considered the exclusivity provision first, finding that to be the easy question: "We find, upon turning to decisions of sister courts, that exclusive agency clauses have been deemed exempt from anti-trust scrutiny as part of the business of insurance." *Id.* at 443. That, however, did not end the analysis because "the challenged condition before us is not merely a restriction upon servicing a competitor in the insurance business," but also a prohibition on outside employment. *Id.* at 444. The Court thus considered whether the presence of these additional restrictions changed the result—and held that it did not. Taken together, the "restrictions did not force appellant to engage in activities unrelated to insurance," but rather offered "various incentives, beyond the usual agency relationship, so that appellant would agree to focus all his entrepreneurial skills solely on selling insurance. . . . Such activity, whatever its merit, is within the business of insurance." *Id.* The Court reached this result, notwithstanding that the insurer's conditions were more restrictive than traditional exclusivity provisions. *See id.* at 443-44.

Thompson controls the outcome here. Like the agent in *Thompson*, Oscar challenges an "exclusive agency clause[]," which has already been found "exempt from the anti-trust laws as part of the 'business of insurance.'" *Id.* at 443. Moreover, as in *Thompson*, Florida Blue's exclusivity policy does not force its agents to engage in activities unrelated to insurance, but instead (as Oscar admits) provides incentives so that the agents focus their entrepreneurial skills on selling Florida Blue's insurance, and no one else's. (*See* Doc. 75 at 4–5; *see also id.* at 3, 22.) Such activity falls squarely within the "business of insurance." Indeed, it is hard to imagine an activity more central to "the relationship between the insurance company and the policyholder" than the means by which an insurer sells policies and forms its relationship with insureds. *See Nat'l Secs.*, 393 U.S. at 460 ("The relationship between the insurer and the insured, the type of policy which could be issued, its reliability and interpretation and enforcement, these were the core of the 'business of insurance.'"); *Thompson,* 644 F.2d at 443.

Oscar argues that *Thompson* does not control because it "addressed a different type of broker arrangement"—namely, "the requirement not to engage in other work besides the sale of insurance." (Appellant 31; *see also* Gov't 22.) But that ignores the facts of *Thompson*, which addressed four "conditions pertinent to this appeal," including exclusivity. *Thompson*, 644 F.2d at 441. Although the Court easily found that exclusivity was the "business of insurance," *id.* at 443, and

therefore spent more time on the noncompete restriction, the Court's holding was addressed to all of the "challenged *provisions*" finding that they "are exempt from anti-trust liability" under the Act, *id.* at 442 (emphasis added). Moreover, even if the Court were to focus on the noncompete aspect of *Thompson*, the result would be the same. Indeed, that was precisely the holding of *Sanger,* in which the Fifth Circuit reaffirmed *Thompson* and expressly stated that exclusivity provisions between insurers and their agents "are *more* fundamental to the risk spreading characteristics of insurance than are the noncompete agreement at issue in *Thompson*." *Sanger,* 802 F.3d at 745 (finding an exclusivity agreement exempt under McCarran-Ferguson).

Oscar next argues that *Thompson* is no longer good law because it has been "undermined to the point of abrogation" by *Pireno*—a case that has nothing to do with the insurer-agent relationship and never mentions *Thompson*. (*See* Appellant 32; Gov't 23.) In *Pireno*, the Supreme Court considered whether an insurance company's use of a peer review committee that advised "whether particular . . . treatments and fees were 'necessary' and 'reasonable'" constituted the "business of insurance." 458 U.S. at 122. Despite *Pireno*'s incongruous facts, Oscar argues that *Pireno* (decided in 1982) abrogates *Thompson* (decided in 1981) because *Pireno* "distilled" the three criteria for assessing the "business of insurance," and *Thompson* "addressed none of th[ose] criteria." (Appellant 32–33;

Gov't 23.) In fact, however, Oscar's so-called "*Pireno* criteria" were announced by the Supreme Court in *Royal Drug* (decided in 1979), which itself derived the criteria from even earlier case law. *See Nat'l Secs.*, 393 U.S. at 459–60; *SEC v. Variable Annuity Life Ins. Co. of Am.*, 359 U.S. 65 (1959). Indeed, *Pireno* itself credits *Royal Drug* with "identif[ying] three criteria relevant in determining whether a particular practice is part of the 'business of insurance.'" 458 U.S. at 129. *Royal Drug* not only predates *Thompson*, but the *Thompson* decision heavily relied on *Royal Drug*. *Thompson*, 644 F.2d at 443. The only *Royal Drug* factor not expressly addressed in *Thompson* is the first factor—whether the conduct implicates the spreading of risk—an issue not challenged by the appellant in that case. *Id.*

Thompson has also been cited with approval numerous times since *Pireno*, further underscoring that it remains good law. As recently as 2015, the Fifth Circuit reaffirmed *Thompson* in finding that "routine dealings between insurers and brokers or agents do constitute the business of insurance." *See Sanger*, 802 F.3d at 744. As the *Sanger* court explained, "most courts" have reached this conclusion and—citing *Thompson*—"[s]o have we." *Id.*

District courts also have relied on *Thompson* as binding precedent in the years since *Pireno* to find conduct immune as the "business of insurance" under the McCarran-Ferguson Act. In *Hopping v. Standard Life Ins. Co.*,

No. GC81-167-LS-P, 1983 WL 1946 (N.D. Miss. Sept. 14, 1983), for example, the district court applied *Thompson* to conclude that an arrangement intended to prevent activity that could "reduce the effectiveness of [defendant's] marketing strategy" constituted the "business of insurance." *Id.* at *8. And another district court relied on *Thompson* to hold that restrictions in insurer-agent agreements were the "business of insurance." *See Gribbin v. S. Farm Bureau Life Ins. Co.*, No. CIV. A. 82-2727, 1984 WL 21975, at *3–4 (W.D. La. Jan. 3, 1984) And, of course, the district court here correctly viewed *Thompson* as binding authority, unabrogated by *Pireno*. (Doc. 113 at 8 n.9, 12 n.14.) By contrast, Oscar cites no court finding that *Pireno* and *Thompson* are irreconcilable—much less that *Thompson* was implicitly overruled by *Pireno.*

