

NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 21-1142

LIFEWATCH SERVICES, INC.,
Appellant

v.

HIGHMARK, INC.; BLUE CROSS AND BLUE SHIELD ASSOCIATION;
WELLPOINT, INC.; HORIZON BLUE CROSS BLUE SHIELD OF NEW JERSEY;
BLUE CROSS AND BLUE SHIELD OF SOUTH CAROLINA;
BCBSM, INC., d/b/a BLUE CROSS BLUE AND SHIELD OF MINNESOTA

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. No. 2-12-cv-05146)
District Judge: Honorable Eduardo C. Robreno

Argued on October 14, 2021

Before: SHWARTZ, NYGAARD and FISHER, *Circuit Judges*.

(Filed: November 17, 2021)

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OPINION*

FISHER, *Circuit Judge*.

Appellant LifeWatch Services, Inc. is a large seller of telemetry monitors, which are outpatient heart monitors used primarily for detecting arrhythmias. Appellee Blue Cross Blue Shield Association licenses the Blue Cross/Blue Shield trade name to approximately 36 separate, locally operated health insurers called Blue Plans. LifeWatch alleges that the Association and Blue Plans have a horizontal agreement not to cover telemetry and that this agreement violates the Sherman Act, which prohibits conspiracies that restrain trade. The District Court dismissed LifeWatch’s complaint, holding that the agreement between the Association and Blue Plans is exempt from federal antitrust liability under the McCarran-Ferguson Act. LifeWatch now appeals. We will affirm.¹

An insurance practice receives McCarran-Ferguson immunity from federal antitrust liability if it (1) constitutes the “business of insurance,” (2) is “regulated by state law,” and (3) does not “amount to a boycott, coercion, or intimidation.” *Union Lab. Life Ins. Co. v. Pireno*, 458 U.S. 119, 124 (1982) (internal quotation omitted); *see also* 15

* This disposition is not an opinion of the full Court and pursuant to I.O.P. 5.7 does not constitute binding precedent.

¹ The District Court had jurisdiction under 28 U.S.C. §§ 1331 (federal questions), 1337 (commerce and antitrust regulations). This Court has jurisdiction under 28 U.S.C. § 1291 (final judgments).

U.S.C. § 1012(b). Only the first and second prongs are at issue here. Under the first prong, a court must examine an insurance practice against three criteria to determine whether it constitutes the business of insurance: (a) “whether the practice has the effect of transferring or spreading a policyholder’s risk”; (b) “whether the practice is an integral part of the policy relationship between the insurer and the insured”; and (c) “whether the practice is limited to entities within the insurance industry.” *Pireno*, 458 U.S. at 129.

Under the second prong, state regulation need not mirror federal antitrust law to trigger McCarran-Ferguson’s exemption, *Travelers Ins. Co. v. Blue Cross of W. Pa.*, 481 F.2d 80, 83 n.10 (3d Cir. 1973); rather, “general prohibition[s] designed to guarantee certain standards of conduct” are sufficient to show regulation by the state so long as they are not “mere pretense.” *FTC v. Nat’l Cas. Co.*, 357 U.S. 560, 564 (1957). Finally, “exemptions from the antitrust laws are to be narrowly construed.” *Grp. Life & Health Ins. Co. v. Royal Drug, Co.*, 440 U.S. 205, 231 (1979) (citation omitted).

LifeWatch argues that the horizontal agreement between the Association and Blue Plans not to cover telemetry, which it dubs the Uniformity Rule, fails both of McCarran-Ferguson’s first two prongs and is therefore not immune from federal antitrust liability. We disagree.

According to LifeWatch’s complaint, the Uniformity Rule works as follows. The Association and Blue Plans create a model medical policy, which is made up of directions for the Blue Plans on what claims to cover. The model medical policy is set by

a Medical Policy Panel and voted on by each Blue Plan. The Association and Blue Plans then “agree to require substantial conformity” by Blue Plans with the model medical policy. J.A. 49. The Association, LifeWatch alleges, enforces the Uniformity Rule through “audits” to ensure that each Blue Plan substantially complies with the model medical policy. *Id.* The gravamen of LifeWatch’s argument is that the Blue Plans have “repeatedly voted on the model medical policy that requires blanket denial of telemetry coverage,” *Id.*, and that the Uniformity Rule enforcing this decision does not constitute the business of insurance. This argument does not pass muster when assessed against the three “business of insurance” criteria. *Pireno*, 458 U.S. at 129.

