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.)

SUPPLEMENTAL BRIEF FOR APPELLEES

EVAN R. CHESLER
KARIN A. DEMASI
LAUREN R. KENNEDY
CRAVATH, SWAINE
& MOORE LLP
Worldwide Plaza
825 Eighth Avenue
New York, NY 10019
(212) 474-1000

TIMOTHY CONNER
HOLLAND & KNIGHT LLP
50 North Laura Street,
Suite 3900
Jacksonville, FL 32202
(908) 798-7362

February 12, 2021

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 and Reply Briefs of Plaintiff-Appellant Oscar Insurance Company of Florida ("Oscar") together constitute a complete list of all persons and entities known to have an interest in the outcome of this case or appeal.

TABLE OF CONTENTS

Page

TABLE OF CITATIONS

Cases **Page(s)**

Statutes

Other Authorities

PRELIMINARY STATEMENT

Pursuant to the Court's January 15, 2021 Order, Florida Blue respectfully submits this supplemental submission to "address whether and how the Competitive Health Insurance Reform Act of 2020 ['CHIRA'] applies to Oscar Insurance's claims for injunctive relief, damages, and any other relief," and to respond to the submissions of Oscar and of the United States Department of Justice ("DOJ").

Oscar's submission confirms that it maintains a claim not only for prospective injunctive relief and damages accruing after CHIRA was enacted on January 13, 2021, but also for backward-looking damages for Florida Blue's exclusive arrangements during the period before that date. (Appellant Suppl. 3.) Given that position, the parties agree on a number of issues:

- That CHIRA applies prospectively to Oscar's claims for injunctive relief and damages (*i.e.*, claims from January 13, 2021 forward) (*accord* Appellant Suppl. 6–7; DOJ Suppl. 2);
- That Oscar's maintenance of its backward-looking (*i.e.*, pre–January 13, 2021) damages claim requires this Court to decide Oscar's pending appeal with respect to the application of McCarran-Ferguson immunity to that claim (*accord* Appellant Suppl. 9);

- That whether CHIRA applies retroactively is a question that is reached only in the event this Court rules (as Florida Blue believes it should) that Florida Blue's exclusive agency agreements fell within the McCarran-Ferguson Act's antitrust immunity during the period prior to CHIRA's enactment (*accord* Appellant Suppl. 9–10); and
- That CHIRA's retroactive effect is a pure legal issue raised for the first time on appeal due to an intervening change in law (*accord* Appellant Suppl. 9).[1]

Accordingly, the only issue for this Court to address in light of CHIRA is whether, in the event Florida Blue prevails on the underlying appeal, this Court should rule now on whether CHIRA applies retroactively to revive Oscar's backward-looking (*i.e.*, pre–January 13, 2021) damages claim. Because it is clear under binding Supreme Court precedent that CHIRA does *not* apply retroactively, this Court can and should resolve that question against retroactivity, affirm the dismissal below for the period through January 13, 2021, and remand to the district court for further proceedings on Oscar's prospective claims.

[1] Florida Blue likewise agrees with the factual and procedural background set forth in Oscar's supplemental submission (Appellant Suppl. 3–5), and therefore does not repeat it here.

ARGUMENT

I. CHIRA Applies to Oscar's Claims for Injunctive Relief and Post-Enactment Damages.

As discussed above, the parties agree that CHIRA applies to Oscar's prospective claims for an injunction and damages accruing after January 13, 2021. Of course, the district court did not consider the effect of CHIRA on such claims because CHIRA had not yet been enacted. As such, the Court should remand Oscar's claims for injunctive relief and post-CHIRA damages to the district court, where Florida Blue will renew its motion to dismiss on other meritorious grounds that the district court previously had no need to reach in light of its ruling on McCarran-Ferguson Act immunity.

