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Unfair Competition Issues Affecting the Auto Repair Industry

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Table of Contents

Section	Page
1. Introduction	3
2. What Happens in the Auto Repair – Insurance Relationship?	4
2.1 The Claim and Auto Repair Process	6
3. Are Consumers Impacted by the Auto Repair – Insurance Relationship?	8
4. Does the Auto Repair – Insurance Relationship Injure Excluded Shops?	12
5. What Is the "Antitrust Law?"	12
5.1 Basic Antitrust Laws	13
5.2 Analysis of Basic Antitrust Law	14
5.3 Exclusionary Practice; Certain Mergers, Contrary to Antitrust Law	17
5.4 Antitrust Enforcement	18
5.5 Antitrust Exemptions	19
6. What does the *McCarran Act* Do?	19
7. Antitrust Theory. Why Antitrust Claims Fail	20
7.1 Insurers' Activities Not the "Business of Insurance"	21
7.2 The Difficulties With the Federal Sherman Act	22
8. State Law Remedies	22
8.1 Are the Nebraska Statutes Enforced?	24
9. PartsTrader	25
10. What are the Solutions?	28

1. Introduction

The auto repair industry and the auto insurance industry are intertwined. The industries share clients—insured persons. On the claims side, the overlap is nearly perfect. Insureds and claimants have damaged vehicles, and they seek money from insurance companies. Insureds and claimants also require the services of the auto body industry.

Insurers' involvement in the auto repair industry creates a complex series of relationships between the three entities involved. This relationship underlies the problems faced by auto body repair shops:

> This scenario accurately depicts a triangular relationship, with points consisting of: (1) insured; (2) insurer; and (3) repair facility. These points are connected by relationships composed of: (1) insured-insurer relationship; (2) insured-repair facility relationship; and (3) insurer-repair facility relationship. Mindful of the insurer's role--to indemnify the insured--and the repair facility's role--to restore the insured's vehicle to pre-accident condition--one would expect the insurer-repair facility relationship to be limited to the insurer issuing a check to the repair facility for previously authorized repairs performed to the insured's vehicle. Yet the repair facility-insurer relationship is extensive, involving preliminary estimates, supplemental estimates, and negotiations about labor rates, aftermarket parts, paint materials, and virtually every aspect of the repair process.[1]

Insurance companies want to make repairs for as little money as possible. Auto body owners want to be paid fairly. There is widespread belief, however, that the insurance industry does not engage in fair competition. This is because it caps payments and steers insureds and claimants to friendly shops with arrangements, formal or informal, for repair work at reduced, perhaps noncompetitive, rates.

The law frustrates the auto repair industry—which consists almost exclusively of small business owners. It favors huge insurance companies.

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[1] Michael V. Sacchetto, *Buyer Power Abuse in the Auto-Repair Industry: Is There A Remedy?*, 38 Sw. L. Rev. 503, 508-09 (2009).

2. What Happens in the Auto Repair – Insurance Relationship?

Before dealing with "what happens" terms must be defined. Most are well known to those in the repair industry. Here is a list that may help[2]:

- **Tortfeasor:** the one whose NEGLIGENCE caused the accident and who may or may not have insurance. (Note: be sure you ALWAYS state that you are the victim of negligence, and NOT EVER the victim of an intentional act; insurance ONLY covers negligence, and never intentional torts.)
- **Third Party Carrier:** the tortfeasor's insurance carrier.
- **First Party Carrier:** your own insurance carrier.
- **Comp/Collision coverage:** Your own first party comprehensive (damage from sources OTHER THAN AN AUTO ACCIDENT) and collision (AUTO ACCIDENT) coverage.
- **Towing/Rental car coverage:** First party coverage clauses that we recommend each insured add to her policy ASAP. Inexpensive coverage and a darn good investment that pays enormous dividends if you should ever need it. See the link below.
- **Auto collision repair facility:** In pre-PC language days, also known simply as an auto body repair shop-same thing, but dressed up with computers and the like.
- **"Preferred Shop", "Approved Shop" or the like:** An auto collision repair facility that has been licensed by the insurer to write estimates for it and to repair from those estimates. This can save the insurer from having to hire its own adjuster to travel around and write his own estimates. BUT be careful that they are not selected because they agree to shortchange on the repairs.
- **DRP: Direct repair or referral program:** This is where they use those preferred or approved shops. This does have some potential for disadvantage to you if participation in the program is dependant upon siding with the insurance company when it comes to the overall quality of the repairs. But in our experience, many fine independent shops also participate in such programs for a number of insurers, so one should investigate the extent of the commitment to the insurance company required of the shop owner.
- **"Steering":** This is a practice where some insurers will attempt to recommend, direct, encourage, or otherwise influence a consumer to use a repair facility selected by the insurer.
- **Depreciation:** This is the natural and expected decrease in value due to age, wear and tear, and the like.
- **Deductible:** This is the amount that you must pay if you use your own insurance to do the repairs. Look at it like the "copay" on a health insurance policy. You selected this amount when you bought your insurance and it is the amount of the repair cost you are responsible for when filing a claim with your own insurance company. Common amounts are $500.00 and $1000.00. With a higher deductible, your premiums are usually lower.

[2] Source: http://www.settlementcentral.com/page0456.htm.

