Notre Dame Law School
NDLScholarship

Journal Articles | Publications

1985

Application of the Antitrust Laws to the Activities of Insurance Companies: Heavier Risks, Expanded Coverage, and Greater Liability

Joseph Bauer
Notre Dame Law School

Earl W. Kintner

Michael J. Allen

Follow this and additional works at: https://scholarship.law.nd.edu/law_faculty_scholarship

 Part of the Antitrust and Trade Regulation Commons, and the Insurance Law Commons

Recommended Citation
Joseph Bauer, Earl W. Kintner & Michael J. Allen, *Application of the Antitrust Laws to the Activities of Insurance Companies: Heavier Risks, Expanded Coverage, and Greater Liability*, 63 N.C. L. Rev. 431 (1984-1985).
Available at: https://scholarship.law.nd.edu/law_faculty_scholarship/147

This Article is brought to you for free and open access by the Publications at NDLScholarship. It has been accepted for inclusion in Journal Articles by an authorized administrator of NDLScholarship. For more information, please contact lawdr@nd.edu.

APPLICATION OF THE ANTITRUST LAWS TO THE ACTIVITIES OF INSURANCE COMPANIES: HEAVIER RISKS, EXPANDED COVERAGE, AND GREATER LIABILITY†

EARL W. KINTNER*
JOSEPH P. BAUER**
MICHAEL J. ALLEN***

Since 1945 Congress has exempted certain activities of insurance companies from federal antitrust scrutiny. This exemption, provided by the McCarran-Ferguson Act, is not unqualified; it only applies to insurance company activities that constitute the "business of insurance" and that already are regulated under state law. Moreover, the exemption does not apply to activities that involve boycotts, coercion, or intimidation. The purpose of this exemption was to preserve the long tradition of state regulation of insurance, while providing federal remedies for coercive anticompetitive activities. The authors examine recent Supreme Court interpretations of the Act in light of this legislative policy and conclude that the Court has unduly restricted the scope and application of the Act. They urge the Court to abandon this restricted view and call on Congress to assert its view of the nature and scope of the McCarran-Ferguson exemption.

In 1945, by the McCarran-Ferguson Act,[1] Congress conferred a partial exemption from the federal antitrust laws on certain activities of insurance companies. In brief, the Act provides for the preemption of the federal antitrust—and other—laws if the conduct in question (1) is the "business of insurance," (2) is regulated by state law, and (3) does not constitute an agreement to or act of boycott, coercion, or intimidation.

The availability of this exemption has been restricted substantially in the last decade. In part this trend reflects an evolution of the insurance industry and its needs; it also reflects a tendency to construe narrowly any immunity from the

† Copyright © 1985 by Earl W. Kintner, Joseph P. Bauer, and Michael J. Allen. This Article is an advance version of a chapter in volume VIII of the treatise FEDERAL ANTITRUST LAW by Earl W. Kintner and Joseph P. Bauer, published by Anderson Publishing Co. All rights reserved.

* Senior Partner, Arent, Fox, Kintner, Plotkin & Kahn, Washington, D.C. Former Chairman and General Counsel, Federal Trade Commission. A.B. 1936, Depauw University; J.D. 1938, Indiana University.

** Professor of Law, University of Notre Dame. A.B. 1965, University of Pennsylvania; J.D. 1969, Harvard.

*** B.A. 1982, Westminster College; Class of 1985, Notre Dame Law School.

1. Act of Mar. 9, 1945, ch. 20, 59 Stat. 33 (codified as amended at 15 U.S.C. §§ 1011-1015 (1982)). The text of the Act is found *infra* text accompanying note 50.

antitrust laws for special sectors or interests. Although much of this trend is to be welcomed, in some respects the courts[2] have gone too far and too fast in restricting this exemption—both beyond what Congress intended in 1945 and beyond the present needs of the insurance industry.

This Article will describe the rationale for and history of the exemption. An extensive analysis of the three requirements for the invocation of the exemption will follow. The Article will conclude with a consideration of the interrelationship of the McCarran-Ferguson exemption and the state-action doctrine articulated in *Parker v. Brown*.[3]

I. THEORIES FOR GRANTING EXEMPTION TO INSURANCE COMPANIES

Free competition between the entities in any industry usually is considered desirable. Because of characteristics unique to some industries, however, competition may have adverse side effects; thus, some form of governmental regulation may be necessary to ensure that the members of the industry conduct their businesses efficiently and effectively. Many believe the insurance business to be such an industry.

The McCarran-Ferguson Act attempts to further this goal in two ways. It provides a partial exemption from the federal antitrust laws for the business of insurance, and it specifically authorizes state regulation and taxation of the "business of insurance."[4] To understand the rationale for state regulation of the insurance business, it is necessary to consider the need for any type of regulation of the business of insurance; the history of state regulation of the business;[5] and the United States Supreme Court decision[6] that led to the enactment of the McCarran-Ferguson Act.

Historically, it has been thought necessary to regulate the insurance industry in some way; this regulation traditionally came from the individual states.[7] The rationale for such regulation is that vigorous competition could lead to inadequate premium rates and eventually to the insolvency of insurance companies. This competition would injure policyholders as well as the companies themselves.[8] In the fire insurance industry, for example, the dangers that flowed from unbridled competition were inadequate rate levels, rate discrimination, and

2. Although most of this narrowing trend has resulted from a few decisions of the Supreme Court, *see infra* notes 77-99, 305-12 and accompanying text, many lower courts not only have adopted this trend, but also are vying to limit the exemption even further.

3. 317 U.S. 341 (1943).

4. 15 U.S.C. § 1012(b) (1982).

5. The history of the McCarran-Ferguson Act is discussed *infra* notes 24-50 and accompanying text.

6. United States v. South-Eastern Underwriters Ass'n, 322 U.S. 533 (1944).

7. Until 1944 the Supreme Court did not consider insurance to be within the scope of the commerce clause; federal regulation therefore would have been impossible. *See infra* notes 15, 24-50 and accompanying text.

8. *See* United States v. South-Eastern Underwriters Ass'n, 322 U.S. 533, 561 (1944) ("opinions expressed by various persons that unrestricted competition in insurance results in financial chaos and public injury").

insolvency.[9] "Rate-setting in concert was the industry's answer to these presumed dangers."[10]

Although the danger of insurer insolvency required that premium rates not be too low, it also was important that insurance rates not be set at excessive levels as a result of compacts between insurers.[11] These competing objectives—keeping insurance companies solvent and preventing them from placing unnecessary restraints on competition—led many states to regulate insurance companies operating within their borders.[12] Thus, a recent governmental report concluded that "the interests of industry, consumers, and society in sharing risks and spreading the cost of loss are so compelling that a government regulatory system is justified."[13]

This inherent tension between the desire by policyholders for both the benefits of competition and some control of the activities of insurance companies is at the heart of the theory supporting state regulation of the insurance business.

> [T]he policyholder must be considered . . . . On the one hand, he wants his company's financial structure to be strong, its reserves adequate, its rating plans sound, its advertising truthful and its policy forms understandable. To be assured of these things, his interest requires that state supervision and regulation be effective. On the other hand, he never ceases to hope for lower premium rates, broader policy coverage, more efficient service and more aggressive management. The objectives are attainable primarily through competiton.[14]

---

9. J. DAY, ECONOMIC REGULATION OF INSURANCE IN THE UNITED STATES 18 (1970).

10. *Id.* A substantial part of the problem is that an insurer may have difficulty assessing the risks involved and hence the magnitude of claims that it may have to pay. Thus, although premiums define the insurer's income, its costs or expenses are far less predictable. If an insurer underestimates the claims it will have to pay, it may not have sufficient funds to pay them. This uncertainty will lead either to a lack of adequate coverage, insolvency of the company, or both. This uncertainty is far more serious for property or liability insurers than for health or life insurers; in the latter categories actuarial tables, health statistics, and other predictors make the accurate assessment of risk far easier. As a result, it is argued that state regulation of these latter insurers is far less necessary and that they are far less deserving of antitrust immunity. *See, e.g.*, NAT'L COMM'N FOR THE REVIEW OF ANTITRUST LAWS AND PROCEDURES, REPORT TO THE PRESIDENT AND THE ATTORNEY GENERAL (1979), *reprinted in* [Jan.-June] ANTITRUST & TRADE REG. REP. (BNA) No. 897, at Special Supp. 65 (Jan. 18, 1979).

11. J. DAY, *supra* note 9, at 18-19. The concern about excessive rates by agreement led a number of states to enact anticompact statutes. *See id.* at 19.

12. In 1909 Kansas became the first state to enact legislation providing for joint ratemaking by insurers, subject to regulatory approval. These regulatory statutes negated the effect of prior state anticompact legislation. *Id.* at 19.

13. U.S. COMPTROLLER GEN., ISSUES AND NEEDED IMPROVEMENTS IN STATE REGULATION OF THE INSURANCE BUSINESS: REPORT TO THE CONGRESS 11 (1979). State regulation often becomes the necessary substitute for consumer knowledge, which is generally lacking in the insurance field. *Id.* at 11-12.

14. Bergson, *Regulation v. Competition*, 1956 INS. L.J. 703, 705.

More recently, another justification for state regulation has been profferred—to prevent rates or rate classifications that are discriminatory or unaffordable by potential insureds. It is argued that absent regulation, insurers either would decline to insure certain persons when the perceived risk exceeds the premium that could be charged, or would place certain persons in high risk groups when these persons either have no control over these high risk characterizations or simply cannot afford the high premiums. "Social policy" therefore requires state regulation, which effectively will subsidize these persons and guarantee that insurance coverage will be available to them. *See* NAT'L COMM'N FOR THE REVIEW OF ANTITRUST LAWS AND PROCEDURES, *supra* note 10, at Special Supp. 71.

During the nineteenth and early twentieth centuries, the regulation of insurance companies took place exclusively at the state level. Indeed, the prevailing view was that the federal government lacked the power to regulate or control the insurance business.[15] Although there was unevenness in the level and quality of regulation by the forty-eight states, state supervision generally contributed both to enhanced protection of policyholders and increased stability among insurance companies.[16] In addition, the regulation of insurance often was accompanied by taxation of these companies; in many states this was an important source of revenue.

In 1944 the United States Supreme Court decided *United States v. South-Eastern Underwriters Association*,[17] a landmark decision that threatened to displace substantially this state regulation and taxation regime. The Court held that insurance was commerce for purposes of the commerce clause and thus was subject to the federal antitrust laws. The McCarran-Ferguson Act was in large part a congressional attempt to overturn the effect that *South-Eastern Underwriters* had on the states' ability to regulate the insurance business.[18]

The primary concern of the sponsors of the McCarran-Ferguson Act was that full application of federal laws—especially the antitrust laws—to the insurance industry would preclude state regulation of insurance companies that was intended to protect policyholders, would interfere with continued state taxation of all insurance company activities, and would prevent some of the more necessary functions of insurance groups such as cooperative ratemaking.[19] Although it promotes these goals, the McCarran-Ferguson Act does not exempt insurance companies completely from federal laws. The exemption exists only when three requirements are satisfied.[20] The intention of the Congress in passing the Act was to restore to the states the opportunity to regulate and tax insurance within

15. Prior to the decision in United States v. South-Eastern Underwriters Ass'n, 322 U.S. 533 (1944), the Court had held that insurance was not "commerce" for purposes of the commerce clause. *See* New York Life Ins. Co. v. Deer Lodge County, 231 U.S. 495 (1913); Hooper v. California, 155 U.S. 648 (1895); Paul v. Virginia, 75 U.S. (8 Wall.) 168 (1869). Congress tacitly had affirmed the sole regulation of insurance by the states by failing to enact several bills providing for federal regulation of the insurance business. *See* 90 CONG. REC. A4404 (1944).

16. For a good discussion of the history of state regulation of insurance and its relation to the McCarran-Ferguson Act, see Kimball & Boyce, *The Adequacy of State Insurance Rate Regulation: The McCarran-Ferguson Act in Historical Perspective*, 56 MICH. L. REV. 545 (1958). The fire insurance industry is illustrative of the instability that prevailed prior to state regulation. As early as 1877 it was noted that although approximately 4000 insurers had been in the business at one time or another, only 1000 remained. *Id.* at 547-48.

17. 322 U.S. 533 (1944). *South-Eastern Underwriters* is described *infra* notes 31-39 and accompanying text.

18. In his treatise on economic regulation of insurance, Day noted: "Congress opted for state primacy because of the possible dislocation and confusion that might result from the disruption of established regulatory and operating practices and its belief that the states possessed the experience in insurance regulation necessary to regulate 'local' industry problems." J. DAY, *supra* note 9, at 24-25.

19. Although this latter function was deemed essential for the protection of policyholders from both excessive premiums and inadequate coverage, absent exemptive legislation such cooperative ratemaking among insurers clearly would have violated the federal antitrust laws.

20. The activities of insurance companies are exempted only to the extent that they constitute the "business of insurance," are regulated by state law, and do not constitute an agreement to or act of boycott, coercion, or intimidation. 15 U.S.C. §§ 1012(b), 1013(b) (1982).

their respective boundaries, while applying the antitrust laws to conduct not necessary for the welfare of the policyholder.[21]

Despite these rationales for substantial antitrust immunity for certain insurance activities, there have been numerous recent calls for substantial modification or repeal of the exemption.[22] As a corollary to the prevailing national mood for deregulation of many industries, many now believe that the insurance industry should be subject to the same rules of substantial competition—which the antitrust laws promote—that apply to most other industries. The Supreme Court's recent interpretations of the McCarran-Ferguson Act[23] are consistent with these trends; the successful assertion of the defense for insurance company activities has become substantially more difficult since 1978.

II. SOURCE OF THE EXEMPTION—THE McCARRAN-FERGUSON ACT AND ITS HISTORY[24]

Prior to 1944 regulation of the insurance industry was undertaken solely by the states. In 1869 the Supreme Court held in *Paul v. Virginia*[25] that a state statute regulating a "foreign" insurance company did not violate the commerce clause of the Constitution. Justice Field's opinion concluded that "[i]ssuing a policy of insurance is not a transaction of commerce"[26] and that insurance contracts "are not articles of commerce in any proper meaning of the word."[27] The Supreme Court later broadened the *Paul* decision, holding that the "business of insurance" generally was not commerce.[28]

In the period between 1869 and 1944 many bills designed to give the federal

---

21. *See* Prudential Ins. Co. v. Benjamin, 328 U.S. 408, 429 (1946) ("Obviously Congress' purpose was broadly to give support to the existing and future state systems for regulating and taxing the business of insurance.").

22. *See, e.g.*, NAT'L COMM'N FOR THE REVIEW OF ANTITRUST LAWS AND PROCEDURES, *supra* note 10, at Special Supp. 64-73; U.S. DEP'T OF JUSTICE, REPORT OF THE TASK GROUP ON ANTITRUST IMMUNITIES 30 (1977); S. 1710, 95th Cong., 1st Sess. (1977) ("Federal Insurance Act of 1977" (proposal to modify exemption)); H.R. 7623, 95th Cong., 1st Sess. (1977) (proposal to repeal exemption); *Continuation of Business of Insurance Exemption is Scrutinized by Rodino Panel*, 46 ANTITRUST & TRADE REG. REP. (BNA) No. 761, at 768 (Apr. 19, 1984).

23. Union Labor Life Ins. Co. v. Pireno, 458 U.S. 119 (1982); Group Life & Health Ins. Co. v. Royal Drug Co., 440 U.S. 205 (1979); St. Paul Fire & Marine Ins. Co. v. Barry, 438 U.S. 531 (1978).

24. *See* J. DAY, *supra* note 9; Kimball & Boyce, *supra* note 16; Weller, *The McCarran-Ferguson Act's Antitrust Exemption for Insurance: Language, History and Policy*, 1978 DUKE L.J. 587; Wiley, *Pups, Plants and Package Policies—or the Insurance Antitrust Exemption Reexamined*, 6 VILL. L. REV. 281, 286-91 (1961); Note, *A Year of S.E.U.A.*, 23 CHI.-KENT L. REV. 317 (1945).

25. 75 U.S. (8 Wall.) 168 (1869). Paul was an agent for insurance companies incorporated in the state of New York. A Virginia statute required anyone wishing to sell insurance policies in the state to deposit bonds with the state treasurer. Although Paul satisfied a number of other requirements imposed by the statute, he failed to deposit the required bonds. After he began soliciting insurance policies, he was convicted and fined by a Virginia circuit court; the Virginia Supreme Court of Appeals upheld the conviction. In his unsuccessful appeal to the United States Supreme Court, Paul argued that Virginia had no power to regulate his conduct because the commerce clause conferred that authority to Congress.

26. *Id.* at 183.

27. *Id.*

28. *See* New York Life Ins. Co. v. Deer Lodge County, 231 U.S. 495 (1913); Hooper v. California, 155 U.S. 648 (1895).

government express power to regulate insurance were introduced in Congress.[29] None of these bills was passed.[30] Thus, until the Supreme Court's 1944 decision in *South-Eastern Underwriters*,[31] both the courts and Congress approved of exclusive regulation of the business of insurance by the states.[32]

In *South-Eastern Underwriters* the United States alleged that South-Eastern Underwriters Association (SEUA), an insurance association, violated sections 1 and 2 of the Sherman Act[33] by fixing rates and using other illegal measures to coerce people into purchasing insurance policies from its member companies. Overruling over seventy-five years of judicial precedent, the Supreme Court held that insurance was commerce for purposes of the commerce clause and therefore that the business of insurance was subject to federal laws.[34] The Court concluded that insurance should be treated no differently than any other business that affects interstate commerce: "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."[35]

Chief Justice Stone's and Justice Jackson's dissenting opinions[36] expressed many of the fears and concerns of insurers, state insurance commissioners, and Congress about how and by whom the insurance industry would be regulated.[37] Because no federal legislation dealt with insurance, they objected that insurance

29. *See generally* 90 CONG. REC. A4404 (1944) (discussing the bills).

30. *Id.*

31. 322 U.S. 533 (1944).

32. Even while the appeal in *South-Eastern Underwriters* was pending before the Court, several abortive efforts were made to immunize the business of insurance from the federal antitrust laws. FTC v. Travelers Health Ass'n, 362 U.S. 293, 299 n.5 (1960).

33. 15 U.S.C. §§ 1-2 (1982).

34. *South-Eastern Underwriters*, 322 U.S. at 552-53. Justice Black's opinion asserted that prior decisions had involved only whether the *states* could regulate insurance and had not reached the issue raised in *South-Eastern Underwriters*—whether the reach of *federal* legislation was limited such that a *federal* statute like the Sherman Act could not regulate the business of insurance. Thus, in concluding that insurance was commerce for the purposes of the Sherman Act, the Court was not overruling prior cases, but only was rejecting the implications of their broad language regarding insurance and the commerce clause. The practical result of the extension of federal law to insurance, however, was to displace inconsistent state law and regulation and to make unlawful certain conduct by insurance companies that previously had been either condoned or affirmatively approved by the states.

On the other hand, the decision would not necessarily have prevented continued, albeit more limited, state regulation of insurance company conduct, and also would not preclude state licensing and taxation. *See id.* at 548-49. Nevertheless, because there was concern in Congress and elsewhere that the Court's decision might affect even this latter form of state control, the McCarran-Ferguson Act was drafted broadly.

35. *Id.* at 553. The Court also rejected the argument that the Congress in 1890 did not intend to bring insurance companies within the scope of the Sherman Act. The Court held that the Sherman Act was intended to be constitutionally broad in its language and scope and that exemptions for specific industries had to be the product of express language or stated intent. *Id.* at 552-62.

36. *Id.* at 562 (Stone, C.J., dissenting), 584 (Jackson, J., dissenting in part). Justice Frankfurter joined in the opinion of the Chief Justice. Two members of the Court did not participate in the decision.

37. *South-Eastern Underwriters* was a four-to-three decision. It has been argued that in so proceeding, the Court went against an informal rule of not deciding constitutional questions with less than a five-Justice majority. *See* Rose, *State Regulation of Property and Casualty Insurance Rates*, 28 OHIO ST. L.J. 669, 686-87 (1967); *cf.* Mayor of New York v. Miln, 34 U.S. (9 Pet.) 85 (1835) (Court refused to consider case involving constitutional questions when vacancy existed.)

companies would suffer a serious lack of direction after the decision.[38] They argued that this abrupt change in federal policy towards insurance regulation would leave the insurance industry, the policyholders, the states, and the federal government in a state of confusion.[39]

In the wake of *South-Eastern Underwriters*, Congress moved quickly to enact legislation that would allow the states to regulate those activities in the insurance industry that otherwise would be subject to federal regulations such as the antitrust laws. In a step that would have reversed the *South-Eastern Underwriters* decision altogether, the House of Representatives, less than three weeks after the decision, passed a bill that would have provided the insurance industry with a total exemption from the federal antitrust laws.[40] Known in the House as the Walter-Hancock Bill, this legislation also was passed, but later rejected on reconsideration, by the Senate.[41]

After Congress failed to enact this complete exemption legislation, different groups offered suggestions to allow state regulation without precluding the application of federal laws to insurance. The National Association of Insurance Commissioners presented a proposal that provided for a partial exemption from federal laws, giving the states primary regulatory power over the business of insurance.[42] This proposal was modified and then introduced as the McCarran-Ferguson Bill.[43] After the House and Senate passed different versions of the Bill, it was sent to a conference committee and amended substantially.

The amended Bill provided for a three-year complete exemption for the insurance industry from all federal laws; this exemption was designed to allow the states to adjust their regulatory schemes to accommodate federal law.[44] Af-

38. *South-Eastern Underwriters*, 322 U.S. at 582-83 (Stone, C.J., dissenting), 590-93 (Jackson, J., dissenting in part).

39. *Id.*

40. H.R. 3270, 78th Cong., 2d Sess. (1944). The bill passed in the House by a vote of 283 to 54. 90 CONG. REC. 6565 (1944).

Concern over the then-pending *South-Eastern Underwriters* case led to the introduction of this legislation in the House and a companion bill in the Senate, *see infra* note 41, in 1943 after the United States District Court for the Northern District of Georgia had rejected the government's antitrust challenge, but before the Supreme Court's eventual decision reversing that disposition. The passage of the total exemption bill in the House only 17 days after the Court's decision reflects this pent-up concern.