Thompson is also consistent with the decisions of other circuit courts, including those decided after *Pireno*, concluding that insurers' use of agents or brokers and the terms of those agency arrangements are the "business of insurance." *See Arroyo-Melecio*, 398 F.3d at 68 (First Circuit decision noting that "[c]ircuit courts have explicitly held that the decision to use or not use agents to market and solicit for policies . . . is within the 'business of insurance.'"); *Owens*, 654 F.2d at 226 (Third Circuit decision explaining that the "business of insurance" includes "authorizing agents to solicit individual or group policies"); *see also Card*, 603 F.2d at 832 (Tenth Circuit decision recognizing that the exclusivity

requirement in agent-insurer contract constituted the "business of insurance"); *Steinberg v. Guardian Life Ins. Co. of Am.*, 486 F. Supp. 122, 124 (E.D. Pa. 1980) (requirements that agent undertake "full line sales" as a condition of general agency and submit "all insurance applications solicited by [the agent] to [the insurer]" constituted the "business of insurance"); *Black*, 429 F. Supp. at 460, (holding that an exclusivity requirement in an agent-insurer contract constituted the "business of insurance"), *aff'd* 571 F.2d 571 (3d Cir. 1978).[4]

In response to this great weight of authority, Oscar has identified only two out-of-circuit district court cases from the 1970s holding "that agent exclusivity arrangements are *not* the business of insurance." (Appellant 34.) Those cases—*Ray v. United Family Life Insurance Co.*, 430 F. Supp. 1353 (W.D.N.C. 1977) and *American Family Life Assurance Co. of Columbus v. Planned Marketing Associates, Inc.*, 389 F. Supp. 1141 (E.D. Va. 1974)—predate

[4] Even Professor Hovenkamp, an amicus in favor of Oscar, has admitted elsewhere that "the structure of the McCarran-Ferguson Act implies that such relationships"—*i.e.*, "insurer-agent dealings"—"are within the immune category." Herbert J. Hovenkamp, *The Insurance Industry's Antitrust Immunity*, U. of Penn. Law School, Jan. 29, 2010, at 15, https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=2808&context=faculty_scholarship.

Royal Drug, Thompson and *Sanger* and contradict the weight of authority.[5] And in any event, they cannot overcome this circuit's binding authority.

B. Florida Blue's Use of Exclusive Agents Satisfies the Three "Business of Insurance" Factors Set Forth by the Supreme Court.

Even if *Thompson* had not decided the issue, the district court should be affirmed because Florida Blue's use of exclusive agents meets each of the three "business of insurance" factors set forth in *Royal Drug*.

i. Florida Blue's Exclusivity Arrangements Have the Effect of Transferring and Spreading Policyholder Risk.

The first factor for assessing whether challenged conduct constitutes the "business of insurance" is whether the practice "has 'the effect of transferring or spreading a policyholder's risk.'" *Gilchrist*, 390 F.3d at 1331 (quoting *Pireno*, 458 U.S. at 129). Risk is "transferred" through "the very purchase of insurance," which moves risk "from the insured to [the insurer]." *Pireno*, 458 U.S. at 130 (internal citation omitted). Risk is "spread" when the losses associated with some transferred risks are distributed across all transferred risks, "so as to enable the insurer to accept each risk at a slight fraction of the possible liability upon it." *Royal Drug*, 440 U.S. at 211.

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[5] *Ray* and *American Family* also predate *Pireno*. Thus, Oscar appears to argue that *Thompson* cannot be good law since it was decided before *Pireno*, but these district court cases nevertheless survive. Oscar cannot have it both ways.

Taking Oscar's allegations as true, Florida Blue's use of exclusive agents plainly affects the transferring and spreading of policyholder risk. The exclusive agents interact with consumers at the time the policyholder relationship is formed and, by selling insurance (or not), directly affect whether and to what extent risk is transferred to Florida Blue. By Oscar's own admission, agents drive enrollees to Florida Blue's plans (*see* Doc. 75 at 4–5, 22–23, 44–45), and help insureds select the right plan for their particular risk profile (*see id.* at 3, 15–16; Appellant 42). Indeed, Oscar has conceded that, absent exclusivity, some insureds would select different policies from different insurers (Doc. 75 at 43–44), or might not purchase *any* insurance at all (*see* Appellant 42). Exclusive agents also impact Florida Blue's ability to spread risk across different insureds by both bringing enrollees to Florida Blue and preventing competitors from siphoning away those customers. (*See* Doc. 75 at 4–5, 22–23, 44–45.) In fact, the very premise of Oscar's Complaint is that but for the exclusive arrangements, Oscar would have taken Florida Blue's customers and made "substantially" more sales. (*Id.* at 7–8.) The exclusive agents thus allow Florida Blue to maintain the volume, composition and integrity of its insurance pool, which is the very means by which consumers transfer risk to Florida Blue, which in turn spreads that risk across policyholders.

Indeed, as the district court recognized, that is precisely the holding of two circuit courts: the Fifth Circuit in *Sanger* and the Ninth Circuit in *Feinstein*.

Sanger concerned an exclusivity arrangement between an insurance broker (HUB) and certain professional liability insurers. 802 F.3d at 734. HUB bundled the insurers' policies and offered them as a group plan for members of the American Veterinary Medical Association ("AVMA"). *Id.* at 734–35. Sanger, a broker who competed with HUB, wanted to offer a competing group plan to non-AVMA veterinarians, but the insurers refused to sell through Sanger, citing their exclusivity with HUB. *Id.* In evaluating whether the Act immunized the insurers from Sanger's Sherman Act claims, the Fifth Circuit held that HUB's "exclusive dealing arrangements with insurers" were part of the "business of insurance" and, specifically, involved the "transferring or spreading of risk." *Id.* at 743–44. As the court explained, "[k]eeping a large, geographically and professionally diverse pool of veterinarians in the Program" enabled the insurers to "spread[] risk." *Id.* at 743. The exclusivity policy also ensured that other brokers (like Sanger) could not "siphon off" HUB's customers, which would "alter the composition of policyholders in the Program and thus would likely impact the Program's ability to spread risk." 802 F.3d at 744.

The Ninth Circuit reached the same conclusion in *Feinstein*. There, a medical association contracted with an agent to serve as the "sole and exclusive" agent for the association's members to obtain malpractice insurance. 714 F.2d at 930. The agent could offer insurance to the association's members only, and to

no one else. *Id.* The Ninth Circuit held that this agreement involved the transfer or spreading of risk: "The medical association sought to provide a single insurance broker for all of its members in order to assure coverage for certain high-risk specialties, thereby distributing risk across the membership." *Id.* at 932.