- **"OEM PARTS":** These are the parts manufactured either by the maker of your vehicle, or by its authorized facility. Also referred to as Original Manufacturer's Equipment.
- **"Aftermarket" parts, "Like Kind and Quality Parts", or "Quality Replacement Parts":** These are the parts made by some unknown shop overseas and are pushed by the insurance industry as a cost saving for their insureds. Since they are usually not of the same quality or fit as the OEM parts, sometimes customers will hold out for even a used OEM part rather than a new Aftermarket part.
- **Betterment or Upgrade:** This is a charge that the insurance adjuster might try to collect from you if the repairs or replacements increased the value of your vehicle. For example, what if you got new tires because your worn ones were punctured in the accident? Or what if you insisted on a new OEM generator for your eight year old car instead of accepting a rebuilt one?
- **"Pre-loss condition":** This is the goal of your auto body repair efforts. It is supposed to be as close as possible to the condition your vehicle was in the instant prior to an accident. You are entitled to be made whole by restoring your vehicle to its pre-loss condition or by compensating you if that cannot be done. The insurance company is not obligated to make it better than it was, however, they can not force you to accept anything less.
- **Pre-loss elements defined:** Here are the elements of pre-loss condition that one should consider to ensure your vehicle is restored.
- **(1) Function.** Do all of your automotive systems work, including things like the systems that relate to stopping, steering, and handling of the subject vehicle?
- **(2) Appearance.** Here the condition of all areas of the vehicle should be restored to at least the same appearance of the subject vehicle just previous to the accident.
- **(3) Safety.** This is a most important, but frequently overlooked area, probably because most consumers have no idea what to look for. Who among us would know how to figure out whether or not the SRS systems (which control airbags and seatbelt pre-tensioners, etc.) have been set correctly or whether or not the vehicle has been restored to withstand a subsequent impact and absorb that impact and protect the occupants as designed by the manufacturer?
- **(4) Value.** Has the including restoration of the subject vehicle to a value equal to the value of the vehicle just before impact? See the pages on diminished value, linked below.

The law requires that the insurance company pay only the reasonable cost estimated to make repairs that restore a damaged vehicle to its pre-loss condition. This is generally the lowest reasonable estimate. The estimate can be made by a shop with a relationship to the insurance company that generates volume, reliable business, and streamlines estimating and repair work into a single stop. It cannot include cheating the insured. This requires objective decision-making, free from undue influence by the dominating insurance relationship.

Auto repair – insurance relations are similar to the now-prohibited practice of allowing manufacturers to require repairs under warranty with OEM parts. There is general acceptance of the FTC's implementation of a law passed by Congress to prohibit this practice.[3]

2.1 The Claim and Auto Repair Process

It is useful to understand the claims handling process and the points in time in which insurers and auto body repair facilities interact. Insurers utilize different procedures and staff organizations for claims handling. Some companies triage the different aspects of the claim to different departments and individuals within those departments (i.e. coverage and liability issues are handled by one adjuster while property damage estimatics and bodily injuries are handled by others). Other insurance companies utilize one adjuster to oversee all aspects of the claim. Some (typically smaller) insurance companies utilize independent adjusters to draft estimates.

Regardless of the claims handling procedures employed by the insurer, a typical insurance claim timeline looks like this:

- The claim is reported to insurer. A representative takes down the basic information about the claim including:
  - The parties involved if known and their contact information
  - A description of the vehicles and severity of damage
  - Injuries reported
  - Vehicle drivability and location
  - An attempt may be made to sell the insured or claimant on a preferred or approved shop
- The claim is triaged to the appropriate office. The triage is usually based upon geography. An adjuster is assigned.
- The adjuster calls all parties involved in the accident to determine:
  - How the accident occurred
  - What exposures, if any, exist for the insurer
  - If any coverage issues are present which need to be addressed prior to claim payment
- The adjuster obtains a description of the vehicle damage, including whether or not the vehicle is drivable.

[3] The statute is 15 USC § 2302(c). The regulations are at 16 CFR Pt 700. For a paper explaining them, see http://www.ftc.gov/os/comments/warrantyrules/00010-80820.pdf

- If the insured or claimant chooses to repair the vehicle, the adjuster discusses the insured's/claimant's repair options, including options within the insurer's preferred network:
    - The adjuster may offer a guarantee by the insurer in addition to any shop-provided guaranties on the repair work if the insured/claimant chooses a preferred provider.
    - Depending on the state's requirements and the insurer's internal policy, the adjuster might also affirmatively state that the insured or claimant may choose any repair facility for repairs to avoid the appearance of steering.
- The adjuster typically sets up all rental car reservations if the insured or claimant chooses to repair the vehicle. Most rental car companies will pick up insureds or claimants at the repair facility. Some insurers are able to communicate electronically with rental car providers so a reservation can be made and confirmed on the first phone call.
- If the insured or claimant chooses not to repair the vehicle, the adjuster will set up an inspection of the vehicle where an estimate is written and payment is issued to the insured or claimant to settle the claim.

Once the repair facility is chosen, an adjuster visits the repair facility to write an estimate. Some insurer agreements with preferred repair facilities allow the repair facility to write the estimate without the need for adjuster intervention. Once the insured or claimant has chosen a repair facility, the insured or claimant is mostly uninvolved in the repair process, and all communication regarding the repair of the vehicle occurs between the insurer and the repair facility.

Typically, the estimate is not written until the insured or claimant authorizes the repair and a "tear down" of the vehicle. The tear down ensures an accurate estimate because all damaged components may be viewed. The adjuster speaks with a shop representative to review the adjuster's estimate. Typically, the shop has already produced an estimate, and the two compare their estimates. The adjuster and shop representative attempt to reach an agreed price on the estimate. The agreed price includes a number of components:

- Labor rate
- Labor hours (including electrical, mechanical, and refinish operations)
- Paint and materials cost
- Replacement parts and corresponding markup. This factor typically involves a discussion of OEM versus aftermarket or used/remanufactured parts. Insurance companies provide adjusters with standards regarding the use of OEM parts which

include consideration of vehicle age, whether the part is a major safety component (e.g. airbags), and whether non-OEM parts are available.

- Days until the repairs are complete. This is particularly important when the insured or claimant is in a rental vehicle at the insurer's expense. The adjuster negotiates this time based upon the total labor hours in the estimate. The negotiation is based upon the insurer's standard that X number of labor hours equals one day of rental. For example, if the insurer's standard is 4 hours of labor for each day of repair, a 40 hour repair should be completed in 10 days, and 10 days of rental is authorized by the insurer.

If the adjuster and the repair facility cannot agree on some or all of the components above, the insured or claimant may leave the vehicle at the facility, but may be forced to pay the difference between the insurer's estimate and the repair facility's estimate.[4] Some insurers might also pass on the cost of additional rental fees if the repair facility fails to repair the vehicle within the insurer's guidelines.

Typically, the adjuster communicates with the repair facility throughout the repair process and ensures the rental is approved for the appropriate number of days with the rental car company. If additional damage not accounted for in the adjuster's estimate is discovered by shop personnel, the shop will notify the adjuster. The adjuster will typically reinspect the vehicle and supplement the estimate to account for the additional damage and add days to the rental car reservation. The adjuster ensures the damaged vehicle is picked up and the rental is returned.