41. S. 1362, 78th Cong., 2d Sess. (1944). On September 21, 1944, the Senate passed its version of the Bill, known as the Bailey-Van Nuys Bill; it rejected the Bill later the same day after a motion for reconsideration. For the Senate discussion of the motion for reconsideration, see 90 CONG. REC. 8054 (1944). Several reasons were given for the Senate's eventual rejection of the complete exemption Bill. The three most important were the following: the threat by President Franklin Roosevelt to veto the Bill; the limited support it received from the insurance industry generally (although certain stock companies and casualty insurers preferred this approach, life insurers and mutual companies were unsupportive); and the preference of state insurance commissioners—represented by the National Association of Insurance Commissioners—for a limited exemption. *See generally* Rose, *supra* note 37, at 682-704 (discussing limited support of insurance industry); Weller, *supra* note 24, at 592 & n.34 (discussing the veto threat); Note, *supra* note 24, at 321-25 (discussing the National Association of Insurance Commissioners desire for a limited exemption).

42. 90 CONG. REC. A4406 (1944).

43. S. 340, 79th Cong., 1st Sess., 91 CONG. REC. 330 (1945).

44. 15 U.S.C. § 1013(a) (1982).

ter the three-year moratorium expired, federal law[45] would be displaced to the extent that the states actually regulated the particular form of the "business of insurance" under scrutiny. The amended form of the Bill also provided that agreements to boycott, coerce, or intimidate, as well as acts of boycott, coercion, or intimidation, were not exempt from federal laws.[46] The House passed the Bill without debate,[47] while the Senate passed it after two days of consideration.[48] President Roosevelt then signed the Bill on March 9, 1945.[49] The Act as currently in force provides:

> § 1 Congress 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.
>
> § 2 (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 on such business, unless such Act specifically relates to the business of insurance: *Provided*, That after June 30, 1948, . . . the Sherman Act, . . . the Clayton Act, and . . . the Federal Trade Commission Act, as amended, shall be applicable to the business of insurance to the extent that such business is not regulated by State law.
>
> § 3 (a) Until June 30, 1948, . . . the Sherman Act, . . . the Clayton Act, . . . the Federal Trade Commission Act, and . . . the Robinson-Patman Anti-Discrimination Act, shall not apply to the business of insurance or to acts in the conduct thereof.
>
> (b) Nothing contained in this chapter shall render the said Sherman Act inapplicable to any agreement to boycott, coerce, or intimi-

45. *See* Freeman v. Chicago Title & Trust Co., 505 F.2d 527, 531-33 (7th Cir. 1974) (§ 2(b) exception also applies to Robinson-Patman Act, 15 U.S.C. § 13 (1982)).

46. 15 U.S.C. § 1013(b) (1982).

47. 91 CONG. REC. 1396 (1945).

48. S. 340, 79th Cong., 1st Sess. (1945); 91 CONG. REC. 1442-44, 1477-89 (1945).

The Supreme Court's treatment of this legislative history has been inconsistent, confusing, and occasionally inaccurate. Most notably, in SEC v. National Sec., Inc., 393 U.S. 453, 458 (1969), the Court stated that "[e]ven before the [*South-Eastern Underwriters*] opinion was announced, the House had passed a bill exempting the insurance industry from the antitrust laws." As noted *supra* note 40 and accompanying text, however, the Supreme Court's decision was announced on June 5, 1944, and the House did not pass H.R. 3270, the Walter-Hancock Bill, until June 22, 1944. In St. Paul Fire & Marine Ins. Co. v. Barry, 438 U.S. 531, 561 n.11 (1978) (Stewart, J., dissenting), Justice Stewart, in discussing the passage of H.R. 3270 in June 1944, incorrectly cited to 90 CONG. REC. 6510; in fact, that reference is to the House's passage of H.R. Res. 422, 78th Cong., 2d Sess. (1944), which was only a resolution to consider H.R. 3270. In FTC v. Travelers Health Ass'n, 362 U.S. 293, 299 n.5 (1960), the Court noted that there had been abortive attempts to immunize the insurance industry from the antitrust laws; for this proposition, however, it cited to the Congressional Record pages describing the introduction of these bills, rather than to the pages describing when the bills were considered and defeated.

49. 91 CONG. REC. 1992 (1945). The background and legislative history of the Act are recounted in the first Supreme Court decision after the statute's passage. *See* Prudential Ins. Co. v. Benjamin, 328 U.S. 408, 414-17, 428-33 (1946).

date, or act of boycott, coercion, or intimidation.[50]

III. LIMITATIONS ON THE STATUTORY EXEMPTION

Congress did not intend the McCarran-Ferguson Act to provide a wholesale exemption from federal laws for the insurance business.[51] Rather, it established three requirements that must be satisfied before the activities of insurance companies will be exempted from the application of federal law.

The first two requirements are found in section 2(b) of the Act. First, the conduct complained of must be within the "business of insurance."[52] This requirement goes to the heart of the Act, for the term "business of insurance" identifies the narrow range of activities that Congress sought to exempt from federal laws. This requirement has been the subject of the majority of judicial decisions under the Act. Second, the challenged conduct must be "regulated by State law."[53] Since the Act essentially was intended to restore the regulation of insurance to the pre-*South-Eastern Underwriters* situation in which the states had exclusive responsibility for that regulation, it was not intended to leave insurance company activities free of federal control if the states did not fill the breach. In contrast to the narrow interpretation given to "the business of insurance," the courts have interpreted this second requirement broadly.[54]

The third requirement is articulated in section 3 of the Act. Even if the activity is within the "business of insurance" and is regulated by state law, it will not be immunized if it constitutes an agreement to or an act of boycott, coercion, or intimidation.[55]

A. Activity Must Encompass "Business of Insurance"

Section 2(b) of the McCarran-Ferguson Act provides:

> No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of *regulating the business of insurance* . . . : *Provided*, That after June 30, 1948, . . . 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.[56]

Although Congress affirmatively provided that the states could regulate the "business of insurance" and further provided that state law designed to achieve

---

50. Act of Mar. 9, 1945, ch. 20, §§ 1-3, 59 Stat. 33-34 (codified as amended at 15 U.S.C. §§ 1011-1013 (1982)).

51. *See supra* notes 40-41 and accompanying text (bill that would have provided a total exemption from federal antitrust laws for the business of insurance not enacted).

52. 15 U.S.C. § 1012(b) (1982).

53. *Id.* It bears emphasis that although the business-of-insurance requirement and the regulated-by-State-law requirement are both found in § 2(b), they are separate and must be satisfied independently. Thus, as the Supreme Court has stressed, the mere fact that aspects of insurance companies are regulated by state law does not mean that these aspects constitute the "business of insurance." *See* Group Life & Health Ins. Co. v. Royal Drug Co., 440 U.S. 205, 230 n.38 (1979).

54. *See infra* notes 254-99 and accompanying text.

55. 15 U.S.C. § 1013(b) (1982).

56. *Id.* § 1012(b) (emphasis added).

that purpose would not be invalidated by federal law, the Act contains no definition of the term "business of insurance." The determination of this question, which has given rise to the majority of decisions under the Act, has arisen in the following five types of relationships: agreements between an insurer and a third party that is not a member of the insurance industry; agreements between insurance companies; relations between the insurer and its policyholders; relationships between an insurance company and its agents or others in the insurance industry; and unilateral activities by insurance companies.[57]

In two recent decisions the Supreme Court articulated the test to determine whether the alleged unlawful conduct constitutes the "business of insurance."[58] A court must consider the conduct in light of three factors: whether, with respect to the challenged activity, the insurance company is engaging in an underwriting or risk-spreading function; whether the conduct involves the relationship between the insurer and the policyholder; and whether the conduct is limited to activities between entities within the insurance industry. This tripartite test will be applied in all determinations whether the activity in question constitutes the "business of insurance."

The first step in determining whether a particular activity constitutes the "business of insurance" is determining the applicable law—that of the federal courts or a state. In *SEC v. Variable Annuity Life Insurance Company of America*[59] the Securities and Exchange Commission sought to enjoin a life insurance company from offering certain kinds of variable annuity contracts without first registering them under the Securities Act of 1933[60] and the Investment Company Act of 1940.[61] Because the laws of a number of states and the District of Columbia did regulate to some extent both defendant generally and its issuance of these contracts specifically, defendant argued that section 2(b) of the Act rendered these federal laws inapplicable to these activities.[62]

At issue in *Variable Annuity Life*, which arose in a *non-antitrust* context, was whether these offerings constituted the "business of insurance" for purposes of section 2(b) of the Act. The Court began by emphasizing that this determination was a *federal* question and was *not* governed by statements of state legislatures or state courts.[63]

The Supreme Court then held, on the merits, that these annuities were not insurance contracts, that their issuance by defendant did not constitute the "business of insurance," and that therefore the McCarran-Ferguson exemption

57. *See infra* notes 100-253 and accompanying text.

58. *See* Union Labor Life Ins. Co. v. Pireno, 458 U.S. 119 (1982); Group Life & Health Ins. Co. v. Royal Drug Co., 440 U.S. 205 (1979).

59. 359 U.S. 65 (1959). This case was decided by a five-to-four vote.

60. 15 U.S.C. § 77a (1982).

61. *Id.* § 80a-1.

62. Defendant also argued that provisions of the two statutes—the Securities Act of 1933 and the Investment Company Act of 1940—exempted insurance companies and insurance contracts. The Court held that whether defendant fell within these two statutes involved a "question common . . . to § 2(b) of the McCarran-Ferguson Act . . . [i.e.,] whether respondents are issuing contracts of insurance." *Variable Annuity Life*, 359 U.S. at 67-68.

63. *Id.* at 69.

did not apply.[64] The Court emphasized that insurance involved some element of risk-spreading; the *underwriting of risks* is "the one earmark of insurance as it has commonly been conceived of in popular understanding and usage."[65] This requirement of risk-spreading, which was the only factor to which the Court in *Variable Annuity Life* looked, has become one element of a three-part test for those activities that are shielded by the McCarran-Ferguson Act.[66]

The next consideration by the Supreme Court of the "business of insurance," *SEC v. National Securities, Inc.*,[67] once again was in a *nonantitrust* context involving an alleged securities violation. One insurance company acquired the stock of another insurance company; the acquisition was approved by the Arizona Director of Insurance, who had examined the transaction and determined that it satisfied the requirements of the Arizona insurance statutes. The SEC challenged the acquisition in federal court, asserting that the nondisclosure by the acquiring company of certain material facts to the stockholders of the acquired company violated the Secutities Exchange Act of 1934.[68] Both the trial court and the United States Court of Appeals for the Ninth Circuit found the SEC's challenge shielded by section 2(b) of the McCarran-Ferguson Act and dismissed the complaint.

The Supreme Court reversed, emphasizing that "[t]he first question posed by this case is whether the relevant Arizona statute is a 'law enacted . . . for the purposes of regulating the business of insurance' within the meaning of the McCarran-Ferguson Act."[69] The Court then concluded that "it is clear where the focus [of the exemption] was—it was on the relationship between the insurance company and the policyholder."[70]

The Court stressed that the exemption was not for "all the activities of insurance *companies*; [the statutory] language refers not to the persons or com-

64. *Id.* at 71-73. The principal analysis in Justice Douglas' opinion for the Court, and even more so in Justice Brennan's concurring opinion and Justice Harlan's dissenting opinion (for himself and three other members of the Court), was on the application of the *securities* laws to this conduct, and on the intent of Congress in 1933 and 1940 rather than in 1945. *See supra* note 62. In a subsequent decision, SEC v. United Benefit Life Ins. Co., 387 U.S. 202 (1967), the Court held that a deferred annuity contract offered by an insurance company also was subject to the registration requirements of the Securities Act of 1933; the Court did not address the possibility of a McCarran-Ferguson exemption.

65. *Variable Annuity Life*, 359 U.S. at 73. The Court had stated that "the concept of 'insurance' involves some investment risk-taking on the part of the company." *Id.* at 71.

66. In a decision the year before, FTC v. National Casualty Co., 357 U.S. 560 (1958), the Court had held that the preparation and shipment of allegedly unfair advertising by insurance companies fell within the § 2(b) exemption. The Court apparently assumed that the business-of-insurance requirement was satisfied; it did not consider explicitly whether this conduct constituted the business of insurance. This advertising, however, clearly did not relate directly to the underwriting-of-risk function. *Cf.* Group Life & Health Ins. Co. v. Royal Drug Co., 440 U.S. 205, 244 (1979) (Brennan, J., dissenting) (finding *National Casualty* indistinguishable). *National Casualty* is discussed *infra* notes 259-64 and accompanying text.

67. 393 U.S. 453 (1969).

68. 15 U.S.C. §§ 78a-78kk (1982).

69. *National Sec.*, 393 U.S. at 457.

70. *Id.* at 460. The Court expressed the primacy of this standard in a number of ways. *See, e.g., id.* at 459 ("The McCarran-Ferguson Act was an attempt . . . to assure that the activities of insurance companies in dealing with their policyholders would remain subject to state regulation."); *infra* text accompanying note 76.

panies who are subject to state regulation, but to laws 'regulating the *business* of insurance.' "[71] The opinion then provided examples of conduct that were within the scope of this limitation: "Certainly the fixing of rates is part of this business . . . ."[72] "The selling and advertising of policies,[73] . . . and the licensing of companies and their agents[74] are also within the scope of the statute."[75] Finally, the Court generalized about the forms of conduct that were within the exemption: "Congress was concerned with the type of state regulation that centers around the contract of insurance . . . . 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.' "[76]

In *National Securities* the Court seemed to be substituting a new analysis for that used in *Variable Life Annuity* rather than adding an additional criterion. Subsequent cases, however, demonstrate that this requirement—that the activities of the insurance company under scrutiny must be between it and its policyholders, rather than with investors or others—has become the second prong of the business-of-insurance test. The third prong of the test, as well as a fuller development of the first two factors, evolved in the next two Supreme Court decisions involving this issue.

The two most recent cases to have considered the "business of insurance," *Group Life & Health Insurance Co. v. Royal Drug Co.*[77] and *Union Labor Life Insurance Co. v. Pireno*,[78] have expanded the factors to be weighed from two to three.[79] It is noteworthy, however, that the Court seems not to treat these criteria as part of a checklist, each of which must be satisfied before the conduct in question is deemed within the "business of insurance." Rather, they are merely factors to be considered and balanced in making an overall judgment on the nature of the scrutinized activity.

In *Royal Drug* the Texas Blue Shield corporation, a company engaged in

71. *National Sec.*, 393 U.S. at 459.

72. *Id.* at 460 ("[T]hat is what *South-Eastern Underwriters* was all about.").

73. *Id.* (citing FTC v. National Casualty Co., 357 U.S. 560 (1958)).

74. *Id.* (citing Robertson v. California, 328 U.S. 440 (1946)).

75. *Id.*

76. *Id.*

77. 440 U.S. 205 (1979).

78. 458 U.S. 119 (1982).

79. The Supreme Court also gave brief consideration to the "business of insurance" in a recent non-antitrust decision, Arizona Governing Comm. v. Norris, 103 S. Ct. 3492, 3500 n.17 (1983) (Marshall, J., concurring in part). Plaintiff in *Norris* challenged under Title VII of the Civil Rights Act of 1964 the use by the State of Arizona of deferred compensation plans that paid different benefits to male and female employees. Speaking for himself and four other members of the Court, Justice Marshall asserted that the plan was not exempt from challenge because of the McCarran-Ferguson Act since "the plaintiffs . . . have not challenged the conduct of the business of insurance. All that is at issue in this case is *an employment practice:* the practice of offering a male employee the opportunity to obtain greater monthly annuity benefits than could be obtained by a similarly situated female employee." *Id.* (Marshall, J., concurring in part). Justice Powell, dissenting in part in an opinion for himself and three other Justices, concluded that both the McCarran-Ferguson Act and the legislative intent of the 1964 Civil Rights Act evinced a willingness to allow state regulation of such insurance compensation determinations. *Id.* at 3506-08 (Powell, J., dissenting in part). The same issues had been raised and similarly resolved in an earlier circuit court case, Spirt v. Teachers Ins. & Annuity Ass'n, 691 F.2d 1054, 1063-66 (2d Cir. 1982).

offering health care insurance, had entered into "provider agreements" with pharmacies with the intent of reducing the cost of reimbursement for prescription drugs.[80] Each pharmacy in Texas was offered the opportunity to contract with Blue Shield to become a "participating pharmacy." Each such store agreed to furnish pharmaceuticals to insureds of Blue Shield on a "cost plus fixed mark-up" basis; Blue Shield would make direct payment of the pharmacy's costs to the pharmacy and the insured would pay the pharmacy the two dollar "mark-up" amount. With respect to drugs purchased from nonparticipating pharmacies, however, the insured paid the entire prescription price; Blue Shield then reimbursed him only seventy-five percent of the difference between the prescription price and two dollars.[81] The result of this program was to encourage insureds to patronize participating pharmacies. Several nonparticipating pharmacies challenged Blue Shield's practice as a price-fixing agreement in violation of section 1 of the Sherman Act. Although the district court dismissed the complaint, concluding that the agreements between Blue Shield and the participating pharmacies were immunized by section 2(b) of the McCarran-Ferguson Act, the United States Court of Appeals for the Fifth Circuit reversed. The court of appeals concluded that these challenged agreements were not part of the "business of insurance."[82]

In affirming the court of appeals,[83] the Supreme Court identified three factors that were to be weighed in making this determination.[84] First, the Court noted that "[t]he primary elements of an insurance contract are the spreading and underwriting of a policyholder's risk."[85] Second, "[a]nother commonly understood aspect of the business of insurance relates to the contract between the insurer and the insured."[86] Evaluating the facts, the Court concluded that

---

80. *Royal Drug*, 440 U.S. at 214-16. "Provider agreements" are described *infra* text accompanying note 101.

81. *Id.* at 209.

82. 556 F.2d 1375 (5th Cir. 1977), *rev'g* 415 F. Supp. 343 (W.D. Tex. 1976), *aff'd*, 440 U.S. 205 (1979).

83. The Court emphasized that the scope of the exemption is limited: "The exemption is for the 'business of insurance,' not the 'business of insurers.' " *Royal Drug*, 440 U.S. at 211.

Royal Drug was a five-to-four decision. One obvious area of disagreement concerned the general scope of the exemption. *Compare id.* at 231 ("It is well settled that exemptions from the antitrust laws are to be narrowly construed . . . .") *with id.* at 234-35 (Brennan, J., dissenting) ("[T]he legislative history . . . indicate[s] that Congress deliberately chose to phrase the exemption broadly."). It also is implicit in the dissent that the scope of the "business of insurance" includes some aspects of the "business of insurance companies." "[E]vidence of what states might reasonably have considered to be and regulated as insurance at the time the McCarran-Ferguson Act was passed in 1945 is clearly relevant to [the] decision." *Id.* at 237-38 (Brennan, J., dissenting).

84. The Court only decided that the McCarran-Ferguson exemption did not apply; the decision did not purport to pass on the merits of plaintiffs' Sherman Act claims. *Id.* at 210 & n.5 ("Whether the Agreements are *illegal* under the antitrust laws is an entirely separate question . . . . It is axiomatic that conduct which is not exempt from the antitrust laws may nevertheless be perfectly legal."). The merits of this open issue—whether such provider agreements are unlawful—were considered in Medical Arts Pharmacy v. Blue Cross & Blue Shield, 518 F. Supp. 1100, 1107-09 (D. Conn. 1981) (per se rule inapplicable; rule of reason approach precludes disposition by summary judgment). *See infra* note 122 and accompanying text.

85. *Royal Drug*, 440 U.S. at 211; *see also id.* at 213 ("[T]he underwriting or spreading of risk is a critical determinant in identifying insurance.").

86. *Id.* at 215.

neither of these criteria was met.[87]

In addition, the Court identified another consideration which suggested that the agreements under attack were not part of the "business of insurance." After reviewing the legislative history of McCarran-Ferguson, the Court concluded that the Act's purpose was to allow insurance companies to continue to work cooperatively, particularly in the area of rate-setting, under the supervision of state authorities and thereby engage in joint activities that otherwise would be unlawful under the Sherman Act. It was not contemplated, however, that the exemption would extend to activities or agreements between an insurance company and a third party. In *Royal Drug*, the conduct was held not exempted by McCarran-Ferguson "because the Pharmacy Agreements involve parties wholly outside the insurance industry."[88]

Although this third consideration was not identified clearly in *Royal Drug* as an important concern, the *Pireno* court was far more explicit. In *Pireno* an insurance company provided in its health insurance policies that its liability would extend to the "reasonable charges" for "necessary medical care and services."[89] To assist in evaluating the reasonableness of charges or the necessity of medical services for which claims had been submitted by its insureds, the company arranged with health providers to organize a "peer review committee" that would study these claims and report on their validity.[90] Plaintiff was a chiropractor, some of whose charges to his patients had been rejected by the company because of adverse reports from the peer review committee. He brought an action under section 1 of the Sherman Act asserting that the arrangements between the company and the members of the committee constituted price fixing agreements and a group boycott. As in *Royal Drug*, the district court dismissed the claim, finding defendant company's activities shielded by section 2(b) of the McCarran-Ferguson Act.[91] This determination was rejected by the United States Court of Appeals for the Second Circuit[92] and the Supreme Court,[93] which both concluded that these arrangements were not part of the "business of insurance."

In *Pireno* the Supreme Court summarized the factors relevant to this determination:

> [T]hree criteria [are] relevant in determining whether a particular practice is part of the "business of insurance" exempted from the antitrust laws by § 2(b): *first*, whether the practice has the effect of transferring or spreading a policyholder's risk; *second*, whether the practice is an integral part of the policy relationship between the insurer and

87. The Court's discussion of the application of these two factors to the facts is described in detail *infra* notes 108-13 and accompanying text.

88. *Royal Drug*, 440 U.S. at 231.

89. *Pireno*, 458 U.S. at 122.

90. *Id.* at 123.

91. Pireno v. New York State Chiropractic Ass'n, 1979-2 Trade Cas. (CCH) ¶ 62,758 (S.D.N.Y. 1979), *rev'd*, 650 F.2d 387 (2d Cir. 1981), *aff'd*, 458 U.S. 119 (1982).

