19-14096

United States Court of Appeals
for the
Eleventh Circuit

OSCAR INSURANCE COMPANY OF FLORIDA,

Plaintiff-Appellant,

– against –

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.)

BRIEF FOR *AMICUS CURIAE* PROFESSOR SCOTT E. HARRINGTON IN SUPPORT OF APPELLEE FOR AFFIRMANCE

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and Eleventh Circuit Rule 26.1, counsel for Professor Scott E. Harrington provide the following Certificate of Interested Persons:

1. Blue Cross and Blue Shield of Florida, Inc. (Defendant-Appellee)
2. Byron, Paul G. (District Judge)
3. Calkins, Stephen (Amicus Curiae)
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The undersigned certifies that no publicly traded company or organization is known to have an interest in the outcome of this case or appeal.

Dated: February 25, 2020

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STATEMENT OF INTEREST OF AMICUS CURIAE[1]

I am the Alan B. Miller Professor of Health Care Management, Insurance and Risk Management, and Business Economics and Public Policy at the Wharton School of the University of Pennsylvania, where I serve as Chair of the Health Care Management Department.

I am writing to share my perspective on whether exclusive agency arrangements should be considered a part of the business of insurance; this perspective is based on my four decades of study, research, and teaching on the economics and regulation of insurance and insurance markets. My scholarly publications have dealt extensively with insurance pricing and underwriting, insurance company solvency and solvency regulation, and competition in insurance markets, including the role of the McCarran-Ferguson Act antitrust exemption. Much of my teaching and research over the past 15 years has dealt specifically with health insurance and the Affordable Care Act (the "ACA").

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[1] No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this amicus brief. The parties have consented to its filing. The views expressed herein are mine and not those of the Wharton School, University of Pennsylvania, or any other institution with which I am affiliated. Except where otherwise cited, all conclusions and analyses in this memorandum are based on my experience with the health care and insurance industries.

Based upon that experience, the exclusive agency arrangements at issue in this litigation fall squarely within the business of insurance. They are instrumental in the transfer and spread of risk in that they increase policyholder volume and help to achieve a balanced risk pool, and the ACA's risk adjustment-related provisions do not eliminate the impact of exclusive agency agreements. Based on my experience, exclusive insurance agents are integral to the insurer-insured relationship as well. The challenged practice solely involves entities in the insurance industry: the insurers and their agents or brokers. Finally, the exclusive agency arrangements at issue in this appeal are not coercive in any way.

STATEMENT OF THE ISSUES

1. Whether the District Court correctly found that exclusive agency agreements, in which insurance agents or brokers[2] agree to represent a single insurer for a given category of coverage, transfer and spread risk.

2. Whether the District Court correctly found that exclusive agency agreements are integral to the relationship between the policyholder and the insurer.

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[2] Depending on the particular facts and circumstances, "brokers" are representatives of insurance buyers for the purpose of obtaining coverage, whereas "agents" are representatives of the insurer. Exclusive agents represent only a single insurer for a given category of coverage. Independent agents and brokers serve as intermediaries with multiple insurance companies. The analysis in this brief applies whether the entity or individual is referred to as a broker or an agent by appellant and appellant amici.

3. Whether the District Court correctly found that exclusive insurance agency relationships relate only to entities within the insurance industry.

4. Whether the District Court correctly found that the challenged conduct does not fall within the "boycott, coercion, or intimidation" exception to the McCarran-Ferguson exemption. 15 U.S.C. § 1013(b).

SUMMARY OF ARGUMENT

Central questions in this appeal are whether an insurer's utilization of exclusive agents has the "effect of transferring or spreading a policyholder's risk" and is "an integral part of the policy relationship between the insurer and the insured." *See Gilchrist v. State Farm Mut. Auto. Ins. Co.*, 390 F.3d 1327, 1331 (11th Cir. 2004) (internal quotations omitted). Based on my decades of study, experience, and scholarship, the answer to both questions is clearly yes. To suggest otherwise ignores the economics and real-world operation of health insurance.

Exclusive agency agreements are fundamental to the risk-transfer and risk-spreading functions of insurance. As discussed below, they promote greater volume of coverage for the insurer with policyholders. This greater volume both reduces the statistical variability in an insurer's average cost of claims and facilitates more accurate forecasting of claim costs over time—key elements of an effective risk-spreading program—thus helping to expand the market for coverage and thereby spreading policyholder risk. Exclusive agency agreements also serve to assist insurers in maintaining a balanced risk pool commensurate with the forecasts they use to set premiums. With an exclusive agency agreement in place, individual agents are prevented from steering customers with particular characteristics to certain insurers, thereby enabling the insurer more effectively to monitor and more effectively price the pool of policyholders for which it is spreading risk through insurance, again helping to expand the market for coverage.

