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BAR-RELATED TITLE INSURANCE COMPANIES: AN ANTITRUST ANALYSIS

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I. INTRODUCTION

IN 1947, 1,400 MEMBERS OF THE FLORIDA BAR united to establish a common law business trust, known as the Lawyers Title Guaranty Fund (Fund), in order to issue title insurance policies through lawyers.¹ In the same year, the American Bar Association (ABA) took notice of the formation of this Florida company and suggested to its members that they study the Fund "as one of the steps in preserving to the legal profession a field of activity which is rapidly becoming the object of corporate encroachment."² Subsequently, in 1967, the House of Delegates of the ABA adopted, by a vote of ninety to eighty-seven, resolutions approving in principle the

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McNees, Wallace & Nurick is counsel to the Pennsylvania Title Insurance Rating Bureau, a statutorily authorized title insurance rate-making organization. The analyses and conclusions expressed in this article are those of the authors, and not those of McNees, Wallace & Nurick or any of its clients. This article arose out of a study of conflicts of interest in real estate transactions commissioned by the Pennsylvania Title Insurance Rating Bureau.

1. See ABA STANDING COMM. ON LAWYERS' TITLE GUARANTY FUNDS, HOW-TO-DO-IT: BAR-RELATED TITLE ASSURING ORGANIZATIONS 6 (1976) [hereinafter cited as HOW-TO-DO-IT: BAR-RELATED TITLE ASSURING ORGANIZATIONS]; Johnstone, *Title Insurance*, 66 YALE L.J. 492, 509 (1957). See generally ABA STANDING COMM. ON LAWYERS' TITLE GUARANTY FUNDS, BAR-RELATED TITLE ASSURING ORGANIZATIONS 3-4 (1976) [hereinafter cited as BAR-RELATED TITLE ASSURING ORGANIZATIONS].

2. BAR-RELATED TITLE ASSURING ORGANIZATIONS, *supra* note 1, at 5, quoting ABA Committee on Unauthorized Practice, *Florida Lawyers Organize Title Guaranty Fund*, 13 UN-AUTH. PRAC. NEWS No. 4, at 2, 4 (3d Quarter 1947).

formation of a nationwide bar-related title insurance company and directing its Board of Governors and a Special Committee on Lawyers' Title Guaranty Funds to develop a definitive plan for organization of such a company.³ In May 1968, the Board of Governors voted ten to eight to send to the House of Delegates for consideration a plan that essentially envisioned a joint enterprise of the ABA and the Continental Insurance Company.⁴ The American Land Title Association, through its counsel and special counsel, submitted statements in opposition to the proposed company.⁵ These statements contended that the proposed ABA sponsored bar-related company raised serious ethical⁶ and antitrust⁷ problems for the ABA. The issue was deferred and never voted on by the House of Delegates. In 1971, the Board of Governors ultimately endorsed a resolution abandoning the concept of sponsoring or funding a bar-related title insurance company.⁸

The defeat of the proposed ABA sponsored bar-related title insurance company redirected the efforts of the proponents of bar-related title companies from the national to the state level. By 1976, over 10,000 lawyers in nineteen states were active in nine separate bar-related title companies that had assets in excess of eighteen mil-

3. D. Maxwell, Statement in Opposition to the Joint Report of the Subcommittee of the Board of Governors and the Special Committee on Lawyers Title Guaranty Funds Recommending That the American Bar Association Organize a Bar-Related Title Insurance Company in Collaboration with Continental Insurance Company 1 (1968). See Board of Governors, *Report*, 92 A.B.A. REP. 366, 374-75 (1967); Special Committee on Lawyers' Title Guaranty Funds, *Report*, 92 A.B.A. REP. 608, 608 (1967). The following terms are used interchangeably: "bar-related title assuring company/organization/fund; bar-related company; and bar-related title insurance company." HOW-TO-DO-IT: BAR-RELATED TITLE ASSURING ORGANIZATIONS, *supra* note 1, at iv.

4. D. Maxwell, *supra* note 3, at 2. See Board of Governors, *Report Transmitting Reports of Sections and Committees to the House of Delegates*, 93 A.B.A. REP. 393, 395 (1968). The plan involved organization of a title insurance company managed by a 15 member board of directors, of which seven would be nominees of the Board of Governors of the ABA. *Id.* A provision providing for the division of profits between the ABA Foundation and the Continental Insurance Company was stricken from the plan. *Id.*

5. See T. Jackson, Statement in Opposition to Action by the Board of Governors to Sponsor a National Title Insurance Company (1968); D. Maxwell, *supra* note 3.

6. T. Jackson, *supra* note 5, at 6-11; D. Maxwell, *supra* note 3, at 8-13.

7. T. Jackson, *supra* note 5, at 14-15; D. Maxwell, *supra* note 3, at 13-15. Additionally, Maxwell's statement refers to a Memorandum on the Legality under the Federal Antitrust Laws of the Proposed Formation of a National Title Insurance Company sponsored by the American Bar Association, dated June 21, 1968, prepared by the firm of Howrey, Simon, Baker & Murchison. *Id.* at 14 n.3.

8. Board of Governors, *Informational Report to the House of Delegates*, 96 A.B.A. REP. 159, 171 (1971). The Board of Governors endorsed the following statements of policy:

1. The ABA does not sponsor any title insurance company or fund, and has no financial interest in any such enterprise.

2. No committee, officer or agency of the ABA is authorized to state that the ABA does or will engage in such sponsorship.

3. No committee, officer or agency of the ABA has any authority in its or his official capacity to participate in a stock solicitation drive of any such company or fund.

Id.

lion dollars.⁹ Moreover, the formation of additional bar-related companies has been actively encouraged by the ABA Standing Committee on Lawyers' Title Guaranty Funds (ABA Standing Committee).¹⁰ Since 1971, skirmishing between the commercial title insurance industry and the proponents of bar-related title companies has continued at the state level, with the commercial title insurers reiterating the arguments of unethical conflict of interest and antitrust violations that had been raised against the ABA plan in 1968.¹¹ Rejecting these arguments,¹² the proponents of bar-related insurers accuse the com-

9. BAR-RELATED TITLE ASSURING ORGANIZATIONS, *supra* note 1, at 4; HOW-TO-DO-IT: BAR-RELATED TITLE ASSURING ORGANIZATIONS, *supra* note 1, at 9. As of 1976, existing bar-related title insurance companies and the states in which they operate are: Lawyers' Title Guaranty Fund (Florida); Ohio Bar Title Insurance Company (Ohio); National Attorneys' Title Assurance Fund, Inc. (Indiana); Attorneys' Title Guaranty Fund, Inc. (Colorado, Minnesota, Utah); Insured Titles, Inc. (Kansas, Louisiana, Missouri, Montana, Nebraska, New Mexico, North Dakota, Oklahoma, Wisconsin); Attorneys' Title Guaranty Fund, Inc. (Illinois); Connecticut Attorney's Title Guaranty Fund (Connecticut); Mutual Title Insurance Company (Maine); Attorneys' Title Guaranty Fund, Inc. (Georgia). *Id.* at 6-7. Additional bar-related title companies are being organized in Massachusetts, Maryland, and Texas, and attorneys in Alabama, Michigan, New York, and Virginia are "evinced interest" in organizing bar-related companies. ABA Standing Committee on Lawyers' Title Guaranty Funds, *Maryland Lawyers Express Interest in Bar-Related Title Insurance*, LAWYERS' TITLE GUARANTY FUNDS NEWSLETTER, Aug., 1977, at 2.

10. See Special Committee on Lawyers' Title Guaranty Funds, *Report*, 97 A.B.A. REP. 789, 789 (1972). The ABA Standing Committee on Lawyers' Title Guaranty Funds (Standing Committee), authorized by the ABA in 1972, is the successor to the ABA Special Committee on Lawyers' Title Guaranty Funds, which was established in 1961. *Id.*; Board of Governors, *Report*, 87 A.B.A. REP. 194, 194 (1962). According to the ABA bylaws, the Standing Committee "shall study title insurance and guaranty funds; cooperate with state and local bar associations indicating an interest in lawyers' title guaranty funds; and stimulate efforts among lawyers and laymen to recognize the essential role of the lawyer in real estate transactions." ABA BY-LAWS § 30.7.

11. See notes 5-7 and accompanying text *supra*. Rules in several states actually bar lawyers from participating in title insurance transactions. See, e.g., N.C. GEN. STAT. § 58-135.1 (1975) (law prohibiting a real estate agent, attorney, or lender whose services are incident to any real estate transaction from receiving a rebate, commission, or other payment in connection with the issuance of title insurance in the same transaction); OKLA. BAR ASS'N, LEGAL ETHICS OPINIONS, No. 258 (1969) (unethical for lawyers to operate a title insurance fund for the purposes of expanding the attorney-members' title practice and securing better professional fees); VA. STATE BAR, ETHICS OPINIONS, No. 93 (1959) (lawyer should not examine title for a client and also issue policy for title company unless the client insists after being fully informed of the lawyer's status). *But see* ABA COMM. ON PROFESSIONAL ETHICS, OPINIONS, No. 331 (1973) (lawyer may represent client and title insurer in same transaction if there is full disclosure); *Id.*, No. 304 (1962) (lawyer may ethically recommend or sell title insurance to a client if he discloses his financial interest in the transaction).

The interests of the client and the insurer often conflict. Where the insurability of title is in question, it is in the client's interest to have the policy issued and in the insurer's interest to refuse issuance. In other situations, the insurer may be the only one willing to accept a risk. In reply, the proponents of bar-related companies contend that "[t]he position of trust occupied by lawyers is not based upon the absence of a conflict of interest but rather upon the ability of lawyers to resolve such conflicts by invariably placing the clients' interests ahead of their own." BAR-RELATED TITLE ASSURING ORGANIZATIONS, *supra* note 1, at 13.

12. See, e.g., Balbach, *Title Insurance and the Lawyer*, 52 A.B.A.J. 65 (1966); Balbach, *Bar-Related Title Insurance—An Obligation of the Organized Bar*, 7 GA. ST. B.J. 337 (1971); Kellogg, *The Course Ahead: Bar-Related Title Insurance*, 14 PRAC. LAW. 13 (1968).

mercial companies of the unauthorized practice of law.¹³ However these conflict of interest, ethical, and unauthorized practice issues may be resolved by the various states,¹⁴ the success or failure of the bar-related title movement on a nationwide basis may ultimately be determined by the legality of bar-related insurance under the federal antitrust laws. This article will, therefore, examine the legality of state organized bar-related title insurers under sections 1 and 2 of the Sherman Act.¹⁵

A. The Title Insurance Industry¹⁶

Title insurance differs from other forms of insurance in that indemnity for loss is only one component.¹⁷ The other component, which title companies contend is more important, is loss prevention.¹⁸ As part of this loss prevention function, the title insurer will,

13. See Balbach, *Title Assurance: A New Approach to Unauthorized Practice*, 41 NOTRE DAME LAW. 192 (1965). On the issue of unauthorized practice, compare *State Bar v. Arizona Land Title & Trust Co.*, 90 Ariz. 76, 366 P.2d 1 (1961), *modified*, 91 Ariz. 293, 371 P.2d 1020 (1962); *Beach Abstract & Guar. Co. v. Bar Ass'n*, 230 Ark. 494, 326 S.W.2d 900 (1959); *Title Guar. Co. v. Denver Bar Ass'n.*, 135 Colo. 423, 312 P.2d 1011 (1957); *Pioneer Title Ins. & Trust Co. v. State Bar*, 74 Nev. 186, 326 P.2d 408 (1958); *People v. Lawyers Title Corp.*, 282 N.Y. 513, 27 N.E.2d 30, 16 N.Y.S.2d 357 (1940); *Hexter Title & Abstract Co. v. Grievance Comm.*, 142 Tex. 506, 179 S.W.2d 946 (1944); *Rattikin Title Co. v. Grievance Comm.*, 272 S.W.2d 948 (Tex. Ct. App. 1954) and *Stewart Abstract Co. v. Judicial Comm'n*, 131 S.W.2d 686 (Tex. Ct. App. 1939) with *Cooperman v. West Coast Title Co.*, 75 So. 2d 818 (Fla. 1954); *People v. Title Guarantee & Trust Co.*, 227 N.Y. 366, 125 N.E. 666, 168 N.Y.S. 278 (1919); *La Brum v. Commonwealth Title Co.*, 358 Pa. 239, 56 A.2d 246 (1948) and *Bar Ass'n. v. Union Planters Title Guar. Co.*, 46 Tenn. App. 100, 326 S.W.2d 767 (1959).

14. See notes 11 & 13 *supra*.

15. 15 U.S.C. §§ 1, 2 (1976). For the text of these sections, see note 59 *infra*.

16. For descriptions of the history and development of the title insurance industry, see GAGE, *LAND TITLE ASSURING AGENCIES IN THE UNITED STATES* 58 (1937); Johnstone, *supra* note 1, at 492-93; Roberts, *Title Insurance: State Regulation and the Public Perspective*, 39 IND. L.J. 1, 5-19 (1963); Rosenberg, *Historical Perspective of the Development of Rate Regulation of Title Insurance*, 1977 J. RISK & INS. 193.

17. See Johnstone, *supra* note 1, at 494-95.

18. See *id.* One study of title insurance reported that

title insurance has focused on risk reduction. Rather than simply accept risks, title insurers (either by law or common practice) devote the greatest part of their efforts to conducting rigorous examinations of the titles they are asked to insure, and accept them as insured risks only when all title difficulties discovered have either been corrected or explicitly exempted from coverage; in consequence, losses are very infrequent. Thus, the very term "title insurance" is something of a misnomer, for title insurance is primarily a loss prevention rather than loss reimbursement activity.

REGULATORY RESEARCH CORP., *ECONOMIC PRINCIPLES AND TITLE INSURANCE RATE REVIEW: REPORT TO OHIO TITLE INSURANCE RATING BUREAU*, 12-13 (1977) (emphasis in original) (footnote omitted) [hereinafter cited as *ECONOMIC PRINCIPLES AND TITLE INSURANCE RATE REVIEW*]. See also LAND TITLE ASSOCIATION, *The Nature of and Need for Title Insurance Services*, 1 THE TITLE INDUSTRY WHITE PAPERS 4-10 (1976).

Pennsylvania specifically requires a title examination before the issuance of title insurance. PA. STAT. ANN. tit. 40, § 910-7 (Purdon 1971). See Roberts, *supra* note 16, at 28. See also Johnstone, *supra* note 1, at 508-09.

either directly or through an approved agency or attorney, search the title, take steps to remove liens or defects, fill in preprinted settlement forms, and handle real estate closings.¹⁹ It is this loss prevention component of title insurance, as opposed to the indemnity, or what the organized bar characterizes as the "pure insurance," component of title insurance, that is responsible for much of the conflict between commercial title companies and private lawyers who traditionally have searched titles, eliminated defects, and handled closings.²⁰ These two distinct aspects of title insurance are reflected in state regulation of title insurance rates. In many states, title insurers charge an "all-inclusive" rate which encompasses title examination, ancillary closing services, and the insurance policy. In other states, regulations provide for a "risk rate" which excludes examination, closing, and ancillary services and covers only the indemnity risk.²¹

Title insurance is normally required by the lender as a condition of granting a mortgage loan, but the cost of the policy is usually paid by the borrower-purchaser.²² In the typical residential transaction, the purchaser is ignorant of the complexities of real estate transactions and relies on knowledgeable intermediaries, such as lawyers, realtors, or lenders, to select title companies.²³ Hofflander and Shulman have found that these professionals have an inherent power to control the placement of title insurance business:

Individual homebuyers engaged in a generally non-repetitive transaction, are faced with real estate settlement producers—real estate brokers, attorneys, mortgage companies, builders or lenders—whose knowledge, experience and business relationships give them an inherent power with respect to the transaction. Through the settlement process the producers control or have the potential to

19. For a description of services frequently but not always performed by a commercial title insurer, see *State Bar v. Guardian Abstract Co.*, 91 N.M. 434, 440, 575 P.2d 943,949 (1978) (an unauthorized practice action by the New Mexico bar and individual attorneys).

20. See HOW-TO-DO-IT: BAR-RELATED TITLE ASSURING ORGANIZATIONS, *supra* note 1, at 17. For a discussion of this conflict in the area of unauthorized practice, see cases cited note 13 *supra*.

21. See ECONOMIC PRINCIPLES AND TITLE INSURANCE RATE REVIEW, *supra* note 18, at 15-18. For example, "all-inclusive" rates are charged in California, Colorado, Oregon, Pennsylvania, and Texas; risk rates are used in Florida, Ohio, Virginia, and Wyoming. Rosenberg, *supra* note 16, at 206 app. For a listing of all state statutes governing title insurance company rates, see *id.*

22. See Johnstone, *supra* note 1, at 493-94. Title insurance is available in both mortgage policies, which protect the lender, and owner policies, which protect the owner-purchaser. See HOW-TO-DO-IT: BAR-RELATED TITLE ASSURING ORGANIZATIONS, *supra* note 1, at 8; Hofflander & Shulman, *The Distribution of Title Insurance: The Unregulated Intermediary*, 1977 J. RISK & INS. 423, 439; Johnstone, *supra* note 1, at 497-98.

23. See Hofflander & Shulman, *supra* note 22, at 437-38.

control the placement of orders for (or to tie) a whole array of ancillary services, such as pest-control inspections, escrow services, property-liability insurance and title insurance. These ancillary transactions are at once both necessary and incidental to the primary transaction, the purchase of a home. . . .

. . . Consumers, lacking time and knowledge about the process, generally go along with or even seek out the suggestions of producers. Even for knowledgeable consumers there is little incentive to shop separately for ancillary services because the total price of these services represents a small percentage, both of the total purchase price and of the cash down payment, and thus the price of any one service is much smaller in relation to the entire transaction.²⁴

The result is that title insurers compete for the patronage of these professionals, rather than for the patronage of the ultimate consumer, a process known as "reverse competition."²⁵ Reverse competition raises rather than lowers the price of title insurance because each title company seeks to provide the real estate professional with more compensation or benefits in an effort to secure his referrals of prospective policyholders.²⁶ A further effect of reverse competition is the development of "controlled" title insurance companies, which are companies owned and operated by real estate professionals or groups of real estate professionals who use their power to control the placement of title insurance business to channel policies to the controlled companies.²⁷ To the extent that lawyers are real estate professionals able to control the placement of title insurance business by referring prospective policyholders to a specific title company, bar-

24. *Id.* (footnote omitted).

25. U.S. DEP'T OF JUSTICE, *THE PRICING AND MARKETING OF INSURANCE* 274 (1977). The report states: "Reverse competition presently overwhelms most forms of competitive pressure in its tendency to drive title insurance rates up. Unless this problem can be solved, or unless title insurance is marketed in new, direct ways which eliminate reverse competition, competitive controls cannot be relied upon to prevent excessive rates." *Id.* Hofflander and Shulman contend that reverse competition can also lead to a degradation of the title insurance product as the work of title companies is not thorough when they are attempting to meet the closing schedules demanded by real estate professionals. Hofflander & Shulman, *supra* note 22, at 444-45.

26. Hofflander & Shulman, *supra* note 22, at 444.

27. *Id.* at 443-44. The development of controlled title insurers may also be traced in part to regulatory attempts by state insurance commissioners to control reverse competition by prohibiting, as "rebates or kickbacks," payments by title insurers to real estate professionals which exceed the value of services rendered by those business referrers. *Id.* at 442-44. In Pennsylvania, for example, an insurance department regulation restricts payments of commissions to bona fide agents. 30 PA. CODE § 125.1. By 1977, certain real estate brokers in suburban Philadelphia counties had organized controlled title insurance agencies to which they referred policies. See *Commonwealth Land Title Ins. Co. v. Berks Title Ins. Co.*, No. C76-106 (Pa. Ins. Comm'n 1978).

related title insurance companies are controlled companies and, along with the referring lawyer, beneficiaries of reverse competition.

B. Bar-Related Title Insurance Companies

Although the nine bar-related title insurance companies vary in some organizational details,²⁸ there are certain common elements which distinguish them from commercial title insurance companies.²⁹ Bar-related companies are established, managed, and controlled by lawyers, and offer title insurance only through lawyers to owners or lenders when the home purchaser has retained private counsel for the real estate conveyance.³⁰ Most bar-related title insurance companies also provide for a rebate of the excess of premiums and earnings over expenses to the participating attorneys through commissions, dividends, or a combination of both.³¹ Emphasis is placed on the return of premiums and investment income through devices other than dividends so that the amount of return is proportionate to the amount of business referred to the company, and not to the capital invested in the bar-related company.³² Two further

28. See HOW-TO-DO-IT: BAR-RELATED TITLE ASSURING ORGANIZATIONS, *supra* note 1, at 5-7. See also note 9 and accompanying text *supra*. All but two of the bar-related title insurance companies are organized as corporations in which stock ownership is limited to practicing lawyers in the relevant state or states. HOW-TO-DO-IT: BAR-RELATED TITLE ASSURING ORGANIZATIONS, *supra* note 1, at 6-7. The Florida company is organized as a Massachusetts Business Trust in which membership is limited to practicing Florida attorneys. *Id.* at 6. The Maine Title Insurance Company is a mutual fund owned by the policyholders. *Id.* at 7. All of the bar-related title insurance companies, except the Connecticut Attorney's Title Guaranty Fund, Inc., are private entities organized under general corporate insurance laws. *Id.* at 6-7. The Connecticut fund is specifically authorized by statute. See Act of July 1, 1976, Sp. Act No. 339, §§ 1-6, 1965 Conn. Spec. Acts 352-58.

29. For a list of the common elements, see Miles, Bar-Related Title Insurers: Their Benefits to the Bar and the Public, in ABA SECTION OF GENERAL PRAC., DOCKET CALL, Winter 1977, at 8. See notes 30-35 and accompanying text *infra*.