92. Pireno v. New York State Chiropractic Ass'n, 650 F.2d 387 (2d Cir. 1981), *aff'd*, 458 U.S. 119 (1982).

93. *Pireno*, 458 U.S. at 129.

the insured; and *third*, whether the practice is limited to entities within the insurance industry.[94]

The Court's opinion elaborates on the significance of this third factor. The congressional intent in passing McCarran-Ferguson was to protect *intra*-industry cooperation and to sanction the diminution of competition within the insurance industry, in part because its activities would be regulated by the states. On the other hand, conduct by insurers that involves third parties may substantially lessen competition outside the insurance industry. "Arrangements between insurance companies and parties outside the insurance industry can hardly be said to lie at the center of [the] legislative concern."[95]

The Court's treatment of these three criteria was a rejection of the "checklist" approach. Indeed, the Court stressed that "[n]one of these criteria is necessarily determinative in itself."[96] On the other hand, none of these factors may be ignored or depreciated; a failure to satisfy any of the three will create substantial difficulty for a defendant attempting to bring its conduct within the "business of insurance."[97]

It is obvious that the establishment of this three-part test was the Court's vehicle for construing exemptions from the antitrust laws in a limited fashion.[98] The Court, however, effectuated this result by opting for a mechanical rather than an analytic approach. If the ultimate inquiry should be which activities of insurance companies require cooperative effort, thereby justifying the substitution of governmental supervision and regulation for the full scrutiny of the antitrust laws, then the distinctions the Court made—for example, permitting joint conduct that *spreads* the risk, but denying the exemption for risk *reduction*—often will fail to reflect accurately the purpose of the statutory exemption. It therefore is suggested that after further development of this tripartite test in the lower courts, the Supreme Court should reexamine whether its application of this test has been consistent with the goals of McCarran-Ferguson. Although the Court has identified these criteria, applying them to particular factual situations has not proven easy.[99]

---

94. *Id.*

95. *Id.* at 133.

96. *Id.* at 129. The Court in *Royal Drug* had implied that these criteria might be accorded different weights. *Royal Drug* had referred to "underwriting or spreading of risk as an indispensable characteristic of insurance," *Royal Drug*, 440 U.S. at 212, while merely stating that "[a]nother commonly understood aspect of the business of insurance relates to the contract between the insurer and the insured." *Id.* at 215.

97. "We may assume that the challenged peer review practices need not be denied the § 2(b) exemption *solely* because they involve parties outside the insurance industry. But the involvement of such parties, even if not dispositive, constitutes part of the inquiry . . . . Thus we can not join petitioners in depreciating [this] fact . . . ." *Pireno*, 458 U.S. at 133-34.

98. "It is well settled that exemptions from the antitrust laws are to be narrowly construed . . . . This doctrine is not limited to implicit exemptions from the antitrust laws, but applies with equal force to express statutory exemptions." *Royal Drug*, 440 U.S. at 231.

99. One open issue relates not to the specific activities of the insurance company, but to the type of insurance being sold: whether the issuance of *title insurance* is part of the "business of *insurance*." The question arises because it has been suggested that title insurance actually involves very little underwriting of risk; such insurance usually is obtained for, and its premiums are calculated based upon, the cost of escrow services and of the title search rather than the risk that a purchaser will obtain inadequate title to real property. Although some courts have acknowledged this fact, none-

1. Relationships with Entities Outside the Insurance Industry

As noted, the two most recent Supreme Court decisions that discussed the "business of insurance"[100] have added a third factor to the analysis—whether the challenged conduct involves an agreement between the insurance company and an entity outside the industry. In both cases, after concluding that the challenged conduct was between an insurance company and a noninsurance entity, the Court concluded that the McCarran-Ferguson exemption was unavailable. These outside relationships also have been the subject of much of the business-of-insurance jurisprudence in the lower courts. Two kinds of insurer-outsider activity have been considered in detail: provider agreements and fee review committees.

The greatest number of cases involving the definition of the "business of insurance" have involved provider agreements. A provider agreement is a contract or arrangement in which a third party agrees to provide certain goods or services to the insurer's policyholders with direct payment made to the provider from the insurer. The insurer usually can decrease its costs through such arrangements because it can bargain for lower rates than would be afforded by the provider to a policyholder. Such provider arrangements have been used principally in the fields of health and automobile insurance. Generally, the same standard for determining whether the arrangements are within the "business of insurance" has been applied to all types of insurance.[101]

The seminal provider agreement case is *Group Life & Health Insurance Co.*

---

theless courts consistently hold—or assume—that title insurance is indeed within the "business of insurance." *See* Lawyers Title Co. v. St. Paul Title Ins. Corp., 526 F.2d 795 (8th Cir. 1975); Crawford v. American Title & Ins. Co., 518 F.2d 217 (5th Cir. 1975); Commander Leasing Co. v. Transamerica Title Ins. Co., 477 F.2d 77 (10th Cir. 1973); Escrow Disbursement Ins. Agency v. American Title & Ins. Co., 550 F. Supp. 1192 (S.D. Fla. 1982); Lawyer's Realty Corp. v. Peninsular Title Ins. Co., 428 F. Supp. 1288 (E.D. La. 1976), *aff'd*, 550 F.2d 1035 (5th Cir. 1977); 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); Mitgang v. Western Title Ins. Co., 1974-2 Trade Cas. (CCH) ¶ 75,322 (N.D. Cal. 1974).

In a recent case, United States v. Title Ins. Rating Bureau, 700 F.2d 1247 (9th Cir. 1983), *cert. denied*, 104 S. Ct. 3509 (1984), however, the United States Court of Appeals for the Ninth Circuit held that *escrow services* were *not* part of the "business of insurance" under the *Royal Drug* tripartite test. The court also observed that the Supreme Court never has resolved the status of title insurance. *Id.* at 1250. It remains to be seen whether these recent developments will have an effect on judicial treatment of title insurance.

In First Am. Title Co. v. South Dakota Land Title Ass'n, 541 F. Supp. 1147, 1153 (D.S.D. 1982), *aff'd*, 714 F.2d 1439 (8th Cir. 1983), *cert. denied*, 104 S. Ct. 709 (1984), the United States District Court for the District of South Dakota held that although certain essential activities of title insurers—including seeking enforcement of a state law requiring that title insurance policies be countersigned by an abstractor—were part of the "business of insurance;" other related activities were not. *See infra* note 174. On Jan. 7, 1985, the FTC announced the filing of an administrative complaint against six national title insurance companies, alleging that they unlawfully fixed prices on title search and examination services through participation in rating bureaus, in violation of § 5 of the FTC Act, 15 U.S.C. § 45 (1982). The complaint specifically asserted that these activities were not part of the "business of insurance," and hence were not exempted by the McCarran-Ferguson Act. *In re* Ticor Title Ins. Co., 3 Trade Reg. Rep. (CCH) ¶ 22,219 (1985).

100. *See supra* notes 77-97 and accompanying text.

101. *But see* Proctor v. State Farm Mut. Auto. Ins. Co., 675 F.2d 308 (D.C. Cir. 1982) (noting difference between ascertaining premium rates for automobile insurance and for health insurance).

v. Royal Drug Co.[102] Prior to that decision most lower court decisions had focused on the criterion identified by the Supreme Court in *SEC v. National Securities, Inc.*[103]—whether the conduct principally involved the relationship between the insurer and the policyholder.[104] These courts had concluded that the agreements between the insurer and a third-party service provider so directly affected the insurer-insured relationship that they constituted the "business of insurance."[105]

As noted above, in *Royal Drug* the Supreme Court adopted a three-part test to determine whether alleged unlawful conduct was within the "business of insurance."[106] In the course of applying this test to the provider agreement under scrutiny, the Court adopted a narrower view of the "business of insurance" than had many of these prior lower court decisions.[107]

The Court began its analysis by stressing that the "primary elements of an insurance contract are the spreading and underwriting of a policyholder's risk."[108] Applying this factor, the Court construed the function of "risk-spreading" narrowly. This characteristic did apply to the Blue Shield policies themselves, "which insure against the risk that policyholders will be unable to pay for prescription drugs during the period of coverage."[109] On the other hand, the challenged provider agreements spread no risk, but rather served only to minimize the insurer's costs and maximize its profits. Independent arrangements

---

102. 440 U.S. 205 (1979); *see supra* notes 80-88 and accompanying text.

103. 393 U.S. 453 (1969).

104. *See supra* notes 67-76 and accompanying text.

105. *See* Proctor v. State Farm Mut. Auto. Ins. Co., 561 F.2d 262 (D.C. Cir. 1977), *aff'g* 406 F. Supp. 27 (D.D.C. 1975), *vacated*, 440 U.S. 942 (1979); General Glass Co. v. Globe Glass & Trim Co., 1978-1 Trade Cas. (CCH) ¶ 61,998, at 74,268 (N.D. Ill.) ("Simply because a non-insurance, service company is involved in the claims settlement process does not preclude a conclusion that, as a matter of law, the 'business of insurance' embraces arrangements between the insurance companies and third-party, non-policyholders who provide auto glass replacement services."), *aff'd on reconsideration*, 1978-2 Trade Cas. (CCH) ¶ 62,231 (N.D. Ill. 1978); St. Bernard Gen. Hosp. v. Hospital Serv. Ass'n, 1978-1 Trade Cas. ¶ 61,868 (E.D. La. 1977), *rev'd*, 618 F.2d 1140 (5th Cir. 1980), *cert. denied*, 104 S. Ct. 2342 (1984); Manasen v. California Dental Serv., 424 F. Supp. 657 (N.D. Cal. 1976), *rev'd*, 638 F.2d 452 (9th Cir. 1979); Frankford Hosp. v. Blue Cross, 417 F. Supp. 1104 (E.D. Pa. 1976), *aff'd per curiam*, 554 F.2d 1253 (3d Cir. 1977), *cert. denied*, 434 U.S. 860 (1977); Anderson v. Medical Serv., 1976-1 Trade Cas. (CCH) ¶ 60,884 (E.D. Va. 1976), *aff'd mem.*, 551 F.2d 304 (4th Cir. 1977); Doctors, Inc. v. Blue Cross, 431 F. Supp. 5, 9-10 (E.D. Pa. 1975), *aff'd per curiam*, 557 F.2d 1001 (3d Cir. 1976); Nankin Hosp. v. Michigan Hosp. Serv., 361 F. Supp. 1199 (E.D. Mich. 1973); Travelers Ins. Co. v. Blue Cross, 361 F. Supp. 774 (W.D. Pa. 1972), *aff'd*, 481 F.2d 80, 83 (3d Cir.), *cert. denied*, 414 U.S. 1093 (1973); *see also* Ohio v. Ohio Medical Indem., 1976-2 Trade Cas. (CCH) ¶ 61,128 (S.D. Ohio 1976) (in suit challenging provider agreements, McCarran-Ferguson Act shields only insurers, not providers); Pastor v. Hartford Fire Ins. Co., 1976-1 Trade Cas. (CCH) ¶ 60,783 (C.D. Cal. 1976) (same). *But see* Battle v. Liberty Nat'l Life Ins. Co., 493 F.2d 39 (5th Cir. 1974) (use of intermediary between insurer and provider may result in activities outside of "business of insurance"), *cert. denied*, 419 U.S. 1110 (1975); Hill v. National Auto Glass Co., 293 F. Supp. 295, 296 (N.D. Cal. 1968) (holding that the insurer's activities were not part of the "business of insurance").

106. *See supra* notes 77-88 and accompanying text.

107. *See generally* Richards, *Federal Antitrust Law and the* Royal Drug *Pharmacy Agreement: Implications for Formulating National Health Policy*, 34 OKLA. L. REV. 233 (1981) (discussing decisions prior to *Royal Drug*); Note, *Insurance Provider Agreements Subject to Antitrust Scrutiny*, 17 HOUS. L. REV. 643 (1980) (discussing Supreme Court's adoption of narrower view).

108. *Royal Drug*, 440 U.S. at 211.

109. *Id.* at 213.

between the insurer and third parties, even if they might redound indirectly to the benefit of the insureds because of lower premiums[110] and may be necessary to the successful operation of the insurance plan,[111] still are *not* part of the risk-spreading or underwriting aspect of the business of insurance.

The second characteristic of the "business of insurance" is a contractual relationship between the insurer and the insured; this was the factor on which the Court had focused in *National Securities*.[112] This requirement was not satisfied in *Royal Drug* because the challenged pharmacy agreements were not "between insurer and insured." Rather, "[t]hey [were] separate contractual arrangements between Blue Shield and pharmacies engaged in the sale and distribution of goods and services other than insurance."[113] The Court rejected the argument that this criterion was satisfied by conduct which, by controlling costs, would "affect the 'reliability, interpretation, and enforcement' of the insurance contract and 'relate closely to their status as reliable insurers.' "[114] Almost all of Blue Shield's activities would satisfy this requirement. "Such a result[, however,] would be plainly contrary to the statutory language, which exempts the 'business of insurance' and not the 'business of insurance companies.' "[115] To obtain the exemption afforded by section 2(b), the conduct must *involve* the insurer-insured relationship, rather than merely *affect* it.

The Court's third criterion for determining whether challenged conduct was part of the "business of insurance"—whether the conduct was limited to entities within the insurance industry[116]—was derived from an examination of the legislative history and purposes of the Act. The principal purpose of McCarran-Ferguson was to allow the states to regulate and tax insurance companies to the extent they had done so before the *South-Eastern Underwriters* decision. The secondary purpose—but the one of chief importance to the *Royal Drug* decision—was to give insurance companies a limited exemption from the antitrust laws.[117] This exemption, however, was intended to extend only to "practices which involved intra-industry cooperatives or concerted activities."[118]

The Court concluded that joint ratemaking between insurance companies was the principal activity that Congress intended to protect with the McCarran-

110. "[T]here is an important distinction between risk underwriting and risk reduction. By reducing the total amount it must pay to policyholders, an insurer reduces its liability and therefore its risk. But unless there is some element of spreading risk more widely, there is no underwriting of risk." *Id.* at 214 n.12.

111. "It is true that some type of provider agreement is necessary for a service benefit plan to exist. But it does not follow that because an agreement is necessary to provide insurance, it is also the 'business of insurance.' " *Id.* at 213 n.9.

112. *See supra* notes 67-76 and accompanying text.

113. *Royal Drug*, 440 U.S. at 216.

114. *Id.* (quoting *National Sec.*, 393 U.S. at 460).

115. *Id.* at 217.

116. *Id.* at 231. The Court compared the impermissible presence of a noninsurance entity as the other party to the pharmacy agreements with similar situations involving the agricultural cooperative exemption and the labor exemption, in which the presence of an entity outside the protected group also results in the loss of the antitrust exemption. *Id.*

117. *Id.* at 218 n.18.

118. *Id.* at 222.

Ferguson exemption. Contractual relationships with entities outside the industry are not unique to the insurance business; therefore, Congress saw no special needs requiring an exemption from the antitrust laws. "There is not the slightest suggestion in the legislative history that Congress in any way contemplated that arrangements such as the Pharmacy Agreements in this case, which involve the mass purchase of goods and services from entities outside the insurance industry, are the 'business of insurance.' "[119]

Although the *Royal Drug* Court's narrow application of the "business of insurance" to Blue Shield's provider agreements may reflect correctly the prevailing view of that term when Congress passed the Act in 1945,[120] the Court's decision conflicts with some of the broader purposes of the McCarran-Ferguson exemption. The Court rejected as irrelevant to the existence of the immunity the arguments that these pharmacy agreements would have resulted in lower costs to the insurer and hence to the insured and that they might have been necessary for the successful operation of the full-reimbursement plan. In allowing continued regulation of such activities by the states, Congress in 1945 intended to foster the financial stability of insurance companies and the establishment of low premium rates with reasonable levels of protection to insureds. The Court's decision tends to freeze insurance arrangements at the levels of innovation and services prevalent in 1945—when there was considerable doubt that these health care arrangements constituted insurance at all.[121] Because Blue Shield's provider agreements were among the necessary, reasonable, and beneficial activities of an insurance company, it would have been wiser to include them within the "business of insurance."

On the other hand, the Court might have desired to resolve these arguments of "necessity" or "consumer benefit" on the merits of the antitrust analysis, rather than through the preliminary issue of insurance activity blanket immunity. Although the "business of insurance" now must be construed narrowly, the arguments about the desirability of these provider agreements still can be considered at the next stage. Under the rule of reason analysis, a court would make a full calculus of the adverse impact and the benefits to evaluate the net result of these restraints on competition, as well as the possible existence of less restrictive and less anticompetitive arrangements. It may well turn out that Blue Shield's provider agreements are lawful and still can be implemented.[122]

Most subsequent lower court decisions dealing with provider agreements have followed the narrower approach of *Royal Drug*. The application of the

119. *Id.* at 224.

120. The dissenting opinion offered several persuasive arguments why provider agreements in general, and the Blue Shield pharmacy agreements in particular, were intended by the 1945 Congress to fall within the "business of insurance." *Id.* at 243-52 (Brennan, J., dissenting).

121. *Id.* at 225-30.

122. *See, e.g.*, Royal Drug Co. v. Group Life & Health Ins. Co., 737 F.2d 1433 (5th Cir. 1984), *on remand from* 440 U.S. 205 (1979) (on merits, program between insurer and providers did not constitute illegal price fixing or group boycott), *cert. denied*, 53 U.S.L.W. 3507 (Jan. 15, 1985); Medical Arts Pharmacy v. Blue Cross & Blue Shield, 518 F. Supp. 1100 (D. Conn. 1981) (per se rule inapplicable; rule of reason approach precludes disposition of challenge to provider agreements by summary judgment), *aff'd*, 675 F.2d 502 (2d Cir. 1982).

narrow test is best illustrated by recent challenges to the practices of a number of automobile insurance companies. Automobile insurance policies typically provide that the insured will be reimbursed for damage to her car for no more than the "reasonable" cost of repair. In a further effort to reduce the amount paid in claims, some automobile insurance companies have sought to make cost reduction arrangements with repair shops. In exchange for an agreement by the garage to charge no more than a stated maximum price for designated repairs, the insurance companies agreed to recommend these providers to insureds who had no preference on a repair shop or who asked for recommendations of shops that would perform the work for no more than the predetermined reasonable cost. Every court but one has held that these "provider agreements" are *not* part of the "business of insurance."[123] The focus of the analysis has been on two factors identified in *Royal Drug*—the arrangements involve agreements between an insurance company and a party outside the industry[124] and the defendants' purpose in making these agreements is not the spreading or underwriting of risk, but rather the reduction of cost.[125]

Similar results have been reached in recent cases involving provider agreements between insurance companies and health care providers. These cases have restricted the McCarran-Ferguson immunity even more narrowly than *Royal Drug*.[126] It has been held that the "business of insurance" does not include the following: an agreement between Blue Cross and "contracting hospitals" providing direct payment for services rendered to Blue Cross' insureds, while placing a ceiling on the amount the hospitals can receive;[127] an agreement

123. *See* Proctor v. State Farm Mut. Auto. Ins. Co., 675 F.2d 308, 336-37 (D.C. Cir.), *cert. denied*, 459 U.S. 839 (1982); Quality Auto Body, Inc. v. Allstate Ins. Co., 660 F.2d 1195, 1201-02 (7th Cir. 1981), *cert. denied*, 455 U.S. 1020 (1982); Liberty Glass Co. v. Allstate Ins. Co., 607 F.2d 135, 136-38 (5th Cir. 1979); Custom Auto Body, Inc. v. Aetna Casualty & Sur. Co., 1983-2 Trade Cas. (CCH) ¶ 65,629 (D.R.I. 1983). *But see* Proctor v. State Farm Mut. Auto. Ins. Co., 1980-1 Trade Cas. (CCH) ¶ 63,591 (D.D.C. 1980) (agreements lawful), *rev'd on this point and aff'd on other grounds*, 675 F.2d 308 (D.C. Cir.), *cert. denied*, 459 U.S. 839 (1982). *See also* General Glass Co. v. Globe Glass & Trim Co., 1978-2 Trade Cas. (CCH) ¶ 62,231 (N.D. Ill. 1978) (decided before *Royal Drug*); General Glass Co. v. Globe Glass & Trim Co., 1978-1 Trade Cas. (CCH) ¶ 61,998 (N.D. Ill.) (same), *aff'd on reconsideration*, 1978-2 Trade Cas. (CCH) ¶ 62,231 (N.D. Ill. 1978); *cf.* Workman v. State Farm Mut. Auto. Ins. Co., 520 F. Supp. 610 (N.D. Cal. 1981) (such provider agreements lawful on merits; "business of insurance" issue not reached).

124. *See, e.g.*, Proctor v. State Farm Mut. Auto. Ins. Co., 675 F.2d 308, 336-37 (D.C. Cir.), *cert. denied*, 459 U.S. 839 (1982).

An agreement between an insurance company and a provider has been characterized as vertical (between supplier and customer), in contrast to an agreement among insurance companies, which is characterized as horizontal (between competitors or parties operating at the same level in the industry). "The Court in *Royal Drug* emphasized that the pharmacy agreements under consideration were for the purchase of goods and services outside the insurance industry. The same is true of the alleged vertical arrangements in this case." *Id.* at 336. On the other hand, most horizontal agreements are deemed to be within the "business of insurance." *See infra* notes 170-92 and accompanying text.

125. *See, e.g.*, Custom Auto Body, Inc. v. Aetna Casualty & Sur. Co., 1983-2 Trade Cas. (CCH) ¶ 65,629 (D.R.I. 1983).

126. *See* Virginia Academy of Clinical Psychologists v. Blue Shield, 624 F.2d 476, 483 (4th Cir. 1980), ("[A]t the time of the enactment of the McCarran-Ferguson Act, activities of programs like Blue Shield were not considered to be insurance at all . . . . [T]he exemption should be narrowly applied to Blue Shield plans, especially where provider control is in issue."), *cert. denied*, 450 U.S. 916 (1981).

127. *See* St. Bernard Hosp. v. Hospital Serv. Ass'n, 618 F.2d 1140 (5th Cir. 1980), *cert. denied*,

between a health maintenance organization—an entity acting as both an insurer and a provider of health care services—and drug companies on the cost of pharmaceuticals, even though defendant organization distributed the drugs directly to its insureds;[128] an insurer's policy of requiring that certain medical services be obtained by its insureds exclusively from certain providers;[129] an insurance company's policy not to pay the charges of certain kinds of health care providers for services rendered to its insureds unless the services were billed through physicians;[130] agreements between the insurer and "participating physicians" in which they agree to accept the "usual, customary, and reasonable" fees prevailing in the area for their services to the insureds;[131] and even agreements between an insurer and participating physicians under which the physicians agree to accept reduced, pro rata compensation for their services if the insurer's funds should be depleted.[132]

Royal Drug and these subsequent decisions make it risky[133] for insurance companies to make reasonable, but arguably anticompetitive, arrangements with providers even if these arrangements benefit the insureds. Perhaps the McCarran-Ferguson immunity still can be preserved if the outside providers are somewhat uncertain about the amount they will be reimbursed so that there is an element of risk-taking or underwriting in the provider agreements.[134] Similarly,

---

104 S. Ct. 2342 (1984); *see also* Blue Cross v. Kitsap Physicians Serv., 1982-1 Trade Cas. (CCH) ¶ 64,588 (W.D. Wash. 1981) (bylaw of health care insurer, preventing physicians providing care to its insureds from also contracting with competitor health maintenance organization, not part of "business of insurance").