Oscar attempts to distinguish *Sanger* and *Feinstein* as cases involving "group policies that cover[ed] multiple insureds under a single master policy," whereas Florida Blue's exclusive agents enroll "individual policyholders" only. (Appellant 37; Gov't 17–18.) According to Oscar, unlike with group policies, "[o]n the ACA individual market, . . . [w]hether the insurer loses or gains the business of a separate customer who is a stranger to the policy does not affect the transfer and spreading of risk." (Appellant 38–39.) This argument is wrong and reflects a fundamental misunderstanding of the ACA. The basic premise of the ACA is that "significantly increasing health insurance coverage" to a larger population of insureds "will minimize . . . adverse selection and broaden the health insurance risk pool to include healthy individuals, which will lower health insurance premiums." 42 U.S.C. § 18091(2)(I). Oscar's suggestion that siphoning away customers from Florida Blue would not affect the risk pool (*see* Appellant 38–39) flies in the face of this central mission.

Using the same faulty logic, Oscar next argues that, unlike group insurance at issue in *Sanger* and *Feinstein,* the ACA individual insurance market is

uniquely risk-neutral. (Appellant 39–40.) In particular, Oscar suggests that the ACA's risk-adjustment provision, 42 U.S.C. § 18063, "eliminates any incremental risk to Florida Blue from the 'siphoning off' it would face in the presence of true competition." (Appellant 40.) As the district court recognized, nothing in the plain language of 42 U.S.C. § 18063 suggests that the risk-adjustment provision "eliminates" the risk each insurer bears by selling policies. *See* 42 U.S.C. § 18063 (requiring each State to "assess a charge" on insurers whose enrollees have "less than the average actuarial risk," and to "provide a payment" to insurers whose enrollees have "greater than average actuarial risk"). And the exit of insurers from Florida following implementation of the ACA (Doc. 75 at 35, 44) confirms that insuring the public under the ACA is not risk-neutral to insurers.[6] Nor, as the district court observed, did Oscar allege in its Complaint "that under the ACA an insurer need no longer worry about spreading the risk." (Doc. 113 at 13.)

Oscar further implies that *Sanger* and *Feinstein* prove too much because "all anticompetitive conduct . . . would come within the 'business of

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[6] *See, e.g.*, Greg Fann, *The Evolution of the Individual Market (Part I)*, Health Watch, March 2017 at 33, https://www.soa.org/globalassets/assets/library/newsletters/health-watch-newsletter/2017/march/hsn-2017-iss82-fann.pdf ("Many insurers have exited the market . . . due to financial results and predictability concerns," and "risk adjustment results have often been cited as the 'surprise' financial item in poor results.").

insurance'" if prevention of "siphoning" were sufficient "because all anticompetitive conduct aims to prevent new market entrants from 'siphoning off' customers." (Appellant 34; *see also* Gov't 14–15; Scholars 16.) But this argument overlooks that there are other types of conduct—outside of the "contract of insurance" that is the focus of the Act, *Nat'l Secs.*, 393 U.S. at 460—that remain subject to antitrust scrutiny even if they have the effect of preventing "siphoning" of customers. *Pireno*, 458 U.S. at 130–31; *Royal Drug*, 440 U.S. at 213–24. For example, mergers between two insurance companies (Scholars 17) and acquisitions of "must-have" hospitals (Gov't 14–15) would *not* be immune because they have nothing to do with "the activities of insurance companies in dealing with their policyholders," *Nat'l Secs.*, 393 U.S. at 459. In addition, Oscar's argument ignores that there are other elements, in addition to transferring and spreading risk, that factor into whether the Act's immunity will apply.

Finally, Oscar makes three other arguments why Florida Blue's exclusive agent relationships do not transfer or spread risk. Each is without merit.

First, Oscar contends that "Florida Blue's exclusivity practices" are "ancillary" and "logically and temporally unconnected" to the transfer of risk and, therefore, do not constitute the "business of insurance" under *Royal Drug* and *Pireno*. (Appellant 25–28; Gov't 18.) But that argument misapplies those cases—neither of which involved the sale of insurance policies to consumers. For

example, in *Royal Drug*, an insurer entered into cost-savings agreements with certain pharmacies, whereby the pharmacies agreed to sell prescription drugs to the insurer's policyholders at a low price in exchange for reimbursements from the insurer. 440 U.S. at 209. The Court held that this practice did not constitute the "business of insurance" because the "Pharmacy Agreements . . . do not involve any underwriting or spreading of risk, but are merely arrangements for the purchase of goods and services." *Id.* at 214. In fact, "the benefit promised to . . . policyholders" (prescription coverage) was exactly the same regardless of the Pharmacy Agreements, leaving policyholders "basically unconcerned" with those arrangements, which impacted only the insurer's costs. *Id.* at 213–14.

In *Pireno*, an insurer issued policies that covered chiropractic treatments, so long as the treatments were "necessary" and the charges "reasonable." 458 U.S. at 122. The insurer retained a peer-review committee to assess whether some claims under those policies were medically necessary and reasonably charged. *Id*. The Court held that use of the peer review committee was not the "business of insurance" because it "plays no part in the spreading and underwriting of a policyholder's risk." *Id.* at 130. Far from impacting "[t]he transfer of risk from insured to insurer," peer review was simply the means by which "the insured's claim is settled." *Id.* at 130–31. In fact, the Supreme Court observed that transfer of risk was "effected by means of the contract between the

parties—the insurance policy—and that transfer is complete" long before peer review took place. *Id.* In other words, *Pireno*, though itself involving an ancillary agreement, expressly observed that the sale of insurance policies transfers risk.

Thus, *Royal Drug* and *Pireno*—the two cases upon which Oscar primarily relies—actually support Florida Blue. That is because unlike the Pharmacy Agreements in *Royal Drug* or the peer review committee in *Pireno*, Florida Blue's exclusive arrangements directly impact policy sales, as Oscar concedes (Doc. 75 at 15–16), and thus directly impact the formation of the policyholder relationship. They do so by driving policyholders to Florida Blue and no one else, and by helping consumers select appropriate policies (among the myriad of other benefits Oscar has specifically pleaded). (*See id.* at 15–17; Appellant 42.) It cannot be said (as was true in *Royal Drug* and *Pireno*) that consumers would be "unconcerned" with this arrangement; indeed, Oscar admits that Florida consumers heavily depend on agents when making purchasing decisions. (Doc 75 at 15–17.) Nor is it meaningful that exclusivity may be entered separately from the underlying insurance contract. Exclusive agents affect the contract between insurer and insured, regardless of when exclusivity is entered.