30. See BAR-RELATED TITLE ASSURING ORGANIZATIONS, *supra* note 1, at 9-12; Miles, *supra* note 29, at 8.

31. See HOW-TO-DO-IT: BAR-RELATED TITLE ASSURING ORGANIZATIONS, *supra* note 1, at 6-7. Of the nine bar-related title insurance companies, five declare dividends, six offer returns on premiums and investment income according to the number of policies written, and four companies offer both. *Id.*

32. See BAR-RELATED TITLE ASSURING ORGANIZATIONS, *supra* note 1, at 11. According to the ABA Standing Committee, a recommended principle of bar-related title insurance is that it should be "fundamentally cooperative," with remittances for premiums and investment income returned to the lawyer writing the policy which provided the premium and the resulting income, after the reserve periods have passed. *Id.* (emphasis omitted). The operation of the Florida Lawyers' Title Guaranty Fund is typical in that each member lawyer pays \$200 upon joining the fund and pays a premium for each policy written. Johnstone, *supra* note 1, at 509. All payments by a member are credited to an account maintained in his name, and expenses and investment income of the company are charged against the members' account in proportion to the lawyer's payments into his account. *Id.* at 509-10. After seven years, a member may withdraw the balance in his account. *Id.* at 510.

common aspects of bar-related title insurance companies are their continuing efforts to enroll all members of the bar,³³ and their efforts to ensure routine and exclusive use by all members of bar-related insurance rather than of commercial title insurance.³⁴ These efforts are mandated not only by the conviction that bar-related title insurance is beneficial for the lawyer and the public, but also by the economics of the title insurance business, which require a large volume of business to meet overhead operating expenses and to be profitable.³⁵

These common characteristics of bar-related title insurance companies reflect the major purpose of the bar-related title insurance movement, which is to preserve and expand the role of the private attorney in real estate transactions.³⁶ Both lawyers and commercial title companies can, subject to state laws and regulations on unauthorized practice, search titles, prepare closing forms, clear liens, serve as agents, and conduct title closings.³⁷ Where these services must be performed by lawyers, they can be performed either by attorneys employed by the title insurance company or by private attorneys retained directly by the purchaser of the real estate.³⁸ The existence of a bar-related title insurance company essentially ensures that the home purchaser who is referred to it for a title policy will retain his personal lawyer to handle these aspects of the real estate transaction and any other incidental legal matters.³⁹ Proponents of bar-related title insurance maintain that this benefits both the public

33. See BAR-RELATED TITLE ASSURING ORGANIZATIONS, *supra* note 1, at 14.

34. See HOW-TO-DO-IT: BAR-RELATED TITLE ASSURING ORGANIZATIONS, *supra* note 1, at 11-13. For specific directions for recruiting members and stimulating policy usage by members, see *id.* Emphasis is placed on personal contacts, visits, and mailings. *Id.* The ABA Standing Committee advocates a "statewide membership campaign, much as is done in a campaign for funds or votes," and observes that "[b]est results are achieved by repeated visits, with the average 'sale' taking place on the third visits." *Id.* at 11. Personal visits are to be made to members who do not regularly write policies. *Id.* at 13. A close relationship with local bar groups is also advocated. *Id.* at 11.

35. See BAR-RELATED TITLE ASSURING ORGANIZATIONS, *supra* note 1, at 14; HOW-TO-DO-IT: BAR-RELATED TITLE ASSURING ORGANIZATIONS, *supra* note 1, at 16-17. For a description of the cost components and overhead of title insurance, see ECONOMIC PRINCIPLES AND TITLE INSURANCE RATE REVIEW, *supra* note 18, at 13-17.

36. BAR-RELATED TITLE ASSURING ORGANIZATIONS, *supra* note 1, at 9; HOW-TO-DO-IT: BAR-RELATED TITLE ASSURING ORGANIZATIONS, *supra* note 1, at 1-2, 25-26. According to one proponent of bar-related title insurance: "The first and most important benefit is the expansion of the lawyers' real estate law services. In many areas where lawyers did not add this service to their practices, they were largely eliminated from real estate law practice." Miles, *supra* note 29, at 9.

37. See Miles, *supra* note 29, at 8-9.

38. *Id.*

39. See BAR-RELATED TITLE ASSURING ORGANIZATIONS, *supra* note 1, at 10; HOW-TO-DO-IT: BAR-RELATED TITLE ASSURING ORGANIZATIONS, *supra* note 1, at 2-3.

and the bar.⁴⁰ The asserted benefit to the public lies in the use of the private lawyer.⁴¹ Whether the involvement of a lawyer is in the public interest has been questioned by some writers,⁴² but that prob-

40. See, e.g., BAR-RELATED TITLE ASSURING ORGANIZATIONS, *supra* note 1, at 10; HOW-TO-DO-IT: BAR-RELATED TITLE ASSURING ORGANIZATIONS, *supra* note 1, at 2-3; Miles, *supra* note 29, at 8-9.

The economic motivation behind the growth of bar-related title companies is evident from the following "test":

A Test for Every Lawyer Regarding the Extent
of His Real Property Practice

Survey your practice for a few weeks, tabulating daily your answers to these questions:

1. What is your gross revenue from real property work? Has it diminished because your former clients are patronizing lay agencies?
2. What percentage of your closings produce a fully adequate fee?
3. What percentage of your clients do you confidently expect to represent in future real property transactions? Now, based on the survey data, make up your own mind as to how important the bar-related title movement is—or can be—to you.

BAR-RELATED TITLE ASSURING ORGANIZATIONS, *supra* note 1, at 2.

41. See HOW-TO-DO-IT: BAR-RELATED TITLE ASSURING ORGANIZATIONS, *supra* note 1, at 1-3, 22-23; Miles, *supra* note 29, at 9.

42. See Whiteman, *Home Transfer Costs: An Economic and Legal Analysis*, 62 GEO. L.J. 1311, 1334 (1974). One commentator has observed:

A major factor in the inefficiency of present real estate transfers is the concept that attorneys search titles and conduct closings. The use of legally trained professionals to perform these routine tasks constitutes an enormous waste of skill and causes increased overall costs to parties. By contrast, on the Pacific coast all of the routine aspects of transfer are handled by title and escrow companies.

Id. (footnote omitted).

Proponents of attorney involvement in real estate closings assert that "[t]he purchaser who buys real estate without independent legal counsel may well fail to take into consideration the effect that the acquisition has upon his estate planning, business, and personal life." HOW-TO-DO-IT: BAR-RELATED TITLE ASSURING ORGANIZATIONS, *supra* note 1, at 1-2. They also contend that commercial title companies may not sufficiently "explain the effect of a policy's exclusions and exceptions, which limit a title." *Id.* at 2. The ABA Standing Committee further maintains:

Lawyers should provide the legal services needed by real estate buyers and sellers because:

1. The purchase or sale of a home is frequently the most important financial event in a person's life. The seller and the buyer need legal assistance and counsel to protect their rights, and lawyers have a professional duty to represent the needs of the public even if there might be other types of work that they would prefer to do.
2. Surveys show that the way the average member of the public is introduced to a lawyer is through a real estate transaction, with the exception of those states where the lawyer has been eliminated. A real estate transaction provides an excellent opportunity to develop a good attorney-client relationship because normally the seller is happy to sell and the buyer is happy to buy. The conflicts which a lawyer faces in litigation (and, in fact, in most of the representation that he does on behalf of a client) are not present in a real estate transaction.
3. The real estate transaction is an excellent occasion for the lawyer to do the legal checkup which his client usually needs. The method by which a buyer takes title to property will frequently require examination of the estate of the individual and a consideration of his insurance protection. The legal checkup is a sufficiently important by-product to qualify it almost as the purpose of the representation.

lem is beyond the scope of this article. This article also does not address the related issue of whether a single lawyer can ethically and practically conduct a real estate transaction in which he represents the buyer, the title insurer, and the lender without prejudicing the individual home buyer, whom proponents of bar-related insurance claim to benefit.⁴³

The burgeoning organization of bar-related title companies and the increasing interest of lawyers therein is understandable in light of their economic potential.⁴⁴ Once a sufficient number of lawyers are enrolled, the success of these companies is likewise understandable in view of their status as controlled title insurance companies.⁴⁵ The reverse competition which characterizes the market for title insurance policies enables bar-related title insurance companies to start businesses with an assured minimum number of customers, once enough lawyers who function as title insurance referrers agree to support the bar-related company.⁴⁶ This virtual guarantee of success explains the strong concern of commercial title insurers about, and their opposition to, the development of bar-related companies.⁴⁷ It also raises the question, analyzed in this article, whether the practices of the bar-related title insurers, and their organizers who guarantee them success, constitute a violation of the Sherman Act, as commercial title insurers have contended.⁴⁸

4. Real estate practice can be remunerative if it is handled in a professional and businesslike manner. The indemnification provided by title insurance is readily understood by the client and is frequently provided as a matter of course by the lawyer because the client selected the lawyer in order to receive the maximum protection.

Id. at 3.

43. In most Atlantic seaboard states, an attorney paid by the purchaser usually handles the entire transaction. Whitman, *supra* note 42, at 1333-34. In New Jersey and New York, however, it is common for real estate closings to involve three attorneys, one each for the buyer, seller, and lender. *Id.* The necessity of a separate lawyer for each party has been attacked as contributing to the "exceedingly high cost" of real estate transfers in these states. *Id.* But see ABA SPECIAL COMMITTEE ON RESIDENTIAL REAL ESTATE TRANSACTIONS, THE PROPER ROLE OF THE LAWYER IN RESIDENTIAL REAL ESTATE TRANSACTIONS, HIS SERVICES AND COMPENSATION 19 (1976) (hereinafter cited as THE PROPER ROLE OF THE LAWYER) (concluding that the purchaser needs his own lawyer and calling for education of the public to discredit the notion that only one lawyer is needed to complete a title transaction).

44. See generally BAR-RELATED TITLE ASSURING ORGANIZATIONS, *supra* note 1, at 4, 11; HOW-TO-DO-IT: BAR-RELATED TITLE ASSURING ORGANIZATIONS, *supra* note 1, at 1-3.

45. See Hofflander & Shulman, *supra* note 22, at 442-45.

46. See HOW-TO-DO-IT: BAR-RELATED TITLE ASSURING ORGANIZATIONS, *supra* note 1, at 1-3, 11-13; Hofflander & Shulman, *supra* note 22, at 444.

47. See T. Jackson, *supra* note 5; D. Maxwell, *supra* note 3.

48. See notes 5-7 and accompanying text *supra*.

II. ANTITRUST ANALYSIS

A. *The Factual Setting*

The process of organizing a bar-related title insurance company can be summarized as follows: a group of lawyers⁴⁹ agree to organize a company, of which they will be the shareholders, which will adhere to the policies characteristic of a bar-related company.⁵⁰ Of necessity, the organizing shareholders also agree, either directly or by implication, to patronize the bar-related company by writing policies for it and referring home purchasers to the company and to the lawyers using it,⁵¹ to seek out other lawyers who are willing to become shareholders on the same terms,⁵² and to recruit realtors, lenders, and other title insurance business referrers to refer home buyers to the bar-related company.⁵³

This conduct raises the following issues under the Sherman Act: 1) whether the agreement by the individual lawyers to refer business exclusively to, and to write insurance policies exclusively for, the bar-related company constitutes a group boycott or a concerted refusal to deal with commercial title companies under section 1 of the Sherman Act;⁵⁴ 2) whether the lawyers' agreement to recruit realtors, abstractors, and other nonlawyer policy referrers involves a secondary boycott under section 1;⁵⁵ 3) whether the lawyers' organization of a bar-related title company as a means of requiring real estate purchasers to retain them in real estate transactions constitutes an attempt to

49. In some states, abstractors or realtors may also be members. See *HOW-TO-DO-IT: BAR-RELATED TITLE ASSURING ORGANIZATIONS*, *supra* note 1, at 6-7.

50. See *id.* at 11-13. This narrative is based on the description of a bar-related title company set forth by the ABA Standing Committee. *Id.* There are certain differences between this description and a number of the individual bar-related companies, such as the Maine "mutual insurance" company. See *id.* at 6-7. The Maine fund, the Mutual Title Insurance Company, does not have shareholders and is owned not by lawyers, but rather by its policyholders, who are home purchasers. *Id.* at 7.

51. The whole thrust of the bar-related title movement is that lawyers should use it routinely and exclusively. See generally *BAR-RELATED TITLE ASSURING ORGANIZATIONS*, *supra* note 1, at 9; *HOW-TO-DO-IT: BAR-RELATED TITLE ASSURING ORGANIZATIONS*, *supra* note 1, at 8-13, 25-26. The purpose of organizing a bar-related company would be defeated if the organizers did not intend to utilize it themselves or to refer home purchasers to lawyers using it. *Id.* at 13. Although the shareholders or organizers of a bar-related company include lawyers who are involved in few, if any, real estate transactions, they will be able to refer prospective purchasers to the bar-related company and to attorneys utilizing it. See *id.* at 12-13.

52. See *BAR-RELATED TITLE ASSURING ORGANIZATIONS*, *supra* note 1, at 14; *HOW-TO-DO-IT: BAR-RELATED TITLE ASSURING ORGANIZATIONS*, *supra* note 1, at 11.

53. See *HOW-TO-DO-IT: BAR-RELATED TITLE ASSURING ORGANIZATIONS*, *supra* note 1, at 19.

54. See notes 68-112 and accompanying text *infra*.

55. See notes 113-15 and accompanying text *infra*.

monopolize under section 2 of the Act;⁵⁶ 4) whether the policy of the bar-related company requiring policyholders to employ private attorneys is a tying arrangement under section 1;⁵⁷ and 5) whether the policy of the bar-related company of paying excess premiums and income to lawyers in proportion to the business supplied to the company constitutes an illegal rebate under sections 1 and 2 of the Act.⁵⁸

B. Interstate Commerce

Jurisdiction under sections 1 and 2 of the Sherman Act⁵⁹ exists only when the acts complained of occur within the flow of or substantially affect interstate commerce.⁶⁰ The intent and effect of the attorneys' agreement to establish and refer business to a bar-related title insurer is to increase the use of lawyers in residential real estate transactions.⁶¹ In *Goldfarb v. Virginia State Bar*,⁶² the Supreme Court of the United States found certain residential real estate transactions and the legal services and title examinations associated with them to be incident to interstate transactions so as to be subject to the federal antitrust laws.⁶³ As a necessary component of the real estate transfer, title insurance itself has also been held to be an integral part of the flow of interstate commerce.⁶⁴ *Goldfarb* should thus

56. See notes 116-42 and accompanying text *infra*.

57. See notes 144-65 and accompanying text *infra*.

58. See notes 166-74 and accompanying text *infra*.

59. Section 1 of the Sherman Act provides in relevant part: "Every contract, combination in the form of trust or otherwise, or a conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal." 15 U.S.C. § 1 (1976). Section 2 of the Sherman Act provides in relevant part:

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

Id. § 2.

60. See *United States v. Women's Sportswear Mfrs. Ass'n*, 336 U.S. 460, 464-65 (1949); *DeVoto v. Pacific Fidelity Life Ins. Co.*, 516 F.2d 1, 4 (9th Cir.), *cert. denied*, 423 U.S. 894 (1975).

61. See BAR-RELATED TITLE ASSURING ORGANIZATIONS, *supra* note 1, at 3-7; HOW-TO-DO-IT: BAR-RELATED TITLE ASSURING ORGANIZATIONS, *supra* note 1, at 1-3.

62. 421 U.S. 773 (1975).

63. *Id.* at 783-86. The Supreme Court based this conclusion on findings that a significant portion of the funds for home purchases had either come from out of state or had been guaranteed by the federal government. *Id.* at 783-85. See also *Surety Title Ins. Agency, Inc. v. Virginia State Bar*, 431 F. Supp. 298, 303 (E.D. Va. 1977), *vacated and remanded with instructions*, 571 F.2d 205 (4th Cir.), *cert. denied*, 436 U.S. 941 (1978).

64. *Surety Title Ins. Agency, Inc. v. Virginia State Bar*, 431 F. Supp. 298, 303 (E.D. Va. 1977), *vacated and remanded with instructions*, 571 F.2d 205 (4th Cir.), *cert. denied*, 436 U.S. 941 (1978).

preclude any claim that the lawyers' agreement, affecting inseparable and necessary components of real estate transfers, is not part of interstate commerce.⁶⁵ Furthermore, the business of insurance itself, which may involve the sale in one state of policies of a corporation headquartered or incorporated in another, is now considered to be part of interstate commerce.⁶⁶

C. *Conduct of the Lawyers who Organize and Maintain Bar-Related Companies*

1. *Concerted Refusal to Deal*

It has been seen that the title insurance industry is characterized by reverse competition in which real estate professionals, including attorneys, have the ability to control the purchase of title insurance policies.⁶⁷ The attorneys' agreement to establish a bar-related title insurer contains an undertaking, express or implied, to refer prospective purchasers of title insurance to the bar-related company or to an attorney representing it and to write policies exclusively for the bar-related company rather than for a commercial title company.⁶⁸ One effect of this agreement is to essentially exclude commercial title insurance companies from securing business controlled by lawyers who support the bar-related company.

Every agreement concerning trade inevitably restrains trade to some extent.⁶⁹ Section 1 of the Sherman Act, however, applies only

65. See 421 U.S. at 783-86.

66. See *United States v. South-Eastern Underwriters Ass'n*, 322 U.S. 533, 553 (1944). The Supreme Court stated: "No commercial enterprise of any kind which conducts its activities across state lines has been held to be wholly beyond the regulatory power of Congress under the Commerce Clause. We cannot make an exception of the business of insurance." *Id.* It was this finding which made the McCarran-Ferguson Act, 15 U.S.C. §§ 1011-1015 (1976), necessary if state regulation of insurance was to be preserved. For a discussion of the McCarran-Ferguson Act, see notes 175-87 and accompanying text *infra*.

67. See notes 22-27 and accompanying text *supra*.

68. See generally BAR-RELATED TITLE ASSURING ORGANIZATIONS, *supra* note 1, at 3-8; HOW-TO-DO-IT: BAR-RELATED TITLE ASSURING ORGANIZATIONS, *supra* note 1, at 11-13. It is assumed that in the particular geographic market at issue lawyers in fact function as title insurance referrers. There may be certain regions, such as large urban areas, where because there is no contact between home purchasers and lawyers, the lawyers would be unable to refer the purchasers to anyone. It seems doubtful that such a situation would arise involving a bar-related title insurer, since lawyers so excluded from real estate transactions would not have organized the bar-related insurer as a means of preserving their participation in real estate transfers. See BAR-RELATED TITLE ASSURING ORGANIZATIONS, *supra* note 1, at 3-8. Organization of a bar-related insurer is normally a device to preclude further loss of business and to recapture past business in areas where lawyers are still involved in real estate transfers. See *id.*

69. See *Chicago Bd. of Trade v. United States*, 246 U.S. 231, 238 (1918); *Standard Oil Co. v. United States*, 221 U.S. 1, 60 (1911); *McQuade Tours, Inc. v. Consolidated Air Tour Manual Comm.*, 467 F.2d 178, 185 (5th Cir. 1972), *cert. denied*, 409 U.S. 1109 (1973).

to "unreasonable" restraints of trade.⁷⁰ Pursuant to this rule, an individual may decide of his own accord to refer his business exclusively to, or to deal exclusively with, only one firm.⁷¹ An individual lawyer could independently decide which title company offers the quickest, the most reliable, and, where title companies compete in rates,⁷² the least expensive service, and refer purchasers only to that company, be it a bar-related or a commercial company. Each title company would be free to compete for and to solicit his referrals.

Different considerations exist when a group joins together and agrees that they will deal exclusively with one company and not with others.⁷³ Such a "concerted refusal to deal" provides restraints which are not present in an individual refusal to deal.⁷⁴ Membership in the group in itself reinforces each member's original decision, and group pressure hinders individual choice.⁷⁵ When there is this type of agreement by two or more persons not to do business with another or to do business only on specified terms, a concerted refusal to deal exists.⁷⁶ These concerted refusals to deal are usually considered in-

70. *Chicago Bd. of Trade v. United States*, 246 U.S. 231, 238 (1918). Justice Brandeis' classic formulation of the "rule of reason" states: "The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition." *Id.* See also *National Soc'y of Professional Eng'rs v. United States*, 435 U.S. 679, 692 (1978).

71. See *United States v. Associated Press*, 326 U.S. 1, 14-15 (1945); *United States v. Colgate & Co.*, 250 U.S. 300, 307 (1919).

72. State statutes in many instances expressly discourage price competition and contemplate uniform prices for uniform policies through the use of rating bureaus. See *Schwartz v. Commonwealth Land Title Ins. Co.*, 374 F. Supp. 564, 569 (E.D. Pa.), *order entered*, 384 F. Supp. 302 (E.D. Pa. 1974); *Rosenberg*, *supra* note 16, at 201-05. In the absence of price competition, title companies can compete with respect to the quality of their loss elimination practices and the speed with which these procedures and the closing of a sale are completed.

73. See generally *Klor's, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207, 212-14 (1959); *Eastern States Retail Lumber Dealers' Ass'n v. United States*, 234 U.S. 600, 609-14 (1914); *Union Leader Corp. v. Newspapers of New England, Inc.*, 180 F. Supp. 125, 140-41 (D. Mass.), *modified in part and aff'd in part*, 284 F.2d 582 (1st Cir. 1960), *cert. denied*, 365 U.S. 833 (1961); *Barber, Refusals to Deal Under the Federal Antitrust Laws*, 103 U. PA. L. REV. 847 (1955); Comment, *Concerted Refusals To Deal Under the Federal Antitrust Laws*, 71 HARV. L. REV. 1531 (1958).