128. *See* Portland Retail Druggists Ass'n v. Kaiser Found. Health Plan, 662 F.2d 641 (9th Cir. 1981); *cf.* Klamath-Lake Pharmaceutical Ass'n v. Klamath Medical Serv. Bureau, 701 F.2d 1276, 1284-87 (9th Cir.) (agreement between health care provider-insurer and its patients-insureds that prescription drug benefit could be used only at provider's pharmacy was "business of insurance" because it was part of insurer-insured relationship and did not involve outside entitites), *cert. denied*, 104 S. Ct. 88 (1983).

129. *See* Hahn v. Oregon Physicians' Serv., 689 F.2d 840 (9th Cir. 1982), *cert. denied*, 103 S. Ct. 3115 (1983); *see also* National Gerimedical Hosp. & Gerontology Center v. Blue Cross, 628 F.2d 1050, 1057 (8th Cir. 1980) (refusal by health care insurer to enter into provider agreement with new, private hospital not part of "business of insurance"), *aff'g* 479 F. Supp. 1012 (W.D. Mo. 1979), *rev'd on other grounds*, 452 U.S. 378 (1981).

130. *See* Hahn v. Oregon Physicians' Serv., 689 F.2d 840 (9th Cir. 1982), *cert. denied*, 103 S. Ct. 3115 (1983); Virginia Academy of Clinical Psychologists v. Blue Shield, 624 F.2d 476, 484 (4th Cir. 1980) (Defendants' "decision regarding psychologists was not whether to underwrite the risk of those disorders or even the need for psychotherapy; rather it was a question of who they would pay for such services."), *cert. denied*, 450 U.S. 916 (1981); *see also* Hoffman v. Delta Dental Plan, 517 F. Supp. 564 (D. Minn. 1981) (contracts between insurer, insureds, and "participating dentists" providing for payment of greater amounts to latter than to "non-participating dentists" not "business of insurance" even if provider agreements reflect the terms of the contracts with the insureds that describe the payment differentials).

131. *See* Ratino v. Medical Serv., 718 F.2d 1260 (4th Cir. 1983); *see infra* notes 154-56 and accompanying text.

132. *See* Kartell v. Blue Shield, 542 F. Supp. 782, 792-94 (D. Mass. 1984) (fact that physicians share risk with insurer still does not satisfy first part of *Royal Drug* test even though provider agreement may result in lower costs and lower premiums to insureds).

133. A finding that the conduct in question is not the "business of insurance" and therefore is not within the McCarran-Ferguson exemption, of course, does not mean that antitrust liability exists. There also must be a determination on the merits that the action violates the Sherman or Clayton Act. *See supra* notes 84, 122.

134. *See* St. Bernard Hosp. v. Hospital Serv. Ass'n, 618 F.2d 1140, 1144-45 (5th Cir. 1980), *cert. denied*, 104 S. Ct. 2342 (1984).

the agreements might be immunized if the arguably anticompetitive restraints first are incorporated in the policy between insurer and insured and then merely are reflected in the provider agreements.[135] Even with these variations, however, courts probably will continue to focus on the third factor identified in *Royal Drug*—the existence of relationships with noninsurance industry entities—and make this factor a barrier to assertion of the McCarran-Ferguson shield.[136] Such an interpretation will be additional proof that the Court may have proceeded unwisely in *Royal Drug* by refusing to take account of the cost-reducing, efficiency-enhancing characteristics of the pharmacy agreements in characterizing such agreements as outside the "business of insurance."

The other principal activities between insurers and outsiders subject to challenge as outside the "business of insurance" are various devices to review the amounts and scope of claims made by insureds against the insurance companies. Since many kinds of insurance policies contain provisions relating both the range of insured-against incidents and the amount that will be paid to standards prevailing in the relevant community, the insurance companies have felt a need for input from others, including providers, on these standards. Yet, to the extent that such information can inhibit competition regarding the identity of providers, the services they can offer under the insurance policies, and the amount they can charge, antitrust concerns will be raised. If these means of collecting information were deemed part of the "business of insurance," however, the McCarran-Ferguson Act would exempt these activities from antitrust examination.

The Supreme Court's most recent McCarran-Ferguson decision, *Union La-*

135. *See* Mulhearn v. Rose-Neath Funeral Home, Inc., 512 F. Supp. 747 (W.D. La. 1981) (agreement between insurer and designated funeral homes allowing insured only a 75% alternative cash payment provision when services of undesignated funeral homes were used was within "business of insurance" when these provisions also were incorporated in insurance policies). *But see Royal Drug*, 440 U.S. at 216 n.14 ("The wholly separate nature of the two categories of agreements is in no way affected by the fact that the Pharmacy Agreements are indirectly referred to in the insurance policies."); Hoffman v. Delta Dental Plan, 517 F. Supp. 564 (D. Minn. 1981) (discussed *supra* note 130).

136. Not only has this factor become controlling in the cases described *supra* notes 123-35 and accompanying text; it also has been extended inappropriately. In United States v. Title Ins. Rating Bureau Inc., 700 F.2d 1247 (9th Cir. 1983), *cert. denied*, 104 S. Ct. 3509 (1984), the government challenged price-fixing by title insurance companies in the offering of escrow services. Noting that the challenged agreement was solely among defendant insurers, the court stated that their "activity would seem at first glance to satisfy the third requirement." The court continued: "However, Congress seems to have envisioned a total horizontal restraint." *Id.* at 1252. This still would seem to have been satisfied by the fact that only parties engaged in the same activity—offering title insurance—were charged with the antitrust violation. *See supra* note 124. The court, however, found that the price-fixing still did not meet this requirement because there were other, noninsurance companies that also performed escrow services, and the level of competition they could offer would be distorted by this arrangement.

This interpretation seems to add new limitations to the business-of-insurance requirement. The United States Court of Appeals for the Ninth Circuit suggests that conduct is such "business" only when it is engaged in exclusively by insurance companies and only when the conduct does not affect the ability of noninsurance companies to compete. These requirements will narrow the exemption even further and take the Act further from the legislative intent of the Congress in 1945, which was to return the power to control the activities of insurance companies to the states while removing that conduct from the scrutiny of federal antitrust and other legislation.

bor Life Insurance Co. v. Pireno,[137] addressed the scope of the business-of-insurance requirement in the context of one such information-gathering device, the peer review committee.[138] In its opinion, however, the Court considered this requirement more expansively and in the process narrowed the availability of the McCarran-Ferguson exemption. As noted above,[139] in *Pireno* defendant insurance company had arranged with health care providers to organize a "peer review committee" to study the claims submitted by its insureds and to assist the company in determining whether these claims were within the coverage of the company's policies. Plaintiff was a health care provider, some of whose patient charges had been rejected by the insurance company because of adverse reports from the peer review committee. Asserting that his ability to compete had been impaired, he brought an action under section 1 of the Sherman Act.[140] Defendant insurance company asserted that antitrust scrutiny of this conduct was foreclosed by the McCarran-Ferguson Act. Rejecting this defense, the Supreme Court concluded that the use of such peer review groups was not part of the "business of insurance" and therefore the exemption was unavailable.[141]

After describing its decision in *Royal Drug*, the Supreme Court summarized the tripartite standard it had articulated.[142] Then, applying that standard to the peer review committee, the Court concluded that none of the three criteria were satisfied.

First, the Court concluded that the peer review committee did not perform any risk-spreading or underwriting function. The transfer of risk takes place at the time that the insurer and the insured enter into the contract, the insurance policy.[143] " 'Peer review takes place only after the risk had been transferred by means of the policy . . . .' "[144] Thus, "the challenged peer review arrangement is logically and temporally unconnected to the transfer of risk accomplished by [defendant's] insurance policies."[145]

---

137. 458 U.S. 119 (1982).

138. Prior to the Supreme Court's decision in *Pireno*, fee review arrangements involving outside groups had been the subject of inconsistent lower court opinions, although the majority of decisions had concluded that they were within the "business of insurance." *See, e.g.*, Bartholomew v. Virginia Chiropractors Ass'n, 612 F.2d 812 (4th Cir. 1979) (exemption available), *aff'g* 451 F. Supp. 624 (W.D. Va. 1978), *cert. denied*, 446 U.S. 938 (1980). *But see, e.g.*, Pireno v. New York State Chiropractic Ass'n, 650 F.2d 387 (2d Cir. 1981) (exemption unavailable), *rev'g* 1979-2 Trade Cas. (CCH) ¶ 62,758 (S.D.N.Y.), *aff'd sub nom.* Union Labor Life Ins. Co. v. Pireno, 458 U.S. 119 (1982).

139. *See supra* notes 89-95 and accompanying text.

140. Plaintiff also had sued the New York State Chiropractic Association (NYSCA), a professional association of chiropractors, which had established the peer review committee.

141. *Pireno*, 458 U.S. at 134.

142. *See supra* note 94 and accompanying text.

143. "The transfer of risk from insured to insurer is effected by means of the contract between the parties—the insurance policy—and that transfer is complete at the time that the contract is entered." *Pireno*, 458 U.S. at 130.

144. *Id.* (quoting Pireno v. New York State Chiropractic Ass'n, 650 F.2d 387, 393 (2d Cir. 1981)).

145. *Id.* The Court rejected defendant's argument that the peer review procedure was part of the risk transfer because it helped to determine both whether the risk had been transferred at all, and if so, the scope of that transfer:

> Petitioner's argument contains the unspoken premise that the transfer of risk from an insured to his insurer actually takes place not when the contract between those parties is completed, but rather only when the insured's claim is settled. This premise is contrary to

Applying the second criterion, the Court noted that the peer review arrangement "is obviously distinct from [defendant's] contracts with its policyholders."[146] The company's "use of [the] Peer Review Committee as an aid in its decisionmaking process is a matter of indifference to the policyholder, whose only concern is *whether* his claim is paid, not *why* it is paid."[147] Because the challenged arrangements were between the insurer and third parties who were not engaged in the business of insurance, this second requirement was not satisfied.

This conclusion also was dispositive of the third criterion—whether the practice was limited to entities within the insurance industry—since defendant's "use of [the] Peer Review Committee inevitably involve[d] third parties wholly outside the insurance industry—namely, chiropractors."[148] Although this outside involvement was not necessarily fatal to the defense, it was important because the participation of noninsurers increased the likelihood of an adverse competitive impact beyond the insurance industry. This adverse impact would be inconsistent with a congressional intent only to immunize conduct that truly was within the "business of insurance."

> Arrangements between insurance companies and parties outside the insurance industry can hardly be said to lie at the center of that legislative concern. More importantly, such arrangements may prove contrary to the spirit as well as the letter of § 2(b), because they have the potential to restrain competition in non-insurance markets.[149]

Although the Court viewed its decision in *Pireno* as the natural extension of *Royal Drug*,[150] the decision appears to extend the reach of the antitrust laws and limit the scope of state supervision considerably beyond the legislative intent in 1945.[151] As Justice Rehnquist noted in his dissent, the claims adjustment function performed by the peer review board is "at the heart of the relationship between insurance companies and their policyholders."[152] "Few insurance matters could be of greater importance to policyholders than whether their claims will be paid, and it is the peer review committee which in effect makes that determination."[153] Since few insurers could afford to employ physicians for the sake of internalizing this claims adjustment process, the use of a competent and experienced professional review panel was important both for the insurer and its

---

> the fundamental principle of insurance that the insurance policy defines the scope of risk assumed by the insurer to the insured.

Id. at 131.

146. *Id.*

147. *Id.* at 132.

148. *Id.* at 133.

149. *Id.*

150. *Id.* at 129.

151. The dissent noted that the McCarran-Ferguson Act was similar to the proposal of the National Association of Insurance Commissioners. This proposal listed seven practices that expressly were exempt from the Sherman Act, one of which was the process of claims adjustment. *Id.* at 138-39 (Rehnquist, J., dissenting).

152. *Id.* at 135 (Rehnquist, J., dissenting). Chief Justice Burger and Justice O'Connor joined in Justice Rehnquist's dissent.

153. *Id.* at 137 (Rehnquist, J., dissenting).

policyholders. Thus, as far as the insured was concerned, these determinations were the very essence of the "business of insurance."

The Court's *Pireno* decision has important implications that extend beyond the peer review system in controversy. By making both the second and third of *Royal Drug*'s three factors turn on the involvement of outsiders, the Court has made it virtually impossible to bring almost any relationship of an insurance company, other than with policyholders or industry members, within the "business of insurance." In addition to provider agreements and fee review arrangements, a broad range of other insurance company activities now will be subject to antitrust scrutiny.

Since *Pireno*, only one court has analyzed the applicability of the antitrust laws to fee review arrangements.[154] Not surprisingly, it concluded that the challenged conduct did not fall within the "business of insurance." Defendant Blue Shield had entered into agreements with the overwhelming majority of physicians in the District of Columbia area to pay them directly their "usual, customary and reasonable" (UCR) fees for services rendered to its insureds. The fees of "nonparticipating" physicians were paid only to the insured, who then was responsible for paying the physician. Pursuant to the insurance policy, Blue Shield normally would not pay more than the UCR amount for these charges. If a nonparticipating physician believed that his fee, which was higher than the UCR level, was appropriate, that determination would be made by a committee of participating physicians acting in an advisory role to Blue Shield. Finding that these "peer review activities are indistinguishable from those in *Pireno*,"[155] the United States Court of Appeals for the Fourth Circuit concluded that they were beyond the "business of insurance" and therefore not immunized by McCarran-Ferguson.[156]

A number of other insurance companies' activities involving or affecting third parties have been the subject of scrutiny under the *Royal Drug-Pireno* test.[157] In the majority of the cases, the conduct has not received the McCarran-Ferguson exemption. More significantly, the range of conduct excluded from the immunity by this test has expanded substantially—perhaps considerably beyond the 1945 Congress' intent. Even if the direct involvement of the insurance companies with outsiders is minimal, the conduct has been excluded from the exemption when it has some effect outside the insurance industry.

It has been held that the exemption does not apply to an agreement between

154. Ratino v. Medical Serv., 718 F.2d 1260 (4th Cir. 1983). *See generally* Borosody & Tiano, *Peer Review and the Antitrust Laws: An Analysis and A Proposal*, 26 ST. LOUIS U.L.J. 511 (1982) (modern analysis of fee review arrangement under the antitrust laws).

155. Ratino v. Medical Serv., 718 F.2d 1260, 1267 (4th Cir. 1983).

156. *Id.* The court also held that the arrangements between Blue Shield and the participating physicians in which the latter agreed to take no more than the UCR fee were "provider agreements" outside the scope of the "business of insurance" as defined in *Royal Drug*. *Id.* at 1265-67.

157. In *Royal Drug* the Court offered several examples of conduct between an insurance company and outsiders that would not fall within the "business of insurance": an arrangement with a bank for a line of credit to pay off its claims; a contract with a large retail drug chain whereby the policyholders could obtain drugs under their policies only from stores operated by this chain, but at a reduced price; or the acquisition by the insurer of a chain of drug stores to lower the insurer's costs. *Royal Drug*, 440 U.S. at 213 n.9, 215 n.13.

an insurer and certain health care providers in which the insurer refuses to make direct payments to other providers for services obtained by the insurer's policyholders.[158] Similarly, an agreement between an insurer and certain health care providers permitting the conspirators to monopolize the market is not part of the "business of insurance."[159] The exemption also has been denied to a health maintenance organization that allegedly paid discriminatory low prices to its suppliers for drugs.[160]

Not all lower court decisions after *Pireno* have held arrangments between insurance companies and outsiders beyond the pale of the "business of insurance." In *Feinstein v. Nettleship Co.*,[161] Nettleship, an underwriting manager for medical malpractice insurance, and the Los Angeles County Medical Association (LACMA) had entered into an agreement for the issuance of group insurance. Nettleship promised not to limit its malpractice coverage to physicians practicing in the low-risk areas of medicine, but to extend coverage to all LACMA members, including those operating in high-risk areas. In exchange, LACMA agreed that Nettleship would be LACMA's exclusive medical malpractice insurance agent. Although LACMA members were free to purchase policies from sources other than Nettleship, a physician who wished to purchase a policy offered by Nettleship had to be a member of LACMA. Eventually, Nettleship obtained a large share of the medical malpractice insurance market in southern California and then imposed substantial, successive rate increases. Plaintiffs, a group of physicians in Los Angeles County, asserted that the LACMA-Nettleship agreement constituted monopolization, conspiracy to monopolize, price-fixing, and an unlawful tying arrangement.[162]

The United States Court of Appeals for the Ninth Circuit affirmed the district court's grant of summary judgment for defendant, finding that the McCarran-Ferguson Act exempted the agreement and that the three requirements of the *Royal Drug-Pireno* test were satisfied. First, the purpose of the agreement was to guarantee coverage for physicians practicing in high-risk areas by distributing the risk across the whole LACMA membership.[163] Second, the agreement involved the insurer-insured relationship, since Nettleship, the underwriter, was

158. *See* Virginia Academy of Clinical Psychologists v. Blue Shield, 624 F.2d 476, 483 (4th Cir. 1980), *cert. denied*, 450 U.S. 916 (1981) (discussed *supra* note 130 and accompanying text); *see also* Ohio v. Ohio Medical Indem., Inc., 1978-2 Trade Cas. (CCH) ¶ 62,154 (S.D. Ohio 1978) (activities of medical association, through use of insurance company, to fix prices of physicians' services, held not within "business of insurance").

159. *See* Nurse Midwifery Assocs. v. Hibbert, 549 F. Supp. 1185, 1192-94 (M.D. Tenn. 1982); *cf.* Blue Cross v. Kitsap Physician Serv., 1982-1 Trade Cas. (CCH) ¶ 64,588 (W.D. Wash. 1981) (exemption does not apply to health care insurer's bylaw that excluded from membership those physicians who contracted to provide medical services to subscribers of any competing health maintenance organization). *But see* Health Care Equalization Comm. v. Iowa Medical Soc'y, 501 F. Supp. 970, 993-94 (S.D. Iowa 1980) ("Since the relationship of insured to insurer is of central concern herein, the challenge involves the 'business of insurance.' ").

160. *See* Portland Retail Druggists Ass'n v. Kaiser Found. Health Plan, 662 F.2d 641, 647 (9th Cir. 1981).

161. 714 F.2d 928 (9th Cir. 1983), *cert. denied*, 104 S. Ct. 2346 (1984).

162. *Id.* at 930.

163. *Id.* at 932.

acting as an agent for the insurer.[164] Last, although *Royal Drug-Pireno* required that the conduct in question be limited to entities within the insurance industry, and although LACMA was neither the insurer nor the insured,[165] LACMA could be viewed as an agent for either the insurer or the insured because it operated as an intermediary of a group policy. Furthermore, LACMA's presence in the relationship did not affect the policy goals of *Royal Drug-Pireno*, which were to prevent McCarran-Ferguson from being used to restrain competition outside the insurance industry. "Thus *Pireno* appears to be satisfied where, as here, the only role of the noninsurer is in negotiating the terms of the policy relationship between insurer and insured, and the gravaman of the complaint is lack of competition in the insurance market itself."[166]

The court of appeals' application of the third *Royal Drug-Pireno* requirement is a fair one. Not only was the involvement of an "outsider" not critical to the underlying conduct under scrutiny, but it also was essential for the provision of group insurance—a device that "occup[ies] an increasingly large share of the overall insurance market in the United States."[167] Thus, the pragmatic approach of the court, rejecting a mechanical application of the "outside entity" criterion, is a welcome policy decision.[168] A stricter application of this requirement would have resulted in a definition of the "business of insurance" narrower than that intended by Congress.

Through its decisions in *Pireno* and *Royal Drug*, the Supreme Court has narrowed the scope of the "business of insurance" to the point that not only almost all provider agreements and peer review boards will fall outside the definition, but so will many other activities of insurance companies with noninsurance entities.[169] Although the scope of the exemption Congress sought to confer in 1945 admittedly is not clear, it is probable that the Court's recent decisions are inconsistent with the earlier Congress' general intent. Unless Congress takes the unlikely step of amending the exemption, however, it is likely that the trend towards restricted application of McCarran-Ferguson will continue.

---

164. *Id.*

165. *Id.*

166. *Id.*

167. *Id.*

168. For other recent decisions holding certain insurer-outsider activities within the "business of insurance," see Klamath-Lake Pharmaceutical Ass'n v. Klamath Medical Serv. Bureau, 701 F.2d 1276 (9th Cir. 1983); Owens v. Aetna Life & Casualty Co., 654 F.2d 218 (3d Cir.), *cert. denied*, 454 U.S. 1092 (1981); Health Care Equalization Comm. v. Iowa Medical Soc'y, 501 F. Supp. 970 (S.D. Iowa 1980).

169. *See generally* Nedrow, *The McCarran Controversy: Insurance and the Antitrust Law*, 12 CONN. L. REV. 205 (1980) (discussing gradual narrowing of exemptions for tying arrangements, agency relationships, insurance company mergers, and service provider transactions); Comment, *The McCarran Act's Antitrust Exemption for the "Business of Insurance": A Shrinking Umbrella*, 43 TENN. L. REV. 329 (1976) (stating that modern trend of cases is narrowing the scope of the "business of insurance" exemption); Note, *The Definition of "Business of Insurance" Under the McCarran-Ferguson Act After* Royal Drug, 80 COLUM. L. REV. 1475 (1980) (discussing narrowing of exemption for referral arrangements, tying arrangements, and insurer-agent agreements).

2. Relations Between Insurance Companies

A variety of agreements between insurance companies have been challenged as unlawful under the antitrust laws, and in those actions the McCarran-Ferguson defense also has been asserted. Among the more commonly litigated practices have been agreements on the determination of rate premiums, cooperation on the amount to be paid to insureds pursuant to claims, and mergers between two insurance companies. Although many of these activities have been held within the "business of insurance," the immunity has been denied to a number of other practices. In almost all cases the courts have applied the *Royal Drug-Pireno* standard or its variants and predecessors to determine whether the challenged conduct was the "business of insurance."