Second, Oscar relies on *In re Insurance Brokerage Antitrust Litigation*, 618 F.3d 300 (3d Cir. 2010)—a market allocation case—to argue that Florida Blue's exclusivity agreements do not transfer or spread risk because they

"do not control '*whether* or *to what extent* a prospective insurance purchase w[ill] transfer its risk to an insurer, but merely to *which* insurer that risk w[ill] be transferred.'" (Appellant 35 (citation omitted); Gov't 18–19.) This argument again ignores Oscar's pleadings, which concede that Florida Blue's exclusive agents do much more than determine "to which insurer" a particular risk will be transferred. (*See* Statement of Facts, Section II.A, *supra*.) Indeed, Oscar does not allege that every sale by Florida Blue's agents would translate into a sale for a competitor absent Florida Blue's exclusive dealing—nor could it, given that Florida Blue has a more expansive footprint in Florida than Oscar (or any other competitor, for that matter). (*See* Doc. 75 at 2–4.)

Third, Oscar concedes that Florida Blue's agents maintain and "expand[] Florida Blue's customer base," but insists that exclusivity has no bearing on those effects. (Appellant 29–30; Gov't 11–13; Scholars 11–13.) But Oscar has this exactly backward. Florida Blue's exclusive agents are able to expand the pool of insureds and prevent siphoning of Florida Blue's risk pool *precisely because* they are subject to exclusivity obligations and cannot direct consumers to other insurers. *See Sanger*, 802 F.3d at 743. If *independent agents* help spread risk, then *exclusive agents* certainly do. This is precisely why Oscar calls them "an indispensable path to insurance customers." (Doc. 75 at 44.)

ii. Exclusivity Is an Integral Part of the Policy Relationship.

The second "business of insurance" factor is whether the challenged practice is integral to the "policy relationship between insurer and insured." *Gilchrist*, 390 F.3d at 1331 (citation omitted). A practice is "integral" where it implicates "[t]he relationship between insurer and insured," including "the type of policy which could be issued, its reliability, interpretation and enforcement." *Nat'l Secs.*, 393 U.S. at 460; *see also Royal Drug*, 440 U.S. at 215. For all of the reasons set forth above (*see* Argument, Section I.B.i, *supra*), that standard is plainly met here, as the district court concluded. (*See* Doc. 113 at 16.) Oscar argues that the exclusive agency relationships are not "integral" to the policy relationship for two reasons.

First, citing *Royal Drug* and *Pireno*, Oscar argues that exclusivity arrangements cannot be "integral" because they constitute "'separate contractual arrangements' between Florida Blue and third parties other than the policyholder." (Appellant 42 (quoting *Royal Drug*, 440 U.S. at 216); *see also* Gov't 19–20.) This argument ignores *Thompson*, *Sanger* and the numerous cases that hold otherwise. Moreover, as discussed above, *Royal Drug* and *Pireno* involve distinguishable agreements. Neither case involved an agreement that impacted the *policyholder relationship*, and neither suggested that a practice falls outside the "business of insurance" whenever it involves a "separate contractual arrangement[]" from the

insurance policy. To the contrary, *Royal Drug* recognized that "the 'business of insurance' may have been intended to include" certain "separate contractual arrangements"—namely, "dealings within the insurance industry between insurers and agents." 440 U.S. at 216, 224 n.32.

Second, Oscar insists that Florida Blue's use of exclusive agents is not "integral" to the policyholder relationship because it is "unique to Florida Blue." (Gov't 21; *see also* Appellant 42–43.) Oscar does not cite a single case in support of this proposition, nor have we found one. And the long list of cases treating routine insurer-agent dealings as part of the "business of insurance" belies this argument. (*See* Argument, Section I.A, *supra*.)

iii. Florida Blue's Use of Exclusive Agents Is Limited to Entities Within the Insurance Industry.

Finally, the district court properly concluded that Florida Blue's exclusivity policy is "limited to entities within the insurance industry," and thus satisfies the third criteria of the "business of insurance." (Doc. 113 at 17–18.) By definition, an insurance company and its agents are "entities within the insurance industry." *See Thompson*, 644 F.2d at 443–44; *see also Sanger*, 802 F.3d at 744; *Owens*, 654 F.2d at 226; *Arroyo-Melecio*, 398 F.3d at 68. Oscar's sole argument to the contrary—that the use of exclusive agents is not "limited to entities within the insurance industry" because "exclusive agents "are regularly used in many

industries" (Appellant 45)—cannot be reconciled with Supreme Court and circuit court authority.

Oscar again derives its purported test from a misreading of *Royal Drug* (Appellant 46), but that case concluded only that "the mass purchase of goods and services from *entities* outside the insurance industry" is not the business of insurance. 440 U.S. at 224 (emphasis added). *Royal Drug* does not speak of *practices* outside the insurance industry, and it certainly never states that the "challenged practice" must be "uniquely characteristic of insurance." (Appellant 46.) In fact, *Royal Drug* explicitly recognized that "[t]ransactions between an insurer and an agent, unlike the Pharmacy Agreements [at issue in *Royal Drug*], are wholly intra-industry; an insurance agent sells insurance while a pharmacy sells goods and services." *Id*. at 224 n.32.

Nor can such an expansive reading be squared with post-*Royal Drug* case law. In *Thompson*, for example, the Court held that a contract between an insurer and its agent containing typical noncompete and exclusivity clauses—an agreement that plainly could, and does, exist outside the insurance industry—was "exempted" under McCarran-Ferguson. 644 F.2d at 444. Since *Thompson*, the Fifth Circuit has expressly held that alleged exclusive dealing between an insurer and its agents "undisputedly" satisfies the "third criterion" of the "business of

insurance" test, even though such a practice "would be expected . . . in any industry." *Sanger*, 802 F.3d at 744–45 (citation omitted).

Oscar's countervailing citations are not persuasive. For example, Oscar cites *FTC v. IAB Marketing Associates, LP*, 746 F.3d 1228 (11th Cir. 2014) for the proposition that a practice was "not limited to entities within the insurance industry" because "'[n]on insurance company associations' frequently engaged" in the same practice. (Appellant 45 (citation omitted).) *IAB*, however, concerns a non-insurance company selling something other than insurance, 746 F.3d at 1235, and thus is inapposite here. Oscar's remaining authority, *Ray* and *American Family* (Appellant 45–46), is similarly unavailing for the reasons already set forth above: these are out-of-circuit district court cases that predate and contradict binding Supreme Court and circuit precedent. (*See* Argument, Section I.A, *supra*.)