First, the arrangement between the Association and Blue Plans “has the effect of transferring or spreading a policyholder’s risk,” *id.*, because, according to LifeWatch’s complaint, it is an agreement “not to compete on the package of services offered.” J.A. 52. McCarran-Ferguson “was intended primarily to protect ‘*intra*-industry cooperation’ in the underwriting of risks.” *Pireno*, 458 U.S. at 133 (emphasis in original) (quoting *Royal Drug*, 440 U.S. at 221). The arrangement here keeps the risk of the cost for telemetry services with the insured when it might otherwise be borne by an insurer as “medically necessary,” and thus transfers the policyholder’s risk. It is precisely the intra-industry cooperation in underwriting Congress contemplated. Thus, this arrangement is readily distinguishable from ones that the Supreme Court and we have found not to constitute the business of insurance.

For example, in *Royal Drug* the Supreme Court held that an agreement between an insurer and participating pharmacies did not spread risk. There, the defendant insurer's policy promised subscribers prescription drug coverage at \$2 per prescription, with the insurer reimbursing the pharmacy for the balance. 440 U.S. at 209. To fulfill its obligations, the insurer entered a separate "Pharmacy Agreement" with participating pharmacies. *Id.* If a subscriber filled a prescription at a participating pharmacy, the insurer covered the cost according to the terms of the policy; however, if a subscriber filled a prescription at a non-participating pharmacy, he or she had to pay full price and the insurer would only reimburse him or her for 75% of the amount over \$2. *Id.* This arrangement, the Court held, did not spread risk, but "serve[d] only to minimize the costs [the insurer] incur[red] in fulfilling its underwriting obligations." *Id.* at 213. Similarly, in *Pireno*, the Court held that a defendant-insurer's use of a peer-review committee to determine whether a subscriber's claim for chiropractic care was "necessary" and "reasonabl[y]" priced under the policy did not spread risk because it was "logically and temporally unconnected to the transfer of risk accomplished" by the policy itself. 458 U.S. at 130.

We have held that an arrangement where brokers steered clients to particular insurers in exchange for payment was not the business of insurance because that conduct did not affect "*whether or to what extent* a prospective insurance purchaser would transfer risk to an insurer, but merely to *which* insurer that risk would be transferred." *In*

re Ins. Brokerage Antitrust Litig., 618 F.3d 300, 311–13, 357 (3d Cir. 2010) (emphasis in original).

Here, the arrangement between the Association and Blue Plans bears “on the package of services offered” to insureds through the Blue Plans’ respective policies. J.A. 52. This is not “merely [an] arrangement[] for the purchase of goods or services,” *Royal Drug*, 440 U.S. at 214, or a post-execution determination of benefits “unconnected to the transfer of risk,” *Pireno*, 458 U.S. at 130, but rather an agreement as to “the type of coverage [prospective policyholders can] obtain,” *Ins. Brokerage*, 618 F.3d at 357. Accordingly, the arrangement between the Association and Blue Plans meets *Pireno*’s first criterion of risk-spreading.

Second, the arrangement between the Association and Blue Plans is “an integral part of the policy relationship” between the Blue Plans and their insureds. *See Pireno*, 458 U.S. at 129. It has long been established that the policy relationship between the insurer and insured relates to the “type of policy which could be issued, its reliability, interpretation, and enforcement.” *SEC v. Nat’l Sec., Inc.*, 393 U.S. 453, 460 (1969). At the outset, there is a distinction between vertical agreements—such as an agreement between an insurer and a provider—and a horizontal agreement, such as an agreement among insurers to engage in cooperative ratemaking and underwriting. *See Restraint of Trade*, *Black’s Law Dictionary* (11th ed. 2019) (defining “horizontal restraint” as “[a] restraint of trade imposed by an agreement between competitors at the same level of

distribution”). For this reason, the arrangement in question here is far afield from the arrangements in *Royal Drug* and *Pireno* that the Supreme Court held as not integral to the insurer-insured relationship. The challenged relationships in those cases involved vertical agreements with entities wholly outside the insurance industry, and in both cases the Court reasoned that agreements with such entities were too attenuated from the insurer-insured relationship to be integral to it. *Royal Drug*, 440 U.S. at 216; *Pireno*, 458 U.S. at 131. Here, the arrangement between the Association and Blue Plans determines the “type of coverage” that an insured may receive. *Ins. Brokerage*, 618 F.3d at 357. Therefore, the arrangement between the Association and Blue Plans satisfies *Pireno*’s second criterion because it is integral to the insurer-policyholder relationship.