3. Are Consumers Impacted by the Auto Repair – Insurance Relationship?

One consumer oriented website, Settlementcentral.com, answers the impact to consumers from auto repair – insurance company relations this way[5]:

> ***Who wins in a dispute between my auto collision repair expert versus the insurance adjuster and his appraiser regarding what to repair and how to replace parts?***
> There can be any number of differences between the auto body shop owner and the adjuster as to just what should be done to restore your vehicle. And of course you can see how their positions dictate the outcome they argue for.
>
> The auto collision repair facility wants to restore your car to the best pre-accident condition, and

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[4] *See Neb Rev Stat* § 44-1540(16) ("If the insured or claimant chooses to use a particular company or location other than the one providing the lowest estimate for like kind and quality motor vehicle repair, the insurer shall not be liable for any cost exceeding the lowest estimate.").

[5] *Supra* n. 1.

to do so without totally alienating the insurance adjuster, who can be considered helpful in steering business his way in the future.

The insurance adjuster wants to close your file as soon as possible with as little payout as possible.

Your personal investment has been damaged: you are entitled to complete restoration of your investment. Insist on nothing less. If need be, do not hesitate to contact your state insurance commissioner (see our links page). He has established guidelines for the repair of vehicles after an accident. Speak with a representative and sound her out about the situation, but DO NOT FILE A COMPLAINT at this time.
Instead, go back to the insurance adjuster or to his supervisor and let her know what the insurance commission had to say and that if you do not get satisfaction you will not hesitate to file a complaint. THAT is the smart way to use the threat of a complaint as a bargaining chip to your benefit.

Most policies do have an "appraisal clause" that can be used to resolve differences. Usually the appraisal clause allows you to choose and pay for an appraiser to represent you, and the insurance company will choose and pay for an appraiser to represent them.

Those two will select a third, who will act as an umpire. and a decision by any two of the three is binding. Although either the vehicle owner (you) or the insurance company may invoke the appraisal clause, it is almost always the vehicle owner who asks for this.

Can the insurance adjuster make me select an auto collision repair shop from a list of "approved" shops?
It is not legal for an insurance company to require that you take your business to any particular auto collision repair facility. Although they can "recommend" some auto body shops, the insurance adjusters CANNOT REQUIRE you to use a specific repair facility or to select from a list of their "preferred" shops. That is a practice called "steering", and if you take exception to it, you can report the adjuster to your state insurance commissioner.

You, the consumer, have the right to use any licensed repair facility that you choose. You cannot be forced to take your vehicle to any particular auto collision repair facility. You may choose your own place, but then there may be consequences that you may not like.

"Preferred Shop", "Approved Shop" or the like explained
On the other hand, there is nothing wrong with listing those shops that are pre-qualified by the insurance company to write its estimates, and, as you will see below, there could even be advantages to using such a shop. The advantages are notable particularly in: (1) getting your vehicle repairs started earlier without waiting for an insurance appraisal, and (2) in getting the insurance adjuster to go to bat for you in resolving any problems that might develop between you and the repair shop.

First of all, let's understand that the insurance company does not "own" the "Preferred Shop",

"Approved Shop" or the like. Nor does the insurance adjuster have any right to dictate to the owner what will happen in any given job. The insurance company has just licensed the "Preferred Shop" to make estimates and to do repair work because through its past experience with the shop, the company believes that the shop is honest and that it will do work with satisfactory results. The shops selected by the insurer are usually part of the insurer's direct repair or referral program (aka "DRP"). The purposes of such programs are supposedly to benefit BOTH the insurance company and the consumer.

Allegations disfavoring using a "preferred shop"

There are allegations that these approved or direct-repair body shops get on the insurance company's list by keeping their costs low, and hence the company will be paying less to repair your vehicle when you use one of those shops. Some people-maybe some who are NOT approved shops-have stated that such preferred shops realize the alleged savings to the insurance companies through business practices that are not favorable to the customer.

The allegations mention such practices as spending less time on repairs, using cheaper parts, and overlooking damages that only an expert could spot. It is alleged that one prominent company even had a requirement that the auto collision repair shop personnel could NOT talk to their customers about their cars until they had cleared it with the insurance adjuster first.

And we are aware that these preferred shops are frequently accused by non-DRP shops of being required by the insurance company to use lower cost non-original parts or other cost-cutting procedures which may not truly restore the safety, appearance, and value of your car to pre-accident condition, and which may jeopardize your factory warranty.

Finally, it is alleged by some that because the insurance companies hold so much power in distributing auto collision repair business, many auto body repair shops can't stay in business unless they stay on those "Preferred Shop" or "Approved Shop" lists.

Arguments in favor of using a "Preferred Shop

We know of a number of such DRP shops that are tops to work with, and that always produce satisfied customers. And we do not believe that they cut corners or unduly favor the insurance adjuster. But maybe that is just because our experience has been limited in one geographic area where business ethics are high.

Take a look at the purposes of the arrangement and you can see that there is nothing shady going on here, although one can plainly understand that the auto accident repair shop owner DOES know who is buttering his bread. Still, he owes a loyalty to you, inasmuch as you are his customer, not the insurance adjuster. So I would not reject an insurance-approved auto collision repair shop just because it has earned the status of being pre-approved. Indeed, many in the auto accident repair shop business would covet such a relationship inasmuch as it is a designation given to the better repair shops.

The first advantage is one of speed. You can get your car estimate done immediately instead of having to wait for three or four days until the insurance adjuster makes it out to your location.