Exclusive agency agreements are also integral to the relationship between the insurer and its policyholders. While the exclusivity arrangements at issue are between insurance agents and brokers and Blue Cross and Blue Shield of Florida, Inc., Health Options Inc., and Florida Health Care Plan, Inc. (collectively, "Florida Blue"), it is through these intermediaries that the relationships between Florida Blue and its policyholders are formed.

The District Court correctly found that the relationship between insurers and agents or brokers is "fundamental to the type of policy which could be issued, its reliability, interpretation, and enforcement." (District Court Op. at 15.) Exclusive agency removes the possibility of free-riding, thus facilitating substantial investments by the insurer in developing and training agents, and in fostering market development, advertising, and branding. Exclusivity also encourages substantial investments by the agents in their own relationships with insurers, for example by encouraging them to take the time to develop specific expertise in the insurer's products and modes of operation, with beneficial impacts on policyholders. The exclusive agency arrangements involve insurance agents or brokers and the insurers, entities that exist entirely within the insurance industry ecosystem.

Finally, exclusive agency arrangements are a common and important practice in the insurance industry, and there is nothing coercive about the enforcement of mutually beneficial lawful contracts. As the District Court rightly concluded, the "boycott, coercion, or intimidation" exception to the McCarran-Ferguson exemption does not apply.

ARGUMENT

Congress enacted the McCarran-Ferguson Act in 1945 to "allow insurers to share information relating to risk underwriting and loss experience without exposure to federal antitrust liability and to preserve for the states the power to regulate the insurance industry." *Gilchrist*, 390 F.3d at 1330. As this Court has held, "[t]he McCarran-Ferguson Act exempts the business of insurance from antitrust laws if: 1) state law regulates such activity; and 2) the complained of activity does not constitute a 'boycott.'" *Uniforce Temp. Pers., Inc. v. Nat'l Council on Comp. Ins., Inc.*, 87 F.3d 1296, 1299 (11th Cir. 1996) (citing 15 U.S.C. §§ 1011, 1012, 1013(b)).[3]

[3] Appellant, correctly, does not dispute on appeal that Florida law regulates the challenged activity. Therefore, this brief does not address that aspect of the McCarran-Ferguson test.

I. EXCLUSIVE AGENCY ARRANGEMENTS ARE PART OF THE BUSINESS OF INSURANCE.

Where parties invoke the McCarran-Ferguson exemption, courts make "three inquiries" to determine whether the challenged practice "constitutes the business of insurance: 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." *Uniforce*, 87 F.3d at 1299-1300 (internal quotations and citation omitted); *see also Union Labor Life Ins. Co. v. Pireno*, 458 U.S. 119, 129 (1982).

A. Exclusive Agency Arrangements Are Instrumental In The Transfer And Spreading Of Risk.

Appellant and its amici argue that the exclusivity provisions in Florida Blue's agreements with its agents have "no relationship to the transfer and spreading of risk," even as they acknowledge that such exclusivity promotes greater volume. (Appellant's Br. at 24.) This argument exhibits a fundamental misunderstanding of the economics and statistics of risk spreading in insurance markets and the relationship of risk spreading to the volume of coverage sold by an insurer. In fact, the increase in volume is important to risk-spreading because it impacts the variability in the average cost of claims and the insurer's ability to forecast claim costs accurately and achieve a balanced risk pool.

1. *Exclusive Agency Arrangements Spread Risk by Increasing Insured Volume and Helping to Ensure a Balanced Risk Pool.*

Insurance involves the transfer and spreading or distribution of risk. The insurer assumes the risk of paying specified losses experienced by a given policyholder and pooling that experience with other policyholders. Spreading the risk of loss across a large group of policyholders is fundamental to the insurer's ability to offer protection against loss at prices that policyholders are willing to pay. As the Fifth Circuit found in *Sanger Insurance Agency v. HUB International, Ltd.*, maintaining a "large" and "diverse" pool of insureds "spreads risk." 802 F.3d 732, 743 (5th Cir. 2015). It does so in several ways.