II. CHIRA Does Not Apply Retroactively.

While Oscar does not take a position on retroactivity, and instead urges the Court not to address the issue, Oscar does suggest that CHIRA might operate retroactively to revive its pre-CHIRA claim for damages. (Appellant Suppl. 7–8.) As noted above, this issue arises if this Court rules on the underlying appeal (as Florida Blue believes it should) that the McCarran-Ferguson Act immunized Florida Blue's conduct from antitrust scrutiny prior to CHIRA's enactment. For all the reasons set forth in Florida Blue's brief and at oral argument, the Court should affirm on that basis.

The Court should likewise rule that CHIRA does not apply retroactively, a purely legal issue that arises for the first time on appeal. This Court routinely resolves such questions where, as in this case, the "proper resolution is beyond any doubt." That is precisely the case here: the Supreme Court has repeatedly refused to apply statutes like CHIRA retroactively, and has expressly rejected Oscar's argument that retroactivity turns on whether a statute is "jurisdictional."

A. This Court Can and Should Address CHIRA's Retroactive Effect, a Pure Issue of Law Arising on Appeal.

"The question of whether to hear a claim not raised in the district court . . . falls within the sound discretion of the Court." *Blue Martini Kendall, LLC v. Miami Dade Cty.*, 816 F.3d 1343, 1349 (11th Cir. 2016). In this Circuit, panels routinely exercise that discretion where, *inter alia*, "the proper resolution is beyond any doubt." *Id.* (quoting *Dean Witter Reynolds, Inc. v. Fernandez*, 741 F.2d 355, 361 (11th Cir. 1984)). New legal issues are particularly ripe for immediate decision where, as here, "the proper resolution . . . is as clear as a bell." *Id.* at 1350; *Narey v. Dean*, 32 F.3d 1521, 1527 (11th Cir. 1994) (resolving an issue raised on appeal because authority published after oral argument put "the proper resolution of th[e] issue . . . beyond any doubt").

As explained below, binding precedent forecloses any argument that CHIRA applies to Florida Blue's conduct prior to CHIRA's enactment on January

13, 2021. Congress has manifested no intent to except CHIRA from the strong presumption against retroactivity that, for centuries, has applied to every statute. *See, e.g.*, *Landgraf v. USI Film Prods.*, 511 U.S. 244, 265 (1994). And the Supreme Court's decision in *Hughes Aircraft Co. v. United States ex rel. Schumer*, 520 U.S. 939 (1997) (which Oscar ignores) expressly rejects the notion that retroactivity turns on whether a statute is "jurisdictional." Thus, it is "beyond any doubt" that retroactivity does not apply to CHIRA, and there is no reason to remand that purely legal issue to the district court—particularly since the issue is already fully briefed in the supplemental submissions to this Court.

B. CHIRA Does Not Apply Retroactively to Pre-Enactment Conduct.

i. There Is a "Deeply Rooted" Presumption Against Retroactivity.

As the Supreme Court has repeatedly observed, "the presumption against retroactive legislation is deeply rooted in our jurisprudence, and embodies a legal doctrine centuries older than our Republic." *Landgraf*, 511 at 265; *see also Hughes Aircraft*, 520 U.S. at 946. "Elementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly." *Landgraf*, 511 U.S. at 265. Thus, "the principle that the legal effect of conduct should ordinarily be assessed under the law that existed when the conduct took place has timeless and universal appeal." *Landgraf*, 511 U.S. at 265 (internal quotation marks omitted).

For these reasons, "retroactivity has long been disfavored," and the Supreme Court has "declined to give retroactive effect to statutes burdening private rights unless Congress has made clear its intent." *Id.* at 268, 270; *Hughes Aircraft*, 520 U.S. at 946. Thus, unless Congress communicates such "clear intent" to apply a statute to pre-enactment conduct, "retroactive effect is impermissible if the statute would impair the rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed." *Cabello v. Fernández-Larios*, 402 F.3d 1148, 1153 (11th Cir. 2005) (citing *Landgraf*, 511 U.S. at 280).