* * *

The district court thus correctly concluded—under binding Supreme Court and Eleventh Circuit authority—that Florida Blue's exclusive agency arrangements fall within Section 1012(b) of the McCarran-Ferguson Act. The only remaining question is whether the narrow exception of Section 1013(b) applies to save Oscar's Complaint. As set forth below, it does not.

II. The District Court Properly Determined that Florida Blue's Use of Exclusive Agents Does Not Constitute "Coercion."

Under a narrow exception to the McCarran-Ferguson Act, acts of "boycott, coercion, or intimidation" are not immune from federal antitrust scrutiny. 15 U.S.C. § 1013(b). Oscar alleges that it has sufficiently alleged an act of "coercion." That is wrong for two reasons, each of which is sufficient to affirm the district court's decision. *First*, Oscar has failed to allege improper leveraging of unrelated transactions. (*See* Argument, Section II.A, *infra*.) *Second*, Oscar has failed to allege concerted action between two or more parties. (*See* Argument, Section II.B, *infra*.)

A. Oscar Has Failed To Plead Leveraging of Unrelated Transactions.

Under the Act, "coercion" requires improper leveraging of "unrelated transactions," *Hartford Fire*, 509 U.S. at 803—an element even the Government concedes is essential (*see* Gov't 25–26). The Supreme Court announced this rule in *Hartford Fire*, in which primary insurers alleged a conspiracy among reinsurers to force the primary insurers to comply with the reinsurers' preferred terms. 509 U.S. at 770–71. In particular, plaintiffs alleged that "primary insurers who wrote insurance on disfavored forms would be refused all reinsurance, *even* as to risks written on *other forms*." *Id.* at 810. The Supreme Court held that such allegations could amount to a boycott, "unless the primary insurers' other business were relevant to the proposed reinsurance contract." *Id.*

This "expansion of the refusal to deal beyond the targeted transaction" was essential to the definition of a "boycott," the *Hartford Fire* Court explained, because unless "unrelated transactions are used as leverage to achieve the terms desired," the misconduct is nothing more than "a concerted agreement to terms"—*i.e.*, "obtaining and exercising market power by concertedly exacting terms like those which a monopolist might exact." *Id.* at 803. A "concerted agreement to terms" cannot be sufficient to trigger the boycott exception because then "every price fixing agreement would be a boycott also." *Id.* at 802 (citation omitted). Because the Act plainly meant to immunize most price-fixing, *see Royal Drug*, 440 U.S. at 221, and exempt from immunity only agreements that amounted to "boycott, coercion or intimidation," 15 U.S.C. § 1013(b), the definitions for "boycott" and "price-fixing" must be distinct.

By the same logic, the Supreme Court explained that "coercion" under McCarran-Ferguson also requires more than a "concerted agreement to terms." *Hartford Fire*, 509 U.S. at 808 n.6. Mere "concerted agreements do 'not coerc[e] anyone, at least not in the usual sense of that word.'" *Id.* (citation omitted). Thus, the Court explained, such "actions do not constitute 'coercion' or intimidation' within the meaning of the statute . . . because they are precisely what is protected by McCarran-Ferguson immunity." *Id.*

Here, Oscar alleges that Florida Blue uses monopoly power to force agents to agree to exclusivity, and then enforces those agreements. At the center of this allegation is a single transaction: the agreement by which agents accept exclusivity in exchange for an appointment under the Florida regulatory scheme to sell health insurance on behalf of Florida Blue. (Doc. 75 at 22.)[7] Agents who fail to abide by this single contractual obligation risk losing their appointment as an agent for Florida Blue—and thus, by virtue of Florida law, the authorization to sell any Florida Blue insurance in any portion of the state. *See* Fla. Stat. § 626.112(1)(a) (agents may not sell insurance on behalf of insurer without an appointment). That is not improper leveraging of an unrelated transaction because there is no "other, unrelated transaction[]." *Hartford Fire*, 509 U.S. at 802–03.[8]

Similarly, it is not sufficient to argue that Florida Blue leverages its purported monopoly power by withholding commissions. (*See* Appellant 2, 11; Gov't 28.) As an initial matter, there is no well-pleaded allegation that *Florida*

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[7] It is irrelevant whether individual agents contract directly with Florida Blue or instead through CGAs. (Appellant 52 n.8.) Either way, an agent agrees to maintain exclusivity in exchange for a Florida Blue appointment. (Doc. 75 at 3, 22.)

[8] Because Oscar has not alleged that Florida Blue can make or terminate appointments piecemeal (and it cannot), this case is unlike *Hartford Fire*, which involved allegations of leveraging of completely unrelated forms. 509 U.S. at 810. In addition, *Hartford Fire* was decided under the more lenient pleading standard in place before *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007).

Blue could threaten to withhold commissions from agents; rather, Oscar has alleged that "Florida Blue pays CGAs a lump sum from which *CGAs are responsible for distributing broker commission payments.*" (Doc. 75 at 26 (emphasis added).) According to Oscar, "CGAs have considerable leeway in distributing commission payments, and they can withhold commissions . . . if [a] broker violates the terms of Florida Blue's exclusivity policy." (*Id.*) Thus, even as pleaded, there is no basis to find that Florida Blue could withhold commissions from agents. *See McMahon v. City of Riviera Beach*, No. 08-80499-CIV, 2008 WL 4108051, at *3 (S.D. Fla. Aug. 28, 2008) ("[W]hen reviewing a motion to dismiss, a court is not required to 'accept factual claims that are internally inconsistent.'" (citation omitted)). Moreover, even if there were, this still would not involve leveraging of *unrelated* transactions: as Oscar has conceded, there is only one "lump-sum" commission covering the sale of Florida Blue health insurance.[9]

[9] This case is thus different than *South-Eastern Underwriters*, where "independent sales agents who defiantly represented insurers outside the conspiracy were punished by withdrawal of the right to represent the members of the conspiracy." (Gov't 28–29 (alterations omitted).) There, the "punishment" was part of the enforcement of the conspirators' separate effort to coerce competitors into a price-fixing scheme. *See Hartford Fire*, 509 U.S. at 808 (explaining the Court's reasoning in *South-Eastern Underwriters*).