Third, the Association and Blue Plans are “entities within the insurance industry.” *Pireno*, 458 U.S. at 129. LifeWatch concedes that the Blue Plans, which are health insurers, are in the insurance industry, but it argues that the Association is not. LifeWatch’s argument cannot be squared with the allegations in its complaint that, in addition to licensing the Blue Cross/Blue Shield trade name, the Association also “negotiat[es] . . . benefits and premiums” for “Blue Cross health insurance [for] 5.3 million federal employees,” and “establish[es] medical policies affecting subscribers and providers.” J.A. 34–35. Moreover, the Supreme Court in *Royal Drug* and *Pireno* held that the arrangements in those cases did not constitute the business of insurance in part because they included entities “wholly outside the insurance industry.” *Royal Drug*, 440

U.S. at 231; *Pireno*, 458 U.S. at 132. The test is not whether an arrangement is limited to “insurance companies” or “insurers,” but whether it is limited to “entities within the insurance industry.” *Pireno*, 458 U.S. at 129.

In short, the Association is dissimilar to the pharmacies in *Royal Drug* and the peer-review committee in *Pireno*. As the Association and Blue Plans correctly point out, “LifeWatch does not allege the Association is involved in any activities unrelated to Blue Plans.” Appellee’s Br. 30. And according to LifeWatch’s complaint, the Association, in collaboration with the Blue Plans, sets the very model medical policy at issue here. It follows that the arrangement between the Association and Blue Plans is limited to entities within the insurance industry under *Pireno*’s third criterion.

Analyzed against the three *Pireno* criteria, the Uniformity Rule meets the first requirement for McCarran-Ferguson antitrust exemption: it constitutes the business of insurance.

The second prong of McCarran-Ferguson at issue here is whether the Uniformity Rule is “regulated by State Law.” 15 U.S.C. § 1012(b). The relevant portion of the statute in effect during the time of the conduct alleged here provides:

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 . . . [the federal antitrust laws] . . . shall be applicable to the business of insurance to the extent that such business is not regulated by State Law.

15 U.S.C. § 1012(b). The first sentence deals with all federal statutes, while the second

focuses specifically on federal antitrust laws. LifeWatch offers two interpretive theories to argue that the District Court erred in concluding that the arrangement between the Association and Blue Plans is regulated within the meaning of McCarran-Ferguson. Neither theory is persuasive, even under a narrow construction of the statute.

First, LifeWatch argues that the District Court did not place proper weight on the statutory phrase “to the extent that.” Focusing on that phrase, LifeWatch argues that “the business of insurance *is* exempt only ‘*to the extent that*’ it is controlled, by rule or restriction, by state law.” Appellant’s Br. 24 (emphasis in original) (footnote omitted) (quoting 15 U.S.C. § 1012(b)). Therefore, LifeWatch argues that federal antitrust law applies up to the point that the challenged conduct is regulated by state law. According to LifeWatch, a court must take a practice-by-practice approach and look to whether an individual insurance practice—like the exclusion of telemetry through the Uniformity Rule—is regulated by the state to determine whether McCarran-Ferguson applies.

No court has embraced this interpretation of the statutory text. Indeed, the Supreme Court rejected substantially the same argument in *FTC v. National Casualty Co.*, 357 U.S. 560 (1957). There, the petitioner argued that the “regulated by state law” prong of McCarran-Ferguson was not met because “a general prohibition designed to guarantee certain standards of conduct is too ‘inchoate’ to be ‘regulation’ until that prohibition has been crystallized into ‘administrative elaboration of these standards and application in individual cases.’” *Id.* at 564. The Supreme Court rejected this position.