> Since the auto collision repair shop owner is pre-approved to write his own estimates, your repair order will be ready immediately.
>
> A second advantage to a pre-approved collision repair facility is in your relationship with and negotiations with the shop owner should things not work out smoothly for a good repair job.
>
> For example, let's say that complications result in the repairs. These could be parts delays, work delays, marginal or unsatisfactory repair jobs, or just your dissatisfaction with the fit and finish of the work product.
>
> If you found your own auto collision repair facility, you are going to be without any real backup to do battle with the shop owner over the dispute. You will be pretty much on your own. Don't expect much assistance if you stormed off to a shop of your own choosing and the shop owner now states that the job is "as good as new", but you still detect problems with his accident repair work. It is your repair contract, and you will have to insist to the shop owner that he needs to take yet another shot at fixing a problem that he thinks is already fixed. Good luck.
>
> By contrast, you will have more horsepower to demand assistance from the insurance adjuster with these kinds of problems if you have your vehicle repaired at an auto body repair shop that is one of the insurance company's approved body shops. You can expect that the insurance adjuster will not hesitate to give the shop owner a call on your behalf. Since the insurance adjuster is a lot more knowledgeable about auto collision repair problems, many consumers believe it is a real advantage to have him on their side when any problems develop with the work of the auto body shop."

The Federal Trade Commission has expressed itself insofar as auto manufacturers have tried to tie its dealers and its parts to the service after-market. In 2011, the FTC published a consumer guide advising customers they are not bound by tie-in arrangements in contracts for automobiles. See, FTC Consumer Alert: Auto Warranties, Routine Maintenance, and Repairs: Is Using the Dealer a Must? (July 2011), available at http://www.ftc.gov/bcp/edu/pubs/consumer/ alerts/alt192.pdf .

4. Does the Auto Repair – Insurance Relationship Injure Excluded Shops?

Insurer meddling in the auto repair industry influences the market or "prevailing" labor rates in most areas. Insurers have agreements with repair facilities typically involving a labor rate to be charged on repairs for the insurer's claims. The shops are willing to accept a labor rate lower than the rate posted in its lobby in exchange for the increased volume provided by insurer referrals.

Shops not associated with an insurer, likely with higher posted labor rates, will face pushback from insurers that the shop's labor rate is above the market rate in the area. If the shop and the insurer are unable to reach an agreement on the price of the repairs,

the adjuster will advise the insured or claimant that the repair facility is charging an amount above the market rate, and the insured or claimant is responsible for the amount above the adjuster's estimate. This obviously leaves the repair facility in a difficult situation and requires that shops not affiliated with insurers accept lower labor rates without the benefit of insurer referrals.

Repair facilities not affiliated with insurers by choice or by circumstance are left with few options to address the issue described above—there are few, if any, remedies available to a repair facility when the relationship with an insurer deteriorates. There are no contract remedies available against the insurer if no contractual relationship exists with the insurer. There exist few effective administrative procedures or remedies to adjudicate these disputes. Thus, the insurer's estimate, including the insurer's determination of the market or prevailing labor rate, effectively becomes the final word on the matter.[6]

5. What Is the "Antitrust Law?"

Historically, insurance is viewed as local and not affecting interstate commerce.[7] It was not until 1944, in a case involving criminal antitrust activity, that the United States recognized the business of insurance as having interstate implications.[8] And, when the Supreme Court finally spoke to treat insurance in its actual interstate context, Congress reacted to the Supreme Court by granting an exemption. The exemption is embodied in a statute known as the *McCarran-Ferguson Act*.[9] The exemption takes insurance out of the context of the broad prohibitions of the *Sherman Antitrust Act*.[10] The *Sherman Act* prohibits "every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce…" and declares these combinations "to be illegal."[11] It is a cornerstone of antitrust law.

5.1 Basic Antitrust Laws

The basics of the antitrust area… reduced to core points that have commanded volumes and volumes of explanations, are:

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[6] *See* Michael V. Sacchetto, Buyer Power Abuse in the Auto-Repair Industry: Is There A Remedy?, 38 Sw. L. Rev. 503, 509 (2009) for a discussion about this scenario in California.

[7] This statement seems remarkable, and stems to a 19th century decision of the United States Supreme Court, rendered when insurance on homes in Philadelphia was so small it was literally a neighborhood business. *Paul v. Virginia*, 75 US 168 (1868) (holding "The issuing of a policy of insurance is not a transaction of commerce," overruled by *United States v. SE Underwriters Association*, 322 US 533 (1944).

[8] *Id*.

[9] 15 *USC* §§ 1011-1015 (2000)

[10] 15 *USC* § 1 (2000)

[11] *Id.*

The **Sherman Antitrust Act** prohibits

(1) contracts, combinations, and conspiracies in **restraint of interstate trade or commerce**, and

(2) actual or attempted **monopolization of interstate trade or commerce** by one or more persons.

The **Clayton Act** (as amended by the **Robinson-Patman Act**) bars any person engaged in interstate commerce from

(1) practicing **price discrimination** among customers that cannot be justified by differences in production costs, transportation costs, or other cost differences;

(2) entering into **exclusive dealing** or **tying** arrangements that restrain interstate trade or commerce; and

(3) effecting any **merger** the effect of which <u>may</u> be to substantially lessen competition.

The **Federal Trade Commission Act** prohibits "unfair methods of competition" and "unfair or deceptive acts or practices" in or affecting interstate commerce.

Key Antitrust Terms from the Sherman Act:

- **Monopoly:** A market in which a single seller (the "monopolist") sells at least fifty percent (50%) of the goods or services.

- **Monopoly Power:** A monopolist's ability to dictate price, quantity, or both, in the market for its goods or services.

- **Market Power:** A seller's ability to control the market price of its goods or services.

Jurisdictional Reach: The Sherman Act applies only to anticompetitive behavior that affects interstate commerce or U.S. commerce with one or more foreign countries. Monopolies or other restraints of trade that affect only intrastate commerce are subject to the laws of that state.

5.2 Analysis of Basic Antitrust law

Analyzing Alleged Violations. Alleged violations of the Sherman Act are tested against one of two standards:

***Per Se* Violation:** Certain anticompetitive acts or agreements (*e.g.*, a price fixing agreement among competitors) are considered to be so injurious to the public that there is **no need to determine whether competition is actually reduced or otherwise injured** – they are violations of the Sherman Act *per se*; and

Rule of Reason: Acts or agreements that are not considered to be illegal *per se* are analyzed by comparing their positive effects (*e.g.*, efficiency) against their potentially anticompetitive effects. If the act or agreement is found not to **unreasonably restrain trade**, it will not be considered a violation of the Sherman Act.