Here, CHIRA contains no express provision for retroactive application, nor any other indication that Congress intended it to apply retroactively.[2] Indeed, in arguing that "CHIRA does not clearly speak to whether Congress intended it to apply retroactively," (Appellant Suppl. 6), Oscar concedes that it is subject to the presumption against retroactivity. *See Hughes Aircraft*, 520 U.S. at 952 ("Given the absence of a clear statutory expression of congressional

[2] The relevant text of CHIRA, which amends the McCarran-Ferguson Act (referred to as the "Act"), reads as follows: "Nothing contained in this Act shall modify, impair, or supersede the operation of any of the antitrust laws with respect to the business of health insurance." Pub. L. 116-327, § 2(a), 134 Stat. 5097, 5097 (2021) (to be codified at 15 U.S.C. § 1013(c)(1)).

intent to apply the 1986 amendment to conduct completed before its enactment, we apply our presumption against retroactivity . . . .").

ii. The Presumption Against Retroactivity Does Not Turn on Whether a Statute Is Deemed "Jurisdictional."

Recognizing this clear authority, Oscar attempts to manufacture ambiguity by suggesting that, under *Landgraf*, the presumption against retroactivity does not apply if McCarran-Ferguson is a "jurisdictional" statute. (Appellant Suppl. 7.) Oscar is wrong. The Supreme Court expressly rejected this very argument in *Hughes Aircraft*, binding authority decided three years after *Landgraf* that Oscar never mentions.

In *Hughes Aircraft*, the Supreme Court addressed whether a 1986 amendment that eliminated a False Claims Act defense applied retroactively to revive *qui tam* claims against Hughes based on pre-1986 conduct. On appeal, the Ninth Circuit held that the statute "should be applied retroactively to suits based on pre-1986 conduct because the amendment involved only the 'subject matter jurisdiction' of courts to hear *qui tam* claims and did not affect the substantive liability of *qui tam* defendants." *Hughes Aircraft*, 520 U.S. at 944–45. The Supreme Court rejected this argument and held that reviving the claim retroactively would "subject[] Hughes to previously foreclosed *qui tam* litigation" in a manner that would alter its substantive rights and increase its potential liability. *Id.* at 950.

In so ruling, the Court expressly rejected the argument that *Landgraf* created a broad "jurisdictional" exception to the presumption against retroactivity.[3] *Id.* at 951. Rather, relying on *Landraf* and other precedent, the Court drew a sharp distinction between procedural "[s]tatutes merely addressing *which* court shall have jurisdiction to entertain a particular cause of action" (which may apply retroactively) and substantive statutes that affect "*whether* [a cause of action] may be brought at all" (which presumptively may not). *Id.* The Court held that because the 1986 amendment "d[id] not merely allocate jurisdiction among forums" but rather "*create*[*d*] jurisdiction where none previously existed," it spoke "not just to the power of a particular court but to the substantive rights of the parties as well. Such a statute, even though phrased in 'jurisdictional' terms, is as much subject to [the] presumption against retroactivity as any other." *Id.* The Supreme Court, therefore, refused to apply the 1986 amendment retroactively. *Id.* at 951–52;

[3] Arguing at that time for the Government as amicus curiae in *Hughes Aircraft*, Oscar's counsel agreed: "Although [the 1986 amendment] is properly characterized as a 'jurisdictional' rule, the propriety of applying [the statute retroactively] does not depend on that characterization. The principle that new jurisdictional statutes apply to cases involving pre-statute conduct is not an exception to the presumption against retroactive application of statutory changes. . . . We therefore disagree with the court of appeals' assertion that the Court in *Landgraf* 'carved out an exception to [the presumption of nonretroactivity] in the case of jurisdictional statutes.'" Br. for the United States as Amicus Curiae at 14–15 & n.8, *Hughes Aircraft Co. v. United States ex rel. Schumer*, 520 U.S. 939 (1997) (No. 95-1340), 1996 WL 744847.

accord Johnson v. Conner, 754 F.3d 918, 921 (11th Cir. 2014) ("[S]tatutes that affect substantive, vested rights—even when framed in jurisdictional terms—are still presumed to apply only prospectively.").