74. See *Klor's, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207, 212-13 (1959).

75. *Id.* Concerted refusals to deal "cripple the freedom of traders and thereby restrain their ability to sell in accordance with their own judgment." *Id.* at 212, quoting *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons*, 340 U.S. 211, 213 (1951). Accordingly, "[a]n act harmless when done by one may become a public wrong when done by many acting in concert, for it then takes on the form of a conspiracy, and may be prohibited or punished, if the result be hurtful to the public. . . ." *Eastern States Retail Lumber Dealers' Ass'n v. United States*, 234 U.S. 600, 614 (1914), quoting *Grenada Lumber Co. v. Mississippi*, 217 U.S. 433, 440-41 (1910). See also *Union Leader Corp. v. Newspapers of New England, Inc.*, 180 F. Supp. 125, 140-41 (D. Mass.), *modified in part and aff'd in part*, 284 F.2d 582 (1st Cir. 1960), *cert. denied*, 365 U.S. 833 (1961).

76. See *United States v. General Motors Corp.*, 384 U.S. 127, 144-46 (1966); *Klor's, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207, 209 (1959); *Silver v. New York Stock Exch.*, 196 F. Supp. 209, 222 (S.D.N.Y. 1961), *rev'd*, 302 F.2d 714 (2d Cir. 1962), *rev'd*, 373 U.S. 341 (1963).

herently unreasonable under section 1 of the Sherman Act and are therefore illegal per se.⁷⁷

Concerted refusals to deal can be characterized as primary or group boycotts and as secondary boycotts.⁷⁸ A primary boycott is an agreement to refrain from dealing with another or to peaceably persuade others from dealing with him.⁷⁹ A secondary boycott is the use of economic pressure upon others to cause them to cease dealing with a third person because of fear of loss or harm to themselves or their business.⁸⁰

As recognized in *Union Leader Corp. v. Newspapers of New England, Inc.*,⁸¹ an agreement to deal exclusively with one entity is an agreement to boycott its competitors.⁸² An agreement by attorneys to refer business exclusively to the bar-related company is thus equivalent to a boycott of commercial title insurance companies. Such a group boycott, whether produced by peaceful persuasion or by blatant coercion and intimidation, is prohibited by the Sherman Act.⁸³ It is important to observe that bar-related companies have developed close relationships with organized bar associations⁸⁴ and prominent

77. See *United States v. General Motors Corp.*, 384 U.S. 127, 145-58 (1966); *Silver v. New York Stock Exch.*, 373 U.S. 341, 364-66 (1963); *Radiant Burners, Inc. v. Peoples Gas Light & Coke Co.*, 364 U.S. 656, 659-60 (1961) (per curiam); *Klor's, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207, 212 (1959); *Fashion Originators' Guild v. FTC*, 312 U.S. 457, 467-68 (1941). At least one court has indicated that these observations about per se illegality may be dicta and that application of the per se rule is restricted to certain categories of concerted refusals to deal. *McQuade Tours, Inc. v. Consolidated Air Tours Manual Comm.*, 467 F.2d 178, 186-87 (5th Cir. 1972), cert. denied, 409 U.S. 1109 (1973).

78. See Barber, *supra* note 73, at 872-79.

79. *Id.* at 872-73.

80. See *Duplex Printing Press Co. v. Deering*, 254 U.S. 443, 446 (1921); *Professional & Business Men's Life Ins. Co. v. Bankers Life Co.*, 163 F. Supp. 274, 281-83 (D. Mont. 1958).

81. 180 F. Supp. 125 (D. Mass.), modified in part and *aff'd in part*, 284 F.2d 582 (1st Cir. 1960), cert. denied, 365 U.S. 833 (1961).

82. 180 F. Supp. at 140. In *Union Leader*, a group of businessmen offered their advertising to a newspaper to induce it to publish an edition in competition with an existing paper that was involved in a labor dispute. *Id.* at 129-30. It "must have been generally realized by all . . . that 'as a practical matter, if you gave your advertising to the Journal you would not be advertising in the Gazette.'" *Id.* at 131. For a further discussion of *Union Leader*, see notes 97-100 *infra*.

83. See, e.g., *Duplex Printing Press Co. v. Deering*, 254 U.S. 443, 468 (1921); *Lawlor v. Loewe*, 235 U.S. 522, 534 (1915); *Harlem River Consumers Coop., Inc. v. Associated Grocers of Harlem, Inc.*, 408 F. Supp. 1251, 1284 (S.D.N.Y. 1976); *Vandervelde v. Put & Call Brokers & Dealers Ass'n*, 344 F. Supp. 118, 141 (S.D.N.Y. 1971); *Cooperativa De Seguros Multiples De Puerto Rico v. San Juan*, 294 F. Supp. 627, 629 (D.P.R. 1968); *Caldwell-Clements, Inc. v. Cowan Publishing Corp.*, 130 F. Supp. 326, 328 (S.D.N.Y. 1955). See also *Professional & Business Men's Life Ins. Co. v. Bankers Life Co.*, 163 F. Supp. 274, 281-83 (D. Mont. 1958).

84. BAR-RELATED TITLE ASSURING ORGANIZATIONS, *supra* note 1, at 12-13; HOW-TO-DO-IT: BAR-RELATED TITLE ASSURING ORGANIZATIONS, *supra* note 1, at 20. The establishment of bar-related companies is encouraged, aided, and assisted by a standing committee of the American Bar Association. BAR-RELATED TITLE ASSURING ORGANIZATIONS, *supra* note 1, at 4; HOW-TO-DO-IT: BAR-RELATED ASSURING ORGANIZATIONS, *supra* note 1, at v. Additionally, "[t]he close relationship of bar-related title assurance to the organized bar is best shown by the fact that several of the bar-related companies were organized as a result of the efforts of bar

members of the local bar. Furthermore, recruitment of new shareholders or member attorneys is accomplished by repeated personal visits by other lawyers.⁸⁵ Exclusive policy use by those who become members or stockholders is policed by records kept by the company and by regular personal visits "to the office of any member who is not issuing policies on a regular basis."⁸⁶ The purpose of such activities is to convince the attorney, who "thinks it serves his professional purposes just as well to order title insurance in most cases from one or more of the commercial insurers," to change his business to the bar-related company.⁸⁷ During these visits, attempts are made to persuade the attorneys that they are not offering their clients the best coverage and are in fact undermining the local bar or encouraging unauthorized practice.⁸⁸ Such collective reinforcement of the commitment to use bar-related rather than commercial insurers is the type of peaceful persuasion that has been found to be a concerted refusal to deal.⁸⁹ For example, in *Professional & Business Men's Life Insurance Co. v. Bankers Life Co.*,⁹⁰ the United States District Court for the District of Montana found a group attempt to destroy the plaintiff's insurance business by efforts to persuade the public not to deal with the plaintiff and to dissuade prospective agents from representing the plaintiff sufficient to state a claim of an illegal boycott under section 1 of the Sherman Act.⁹¹

associations in those particular states." *Id.* at 20. The Ohio Bar Title Insurance Co. and the National Attorneys' Title Assurance Fund, Inc., operating in Indiana, were organized by their state bar associations, both of which own, through their state bar association foundations, stock of the bar-related title company. *Id.* at 6. The Connecticut Attorneys' Title Guaranty Fund, Inc. is an outgrowth of the Committee on Real Property of the Connecticut Bar Association. See *Connecticut Attorneys' Title Guaranty Fund, Inc.*, 38 CONN. B.J. 675, 675 (1964). Organization of a bar-related title insurance company in Massachusetts was approved at the 1975 meeting of the Board of Delegates of the Massachusetts Bar Association. ABA Standing Committee on Lawyers' Title Guaranty Funds, *Massachusetts Bar Association Approved Formation Of Fund*, LAWYERS' TITLE GUARANTY FUNDS NEWSLETTER, Nov. 1975, at 1, *quoted in* AMERICAN LAND TITLE ASSOCIATION, FINAL REPORT OF THE SPECIAL COMMITTEE TO STUDY BAR RELATED TITLE GUARANTY FUNDS 40. Although funded independently, the Lawyers' Title Guaranty-Fund, operating in Florida, also works closely with the state bar and co-sponsors programs with the local and national bars. HOW-TO-DO-IT: BAR-RELATED TITLE ASSURING ORGANIZATIONS, *supra* note 1, at 20.

85. HOW-TO-DO-IT: BAR-RELATED TITLE ASSURING ORGANIZATIONS, *supra* note 1, at 11.

86. *Id.* at 12.

87. *Id.*

88. See generally BAR-RELATED TITLE ASSURING ORGANIZATIONS, *supra* note 1, at 3-14; HOW-TO-DO-IT: BAR-RELATED TITLE ASSURING ORGANIZATIONS, *supra* note 1, at 1-3, 19-27.

89. See, e.g., *Eastern States Retail Lumber Dealers' Ass'n v. United States*, 234 U.S. 600, 605-14 (1914); *Professional & Business Men's Life Ins. Co. v. Bankers Life Co.*, 163 F. Supp. 274, 281-85 (D. Mont. 1958).

90. 163 F. Supp. 274 (D. Mont. 1958).

91. *Id.* at 281-83. See *Feminist Women's Health Center v. Mohammad*, 415 F. Supp. 1258 (N.D. Fla. 1976) (group boycott by local obstetricians of an abortion clinic); *Union Leader Corp. v. Newspapers of New England, Inc.*, 180 F. Supp. 125 (D. Mass.), *modified in part and aff'd*

In order for a group boycott to be held in violation of the Sherman Act, there must be evidence of a combination, contract, or agreement, which has been defined as "a unity of purpose or a common design and understanding, or a meeting of minds," on the agreed upon conduct.⁹² One court has explained that "[a]cquiescence in a course of conduct, the necessary consequences of which would be to restrain trade, is sufficient to imply intent and to establish a conspiracy."⁹³ The group conduct involved in organizing a bar-related company, in visiting and contacting prospective members, and in repeatedly visiting shareholders who continue to use commercial title companies,⁹⁴ illustrates the necessarily joint and organized conduct involved. Moreover, the existence of the anticompetitive intent to exclude laymen from real estate transfers and to prevent lawyers from writing policies for or referring clients to commercial companies is central to the nature of the bar-related title company movement and is expressly set forth in its literature,⁹⁵ so that it need not be implied from conduct.

Union Leader illustrates the application of the elements of a section 1 Sherman Act group boycott in a situation parallel to that of the bar-related title company.⁹⁶ During a strike against the only newspaper in Haverhill, Massachusetts, a small group of advertisers who controlled approximately five percent of the existing newspaper's advertising agreed to place all their advertising in a new town newspaper which they had requested publisher William Loeb to establish.⁹⁷ The group also agreed to persuade other advertisers to do likewise.⁹⁸ When one of the group's members subsequently placed advertisements in the rival paper, the others expressed their disap-

in part, 284 F.2d 582 (1st Cir. 1960), *cert. denied*, 365 U.S. 833 (1961) (group boycott by local advertisers of newspaper with group disapproval of members who broke ranks and advertised in it). See also cases cited note 83 *supra*.

92. *American Motor Inns, Inc. v. Holiday Inns, Inc.*, 521 F.2d 1230, 1243 (3d Cir. 1975), quoting *American Tobacco Co. v. United States*, 328 U.S. 781, 810 (1946). See also *United States v. General Motors Corp.*, 384 U.S. 127, 140-45 (1966); *Ford Motor Co. v. Webster's Auto Sales, Inc.*, 361 F.2d 874, 878 (1st Cir. 1966).

93. *Feminist Women's Health Center v. Mohammad*, 415 F. Supp. 1258, 1267 (N.D. Fla. 1976) (citation omitted). See *United States v. Paramount Pictures, Inc.*, 334 U.S. 131, 161 (1948); *Interstate Circuit, Inc. v. United States*, 306 U.S. 208, 227 (1939); *Coleman Motor Co. v. Chrysler Corp.*, 525 F.2d 1338, 1345 (3d Cir. 1975); *Industrial Bldg. Materials, Inc. v. Interchemical Corp.*, 437 F.2d 1336, 1343 (9th Cir. 1970); *Flintkote Co. v. Lysfjord*, 246 F.2d 368, 374 (9th Cir.), *cert. denied*, 355 U.S. 835 (1957).

94. See notes 84-87 and accompanying text *supra*.

95. See BAR-RELATED TITLE ASSURING ORGANIZATIONS, *supra* note 1, at 5-7; HOW-TO-DO-IT: BAR-RELATED TITLE ASSURING ORGANIZATIONS, *supra* note 1, at 1-2, 11-13.

96. See 180 F. Supp. at 140-41. See notes 81-83 and accompanying text *supra*.

97. 180 F. Supp. at 130-31.

98. *Id.* at 131.

proval.⁹⁹ The agreement by the advertisers in *Union Leader* and by the organizing attorneys in the case of a bar-related title insurer both contain promises by suppliers of business to place all their business with a new company rather than with an existing one. These promises would be enforceable by group persuasion, pressure, and disapproval. The *Union Leader* court found the conduct of Loeb to be "an encouragement to a group boycott in which each one of the eight . . . acted as a watch-dog with respect to his seven fellows and other advertisers in Haverhill."¹⁰⁰

Other principles underlying bar-related title insurance companies are also indicative of a group boycott. For example, the proponents of bar-related title insurance find the elimination of the attorney-client relationship in real estate transactions conducted by commercial companies to be contrary to the public interest.¹⁰¹ In establishing bar-related insurance companies as a means of preserving their real estate practices from the willingness of the public to dispense with privately retained counsel in favor of commercial title companies, the conduct of private real estate attorneys resembles that of private, office-based physicians. In the 1940's, private physicians found the development of group health practices dangerous to the doctor-patient relationship and contrary to the public interest.¹⁰² In *American Medical Association v. United States*,¹⁰³ efforts by a group of private, office-based physicians to persuade doctors not to consult for group health association physicians and to deny facilities at hospitals to employees of group health associations were held to constitute a conspiracy in violation of the Sherman Act.¹⁰⁴ The United States Court of Appeals for

99. *Id.* At first, the advertisers advertised in the new publication gratuitously. *Id.* Eventually, weekly payments and a share of profits were agreed to between the advertisers and the publisher of the newspaper. *Id.*

100. *Id.* at 141. For analogous cases, see *United States v. Insurance Bd.*, 188 F. Supp. 949, 955-56 (N.D. Ohio 1960) (refusal by a group of stock insurance agencies to join in a trade association with agents representing mutual insurers); *United States v. New Orleans Ins. Exch.*, 148 F. Supp. 915, 917-20 (E.D. La. 1957), *aff'd per curiam*, 355 U.S. 22 (1957) (same factual setting as *Insurance Board*).

101. See BAR-RELATED TITLE ASSURING ORGANIZATIONS, *supra* note 1, at 5-7, 13; HOW-TO-DO-IT: BAR-RELATED TITLE ASSURING ORGANIZATIONS, *supra* note 1, at 1-3, 25-26; Miles, *supra* note 25, at 9.

102. See *American Medical Ass'n v. United States*, 130 F.2d 233, 238-41 (D.C. Cir. 1942), *aff'd*, 317 U.S. 519 (1943).

103. 130 F.2d 233 (D.C. Cir. 1942), *aff'd*, 317 U.S. 519 (1943).

104. 319 U.S. at 526-33. The United States Supreme Court found the activities of the defendants to be in violation of § 3 of the Sherman Act, 15 U.S.C. § 3 (1976) (similar to § 1 for District of Columbia). 319 U.S. at 529-33. The conduct by the doctors exceeded that of the organizers of bar-related title companies in that membership in the American Medical Association and the use of hospital facilities to care for patients were actually denied to group health association physicians. See *id.* at 527. Actual coercion was involved in the case as some group health association physicians were forced to resign and others were threatened with disciplinary

the District of Columbia Circuit noted that the private physicians were attempting to impose their views of proper medical practice upon the profession and the public by group action to forestall a competing form of practice, rather than by persuading the public or the legislature to protect their interest.¹⁰⁵ In dictum, the court analogized the conduct of the physicians to conduct by lawyers against, *inter alia*, commercial title companies:

Again, to use the analogy of the legal profession, the activities of the American Medical Association in the present case more nearly resemble the situation which would exist if the American Bar Association or one of the state associations should undertake to destroy, by methods of criminal conspiracy, business organizations which employ lawyers, such as automobile associations, collection agencies, bankers' associations and title and trust companies. It is true that they have attempted, by means of actions to forbid unlawful practice of the law and by efforts to secure legislation, thus to prevent activities which they regarded as encroachments upon the practice of law. Such actions at law and such efforts to secure enactment of legislation are equally available to appellants. But there is a clearly defined line of demarcation here which must be observed if the penalties of the Sherman Act are to be avoided. As we suggested in our earlier opinion, appellants have open to them always the safer and more kindly weapons of legitimate persuasion and reasoned argument, as a means of preserving professional esprit de corps, winning public sentiment to their point of view or securing legislation. But they have no license to commit crime. When they go so far as to impose unreasonable restraints, they become subject to the prohibition of the Sherman Act. This, then, represents a limit to professional group activities.¹⁰⁶

action. See *United States v. American Medical Ass'n*, 110 F.2d 703, 706-07 (D.C. Cir.), *cert. denied*, 310 U.S. 644 (1940), *aff'd after remand*, 130 F.2d 233 (D.C. Cir. 1942), *aff'd*, 317 U.S. 519 (1943). The conduct of bar-related title companies and their shareholder attorneys appears limited to persuasion and group disapproval as a means of enforcing the boycott. In view of current authority that persuasion and group disapproval are equally effective in manifesting a group boycott, *see cases cited note 83 supra*, it is submitted that the distinction between the conduct of the physicians in *American Medical Ass'n* and the attorneys in a bar-related title company should not justify a difference in result.

105. 130 F.2d at 248.

106. *Id.* (footnotes omitted). The practices found to violate § 1 of the Sherman Act in *American Medical Ass'n* and the practices of the private attorneys organizing bar-related title companies should be compared with activities undertaken by private doctors through organization of Blue Shield plans. The typical Blue Shield plan or state medical plan is a nonprofit corporation organized originally by physicians pursuant to either special or general purpose legislation as a prepaid medical plan. See generally *Ballard v. Blue Shield*, 543 F.2d 1075 (4th Cir. 1976), *cert. denied*, 430 U.S. 922 (1977); *Ohio v. Ohio Medical Indem. Inc.*, [1976-2] Trade Cas. (CCH) 70,110 (S.D. Ohio 1976); *United States v. Oregon State Medical Soc'y*, 95 F. Supp. 103 (D. Or. 1950), *aff'd*, 343 U.S. 326 (1952). Physicians are not subjected to group pressure,

By establishing a bar-related title company, by agreeing both explicitly and implicitly to deal only with it, and by utilizing group pressure and the prestige of the bar to persuade other lawyers to do business only with it, the organizers of the bar-related title companies have also gone beyond unauthorized practice actions, public persuasion, and attempts to secure legislation in order to impose their concept of the public interest upon real estate purchasers.

It is frequently stated that concerted refusals to deal are per se illegal and cannot be justified under the rule of reason.¹⁰⁷ Although

persuasion, or coercion to participate in state prepaid medical plans to the exclusion of other health insurance or prepaid health plans. 95 F. Supp. at 115. To the contrary, a physician may accept patients and reimbursement from commercial health insurance plans if he chooses. *Id.* at 115-20. Nonetheless, charges that state prepaid medical plans and member physicians have refused to deal with commercial insurers have resulted in antitrust challenges under § 1 of the Sherman Act, *id.* at 123 app., as have charges that Blue Shield plans have served as an instrumentality to exclude chiropractors from rendering services which the member physicians felt should be part of the practice of medicine by denying the nondoctors Blue Cross-Blue Shield reimbursement. *Ballard v. Blue Shield*, 543 F.2d at 1077-79. Bar-related title companies and their organizing attorneys engage in practices comparable to those alleged in *Oregon State Medical Soc'y* and *Ballard* through their efforts to persuade shareholder attorneys not to write policies for or to deal with commercial companies, thereby excluding nonprivate, office based lawyers from what the shareholder attorneys consider to be part of the practice of law. See HOW-TO-DO-IT: BAR-RELATED TITLE ASSURING ORGANIZATIONS, *supra* note 1, at 1-2.

There are competitive differences between Blue Shield plans and bar-related companies which make Blue Shield plans a questionable model for real estate attorneys seeking to establish bar-related title companies. For example, Blue Shield plans are not dependent upon medical personnel for subscribers, while title insurance companies are dependent upon real estate professionals, including lawyers, for referral of policyholders. See *Hofflander & Shulman, supra* note 22, at 437-38. See notes 51-53 and accompanying text *supra*. Accordingly, the organization by a group of doctors of a Blue Shield plan does not impose any restriction on the ability of other health insurers to compete for policyholders, since the member doctors do not control the placement of the policyholders with a particular health insurer. The reverse competition which characterizes the title insurance industry, however, gives lawyers power to control placement of policyholders, so that organization of a bar-related title company inherently restricts the ability of commercial title companies to compete for the prospective policyholders controlled by the organizing attorneys. See notes 22-27 and accompanying text *supra*.

Conduct by the Allen County, Indiana, Bar Association to exclude commercial title companies from real estate transactions is the subject of a pending action brought by the Department of Justice, alleging violations of § 1 and § 2 of the Sherman Act. *United States v. Allen County Ind. Bar Ass'n*, No. F-79-0042 (N.D. Ind. Mar. 2, 1979). The complaint alleges a combination or conspiracy among the members of the Allen County Bar Association, and certain unnamed co-conspirators, presumably lending institutions, "to restrain and prevent title insurance companies from competing with the defendants' members in the business of certifying title to residential real estate in Fort Wayne." *Id.* at 4. The action resulted from a local bar association marketable title standard that advised examination of title by lawyers in addition to title insurance. *Id.* at 5. The complaint seeks an injunction against promulgation or adherence to any such "collective statement" that had "the purpose or effect of discouraging the use or acceptance of title insurance to certify the lack of defects in title" and an injunction prohibiting the bar association from "any similar agreement or concert of action." *Id.* at 6.