First and fundamentally, increased volume of coverage reduces the statistical variability in an insurer's average cost of claims. Stated differently, it increases the likelihood that the insurer's average claim costs will fall within a given range, thus reducing its risk.[4] The ability of insurance companies to reduce the variability of average claim costs by pooling exposure to loss across multiple policyholders is the

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[4] J. David Cummins, "Insurer's Risk: A Restatement," 41 *The Journal of Risk and Insurance*, 147-157 (Mar. 1974); Scott Harrington and Greg Niehaus, "Pooling Arrangements and Diversification of Risk," at 54-74, Chapter 4 in *Risk Management and Insurance*, (Burr Ridge, Ill.: Irwin / McGraw-Hill, 2d ed. 2004); Neil A. Doherty, "Portfolio Theory and Risk Management," at 87-126, Chapter 4 in *Integrated Risk Management: Techniques and Strategies for Reducing Risk* (New York, NY: McGraw-Hill, Inc., 2000).

underlying source of insurers' comparative advantage in bearing risk and offering economically attractive coverage that transfers risk from policyholders to insurers.

Furthermore, insuring more customers directly, or in conjunction with other insurers through reinsurance, leads to greater risk spreading because it reduces the amount of capital an insurer needs to hold (or other necessary financial backing) to achieve a high probability of meeting its obligations, thus reducing the premiums needed to provide coverage.[5] The reduction of risk at the insurer level is central to risk spreading in aggregate and the overall volume of insurance protection purchased by consumers. It is not a matter of indifference to policyholders.

In addition, an increased volume of customers and knowledge of their claims experience in a given period facilitates more accurate forecasting of claim costs by the insurer over time. Setting premiums for individual health insurance generally requires an insurer to forecast medical costs at least 6 to 18 months in advance of when medical treatment is provided. While input from actuarial consulting firms facilitates such forecasts, historical claims experience for an insurer's own

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[5] Harrington and Niehaus, *ibid.,* at 75-96 Chapter 5, "Insurer Ownership, Financial and Operational Structure,"; Daniel Bauer, Richard D. Phillips, and George H. Zanjani, "Financial Pricing of Insurance," Chapter 22 in *The Handbook of Insurance*, (Georges Dionne, ed. Kluwer Academic, 2d ed. 2013).

customers is important in improving its forecasts, thus reducing its risk and facilitating the spreading of risk among policyholders.

Contrary to Appellant's suggestion, the role of exclusive agency relationships in the transfer and spreading of risk also extends beyond increasing policyholder volume. In *Sanger*, the Fifth Circuit found that "[t]o the extent Sanger would have been able to siphon off HUB's vets by offering group plans through other veterinary associations, its actions 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. A similar dynamic is true in this case. Exclusive agency relationships help an insurer spread risk by achieving a balanced risk pool that is commensurate with the forecasts it uses to set premiums. The result is improved financial stability, with increased security and reliability of coverage for policyholders. This dimension contributes to the substantial success of exclusive agency systems in personal automobile and residential property insurance, where they are commonly used.

To elaborate, an insurer that utilizes independent agents and brokers is vulnerable to some degree of "adverse selection" (selection against the insurer) by those intermediaries. A health insurer, for example, assumes a given mix of customers according to health status when setting premiums. If an agent represents more than one insurer, the agent may be able to direct some customers to another company that is somehow targeting healthier customers, perhaps with a lower premium and higher commission for the agent, thus undermining the insurer's ability to achieve a balanced risk pool consistent with its pricing assumptions.[6]

Exclusive agency avoids this potential problem. The arrangements therefore help preserve the composition of policyholders in Florida Blue's program, and directly relate to the spreading of risk and its ability to offer a range of health insurance products throughout the state.

2. *The ACA's Rating Requirements and Risk Adjustment Program Do Not Substantially Eliminate the Beneficial Effects of Exclusive Agency Agreements on Risk Spreading.*

In arguing that the exclusive agency arrangements do not impact the spreading of risk, Appellant asserts that "[a]ny impact on Florida Blue's own risk or costs is minimal because the ACA's [Affordable Care Act] risk-adjustment provisions are designed to make the gain or loss of an individual policyholder risk-neutral for insurers." (Appellant's Br. at 39.) This assertion is inconsistent with how the ACA's rating requirements and risk adjustment program actually function.

A major objective of the ACA is to expand the number of people with health insurance, in significant part by preventing health insurers from designing and

[6] Alternatively, independent agents and brokers might direct some customers with a higher risk of claims to an insurer with which they conduct relatively little business.

pricing coverage to reflect an individual policyholder's health.[7] To that end, the ACA requires, among other things, the guaranteed issuance of individual and small group health insurance with minimum "essential benefits" at premium rates that are only permitted to vary by the customer's age within a limited range, type of plan, geographic location, and smoking.