It is clear that agreements between insurance companies about their rates are within the "business of insurance." Given the long history of state regulation designed to prevent insurance companies from charging injuriously low or rapaciously high rates,[170] it is not surprising that the *Royal Drug* Court stated that "the primary concern of both representatives of the insurance industry and the Congress [in 1945] was that cooperative ratemaking efforts be exempt from the antitrust laws."[171] Lower court decisions preceding[172] and following[173] *Royal Drug* and *Pireno* have reached similar conclusions.[174]

A number of other essentially horizontal arrangements between insurance companies that affect the scope or amount of coverage afforded to an insured or that indirectly affect the premium paid by the insured also have been held within the "business of insurance." An agreement between automobile insurance companies to share data on the costs of services charged by garages and parts companies and then not to pay their insureds more than a common maximum "reasonable" price for repairs based on the cost data was held to be within the McCarran-Ferguson exemption.[175] The use of a rating bureau by several insur-

170. *See supra* notes 7-16 and accompanying text.

171. *Royal Drug*, 440 U.S. at 221; *see also National Sec.*, 393 U.S. at 460 ("Certainly the fixing of rates is part of this business; that is what *South-Eastern Underwriters* was all about . . . .").

172. *See, e.g.*, Meicler v. Aetna Casualty & Sur. Co., 506 F.2d 732, 734 (5th Cir. 1975); *see also* Ohio AFL-CIO v. Insurance Rating Bd., 451 F.2d 1178, 1182-83 (6th Cir. 1971) (McCarran-Ferguson applied because cooperative rate setting was adequately regulated by state); Steingart v. Equitable Life Assurance Soc'y, 366 F. Supp. 790, 794-95 (S.D.N.Y. 1973) (same); *cf.* California League of Indep. Ins. Producers v. Aetna Casualty & Sur. Co., 175 F. Supp. 857, 860 (N.D. Cal. 1959) (agreement among insurers to set lower commission rates to agents immunized); *infra* notes 230-231 and accompanying text.

173. *See, e.g.*, *In re* Workers' Compensation Ins. Antitrust Litigation, 574 F. Supp. 525, 529-31 (D. Minn. 1983) (distinguishing *Royal Drug* and *Pireno*; tripartite test applies only to "ancillary activities carried on by insurance companies" and not to "blatant price fixing").

174. *But see* First Am. Title Co. v. South Dakota Land Title Ass'n, 541 F. Supp. 1147, 1153-54 (D.S.D. 1982) (agreement fixing price for abstractor's countersignatures on title insurance policies "too far removed from the business of title insurance to warrant a McCarran Act exemption"), *aff'd*, 714 F.2d 1439 (8th Cir. 1983), *cert. denied*, 104 S. Ct. 709 (1984).

175. *See* Proctor v. State Farm Mut. Auto. Ins. Co., 675 F.2d 308, 318-25 (D.C. Cir.), *cert. denied*, 459 U.S. 839 (1982); Quality Auto Body, Inc. v. Allstate Ins. Co., 660 F.2d 1195, 1201 (7th Cir. 1981) (alternate holding), *cert. denied*, 455 U.S. 1020 (1982); *see also* Grant v. Erie Ins. Exch., 542 F. Supp. 457, 461-63 (M.D. Pa. 1982) (collection of statistical data and agreement to fix the extent of coverage regarding work loss benefits paid to insureds are part of "business of insurance"). *But see* Custom Auto Body, Inc. v. Aetna Casualty & Sur. Co., 1983-2 Trade Cas. (CCH) ¶ 65,629 at

ers was held to be part of the "business of insurance" because it involved the underwriting of risks.[176] The insurers used the bureaus to divide the market by having some insurers offer attractive group policy rates and others offer only higher-priced, individual coverage or by having the various insurers offer different kinds of coverage. Similarly, the agreement by title insurance companies, using the vehicle of an insurance rating bureau to impose a uniform charge on sellers of real estate when the buyers obtained title insurance, was held part of the "business of insurance."[177]

The application of the business-of-insurance standard to mergers between insurance companies has received inconsistent treatment from the courts. In part, courts have looked to the purpose and effect of the transaction, including whether the merger would afford better services or lower rates to policyholders, in determining whether immunity exists.

Only one Supreme Court decision, *SEC v. National Securities, Inc.*,[178] has dealt with this question. The acquisition by defendant insurer of another insurance company had been approved by the Arizona State Insurance Commissioner. The SEC alleged that the acquiring company violated the antifraud provisions of the Securities Exchange Act of 1934[179] by failing to make certain disclosures to stockholders of the acquired company. Defendant argued that federal scrutiny was preempted by McCarran-Ferguson because of the express approval of the transaction by a state official. Because no claim alleged that the underlying transaction itself violated section 7 of the Clayton Act,[180] the case did not raise any antitrust issues; rather, at issue was whether McCarran-Ferguson preempted the application of another federal statute.[181] The Court held that the activity under scrutiny—the nondisclosure of certain material facts to stockholders—was not part of the "relationship between the insurance company and the policyholder";[182] since this was one of the relevant criteria for determining

69,187 n.16 (D.R.I. 1983) ("[T]he Court . . . need not decide whether an agreement between insurance companies to fix the price of automobile repairs would be immune under the McCarran-Ferguson Act.").

176. *See* Owens v. Aetna Life & Casualty Co., 654 F.2d 218, 224-32 (3d Cir.), *cert. denied*, 454 U.S. 1092 (1981). The court stated:

> [I]t is clear that at least the following activities are the business of insurance . . . : 1. preparing and filing a rating-schedule, either on behalf of an individual company or jointly through a rating bureau; 2. deciding upon rating classification differences between individual policies and group marketing plans, either individually or jointly through a rating bureau . . . .

Id. at 225-26.

177. *See* Schwartz v. Commonwealth Land Title Ins. Co., 374 F. Supp. 564 (E.D. Pa. 1974); *see also* Commander Leasing Co. v. Transamerica Title Ins. Co., 477 F.2d 77, 86 (10th Cir. 1973) (price fixing, price discrimination, and monopolistic practices by insurers all held part of "business of insurance"). *But see supra* note 99 (noting controversy whether title insurance is "insurance").

178. 393 U.S. 453 (1969). This case is discussed *supra* notes 67-76 and accompanying text.

179. Securities Exchange Act of 1934, Pub. L. No. 291, 48 Stat. 881 (codified as amended in 15 U.S.C. §§ 78a-78kk).

180. 15 U.S.C. § 18 (1982).

181. No question of the legality or illegality of the merger, standing alone, was raised. "The gravamen of the complaint was the misrepresentation, not the merger. The merger became relevant only insofar as it was necessary to attack it in order to undo the harm caused by the alleged deception." *National Sec.*, 393 U.S. at 462.

182. *Id.* at 460.

the "business of insurance," the transaction was not exempt. This conclusion was reinforced by the fact that the state and the federal statutory regimes were designed to protect different interests—the state insurance system was protective of policyholders, whereas the federal securities laws were enacted to protect purchasers and sellers of securities. Thus, there was no "impairment" by federal regulation of any state interest. "Different questions would, of course, arise if the Federal Government were attempting to regulate in the sphere reserved primarily to the States by the McCarran-Ferguson Act."[183]

National Securities highlights the ambiguous treatment of insurance company mergers. Although an alleged fraudulent nondisclosure to stockholders indeed does not affect the insurance policyholders, other aspects of mergers might affect this relationship more directly and therefore could satisfy the *Royal Drug-Pireno* test.

The issue avoided in *National Securities*—the application of section 7 of the Clayton Act to a merger involving insurance companies—subsequently has been considered by lower federal courts. In *American General Insurance Co. v. FTC*,[184] an insurance company sought to enjoin the FTC from challenging a merger agreement between plaintiff and another insurance company on the ground that the approval of the transaction by state insurance authorities in the two states in which the parties to the merger were incorporated conferred McCarran-Ferguson immunity. The court rejected this argument, concluding that since "the competitive aspects of these mergers [are] certainly a subject far removed from the relationship between the insurance company and the policyholder contemplated in *National Securities*,"[185] the scrutiny of the transaction under federal law was not preempted.

In *Commander Leasing Co. v. Transamerica Title Insurance Co.*,[186] an insured challenged the acquisitions by a title insurance company of other insurance companies, asserting that one result of these acquisitions was an overcharge in the title insurance it purchased.[187] After characterizing plaintiff's basic claim as an assertion that the mergers affected the premium rate—they resulted in noncompetitive pricing—the court concluded that the conduct clearly was within the "business of insurance."[188]

This result can be viewed as consistent with other McCarran-Ferguson jurisprudence. The principal anticompetitive effects of horizontal mergers are the elimination of the competition that formerly prevailed between the companies with a resulting increase in monopoly power and higher prices; in addition, the creation of one larger company as a substitute for two smaller entities may have adverse effects on existing competitors and may deter new entry. Although hori-

183. *Id.* at 463.

184. 359 F. Supp. 887 (S.D. Tex. 1973), *aff'd*, 496 F.2d 197 (5th Cir. 1974).

185. *Id.* at 897. Rather, "[t]he relationship involved in the merger of insurance companies is in essence one between individual companies and between companies seeking to merge and the industry as a whole." *Id.* at 896-97.

186. 477 F.2d 77 (10th Cir. 1973).

187. *Id.* at 86.

188. *Id.*

zontal price fixing will have many of these same effects, it is clear that this form of intra-industry cooperation is sanctioned by McCarran-Ferguson. Thus, it is arguable that mergers or acquisitions should be treated no differently.

After *Royal Drug* and *Pireno*, however, it is likely that the treatment of these transactions will depend less on a characterization of their competitive effect than on a rigorous analysis under the Court's tripartite test.[189] Although a merger may affect costs, it is less directly related to the risk-spreading or underwriting function than is the setting of common rates. Perhaps more important, looking at the second prong, mergers are related only indirectly to the insurer-insured relationship. The effect of a merger on the rights and responsibilities of the policyholders or the insurer is no more direct than are many other activities of insurance companies that are deemed not part of the "business of insurance." Given the important national policies reflected by section 7 of the Clayton Act, it is preferable to submit acquisitions by insurance companies to the same competitive yardstick as those by noninsurance entities.[190]

Finally, a few other horizontal relationships between insurance companies that are peripheral to their central activities of setting rates, paying claims, and defining risks also have been held outside of the "business of insurance." Some examples of these activities include agreements between health maintenance organizations limiting insureds only to certain providers or requiring that the services of certain providers be referred by other providers,[191] and concerted action by insurers to drive another insurer out of business in an attempt to monopolize the market.[192]

3. Relations Between Insurer and Insured

Relationships between the insurance company and its insureds have the potential for adverse effects on competition and normally would be subject to antitrust scrutiny. For the most part, however, these relations have been deemed part of the "business of insurance" and therefore within the McCarran-Ferguson exemption.

The most frequently litigated insurer-insured activities have been tying arrangements; these are sales arrangements whereby the seller insists that the

189. *Cf. Royal Drug*, 440 U.S. at 215 n.13 ("If a merger between two insurance companies is not the 'business of insurance,' then an acquisition by an insurer of a manufacturer or a retail chain, although conceptually indistinguishable from the Pharmacy Agreements in this case, is also not the 'business of insurance.' ").

190. *Cf.* United States v. Crocker Nat'l Corp., 656 F.2d 428, 455 (9th Cir. 1981) (interlocking directorates between commercial banks and insurance companies "may not be part of the 'business of insurance' "; Clayton Act § 8, 15 U.S.C. § 19 (1982), held applicable to transaction on other grounds; *see infra* note 278), *rev'd on other grounds sub nom.* Bankamerica Corp. v. United States, 103 S. Ct. 2266 (1983).

191. *See* Hahn v. Oregon Physicians' Serv., 689 F.2d 840 (9th Cir. 1982).

192. *See* Escrow Disbursement Ins. Agency, Inc. v. American Title & Ins. Co., 550 F. Supp. 1192, 1196-97 (S.D. Fla. 1982); *see also* Devoto v. Pacific Fidelity Life Ins. Co., 354 F. Supp. 874, 876 (N.D. Cal. 1973) (breach of exclusive contract between plaintiff insurer and mortgage banker in favor of contract between that banker and defendant insurer, a competitor of plaintiff, *not* within "business of insurance"), *rev'd on other grounds*, 516 F.2d 1, 3 (9th Cir.), *cert. denied*, 423 U.S. 894 (1975).

buyer take a second product, the tied product, as a condition of being able to purchase the first or tying product.[193] The tying arrangement cases have involved situations in which the insurance contract has been alternately the tying or the tied product. In the majority of decisions, these arrangements have been held to be part of the "business of insurance" and therefore immunized from antitrust scrutiny. More recent decisions, however, particularly those decided after *Royal Drug* and *Pireno*, have been less willing to confer the exemption.

Other relationships between insurer and insured also have been analyzed. In the majority of these cases, the exemption has been found inapplicable. This section will examine both tying arrangements and these other relationships.[194]

In one variety of tying arrangement, the insurance policy is the tied product; the insurance company refuses to sell some product or service unless the purchaser also obtains an insurance policy from it. An often-cited example of such conduct is *Addrisi v. Equitable Life Assurance Society*.[195] Defendant insurer conditioned the securing of a homeowner's loan on simultaneous purchase by the borrower of a cash value life insurance policy. The United States Court of Appeals for the Ninth Circuit affirmed the district court's dismissal of plaintiff's complaint, concluding that this activity was indeed part of the "business of insurance." In this pre-*Royal Drug-Pireno* decision, the court focused on the criterion identified by *National Securities*[196]—whether the activity involved the relationship between insurer and insured.[197] Because the tying arrangement clearly fell within this relationship, McCarran-Ferguson applied.[198]

Similar results have been reached in subsequent cases involving insurance as the tied product. In *Dexter v. Equitable Life Assurance Society*,[199] a case similar on its facts to *Addrisi*, the United States Court of Appeals for the Second

193. For a detailed discussion of tying arrangements, see 4 E. KINTNER, FEDERAL ANTITRUST LAW §§ 32.1-.60 (1984); 2 E. KINTNER, FEDERAL ANTITRUST LAW §§ 10.52-.64 (1980); Bauer, *A Simplified Approach to Tying Arrangements: A Legal and Economic Analysis*, 33 VAND. L. REV. 283 (1980).

194. *See generally* Commander Leasing Co. v. Transamerica Title Ins. Co., 477 F.2d 77, 86 (10th Cir. 1973) (relationship between policyholder and agent treated same way as relationship between policyholder and insurance company: "[I]n applying the McCarran Act, we see no reason to distinguish between a principal and an agent. It would appear to us that an insurance agent, as well as an insurance company, is engaged in the 'business of insurance.' ").

195. 503 F.2d 725, 727-28 (9th Cir. 1974), *cert. denied*, 420 U.S. 929 (1975).

196. SEC v. National Sec., Inc., 393 U.S. 453 (1969); *see supra* notes 67-76 and accompanying text.

197. "The McCarran-Ferguson Act was an attempt to turn back the clock, to assure that the activities of insurance companies in dealing with their policyholders would remain subject to state regulation." *National Sec.*, 393 U.S. at 459.

198. An earlier district court decision, Fry v. John Hancock Mut. Life Ins. Co., 355 F. Supp. 1151 (N.D. Tex. 1973), had concluded that such tying arrangements were not part of the "business of insurance." After *Addrisi* was decided, this district court vacated and modified its earlier order, accepting the conclusion that such tying arrangements are within the exemption. Fry v. John Hancock Mut. Life Ins. Co., 1976-1 Trade Cas. (CCH) ¶ 60,728 (N.D. Tex. 1975). The facts in *Fry*, however, are distinguishable from *Addrisi*, and a conclusion that the exemption should not apply would have been justified even if one accepts the *Addrisi* holding. In *Fry* defendant insurer offered farm loans on the condition that the borrower purchase either irrigation systems or life insurance policies from the insurer. When neither the tying nor the tied product is insurance, it is hard to assert that this transaction involves the "business of insurance" merely because the lender happens to be engaged principally in that business.

199. 527 F.2d 233 (2d Cir. 1975).

Circuit concluded that this conduct, while arguably anticompetitive, nonetheless was not subject to antitrust challenge.[200] "Forcing people to buy insurance may well be an undesirable practice—and we do not suggest that we approve of it—but it is part of the 'business of insurance.' "[201]

In several post-*Royal Drug-Pireno* actions involving the use of insurance as a tied product by companies not principally engaged in the sale of insurance, courts have reached contrary conclusions.[202] An examination of the analysis in one such case, *FTC v. Manufacturers Hanover Credit Services, Inc.*,[203] illustrates the current approach. During FTC investigations of certain credit practices by noninsurance company lenders, the Commission sought judicial enforcement of Civil Investigative Demands. The FTC asserted that the conduct of these lenders, requiring their customers to purchase credit insurance from them as a prerequisite to the extension of credit, amounted to unfair or deceptive acts or practices in violation of section 5 of the FTC Act.[204] In resisting compliance with the demands, the respondents asserted that their activities were not the proper subject of FTC investigation because of the McCarran-Ferguson exemption.

Using the three-pronged *Royal Drug-Pireno* test, the district court determined that the conduct sought to be investigated was not the "business of insurance." Applying the first criterion, the court conceded that credit insurance might spread risks both for the lenders and borrowers; it then stated, however, that "[r]isk spreading is an indispensible element . . . but its presence is not determinative."[205]

The court then found that neither the second nor the third criterion was met. First, concluding that the practice did not involve the insurer-insured relationship, the court noted that the challenged practice was the requirement that borrowers purchase credit insurance. Although this could have been characterized as an insurer-insured relationship, the court instead held that it primarily involved a creditor-debtor or buyer-seller relationship to which insurance was merely incidental.[206] Then, applying the final *Royal Drug-Pireno* factor—

200. *Id.* at 235. *But see* Battle v. Liberty Nat'l Life Ins. Co., 493 F.2d 39 (5th Cir. 1974) (conspiracy between insurance company and provider that insureds could use services only of certain providers not shielded by McCarran-Ferguson), *cert. denied*, 419 U.S. 1110 (1975).

201. *Dexter*, 527 F.2d at 235.

202. *See* FTC v. Dixie Fin. Co., 695 F.2d 926 (5th Cir.) (affirming and adopting district court's opinion), *cert. denied*, 103 S. Ct. 2088 (1983); FTC v. Manufacturers Hanover Consumer Servs., Inc., 567 F. Supp. 992 (E.D. Pa. 1983); *see also* General Fin. Corp. v. FTC, 700 F.2d 366 (7th Cir. 1983) (courts lack jurisdiction to enjoin FTC from investigating credit insurance activities; merits of McCarran-Ferguson exemption not reached); Audobon Life Ins. Co. v. FTC, 543 F. Supp. 1362 (M.D. La. 1982) (same); FTC v. Manufacturers Hanover Consumer Servs., Inc., 543 F. Supp. 1071 (E.D. Pa. 1982). *See generally* Polden, *The Antitrust Implications of Credit Insurance Tying Arrangements*, 32 DRAKE L. REV. 861 (1982-83) (discussing credit insurance tying arrangements).

203. 567 F. Supp. 992 (E.D. Pa. 1983).

204. 15 U.S.C. § 45 (1982).

205. *Id.* at 995.

206. The court's hostility to the McCarran-Ferguson exemption is exemplified in one revealing passage: "Where possible to characterize the practice either broadly so that the activity appears to be part of the relationship between insurer and the insured, or narrowly so that it appears otherwise, the latter path should be followed." *Id.*

whether the practice was limited to entities within the insurance industry—the court properly noted that the subjects of the investigation were not principally insurance companies, but rather were credit institutions or automobile sellers for whom credit insurance was merely incidental and secondary.[207]

The majority of the decisions also treat a tying arrangement as part of the "business of insurance" when the policy is the tying product. Thus, it is not unlawful for an issuer of automobile insurance to require that the purchaser also obtain membership in an automobile club,[208] or for the issuer of title insurance to require that purchasers of homes also obtain a mechanic's lien insurance policy.[209] The exemption also has been held applicable to a health maintenance organization's practice of requiring its insureds to fill their prescriptions through its own pharmacy and denying reimbursement under the insurance contract for certain prescriptions filled at independent pharmacies,[210] and to its requirement that persons who seek to purchase "pharmacy benefits" coverage also must purchase a basic health care insurance contract.[211]

The effect that *Royal Drug* and *Pireno* will have on these kinds of tie-in cases is unclear. On the one hand, as one of the FTC investigation cases noted in refusing to rely on *Addrisi* and *Dexter*,[212] "these decisions have lost their viability and are distinguishable in light of . . . *Royal Drug* . . . ."[213] It indeed does seem questionable whether a requirement that a purchaser of a noninsurance product also purchase an insurance policy satisfies the second criterion, because the complained-of conduct only tangentially involves the insurer-in-

207. This factor was rejected by Judge Reavley, dissenting in FTC v. Dixie Fin. Co., 695 F.2d 926 (5th Cir.), *cert. denied*, 103 S. Ct. 2088 (1983). Noting that the exemption was for the "business of insurance" rather than the "business of insurers," he argued that as long as the finance companies were using restraints to sell insurance policies, their principal line of business was "irrelevant." *Id.* at 932 (Reavley, J., dissenting); *see also* Zelson v. Phoenix Mut. Life Ins. Co., 549 F.2d 62 (8th Cir. 1977) (tying arrangement between insurance company, which also was a securities broker-dealer through an affiliate, and its agent, requiring as condition of retention of insurance agency that agent also sell securities only through the affiliate, held not part of "business of insurance").

208. Mathis v. Automobile Club Inter-Ins. Exch., 410 F. Supp. 1037 (W.D. Mo. 1976).

209. McIlhenny v. American Title Ins. Co., 418 F. Supp. 364 (E.D. Pa. 1976). *But see supra* note 99 (noting controversy whether title insurance is "insurance").