107. See note 77 and accompanying text *supra*. The United States Court of Appeals for the Fifth Circuit in *McQuade Tours, Inc. v. Consolidated Air Tour Manual Comm.*, 467 F.2d 178 (5th Cir. 1972), *cert. denied*, 409 U.S. 1109 (1973), sought to limit the broad language of cases adopting the per se rule to specific factual situations: 1) horizontal combinations among competitors at the same level of competition; 2) vertical combinations among traders at different

there is no longer any doubt of the applicability of the antitrust laws to the professions themselves,¹⁰⁸ doubt has been expressed concerning the blanket application of traditional per se rules to conduct by learned professions.¹⁰⁹ Justice Stevens has stated "that the inquiry mandated by the Rule of Reason is whether the challenged agreement is one that promotes competition or one that suppresses competition."¹¹⁰ The attorneys' agreement to do business only with the bar-related company reduces competition by excluding commercial title companies from competing for the business controlled by the attorneys. Frequent personal visits and group pressure from fellow members of the bar, coupled with assertions that one is acting contrary to the best interests of one's clients and the profession by doing business with commercial title companies, enforce compliance.¹¹¹ Since the effect of the agreement is to reduce competition by foreclosing commercial title companies from part of the market, the agreement would not be justifiable under the rule of reason.¹¹²

A secondary boycott, another type of concerted refusal to deal, is a concerted attempt to cause others not to do business with a

levels to exclude direct competitors; and 3) boycotts to influence the commercial practices of the boycott victims. 467 F.2d at 186-87. As has been stated, the purpose of those organizing a bar-related insurer is to exclude their direct competitors from that part of the real estate transaction which they consider to be part of the practice of law. This exclusion is a horizontal restraint. To accomplish this result, the organizers establish a new company, the bar-related insurer, and enter into a vertical combination with it under which the lawyers will be restrained from referring business to its competitors, and the company will refrain from dealing with the lawyers' competitors, a situation involving both horizontal and vertical restraints. Therefore, even under the limited interpretation in *McQuade*, the per se rule would remain applicable to the lawyers' agreement to organize a bar-related company.

108. See *National Soc'y of Professional Eng'rs v. United States*, 435 U.S. 679, 696 (1978); *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 785-88 (1975); *American Medical Ass'n v. United States*, 130 F.2d 233, 245-48 (D.C. Cir. 1942), *aff'd*, 317 U.S. 519, 528-29 (1943); *Feminist Women's Health Center v. Mohammad*, 415 F. Supp. 1258, 1263 (N.D. Fla. 1976).

109. See *National Soc'y of Professional Eng'rs v. United States*, 435 U.S. 679, 699-701 (1978) (Blackmun, J., concurring). Justice Blackmun observed in *National Society* that traditional per se rules applicable in commercial contexts may not be applicable to conduct by the professions where justifications other than competitive or economic ones may be present. *Id.* at 701 (Blackmun, J., concurring). See *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 788 n.17 (1975) ("It would be unrealistic to view the practice of professions as interchangeable with other business activities, and automatically to apply to the professions antitrust concepts which originated in other areas."); *Feminist Women's Health Center v. Mohammad*, 415 F. Supp. 1258, 1269 (N.D. Fla. 1976) (permitting a "good faith" affirmative defense to a Sherman Act § 1 boycott complaint against local obstetricians by an abortion center).

110. *National Soc'y of Professional Eng'rs v. United States*, 435 U.S. 679, 691 (1978).

111. See HOW-TO-DO-IT: BAR-RELATED TITLE ASSURING ORGANIZATIONS, *supra* note 1, at 11-13.

112. The fact that members of a profession believe that their conduct is in the public interest is not a factor to be considered under the rule of reason. See *National Soc'y of Professional Eng'rs v. United States*, 435 U.S. 679, 686-92 (1978). The public interest should be determined by the public through free competition or by the legislature, rather than by organizations of private individuals. See *American Medical Ass'n v. United States*, 130 F.2d 233, 248-49 (D.C. Cir. 1942), *aff'd*, 317 U.S. 519 (1943); Comment, *supra* note 73, at 1538-39.

third party for fear of loss or harm to themselves or their business.¹¹³ Bar-related companies and their shareholders attempt to persuade realtors, lenders, abstractors, and other title insurance business producers to refer business to the bar-related company and its shareholders.¹¹⁴ Attorneys also serve as business referrers for realtors, abstractors, and lenders as well as title companies. It does not appear, however, that bar-related companies advise or encourage their shareholders not to refer business to those real estate professionals who refer business to commercial companies. Absent any such organized behavior by bar-related title companies or their organizing shareholders, neither the attorneys who organize the companies nor the bar-related company should be considered to be engaged in a secondary boycott of other real estate professionals.¹¹⁵

2. Attempt to Monopolize

Section 2 of the Sherman Act makes illegal any agreement or combination to monopolize or attempt to monopolize interstate commerce.¹¹⁶ Section 2 has also been interpreted to prohibit one who possesses a lawful monopoly over one product or activity from using that monopoly to gain control of another segment of commerce.¹¹⁷ Except to the extent that specific activities may be considered in certain states to be part of the practice of law,¹¹⁸ attorneys currently

113. See cases cited note 80 *supra*.

114. See HOW-TO-DO-IT: BAR-RELATED TITLE ASSURING ORGANIZATIONS, *supra* note 1, at 19.

115. A sudden shift of referrals by shareholders of a bar-related company from realtors or lenders who do business with commercial title companies to those doing business with a bar-related company exclusively could be evidence of such a secondary boycott. Absent any indication in the literature of such occurrence, it will not be presumed.

116. 15 U.S.C. § 2 (1976). See generally *Otter Tail Power Co. v. United States*, 410 U.S. 366 (1973); *Swift & Co. v. United States*, 196 U.S. 375 (1905).

117. See *Times-Picayune Publishing Co. v. United States*, 345 U.S. 594, 614 (1953) (no unlawful tying arrangement found in newspaper advertising contracts since only one market and one product were involved); *United States v. Paramount Pictures, Inc.*, 334 U.S. 131, 173 (1948) (motion picture producers and distributors restrained and monopolized trade in the distribution of films); *United States v. Griffith*, 334 U.S. 100, 106-07 (1948) (unlawful for motion picture circuit operator to use monopoly in noncompetitive towns to obtain exclusive film rights in competitive towns); *Schine Chain Theatres, Inc. v. United States*, 334 U.S. 110, 116-17 (1948) (theatre circuit corporation used monopoly power obtained by combining buying power of theatres in competitive and noncompetitive towns to deprive its competition of certain motion pictures); *Surety Title Ins. Agency, Inc. v. Virginia State Bar*, 431 F. Supp. 298, 303 (E.D. Va. 1977), *vacated and remanded with instructions*, 571 F.2d 205 (4th Cir.), *cert. denied*, 436 U.S. 941 (1978) (attempt to extend monopoly over drafting of titles to title insurance).

118. See cases cited in note 13 *supra*.

In English common law, real estate conveyancing was not considered part of attorney's practice. The law list for the year 1783 thus listed the members of the bar and in addition "some Conveyancers, who were not called to the Bar. These were mostly Roman Catholics who adopted this line because they were incapable of being called." F. MACKINNON, *ESSAYS ON*

have no legal monopoly over the conveyancing of real estate or the preparation of documents incident thereto. A central concept behind the bar-related title movement is its usefulness in preserving for or limiting to private lawyers all noninsurance aspects of real estate conveyances.¹¹⁹ This purpose raises the question whether the organization by private lawyers of a bar-related title company to issue policies only through lawyers to those persons who employ private lawyers to handle the conveyance, or to their lenders, is a combination or attempt by the organizing attorneys to establish a monopoly of real estate transfers. In *Ballard v. Blue Shield*,¹²⁰ the United States Court of Appeals for the Fourth Circuit held that similar allegations by chiropractors of an attempt to monopolize certain medical treatments by denying patients health insurance coverage for chiropractic services stated a claim under sections 1 and 2 of the Sherman Act.¹²¹

An attempt to monopolize is the employment of practices which would, if successful, accomplish monopolization or create a dangerous probability of success of monopolization and which are utilized by the members of the combination for that purpose.¹²² The definitions of

THE LAW AND LAWYERS, 2 JOHNSON'S ENGLAND 287, *quoted in* *La Brum v. Commonwealth Title Co.*, 358 Pa. 239, 245 n.4, 56 A.2d 246, 249 n.4 (1948). This distinction between real estate conveyancing and the practice of law continued in the American colonies, both before and after independence: "From the earliest days in this Commonwealth, justices of the peace, aldermen and local magistrates have drawn and still continue to draw leases, deeds and mortgages without holding themselves out as lawyers or engaging in the practice of law" 358 Pa. at 244, 56 A.2d at 248. Lawyers also handled real estate conveyances, but had no monopoly on them. *See generally* *Watson v. Muirhead*, 57 Pa. 161, 167-68 (1868) (liability for negligence of conveyancer).

119. *See* notes 36-42 and accompanying text *supra*. The goal is to exclude lawyers employed by commercial title companies, as well as nonlawyers, from real estate conveyances. *See* HOW-TO-DO-IT: BAR-RELATED TITLE ASSURING ORGANIZATIONS, *supra* note 1, at 2.

120. 543 F.2d 1075 (4th Cir. 1976), *cert. denied*, 430 U.S. 922 (1977).

121. 543 F.2d at 1077-78.

122. *American Tobacco Co. v. United States*, 328 U.S. 781, 785 (1946). *See also* *Coleman Motor Co. v. Chrysler Corp.*, 525 F.2d 1338, 1348 (3d Cir. 1975); *Agrashell, Inc. v. Hammons Prods. Co.*, 479 F.2d 269, 284-85 (8th Cir.), *cert. denied*, 414 U.S. 1022 (1973); *Cornwell Quality Tools Co. v. C.T.S. Co.*, 446 F.2d 825, 832 (9th Cir. 1971), *cert. denied*, 404 U.S. 1049 (1972); *Merit Motors, Inc. v. Chrysler Corp.*, 417 F. Supp. 263, 269 (D.D.C. 1976).

One court has stated that § 2 of the Sherman Act actually proscribes three separate offenses: 1) actual monopolization; 2) attempts to monopolize; and 3) combinations or conspiracies to monopolize. *Coleman Motor Co. v. Chrysler Corp.*, 525 F.2d at 1348 n.16. The essential element of a conspiracy to monopolize is the existence of a specific intent to monopolize some appreciable part of interstate commerce. *See, e.g.,* *Salco Corp. v. General Motors Corp.*, 517 F.2d 567, 576 (10th Cir. 1975); *United States v. Consolidated Laundries Corp.*, 291 F.2d 563, 573 (2d Cir. 1961); *Carlo C. Gelardi Corp. v. Miller Brewing Co.*, 421 F. Supp. 237, 244-45 (D.N.J. 1976). *See also* *Hudson Valley Asbestos Corp. v. Tougher Heating & Plumbing Co.*, 510 F.2d 1140, 1144 (2d Cir.), *cert. denied*, 421 U.S. 1011 (1975).

There is language in certain cases indicating that proof of a probability of success in a particular relevant market is not an element of a § 2 violation for conspiracy to monopolize, as distinguished from an attempt to monopolize. *See* *Salco Corp. v. General Motors Corp.*, 517 F.2d at 576; *United States v. Consolidated Laundries Corp.*, 291 F.2d at 573. *See also* *United States v. Yellow Cab Co.*, 332 U.S. 218, 225-26 (1947); *Turner, Antitrust Policy And The Cel-*

interstate commerce, combination, and intent for purposes of an attempt to monopolize under section 2 of the Sherman Act are the same as under section 1.¹²³ Accordingly, refusals to deal can constitute sufficient acts or practices to establish an attempt to monopolize.¹²⁴ It has been seen that the conduct of private attorneys establishing a bar-related title company constitutes a concerted refusal to deal under section 1.¹²⁵ Whether the attorneys' refusal to deal with commercial title companies is an attempt to monopolize in violation of section 2 of the Sherman Act consequently depends on whether there is a dangerous probability of success.¹²⁶

The requisite likelihood or dangerous probability of success of an attempt to monopolize is established by proof of the possession of monopoly power in the relevant market.¹²⁷ Monopoly power has

lophane Case, 70 HARV. L. REV. 281, 294, 304-05 (1956). As a practical matter, the cases do examine the existence of a significant probability of success in a relevant market in determining whether there is a conspiracy to monopolize under § 2 of the Sherman Act. For example, in *Hudson Valley Asbestos Corp.*, the court stated that "specific intent to monopolize, and not monopoly power, is the essential element," but nonetheless affirmed judgment for the defendants in a § 2 conspiracy case where "the market at which the alleged conspiracy was supposedly directed . . . [was] not precisely defined." 510 F.2d at 1144 (footnote omitted). The court considered the absence of any likelihood of success as evidence of the lack of specific intent to monopolize any appropriate market. *Id.* Similarly, the court in *Miller Brewing* noted that there was no "dangerous probability of achieving monopoly power in Middlesex and Somerset counties." 421 F. Supp. at 245 (footnote omitted). In light of these cases, a significant question exists as to whether probability of success in a defined relevant market is not in fact essential to a Sherman Act § 2 conspiracy to monopolize violation and, accordingly, whether there is any substantial difference in the elements necessary to establish a group attempt to monopolize and a conspiracy to monopolize.

123. See *Times-Picayune Publishing Co. v. United States*, 348 U.S. 594 (1955); *Union Leader Corp. v. Newspapers of New England, Inc.*, 284 F.2d 582 (1st Cir. 1960), *cert. denied*, 365 U.S. 833 (1961). See also notes 60-66, 92 & 93 and accompanying text *supra*.

124. *Six Twenty-Nine Prods., Inc. v. Rollins Telecasting, Inc.*, 365 F.2d 478, 482 (5th Cir. 1966). The United States Court of Appeals for the Fifth Circuit has stated: "In more recent cases the Supreme Court has firmly established the principle that Section 2 of the Sherman Act prohibits an enterprise from refusing to deal with another business entity when this course of action is undertaken in furtherance of monopolization of the relevant market." *Id.* See also *Lorain Journal Co. v. United States*, 342 U.S. 143, 154 (1951); *Union Leader Corp. v. Newspapers of New England, Inc.*, 130 F. Supp. 125, 140 (D. Mass.), *modified in part and aff'd in part*, 284 F.2d 582 (1st Cir. 1960), *cert. denied*, 365 U.S. 833 (1961).

125. See notes 73-112 and accompanying text *supra*.

126. See note 122 and accompanying text *supra*.

127. See, e.g., *United States v. Empire Gas Corp.*, 537 F.2d 296, 298-99, 302 (8th Cir. 1976), *cert. denied*, 429 U.S. 1122 (1977); *Coleman Motor Co. v. Chrysler Corp.*, 525 F.2d 1338, 1348 (3d Cir. 1975); *Cliff Food Stores, Inc. v. Kroger, Inc.*, 417 F.2d 203, 207 (5th Cir. 1969); *Hiland Dairy, Inc. v. Kroger Co.*, 402 F.2d 968, 974 (8th Cir. 1968), *cert. denied*, 395 U.S. 961 (1969); *Carlo C. Gelardi Corp. v. Miller Brewing Co.*, 421 F. Supp. 237, 244-45 (D.N.J. 1976); *Merit Motors, Inc. v. Chrysler Corp.*, 417 F. Supp. 263, 269 (D.D.C. 1976), *aff'd*, 569 F.2d 666 (D.C. Cir. 1977). The United States Court of Appeals for the Third Circuit stated in *Coleman Motors* that "[a]nother essential element of the offense [of attempt to monopolize] is that the actor have sufficient market power to come dangerously close to success." 525 F.2d at 1348 (citations omitted). *But see* *Lessig v. Tidewater Oil Co.*, 327 F.2d 459, 474 (9th Cir. 1964) (the relevant market is not an issue in an attempt to monopolize case); *Dobbins v. Kawasaki Motors Corp.*, 362 F. Supp. 54, 60 (D. Or. 1973) (a dangerous possibility of

been defined as the power to control prices or exclude competition in the relevant market.¹²⁸ The relevant product market is composed of those products or services reasonably interchangeable for the same purposes.¹²⁹ The relevant geographic market is the geographic region in which the defendant effectively competes in regard to the relevant product market.¹³⁰

In order to evaluate the organization of a bar-related title company as a possible attempt to monopolize, the relevant markets must therefore be defined. The relevant product market would generally consist of all aspects of a real estate conveyance other than the actual underwriting of the title insurance risk.¹³¹ A product market consisting of those aspects of the real estate conveyance that under the laws of the local jurisdiction may be performed by laymen should be considered an appropriate submarket.¹³² This categorization, however, would not be the broadest possible formulation of the relevant market inasmuch as the private attorneys organizing the bar-related company also seek to exclude attorneys employed by commercial title companies from performing services in regard to real estate conveyances.¹³³ The geographic market at its broadest would be defined

success can be established without reference to substantial power in the relevant market when a claim of restraint of trade is proven). *Coleman Motors* expressly refused to follow *Lessig* and *Kawasaki Motors*. 525 F.2d at 1348 n.17.

128. See, e.g., *United States v. E.I. duPont de Nemours & Co.*, 351 U.S. 377, 389 (1956); *Twin City Sportservice, Inc. v. Charles O. Finley & Co.*, 512 F.2d 1264, 1270 (9th Cir. 1975); *Lessig v. Tidewater Oil Co.*, 327 F.2d 459, 474 (9th Cir. 1964); *Carlo C. Gelardi Corp. v. Miller Brewing Co.*, 421 F. Supp. 237, 245 n.13 (D. N.J. 1976).

129. See, e.g., *United States v. E.I. duPont de Nemours & Co.*, 351 U.S. 377, 395 (1956); *Yoder Bros. v. California-Florida Plant Corp.*, 537 F.2d 1347, 1366-67 (5th Cir. 1976), cert. denied, 429 U.S. 1094 (1977); *Coleman Motor Co. v. Chrysler Corp.*, 525 F.2d 1338, 1349 (3d Cir. 1975).

130. See, e.g., *Otter Tail Power Co. v. United States*, 410 U.S. 366, 369 (1973); *United States v. Grinnell Corp.*, 384 U.S. 563, 575-76 (1966); *Morton Bldgs. of Neb., Inc. v. Morton Bldgs., Inc.*, 531 F.2d 910, 918 (8th Cir. 1976); *Case-Swayne Co. v. Sunkist Growers, Inc.*, 369 F.2d 449, 455-56 (9th Cir. 1966), *rev'd on other grounds*, 389 U.S. 384 (1967); *Carlo C. Gelardi Corp. v. Miller Brewing Co.*, 421 F. Supp. 237, 243 (D.N.J. 1976); *Becker v. Safelite Glass Corp.*, 244 F. Supp. 625, 636 (D. Kan. 1965).

131. This would include such matters as title search, title opinion, sale and building contracts, mortgage documents, deeds, releases, required disclosure statements, escrow and closing services, and issuance of the title policy on behalf of the underwriter.

132. A submarket is a division of the broader relevant market which is in itself a distinct and separate market in which competition is restrained for purposes of the Sherman Act. See, e.g., *United States v. Grinnell Corp.*, 384 U.S. 563, 572 (1966); *Brown Shoe Co. v. United States*, 370 U.S. 294, 325 (1962); *United States v. E.I. duPont de Nemours & Co.*, 353 U.S. 586, 593-95 (1957).

133. The emphasis throughout the bar-related movement's literature is upon the attorney-client relationship between the purchaser and his privately retained attorney. See BAR-RELATED TITLE ASSURING ORGANIZATIONS, *supra* note 1, at 8-14; HOW-TO-DO-IT: BAR-RELATED TITLE ASSURING ORGANIZATIONS, *supra* note 1, at 2. Such a restriction would also exclude the attorney employed by a title agency to perform those aspects of the real estate transaction required by local law to be performed only by an attorney.

by the operations of the bar-related title company.¹³⁴ As a practical matter, frequently no statewide or even regional geographic market can be said to exist. Commerical title companies, when expanding to new areas or towns, do so by means of branch offices, local agencies, or local approved attorneys who handle searches, document preparations, closings, and recordings at the local level.¹³⁵ Deeds are usually recorded at a county level. Accordingly, those counties in which the bar-related title company does business could be selected as the relevant geographic market. Each county would then constitute a distinct submarket.

In some states, lawyers have a legal monopoly over certain parts of the real estate transaction, such as preparation of the deed.¹³⁶ In these states, participation of a lawyer in the real estate transaction is mandatory.¹³⁷ The local lawyers in any county would thus have the power to exclude commercial title companies from the county by serving as approved attorneys exclusively for the bar-related company. In such states, private lawyers organized into bar-related companies would possess the market power necessary to establish an attempt to monopolize under section 2 of the Sherman Act.¹³⁸ Furthermore, the organization of all local real estate attorneys into a bar-related company could result in an actual monopoly in many geographic areas.¹³⁹

134. In Florida, the Lawyers' Title Guaranty Fund operates statewide. AMERICAN LAND TITLE ASSOCIATION, FINAL REPORT OF THE SPECIAL COMMITTEE TO STUDY BAR RELATED TITLE GUARANTY FUNDS 24. Attorneys' Title Guaranty Fund, Inc. is qualified to do business in all of Illinois, but in practice writes policies principally in the Champaign-Urbana area. *Id.* at 36. It does almost no business in Cook County (Chicago). *Id.*

135. See Johnstone, *supra* note 1, at 505-06; Roberts, *supra* note 16, at 16.

136. See, e.g., Surety Title Ins. Agency, Inc. v. Virginia State Bar, 431 F. Supp. 298, 303 (E.D. Va. 1977), *vacated and remanded with instructions*, 571 F.2d 205 (4th Cir.), *cert. denied*, 436 U.S. 941 (1978) (only an attorney may prepare a deed); Commonwealth v. Jones & Robins, Inc., 186 Va. 30, 44, 41 S.E.2d 720, 727 (1947) (preparation of deeds is part of the practice of law in Virginia). For comparable decisions in other states in the area of unauthorized practice, see cases cited note 13 *supra*.