In conjunction with these requirements, insurers selling ACA-compliant individual and small group health insurance plans must participate in a state level "risk adjustment" program for each market segment. Under the risk adjustment scheme used in Florida and other states, an average "risk score" is calculated for enrollees with each insurer following the conclusion of the coverage year. While the details are complex, health insurers with enrollees with lower than average risk scores in a state are assessed charges, and those charges are used to finance payments to health insurers in the state with higher than average risk scores.[8]

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[7] Scott Harrington, "U.S. Health Care Reform: The Patient Protection and Affordable Care Act," 77 *The Journal of Risk and Insurance* 703-708 (Sept. 2010); Michael Geruso and Timothy J. Layton, "Selection in the Health Insurance Market and Its Policy Remedies," 31 *Journal of Economic Perspectives* 23-50 (Fall 2017).

[8] Consistent with providing coverage to enrollees with lower than average risk scores, Oscar affiliates were assessed total risk adjustment charges for the 2018 benefit year of $221 million in five of the states in which it sold individual health insurance in 2018 ($36.0 million in California, $12.5 million in New Jersey, $45.6 million in New York, $31.7 million in Tennessee, $95.6 million in Texas). Oscar received $19.4 million in risk adjustment payments for individual coverage in Ohio. Blue Cross and Blue Shield of Florida was due risk adjustment payments of $694.8

Separate risk score models are estimated for adults, infants, and children, and for the different ACA coverage tiers (Platinum, Gold, Silver, Bronze, and Catastrophic). In 2019, for example, risk scores for adults were based on estimates of models (using 2014-2016 data) that included the enrollee's age and gender, diagnosed health conditions, severity indicators for certain medical diagnoses, number of months enrolled, prescriptions of certain drugs, and interactions between certain prescriptions and medical conditions.[9]

The ACA's risk adjustment program is intended to (1) reduce insurers' incentives for risk selection (*i.e.*, marketing and designing products to attract healthier enrollees), (2) produce premiums that reflect average health risk for the population, and (3) promote competition based on price and quality rather than risk selection. But Appellant asserts that, because of the ACA's risk adjustment program, any effect of exclusive agency relationships on Florida Blue's "own risk or costs is minimal." (Appellant's Br. at 39.) That is wrong.

million for individual coverage for the 2018 benefit year, and its health maintenance organization affiliate was assessed $182.6 million. *See* Center for Medicare & Medicaid Services, *Summary Report on Permanent Risk Adjustment Transfers for the 2018 Benefit Year,* at 15 (June 28, 2019).

[9] Center for Medicare & Medicaid Services, *Updated 2019 Benefit Year Final HHS Risk Adjustment Model Coefficients* (July 27, 2018).

Risk adjustment schemes are inherently imperfect in general, and the ACA's program is no exception. Among other factors that reduce ACA risk adjustment accuracy, the ACA risk scoring model does not reflect the potential influence of all health conditions, including those that may not be diagnosed, and it does not fully reflect differences in the expected or realized average cost of medical treatment for enrollees conditional on the prediction variables included in the models. The 2019 models, for example, explained only 40 to 42 percent of the variation in enrollees' insured medical claim costs in the sample data for adults, and only 30 to 33 percent of the variation in costs for infants and other children.[10]

Because the ACA's risk adjustment program does not substantially eliminate variability in a health insurer's claim costs even after accounting for risk adjustment transfers, exclusive agency relationships remain an important component to insurer risk spreading. Indeed, notwithstanding the ACA's risk adjustment program (and risk adjustment in Medicare), insurers likely remain able to predict enrollees that are likely to have lower claim costs than anticipated by risk adjustment models.[11] The possibility exists that some individual health insurers could target such enrollees in

[10] *Ibid.*, at 19.

[11] Jason Brown, Mark Duggan, Ilyana Kuziemko, and William Woolston, "How Does Risk Selection Respond to Risk Adjustment? New Evidence from the Medicare Advantage Program," 104 *American Economic Review* 3335-64 (Oct. 2014).

select geographic areas, perhaps offering higher commissions to independent agents and brokers that market their products. This possibility may be especially likely in view of the rapid advances in information technology and predictive analytics in health care in recent years.