210. *See* Klamath-Lake Pharmaceutial Ass'n v. Klamath Medical Serv. Bureau, 701 F.2d 1276, 1288-90 (9th Cir.) (arrangement involved only one "product"; because there were not two separate products, no need to reach business-of-insurance issue), *cert. denied*, 104 S. Ct. 88 (1983). *But see* Portland Retail Druggists Ass'n v. Kaiser Found. Health Plan, 662 F.2d 641, 647 (9th Cir. 1981) (in view of recent *Royal Drug* decision, premature to decide defendant's motion for summary judgment); Homestead Mobile Homes, Inc. v. Foremost Corp., 1985-1 Trade Cas. (CCH) ¶ 66,343 (N.D. Tex. 1985) (*Royal Drug* and *Dixie Finance*, *supra* note 202, undercut *Dexter* and *Addrisi* holdings).

211. Klamath-Lake Pharmaceutical Ass'n v. Klamath Medical Serv. Bureau, 701 F.2d 1276, 1284-87 (9th Cir.), *cert. denied*, 104 S. Ct. 88 (1983). This "tying" requirement satisfied all three prongs of the *Royal Drug* test:

> The insurer-insured agreement embodied in the basic health care contract and its supplemental pharmacy benefit settles the distribution of the risk that insureds will need medical goods and services, including prescription drugs. It defines the relationship between insurer and insured. And it is limited to these two traditional actors in the insurance industry.

Id. at 1286.

212. *See supra* notes 195-201.

213. FTC v. Dixie Fin. Co., 695 F.2d 926, 931 (5th Cir.) (adopting district court opinion), *cert. denied*, 103 S. Ct. 2088 (1983).

sured relationship. On the other hand, as that same case noted, the FTC investigations were of noninsurance companies and hence the third criterion also was unsatisfied.[214] When the tying arrangement is the practice of an insurer and neither involves an outsider to the industry nor has an adverse competitive impact outside the industry, the basic concern of *Royal Drug* and *Pireno* to limit the exemption to the traditional, insurance-related activities of insurers would seem to be satisfied.

One meaningful difference might lie in whether the insurance policy is the tying or the tied product.[215] When the insurance policy is the tying product, it is what the defendant is principally engaged in selling and is the product desired by the purchaser. Such a transaction seems at the heart of a sale of insurance, the "business" of insurance. On the other hand, when the insurer is principally selling a noninsurance product—making a loan, selling a car, or the like—and conditions the right to purchase that product on the simultaneous purchase of insurance, treating this transaction as the "business of insurance" effectively would allow the tail to wag the dog. Even though the transaction resembles insurance in that it allows the seller to spread to all purchasers the risk that the purchaser of a noninsurance product will be unable to make full payment, it does not involve the basic insurer-insured relationship. Moreover, by allowing the seller to employ its market power in the noninsurance product to force the purchase of insurance, the transaction can have anticompetitive effects outside the insurance industry, one of the principal concerns of the Court in *Royal Drug* and *Pireno*.[216] Thus, these kinds of tying arrangements should be subject to normal antitrust scrutiny.

Many other activities between an insurance company and its insureds also fall within the "business of insurance." Perhaps the clearest example is the determination of the amount of benefits to be paid pursuant to a claim.[217] In addition, the restriction in automobile insurance policies limiting reimbursement to the insured only to the reasonable and competitive costs of repair, even if this could be viewed as resulting in a horizontal conspiracy among the insureds to use their buying power to reduce prices in the provider market, so directly involves the insurer-insured relationship that it also is within the "business of insurance."[218]

---

214. "Were the respondents in this matter insurance companies, the holdings of *Dexter* and *Addrisi* might carry more weight . . . . [T]he conduct being investigated does not relate to respondents as insureds, but as finance companies whose methods of inducing potential borrowers to purchase insurance is an integral part of the arrangement of credit and not the 'business of insurance.'" *Id.*

215. When insurance policies are both the tying and the tied products—the insured must take two kinds of policies or none at all—the "business of insurance" requirement is satisfied. Anglin v. Blue Shield, 693 F.2d 315, 320-21 (4th Cir. 1982); *see infra* text accompanying note 334.

216. *See supra* note 95 and accompanying text.

217. *See* Freier v. New York Life Ins. Co., 679 F.2d 780, 782 (9th Cir. 1982); *see also* Mulhearn v. Rose-Neath Funeral Home, Inc., 512 F. Supp. 747 (W.D. La. 1981) (specification in insurance policy of "authorized provider" and providing lower benefits to insured for services of "unauthorized provider" held within "business of insurance").

218. *See* Custom Auto Body, Inc., v. Aetna Casualty & Sur. Co., 1983-2 Trade Cas. (CCH) ¶ 65,629 (D.R.I. 1983); *see also* Lowe v. Aarco-American, Inc., 536 F.2d 1160, 1162 (7th Cir. 1970) (sale and financing of automobile insurance policies included within "business of insurance," even

On the other hand, as a result of *Royal Drug* and *Pireno* a number of activities by insurance companies other than tying arrangements directed principally at the policyholders have been held to be outside the "business of insurance." These decisions, however, may be taking far too limited a view of the scope of the "business of insurance." In one recent case,[219] defendant health care insurer, Blue Cross, instituted a policy of reimbursing its policyholders only for a CAT scan performed at a hospital and not for those performed by physicians using a privately-owned CAT scanner. Plaintiff-physician, who owned and operated a CAT scanner, complained that Blue Cross' policy was an unlawful boycott of his services; in response, Blue Cross asserted that its decision was part of the "business of insurance."[220]

Applying the three *Royal Drug-Pireno* criteria, the district court concluded that the McCarran-Ferguson defense was unavailable. The conduct did not involve the risk-spreading function because "Blue Cross' decision not to reimburse for physician-owned scanners is not an underwriting decision but rather a cost reduction decision."[221] The court probably was wrong; this decision concerned which claims would be paid and therefore what risks would have to be underwritten and ultimately shared by the policyholders.

Of greater significance was the court's use of the second and third criteria to take this decision on the scope of coverage—something typically thought to be part of the relationship between an insurer and its insureds—outside of the "business of insurance." The court first concluded that these decisions by Blue Cross were not "an integral part of the policy relationship" because they only determined from whom the insured could obtain treatment and not what kinds of incidents were covered; consequently, they did not affect "the benefit conferred on the subscriber."[222] This view is too narrow because the authorized providers of care, as well as the insured-for incidents, are elements of the insurance agreement and are rights for which the insured pays a determined premium.

The court also concluded that the third criterion—"whether the practice is limited to entities within the insurance industry"—was unsatisfied because Blue Cross' decision "inevitably involves third parties outside the insurance indus-

---

though seller was finance company and not insurance company; challenge was under Truth in Lending Act, 15 U.S.C. § 1601 (1982) dismissed). *But see* Cody v. Community Loan Corp., 606 F.2d 499, 503 (5th Cir. 1979) (lending activities of insurance company not part of "business of insurance"; federal Truth in Lending Act not preempted), *cert. denied*, 446 U.S. 988 (1980); Perry v. Fidelity Union Life Ins. Co., 606 F.2d 468 (5th Cir. 1979) (same), *cert. denied*, 446 U.S. 987 (1980); Cochran v. Paco, Inc., 606 F.2d 460 (5th Cir. 1979) (lending activities of insurance premium finance company not part of "business of insurance"; federal Truth in Lending Act not preempted). These cases are discussed in Annot., 51 A.L.R. FED. 743 (1981).

219. Trident Neuro-Imaging Laboratory v. Blue Cross & Blue Shield, 568 F. Supp. 1474 (D.S.C. 1983).

220. *Id.* at 1479.

221. *Id.* at 1482. The court explained its narrow view of the "underwriting" requirement: "[C]ases since *Royal Drug* seem to hold that only the core activities of a traditional insurance company, *viz.*, the underwriting and risk spreading functions, fall within the McCarran-Ferguson Act exemption for the business of insurance." *Id.*

222. *Id.* at 1483.

try—namely neurologists."[223] This conclusion also extends the *Royal Drug-Pireno* test too far. The test should be whether outsiders are involved in the decision, not merely whether they are affected.[224] Conduct by an insurance company, be it with other insurers, with its agents, or with its insureds, will only infrequently not "affect" outsiders. Continuation of this narrow approach will reduce the McCarran-Ferguson exemption far beyond what Congress intended in 1945. Thus, although occasional exceptional situations will arise,[225] the general rule should be that the broad range of relationships between an insurance company and its insured should be deemed part of the "business of insurance."

4. Relations Between Insurance Companies and Other Parties in the Insurance Industry

Relationships between insurance companies—horizontal agreements between competing insurers—generally have been deemed within the "business of insurance."[226] Relationships within the insurance industry of a primarily vertical nature have received somewhat less positive treatment, although more often than not they too have been held to be within the McCarran-Ferguson exemption.[227] These arrangements between an insurer and a person acting as its sales or claims agent generally are immunized when the other party is acting as an intermediary with the policyholder and when the direct relationship itself would be part of the "business of insurance."[228]

The relationship between an insurance company and its agents often is at the core of the "insurance business." Nonetheless, whether it is within the "business of insurance" must depend on the nature and effect of the particular challenged activities.[229] Because it is clear that McCarran-Ferguson authorizes

---

223. *Id.*

224. The court did note that "plaintiffs have alleged that hospital physicians and others influenced Blue Cross' decision not to reimburse. To that extent, third parties outside the insurance industry were involved in the decision-making process." *Id.* Not only was this a supplemental ground for the court's decision, because apparently it was enough that the outsiders were "affected," but reliance on this relatively minor outsider participation itself illustrates the considerable extension of the significance of *Royal Drug*'s pharmacy agreements and *Pireno*'s peer review committees.

225. *See, e.g.*, Cody v. Community Loan Corp., 606 F.2d 499, 503 (5th Cir. 1979) (lending activities of insurance company not part of "business of insurance"; federal Truth In Lending Act not preempted), *cert. denied*, 446 U.S. 988 (1980); Perry v. Fidelity Union Life Ins. Co., 606 F.2d 468 (5th Cir. 1979) (same), *cert. denied*, 446 U.S. 987 (1980).

226. *See supra* notes 170-92 and accompanying text.

227. For a general discussion of relations between insurance companies and other parties in the insurance industry, see Robertson v. California, 328 U.S. 440 (1946) (state statute regulating agents for out-of-state insurance companies not unlawful under either commerce clause or due process clause; unnecessary to consider McCarran-Ferguson exemption).

228. *See, e.g.*, Commander Leasing Co. v. Transamerica Title Ins. Co., 477 F.2d 77, 86 (10th Cir. 1973) ("In applying the McCarran Act, we see no reason to distinguish between a principal and an agent. It would appear to us that an insurance agent, as well as an insurance company, is engaged in the 'business of insurance.' ").

229. Another issue frequently arising out of the insurer-agent relationship is whether certain challenged agency contract provisions and the various enforcement activities undertaken by the insurer constitute a boycott under § 3(b) of the McCarran-Ferguson Act. *See, e.g.*, Blackburn v. Crum & Forster, 611 F.2d 102 (5th Cir. 1980), *cert. denied*, 447 U.S. 906 (1980); Card v. National Life Ins. Co., 603 F.2d 828 (10th Cir. 1979); Seidner v. Union Cent. Life Ins. Co., 1973-1 Trade Cas. (CCH)

joint rate-setting activity by insurers[230] and the rate of commission paid to agents is a vital factor in the insurers' rate-making structure, it generally is assumed that the "business of insurance" also extends to agreements between insurers concerning those commission rates.[231]

The status of exclusive arrangements with agents, limiting those agents to representing only one or a few insurance companies or prohibiting them from engaging in any noninsurance business, has proven more troubling. In the majority of cases, however, when the exclusive agency restrictions were part of the overall insurer-agent relationship, courts have treated them as within the "business of insurance."[232] These arrangements have a sufficiently direct link with the relationship between the insurance company and the policyholders; they affect the reliability of the company's representatives and the care and attention given to policyholders.

Certain other arrangements between an insurance company and its agents also have been held within the "business of insurance." The exemption applies to: a restriction on the types of persons to whom agents may sell insurance;[233] a requirement that upon termination of the agency certain documents and records must be returned to the insurance company;[234] and an alleged tying arrangement in which the continuation of plaintiff's agency was conditioned on his handling the full range of defendant insurer's line of policies.[235]

The approach taken by the courts to these arrangements is illustrated in *Hopping v. Standard Life Insurance Co.*[236] An agent represented defendant in-

¶ 74,561 (N.D. Ill. 1970). *See generally infra* notes 300-54 and accompanying text (discussing the scope of the boycott limitation under the McCarran-Ferguson Act).

230. *See supra* notes 170-74 and accompanying text.

231. *See* California League of Indep. Ins. Producers v. Aetna Casualty & Sur. Co., 175 F. Supp. 857 (N.D. Cal. 1959). The Supreme Court, however, has not yet resolved this issue. *See Royal Drug*, 440 U.S. at 224 n.32 ("It is clear from the legislative history that the fixing of rates is the 'business of insurance.' The same conclusion does not so clearly emerge with respect to the fixing of agents' commissions.").

232. *See, e.g.*, Thompson v. New York Life Ins. Co., 644 F.2d 439, 442-44 (5th Cir. 1981); Gribbin v. Southern Farm Bureau Life Ins. Co., 1984-1 Trade Cas. (CCH) ¶ 65,798 (W.D. La. 1984); Steinberg v. Guardian Life Ins. Co., 486 F. Supp. 122 (E.D. Pa. 1980); Black v. Nationwide Mut. Ins. Co., 429 F. Supp. 458 (W.D. Pa. 1977), *aff'd mem.*, 571 F.2d 571 (3d Cir. 1978); *see also* Blackburn v. Crum & Forster, 611 F.2d 102 (5th Cir. 1980) (court apparently assumed that exclusive dealing provision in agency agreement falls within "business of insurance"; held, termination of agent not "boycott" under § 3(b) of Act), *cert. denied*, 447 U.S. 906 (1980); Card v. National Life Ins. Co., 603 F.2d 828 (10th Cir. 1979) (same); Blackley v. Farmers Ins. Group, Inc., 1976-2 Trade Cas. (CCH) ¶ 61,061 (D. Utah 1976) (exclusive dealing requirement conceded by plaintiff to be "business of insurance"; held, requirement is not "boycott" under § 3(b)). *But see* Ray v. United Family Life Ins. Co., 430 F. Supp. 1353, 1357 (W.D.N.C. 1977) (A lawsuit challenging termination of agent who did not agree to sell only defendant's policies "involves the relationship of *agent* and company, not the relationship of *policyholder* and company. Refusal to deal with an *agent* does not fall into [exempted] categories . . . .").

233. Gribbin v. Southern Farm Bureau Life Ins. Co., 1984-1 Trade Cas. (CCH) ¶ 65,798 (W.D. La. 1984); *see also* Owens v. Aetna Life & Casualty Co., 654 F.2d 218, 225-26 (3d Cir. 1981) ("[I]t is clear that at least the following activities are the business of insurance[:] . . . authorizing agents to solicit individual or group policies; [and] accepting or rejecting coverages tendered by brokers."), *cert. denied*, 454 U.S. 1092 (1981).

234. Gribbin v. Southern Farm Bureau Life Ins. Co., 1984-1 Trade Cas. (CCH) ¶ 65,798 (W.D. La. 1984).

235. Steinberg v. Guardian Life Ins. Co., 486 F. Supp. 122 (E.D. Pa. 1980).

236. 1984-1 Trade Cas. (CCH) ¶ 65,814 (N.D. Miss. 1983).

surer, which sold only life, and not health, insurance; that insurance company had an arrangement with Blue Cross, a seller of health insurance, whereby each company would cooperate with the other in selling health and life insurance packages. Defendant refused to renew plaintiff's agency appointment unless he agreed not to encourage his customers to shift their health insurance business to insurers other than Blue Cross. Applying the *Royal Drug-Pireno* criteria, the court concluded that this conduct fell within the "business of insurance."[237]

On the other hand, certain other relationships between an insurance company and its agents have been held beyond the scope of the "business of insurance." In *Zelson v. Phoenix Mutual Life Insurance Co.*[238] plaintiff was engaged in the sale of both insurance and securities; he alleged that defendant insurance company engaged in an unlawful tying arrangement by terminating his insurance agency contract after he refused to sell securities through an affiliate of defendant. Holding that this conduct would not be shielded by McCarran-Ferguson, the court stressed that the chief impact of this restriction was not in the insurance market, but in the securities field.[239] Because the requirement that plaintiff sell only defendant's securities products did not affect the parties' relationships with insurance policyholders, it was not part of the "business of insurance."[240]

It also has been held that McCarran-Ferguson does not extend to: an insurance company's "pirating" of, and subsequent direct-dealing with, the subagents of the plaintiff, its agent;[241] a conspiracy by defendant insurance companies to induce the agents of plaintiff, a competing insurer, to breach their contracts with plaintiff and instead represent defendants;[242] or a conspiracy between an insurance company and an insurance agency to steal from another insurance agency various trade secrets and confidential information regarding the marketing of an

237. *Id.* Since plaintiff's conduct could have resulted in fewer persons continuing their health insurance policies with Blue Cross, the restriction contributed to the insurers' attempts to spread their policyholders' risks. The potential substitution of other insurance companies for Blue Cross would destroy the relationship between that insurer and its insureds, would decrease the number of its policyholders (and thus indirectly affect its risk spreading), and would affect the confidence policyholders would have both in Blue Cross and in defendant company. Finally, the restraints clearly were limited only to parties within the insurance industry. *Id.*

238. 549 F.2d 62 (8th Cir. 1977).

239. *Id.* at 71.

240. The court distinguished two other tying arrangement cases, Dexter v. Equitable Life Assurance Soc'y, 527 F.2d 233 (2d Cir. 1975) and Addrisi v. Equitable Life Assurance Soc'y, 503 F.2d 725 (9th Cir. 1974), *cert. denied*, 420 U.S. 929 (1975) (discussed *supra* notes 195-201 and accompanying text). In those cases, insurance was the tied product that the policyholder had to take as a condition of obtaining a loan; in *Zelson*, on the other hand, the insurance agency was the tying product and the agent was forced to accept the less desired securities representation as the tied product. *Zelson*, 549 F.2d at 66-68. This distinction demonstrated that in this case, the anticompetitive effect was on the securities market, since other securities firms were foreclosed from making sales through plaintiff's agency because of the restraint imposed by defendant.

241. *See* Allied Fin. Servs., Inc. v. Foremost Ins. Co., 418 F. Supp. 157 (D. Neb. 1976).

242. *See* American Family Life Assurance Co. v. Planned Mktg. Assocs., 389 F. Supp. 1141 (E.D. Va. 1974); *see also* Malley-Duff & Assocs. v. Crown Life Ins. Co., 1983-1 Trade Cas. (CCH) ¶ 65,302 (W.D. Pa. 1983) (insurance company's termination of an agency contract within scrutiny of antitrust laws where termination may have resulted from a conspiracy to boycott the agency and eliminate it), *rev'd on other grounds*, 734 F.2d 133 (3d Cir. 1984).

insurance policy.[243]

5. Unilateral Activities by Insurance Companies

Certain decisions or actions by insurance companies undertaken unilaterally rather than in concert with others also may carry the potential of substantially lessening competition. If the activity falls within the "business of insurance," it too will be exempt from antitrust scrutiny.

A recent example of exempted unilateral activity is *Mackey v. Nationwide Insurance Co.*[244] Plaintiff, a former agent of defendant insurance company, complained that defendant had adopted the practice of "redlining"—refusing to write insurance polices for persons residing in predominantly black neighborhoods. Without applying the *Royal Drug-Pireno* test, the court concluded that the "claim [fell] squarely within the exemption provided by the McCarran-Ferguson Act."[245] Indeed, reprehensible as defendant's practice was, the court's conclusion is correct. It was part of the decision of whom to insure—part of the underwriting or risk-taking aspect of insurance—and it went to the heart of the insurer-insured relationship by determining the parties with whom the insurance company was willing to establish such a relationship.[246] Similarly, the adoption by an insurance company of a policy that resulted in the reduction of the amount of benefits paid to the insured also was an essential element of this insurer-insured relationship and therefore was entitled to McCarran-Ferguson immunity.[247]

On the other hand, activities less central to the insurance enterprise or less unique to the insurance industry are not entitled to the exemption. McCarran-Ferguson was held inapplicable when an established insurance company alleged that defendant, a relatively new and small insurance company, had tried to induce plaintiff's agent to cease selling plaintiff's insurance and instead to sell defendant's policies, and also had utilized plaintiff's trade secrets and customer lists to induce plaintiff's policyholders to shift to coverage with defendant.[248] These activities did not involve or affect the insurer-policyholder relationship; rather, "the activities complained of could easily be employed by one stock brokerage firm against another as by one insurance firm against another."[249] Although defendant's conduct only involved competition within the insurance industry, to the extent that these "unfair activities" rose to the level of potential

243. *See* Center Ins. Agency, Inc. v. Byers, 1976-1 Trade Cas. (CCH) ¶ 60,940 (N.D. Ill. 1976).

244. 724 F.2d 419 (4th Cir. 1984).

245. *Id.* at 421. While dismissing plaintiff's Sherman Act claim, the court held that McCarran-Ferguson did not bar actions under either the federal Fair Housing Act, 42 U.S.C. § 3601 (1968), or the Civil Rights Acts, 42 U.S.C. §§ 1981, 1982 (1982). *Mackey*, 724 F.2d at 421.

246. *Cf.* FTC v. National Casualty Co., 357 U.S. 560 (1958) (challenge to alleged unfair advertising immunized by § 2(b); no discussion of "business of insurance").

247. *See* Frier v. New York Life Ins. Co., 679 F.2d 780, 782-83 (9th Cir. 1982).

248. American Family Life Assurance Co. v. Planned Mktg. Assocs., 389 F. Supp. 1141 (E.D. Va. 1974).

249. *Id.* at 1147; *see also* Center Ins. Agency, Inc. v. Byers, 1976-1 Trade Cas. (CCH) ¶ 60,940 (N.D. Ill. 1976) (discussed *supra* note 243 and accompanying text).

antitrust violations, they properly were held subject to antitrust scrutiny.[250] The exemption does not apply to all of the "business of insurance companies," but only that "business" which is "insurance"; under prevailing norms, acts such as theft of confidential information or inducement of a breach of contract would not be deemed to be within that "business."