137. See Commonwealth v. Jones & Robins, Inc., 186 Va. 30, 44, 41 S.E.2d 720, 727 (1947).

138. Even if the commercial title company were able to enter the county by using a lay agency in the county to search titles and conduct closings and a lawyer in another city to prepare the deed, it would be placed at a competitive disadvantage by the unwillingness of the local attorneys to perform work for it.

139. See, e.g., Surety Title Ins. Agency, Inc. v. Virginia State Bar, 431 F. Supp. 298, 303 (E.D. Va. 1977), *vacated and remanded with instructions*, 571 F.2d 205 (4th Cir.), *cert. denied*, 436 U.S. 941 (1978). In controversy in *Surety* was an unauthorized practice of law opinion by the Virginia State Bar, which stated that the issuance of a title insurance policy directly to a consumer based on a title search by a lay employee was the illegal practice of law. 431 F. Supp. at 302. The United States District Court for the Eastern District of Virginia found the lawyers' use of their legal monopoly over the preparation of deeds to obtain a monopoly over real estate closing services and title insurance to be an "attempted extension of a monopoly from an area sanctioned by the Supreme Court of Virginia . . . to an area which that Court has yet to address." *Id.* at 303. The district court decision was subsequently vacated by the Fourth Circuit, pending the conclusion of a state court proceeding on a related matter. 571 F.2d at 207-08.

In other states, the entire real estate conveyance may legally be conducted by the commercial title company without the participation of any lawyer, either as an approved attorney or as a staff attorney employed by the title company.¹⁴⁰ In these states, the reverse competition which characterizes the title insurance market nonetheless enables attorneys to exclude competition from that part of the title insurance business for which they are business referrers.¹⁴¹ Whether attorneys in these states possess market power ultimately depends upon the degree of business actually referred by private attorneys in the geographic market or submarket. Even in states where there is no legal requirement of attorney involvement in real estate conveyances, private lawyers would possess sufficient market power if the attorneys are responsible for a substantial number of title insurance referrals. This determination of market power should result in a finding of the existence of an attempt to monopolize under section 2 of the Sherman Act in these submarkets as well.¹⁴²

D. Conduct by the Bar-Related Title Insurance Company

To this point, the focus of the article has been on the conduct of the lawyers who organize and maintain bar-related title insurance companies and whether or not their conduct contravenes the Sherman Act. Remaining for consideration is whether the conduct of the

140. See *State Bar v. Guardian Abstract Co.*, 91 N.M. 434, 440, 575 P.2d 943, 949 (1978).

141. See notes 25-27 and accompanying text *supra*.

142. This section has focused on an attempt to monopolize a relevant market involving all aspects of real estate conveyancing except the "pure insurance" or underwriting risks borne by the company issuing the title policy, since this is the conduct which the bar-related title movement seeks to preserve for lawyers. Although the organizers of bar-related title companies assert that they are not "at war with the commercial title insuring industry," HOW-TO-DO-IT: BAR-RELATED TITLE ASSURING ORGANIZATIONS, *supra* note 1, at 26, their establishment of a bar-related title company inevitably raises the issue of whether their conduct would constitute an attempt to monopolize the title insurance industry as well.

For this analysis, the relevant product market would be the underwriting of title insurance policies. The relevant geographic market would remain the area where the bar-related company operates, with each county or region as a relevant submarket. The agreement to refer business to and write policies exclusively for the bar-related title insurance company would provide the necessary acts constituting a group boycott of commercial title companies. See notes 73-112 and accompanying text *supra*. Inasmuch as an inevitable result of the success of the bar-related company would be the exclusion of commercial title companies from the business controlled by real estate lawyers as business referrers, the requisite intent to monopolize could be inferred from the conduct. The organizers of the bar-related company, for the purposes of § 2 of the Sherman Act, would be presumed to intend the consequences of their actions. The requisite market power would exist in those submarkets where participation of a lawyer is legally required in some part of the transaction or where private lawyers make a substantial number of policy referrals. The proponents of a bar-related insurance company could therefore also be charged with attempting to monopolize the business of underwriting title insurance policies under § 2. For the analysis of the defense provided by the McCarran-Ferguson Act, 15 U.S.C. §§ 1011-1015 (1976), see notes 176-255 and accompanying text *infra*.

bar-related insurer itself, in issuing title insurance policies only through lawyers to purchasers who retain private counsel and in distributing earnings to lawyers proportionate to the volume of business written, violates the Sherman Act.¹⁴³

1. *Tying Arrangements*

Tying arrangements involve a situation where the seller of a product or a service forces the purchaser to buy an undesired product or service, along with a desired tying product.¹⁴⁴ Tying arrangements have been held to be illegal per se under section 1 of the Sherman Act where the seller has sufficient economic power with respect to the desired, or tying product to restrain appreciably competition in the undesired, or tied product and where a not insubstantial amount of interstate commerce in the tied product is affected.¹⁴⁵

143. See *Ohio v. Ohio Medical Indem., Inc.*, [1976-2] Trade Cas. (CCH) 70, 110 (S.D. Ohio 1976). *Ohio Medical* involved a suit against Blue Shield and the state medical society, alleging a conspiracy to fix prices and boycott health insurers not connected with doctors. *Id.* at 70, 111. Unnamed individual physicians were included as co-conspirators. *Id.* The United States District Court for the Southern District of Ohio drew a distinction between the conduct of Blue Shield, including the rates set by it, which was found to be protected by the McCarran-Ferguson Act, 15 U.S.C. §§ 1011-1015 (1976), and the conduct of the individual doctors and the state medical society, which was held to be subject to suit under the antitrust laws. [1976-2] Trade Cas. (CCH) at 70, 113-14.

A finding that the conduct of the bar-related insurer did not violate the Sherman Act would not affect the violations by the individual attorneys discussed previously. See notes 59-142 and accompanying text *supra*. Each dealt with a concerted refusal of the attorneys organizing the bar-related company to do business with commercial title companies. Such conduct was not required by the bar-related company, whose shareholders, if they could resist the persuasion, coercion, or peer pressure by the other organizers of the bar-related company, would be free to refer all their business to and write policies for commercial companies. For example, the prospectus for the Attorneys' Title Guaranty Fund, Inc., which operates in Illinois, states:

Shareholders are entirely free, with their clients, to determine the kind of title evidence that best suits the requirements of a given transaction. If desired, a shareholder may render a title opinion . . . without insurance, and in such a case no contribution would be forwarded to the Fund. By the same token, if deemed desirable, insurance may be taken with another title insurance company.

HOW-TO-DO-IT: BAR-RELATED TITLE ASSURING ORGANIZATIONS, *supra* note 1, at 37 app.

144. *Northern Pac. Ry. v. United States*, 356 U.S. 1, 5-6 (1958).

145. *Ungar v. Dunkin' Donuts of America, Inc.*, 531 F.2d 1211, 1223-24 (3d Cir.), *cert. denied*, 429 U.S. 823 (1976). See *Fortner Enterprises, Inc. v. United States Steel Corp.*, 394 U.S. 495, 498-99 (1969); *Northern Pac. Ry. v. United States*, 356 U.S. 1, 6 (1958); *Times-Picayune Publishing Co. v. United States*, 345 U.S. 594, 608-09 (1953).

Tying arrangements are also illegal per se under § 3 of the Clayton Act, 15 U.S.C. § 14 (1976), where a tying and a tied product exist and the seller has sufficient economic power with respect to the tying product to restrain appreciably competition in the tied product and a not insubstantial amount of interstate commerce in the tied product is restrained. See *Advance Business Sys. & Supply Co. v. SCM Corp.*, 415 F.2d 55, 61 (4th Cir. 1969), *cert. denied*, 397 U.S. 920 (1970). Section 3 of the Clayton Act applies only to a sale or lease of "goods, wares, merchandise, machinery, supplies or other commodities." 15 U.S.C. § 14 (1976). Section 3 has been held to be inapplicable to tying arrangements involving services. *Battle v. Liberty Nat'l Life Ins. Co.*, 493 F.2d 39, 46 (5th Cir. 1974), *cert. denied*, 419 U.S. 1110 (1975) (funeral services); *Tri-State Broadcasting Co. v. United Press Int'l, Inc.*, 369 F.2d 268, 270 (5th Cir.

Bar-related title insurance companies require home purchasers to retain private attorneys to represent them in the transaction.¹⁴⁶ In order to prove an invalid tying arrangement, initially the issue whether one or two products are involved must be resolved. A bar-related company can "tie" the rendering of legal services by its shareholders to its issuance of a title insurance policy only if they are separate products or services.¹⁴⁷

As has been stated, loss avoidance is an inherent part of the title insurance business.¹⁴⁸ Steps taken by a title insurance company to examine titles and to remove exceptions to titles are part of the single product offered by the title company.¹⁴⁹ The legal services which the bar-related company requires its prospective policyholder to purchase differ, however, from those connected with the loss avoidance role of a commercial title company in that these services are not performed by the insurer or purchased by the insurer from a third party responsible to it, but rather are performed by a lawyer who is responsible to the prospective policyholder.¹⁵⁰

This distinction is illustrated in *Forrest v. Capital Building & Loan Association*.¹⁵¹ In *Forrest*, a real estate lender was required by

1966) (news services); *Wendkos v. ABC Consol. Corp.*, 379 F. Supp. 15, 18 (E.D. Pa. 1974) (loans). Its applicability to legal services, accordingly, is doubtful.

146. BAR-RELATED TITLE ASSURING ORGANIZATIONS, *supra* note 1, at 11-13. The ABA Standing Committee has stated:

Bar-related title assuring organizations should not offer title insurance except as a supplement to, and as a part of, the professional service of a lawyer. . . . The bar-related title assuring organization . . . should never violate . . . [its] purpose by issuing title insurance where the attorney-client relationship does not exist. If a bar-related organization were to furnish title insurance, knowing that the buyer and seller planned to close without legal counsel, it would be engaging in a practice which it condemns.

Id. at 11-12.

147. See *Fortner Enterprises, Inc. v. United States*, 394 U.S. 495, 507 (1969); *American Mfrs. Mut. Ins. Co. v. American Broadcasting-Paramount Theatres, Inc.*, 388 F.2d 272, 280-83 (2d Cir. 1967); *Forrest v. Capital Bldg. & Loan Ass'n*, 385 F. Supp. 831, 835-36 (M.D. La. 1973), *aff'd per curiam*, 504 F.2d 891 (5th Cir. 1974), *cert. denied*, 421 U.S. 978 (1975). The resolution of this issue often determines the legality of the affected tie.

148. See notes 17-20 and accompanying text *supra*.

149. *Commander Leasing Co. v. Transamerica Title Ins. Co.*, 477 F.2d 77, 82-83 (10th Cir. 1973). In *Commander Leasing*, the United States Court of Appeals for the Tenth Circuit held that abstracting and title services furnished by a commercial title company in connection with issuance of a title policy were not part of a separate business, but were part of the business of insurance for purposes of the McCarran-Ferguson Act, 15 U.S.C. §§ 1011-1015 (1976). 477 F.2d at 83. The complaint alleged a monopolization of title information and price fixing under § 2 of the Sherman Act. *Id.* at 80. See also *McIlhenny v. American Title Ins. Co.*, 418 F. Supp. 364, 368 (E.D. Pa. 1976) (practice of requiring purchasers of new homes to buy mechanic's lien insurance as part of services provided by title company constituted "business of insurance" even where mechanic's liens were expressly waived).

150. See notes 36-40 and accompanying text *supra*.

151. 385 F. Supp. 831, 837 (M.D. La. 1973), *aff'd per curiam*, 504 F.2d 891 (5th Cir. 1974), *cert. denied*, 421 U.S. 978 (1975). *Accord*, *Foster v. Maryland State Sav. & Loan Ass'n*, No. 76-1455 (D.C. Cir. June 12, 1978). See also *Spens v. Citizens Fed. Sav. & Loan Ass'n*, 364 F. Supp. 1161, 1164 (N.D. Ill. 1973) (requiring borrower to purchase title insurance through the

law to make loans only upon receipt of a legal opinion of title.¹⁵² As permitted by federal and state law, the lender required the borrower to pay its legal fees for this opinion.¹⁵³ The United States District Court for the Middle District of Louisiana rejected allegations of a tying arrangement between the legal services and the real estate loan on the ground that the bank was not selling legal services to its borrowers, but rather was purchasing them itself from its own counsel for its own use.¹⁵⁴ The legal services required by the bar-related company are purchased by the policyholder from a lawyer responsible to him and with whom he, rather than the insurer, has an attorney-client relationship.¹⁵⁵ The existence of two separate products for purposes of a tying arrangement under section 1 is shown by the existence of two separate entities selling to the common purchaser.¹⁵⁶ With respect to bar-related title insurance, the home purchaser dealing with the bar-related company purchases a title policy from the bar-related company and legal services from his private attorney.¹⁵⁷ A second difference which also indicates the existence of two separate products is the fact that the services which the private lawyer renders his client include such services as estate planning and a "complete legal check-up," which a title insurer would not and could not perform as a prerequisite to issuing its policy.¹⁵⁸

mortgagee who received discount from insurance company did not restrain interstate commerce since defendant mortgagee lacked necessary market power).

152. 385 F. Supp. at 836-37.

153. *Id.*

154. *Id.* at 837. The court stated that "[i]t is apparent then, that the homestead's legal and notarial services are not owned by, controlled by, acquired by, bargained for or even responsible to the borrower. These legal services are not 'for sale' to prospective borrowers . . ." *Id.* The ABA Standing Committee has noted that a lawyer retained by a commercial title company acts "on behalf of the company and *not* on behalf of the insured." HOW-TO-DO-IT: BAR-RELATED TITLE ASSURING ORGANIZATIONS, *supra* note 1, at 2 (emphasis in original).

155. See BAR-RELATED TITLE ASSURING ORGANIZATIONS, *supra* note 1, at 11-13; HOW-TO-DO-IT: BAR-RELATED TITLE ASSURING ORGANIZATIONS, *supra* note 1, at 1-3.

156. See *Fortner Enterprises, Inc. v. United States*, 394 U.S. 495, 507 (1969). See also *Perma Life Mufflers, Inc. v. International Parts Corp.*, 392 U.S. 134, 141-42 (1968); *Timken Roller Bearing Co. v. United States*, 341 U.S. 593, 598 (1951); *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons*, 340 U.S. 211, 215 (1951); *United States v. Yellow Cab Co.*, 332 U.S. 218, 227 (1947).

157. See BAR-RELATED TITLE ASSURING ORGANIZATIONS, *supra* note 1, at 11-13; HOW-TO-DO-IT: BAR-RELATED TITLE ASSURING ORGANIZATIONS, *supra* note 1, at 1-3.

158. HOW-TO-DO-IT: BAR-RELATED TITLE ASSURING ORGANIZATIONS, *supra* note 1, at 3. These additional legal services would include the effect of the purchase on the purchaser's estate planning, business and personal life, and insurance planning. See *id.* at 2. In addition, the attorney would participate in or give advice relating to negotiations, drafting, and a review of brokerage agreements, purchase agreements, and construction agreements. See *id.* Another legal service which the ABA Standing Committee advocates in conjunction with a real estate transfer is a "complete legal checkup," which it characterizes as "a significantly important by-product to qualify it almost as the purpose of the representation." *Id.* at 3.

Another ABA report lists the elements of a hypothetical home purchase in which a lawyer should be involved: 1) the brokerage contract; 2) the preliminary negotiations; 3) the commit-

Furthermore, in *Surety Title Insurance Agency, Inc. v. Virginia State Bar*,¹⁵⁹ the United States District Court for the Eastern District of Virginia treated attorneys' services and title insurance supplied by a title company as two separate products involved in the transfer of real estate.¹⁶⁰ In view of the substantial differences between a title company's loss avoidance services and the legal services required by a bar-related title company and of the fact that lawyers' services in a bar-related transaction are rendered by different entities to the purchaser, *Surety Title's* position that legal services and title insurance are separate products should be equally applicable to the bar-related title company's requirement that the purchaser secure legal services from a private lawyer.

Utilizing this approach, the tying product is title insurance, the product needed by the real estate purchasers. Legal services, the product real estate purchasers must secure in order to receive title

ment for financing; 4) the contract of sale; 5) establishing title; 6) the survey; 7) curative action; 8) termite inspection; 9) drafting instruments; 10) incidental paperwork; 11) obtaining title insurance; 12) closing; and 13) post-closing procedures. THE PROPER ROLE OF THE LAWYER, *supra* note 43, at 3-9. A commercial title company would probably not be involved in any of the transactions preceding item five.

159. 431 F. Supp. 298 (E.D. Va. 1977), *vacated and remanded with instructions*, 571 F.2d 205 (4th Cir.), *cert. denied*, 436 U.S. 941 (1978). In *Surety Title*, a title insurer brought an action against the Virginia State Bar (Bar), alleging that the Bar's advisory opinions on title insurance together with the threat of disciplinary proceedings against those attorneys who would disregard them constituted an illegal group boycott and an attempt to monopolize under § 1 and § 2 of the Sherman Act. 431 F. Supp. at 299-300. The Bar had stated that the issuance by a title insurance company of a policy to a nonlawyer based upon a title examination by lay employees would constitute unauthorized practice of law. *Id.* at 301-02. The Bar contended that it was exempt from the antitrust laws by the state action doctrine of *Parker v. Brown*, 317 U.S. 341 (1943), since the Supreme Court of Virginia had established the Bar and given it the power to render advisory opinions. 431 F. Supp. at 301, 304. The United States District Court for the Eastern District of Virginia rejected that argument, holding that the challenged activity violated the antitrust laws. *Id.* at 307.

On appeal, the United States Court of Appeals for the Fourth Circuit noted that the United States Supreme Court had issued its opinion in the case of *Bates v. Arizona*, 433 U.S. 350 (1977), which considered the state action doctrine, after the lower court had decided the present action against the Bar. 571 F.2d at 206-07. The Fourth Circuit observed that the *Bates* decision turned upon the extent of the Arizona Supreme Court's supervision over the challenged activity. *Id.* at 207. The Fourth Circuit also stated that the role of the Virginia Supreme Court in the activity challenged in *Surety Title* was not clear. *Id.* The Attorney General of Virginia had charged *Surety Title Insurance Agency, Inc.* with the unauthorized practice of law and the Fourth Circuit noted that this action was proceeding through the Virginia state courts. *Id.* The Fourth Circuit concluded: "We believe that it would be in accord with appropriate federal-state relations for the federal courts to withhold final decision on the issues presented by this case until the Virginia courts have had an opportunity to decide the disputed questions of state law." *Id.* at 207-08. The Fourth Circuit therefore vacated the district court's order and remanded the case with instructions to withhold further action. *Id.* at 208.

Consequently, the district court's opinion cannot be considered as final. Since the courts analysis of attorneys' services and title insurance as two separate products has not been specifically rejected on appeal, however, the discussion remains a relevant and useful consideration of the tying question.

160. 431 F. Supp. at 303.

insurance from a bar-related company, is the tied product. By virtue of the reverse competition which characterizes the title insurance market¹⁶¹ and the bar-related company's shareholders' agreement to refer business exclusively to it,¹⁶² the bar-related company would possess market power in the tying product, title insurance.¹⁶³

The final requirement for a tying arrangement violation of section 1 of the Sherman Act is that a "not insubstantial," or more than a *de minimis*, amount of commerce be restrained.¹⁶⁴ While satisfaction of this requirement will depend upon the individual bar-related company involved, the fact that bar-related insurers have total assets in excess of eighteen million dollars indicates that the amount of commerce involved in the real estate transactions in which bar-related companies are involved is far from *de minimis*.¹⁶⁵ Unless a specific bar-related company were so small that it restrained only a *de minimis* amount of commerce, its requirement that policyholders retain private counsel would constitute a tying arrangement in violation of section 1 of the Sherman Act.

2. Rebates in Restraint of Trade

Most bar-related title companies operate on the "fund" principle and return excess premiums and earnings to their shareholders or member attorneys proportionate to the monetary value of the policies written.¹⁶⁶ Section 1 of the Sherman Act has been interpreted in

161. See notes 25-27 and accompanying text *supra*.

162. See notes 50-53 and accompanying text *supra*.

163. Market power for the purposes of a tying case does not require either a monopoly or even a dominant position throughout the market for the tying product. *Fortner Enterprises, Inc. v. United States Steel Corp.*, 394 U.S. 495, 502-03 (1969). "Our tie-in cases have made unmistakably clear that the economic power over the tying product can be sufficient even though the power falls far short of dominance and even though the power exists only with respect to some of the buyers in the market." *Id.* (citations omitted). See also *United States v. Loew's Inc.*, 371 U.S. 38, 45 (1962); *Northern Pac. Ry. v. United States*, 356 U.S. 1, 11 (1957); *International Salt Co. v. United States*, 332 U.S. 392, 396 (1947); *Lessig v. Tidewater Oil Co.*, 327 F.2d 459, 469-70 (9th Cir. 1964); *Phillips v. Crown Cent. Petroleum Corp.*, 395 F. Supp. 735, 765 (D. Md. 1975).

164. *Fortner Enterprises, Inc. v. United States Steel Corp.*, 394 U.S. 495, 501 (1969). The *Fortner* Court observed that annual purchases of \$190,000 were not "paltry or 'insubstantial.'" *Id.* at 501-02.