The absence of the unrelated transaction is precisely why the district court found no coercion below. As the district court said: "The brokers agreed to work exclusively for Florida Blue in exchange for access to all of Florida Blue's product lines. The consequences of violating the agreement is the broker's inability to sell insurance for Florida Blue. There is nothing coercive about enforcing the contractual relationship." (Doc. 113 at 22.) Contrary to Oscar's contention, the district court was not suggesting that Florida Blue's enforcement of its exclusivity arrangements was not coercive simply because "exclusive dealing arrangements are 'not per se unlawful.'" (Appellant 51 (quoting Doc. 113 at 21); Scholars 24–25.) Rather, the Court was making the correct point that, because there was only a single agreement at issue, Florida Blue's efforts to enforce that agreement were irrelevant to the coercion analysis. Without an improperly leveraged side transaction, Florida Blue's single, lawful contract—and its efforts to enforce that contract—cannot be coercive within the meaning of the Act. *See Hartford Fire*, 509 U.S. at 808 n.6; *Black*, 429 F. Supp. at 462 ("While these matters can be considered acts of coercion and intimation, they were efforts by Nationwide to enforce their contract with Black. Black was told to comply with the contract or face termination as an agent. The legality of these threats and pressures hinges on the lawfulness of their object."), *aff'd* 571 F.2d 571 (3d Cir. 1978).

Oscar's reliance on antitrust tying cases (*see* Appellant 52–53; Gov't 26) only further confirms why Oscar has failed to plead coercion. Tying requires "an agreement by a party to sell one product but only on the condition that the buyer also purchases a different (or tied) product, or at least agrees that he will not purchase that product from any other supplier." *Eastman Kodak Co. v. Image Tech. Servs.*, 504 U.S. 451, 461 (1992) (quotation omitted). In other words, tying, like coercion, requires leveraging of an *unrelated* product or transaction. By contrast, an "employment [contract], standing alone, cannot constitute a tying product within the meaning of the antitrust laws." *De Jesus v. Sears, Roebuck & Co.*, 87 F.3d 65, 71 (2d Cir. 1996). Florida Blue's contracts—which condition an agency relationship on exclusivity—are no different from requiring an employee to deal only with affiliated entities. Neither is tying and neither is improper leveraging.

In an effort to recover from its deficient pleadings, Oscar rejects the Supreme Court's holding in *Hartford Fire*,[10] arguing instead for a "common understanding" of the term "coercion" based on a case decided more than a decade before *Hartford Fire*. (*See* Appellant 48–50 (citing *St. Paul*, 438 U.S. at 552).)

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[10] It is telling that Oscar's appeal relies so heavily on rejecting binding authority—first *Thompson*, then *Gilchrist* and now *Hartford Fire.* That Oscar cannot prevail without repeatedly rejecting controlling authority highlights why Oscar should not prevail at all.

According to Oscar, "[e]conomic pressure" is "coercion." (*Id.* at 50.) Specifically, "[c]onduct becomes coercive, and thus anticompetitive, when a monopolist's power makes it an indispensable trading partner and other actors have no realistic choice but to accede to terms they would not otherwise accept." (*Id.* at 49.) But that is not the standard the Supreme Court has articulated, and for good reasons. *See Hartford Fire*, 509 U.S. at 802, 808 n.6.

To start, a loose definition, such as the one propounded by Oscar, would have the McCarran-Ferguson exception swallow the rule. By definition, a monopolist is always an "indispensable trading partner" and other actors never have a "realistic choice but to accede to terms they would not otherwise accept." (Appellant 49); *see, e.g.*, *Am. Key Corp. v. Cole Nat'l Corp.*, 762 F.2d 1569, 1581 (11th Cir. 1985). Oscar's definition of "coercion" would thus render the exception for "boycott, coercion, or intimidation" coterminous with (at least Section 2) the Sherman Act itself—a proposition the Supreme Court has expressly rejected in the very case on which Oscar relies. *St. Paul*, 438 U.S. at 545 n.18 ("Whatever the precise reach of the terms 'boycott,' 'coercion,' and 'intimidation,' the decisions of this Court do not support the . . . suggestion that they are coextensive with the prohibitions of the Sherman Act.").

Oscar's contention that the exclusive agent agreements are "coercive" simply because Florida Blue is an alleged "monopolist" (Appellant 49, 52–53)

likewise misses the mark. Oscar effectively asks this Court to perform a substantive antitrust analysis in order to determine applicability of the McCarran-Ferguson Act. But, as the Supreme Court said in *Royal Drug*, such an argument puts the cart before the horse. *Royal Drug*, 440 U.S. at 210. That is because whether conduct is "exempt from examination under the antitrust laws" is an "entirely separate question" from whether that same conduct is "*illegal* under the antitrust laws." *Id.*; *see also id.* at 249 ("An antitrust exemption by its very nature must protect some transactions that are anticompetitive.") (Brennan, J., dissenting). Oscar's proposed definition also flies in the face of the Supreme Court's admonition that, whether or not the defendant is an alleged monopolist, "saying '*we will deal with you only on the following trade terms*'" is "not coercing anyone, at least in the usual sense of that word." *Hartford Fire*, 509 U.S. at 802 (citation omitted); (*see also* Scholars 22 (recognizing that "it would generally not be coercion for a monopolist to refuse to sell their product to someone with whom they would prefer not to deal, or to refuse a buyer's preferred terms for that sale itself").) Under the standard set by the Supreme Court, Oscar's allegations do not establish "coercion."

Finally, Oscar is wrong that "[c]ourts applying McCarran-Ferguson have readily found 'coercion' in similar cases." (Appellant 51.) Oscar identifies only two out-of-circuit district court cases, each decided more than thirty years ago

and well before *Hartford Fire*, which purportedly held that terminating or threatening to terminate an exclusive agent could constitute coercion under McCarran-Ferguson. (*Id.* (citing *Ray*, 430 F. Supp. at 1358; *Weatherby v. RCA Corp.*, No. 85-CV-1613, 1986 WL 21336, at *5 (N.D.N.Y. May 9, 1986)).) In fact, neither case determined that terminating an exclusive agent, without more, constitutes "coercion" under the McCarran-Ferguson Act. In *Ray*, for example, the defendant insurance company's conduct affected the terminated agent's ability to participate in the "funeral business" as a whole, not merely his ability to sell "funeral insurance" on behalf of the insurer. *See* 430 F. Supp. at 1355. That case thus involved the impermissible leveraging of unrelated transactions (*i.e.*, the ability to maintain the separate business of running a funeral home) that is missing from Oscar's Complaint. *Weatherby* concerned an alleged conspiracy to terminate a sub-agency contract with an accident and health insurer in order to prevent that insurer from competing in the separate life insurance market—allegations that are nothing like the exclusive agent arrangements at issue in this case. 1986 WL 21336, at *1. Moreover, no circuit court has endorsed these cases, and at least two Courts of Appeals have reached the opposite conclusion on much more analogous facts. *See Card*, 603 F.2d 832; *Black v. Nationwide Mut. Ins. Co.*, 571 F.2d 571 (3d Cir. 1978) (affirming *Black*, 429 F. Supp. 458).