Other interpretative problems can exist when the same entity operates both as an insurer and as a provider of services. One increasingly common example of such dual conduct is a health maintenance organization (HMO), an entity that promises to provide all specified health care of the insured for a fixed fee. It has been held, however, that the adoption by an HMO of a policy not to allow certain providers to become members of these organizations is not exempt as the "business of insurance." Applying the third of the *Royal Drug-Pireno* criteria, a court noted that these "practices restrain competition in a provider market . . . rather than in an insurance market."[251] When the principal effect of a restraint is on competition outside the insurance industry, the exemption usually will be unavailable.[252]

These decisions again evidence the general trend toward a narrowing of the "business of insurance."[253] The exemption appears available only for the activities of traditional insurance companies, and then only with respect to the traditional and necessary acts of these companies. Furthermore, even when these standards are satisfied, the exemption is unavailable if the activities have substantial effects on noninsurers. These continued restrictions on McCarran-Ferguson may deprive the states of the right to regulate insurers, and deprive insurance companies of the protective umbrella that Congress intended to confer in 1945. Although antitrust scrutiny of some of the more anticompetitive or unfair practices may be desirable, the trend marks a shift from the balance struck four decades ago to exempt a broad range of admittedly anticompetitive, and hence otherwise unlawful, conduct.

B. Requirement of State Regulation

The McCarran-Ferguson Act exempts the business of insurance from the federal antitrust laws only "to the extent that such business is not regulated by State law."[254] Accordingly, after a court determines that the activity is within

250. *Cf.* USLIFE Corp. v. U.S. Life Ins. Co., 560 F. Supp. 1302, 1306-08 (N.D. Tex. 1983) (choice of company name not part of "business of insurance"; challenge under federal Lanham Act, 15 U.S.C. § 1051 (1982), not preempted by McCarran-Ferguson).

251. Hahn v. Oregon Physicians' Serv., 689 F.2d 840, 844 (9th Cir. 1982).

252. "Although the Supreme Court [in *Royal Drug*] did not hold that [an] effect on non-insurance markets was in itself sufficient to negate the applicability of the McCarran-Ferguson exemption, arrangements whose primary impact is on competition in markets other than that for insurance do not fall within the exemption." *Id.* at 844.

253. *See also* National Gerimedical Hosp. & Gerontology Center v. Blue Cross, 628 F.2d 1050, 1057 (8th Cir. 1980) (refusal by health care insurer to enter into provider agreement with new, private hospital is not part of "business of insurance"), *aff'g* 479 F. Supp. 1012 (W.D. Mo. 1979), *rev'd on other grounds*, 452 U.S. 378 (1981).

254. Section 2(b) of the Act provides:

> No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee

the "business of insurance," it then must ascertain whether the activity is "regulated by state law."[255] Two issues relating to this requirement have arisen: First, the Act might require state regulation to be of a certain quality and extent before federal laws will be preempted. Second, the statutory regulation of insurance by one state could exempt insurance activities conducted in or having an effect in another state, but which are not regulated by that second state.

1. Quality and Extent of State Regulation

The McCarran-Ferguson Act does not define "regulated by State law." Thus, the Act itself is unclear whether more than some minimum level of state regulation is required before the "business of insurance" is exempt from federal antitrust laws.[256] Many commentators have interpreted the Act's legislative history as requiring more than the mere existence of state legislation applicable to insurance activities.[257] They argue that the congressional debates over the proposed bill, including clarifications offered by its sponsors, illustrate that the Act requires *effective* and *active* regulation of the business of insurance by the states.[258] The state must supervise those functions essential to the insurance business, such as the setting of premium rates. These critics assert that a state statute which does not provide for supervision by a state agency fails to satisfy this "regulation" requirement.

The courts, however, usually have not imposed such a stringent standard. The Supreme Court first addressed this question in *FTC v. National Casualty Co.*[259] Proceeding under section 5 of the FTC Act, the FTC sought to prohibit false, misleading, and deceptive advertising by certain insurance companies. Alabama's insurance regulatory scheme, which the FTC asserted was insufficient to satisfy the McCarran-Ferguson language, provided for enforcement of its statute by the State Insurance Commission. The FTC contended that since the Insurance Commission never had used its enforcement power, the Alabama statute failed to satisfy the "regulated by State law" requirement.[260]

In rejecting these arguments and concluding that the McCarran-Ferguson Act barred the FTC's orders, the Supreme Court concluded that these activities

---

> or tax upon such business, unless such Act specifically relates to the business of insurance: *Provided*, That after June 30, 1948, . . . the Sherman Act, . . . the Clayton Act, and . . . the Federal Trade Commission Act, as amended, shall be applicable to the business of insurance *to the extent that such business is not regulated by State law.*

15 U.S.C. § 1012(b) (1982) (emphasis added).

255. All but one American jurisdiction (Guam) has some type of antitrust legislation. Weller, *To Preempt or Accommodate: The Question of State and Federal Antitrust Laws Under the McCarran-Ferguson Act*, 9 U. TOL. L. REV. 421, 423 (1978). All jurisdictions except Ohio, the District of Columbia, and Guam also have enacted unfair trade practices legislation. *Id.* at 441.

256. *See supra* note 254.

257. *See, e.g.*, Dineen, *The Rating Problem*, 1946 A.B.A. SEC. INS. LAW 11; Kimball & Boyce, *supra* note 16, at 570-575; Weller, *supra* note 24, at 607-14; Weller, *supra* note 255; Comment, *State Regulation Under the McCarran Act*, 47 TUL. L. REV. 1069 (1973); Note, *State Supervision Over Insurance Rate-Making Combinations Under the McCarran Act*, 60 YALE L.J. 160 (1951).

258. Most of these commentators have relied principally upon the Senate discussions preceding the passage of Senate bill 340. *See* 91 CONG. REC. 1442-4, 1479-88 (1945).

259. 357 U.S. 560 (1958).

260. *Id.* at 564.

were regulated sufficiently by the state to meet the statutory standard. The Court noted that "[e]ach State in question has enacted prohibiting legislation which proscribes unfair insurance advertising and authorizes enforcement through a scheme of administrative supervision."[261]

The FTC attempted to distinguish between the mere existence of state legislation and the regulation assertedly required to satisfy McCarran-Ferguson, contending that the fact that a state had enacted legislation prohibiting the conduct in question was not enough. Rather, the FTC argued that the exemption was not available until the state's prohibition of the insurance company's conduct "has been crystallized into 'administrative elaboration of these standards and application in individual cases.' "[262] Rejecting this position, the Supreme Court concluded that "assuming there is some difference in the McCarran-Ferguson Act between 'legislation' and 'regulation,' nothing in the language of that Act or its legislative history supports the distinctions drawn by [the FTC]."[263] The Court concluded that a general prohibitory regulatory scheme would be adequate to invoke the insurance exemption.[264]

Although this approach may be overly deferential to the states and unduly permissive of insurance activities, the majority of subsequent lower court cases actually have taken an even more liberal approach to this requirement of state regulation. Two of the earlier decisions illustrate the generally applicable standard.

In *California League of Independent Insurance Producers v. Aetna Casualty & Surety Co.*[265] plaintiffs alleged that defendant insurance companies had conspired to decrease commission rates paid to insurance agents. Defendants responded that two state statutes regulated their activities; therefore, the alleged conspiracy was immune from federal antitrust challenge. The first statute was a part of the state insurance code; it "authorize[d] cooperation between insurers in rate making and other related matters."[266] The second statute was the state's general antitrust statute, which had been held by the state supreme court to be applicable to insurance companies.[267] The court declined to require either any finding that the state in fact had regulated the challenged activity or even that the statutes referred specifically to the conduct under scrutiny. Rather, the court dismissed the complaint, concluding that "if a State has generally authorized or permitted standards of conduct, it is regulating the business of insurance

261. *Id.* The state regulatory schemes in question were versions of the Model Unfair Practices Bill for Insurance. *Id.* at 564 n.5.

262. *Id.* at 564.

263. *Id.* at 565.

264. The Court observed that the FTC "does not argue that the statutory provisions here under review were mere pretense." *Id.* at 564. This statement would seem to suggest that if the state enacted a law merely to exempt insurers from federal scrutiny, but with no intention of implementing or enforcing that law, such a "sham" would not suffice to meet the § 2(b) standard. What is left unclear is how plaintiffs might prove such a "pretense" and whether any minimal state regulation other than mere "pretense" satisfies the statute.

265. 175 F. Supp. 857 (N.D. Cal. 1959).

266. *Id.* at 860.

267. *Id.*

under the McCarran Act."[268]

In *Ohio AFL-CIO v. Insurance Rating Board*[269] plaintiffs, labor unions and purchasers of automobile liability insurance, alleged that defendant Insurance Rating Board, which was composed of over one hundred insurance companies, had conspired to fix premium rates for automobile casualty insurance. These premium rates did not require prior approval by the Ohio Department of Insurance; rather, they became effective immediately upon proposal by the Board. Plaintiffs argued that since the Department of Insurance never had challenged the rate increases,[270] the state of Ohio did not "regulate" the business of insurance and therefore this conduct was subject to federal antitrust scrutiny. The United States Court of Appeals for the Sixth Circuit, however, found that the existence of Ohio's regulatory scheme was sufficient to invoke the McCarran-Ferguson exemption. Because there was a specific state statute providing for the regulation of rating organizations such as defendant and for the filing of its members' rates, the court applied the same standard used in *California League*, requiring only a general regulatory scheme governing the insurance activity. That the statute actually was not enforced was insignificant;[271] that the system was in place was sufficient to satisfy the statutory requirement of regulation.[272] "[T]here is nothing in the language of the McCarran Act or in its legislative history to support the thesis that the Act does not apply when the state's scheme of regulation has not been effectively enforced."[273]

Most lower court decisions after *California League* and *Ohio AFL-CIO* have construed the requirement of state regulation equally liberally, both relative to the need for actual enforcement of the law by the state and to the regula-

268. *Id.* The court offered a number of formulations of this liberal approach. "[A] state regulates the business of insurance . . . when a State statute generally proscribes . . . or permits or authorizes certain conduct on the part of the insurance companies." *Id.* "[Section 2(b)] precludes a Sherman Act suit if the charges alleged in the complaint are covered by [the] State [antitrust] act." *Id.*

269. 451 F.2d 1178 (6th Cir. 1971), *cert. denied*, 409 U.S. 917 (1972).

270. Plaintiff alleged that the Department of Insurance did not even employ an actuary, who would have been able to examine the rate filings. They therefore asserted that the "state has abdicated its function of regulating the automobile insurance industry in favor of regulation by the . . . industry itself." *Id.* at 1190.

271. "We find no support for the [plaintiff's] argument that the court in this case should inquire into the question as to whether the statutes of Ohio have been effectively enforced in accordance with their terms." *Id.* at 1184.

272. "[C]oncededly [Ohio's] scheme might not be as extensive or as stringent as some of the other states." *Id.* at 1181.

273. *Id.* at 1184. The court seemed to place an almost impossible burden on plaintiffs of showing an absence of regulation. The allegations that rate increases never had been challenged or that the Department never had employed an actuary were dismissed since "[t]hese statements do not necessarily establish a policy of non-enforcement in Ohio and certainly are insufficient to show that the regulation of insurance in that state is a mere 'sham' or 'pretense.' " *Id.*

Dissenting from the Supreme Court's refusal to grant certiorari, Justice Douglas argued:

> A governmental regulatory agency which, in contradiction of a statutory direction, only rarely exercises its examinatory powers; which has never exercised its powers or review of rate increases; and which does not even employ the personnel which would be necessary to exercise the power would prima facie seem to be not more than a "mere pretense" of regulation.

Ohio AFL-CIO v. Insurance Rating Board, 409 U.S. 917, 918 (Douglas, J., dissenting from denial of certiorari).

tion of the particular conduct in question.[274] The existence of a statutory scheme, even if it is not enforced or implemented, continues to suffice. Furthermore, the state regulatory scheme need not be directed specifically at the insurance industry. Rather, a state's general antitrust statute usually will qualify as "state regulation" for McCarran-Ferguson purposes.[275] Although in a number of decisions the courts did find state regulation of the specific activity at issue before granting a McCarran-Ferguson exemption,[276] these findings probably were unnecessary to the holdings[277] that the defendant insurers' business was regulated by state law.[278]

---

274. *See* Mackey v. Nationwide Ins. Co., 724 F.2d 419, 421 (4th Cir. 1984); Seasongood v. K & K Ins. Agency, 548 F.2d 729, 734 (8th Cir. 1977); Dexter v. Equitable Life Assurance Soc'y, 527 F.2d 233, 235-36 (2d Cir. 1975); Addrisi v. Equitable Life Assurance Soc'y, 503 F.2d 725, 728 (9th Cir. 1974), *cert. denied*, 420 U.S. 929 (1975); Commander Leasing Co. v. Transamerica Title Ins. Co., 477 F.2d 77, 83-84 (10th Cir. 1973); First Am. Title Co. v. South Dakota Land Title Ass'n, 541 F. Supp. 1147, 1154 & n.8 (D.S.D. 1982), *aff'd*, 714 F.2d 1439 (8th Cir. 1983), *cert. denied*, 104 S. Ct. 709 (1984); Lawyer's Realty Corp. v. Peninsular Title Ins. Co., 428 F. Supp. 1288, 1292 (E.D. La. 1977); Manasen v. California Dental Servs., 424 F. Supp 657, 667-69 (N.D. Cal. 1976), *rev'd per curiam*, 638 F.2d 1152 (9th Cir. 1979); Harrison v. Chicago Title Ins. Co., 1974-2 Trade Cas. (CCH) ¶ 75,321 (D. Kan. 1974); Crawford v. American Title Ins. Co., 1974-2 Trade Cas. (CCH) ¶ 75,320 (N.D. Ala. 1974), *aff'd per curiam*, 518 F.2d 217 (5th Cir. 1975); Steingart v. Equitable Life Assurance Soc'y, 366 F. Supp. 790, 792-95 (S.D.N.Y. 1973).

275. *See* Lawyers Title Co. v. St. Paul Title Ins. Corp., 526 F.2d 795, 797-98 (8th Cir. 1975); Meicler v. Aetna Casualty & Sur. Co., 506 F.2d 732, 734 (5th Cir. 1975) (state antitrust statute specifically prohibited concerted action to fix cost of insurance); Manasen v. California Dental Servs., 424 F. Supp. 657, 669 (N.D. Cal. 1976) ("There is ample support for the proposition that a state antitrust law constitutes sufficient state regulation within the meaning of the McCarran Act."), *rev'd per curiam*, 638 F.2d 1152 (9th Cir. 1979); Winters v. Kansas Hosp. Serv. Ass'n, 1975-1 Trade Cas. (CCH) ¶ 60,140 (D. Kan. 1975) (defendant's acts, covered by state antitrust law and insurance code, were "regulated" by state law); Mitgang v. Western Title Ins. Co., 1974-2 Trade Cas. (CCH) ¶ 75,322 (N.D. Cal. 1974) (state antitrust statute and unfair trade practices act sufficient); Steingart v. Equitable Life Assurance Soc'y, 366 F. Supp. 790, 794 (S.D.N.Y. 1973) ("On [the basis of the state antitrust law] alone, the McCarran exemption should operate as a bar to plaintiffs' federal antitrust claims."); Professional & Business Men's Life Ins. Co. v. Bankers Life Co., 163 F. Supp. 274, 278-80 (D. Mont. 1958).

276. *See* Klamath-Lake Pharmaceutical Ass'n v. Klamath Medical Serv. Bureau, 701 F.2d 1276, 1287 & n.10 (9th Cir.), *cert. denied*, 104 S. Ct. 88 (1983); Owens v. Aetna Life & Casualty Co., 654 F.2d 218, 226 (3d Cir.), *cert. denied*, 454 U.S. 1092 (1981); Dexter v. Equitable Life Assurance Soc'y, 527 F.2d 233, 235-36 (2d Cir. 1975); Meicler v. Aetna Casualty & Sur. Co., 506 F.2d 732, 734 (5th Cir. 1975); Travelers Ins. Co. v. Blue Cross, 481 F.2d 80, 83-84 (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); Gribbin v. Southern Farm Bureau Life Ins. Co., 1984-1 Trade Cas. (CCH) ¶ 65,798 (W.D. La. 1984); Custom Auto Body, Inc. v. Aetna Casualty & Sur. Co., 1983-2 Trade Cas. (CCH) ¶ 65,629 (D.R.I. 1983); Grant v. Erie Ins. Exch., 542 F. Supp. 457, 463-64 (M.D. Pa. 1982), *aff'd mem.*, 716 F.2d 890 (3d Cir.), *cert. denied*, 104 S. Ct. 349 (1983); Steinberg v. Guardian Life Ins. Co., 486 F. Supp. 122 (E.D. Pa. 1980); Steingart v. Equitable Life Assurance Soc'y, 366 F. Supp. 790, 793-95 (S.D.N.Y. 1973) ("pervasive scheme of legislation and . . . antitrust law which proscribes the very conduct alleged in the complaint"); Miley v. John Hancock Mut. Life Ins. Co., 148 F. Supp. 299, 301-02 (D. Mass.), *aff'd per curiam*, 242 F.2d 758 (1st Cir.), *cert. denied*, 355 U.S. 828 (1957).

277. *See, e.g.*, *In re* Workers' Compensation Ins. Antitrust Litig., 574 F. Supp. 525, 531-33 (D. Minn. 1983) (If a specific prohibition were required, "the exemption would not apply unless the state regulation prohibited all activity which, absent the McCarran Act, would violate the antitrust laws . . . . [Therefore,] [t]his court need only determine whether Minnesota has a general scheme for regulating insurance."); Hopping v. Standard Life. Ins. Co., 1984-1 Trade Cas. (CCH) ¶ 65,814 at 67,412 (N.D. Miss. 1983) ("The Supreme Court, Fifth Circuit, and numerous other courts have held that the 'state regulation' requirement is fully satisfied if there is a pervasive general control of the insurance industry by the state.").

278. *But see* United States v. Crocker Nat'l Corp., 656 F.2d 428, 452-54 (9th Cir. 1981) (state insurance codes prohibited interlocking directorates between two insurers, but not between insurer

A few courts, however, have agreed with the commentators[279] who question the many decisions holding the McCarran-Ferguson Act not to require even a minimal level of effective state regulation before the exemption may be applied. As one case noted, "the Act was never intended to preempt federal antitrust laws in the face of superficial, ineffective state regulation."[280]

These minority decisions are correct in their interpretation both of the language of the Act and of its legislative history. Although the 1945 Congress intended to restore state regulation of the insurance industry, it did not intend for the mere existence of a statutory regime of perhaps limited application to insurers, and in any event only minimally enforced, would displace the strong policies of vigorous antitrust enforcement.[281] Federal regulation would be unnecessary and thus preemption would be acceptable only when the states truly were attempting to protect competitors and competition. As another court recognized,[282] however, these minority decisions fly in the face of *National Casualty*.[283] Although it certainly would be proper for lower courts to give that decision a limited rather than an expansive reading, a change in the basic requirement of only minimal state regulation will require the Supreme Court to reject its earlier approach.[284] Such a shift by the Court would be a healthy

---

and commercial bank; challenge under Clayton Act § 8, 15 U.S.C. § 19 (1982), to later interlocks not preempted by McCarran-Ferguson), *rev'd on other grounds sub nom.* Bankamerica Corp. v. United States, 103 S. Ct. 2266 (1983).

279. *See supra* note 257 and accompanying text.

280. Escrow Disbursement Ins. Agency v. American Title Ins. Co., 550 F. Supp. 1192, 1198 (S.D. Fla. 1982) (emphasis omitted); *see also* Owens v. Aetna Life & Casualty Co., 654 F.2d 218, 246 (3d Cir.) (Sloviter, J., dissenting) ("With regard to the nature of state regulation which satisfies the McCarran-Ferguson Act, more affirmative regulation than a mere general prohibition of unfair trade practices may be required."), *cert. denied*, 454 U.S. 1092 (1981); Crawford v. American Title Ins. Co., 518 F.2d 217, 221 (5th Cir. 1975) (Godbold, J., dissenting) ("In my view, a court faced with the issue of whether a claim of a § 2(b) exemption is well founded must consider not merely whether the state is regulating but whether it is doing so adequately."); United States v. Chicago Title & Trust Co., 242 F. Supp. 56, 70-72 (N.D. Ill. 1965) (although Illinois had a statute regulating title insurance, it did not deal with acquisitions of insurance companies; application of Clayton Act § 7 not preempted); *cf.* Bartholomew v. Virginia Chiropractors Ass'n, 612 F.2d 812, 819-21 (4th Cir. 1979) (Hall, J., dissenting) (court must determine that state regulation exists; mere concession of this issue by plaintiff insufficient), *cert. denied*, 446 U.S. 938 (1980).

281. Extensive descriptions of this legislative history, including excerpts from the congressional debates, are found in Crawford v. American Title Ins. Co., 518 F.2d 217, 220-36 (5th Cir. 1975) (Godbold, J., dissenting).

282. Ohio v. Ohio Medical Indem., Inc., 1976-2 Trade Cas. (CCH) ¶ 61,128 (S.D. Ohio 1976) ("Were the Court writing on a clean slate, it would be persuaded that the [state regulation here is inadequate]. However, there is a strong Congressional policy favoring state regulation of the business of insurance. There are no reported cases holding that a particular state does not regulate the business of insurance.").

283. FTC v. National Casualty Co., 357 U.S. 560 (1958).

284. In a subsequent decision, FTC v. Travelers Health Ass'n, 362 U.S. 293, 298 n.4 (1960), the Court noted that *National Casualty* left open at least two issues: whether general state legislation would be preclusive if it did "not purport to apply to misrepresentations mailed to . . . residents by unlicensed, nonresident insurance companies having no local agents"; and whether, even if the statutes did purport to cover that conduct, they could be preclusive if state law "could not be effectively enforced" against the out-of-state insurers.

There is some suggestion that the Court may impose more demanding standards of state regulation in the future. In St. Paul Fire & Marine Ins. Co. v. Barry, 438 U.S. 531, 554-55 (1978), the Court noted that "petitioners do not aver that state law or regulatory policy can be said to have required or authorized the concerted refusal to deal . . . . [O]ur decision [does not] address insurance practices that are compelled or specifically authorized by state regulatory policy." It has been

development.

2. Extraterritorial Application of State Regulation

Although an insurance company's conduct may be regulated by State *A*, those activities also may take place in, or at least have an effect on competition in, State *B*. The extent to which the regulation of an insurer's activities by one state will confer McCarran-Ferguson immunity to conduct in another state raises the question of extraterritoriality.