165. See note 9 and accompanying text *supra*.

166. See BAR-RELATED TITLE ASSURING ORGANIZATIONS, *supra* note 1, at 11; HOW-TO-DO-IT: BAR-RELATED TITLE ASSURING ORGANIZATIONS, *supra* note 1, at 6-7. This practice is based on that followed by the Lawyers' Title Guaranty Fund, operating in Florida, the first bar-related company. BAR-RELATED TITLE ASSURING ORGANIZATIONS, *supra* note 1, at 11. Mutual Title Insurance Company, operating in Maine, is organized as a mutual company owned by its policyholders, and it appears that any return of premiums would be paid to them rather than to the lawyers writing the policy. HOW-TO-DO-IT: BAR-RELATED TITLE ASSURING ORGANIZATIONS, *supra* note 1, at 7. Attorneys' Title Guaranty Fund, Inc., in Georgia, is a non-profit corporation and may not refund earnings or excess premiums to its shareholder attorneys.

other areas to prohibit undisclosed rebates.¹⁶⁷ For example, in *Knuth v. Erie-Crawford Dairy Cooperative Association*,¹⁶⁸ the United States Court of Appeals for the Third Circuit found that a scheme by a Pennsylvania milk cooperative to pay rebates to milk processors for Pennsylvania milk purchased from it stated a claim under section 1.¹⁶⁹ The court noted that the recipients of the rebate would tend to purchase more Pennsylvania milk than they would without the rebate.¹⁷⁰

In a series of cases involving the optical industry, the Department of Justice secured consent decrees against optical wholesalers who offered unpublicized rebates in the form of commissions to physicians who prescribed their products.¹⁷¹ The Federal Trade Commission has also issued cease and desist orders prohibiting the granting and receiving of undisclosed rebates.¹⁷² The return of excess premiums and income from the bar-related insurer to the attorney issuing the policy proportionate to the value of the policies written has the same restrictive effects on competition as the practice condemned in the optical cases: foreclosure of business to companies not offering rebates and increased prices to the consumer.¹⁷³ The

See id. Whether any payments are made to the members or shareholders of these companies that could be characterized as rebates would depend upon any commissions received for writing the policies.

167. *See Knuth v. Erie-Crawford Dairy Coop. Ass'n*, 395 F.2d 420, 423-24 (3rd Cir. 1968).

168. 395 F.2d 420 (3d Cir. 1968).

169. *Id.* at 423-24. The rebates interfered with the free flow of milk into Pennsylvania and fixed milk prices at higher rates than otherwise would have been charged. *Id.* The complaint was also considered to state a claim under § 2 of the Sherman Act since the rebates were alleged to be part of a conspiracy to monopolize interstate commerce in milk. *Id.* at 424.

170. *Id.*

171. *E.g.*, *United States v. Bausch & Lomb Optical Co.*, [1950-1951] Trade Cas. (CCH) 64,625 (N.D. Ill. 1951); *United States v. House of Vision-Belgard-Spero, Inc.*, [1950-1951] Trade Cas. (CCH) 64,579 (N.D. Ill. 1951); *United States v. Uhlemann Optical Co.*, [1950-1951] Trade Cas. (CCH) 64,570 (N.D. Ill. 1951). The Department of Justice complaints in these actions alleged a conspiracy in restraint of trade whereby the optical dispensers sold ophthalmic goods to patients pursuant to prescriptions from the physicians and rebated to the physician a substantial sum ultimately derived from the sale of the prescribed articles. [1950-1951] Trade Cas. (CCH) at 64,636; [1950-1951] Trade Cas. (CCH) at 64,579; [1950-1951] Trade Cas. (CCH) at 64,571. The dispensers and physicians did not disclose the existence of the rebates to their patients. *See* [1950-1951] Trade Cas. (CCH) at 64,627; [1950-1951] Trade Cas. (CCH) at 64,580; [1950-1951] Trade Cas. (CCH) at 64,572. The rebates were alleged to increase the cost of the prescriptions to the public by the amount of the rebate, to restrain trade in ophthalmic goods, and to constitute a boycott of optical dispensers and/or physicians who did not offer or accept rebates. [1950-1951] Trade Cas. (CCH) at 64,628; [1950-1951] Trade Cas. (CCH) at 64,580; [1950-1951] Trade Cas. (CCH) at 64,572. The consent decree enjoined the granting and accepting of rebates. [1950-1951] Trade Cas. (CCH) at 64,627; [1950-1951] Trade Cas. (CCH) at 64,580; [1950-1951] Trade Cas. (CCH) at 64,572.

172. *David Rosen, Inc.*, 56 F.T.C. 741 (1960). The Federal Trade Commission issued cease and desist orders prohibiting record manufacturers and distributors from offering, without public disclosure, rebates of money or other consideration to media personnel, including disc jockeys, for broadcasting their records. *Id.* at 742-43.

173. *See* note 171 *supra*.

typical policy form and instructions used by bar-related title insurance companies neither reveals nor instructs the issuing attorney to reveal the existence of commissions, dividends, or any other return of income over expenses to the issuing attorney.¹⁷⁴ If undisclosed, these payments would also be violative of the Sherman Act.

III. THE MCCARRAN ACT

The McCarran-Ferguson Act (McCarran Act)¹⁷⁵ exempts conduct from attack under the federal antitrust laws to the extent that it is part of the "business of insurance" and such business is "regulated by state law."¹⁷⁶ The McCarran Act also provides that the Sherman Act remains applicable to acts of intimidation, boycott, or coercion.¹⁷⁷

174. For a sample policy, see HOW-TO-DO-IT: BAR-RELATED TITLE ASSURING ORGANIZATIONS, *supra* note 1, at 56 app.

175. 15 U.S.C. §§ 1011-1015 (1976). The McCarran Act provides in relevant part:

Congress hereby declares that the continued regulation and taxation by the several States of the business of insurance is in the public interest, and that silence on the part of the Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several States.

Id. § 1011. The McCarran Act further states:

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

(b) No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance: *Provided*, That . . . the Sherman Act, . . . the Clayton Act, and . . . the Federal Trade Commission Act . . . shall be applicable to the business of insurance to the extent that such business is not regulated by State Law.

Id. § 1012. Section 1013(b) also provides: "(b) Nothing contained in this chapter shall render the said Sherman Act inapplicable to any agreement to boycott, coerce, or intimidate, or act of boycott, coercion, or intimidation." *Id.* § 1013(b).

The McCarran Act was a reaction to *United States v. South-Eastern Underwriters Ass'n*, 322 U.S. 533 (1944), in which the Supreme Court overruled its prior decision in *Paul v. Virginia*, 75 U.S. (8 Wall.) 168 (1868), and held that contracts of insurance were part of interstate commerce. 322 U.S. at 553. *South-Eastern Underwriters* raised questions concerning the continuing power of the states to regulate and tax insurance. See Comment, *State Regulation of the McCarran Act*, 47 TUL. L. REV. 1069, 1071-72 (1973); Note, *Federal Regulation of Insurance Companies: The Disappearing McCarran Act Exemption*, 1973 DUKE L.J. 1340, 1341-43 [hereinafter cited as *Federal Regulation of Insurance Companies*]; Note, *The Limits of State Regulations Under the McCarran-Ferguson Act: Travelers Insurance Co. v. Blue Cross of Western Pennsylvania*, 42 GEO. WASH. L. REV. 427, 430 (1974) [hereinafter cited as *The Limits of State Regulation*].

176. 15 U.S.C. §§ 1011, 1012(b) (1976).

177. *Id.* § 1013(b). The lower courts had split on the scope of the boycott, coercion, or intimidation exception under the McCarran Act. One line of cases limited the exception to boycotts of insurance companies or agents by other insurance companies or agents. *Meieler v. Aetna Cas. & Sur. Co.*, 506 F.2d 732, 734-35 (5th Cir. 1975); *Adrisi v. Equitable Life Assurance Soc'y of the United States*, 503 F.2d 725, 728-29 (9th Cir. 1974), *cert. denied*, 420 U.S. 929 (1975); *McIlhenny v. American Title Ins. Co.*, 418 F. Supp. 364, 371-72 (E.D. Pa. 1976); *Seasongood v. K & K Ins. Agency*, 414 F. Supp. 698, 702 (E.D. Mo. 1976), *rev'd on other grounds*, 548 F.2d 729 (8th Cir. 1977); *Mathis v. Automobile Club Inter-Ins. Exch.*, 410 F. Supp. 1037, 1041 (W.D. Mo. 1976). Cf. *Frankford Hosp. v. Blue Cross*, 417 F. Supp. 1104, 1110 (E.D. Pa. 1976), *aff'd per curiam*, 554 F.2d 1253 (3d Cir.), *cert. denied*, 434 U.S. 860

A. Regulation by State Law

For purposes of the McCarran Act, a state is deemed to be regulating the "business of insurance" if it has enacted "a comprehensive scheme" authorizing, permitting, or fixing standards of conduct for insurance companies or has empowered an agency to fix standards of conduct for insurance companies.¹⁷⁸ Once the existence of the comprehensive scheme of state regulation is found, it is not necessary that the specific conduct involved be specifically approved by the state regulatory agency.¹⁷⁹ The McCarran Act is also applicable even though the state regulatory scheme is only perfunctorily adminis-

(1977) (adopting *Addrisi* reasoning that the scope of § 1013(b) of the McCarran Act, 15 U.S.C. § 1013(b) (1976), must be narrower than the definition of boycott, coercion, or intimidation under the Sherman Act, but refusing to define precisely how narrow); *Mitgang v. Western Title Ins. Co.*, [1974-2] Trade Cas. (CCH) 98,024, 98,026 (N.D. Cal. 1974) (boycott, coercion, or intimidation exception placed in McCarran Act to protect insurance agents from issuance of a blacklist by insurance companies); *Transnational Ins. Co. v. Rosenlund*, 261 F. Supp. 12, 26-27 (D. Or. 1966) (McCarran exception designed to protect insurance agents from blacklist).

Another line of cases held that the exception is as broad as the definition of boycott, coercion, or intimidation under the Sherman Act. *Proctor v. State Farm Mut. Auto Ins. Co.*, 561 F.2d 262, 271-274 (D.C. Cir. 1977), *vacated and remanded mem.*, 99 S. Ct. 1417 (1979); *Ballard v. Blue Shield*, 543 F.2d 1075, 1078 (4th Cir. 1976), *cert. denied*, 430 U.S. 922 (1977); *Monarch Life Ins. Co. v. Loyal Protective Life Ins. Co.*, 326 F.2d 841, 846 (2d Cir. 1963), *cert. denied*, 376 U.S. 952 (1964).

On June 29, 1978, the Supreme Court of the United States resolved the conflict in favor of those cases holding the scope of the boycott exception under the McCarran Act to be as broad as the definition of boycott under the Sherman Act. *St. Paul Fire & Marine Ins. Co. v. Barry*, 438 U.S. 531, 550 (1978).

178. *Ohio AFL-CIO v. Insurance Rating Bd.*, 451 F.2d 1178, 1182 (6th Cir. 1971), *cert. denied*, 409 U.S. 917 (1972). See also *Crawford v. American Title Ins. Co.*, 518 F.2d 217, 218 (5th Cir. 1975); *Addrisi v. Equitable Life Assurance Soc'y of the United States*, 504 F.2d 725, 728 (9th Cir. 1974), *cert. denied*, 420 U.S. 929 (1975); *Travelers Ins. Co. v. Blue Cross*, 481 F.2d 80, 83 (3d Cir.), *cert. denied*, 414 U.S. 1093 (1973); *Commander Leasing Co. v. Transamerica Title Ins. Co.*, 477 F.2d 77, 83 (10th Cir. 1973); *Proctor v. State Farm Mut. Auto Ins. Co.*, 406 F. Supp. 27, 30 (D.D.C. 1975), *aff'd*, 561 F.2d 262 (D.C. Cir. 1977), *vacated and remanded mem.*, 99 S. Ct. 1417 (1979); *Schwartz v. Commonwealth Land Title Ins. Co.*, 374 F. Supp. 564, 575-76 (E.D. Pa. 1974).

179. *Schwartz v. Commonwealth Land Title Ins. Co.*, 374 F. Supp. 564, 575-76 (E.D. Pa. 1974). In *Schwartz*, a seller of real estate brought suit under the Sherman Act, attacking a \$10 charge imposed by certain title insurance companies doing business in Pennsylvania on the sellers of the insured property, even though the buyer and not the seller purchased title insurance. *Id.* at 566-67. The plaintiff contended that the charge was not regulated by state law and that the state insurance department had rejected filings by the rating bureau seeking approval of the seller charge as "not a proper subject of review by this Department." *Id.* at 570. The United States District Court for the Eastern District of Pennsylvania found the seller charge to be regulated by state law: "[E]ven if the seller charge was not actually regulated by the Insurance Department, the exemption [provided by the McCarran Act from the federal antitrust laws] would still be effective as long as the mechanism for its regulation was available" under state law. *Id.* at 575.

If the state scheme is less than comprehensive, however, so that certain general areas of the business of insurance are unregulated by the state, federal regulation will apply in those areas. *United States v. Chicago Title & Trust Co.*, 242 F. Supp. 56, 65 (N.D. Ill. 1965).

tered,¹⁸⁰ so long as the regulatory scheme is not on its face a “mere pretense.”¹⁸¹ The federal courts will not “supervise the manner in which state officials acted once they entered the close.”¹⁸² Where the state has adopted a comprehensive regulatory scheme and has established a regulatory system to enforce it, the courts have refrained from examining the quality of the agency’s regulation, finding that the McCarran Act’s requirement of regulation under state law to have been satisfied.¹⁸³ Moreover, the fact that a state does not regulate title insurance rates does not prevent a state’s regulation of title

180. *Lawyers Title Co. v. St. Paul Title Ins. Corp.*, 526 F.2d 795, 797 (8th Cir. 1975); *Ohio AFL-CIO v. Insurance Rating Bd.*, 451 F.2d 1178, 1184 (6th Cir. 1971), *cert. denied*, 409 U.S. 917 (1972); *Manasen v. California Dental Servs.*, 424 F. Supp. 657, 667 (N.D. Cal. 1976).

Some commentators have interpreted this line of cases to hold that “the existence of a state statute, even if not enforced, is sufficient regulation to trigger the McCarran exemption.” Comment, *supra* note 175, at 1075. See SENATE SUB-COMM. ON ANTITRUST MONOPOLY, THE INSURANCE INDUSTRY-AVIATION, MARINE AND STATE REGULATION, S. REP. NO. 1834, 80th Cong., 2d Sess. 5 (1960); *The Limits of State Regulation*, *supra* note 175, at 434. These authorities exceed existing case law by implying that the courts will not consider the absence of any effort by a state to enforce its laws, as distinguished from attacks on the quality of enforcement by an existing administrative agency. For example, in *Ohio AFL-CIO*, an opinion frequently cited for this view, see Comment, *supra* note 175, at 1074-75, an active, functioning regulatory commission existed. 451 F.2d at 1182. The plaintiffs’ claim was not that there was no enforcement, but rather that the agency was a rubber stamp for the industry it regulated. *Id.* at 1180. Likewise, *Travelers Ins. Co. v. Blue Cross*, 481 F.2d 80 (3d Cir.), *cert. denied*, 414 U.S. 1093 (1973), was cited by one author as support for the position that an unenforced state statute was sufficient regulation to trigger the McCarran Act exemption. See *The Limits of State Regulation*, *supra* note 175, at 434. In *Travelers*, however, the United States Court of Appeals for the Third Circuit noted that it did not need to decide if the lack of any state enforcement would invalidate the McCarran exemption since it found Pennsylvania’s regulation of insurance to be “aggressive.” 481 F.2d at 83. See *Battle v. Liberty Nat’l Life Ins. Co.*, 493 F.2d 39, 51 n.12 (5th Cir. 1974), *cert. denied*, 419 U.S. 1110 (1975). Consequently, it is more accurate to conclude that while courts will not consider the efficiency of state regulation, the mere enactment of a state law does not preclude consideration as to whether the administrative mechanism the statute creates for enforcement actually exists.

181. *FTC v. National Cas. Co.*, 357 U.S. 560, 564 (1958). See *Commander Leasing Co. v. Transamerica Title Ins. Co.*, 477 F.2d 77, 83-84 (10th Cir. 1973). The types of state regulation that will constitute a “mere pretense” are unclear. The United States Court of Appeals for the Sixth Circuit has stated that “in no case has it been decided that the exemption was inapplicable because of a failure of state regulation.” *Ohio AFL-CIO v. Insurance Rating Bd.*, 451 F.2d 1178, 1183 (6th Cir. 1971), *cert. denied*, 409 U.S. 917 (1972). The cases which have been decided to date have involved claims that state regulation was perfunctory, and not that there had been a complete failure of a state to carry out its regulatory scheme. In *Ohio AFL-CIO*, for example, the attack on the Ohio agency was based on the failure of the agency to ever turn down a rate increase request. 451 F.2d at 1178. There would certainly seem to be a distinction between a challenge to the applicability of the McCarran Act exemption based upon opposition to the quality of state regulation arising out of disagreement with the decisions of the state regulatory agency and a challenge alleging the total absence of a functioning regulatory agency. There are no cases holding that the latter situation satisfies the state regulation requirement of the McCarran Act.

182. *Lawyer’s Realty Corp. v. Peninsular Title Ins. Co.*, 428 F. Supp. 1288, 1293 (E.D. La.) *aff’d per curiam*, 550 F.2d 1035 (5th Cir. 1977) (citation omitted) (footnote omitted). See also *Anderson v. Medical Serv. Co.*, [1976-1] Trade Cas. (CCH) 68,855 (E.D. Va. 1976)."

183. See *Lawyer’s Realty Corp. v. Peninsular Title Ins. Co.*, 428 F. Supp. 1288, 1293 (E.D. La.), *aff’d per curiam*, 550 F.2d 1035 (5th Cir. 1977).

insurance practices from being comprehensive for purposes of applying the McCarran Act exemption.¹⁸⁴

One of the immediate consequences of the adoption of the McCarran Act was the development of model laws regulating all types of insurance, including title insurance.¹⁸⁵ These model acts have been held to constitute state regulation of anticompetitive or monopolistic conduct so as to preclude application of the Sherman Act to the business of insurance.¹⁸⁶ Although the applicability of the exemption is based on an analysis of the law of the state in which the particular conduct asserted to violate the federal antitrust laws occurs,¹⁸⁷ the fact that almost every state has adopted laws closely regulating insurance and title insurance makes it unlikely that the state regulation requirement could be used effectively to exclude the business of title insurance from the protection of the McCarran Act. Accordingly, whether the federal antitrust laws apply to the conduct of attorneys organizing a bar-related title insurer and the conduct of that company will usually depend upon whether the specific conduct involved falls within the "business of insurance" for purposes of the McCarran Act.

B. *The Business of Insurance*

The leading decision on the definition of the business of insurance¹⁸⁸ is *SEC v. National Securities, Inc.*¹⁸⁹ In *National Securities*,

184. *Crawford v. American Title Ins. Co.*, 518 F.2d 217, 219 (5th Cir. 1975). See Note, *The McCarran-Ferguson Act: A Time For Procompetitive Reform*, 29 VAND. L. REV. 1271, 1285 (1966).

185. See *Lawyer's Realty Corp. v. Penninsular Title Ins. Co.*, 428 F. Supp. 1288, 1290-92 (E.D. La.), *aff'd per curiam*, 550 F.2d 1035 (5th Cir. 1977). See also *The Limits of State Regulation*, *supra* note 175, at 435-36. This model law was promptly adopted in some form by 44 states, *FTC v. National Cas. Co.*, 357 U.S. 560, 564 n.6 (1958), and ultimately by all 50 states. *Travelers Health Ass'n v. FTC*, 298 F.2d 820, 823 (8th Cir. 1962). For a complete listing of all state laws regulating title insurance, see Note, *The Title Insurance Industry and Governmental Regulations*, 53 VA. L. REV. 1523, 1526 n.27 (1967). For a list of all state laws regulating title insurance rates, see *Rosenberg*, *supra* note 16, at 206 app. Several courts have also held state antitrust laws which are applicable to intrastate restraint of trade to be part of state regulation of insurance for purposes of the McCarran Act. See *Transnational Ins. Co. v. Rosenlund*, 261 F. Supp. 12, 25-26, 28 (D. Or. 1966).

186. See *Commander Leasing Co. v. Transamerica Title Ins. Co.*, 477 F.2d 77, 83-84 (10th Cir. 1973).

187. See *FTC v. Travelers Health Ass'n*, 362 U.S. 293, 300-02 (1960). The Supreme Court of the United States rejected the argument of a Nebraska corporation that Nebraska state law regulating the business of insurance had an extraterritorial effect which satisfied the McCarran Act and exempted the activities of the corporation in other states from the antitrust laws. *Id.*

188. For articles considering the nature of the "business of insurance" under the McCarran Act, see Comment, *The McCarran Act's Antitrust Exemption for "The Business of Insurance": A Shrinking Umbrella*, 43 TENN. L. REV. 329 (1976); Comment, *supra* note 174, at 1078-81; *Federal Regulation of Insurance Companies*, *supra* note 175, at 1345-46; *The Limits of State Regulation*, *supra* note 175, at 433-34; Note, *supra* note 184, at 1281-83.