The potential for such risk selection increases the risk to an insurer of receiving an unbalanced risk pool with relatively fewer healthy enrollees, and higher average claim costs, that are not offset by payments from the ACA's risk adjustment program. It is simply not true that risk adjustment substantially eliminates exclusive agency's impact on the transfer or spreading of risk, and exclusive agency very likely helps to deter the type of "cream skimming" the ACA is intended to prevent.

B. Exclusive Insurance Agents Are Integral To The Relationship Between The Insurer And Its Policyholders.

Exclusive agency agreements are integral to the relationship between the insurer and its policyholders. They cause insurers to invest in ensuring that their agents are as knowledgeable and capable as possible, and agents to invest in becoming thoroughly familiar with their insurer. As a result, exclusive agents are better placed to provide the link between insurer and policyholder. It is difficult to comprehend how anyone who understands the business of insurance could conclude differently.

In a pre-split Fifth Circuit opinion, the Court observed that whether "the participation of the agent in the alleged scheme concerned the agent's insurance dealings as such . . . is a strong indication that the scheme has a bearing on the core relationship between insurer and insured." *Thompson v. New York Life Ins. Co.*, 644 F.2d 439, 444 (5th Cir. 1981) (internal quotations omitted). *Sanger*, citing *Thompson*, found that exclusive arrangements affected this "core relationship" because it impacted "the insurers from which a prospective purchaser could obtain coverage." 802 F.3d at 745. The role of agents or brokers in the insurance ecosystem, and the impact of the exclusive agency arrangements, further illustrates why this prong of the test is met.

Health, life, and property/casualty insurers utilize a diverse variety of distribution methods to market policies and interact with prospective and existing policyholders. These methods include the use of independent agents and brokers, exclusive agents, insurance company employees, and telephonic and on-line systems. Many insurance companies utilize multiple methods. Florida Blue, for example, utilizes exclusive agents, employees at retail centers, and the federal website healthcare.gov to market individual health insurance throughout the state of Florida.[12] Despite the variety of methods available, many buyers of individual health

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[12] *See* Declaration of Nicholas Tant at 4, *Oscar Ins. Co of Florida, Inc. v. Blue Cross & Blue Shield of Florida Inc. et al.*, No. 6:18−cv−01944 [ECF 62-1](M.D.Fl. Jan. 18, 2019) (hereinafter "Tant Decl.").

insurance and other types of insurance prefer to work with and rely on agents or brokers as intermediaries when they purchase insurance.

Given the complexity of health insurance coverage, the expertise, advice, and ancillary services of agents and brokers are fundamentally important for many individual health insurance buyers. Individual health insurance plans vary widely on numerous dimensions, including the specific medical services covered, the magnitude of required co-payments by policyholders for different services, the size of individual and family deductibles and out-of-pocket maximums, the scope of medical provider networks, requirements for referrals to see physician specialists, and associated variation in premiums across plans. Florida Blue, for example, offers a wide range of individual health plans, which vary in benefits, premiums, deductibles, provider networks, and referral requirements.[13]

Exclusive agency arrangements, in particular, have been extensively used in the insurance industry. And with good reason: they often enhance the customer experience and facilitate a stronger relationship between insurer and policyholder. For example, when State Farm, the country's largest personal auto and homeowner's insurer, asks people to contact a local State Farm agent—because "Like a good

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[13] Tant Decl. at 3.

neighbor, State Farm is there"—the "good neighbor" is an exclusive agent of State Farm.

Exclusive agency helps incentivize investments that benefit the insurer, agents, and policyholders. Insurers invest substantial sums in developing and training exclusive agents, as well as on market development, advertising, and branding. These investments rely heavily on exclusive agency to prevent potential free riding by competitors. Exclusive agents likewise make substantial investments in the relationship with the insurer, including developing specific expertise in the insurer's products and modes of operation, which assists in providing expert advice to policyholders and matching coverage to their needs and preferences.