- ■ **Less Restrictive Means:** Courts will often look to see if the parties could have achieved the same benefits using means that would have had a less restrictive effect on competition.

Horizontal Restraint: Any agreement that restrains competition between rival firms operating in the same geographic or product market.

- ■ **Price Fixing:** An agreement between competitors to fix the prices of products or services. Such agreements are illegal *per se*.
- ■ **Group Boycott:** An agreement between sellers to boycott, or refuse to deal with, a particular person or group of persons. Such agreements are illegal *per se*.
- ■ **Market Division:** An agreement between sellers to divide territories or customers into smaller, exclusive markets. Such agreements are illegal *per se*.
- ■ **Trade Association:** Persons in the same industry or profession may organize for the purpose of, *e.g.*, exchanging information, lobbying, advertising, and setting standards. The anticompetitive effects of trade association activities are tested using the *rule of reason.*

Vertical Restraint: Any agreement between firms at different levels in the manufacturing and distribution process that restrains competition.

- **Territorial or Customer Restriction:** An arrangement whereby a manufacturer institutes restrictions on a seller's territory or the types of customers to whom the seller may sell the manufacturer's goods. The anticompetitive effects of such an arrangement are tested using the *rule of reason*.

- **Resale Price Maintenance:** An agreement between a manufacturer and a retailer in which the manufacturer specifies (rather than suggests) the **minimum retail price** at which the retailer may sell the manufacturer's products. Such agreements are illegal *per se*.

  - **Maximum** resale price fixing is <u>not</u> illegal *per se*, and should be tested using the *rule of reason*.

- **Refusal to Deal:** Unilateral action by a manufacturer who refuses to deal with one or more retailers or other customers. The anticompetitive effects of such an action are tested using the *rule of reason.*

Monopolization requires

(1) the **possession of monopoly power** in the relevant product or geographic market; <u>and</u>

  - The **relevant product market** includes, at a minimum, all other goods with identical or substantially identical attributes, as well as all other goods that are reasonable substitutes.

  - The **relevant geographic market** includes, at a minimum, the territory in which the alleged monopolist actually sells its product.

2) the **willful acquisition or maintenance** of such power, as distinguished from its growth or development due to a superior product, business acumen, or accident.

  - **Predatory Pricing:** Pricing a product below the cost of producing it in order to drive competitors out of a market.

Attempted Monopolization: Any action designed to eliminate competition and gain monopoly power.

Price Discrimination occurs when a seller charges different prices for the same goods or services to competing buyers.

- In order to violate § 2 of the Clayton Act, the effect of the price discrimination must be to (1) **substantially lessen competition** or (2) create a **competitive injury**.

- Price discrimination based on differences in production costs, transportation costs, or other cost differences will not result in a violation of the Clayton Act.

- Price discrimination will also be excused if the seller can prove that it lowered its prices temporarily in an effort to match or beat the price of a competing seller.

- The allegedly discriminating seller must be engaged in interstate commerce; however, the allegedly discriminatory prices need not be charged to buyers in different states.

5.3 Exclusionary Practice; Certain Mergers, Contrary to Antitrust Law

Exclusive-Dealing Contract: An agreement by which a seller forbids a buyer from purchasing products from the seller's competitors is illegal if the agreement would substantially lessen competition or would tend to create monopoly power.

Tying Arrangement: An agreement between a buyer and a seller, which obligates the buyer of a specific product or service to buy additional products or services from the seller.

Section 3 of the Clayton Act applies only to tying arrangements involving the sale of products; however, tying arrangements involving services may be illegal under § 1 of the Sherman Act.

Horizontal Merger: A merger between two firms that are competing in the same product or geographic market.

- **Market Concentration:** Horizontal mergers will generally be deemed illegal if they result in a significant increase in the merged firm's percentage of sales in the relevant geographic and product markets.

- Courts and antitrust regulators also consider the following factors:

(1) **overall concentration** in the relevant markets,

(2) the **trend toward concentration** in the relevant markets,

(3) whether the **purpose** of the merger appears to be to establish market power or restrict competition,

(4) **ease of entry** into the relevant markets,

(5) **economic efficiency** considerations, and

(6) the **financial condition** of the merging firms.

Vertical Merger: A merger of one firm at a particular stage of the production and distribution (*e.g.*, raw materials provider) with another firm at a different stage of the production and distribution process (*e.g.*, manufacturer) of the same product.

The legality of a proposed vertical merger will typically be determined by considering:

(1) **market concentration** in both the "upstream" and "downstream" markets,

(2) **ease of entry** into both markets, and

(3) the **apparent intent** of the merging parties – *i.e.*, as with a horizontal merger, whether the **purpose** of the merger appears to be establishing market power or restricting competition as opposed to promoting efficiencies.

Interlocking Directorates. Section 8 of the Clayton Act imposes restrictions on the ability of any person to serve simultaneously on the board of directors of two or more corporations that are in competition with one another.

5.4 Antitrust Enforcement

Enforcement Agencies: Federal antitrust laws are enforced by the

- **U.S. Department of Justice** (DOJ), and

- **Federal Trade Commission** (FTC).

Private Enforcement: Individuals and companies who have been injured by the anti-competitive behavior of others may recover privately under federal antitrust law if they can show:

(1) that the alleged antitrust violation either directly **caused**, or was at least a **substantial factor** in causing, the injury suffered; and

(2) that the unlawful actions of the defendant(s) affected the plaintiff in some way that federal antitrust law was designed to prevent.

5.5 Antitrust Exemptions

Labor Organizing: Labor unions may organize, bargain collectively, and strike without violating antitrust law.

Agricultural and fishing cooperatives are allowed to combine their efforts and set prices for their products.

Insurance companies that are subject to state regulation are exempt from antitrust law, except when they boycott, coerce, or intimidate. This exemption is limited to "the business of insurance."[12]

Foreign Trade: U.S. exporters may cooperate to compete with foreign cooperatives, as long as their doing so does not restrain trade within the U.S. or injure other U.S. exporters.

- Certain forms of **cooperative research and production** among otherwise competitive firms are exempt.

- The ***Noerr-Pennington*** **Doctrine** exempts collective efforts to obtain or influence legislative or executive action.