B. Oscar Has Failed To Plead Concerted Action.

Although not argued by Oscar and never reached by the district court, there is another, independent reason why Florida Blue's exclusive arrangements do not come within the Act's "coercion" exception: Oscar has failed to plead concerted action.[11] As used in the Act, "coercion" requires concerted action among two or more entities; unilateral conduct does not suffice. *See, e.g.*, *Feinstein*, 714 F.2d at 934. Oscar did not plead concerted action and, therefore, has failed to plead "coercion."

As discussed above (*see* Statement of Facts, Section II.B, *supra*), Congress enacted the McCarran-Ferguson Act in response to *South-Eastern Underwriters*, which concerned an alleged *conspiracy* to boycott. *See Royal Drug*, 440 U.S. at 218–20; *see also Se. Underwriters*, 322 U.S. at 535 (describing the conduct at issue as "employ[ing] boycotts together with other types of coercion and intimidation to force non-member insurance companies into the conspiracies, and to compel persons who needed insurance to buy only from [the conspiracy] members on [those members'] terms"). That is the type of conduct that Congress

[11] The district court found it unnecessary to decide this issue because "the challenged activity . . . does not meet the definition of coercion even assuming concerted action is not required." (Doc. 113 at 23 n.19.) However, this Court "may affirm on any ground supported by the record." *Welding Servs., Inc. v. Forman*, 509 F.3d 1351, 1356 (11th Cir. 2007).

intended to exempt in § 3(b)—conduct that involves concerted action, not unilateral conduct by an alleged monopolist. *See, e.g.*, 91 Cong. Rec. 480–81 (1945) (Senator Ferguson explaining that "[a] state law" authorizing conduct "which might under some definitions of monopoly be monopolistic [*i.e.*, unilateral], would be permitted under the pending [McCarran-Ferguson] bill; but if the State law undertook to authorize a boycott, a coercion, or an intimidation, or an agreement to do any one of those three things, then it would be clearly void"); *see also* 91 Cong. Rec. 1486 (1945) (Senator O'Mahoney explaining that "every effective *combination or agreement* to carry out a program against the public interest . . . would be prohibited by [§ 3(b)]" (emphasis added)).

The Areeda and Hovenkamp treatise—which Oscar cites as the "leading treatise" on antitrust law (Appellant 54 n.9)—agrees. *See Sanger*, 802 F.3d at 747 n.12 ("[T]he leading treatise concludes that concerted activity is likely required to establish coercion and intimidation."). As the treatise explains, "§ 3(b) was drafted by taking language out of the *South-Eastern Underwriters* case, which refers to boycott, coerce, or intimidate, thus suggesting that concerted action was contemplated for all three." Phillip E. Areeda & Herbert J. Hovenkamp, *Antitrust*

Laws: An Analysis of Antitrust Principles and Their Application (4th ed. 2018), ¶ 220a.[12]

Of course, this does not mean that McCarran-Ferguson's exemption reaches only the type of boycott at issue in *South-Eastern Underwriters*. *See St. Paul*, 438 U.S. at 550. But it does mean that the terms "boycott, coercion, or intimidation" must be understood in light of the conspiratorial conduct at issue in that case, since that is the conduct that Congress had in mind when enacting 15 U.S.C. § 1013(b). Importantly, such an interpretation does not read the terms "*act* of boycott, coercion, or intimidation"—as compared to "any *agreement* to boycott, coerce or intimidate"—out of the Act. (*See* Gov't 30 (quoting 15 U.S.C. § 1013(b)).) The terms "act" and "agreement" each retain their meaning if McCarran-Ferguson is understood to prohibit both the unlawful *agreement* among conspirators to boycott, coerce or intimidate as well as the actual *acts* among those conspirators in furtherance of that agreement.

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[12] Even if true, it is thus irrelevant that "[t]he terms 'coercion' and 'intimidation' do not ordinarily require concerted conduct at all." (*See* Scholars 23 (quoting Areeda & Hovenkamp ¶ 220(a)).) Nor can the general observation in *St. Paul* that "this language [should] be read in light of" its "tradition of meaning," 438 U.S. at 541, undermine the Act's basic structure and purpose. (*See* Appellant 48.) To the contrary, *St. Paul* specifically considered the term "'boycott' in view of the language, legislative history and structure of the Act." 438 U.S. at 541.

Finally, there is no reason to fear that a concerted action requirement would render Sherman Act prohibitions on "certain unilateral conduct . . . inapplicable in this context, without any indication that such a limitation was intended." (Gov't 30–31.) For one thing, there is an indication that such a limitation was intended: the legislative history of the Act itself "distinguished between monopolistic practices on the one hand and boycott, coercion or intimidation on the other." *Feinstein*, 714 F.2d at 934. Furthermore, this argument ignores that there are other elements to McCarran-Ferguson immunity—namely, the "business of insurance" and "state regulation" criteria—and that not all monopolistic behavior by insurers will satisfy these factors and thus be immune under McCarran-Ferguson.

Consistent with these points, at least one circuit has expressly limited the Act's exception to concerted action. In *Feinstein*, the Ninth Circuit rejected plaintiffs' arguments that they were coerced into buying defendants' health insurance as a result of defendants' high market share. 714 F.2d at 933. Like Oscar, the *Feinstein* plaintiffs argued that "the existence of defendants' monopoly power was inherently coercive, and [was] therefore within the boycott-coercion exception" of McCarran-Ferguson. *Id.* The court disagreed, reading the legislative history to mean that "[m]onopoly alone is . . . not within any exception to the McCarran-Ferguson Act." *Id.* at 934. *Feinstein* thus confirms that where, as here,

a plaintiff has alleged only unilateral misconduct by a purported monopolist, the narrow exception to McCarran-Ferguson immunity does not apply.