The investments in long-term relationships by the insurer and its exclusive agents create significant economic value, which would be jeopardized if the insurer were to experience financial difficulty. They thus provide significant incentives for the insurer to manage its risk in order to achieve a very high probability that it will be able to honor its obligations to policyholders, thus expanding the availability of secure and reliable coverage to policyholders.[14]

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[14] Insolvency risk is clearly germane in individual health insurance post-ACA, given the failure of most of the ACA's Consumer Operated and Oriented Plans (CO-OPs), some of which expanded rapidly with relatively low premium rates, and which occurred despite relatively large government subsidies. Scott Harrington, testimony on "Review of the Affordable Care Act Health Insurance CO-OP Program," before

C. Exclusive Insurance Agency Relationships Relate Only To Entities Within the Insurance Industry.

A third consideration is whether the challenged practice is "limited to entities within the insurance industry." *Pireno*, 458 U.S. at 132. Appellant argues that, generally speaking, exclusive agents "are regularly used in many industries." (Appellant's Br. at 45.) That is not the question. The issue is whether the specific practice here—Florida Blue's use of exclusive agents—"involves third parties wholly outside the insurance industry." *Pireno*, 458 U.S. at 132. As explained above, it does not. The practice challenged here is an exclusive agency relationship between an insurer, Florida Blue, and insurance agents or brokers. That arrangement impacts how agents or brokers market insurance to policyholders, and involves no entities outside the insurance industry.

II. EXCLUSIVE AGENCY AGREEMENTS ARE NOT COERCIVE.

Appellant argues that even if the exclusive agency arrangements at issue here constitute the "business of insurance," they nonetheless remain subject to antitrust scrutiny under the "boycott, coercion, or intimidation" exception to the McCarran-Ferguson exemption, specifically arguing that Florida Blue's enforcement of the

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the U.S. Senate Permanent Subcommittee on Investigations, Committee on Homeland Security and Government Affairs, March 10, 2016.

agreements constitutes coercion. (Appellant's Br. at 48-54.) While my expertise is on the business of insurance and not legal terminology, I will briefly comment on why these common, mutually beneficial agreements are not "coercive" within any generally understood meaning of the word.

As the District Court pointed out, "there is nothing coercive about enforcing the contractual relationship," a relationship that, as mentioned above, is prevalent in many other insurance contexts besides ACA plans. (District Court Op. at 22.) Exclusive agents benefit from the insurer's investments in development and training, marketing and branding, and the attendant impact on the agents' ability to attract and retain customers. More generally, and as explained above, exclusive agency relationships, which ensure that the exclusive agents are as adept as possible at assisting the insurer's policyholders, are mutually beneficial to the insurer, agents, and policyholders. That is why they are common and why the states, which regulate this area,[15] allow and support the arrangements.

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[15] *See, e.g.*, Fla. Stat. § 627.3518(b) (providing rules for a property insurer's "exclusive agent," defined as "any licensed insurance agent that has, by contract, agreed to act exclusively for one company or group of affiliated insurance companies and is disallowed by the provisions of that contract to directly write for any other unaffiliated insurer absent express consent from the company or group of affiliated insurance companies").

Appellant's argument—that exclusive agency relationships fall within the "boycott, coercion, or intimidation" exception—thus unjustifiably calls into question a practice that is used extensively in the insurance industry. It threatens to have the Sherman Act preempt a broad range of state regulations that govern when and how insurers may use exclusive agents. And it would upset the well-understood protections of the McCarran-Ferguson Act on which all insurers have come to rely. That is not and should not be the law. Indeed, were this Court to label these exclusive agency agreements as coercive and subject them to antitrust scrutiny, it would upend a well-settled practice and be extremely disruptive to the insurance industry, harming not only insurers, but the agents and brokers themselves and, ultimately, policyholders.

CONCLUSION

Exclusive agency arrangements are instrumental in risk spreading. The ACA's rating requirements and risk adjustment mechanism do alter this conclusion. Instead, exclusive agency helps deter the type of "cream skimming" the ACA is intended to prevent. The arrangements also are obviously integrally related to the relationship between the insurer and policyholder. The agreements are not coercive; they mutually benefit the insurer, agents, and policyholders. The District Court's holdings are correct and should be affirmed.

Dated: February 25, 2020

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CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMIT, TYPEFACE REQUIREMENTS, AND TYPE-STYLE REQUIREMENTS

Pursuant to Federal Rule of Appellate Procedure 32(g)(1) and Circuit Rules 29-2 and 28-1(m), the undersigned hereby certifies:

1. This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 29(a)(5) because this brief contains 4,490 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f) and Circuit Rule 32-4.

2. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2013 in 14-point Times New Roman Font.

Dated: February 25, 2020

s/ Jeffrey B. Korn
Jeffrey B. Korn

CERTIFICATE OF SERVICE

I hereby certify that on this 25th day of February 2020, this brief was filed with the Clerk of the United States Court of Appeals for the Eleventh Circuit by using the appellate CM/ECF system and that seven copies were sent by FedEx.

Dated: February 25, 2020

s/ Jeffrey B. Korn
Jeffrey B. Korn