The retroactivity question in this case is the same as in *Hughes Aircraft* (as well as in *Landgraf*, where the Court rejected retroactive application of amendments to Title VII that would have exposed the defendant to new damages for past conduct).[4] Prior to CHIRA's enactment, Oscar had no Sherman Act claim in *any* court. Rather, Florida Blue had complete immunity from antitrust liability under McCarran-Ferguson. Applying CHIRA retroactively, as Oscar urges, would create liability where none previously existed, significantly affecting Florida Blue's substantive rights and increasing its liability for past conduct.[5] *See Landgraf*, 511 U.S. at 282–83 (holding that compensatory damages are "quintessentially backward looking," and necessarily "attach a new legal burden to [defendants' past] conduct."). Under *Hughes Aircraft*, whether CHIRA is labeled

[4] Notably, the presumption against retroactivity applies both to statutes that reinstate liability and to statutes that create liability in the first instance. *See Vartelas v. Holder*, 566 U.S. 257, 273 (2012).

[5] Applying CHIRA retroactively to expose Florida Blue to treble damages is all the more problematic given that treble damages "were designed in part to punish past violations of the antitrust laws." *Am. Soc'y of Mech. Eng'rs, Inc. v. Hydrolevel Corp.*, 456 U.S. 556, 575 (1982). As the Supreme Court observed in *Landgraf*, "[r]etroactive imposition of punitive damages would raise a serious constitutional question." 511 U.S. at 281.

"jurisdictional" is of no moment, since the amendment affects not *where* Oscar's pre-CHIRA damages claim may be brought, but instead *whether* such a claim may be maintained at all.[6] It is therefore "beyond any doubt" and "as clear as a bell" that CHIRA does not apply retroactively to Florida Blue's pre–January 13, 2021 claims. *Blue Martini Kendall,* 816 F.3d at 1349–50.

CONCLUSION

The Court should decide the questions that the parties briefed and argued. Should the Court properly conclude that the McCarran-Ferguson Act immunized Florida Blue's exclusive arrangements before January 13, 2021, it should also hold that CHIRA does not apply retroactively to that conduct. The Court should then affirm the dismissal of Oscar's pre–January 13, 2021 damages claim, and remand to the district court for further proceedings on Oscar's remaining claims and Florida Blue's defenses.

[6] As such, the Court's determination in the underlying appeal of pleading burdens under *Gilchrist v. State Farm Mutual Automobile Insurance Company*, 390 F.3d 1327 (11th Cir. 2004), does not affect, much less dictate (as Oscar suggests), the retroactivity analysis.

February 12, 2021

HOLLAND & KNIGHT LLP,

by

/s/ Timothy Conner

Timothy Conner, Esq.
Florida Bar No. 767580

50 North Laura Street, Suite 3900
Jacksonville, FL 32202
(908) 798-7362
timothy.conner@hklaw.com

CRAVATH, SWAINE & MOORE LLP,

by

/s/ Evan R. Chesler

Evan R. Chesler
Karin A. DeMasi
Lauren R. Kennedy

Worldwide Plaza
825 Eighth Avenue
New York, NY 10019
(212) 474-1000
echesler@cravath.com
kdemasi@cravath.com
lkennedy@cravath.com

Attorneys for Defendants-Appellees

CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that:

i. This brief complies with the limitation of this Court's January 15, 2021 order because this brief contains ten pages, 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 12, 2021

/s/ Evan R. Chesler

CERTIFICATE OF SERVICE

I hereby certify that on February 12, 2021, 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 12, 2021

/s/ Evan R. Chesler