189. 393 U.S. 453 (1969).

the Securities and Exchange Commission challenged a merger of two insurance companies on the ground that the information provided to their shareholders was misleading under the Securities Exchange Act of 1934.¹⁹⁰ The merger had been approved by the Director of Insurance of the State of Arizona.¹⁹¹ The lower courts had found that the suit was barred by the McCarran Act.¹⁹² The Supreme Court of the United States, however, held that since the conduct complained of involved the relationship between a stockholder and his company, it was not part of the business of insurance and the McCarran Act was thus inapplicable.¹⁹² In often cited language,¹⁹³ the Court observed:

The statute did not purport to make the States supreme in regulating all the activities of insurance *companies*; its language refers not to the persons or companies who are subject to state regulation, but to laws "regulating the *business* of insurance." Insurance companies may do many things which are subject to paramount federal regulation; only when they are engaged in the "business of insurance" does the statute apply. Certainly the fixing of rates is part of this business

The selling and advertising of policies . . . and the licensing of companies and their agents . . . are also within the scope of the statute. Congress was concerned with the type of state regulation that centers around the contract of insurance, the transaction which *Paul v. Virginia* held was not "commerce." The relationship between insurer and insured, the type of policy which could be issued, its reliability, interpretation, and enforcement—these were the core of the "business of insurance." Undoubtedly, other activities of insurance companies relate so closely to their status as reliable insurers that they too must be placed in the same class. But whatever the exact scope of the statutory term, it is clear where the focus was—it was on the relationship between the insurance company and the policyholder. Statutes aimed at protecting or regulating this relationship, directly or indirectly, are laws regulating the "business of insurance."¹⁹⁴

Although *National Securities* was a securities and not an antitrust

190. *Id.* at 455. See Securities Exchange Act of 1934, §§ 1-35, 15 U.S.C. §§ 78a-78kk (1976). In particular, the plaintiffs alleged a violation of § 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b) (1976). 393 U.S. at 455.

191. 393 U.S. at 455.

192. *SEC v. National Sec., Inc.*, 252 F. Supp. 623, 626 (D. Ariz. 1966), *aff'd*, 387 F.2d 25 (9th Cir. 1967), *rev'd*, 393 U.S. 453 (1969).

193. 393 U.S. at 460.

194. *Id.* at 459-60 (emphasis in original) (citations omitted).

case, its definition of the business of insurance has been held applicable to antitrust cases.¹⁹⁵

It has been seen that title insurance differs substantially from other forms of insurance in that its major component is loss prevention rather than loss indemnity.¹⁹⁶ Despite this difference, the courts have unanimously held that title insurance is part of the business of insurance for purposes of the McCarran Act.¹⁹⁷

Application of *National Securities* to specific antitrust situations has largely been without guidance by the Supreme Court. The hiatus since *National Securities* has been filled with different, and even conflicting, lower court decisions. Most antitrust cases since *National Securities* considering the "business of insurance" have been decided by the courts' determination of whether the challenged conduct could be placed within one of the categories which *National Securities* enumerated as part of the business of insurance.¹⁹⁸ These cases can

195. *Zelson v. Phoenix Mut. Life Ins. Co.*, 594 F.2d 62, 65 (8th Cir. 1977). See *Proctor v. State Farm Mut. Auto Ins.*, 561 F.2d 262, 266-67 (D.C. Cir. 1977), *vacated and remanded mem.*, 99 S. Ct. 1417 (1979); *Dexter v. Equitable Life Ins. Soc'y*, 527 F.2d 233, 235 (2d Cir. 1975); *Addrisi v. Equitable Life Assurance Soc'y of the United States*, 503 F.2d 725, 728 (9th Cir. 1974), *cert. denied*, 420 U.S. 929 (1975); *Battle v. Liberty Nat'l Life Ins. Co.*, 493 F.2d 39, 49 (5th Cir.), *cert. denied*, 419 U.S. 140 (1974); *Travelers Ins. Co. v. Blue Cross*, 481 F.2d 80, 82-83 (3d Cir.), *cert. denied*, 414 U.S. 1093 (1973); *Commander Leasing Co. v. Transamerica Title Ins. Co.*, 477 F.2d 77, 83 (10th Cir. 1973); *Lawyer's Realty Corp. v. Peninsular Title Ins. Co.*, 428 F. Supp. 1288, 1291 (E.D. La.), *aff'd per curiam*, 550 F.2d 1035 (5th Cir. 1977); *Allied Financial Servs., Inc. v. Foremost Ins. Co.*, 418 F. Supp. 157, 161 (D. Neb. 1976); *McIlhenny v. American Title Ins. Co.*, 418 F. Supp. 364, 367-68 (E.D. Pa. 1976); *American Family Life Assurance Co. v. Planned Marketing Assocs., Inc.* 389 F. Supp. 1141, 1146 (E.D. Va. 1974); *Schwartz v. Commonwealth Land Title Ins. Co.*, 374 F. Supp. 564, 572 (E.D. Pa. 1974); *DeVoto v. Pacific Fidelity Life Ins. Co.*, 354 F. Supp. 874, 877 n.1 (N.D. Cal. 1973), *revid on other grounds*, 516 F.2d 1 (9th Cir.), *cert. denied*, 423 U.S. 894 (1975).

196. See notes 18-20 and accompanying text *supra*.

197. *Crawford v. American Title Ins. Co.*, 518 F.2d 217, 219 (5th Cir. 1975); *Commander Leasing Co. v. Transamerica Title Ins. Co.*, 477 F.2d 77, 79, 86 (10th Cir. 1973); *Lawyer's Realty Corp. v. Peninsular Title Ins. Co.*, 428 F. Supp. 1288, 1290 (E.D. La.), *aff'd per curiam*, 550 F.2d 1035 (5th Cir. 1977); *Mitgang v. Western Title Ins. Co.*, [1974-2] Trade Cas. (CCH) 98,024, 98,025 (N.D. Cal. 1974). Other cases have assumed without discussion that title insurance is part of the business of insurance under the McCarran Act. See *Lawyers Title Co. v. St. Paul Title Ins. Corp.*, 526 F.2d 795 (8th Cir. 1975); *McIlhenny v. American Title Ins. Co.*, 418 F. Supp. 364 (E.D. Pa. 1976); *Schwartz v. Commonwealth Land Title Ins. Co.*, 374 F. Supp. 564 (E.D. Pa. 1974); *United States v. Chicago Title & Trust Co.*, 242 F. Supp. 56 (N.D. Ill. 1965).

Commander Leasing, which held that title insurance was exempt from the antitrust provisions as part of the business of insurance, based its decision on cases decided prior to *United States v. South-Eastern Underwriters Ass'n*, 322 U.S. 533 (1944). 477 F.2d at 82. See, e.g., *United States v. Home Title Ins. Co.*, 285 U.S. 191 (1932); *Real Estate Title Ins. Co. v. District of Columbia*, 161 F.2d 887 (D.C. Cir. 1947). Based upon these cases and the uniform practice of classifying title insurance as part of the business of insurance at the time the McCarran Act was passed, *Commander Leasing* appears to have been correctly decided.

198. See, e.g., *Travelers Ins. Co. v. Blue Cross*, 481 F.2d 80, 82-83 (3d Cir.), *cert. denied*, 414 U.S. 1093 (1973); *Ray v. United Family Life Ins. Co.*, 430 F. Supp. 1353, 1357-58 (W.D.N.C. 1977).

be further divided into three distinct lines. In one line of decisions, the result has depended upon whether the challenged conduct includes the relationship between the company and its policyholders. For example, in *Ray v. United Family Life Insurance Co.*,¹⁹⁹ a former burial insurance salesman alleged that his termination by an insurer for his refusal to represent only that insurer violated sections 1 and 2 of the Sherman Act.²⁰⁰ The United States District Court for the Western District of North Carolina held that the McCarran Act was not intended to exempt the relationship between a company and its agent from the antitrust laws.²⁰¹

In the second line of cases, the challenged activity has been deemed to be part of the business of insurance because the conduct had a major impact upon the interpretation of the policy or the rates charged to the policyholder.²⁰² Utilizing this approach, the United States Court of Appeals for the Third Circuit, in *Travelers Insurance Co. v. Blue Cross*,²⁰³ found that Blue Cross's reimbursement con-

199. 430 F. Supp. 1353 (W.D.N.C. 1977). "Jesse Ray's suit against United Family involves the relationship of *agent* and company, not the relationship of *policyholder* and company. Refusal to deal with an *agent* does not fall into any of the categories listed in the *National Securities* case." *Id.* at 1357 (emphasis in original).

For other cases decided on this insurer-policyholder rationale, see *Allied Financial Servs., Inc. v. Foremost Ins. Co.*, 418 F. Supp. 157, 161 (D. Neb. 1976) (charges by exclusive general agent that insurer "pirated" his sub-agents found not to involve the business of insurance); *DeVoto v. Pacific Fidelity Life Ins. Co.*, 354 F. Supp. 874, 877 n.1 (N.D. Cal. 1973), *rev'd on other grounds*, 516 F.2d 1 (9th Cir.), *cert. denied*, 423 U.S. 894 (1975) (competition between two mortgage insurers for business referrals from a bank providing mortgages was not part of the business of insurance exempted by McCarran Act). *But see Lawyer's Realty Corp. v. Peninsular Title Ins. Co.*, 428 F. Supp. 1288, 1291-93 (E.D. La.), *aff'd per curiam*, 550 F.2d 1035 (5th Cir. 1977) (court rejected policyholder-insurer analysis and held that insurer-agency relationship in *Lawyer's Realty* was part of the business of insurance). *Lawyer's Realty* can be reconciled with the other cases since it involved state licensing of an agent, a category specifically mentioned in *National Securities*, see 393 U.S. at 460, and one which was not involved in the other cases. See 428 F. Supp. at 1290.

200. 430 F. Supp. at 1354-55.

201. *Id.* at 1357-58.

202. *SEC v. National Sec., Inc.*, 393 U.S. 453, 460 (1969). "Certainly the fixing of rates is part of this business [of insurance]. . . ." *Id.*

203. 481 F.2d 80 (3d Cir.), *cert. denied*, 414 U.S. 1093 (1973). For other cases following this rationale, see *Frankford Hosp. v. Blue Cross*, 554 F.2d 1253, 1254 (3d Cir.), *cert. denied*, 434 U.S. 860 (1977); *Manasen v. California Dental Servs.*, 424 F. Supp. 657, 666-67 (N.D. Cal. 1976); *Anderson v. Medical Serv.*, [1976-1] Trade Cas. (CCH) 68,855, 68,857 (E.D. Va. 1976), *aff'd mem.*, 551 F.2d 304 (4th Cir. 1977); *Doctors, Inc. v. Blue Cross*, 431 F. Supp. 5, 10 (E.D. Pa. 1975), *aff'd per curiam*, 557 F.2d 1001 (3d Cir. 1976); *Proctor v. State Farm Mut. Auto Ins. Co.*, 406 F. Supp. 27, 29-30 (D.D.C. 1975), *aff'd*, 561 F.2d 262 (D.C. Cir. 1977), *vacated and remanded*, 99 S. Ct. 1417 (1979); *California League of Independent Ins. Producers v. Aetna Cas. & Sur. Co.*, 175 F. Supp. 857, 860 (N.D. Cal. 1959).

California League predated *National Securities*, which neither cited nor discussed it. One commentator therefore contends that *National Securities* should be read as invalidating *California League*. Comment, *supra* note 188, at 344-36. In *Royal Drug Co. v. Group Life & Health Ins. Co.*, 556 F.2d 1375 (5th Cir. 1977), *aff'd*, 99 S. Ct. 1067 (1979), the United States Court of Appeals for the Fifth Circuit specifically rejected the rationale that contracts that stabilize the

tracts with participating hospitals for payment for medical services to its policyholders had to have a substantial impact upon the rates charged its policyholders and thus was part of the business of insurance under the McCarran Act.²⁰⁴

In the third line of cases, the result is controlled by whether the challenged practices were "peculiar" or "unique" to insurance, as illustrated in *United States v. Crocker National Corp.*²⁰⁵ The *Crocker* court held that interlocking directorships of a bank and an insurance company, challenged under section 8 of the Clayton Act,²⁰⁶ did not constitute part of the business of insurance inasmuch as "the selection of directors to insurance companies are not acts . . . 'peculiar to the insurance industry.'"²⁰⁷ A number of cases utilizing this "peculiar

cost of providing benefits to policyholders constituted the business of insurance because of their effect upon policyholders' rates. 556 F.2d at 1385-86. The Fifth Circuit reasoned that "[a]n activity is not part of the business of insurance solely because it has an impact, favorable or otherwise, upon premiums charged by the insurer." *Id.* at 1386. In affirming the Fifth Circuit, the Supreme Court held that "provider agreements" between an insurer and a noninsurer, under which the noninsurer provides services or products to the insured, were not part of the business of insurance despite their rate-reducing effect. 99 S. Ct. at 1083-84. The Supreme Court's decision in *Royal Drug*, accordingly, casts substantial doubt on the continued validity of this line of cases.

When the district court decision in *Proctor* was appealed, the United States Court of Appeals for the District of Columbia Circuit refrained from deciding whether a substantial impact upon policyholder rates would be sufficient to constitute the business of insurance under the McCarran Act. 561 F.2d at 268. This circuit court decision was subsequently vacated and remanded by the United States Supreme Court for consideration in light of the Court's decision in *Royal Drug*. *Proctor v. State Farm Mut. Auto Ins. Co.*, 99 S. Ct. 1417 (1979).

204. 481 F.2d at 83. *Traveler's Insurance* and the other cases adopting this rationale should be distinguished from *Commander Leasing Co. v. Transamerica Title Ins. Co.*, 477 F.2d 77, 83 (10th Cir. 1973), in which a policyholder's suit claimed that excessive rates had been paid because of certain anticompetitive practices by the insurer. *Id.* at 80. In *Commander Leasing*, the court held that the McCarran Act was applicable to the policyholder's suit, thus barring the antitrust action, without considering whether the particular anticompetitive conduct alleged to cause the overcharge was part of the business of insurance, since the rate charged the policyholder was part of the business of insurance. *Id.* at 86.

205. 422 F. Supp. 686 (N.D. Cal. 1976).

206. 15 U.S.C. § 19 (1976).

207. 422 F. Supp. at 706, quoting *American Family Life Assurance Co. v. Planned Marketing Assoc., Inc.*, 389 F. Supp. 1141, 1145 (E.D. Va. 1974). See also *Royal Drug Co. v. Group Life & Health Ins. Co.*, 556 F.2d 1375, 1386 (5th Cir. 1977), *aff'd*, 99 S. Ct. 1067 (1979); *American Family Life Assurance Co. v. Planned Marketing Assoc., Inc.*, 389 F. Supp. 1141, 1145 (E.D. Va. 1974); *American Gen. Ins. Co. v. FTC*, 359 F. Supp. 887, 896-97 (S.D. Tex. 1973), *aff'd*, 496 F.2d 197 (5th Cir. 1974). The United States District Court for the Eastern District of Virginia commented in *American Family Life* that the defendants' efforts to "usurp" and "pirate" plaintiffs' activities were not part of the business of insurance since "the activities complained of could easily be employed by one stock brokerage firm against another as by one insurance company against another." 359 F. Supp. at 1147. The United States Court of Appeals for the District of Columbia Circuit has observed that the analysis whether the challenged conduct was "peculiar" to the business of insurance was "helpful." *Proctor v. State Farm Mut. Auto Ins. Co.*, 561 F.2d 262, 268 n.9 (D.C. Cir. 1977), *vacated and remanded mem.*, 99 S. Ct. 1417 (1979).

The United States District Court for the Eastern District of Louisiana has criticized this approach in *Lawyer's Realty Co. v. Peninsular Title Ins. Co.*, 428 F. Supp. 1288, 1292 (E.D.

to the insurance industry" approach have also used an analysis under the other categories, such as substantial impact upon rates, as additional reasons for their decision.²⁰⁸

Although in many cases conduct may easily be divided into one category or another, there are many situations which are not capable of classification. The categories referred to in these cases, accordingly, represent ways in which a factual situation can be analyzed or considerations to which a court will look, rather than definite categories into which the facts of a case do not fall. *National Securities*, it will be recalled, described the policyholder-insurer relationship as the "focus" and not the outer perimeter of the business of insurance.²⁰⁹

As an alternative to determining whether the challenged conduct falls within one of the categories enumerated in *National Securities*, several recent cases have focused upon whether the alleged anticompetitive conduct is directed toward and has its primary impact upon an industry other than insurance.²¹⁰ This approach is exemplified by several recent circuit court opinions that reversed district court decisions that had exempted anticompetitive conduct under the McCarran Act.²¹¹ In *Battle v. Liberty National Life Insurance Co.*,²¹² "unauthorized" funeral homes and funeral directors brought suit under sections 1 and 2 of the Sherman Act and section 3 of the Clayton Act²¹³ against a funeral insurer whose policies provided for full payment to "authorized" funeral homes and a fixed monetary payment to "unau-

La.), *aff'd per curiam*, 550 F.2d 1035 (5th Cir. 1977). The district court stated: "Nothing in the McCarran-Ferguson Act, however, draws a distinction based on whether the subject matter is 'peculiar to the insurance industry.'" 428 F. Supp. at 1292, *quoting* American Family Life Assurance Co. v. Planned Marketing Assocs., Inc., 389 F. Supp. 1141, 1145 (E.D. Va. 1974). The *Lawyer's Realty* court concurred with the *American Family Life* court's position that adoption of this analysis would emasculate the ability of the McCarran Act to preclude federal regulation of the insurance industry, contrary to the intent of Congress. 428 F. Supp. at 1292.

208. See *Allied Financial Servs. v. Foremost Ins. Co.*, 418 F. Supp. 157, 161 (D. Neb. 1976); *Proctor v. State Farm Mut. Auto Ins. Co.*, 406 F. Supp. 27, 29 (D.D.C.), *aff'd*, 561 F.2d 262 (D.C. Cir. 1977), *vacated and remanded mem.*, 99 S. Ct. 1417 (1979).

209. 393 U.S. at 460. In *Schwartz v. Commonwealth Land Title Ins. Co.*, 374 F. Supp. 564, 574 (E.D. Pa. 1974), *National Securities* was interpreted as follows:

[T]he Supreme Court indicated in *National Securities* that the "focus" of the McCarran-Ferguson Act "was on the relationship between the insurance company and the policyholder." . . . This language, however, is not restrictive but descriptive. The very next sentence concludes that "[s]tatutes aimed at protecting or regulating this relationship, directly or indirectly, are laws regulating the business of insurance."

Id. (emphasis in original) (citation omitted), *quoting* SEC v. National Sec., Inc., 393 U.S. 453, 460 (1969).

210. See notes 212-24 and accompanying text *infra*.

211. See *Zelson v. Phoenix Mut. Life Ins. Co.*, 549 F.2d 62 (8th Cir. 1977); *Battle v. Liberty Nat'l Life Ins. Co.*, 493 F.2d 39 (5th Cir. 1974), *cert. denied*, 419 U.S. 1110 (1975).

212. 493 F.2d 39 (5th Cir. 1974), *cert. denied*, 419 U.S. 1110 (1975).

213. 15 U.S.C. § 14 (1976).

thorized" funeral homes.²¹⁴ The factual situation therefore resembled *Travelers Insurance* and similar cases in which cost reducing agreements for provision of services under an insurance policy to a policyholder were found to be part of the business of insurance because of their effect upon policyholders' rates and the interpretation of the contract.²¹⁵ The district court in *Battle* found the insurance company's actions to be protected under the McCarran Act as part of the business of insurance.²¹⁶ The United States Court of Appeals for the Fifth Circuit reversed,²¹⁷ noting that to be authorized, the funeral home was required to use caskets and supplies furnished only by a wholly owned subsidiary of the insurer when performing under a policy, to refrain from selling caskets or equipment from that subsidiary to an uninsured customer, to refrain from giving discounts to other insurers or their policyholders, and to pass inspections by the subsidiary.²¹⁸ The court thus found that the insurer in *Battle* "exceeded the business of providing burial insurance and encroached upon the business of providing funeral services."²¹⁹ Essentially, the insurer had attempted to use its policyholders to expand its business into areas other than the sale of insurance.²²⁰

Battle's rationale was subsequently applied by the United States Court of Appeals for the Eighth Circuit in *Zelson v. Phoenix Mutual*

214. 493 F.2d at 42-43.

215. See *Travelers Ins. Co. v. Blue Cross*, 481 F.2d 80, 83 (3d Cir.), cert. denied, 414 U.S. 1093 (1973) (hospital insurance benefits); *Holly Springs Funeral Home, Inc. v. United Funeral Serv., Inc.*, 303 F. Supp. 128, 135-36 (N.D. Miss. 1969) (funeral home benefits); cases cited note 203 *supra*.

216. 493 F.2d at 43-44.

217. *Id.* at 53.

218. *Id.* at 50.

219. *Id.*

220. *Id.* This factor serves to distinguish *Travelers* and other similar cases, see cases cited note 106 *supra*, from *Battle*. In *Travelers*, the court specifically found an arms length contract negotiated in good faith by equals to provide for certain benefits at the lowest cost without any restrictions on the behavior of the hospitals in dealing with other insurers. 481 F.2d at 83-84. Compare *Travelers Ins. Co. v. Blue Cross*, 481 F.2d 80, 82 (3d Cir.), cert. denied, 414 U.S. 1093 (1973) with *Battle v. Liberty Nat'l Life Ins. Co.*, 493 F.2d 39, 50 (5th Cir. 1974). In *Holly Springs Funeral Home, Inc. v. United Funeral Serv., Inc.*, 303 F. Supp. 128 (N.D. Miss. 1969), the restriction was imposed upon the policyholders; the funeral home had no contractual agreements with the insurer restricting their conduct. *Id.* at 136. In *Proctor v. State Farm Mut. Auto Ins. Co.*, 561 F.2d 262 (D.C. Cir. 1977), vacated and remanded mem., 99 S. Ct. 1417 (1979), the circuit court specifically noted that the insurer's conduct was not directed at influencing competition in the automobile repair market:

It is not contended that appellees' effort to give business to some shops, and take away business from other shops, was motivated by reasons independent of the prices charged by those shops. Nor is it alleged that appellees were trying to drive existing body shops out of business in order to facilitate vertical integration by insurance companies into the auto repair industry. We therefore need not decide whether the presence of such factors would have placed the disputed activities outside the business of insurance.