Oscar makes no real effort to contest McCarran-Ferguson's concerted-action requirement or to show how it has been satisfied, instead asserting it will address the issue in reply. (Appellant 54 n.9.) But nothing Oscar says on reply can save its Complaint since Oscar has utterly failed to plead concerted action.[13] While the Complaint alleges that Florida Blue "works in concert" with its CGAs (*i.e.*, the entities with whom Florida Blue contracts for agent exclusivity) to "propagate its threats to other brokers" (Doc. 75 at 26), that is nothing more than a bare recitation of the legal element—unsupported by well-pleaded facts. As such, it is not entitled to any weight by the Court. *See Twombly*, 550 U.S. at 564.

Even if such an allegation were well-pleaded, moreover, it is *not* concerted action. As the Florida courts have made clear, an agent cannot "conspire" with its "corporate principal" when acting within the scope of its authority. *See, e.g.*, *Richard Bertram, Inc. v. Sterling Bank & Tr.*, 820 So. 2d 963,

[13] The bald assertion that Florida Blue "selectively enforced" its exclusive-dealing arrangements" against Oscar does not establish coercion. (Appellant 13, 24, 51.) For starters, there is no well-pleaded allegation that Florida Blue used exclusivity "selectively" against Oscar; instead, the Complaint alleges that Florida Blue obtained market dominance by employing exclusivity *well before Oscar entered the state*. (Doc. 75 at 32–33.) Moreover, "selective enforcement" is still unilateral action that lacks any leveraging of an unrelated transaction.

966 (Fla. 4th Dist. Ct. App. 2002). Oscar pleads that CGAs are agents of Florida Blue—indeed, that is at the core of its Complaint. (*See, e.g.*, Doc. 75 at 26 (alleging that Florida Blue acts "through its CGAs," which "help polic[e] and enforc[e] exclusivity."); *see also id.* at 46–47.) Thus, as a matter of law, Florida Blue cannot act "in concert" with them. That was precisely the holding of *Card*, where the court held that an organization comprised of general agents of the insurer—analogous to the CGAs that contract with Florida Blue—"was really a part of the [insurer]" and thus could not be considered a "legally viable conspirator[]" for purposes of the boycott exemption to the McCarran-Ferguson Act. *Id.* at 834. The same reasoning applies here.

Because Oscar has not pleaded allegations of improper leveraging or concerted action, it cannot meet the "coercion" exception to McCarran-Ferguson immunity.

CONCLUSION

For the foregoing reasons, the district court's judgment should be affirmed.

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STATUTORY ADDENDUM

15 U.S.C. § 1012

(a) State regulation
The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business.

(b) Federal regulation
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, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance: *Provided*, That after June 30, 1948, the Act of July 2, 1890, as amended, known as the Sherman Act, and the Act of October 15, 1914, as amended, known as the Clayton Act, and the Act of September 26, 1914, known as the Federal Trade Commission Act, as amended, shall be applicable to the business of insurance to the extent that such business is not regulated by State Law.

15 U.S.C. § 1013

(a) Until June 30, 1948, the Act of July 2, 1890, as amended, known as the Sherman Act, and the Act of October 15, 1914, as amended, known as the Clayton Act, and the Act of September 26, 1914, known as the Federal Trade Commission Act, and the Act of June 19, 1936, known as the Robinson-Patman Anti-Discrimination Act, shall not apply to the business of insurance or to acts in the conduct thereof.

(b) Nothing contained in this chapter shall render the said Sherman Act inapplicable to any agreement to boycott, coerce, or intimidate, or act of boycott, coercion, or intimidation.

42 U.S.C. § 18063

(a) In general

(1) Low actuarial risk plans
Using the criteria and methods developed under subsection (b), each State shall assess a charge on health plans and health insurance issuers (with respect to health insurance coverage) described in subsection (c) if the actuarial risk of the enrollees of such plans or coverage for a year is less than

the average actuarial risk of all enrollees in all plans or coverage in such State for such year that are not
self-insured group health plans (which are subject to the provisions of the Employee Retirement Income Security Act of 1974).

(2) High actuarial risk plans
Using the criteria and methods developed under subsection (b), each State shall provide a payment to health plans and health insurance issuers (with respect to health insurance coverage) described in subsection (c) if the actuarial risk of the enrollees of such plans or coverage for a year is greater than the average actuarial risk of all enrollees in all plans and coverage in such State for such year that are not self-insured group health plans (which are subject to the provisions of the Employee Retirement Income Security Act of 1974).

(b) Criteria and methods
The Secretary, in consultation with States, shall establish criteria and methods to be used in carrying out the risk adjustment activities under this section. The Secretary may utilize criteria and methods similar to the criteria and methods utilized under part C or D of title XVIII of the Social Security Act. Such criteria and methods shall be included in the standards and requirements the Secretary prescribes under section 18041 of this title.

(c) Scope
A health plan or a health insurance issuer is described in this subsection if such health plan or health insurance issuer provides coverage in the individual or small group market within the State. This subsection shall not apply to a grandfathered health plan or the issuer of a grandfathered health plan with respect to that plan.

<u>42 U.S.C. § 18091(2)(I)</u>

Under sections 2704 and 2705 of the Public Health Service Act (as added by section 1201 of this Act), if there were no requirement, many individuals would wait to purchase health insurance until they needed care. By significantly increasing health insurance coverage, the requirement, together with the other provisions of this Act, will minimize this adverse selection and broaden the health insurance risk pool to include healthy individuals, which will lower health insurance premiums. The requirement is essential to creating effective health insurance markets in which improved health insurance products that are guaranteed issue and do not exclude coverage of pre-existing conditions can be sold.

Fla. Stat. § 626.112(1)(a)

No person may be, act as, or advertise or hold himself or herself out to be an insurance agent, insurance adjuster, or customer representative unless he or she is currently licensed by the department and appointed by an appropriate appointing entity or person.

CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that:

i. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B)(i) because this brief contains 12,997 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

ii. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared using Microsoft Word for Office 365 in 14-point Times New Roman font.

Dated: February 18, 2020

/s/ Evan R. Chesler

CERTIFICATE OF SERVICE

I hereby certify that on February 18, 2020, I caused to be electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Eleventh Circuit by using the CM/ECF system. A copy of this brief has also been served by CM/ECF on counsel for all parties to the case.

Dated: February 18, 2020

/s/ Evan R. Chesler