The **State Action Doctrine** exempts actions undertaken by a business in accordance with clearly articulated state policy and under the direct supervision of state regulators.

[12] 15 U.S.C.A. § 1012 (West) (The McCarran-Ferguson Act).

6. What does the *McCarran-Ferguson Act* Do?

The *McCarran-Ferguson Act* permits insurers to engage in cooperation that would otherwise be illegal under the antitrust laws. Insurance industry compliance depends, therefore, on avoidance of activity so extreme it might result in loss of immunity, or might fall into a *McCarran-Ferguson* boycott exception. Industry collaboration, through rating agencies and joint underwriting pools, are broad-ranging aspects of the insurance industry; they make antitrust advice important to insurers.

But, the insurance industry's penchant to hold down claims, and thereby improve profits, is the classic incentive for vertical integration to reduce expenses. "Vertical integration," classically, involves a combination like manufacturers and dealers, or manufacturers, dealers, and repair industries.

The insurers' power, as it relates to its relationship with auto body repair facilities, is called "oligopsony" power. It means the buyer, instead of the seller, dominates the market and controls price.

Of course, the problem arises when the relationship with the insured, the insurer, and the repair facility bargain unevenly, and the insurance company has extraordinary power to direct the insured to a particular company with pricing favorable to the insured—largely because of the promise of continuing and regular work. The insurance industry's desire to cut costs is so dramatic that relationships and entanglements are undeniably present. Often, the insurance company accomplishes this with a repair facility directory.[13]

Accordingly, serious risks of abuse are created with insurance company arrangements with repair shops to make repairs at reduced prices, or cap repair prices, and steer business to companies with favorable insurer-based arrangements.

7. Antitrust Theory. Why Antitrust Claims Fail

Federal antitrust theory does not apply to the "business of insurance." As a general proposition, parties trying to invoke antitrust claims to prevent liaisons between repair facilities and insurance companies have failed again and again. This is because success under federal antitrust theory requires the industry to prove:

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[13] *Id.* See *Workman v. State Farm Mut. Auto Ins. Co.,* 520 FSupp 610, 622 (ND Cal 1981) (claim that insurance companies boycotted repair facility by (1) dissuading owners from using them, (2) threatening to remove vehicles unless they yielded to price demands, and (3) informing owners not to use facilities because the prices were too high.

(1) The activity in question is not exempted from federal antitrust law by the *McCarran-Ferguson Act* and

(2) That federal antitrust law has been violated.

7.1. Insurers' Activities Not the "Business of Insurance"

The United States Supreme Court has made it clear that insurers are not given a broad exemption under the *McCarran-Ferguson Act*:

> If agreements between an insurer and retail pharmacists are the "business of insurance" because they reduce the insurer's costs, then so are all other agreements insurers may make to keep their costs under control-whether with automobile body repair shops or landlords. Such agreements would be exempt from the antitrust laws if Congress had extended the coverage of the McCarran-Ferguson Act to the "business of insurance companies." But that is precisely what Congress did not do.[14]

Whether a particular activity constitutes the business of insurance is determined by applying the three factor test set out in *Royal Drug*:

> There are three criteria relevant in determining whether a particular practice is part of the "business of insurance" exempted from the antitrust laws by § 2(b): 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.[15]

Several cases have challenged insurers' activities associated with repair facilities arguing the activities are not "the business of insurance" and thus, not exempt from federal antitrust laws. Some courts held various activities involving insurers and auto repair facilities constituted the business of insurance and exempted the insurers' activities from antitrust laws.[16] Other cases held similar activities are not the business of insurance

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[14] *Group Life & Health Ins. Co. v. Royal Drug Co.*, 440 U.S. 205, 232-33, 99 S. Ct. 1067, 1084, 59 L. Ed. 2d 261 (1979) (emphasis added).

[15] *Union Labor Life Ins. Co. v. Pireno*, 458 U.S. 119, 120, 102 S. Ct. 3002, 3004, 73 L. Ed. 2d 647 (1982) (citing *Group Life & Health Ins. Co. v. Royal Drug Co.*, 440 U.S. 205, 99 S.Ct. 1067, 59 L.Ed.2d 261 (1979)).

[16] *See Custom Auto Body, Inc. v. Aetna Cas. & Sur. Co.*, 78-0301, 1983 WL 1873 (D.R.I. Aug. 3, 1983) (holding "that the combination between Aetna and its insureds . . . challenged by the plaintiff constitutes the business of insurance which is regulated by state law."); *Quality Auto Body, Inc. v. Allstate Ins. Co.*, 660 F.2d 1195, 1201 (7th Cir. 1981) (holding "the district court properly observed that even if the alleged horizontal agreement between the

making antitrust laws applicable to insurers.[17] Sometimes, as in *Custom Auto Body, Inc. v. Aetna Cas. & Sur. Co.*, different activities were challenged within a single case resulting in different holdings regarding the exemption of each activity. These cases do not represent the full body of case law in this area. This area of law is complex and requires thoughtful analysis of the case law to determine whether insurers' activities constitute the "business of insurance." Also, these cases only establish whether or not the practice is the "business of insurance." One must still prove a violation of antitrust law to successfully litigate an antitrust violation.

7.2 The Difficulties With the Federal *Sherman Act*

The *Sherman Act* prohibits price fixing by a buyer or a seller. This includes establishing buyer cartels where the prices are fixed. Establishing a *Sherman Act* violation is extremely complicated. The activity must:

(1) Effectively violate the law of mergers.

(2) Be indefensible under a rule of reason doctrine[18] necessary to be established to prove a *Sherman* violation.

8. State Law Remedies

State law contains prohibitions against capping and steering auto repair work. These prohibitions are contained in four specific statutes. The relevant portions of these statutes follow:

Neb Rev Stat § 44-1539:

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defendant insurers did exist, it would be immune from antitrust scrutiny under the McCarran-Ferguson Act, 15 U.S.C. s 1011 et seq., which exempts the 'business of insurance' from the antitrust laws.").