561 F.2d at 268 n.10.

Life Insurance Co.,²²¹ a Sherman Act suit brought by an insurance agent who had been terminated by the insurer for refusing to represent its related securities dealer.²²² *Battle* was cited with approval for the proposition that “[t]he attempted use of an established insurance market to secure an additional market in some non-insurance product or service is not, *by itself*, a part of the business of insurance.”²²³ The Eighth Circuit refused to find the insurer’s conduct to be part of the business of insurance “merely because plaintiff’s insurance agency was the instrument by which the restriction on securities dealings was sought to be imposed.”²²⁴ In *Royal Drug Co. v. Group Life & Health Insurance Co.*,²²⁵ the United States Court of Appeals

221. 549 F.2d 62 (8th Cir. 1977).

222. *Id.* at 63-64.

223. *Id.* at 68 (emphasis in original) (footnote omitted).

224. *Id.* The *Zelson* court distinguished two preceding tying cases, *Dexter v. Equitable Life Assurance Soc’y of the United States*, 527 F.2d 233 (2d Cir. 1975), and *Addrissi v. Equitable Life Assurance Soc’y of the United States*, 503 F.2d 725 (9th Cir. 1974), *cert. denied*, 420 U.S. 929 (1975), on the grounds that in those cases the tied product was the purchase of insurance, so that the anticompetitive effects of the tie manifested themselves in the insurance market. In *Zelson*, insurance was the tying product and securities the tied product, so that the anticompetitive effects were in the securities market. 549 F.2d at 67. Although techniques for the sale of insurance may be part of the business of insurance, and a concern of insurance regulators, the court observed that techniques for the sale of securities or some other product would not be. *Id.*

225. 556 F.2d 1375 (5th Cir. 1977), *aff’d*, 99 S. Ct. 1067 (1979). Group Life & Health (Blue Shield) had entered into contracts with approved pharmacies to pay them for prescriptions according to negotiated price schedules, less a \$2.00 deductible. 556 F.2d at 1377. At an unapproved pharmacy, Blue Shield would not pay the pharmacy directly and instead would reimburse the policyholder for 75% of what it considered to be a reasonable cost for the drug. *Id.* at 1377-79. The United States District Court for the Western District of Texas had found the plan to be protected from the antitrust laws by the McCarran Act. 415 F. Supp. 343, 349 (W.D. Tex. 1976), *rev’d*, 556 F.2d 1375 (5th Cir. 1977), *aff’d*, 99 S. Ct. 1067 (1979). The United States Court of Appeals for the Fifth Circuit noted the plaintiffs’ allegations of a substantial danger that Blue Shield’s contract would lead to monopoly in the pharmacy market in that only three large chain drug stores were able to sell profitably at Blue Shield’s prices, and that Blue Shield controlled a sufficient amount of pharmacy business through its policyholders to put many smaller pharmacies out of business. 556 F.2d at 1378-79. The court also noted the concern that Blue Shield’s conduct, albeit inadvertently and unintentionally, would lead to a monopoly on the part of the large chain stores, which would then be able to raise prices in the future when freed from the competition of the smaller pharmacies. *Id.* The Supreme Court affirmed on the ground that provider contracts under which a noninsurer contracts with the insurer to provide goods or services to policyholders were not part of the business of insurance. 99 S. Ct. at 1083-84.

The Fifth Circuit had distinguished *Travelers* on the ground that in entering into the price control contracts with nonprofit hospitals, the insurer in that case was effectuating cost cutting instructions of the Insurance Commissioner. 556 F.2d at 1382-83. This distinction is irrelevant for purposes of the McCarran Act, however, since the scope of the business of insurance under the McCarran Act is a matter of federal law and is not dependent on the scope of the state definition of the business of insurance. See notes 188-20 and accompanying text *supra*. Moreover, this distinction would have given rise to a *Parker v. Brown*, 317 U.S. 341 (1943), state action exemption for Blue Cross’s conduct. See *Doctors, Inc. v. Blue Cross*, 431 F. Supp. 5 (E.D. Pa. 1975), *aff’d per curiam*, 557 F.2d 1001 (3d Cir. 1976). In *Doctors*, the United States District Court for the Eastern District of Pennsylvania found the *Parker* state action exemption applicable. 431 F. Supp. at 7-8. The Third Circuit affirmed on the basis of its *Travelers* McCarran Act decision without reaching the state action issue. 557 F.2d at 1002.

for the Fifth Circuit rejected the implication in *Battle* that its approach was contingent upon an intent to monopolize or restrain competition in the affected market.²²⁶ The Fifth Circuit expressed disagreement with the line of cases holding that an effect upon rates alone was sufficient to qualify conduct as part of the business of insurance.²²⁷ *Royal Drug* essentially employed a results test for determining the applicability of the McCarran Act: if an insurance company engages in conduct which has a substantial anticompetitive impact upon a noninsurance industry, the conduct having such impact will not be found to constitute the business of insurance.²²⁸ In affirming *Royal Drug*, the United States Supreme Court held that provider contracts, in which an insurance company contracts with noninsurance companies to provide goods or services to its policyholders, were not part of the business of insurance.²²⁹

No single rule can be drawn from these McCarran Act cases. Each case, in large measure, depends upon its own facts. Several generalizations can, however, be made. The focus, but not the outer perimeter, of the business of insurance is the insurer-policyholder relationship, with factors such as the impact upon insurance rates and whether the conduct is "peculiar" or unique to the insurance industry serving as analytical guides. An insurance company may not, however, purposely be used as a device to restrain trade in or expand a competitive advantage to another market, regardless of its short term effect upon rates or the insurer-policyholder relationship. The cases are in conflict on the applicability of the McCarran Act whenever an insurance company's practices have a substantial anticompetitive impact in another market, even though undertaken only for bona fide insurance purposes and without any intent to affect competition adversely in the relevant noninsurance market.²³⁰ It is nonetheless now settled that provider contracts between insurance and noninsurance companies to provide goods or services to policyholders are not part of the business of insurance.²³¹

226. 556 F.2d at 1382-84.

227. *Id.* at 1385-86.

228. *Id.* at 1386-87.

229. 99 S. Ct. at 1074-75, 1083-84. The Court reasoned that the agreements did not involve any risk to the insurer, but were merely a method of reducing costs for the insurer. *Id.* at 1074-75. Moreover, the provider contracts were not between the insurer and the insured and thus were not part of the business of insurance. *Id.* at 1075.

230. *Compare* *Travelers Ins. Co. v. Blue Cross*, 481 F.2d 80, 84-85 (3d Cir. 1973) with *Royal Drug Co. v. Group Life & Health Ins. Co.*, 556 F.2d 1375, 1385-86 (5th Cir. 1977), *aff'd*, 99 S. Ct. 1067 (1979).

231. *Royal Drug Co. v. Group Life & Health Ins. Co.*, 99 S. Ct. 1067, 1074-75, 1083-84 (1975). See notes 203 & 229 *supra*.

C. Concerted Refusal to Deal and Attempt to Monopolize

The initial relationship of the attorney to the bar-related insurance company is that of either organizer or shareholder. There is an initial agreement among lawyers to organize an insurance company and have it follow the policies of a bar-related insurer,²³² including an agreement to subscribe to and vote shares or memberships in the company, to do business only with the bar-related insurer, and to recruit others to do business with and to own shares in the company.²³³ In making this agreement, the attorneys are acting as organizers or shareholders of the company. The bar-related insurance company is not a party to this agreement and does not itself require its shareholders to do business only with it.²³⁴

Similarly, the organization of an insurance company, including the distribution and sale of stock, involves a shareholder/investor relationship with the insurer and has been held not to be part of the business of insurance.²³⁵ The participation of an individual attorney in the agreement to organize a bar-related insurance company is normally signaled by his purchase of its stock. The ABA Standing Committee on Lawyers' Title Guaranty Funds has itself noted that the federal securities laws are applicable to the organization of and

232. See HOW-TO-DO-IT: BAR-RELATED TITLE ASSURING ORGANIZATIONS, *supra* note 1, at 32-33, 36-37 app.

233. *Id.* at 11-13.

234. *Id.* at 36-37 app. The fact that these agreements incidentally result in the referral of prospective policyholders and the recruitment of other referrers of policyholders would not make these agreements part of the shareholder-policyholder relationship. The relevant consideration for purposes of the McCarran Act is the relationship between the individual whose conduct is involved and the insurer, rather than the fact that policyholders may be incidentally affected by that conduct. In *National Securities*, policyholders were incidentally affected by the merger in that the acquiring company secured the acquired company's policyholders, but the relationship at issue was between the company and the individuals who took the action which resulted in the company securing the additional policyholders, namely, the shareholders who voted in favor of the merger. 393 U.S. at 458-60. Several courts have concluded that the relationship between the agents, who wrote policies and therefore supplied policyholders to the insurer, and the insurance company were not part of the insurer-policyholder relationship. *Ray v. United Family Life Ins. Co.*, 430 F. Supp. 1353 (W.D.N.C. 1977); *Allied Financial Servs. v. Foremost Ins. Co.*, 418 F. Supp. 157 (D. Neb. 1976); *DeVoto v. Pacific Fidelity Life Ins. Co.*, 354 F. Supp. 874 (N.D. Cal. 1973), *rev'd on other grounds*, 516 F.2d 1 (9th Cir.), *cert. denied*, 423 U.S. 89 (1975). See note 199 and accompanying text *supra*.

235. *United States v. Meade*, 179 F. Supp. 868, 875-76 (S.D. Ind. 1960). In *Meade*, an insurance agency attempted to establish a controlled insurance company and sell stock in itself for this purpose, in violation of the Securities Act of 1933, 15 U.S.C. §§ 77a-77bbbb (1976). 179 F. Supp. at 870-71. The Securities and Exchange Commission brought criminal charges against the principals of the agency. *Id.* at 871-73. The United States District Court for the Southern District of Indiana held that the attempt was not part of the business of insurance, stating: "Neither the investor in an insurance company nor his stock agent, broker, or solicitor are in the classification of engaging in the insurance business within the meaning of the McCarran Act." *Id.* at 876.

transfers of stock in bar-related companies, thereby recognizing that organization of the title company would not be part of the business of insurance under the McCarran Act.²³⁶ In *Ohio v. Ohio Medical Indemnity, Inc.*,²³⁷ a situation parallel to the lawyers' agreement for organization and operation of a bar-related title insurer was found not to be part of the business of insurance under the McCarran Act.²³⁸ The State of Ohio, as *parens patriae*, brought suit in federal court against Ohio Blue Shield, the Ohio State Medical Association, and its individual member doctors as unnamed co-conspirators for agreeing, in violation of the Sherman Act, to establish Ohio Blue Shield as a means of fixing prices for doctors' services and monopolizing the doctors' insurance market.²³⁹ The individual member doctors were also alleged to have agreed to organize and maintain Ohio Blue Shield, to have agreed not to charge less for patient visits than the amount set by Ohio Blue Shield, and to have agreed not to deal with other health insurers.²⁴⁰ The United States District Court for the Southern District of Ohio held that although the McCarran Act would protect the rates set by Blue Shield under state regulation, it did not protect the agreements among its shareholders, the Medical Association, and the individual doctors.²⁴¹ *Ohio Medical* is direct authority for the proposition that the parallel agreement of the individual attorneys to establish and operate a bar-related title insurance company is not protected from the antitrust laws by the McCarran Act.

Analysis of the attorneys' agreements under those cases which look to the effect upon rates and consider whether the practices are "peculiar" to the insurance industry would not lead to a different re-

236. See HOW-TO-DO-IT: BAR-RELATED TITLE ASSURING ORGANIZATIONS, *supra* note 1, at 17.

237. [1976-2] Trade Cas. (CCH) 70,110 (S.D. Ohio 1976). The Ohio Medical Society owned all but 21 directors' shares of Blue Shield. *Id.* at 70,111. It is informative to compare this situation to the Ohio Bar Title Insurance Company and the National Attorneys Title Insurance Fund, Inc., operating in Indiana, in which the common stock is owned, respectively, by the Ohio State Bar Association Foundation and the Indiana Bar Foundation. HOW-TO-DO-IT: BAR-RELATED TITLE ASSURING ORGANIZATIONS, *supra* note 1, at 6-7. Ownership of stock by the attorneys through their bar associations does not change the analysis of a shareholder-insurer relationship, but simply adds the association as a party.

238. [1976-2] Trade Cas. (CCH) at 70,113.

239. *Id.* at 70,111.

240. *Id.*

241. *Id.* at 70,113. See also *United States v. Oregon State Medical Soc'y*, 95 F. Supp. 103 (D. Or. 1950), *aff'd*, 343 U.S. 326 (1952). Claims parallel to those in *Ohio Medical* were brought against the Oregon State Medical Society, the Oregon Physicians' Service, a corporation engaged in the sale of prepaid medical care, and member physicians. 95 F. Supp. at 104-05. The United States District Court for the District of Oregon decided the case on the merits in favor of the physicians without considering the McCarran Act, which was apparently presumed to be inapplicable.

sult.²⁴² Unlike *Travelers Insurance*, the shareholders' agreement does not involve an agreement between the insurance company and a provider of services to the policyholder under a policy which has the effect of reducing the cost of those services.²⁴³ Furthermore, an agreement to organize a corporation, to have it follow certain practices, to refer business only to it, and to recruit others to join the agreement is not unique to insurance.²⁴⁴

The conclusion that the agreement by the individual attorneys is not protected as part of the business of insurance under the McCarran Act also follows from the analysis applied by the *Battle* court of the intended anticompetitive effect of an agreement.²⁴⁵ The purpose of the lawyers' agreement to establish a bar-related insurance company is to utilize that company as a device to increase the market for private legal services by having the title company require purchasers of title insurance policies to patronize private lawyers.²⁴⁶ As the *Zelson* court stated, "[t]he attempted use of an established insurance market to secure an additional market in some non-insurance product or service is not, *by itself*, a part of the business of insurance."²⁴⁷ This language, and the underlying principle that the use of an insurance company as an instrumentality to affect competition in some other market or to affect the demand for some other service is not part of the business of insurance under the McCarran Act, is equally applicable to the establishment and use of a bar-related insurance company to create the demand for private legal services. The attorneys' agreement to boycott commercial title companies, which underlies the concerted refusal to deal violation under section 1 and the attempt to monopolize violation under section 2 of the Sherman Act, would not be protected from application of federal antitrust law as part of the business of insurance under the McCarran Act.

242. See notes 202-08 and accompanying text *supra*.

243. 481 F.2d at 84. The attorneys do not provide services to the policyholders under an insurance policy since they have an attorney-client relationship with and are responsible to the home purchaser, rather than to the insurer.

244. See *Ohio v. Ohio Medical Indem., Inc.*, [1976-2] Trade Cas. (CCH) 70,110, 70,111 (S.D. Ohio 1976). The cases adopting the analyses of the effect upon rates and practices "peculiar" to the insurance industry all dealt with actions by insurers to reduce costs or actions by insurers unique to the insurance industry. See notes 202-08 and accompanying text *supra*. In the bar-related insurance company context, the agreed upon conduct is not by an insurer at all, but rather by individual attorneys.

245. 493 F.2d at 50. See notes 212-20 and accompanying text *supra*.

246. See BAR-RELATED TITLE ASSURING ORGANIZATIONS, *supra* note 1, at 5-7.

247. 549 F.2d at 68 (emphasis in original) (footnote omitted).

D. Tying Arrangements

Although the bar-related title insurers' requirement that policyholders purchase legal services constitutes a tying arrangement under section 1 of the Sherman Act,²⁴⁸ it would not be illegal under the Sherman Act if the arrangement constituted part of the business of insurance under the McCarran Act. In *Zelson*, the United States Court of Appeals for the Eighth Circuit indicated that whether the McCarran Act exempts a tying arrangement depends upon whether the sale of insurance is the tied or tying product.²⁴⁹ In a tying arrangement, the anticompetitive conduct is directed against and affects the market in the tied product, which in the case of a bar-related title company would be the market for legal services.²⁵⁰ The McCarran Act does not protect anticompetitive conduct intentionally directed at a noninsurance market merely because an insurance company is an intermediary.²⁵¹ The bar-related title insurer's requirement that its policyholders purchase legal services is not designed to sell more insurance, but rather to increase the use of lawyers' services. It would therefore not be exempted from the federal antitrust laws by the McCarran Act.

E. Rebates

Whether the rebates would be protected by the McCarran Act as part of the business of insurance is a more difficult question. In *California League of Independent Insurance Producers v. Aetna Casualty & Surety Co.*,²⁵² agents' commissions were found to be "a vital factor in the ratemaking structure," so as to be part of the business of insurance.²⁵³ It has been seen that there is a split among the

248. See notes 144-65 and accompanying text *supra*.

249. 549 F.2d at 66-67. *Zelson* involved an insurance company's requirement that an agent also become an agent for its wholly owned securities broker or otherwise be terminated. *Id.* at 63-64. The United States District Court for the Eastern District of Missouri, relying on *Dexter v. Equitable Life Assurance Soc'y of the United States*, 527 F.2d 233 (2d Cir. 1975), and *Addrisi v. Equitable Life Assurance Soc'y of the United States*, 503 F.2d 725 (9th Cir. 1974), *cert. denied*, 420 U.S. 929 (1975), found the McCarran Act to be applicable. *Zelson v. Phoenix Mut. Life Ins. Co.*, 410 F. Supp. 1343, 1346-47 (E.D. Mo. 1976), *rev'd*, 549 F.2d 62 (8th Cir. 1977). *Dexter* and *Addrisi* held that the insurer's practice of requiring individuals seeking home loans to also purchase insurance was part of the business of insurance under the McCarran Act. 527 F.2d at 235-36; 503 F.2d at 727-29. The Eighth Circuit in *Zelson* agreed with this reasoning, but distinguished these cases since in *Zelson* insurance was the tying product and securities brokerage the tied product, whereas in *Dexter* and *Addrisi* insurance was the tied product. 549 F.2d at 67.

250. See notes 159-63 and accompanying text *supra*.

251. See *Zelson v. Phoenix Mut. Life Ins. Co.*, 549 F.2d 62, 71 (8th Cir. 1977); *Battle v. Liberty Nat'l Life Ins. Co.*, 493 F.2d 39, 49-50 (5th Cir. 1974).

252. 175 F. Supp. 857 (N.D. Cal. 1959). See note 203 *supra*.

253. 175 F. Supp. at 860 (citations omitted).

circuit courts as to whether an effect upon rates alone is sufficient to establish a practice as part of the business of insurance under the McCarran Act.²⁵⁴ Authorities are also divided as to whether the relationship between an insurer and its agent is itself part of the business of insurance, independent of the effect upon rates.²⁵⁵

Cases such as *Travelers Insurance*, which followed *California League*, involved situations where the challenged conduct was not intended to restrain commerce in a noninsurance market.²⁵⁶ The immediate anticompetitive effect of the bar-related company's rebate manifests itself in the insurance market by increasing the cost of title insurance and by encouraging lawyers to write policies for the bar-related company. The use of anticompetitive conduct as a device to sell insurance was held to be part of the business of insurance in *Zelson*, *Addrisi*, and *Dexter*.²⁵⁷ These cases thus indicate that payment of a rebate or commission by an insurance company to its policy writers would be considered part of the business of insurance under the McCarran Act and exempted thereby from the Sherman Act.

IV. CONCLUSION

Bar-related title insurance companies are attractive devices for private real estate lawyers anxious to preserve their practices. The reverse competition which characterizes the title insurance industry and the requirement in many states that lawyers perform one or more of the elements of a real estate conveyance, such as preparation of the deed, give the organizers of the bar-related companies sufficient control over the placement of title insurance business to guarantee a measure of success once a sufficient number of lawyers are involved.

The goal of the organizers of the bar-related companies is to exclude commercial title companies, realtors, and other nonoffice based lawyers from conducting real estate conveyances. Organization of the bar-related company to accomplish this goal involves the organizing lawyers in two classic combinations in violation of the Sherman Act: a group boycott of commercial title companies by virtue of an agreement to refer business exclusively to the bar-related company and an attempt to monopolize real estate conveyances by establishing and exclusively using the bar-related company. The operation of the

254. See notes 202-04 and accompanying text *supra*.

255. See notes 199-201 and accompanying text *supra*.

256. For a discussion of *Travelers Insurance*, see notes 203 & 204 and accompanying text *supra*.

257. See notes 221-24 and accompanying text *supra*.

bar-related company itself, in support of this same goal, involves two further Sherman Act violations: a tying arrangement by which the bar-related company will issue policies only to those who retain private legal counsel to conduct the conveyance, or to their lenders, and a rebate scheme which encourages exclusive lawyer utilization of the bar-related company.

These antitrust violations are neither novel nor unique. They parallel prior conduct involving insurance agents, doctors, advertisers, and optometrists. The central issue involved in determining their legality is not so much whether the organization and operation of a bar-related company violates the Sherman Act, but whether the Sherman Act is applicable to the organization and operation of the bar-related company. It long has been assumed, without analysis, that either a "learned profession" exemption or the statutorily created McCarran Act exemption for the business of insurance would preclude application of the Sherman Act to such conduct. Recent years have seen the discrediting of this "learned profession" exemption in *Goldfarb*²⁵⁸ and a consistent narrowing of the scope of the McCarran Act exemption. The McCarran Act is now restricted to the insurer-policyholder relationship, with a line of case authority specifically excluding from its protection purposeful use of an insurance company as a device to restrain trade in noninsurance markets. Analysis of the organization and operation of a bar-related title company under this narrow definition of the McCarran Act indicates that its exemption would be applicable only to the rebates offered by the bar-related company and that the group boycott and attempt to monopolize by the company's organizers and the tying arrangement by the company itself should be fully subject to, and accordingly violative of, the Sherman Act.

258. See notes 62-66 and accompanying text *supra*.