See id. at 564–65. A state’s regulatory scheme need not regulate an insurance practice in the particular; so long as a state’s scheme is not “mere pretense,” *id.* at 564, an insurance practice will not lose McCarran-Ferguson’s antitrust immunity.

Similarly, we have rejected the argument that, “to exempt conduct from the federal antitrust laws, state regulation must parallel the Sherman Act.” *Travelers Ins. Co.*, 481 F.2d at 83 n.10. “[H]ad Congress desired this type of regulation, it could simply have continued the applicability to insurance companies of the Sherman Act itself.” *Id.* The Fourth and Sixth Circuits have held the same. *See Crawford v. Am. Title Ins. Co.*, 518 F.2d 217, 218 (4th Cir. 1975) (per curiam) (“[McCarran-Ferguson] renders the federal antitrust laws inapplicable when state legislation generally proscribes, permits, or otherwise regulates the conduct in question and authorizes enforcement through a scheme of administrative supervision.” (citing *Nat’l Cas.*, 357 U.S. at 564–65)); *Ohio AFL-CIO v. Ins. Rating Bd.*, 451 F.2d 1178, 1182 (6th Cir. 1971) (“[W]e are convinced that the controlling test is . . . whether the state has generally authorized or permitted certain standards of conduct.” (internal quotation omitted)).

Here, every state in which the arrangement between the Association and Blue Plans is challenged has health insurance regulations on the books. What’s more, every state in question specifically regulates unfair trade practices, methods of competition, or unfair acts in the insurance industry. LifeWatch does not argue that these regulations are pretextual—just that they do not deal specifically with horizontal agreements in the

telemetry market. This argument is foreclosed by controlling case law. *See, e.g., Travelers*, 481 F.2d at 83 n.10. LifeWatch’s first argument on the state regulation prong fails.

For its second interpretive theory, LifeWatch argues that the statute’s clauses have been bifurcated when they should be read together. The sole case that LifeWatch cites in support of this argument is *Humana Inc. v. Forsyth*, 525 U.S. 299 (1999). There, the Supreme Court applied McCarran-Ferguson’s first clause to hold that, because the Racketeer Influenced and Corrupt Organizations (RICO) Act—which is not an antitrust law—did not “invalidate, impair, or supersede” state law on unfair trade practices, it could be applied “in harmony with the State’s regulation.” *Humana*, 525 U.S. at 303. Based on this holding, LifeWatch argues that federal antitrust law should apply to the insurance industry so long as it does not “invalidate, impair, or supersede” state law.

This argument overplays its hand. The Court in *Humana* noted the differences in language between the first and second sentences of § 1012(b), and these differences played a key part in its decision. 525 U.S. at 309 (“Congress could have provided, as it did with respect to the Sherman, Clayton, and Federal Trade Commission Acts . . . that federal legislation generally, or RICO in particular, would be ‘applicable to the business of insurance [only] *to the extent that* such business *is not regulated* by State law.’” (second alteration in original) (quoting § 1012(b))). Thus, when a court applies the first sentence of § 1012(b) to an insurance practice (*i.e.*, when it is dealing with a federal law

outside the antitrust context), it must determine whether there is a conflict between the federal law and the law of the state in question. However, when a court applies the second sentence of § 1012(b), the test is whether the state in which the insurance practice is challenged has enacted non-pretextual regulations of its insurance industry. *See id.* (noting the difference in language and application between McCarran-Ferguson’s first and second clauses). LifeWatch’s second argument on the state regulation prong fails as well.

* * *

The challenged arrangement between the Association and Blue Plans, the Uniformity Rule, constitutes the business of insurance under the three criteria set forth in *Pireno*. In addition, the arrangement is regulated by the states within the meaning of McCarran-Ferguson because each state in which it is challenged regulates its health insurance industry by permitting and proscribing certain conduct. Accordingly, the challenged arrangement is accorded McCarran-Ferguson immunity from federal antitrust liability.²

For these reasons, we will affirm.

² The Competitive Health Insurance Reform Act of 2020 was enacted after the District Court dismissed LifeWatch’s Third Amended Complaint. Accordingly, this opinion does not resolve the question of whether CHIRA applies to LifeWatch’s prayer for injunctive relief. That issue was not a part of this dispute.