[17] *See Custom Auto Body, Inc. v. Aetna Cas. & Sur. Co.*, 78-0301, 1983 WL 1873 (D.R.I. Aug. 3, 1983) (holding that the provider agreements do not constitute the business of insurance since "[t]hey do not spread or underwrite a policyholder's risk, nor are they contracts between the insurer and insured."); *Liberty Glass Co., Inc. v. Allstate Ins. Co.*, 607 F.2d 135, 137-38 (5th Cir. 1979) (holding "the arrangement between the insurers and the manufacturer and installer of automobile replacement glass cannot be said to fall within the business of insurance."); *Proctor v. State Farm Mut. Auto. Ins. Co.*, 675 F.2d 308, 337 (D.C. Cir. 1982) (disagreeing with the "District Court's conclusion that the alleged vertical arrangements are immune from the antitrust laws under the McCarran Act.").

[18] The rule of reason doctrine determines whether a restraint of trade is reasonable based upon economic factors. Frequently, if there is any rational basis for the restraint, it is upheld, and the rule of reason analysis is not established. *Hardy Bros Body Shop v. State Farm*, 848 FSupp 1276 (SD Miss 1994), citing *Union City Barge Lines v. Union Carbide Corp.*, 823 F2d 129, 138 (5th Cir 1987).

It shall be an unfair claims settlement practice for any domestic, foreign, or alien insurer transacting business in this state to commit an act or practice defined in section 44-1540 if the act or practice (1) is committed flagrantly and in conscious disregard of the Unfair Insurance Claims Settlement Practices Act or any rule or regulation adopted pursuant to the act or (2) has been committed with such frequency as to indicate a general business practice to engage in that type of conduct.

Neb Rev Stat § 44-1540:

Any of the following acts or practices by an insurer, if committed in violation of section 44-1539, shall be an unfair claims settlement practice:

> (15) Failing to adopt and implement reasonable standards to assure that the repairs of a repairer owned by or affiliated with the insurer are performed in a skillful manner. For purposes of this subdivision, a repairer is affiliated with the insurer if there is a preexisting arrangement, understanding, agreement, or contract between the insurer and repairer for services in connection with claims on policies issued by the insurer;
>
> (16) Requiring the insured or claimant to use a particular company or location for motor vehicle repair. Nothing in this subdivision shall prohibit an insurer from entering into discount agreements with companies and locations for motor vehicle repair or otherwise entering into any business arrangements or affiliations which reduce the cost of motor vehicle repair if the insured or claimant has the right to use a particular company or reasonably available location for motor vehicle repair. If the insured or claimant chooses to use a particular company or location other than the one providing the lowest estimate for like kind and quality motor vehicle repair, the insurer shall not be liable for any cost exceeding the lowest estimate. For purposes of this subdivision, motor vehicle repair shall include motor vehicle glass replacement and motor vehicle glass repair;

Neb Rev Stat § 44-1544:

The director may adopt and promulgate rules and regulations to carry out the *Unfair Insurance Claims Settlement Practices Act.*

Neb Rev Stat § 44-6604:

For purposes of the Insurance Fraud Act, a person or entity commits a fraudulent insurance act if he or she:

> (1) Knowingly and with intent to defraud or deceive presents, causes to be presented, or prepares with knowledge or belief that it will be presented to or by an insurer, or any agent of an insurer, any statement as part of, in support of, or in denial of a claim for payment or other benefit from an insurer or pursuant to an insurance policy knowing that the statement contains any false, incomplete, or misleading information concerning any fact or thing material to a claim;
>
> (2) Assists, abets, solicits, or conspires with another to prepare or make any statement that is intended to be presented to or by an insurer or person in connection with or in support of any claim for payment or other benefit from an insurer or pursuant to an insurance policy knowing that the statement contains any false, incomplete, or misleading information concerning any fact or thing material to the claim;

8.1. Are the Nebraska Statutes Enforced?

Unfortunately, Nebraska' statutory prohibitions, and particularly § 44-1450, have not been enforced. No case reported by a Nebraska appellate court is known to have been decided involving capping or steering claims. A few cases have cited the statute, but none for the proposition that capping and steering is unlawful.

Efforts have been made to enforce state law against insurance companies and stretch federal antitrust laws to address issues like arbitrary refusal to pay claims, or arbitrary refusal to pay claims in full through capping and steering.[19] The litigation ranged from post-Katrina claims[20] to short-term disability benefits issues.[21]

Where courts have approached, and closed in, on potential relief, efforts to establish liability have failed because of inadequate information to prove capping or steering, or because of adequate disclosures by the insurance company, and special pricing if the insured would agree to use the company's repair shops.[22]

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[19] An all states search of a prominent legal database, Westlaw, yielded 574 responses to the query "insurance /s practice! /p bad /s faith /p /steer! cap!"

[20] *Williams v. Louisiana Citizens Fair Plan*, 2012 WL1548969 (4th Cir 2012).

[21] *McDonald v. American Family Live*, 70 So3d 1086 (lst Cir LA 2011).

[22] *Ortega v. Topa Ins. Co.*, 206 CalApp 4th 463, 141 Cal Rptr 3d 771 (2012).

9. PartsTrader

A current, and important, issue facing auto body repair facilities is the recent introduction of the PartsTrader parts ordering system. This is a relatively new development and little information is available. An effort has been made, in the following paragraphs under this section, to utilize information provided by PartsTrader or industry trade groups.

PartsTrader is an "online marketplace that allows collision repairers to source parts from leading OEM dealers, parts recyclers, and alternative parts suppliers."[23] PartsTrader does not maintain an inventory of auto parts and essentially operates as a "middle man" between body shops and parts dealers. PartsTrader.com indicates its service is free but plans to "charge parts suppliers a modest monthly membership fee and/or a transaction fee on successful orders." Repair shops will never be charged a fee.

State Farm has teamed up with PartsTrader and has asked its "Select Service Shops" to source parts through PartsTrader's web-based process. Here is a breakdown of the process:[24]

1. Shops write a complete estimate with OEM parts listed in the database and save in preliminary status.

2. That estimate is exported to the shop's EMS directory. The Parts Trader software pulls the parts listed in the estimate into the application automatically.

3. Within Parts Trader, the parts needed for a repair are forwarded to parts suppliers for price quotes.

4. Suppliers have a minimum of one hour to submit price quotes. When time expires, shops review price quotes and order selected parts.

5. Shops update original estimate with the part types and prices selected.

6. Lock-in and upload the final estimate.

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[23] Source: http://www.partstrader.us.com/what-is-partstrader/ (accessed on July 17, 2012).

[24] Source: http://www.fenderbender.com/FenderBender/May-2012/State-Farm-Parts-Bidding-Program-Draws-Fire/ (accessed on 7/17/2012 3:17:18 PM)

According to PartsTrader.com, "PartsTrader is independantly [sic] owned by a small number of private investors, as well as a private equity firm." There are no ownership interests held by insurance companies or members of the collision industry supply chain.[25] PartsTrader's New Zealand website describes its operation in New Zealand and its integration into the U.S. market:[26]

> PartsTrader has been successfully operating in New Zealand since 2005 and now all the major insurance companies use the system. Approximately 80% of all car parts required for collision repairs arising from insurance claims are now sourced through PartsTrader. IAG is the cornerstone insurance company that co-established PartsTrader with PartsTrader Markets Ltd (PML). IAG has approximately 60% market share of auto insurance in New Zealand.
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> . . .
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> In March 2012 PartsTrader began operating in pilot in the United States. PML has established a very attractive contract with the leading US auto insurer (State Farm) to inject PartsTrader into the huge US auto market. PartsTrader is expected to be fully deployed across the US by mid-late 2013 supplying parts to over 10,000 repairers using over 20,000 suppliers.

On PartsTrader's U.S. website, it drafted an Open Letter to the Collision Industry to address the negative public commentary about the initiative.[27] Specifically, PartsTrader identified several examples differentiating its New Zealand program from its program in the United States:

> •In NZ, insurers have access to a repairer's buy prices; in the US they do not.
>
> •In NZ, repairers must get insurer approval on every parts purchase choice; in the US they have complete freedom to choose.

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[25] Source: http://www.partstrader.us.com/what-is-partstrader/faqs/ (accessed on July 17, 2012)

[26] Source: http://www.ptml.co.nz/what.html.

[27] Source: http://www.partstrader.us.com/blogs/.

•In NZ, insurance companies mandate a 24 hour wait time for quotes; in the US that wait time is only 1-2 hours.

•In NZ, the system does not support ordering and is not integrated; in the US the product does support ordering and will be fully integrated.

•In NZ, the majority of parts have always been priced by insurers on a cost-plus basis, well before PartsTrader existed; in the US a different model exists.

PartsTrader also addressed its initial client in the U.S., State Farm Insurance:

> We understand that there is a great deal of concern in the industry about PartsTrader's objectives and insurance companies' involvement in parts procurement. However, we believe that our initial client is a good one based on their shared commitment to win-win outcomes. We have committed to the market that we will not allow insurance companies access to any repairer's buy prices. Similarly, we will not enter into any insurer relationship that prevents repairers from making their own decision about choosing a supplier. We are committed to PartsTrader being a valuable tool for all repairers and suppliers moving forward. In short, we are committed to repairers being in control.

Many trade associations have spoken on this issue. The Society of Collision Repair Specialists (SCRS) interviewed Bob McCoy of the Motor Trade Association (MTA) of New Zealand.[28] According to Mr. McCoy, PartsTrader was first introduced in New Zealand in 2003.[29] Mr. McCoy noted that PartsTrader "was originally built by New Zealand's biggest insurance company for its own use." Mr. McCoy discussed profit reduction in the auto repair industry due to PartsTrader:

> Prior to its inception, collision repairers had the ability to source parts from their local suppliers then pass the retail cost onto the insurer. Now the parts are supplied at cost then a markup is applied depending on whether the part is OEM or second hand. This varies between insurance companies but is around the 10 to 20% range. The only people to see the supplier's quotes are the repairer and insurance [appraiser]. Most repairers have also had to

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[28] Source: http://www.bodyshopbusiness.com/Article/99476/scrs_interviews_new_zealand_collision_repairer_on_partstrader.aasp (last accessed 7/17/2012 3:51:41 PM).

[29] Source: http://www.scrs.com/pdf-news/SCRS-Bob-mccoy.PDF.

employ administration staff or take themselves of the shop floor to carry out the administration role which has impacted on their profit levels.

Mr. McCoy also opined that New Zealand has not seen a reduction in insurance premiums as a result of the program and has experienced increased the average cycle time for repairs.

To date, PartsTrader has not been welcomed into the U.S. market. Those repair facilities that have utilized the program have complained of: (1) time delays, including increased administrative costs; (2) quality and service inconsistencies; (3) vendor pushback; and (4) reduced profits as a result of lower margins.[30]

Little information is known at this time about the PartsTrader program. The authors seek not to offer anything other than the information available about PartsTrader at the time of this paper's drafting. Further inquiry and understanding of the program is required before any legal issues may be identified.

10. What are the Solutions?

Possible solutions:

1. Rhode Island Model: Reporting Repair Labor Rates. Rhode Island law makes it an unfair insurance claims settlement practice to fail to have an independent appraisal when the vehicle damage exceeds $1,500.

2. Private right to sue for violation of Neb Rev Stat § 44-1359, to insured and the injured competitive body shop. Must include attorney's fees and a penalty provision to be workable.

3. Prohibit insurance direct or indirect ownership, financing, or control of repair shops.

4. Give insured absolute right to select repair shop with cap on compensation at amount of third party suit.

5. Require oral and written notification of insured's right to choose.

6. Mandatory reporting of insurer's failure to pay full repair estimate and require a justification with an independent estimate to support the insurer's

[30] Source: http://www.nebraskaautobody.com/partstrad.html.

decision. All the Insurance Department, it its discretion to initiate a disciplinary proceeding against the Company for its action.

7. Provide that an administrative decision against the company has preclusive effect in court but an administrative decision for the company does not. Provide attorney's fees and punitive damages.

8. Give a small business credit: 5% on labor.

9. Give a small business credit: Add sales tax on labor for shops with more than _x_% of monthly / annual volume from a single source.

10. Premium tax audit adjustment. Require the insurance to identify on its annual premium tax return its in state repair vendors and impose a graduated premium tax based on diversity of the pool.

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