In *FTC v. Travelers Health Association*[285] the Supreme Court held that the regulation by one state of an insurance company's activities cannot be used to create McCarran-Ferguson immunity for its activities outside the state. The FTC had sought to prohibit an insurance company from making certain statements and representations in letters sent to prospective policyholders in every state, asserting that these claims were misleading and deceptive in violation of section 5 of the FTC Act.[286] The state of Nebraska, in which defendant was incorporated, had a statute prohibiting "unfair or deceptive acts and practices in the conduct of the business of insurance" both within the state and "in the conduct of insurance in any other state."[287] The company asserted, and the United States Court of Appeals for the Eighth Circuit agreed,[288] that its business was sufficiently "regulated by State Law"[289] under this Nebraska statute to justify immunity under section 2(b) of the McCarran-Ferguson Act.

The Supreme Court rejected this view, concluding that the FTC Act applied to these interstate mailings.[290] Although Nebraska law could immunize approaches to persons within the state, the Court held that:

> we cannot believe that this kind of law of a single State takes from the residents of every other State the protection of the Federal Trade Commission Act. In our opinion the state regulation which Congress provided should operate to displace this federal law means regulation by the State in which the deception is practiced and has its impact.[291]

---

inferred that such levels of policy—compulsion or specific authorization—now are required to satisfy McCarran-Ferguson. *See, e.g.*, Weller, *The "New" McCarran-Ferguson Act Antitrust Exemption After* Barry, 50 INS. COUNS. J. 29 (1983).

285. 362 U.S. 293 (1960).

286. 15 U.S.C. § 45 (1982).

287. NEB. REV. STAT. § 44-1503 (Cum. Supp. 1957), *repealed by* 1973 Neb. Laws 907, 918, *quoted in Travelers Health Ass'n*, 362 U.S. at 295-96.

The Court did not discuss whether the deceptive and misleading mailings were the "business of insurance," since two years earlier, in FTC v. National Casualty Co., 357 U.S. 560 (1958), it had held that advertising by insurance companies, even if deceptive, is part of that "business."

288. 262 F.2d 241 (8th Cir. 1959), *rev'd*, 362 U.S. 293 (1960).

289. 15 U.S.C. § 1012(b) (1982).

290. *Travelers Health Ass'n*, 362 U.S. at 298-99.

291. *Id.* In State Bd. of Ins. v. Todd Shipyards Corp., 370 U.S. 451 (1962), the Supreme Court applied similar reasoning with regard to a state's taxation of out-of-state insurance activities. The state of Texas attempted to tax insurance premiums paid outside the state to insurance companies doing business outside the state; the only connection to Texas was that the insured property was located within the state. Holding this taxation beyond the state's power, the Supreme Court held that the McCarran-Ferguson Act did not confer any greater power on the states to tax these transactions outside their boundaries than they had prior to the passage of the Act.

The Court's conclusion is buttressed by various policy considerations. First, the purpose of McCarran-Ferguson was to restore the level of state regulation to the status prevailing prior to *South-Eastern Underwriters*.[292] The Congress, however, had no intention to allow a state to regulate not only activites within its borders, but also insurance company activities in other states.[293]

Second, adoption of the court of appeals' view would have permitted one state to determine the level of protection from insurance company activities to be enjoyed by the citizens of all states.[294] If the laws of the state of incorporation or regulation were permissive, insurance companies located there could fix prices, exclude competition, or engage in certain deceptive practices regardless of the level of protection other states intended to afford these activities. Thus, a contrary ruling might have led to calls for complete repeal or substantial amendment of McCarran-Ferguson to ensure some level of protection to citizens of those other states.

The McCarran-Ferguson exemption applies, then, only if the various states in which the complained-of activity "is practiced and has its impact"[295] do indeed "regulate" that activity. If there is such a regulation in some states but not in others, the immunity will be afforded only in the former jurisdictions;[296] federal law still will apply in the latter states. The thrust of subsequent decisions has been to identify those states in which the insurer's activity does have an effect and determine whether those states have mechanisms for regulating the conduct.[297]

This approach is not without its difficulties. If an insurance company operates nationally with policyholders, stockholders, and agents in every state, and if the impact of its allegedly anticompetitive activity might extend to every state, a court would be obligated to examine whether the law of each of those states purports to regulate that particular conduct. Although situations might arise in which the contacts with any particular state are so substantial that the state's regulation of an activity will result in broad federal preemption—perhaps if both the plaintiff and the defendant reside in the state and if the primary effect of the

---

292. *See generally supra* notes 24-50 and accompanying text (discussing history and purpose of the McCarran-Ferguson Act).

293. "There was no indication of any thought that a state could regulate activities carried on beyond its own borders." *Travelers Health Ass'n*, 362 U.S. at 300.

294. One of the major arguments advanced by proponents of leaving regulation to the States was that the States were in close proximity to the people affected by the insurance business and, therefore, were in a better position to regulate that business than the Federal Government . . . . Such a purpose would hardly be served by delegating to any one State sole legislative and administrative control of the practices of an insurance business affecting the residents of every other State in the Union.

Id. at 302.

295. *See supra* note 291 and accompanying text.

296. For example, on remand in *Travelers Health Ass'n*, the court of appeals enjoined the FTC from further proceedings only with respect to the two states that had regulated respondent's activities, Travelers Health Ass'n v. FTC, 298 F.2d 820 (8th Cir. 1962).

297. *See* Seasongood v. K & K Ins. Agency, 548 F.2d 729, 735-39 (8th Cir. 1977); United States v. Chicago Title & Trust Co., 242 F. Supp. 56 (N.D. Ill. 1965); *In re* Aviation Ins. Indus., 183 F. Supp. 374 (S.D.N.Y. 1960).

activity occurs there[298]—normally such regulation would not be enough. "*Travelers Health* . . . makes clear that a state regulatory scheme operating essentially extraterritorially is not the kind of regulation contemplated by McCarran-Ferguson."[299]

In summary, the Supreme Court's two decisions in this area, *National Casualty* and *Travelers Health Association*, yield a tenuous balance. The former case holds that minimal state regulation is sufficient to satisfy section 2(b); the latter holds that each state in which an effect is felt must have at least that minimal level of supervision of the conduct. It would make more sense to require more substantial and effective state regulation of the otherwise displaced federal control, but then to find that this state supervision—especially in that state where the activity originates or predominates—could be sufficient to preempt federal intervention even with respect to activities in other, less substantially affected jurisdictions. Supreme Court reexamination of this area is overdue.

C. *Inapplicability of Act to Boycott, Coercion, and Intimidation*

Section 3(b) of the McCarran-Ferguson Act imposes a third requirement for the successful invocation of the exemption for insurance company activities: The conduct, having been determined to involve the "business of insurance" and to be sufficiently regulated by state law, also must be found not to constitute an "agreement to boycott, coerce, or intimidate, or act of boycott, coercion, or intimidation."[300] In assessing the scope of this boycott limitation to the McCarran-Ferguson exemption, three issues must be considered: (1) Who may assert the boycott exclusion? (2) What types of conduct trigger its application? and (3) To what extent should the legality of the underlying conduct, including its purpose and effect, be considered in deciding whether the conduct falls within section 3(b)?

1. Persons Affected by Boycott

The boycott exception was added to the Act "as an important safeguard against the danger that insurance companies might take advantage of purely permissive state legislation to establish monopolies and enter into restrictive agreements falling outside the realm of state-supervised cooperative action."[301] In making "boycott" actions beyond the scope of section 2(b), however, the Act left unclear whether the exception applied only to boycotts of persons within the insurance industry or whether it also might apply to boycotts of those outside the industry.[302]

---

298. *See* Seasongood v. K & K Ins. Agency, 548 F.2d 729, 738 (8th Cir. 1977).

299. *Id.* at 738-39.

300. Section 3(b) of the McCarran-Ferguson Act provides: "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.*" 15 U.S.C. § 1013(b) (1982) (emphasis added). *See generally* Annot., 52 A.L.R. FED. 255 (1981) (discussing what constitutes boycott, coercion, or intimidation for purposes of § 3(b) of the McCarran-Ferguson Act).

301. St. Paul Fire & Marine Ins. Co. v. Barry, 438 U.S. 531, 533 (1978).

302. Although there is some imprecision in the statute, it is clear that § 3(b) permits both private

Prior to 1978 the lower courts disagreed about the range of persons who would fall within the section 3(b) limitation if made the subject of a boycott. Some cases held that only boycotts of other insurance companies or of insurance agents (persons within the industry) were excluded from McCarran-Ferguson immunity.[303] Other decisions extended the exception further.[304] In *St. Paul Fire & Marine Insurance Co. v. Barry*[305] the Supreme Court supported this broader interpretation, holding that section 3(b) made the Sherman Act applicable to a boycott directed against policyholders as well as one against industry members.[306]

In the early 1970s only four companies sold medical malpractice insurance in the state of Rhode Island. In an effort allegedly designed to reduce risks, costs, and premiums, the largest insurer, St. Paul, announced that it would not renew such insurance coverage on an "occurrence" basis, but would write insurance only on a "claims made" basis.[307] Pursuant to an agreement between the four insurers, the other three companies refused to accept applications for any type of malpractice insurance. As a result, all health care providers had to purchase insurance from St. Paul on the terms announced by that company.[308]

The trial court had dismissed a class action brought by a number of physi-

---

treble damage actions and suits by the government for insurance company "boycotts." Monarch Life Ins. Co. v. Loyal Protective Life Ins. Co., 326 F.2d 841 (2d Cir. 1963), *cert. denied*, 376 U.S. 952 (1964).

303. *See, e.g.*, Meicler v. Aetna Casualty & Sur. Co., 506 F.2d 732, 734 (5th Cir. 1975); Addrisi v. Equitable Life Assurance Soc'y, 503 F.2d 725, 729 (9th Cir. 1974), *cert. denied*, 420 U.S. 929 (1975); Manasen v. California Dental Servs., 424 F. Supp. 657, 662 n.3 (N.D. Cal. 1976), *rev'd per curiam*, 638 F.2d 1152 (9th Cir. 1979); Ohio v. Ohio Medical Indem., Inc., 1976-2 Trade Cas. (CCH) ¶ 61,128 (S.D. Ohio 1976); Pierucci v. Continental Casualty Co., 418 F. Supp. 704, 708 (W.D. Pa. 1976); McIlhenny v. American Title Ins. Co., 418 F. Supp. 364 (E.D. Pa. 1976); Frankford Hosp. v. Blue Cross, 417 F. Supp. 1104 (E.D. Pa. 1976), *aff'd per curiam*, 554 F.2d 1253 (3d Cir.), *cert. denied*, 434 U.S. 860 (1977); Mathis v. Automobile Club Inter-Ins. Exch., 410 F. Supp. 1037, 1041 (W.D. Mo. 1976); Pastor v. Hartford Fire Ins. Co., 1976-1 Trade Cas. (CCH) ¶ 60,783 (C.D. Cal. 1976); Mitgang v. Western Title Ins. Co., 1974-2 Trade Cas. (CCH) ¶ 75,322 (N.D. Cal. 1974); Transnational Ins. Co. v. Rosenlund, 261 F. Supp. 12, 26 (D. Or. 1966).

304. *See, e.g.*, Proctor v. State Farm Mut. Auto. Ins. Co., 561 F.2d 262 (D.C. Cir. 1977), *vacated*, 440 U.S. 942 (1979); Barry v. St. Paul Fire & Marine Ins. Co., 555 F.2d 3 (1st Cir. 1977), *aff'd*, 438 U.S. 531 (1978); 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); General Glass Co. v. Globe Glass & Trim Co., 1978-1 Trade Cas. (CCH) ¶ 61,998 (N.D. Ill. 1978).

305. 438 U.S. 531 (1978).

306. *Id.* at 550.

307. "An 'occurrence' policy protects the policyholder from liability for any act done while the policy is in effect, whereas a 'claims made' policy protects the holder only against claims made during the life of the policy." *Id.* at 535 n.3.

308. Solely for the purpose of forcing physicians and hospitals to accede to a substantial curtailment of the coverage previously available, St. Paul induced its competitors to refuse to deal on any terms with its customers. This agreement did not simply fix rates or terms of coverage; it effectively barred St. Paul's policyholders from all access to alternative sources of coverage and even from negotiating for more favorable terms elsewhere in the market. The pact served as a tactical weapon invoked by St. Paul in support of a dispute with its policyholders.

The enlistment of third parties in an agreement not to trade, as a means of compelling capitulation by the boycotted group, long has been viewed as conduct supporting a finding of unlawful boycott.

Id. at 544-45.

cians who were policyholders of St. Paul and their patients, concluding that the McCarran-Ferguson exemption applied[309] because " 'the purpose of the boycott, coercion, and intimidation exception was solely to protect insurance agents or other insurance companies from being 'black-listed' by powerful combinations of insurance companies, not to affect the insurer-insured relationship.' "[310] Rejecting this approach, the Supreme Court affirmed the United States Court of Appeals for the First Circuit's reversal of that ruling. Reviewing both the legislative history of McCarran-Ferguson and the judicial treatment of group boycotts or concerted refusals to deal, the Court broadly defined a "boycott" as "a method of pressuring a party with whom one has a dispute by withholding, or enlisting others to withhold, patronage or services from the target."[311] Therefore, it was inappropriate to limit that term, as used in section 3(b) of McCarran-Ferguson, only to refusals to deal with competitors or with members of the same industry.[312]

Unfortunately, the Supreme Court gave little guidance on the treatment of other entities in future situations. Although policyholders now are identified as within the protected class, the Court articulated no test other than the broad definition of "boycott" for identifying others in that category. In fact, since *Barry* there has been little case law dealing with the range of other persons who, if made the subject of concerted nondealing, will be deemed to have been boycotted under section 3(b).[313] One lower court, however, has construed *Barry* to apply to a concerted refusal to deal with service providers,[314] and thus to treat that conduct also as outside the ambit of the McCarran-Ferguson exemption.

Although the Court's decision was somewhat imprecise both on the rationale for the boycott exception and on the standard to measure its future application, the actual result reached in *Barry* is desirable. McCarran-Ferguson was designed to permit certain forms of collaboration by insurance companies and to restore state regulation of those activities; that immunized conduct, however, was principally rate-setting, data collection and dissemination, establishment of common industry standards, and the like. The Act was not designed to allow insurers to use their common market power to coerce others or to prevent others from enjoying the benefits of competition in the industry. The elimination of federal antitrust scrutiny, coupled with enhanced state regulation, was countenanced only to the extent necessary to protect both the insureds and the stability

309. Plaintiffs conceded that defendants' acts were related to the "business of insurance" and that Rhode Island effectively regulated that business. Barry v. St. Paul Fire & Marine Ins. Co., 555 F.2d 3, 6 (1st Cir. 1977), *aff'd*, 438 U.S. 531 (1978).

310. *Barry*, 438 U.S. at 536 (quoting district court order).

311. *Id.* at 541.

312. "We hold that the term 'boycott' is not limited to concerted activity against insurance companies or agents or, more generally, against competitors of members of the boycotting group." *Id.* at 552.

313. Since *Barry* several courts have reaffirmed the applicability of § 3(b) to the alleged boycott of policyholders. *See, e.g.*, Klamath-Lake Pharmaceutical Ass'n v. Klamath Medical Serv., 701 F.2d 1276 (9th Cir.) (on merits, conduct did not amount to boycott), *cert. denied*, 104 S. Ct. 88 (1983); Virginia Academy of Clinical Psychologists v. Blue Shield, 469 F. Supp. 552 (E.D. Va. 1979), *modified on other grounds*, 624 F.2d 476 (4th Cir. 1980), *cert. denied*, 450 U.S. 916 (1981).

314. *See* Workman v. State Farm Mut. Auto. Ins. Co., 520 F. Supp. 610, 622 (N.D. Cal. 1981).

of insurers. Concerted refusals to deal with others, whether inside or outside the industry, are neither necessary for the success of the insurance industry nor something that the states might regulate adequately. Thus, full antitrust scrutiny of that conduct on the same basis as in any other industry seems desirable.[315]

2. Prohibited Conduct

If the Supreme Court in *Barry* was unclear which persons might be subject to a "boycott" under section 3(b), it was even less clear on what underlying conduct constituted a "boycott" for purposes of that exclusion. On one point, however, the Court was specific: Section 3(b) only refers to a "group boycott"; the refusal of an individual insurer, acting alone, to deal with another is not a "boycott" under this section.[316] On the other hand, the Court was not clear whether a "boycott" was only a simple and absolute refusal to deal or whether it also included conditional or partial refusals to deal.[317] In addition, the Court left open the possibility that a defendant's purpose and the effect on competition of the refusal to deal would be relevant in characterizing conduct as a "boycott" under section 3(b).[318]

Barry actually offered a variety of definitions for a "boycott." The conduct was said to consist of the following: " 'concerted refusals by traders to deal with other traders' ";[319] "combinations of businessmen 'to deprive others of access to merchandise which the latter wish to sell to the public' ";[320] and a " 'concerted refusal to deal' with a disfavored purchaser or seller."[321] Recognizing this mul-

315. *See supra* notes 4-21 and accompanying text.

316. "[C]onduct by individual actors falling short of concerted activity is simply not a 'boycott' within § 3(b)." *Barry*, 438 U.S. at 555; *see also* Klamath-Lake Pharmaceutical Ass'n v. Klamath Medical Serv., 701 F.2d 1276, 1291 (9th Cir.) (on merits, conduct did not amount to a boycott), *cert. denied*, 104 S. Ct. 88 (1983); Anglin v. Blue Shield, 693 F.2d 315, 322 (4th Cir. 1982) (decisions by local insurance organizations not to offer the coverage desired by plaintiff constituted individual actions rather than a "boycott"); Quality Auto Body, Inc. v. Allstate Ins. Co., 660 F.2d 1195, 1206 (7th Cir. 1981) (no boycott without proof of "concerted action"), *cert. denied*, 455 U.S. 1020 (1982); Owens v. Aetna Life & Casualty Co., 654 F.2d 218, 232 (3d Cir.) (concert of action remains a "sine qua non" of a boycott allegation), *cert. denied*, 454 U.S. 1092 (1981); Hopping v. Standard Life Ins. Co., 1984-1 Trade Cas. (CCH) ¶ 65,814 (N.D. Miss. 1983) (termination of agent by insurance company for violation of exclusive agency provisions, covenants not to compete, or nonsolicitation agreements is not a "boycott"); Nurse Midwifery Assocs. v. Hibbett, 549 F. Supp. 1185, 1189 (M.D. Tenn. 1982) (to state a claim within boycott exception to McCarran-Ferguson Act, complaint must allege sufficient concerted action by defendants); Workman v. State Farm Mut. Auto. Ins. Co., 520 F. Supp. 610, 623 (N.D. Cal. 1981) ("[T]he lynchpin of an actionable group boycott under the antitrust laws is concerted action."). Whether there is concerted or only individual action is a question of fact. *See, e.g.*, Card v. National Life Ins. Co., 603 F.2d 828, 832-34 (10th Cir. 1979) (no conspiracy existed between an association of general agents of an insurance company and the insurance company itself); Hoffman v. Delta Dental Plan, 517 F. Supp. 564, 571 (D. Minn. 1981) (corporation consisting of dentists participating in payment-insurance plan could act in concert with member dentists; such an arrangement is not precluded from boycott exception as a matter of law).

317. *See infra* notes 319-45 and accompanying text.

318. *See infra* notes 347-54 and accompanying text.

319. *Barry*, 438 U.S. at 543 (quoting Klor's, Inc. v. Broadway-Hale Stores, 359 U.S. 207, 212 (1959)).

320. *Id.* (quoting United States v. General Motors Corp., 384 U.S. 127, 146 (1966)).

321. *Id.* at 536 (quoting Barry v. St. Paul Fire & Ins. Co., 555 F.2d 3, 7 (1st Cir. 1977), *aff'd*, 438 U.S. 531 (1978)).

tiplicity of definitions,[322] the Court conceded that " 'boycotts are not a unitary phenomenon.' "[323]

The facts in *Barry*, however, offered a clear illustration of an absolute boycott.[324] Prior to the alleged conspiracy, four insurance companies each offered a variety of malpractice policies. After the agreement went into effect, one company insisted on offering only one kind of policy and the other three refused to offer any policies to plaintiffs. The agreement undeniably created coercion to accept a certain product only from a certain seller, and was coupled with an absolute refusal by others to deal. The Court rejected the defendants' argument that conduct should not be deemed a "boycott" unless it was "inherently destructive of competition."[325] Although this particular refusal might not be treated under the per se rule applicable generally to group boycotts under section 1 of the Sherman Act, it clearly was a "boycott" under McCarran-Ferguson section 3(b).[326]

Other cases, however, have been less obvious than *Barry*. Boycotts most frequently have been found in agreements between insurance companies or between an insurer and a provider aimed either at coercing other providers to conform to certain conduct[327] or at deterring the insureds from using those nonconforming providers.[328] In these cases in which the insureds remained free to choose their own providers and in which there was no actual duress or coercion by the insurers, however, there was no boycott even though use by the insureds of the disfavored providers became more expensive or more difficult.[329] Most

322. *See also supra* note 311 and accompanying text (yet another definition of a "boycott" by *Barry* Court).

323. *Barry*, 438 U.S. at 543 (quoting P. AREEDA, ANTITRUST ANALYSIS 381 (2d ed. 1974)).

324. Plaintiffs in *Barry* had characterized the restraint as a " 'traditional boycott,' defined as a concerted refusal to deal on any terms, as opposed to a refusal to deal except on specified terms." *Id.* at 540.

325. *Id.* at 542.

326. [Defendants] cite commentary that attempts to develop a test for distinguishing the types of restraints that warrant *per se* invalidation from other concerted refusals to deal that are not inherently destructive of competition. But the issue before us is whether the conduct in question involves a boycott, not whether it is *per se* unreasonable.

Id. See generally Sullivan & Wiley, *Recent Antitrust Developments: Defining the Scope of Exemptions, Expanding Coverage, and Refining the Rule of Reason*, 27 UCLA L. REV. 265, 276-78 (1979) (distinguishing per se and McCarran-Ferguson boycotts).

327. *See* Trident Neuro-Imaging Lab. v. Blue Cross & Blue Shield, 568 F. Supp. 1474, 1479 (D.S.C. 1983); Nurse Midwifery Assocs. v. Hibbett, 549 F. Supp. 1185, 1190 (M.D. Tenn. 1982); Hoffman v. Delta Dental Plan, 517 F. Supp. 564, 572 (D. Minn. 1981); *see also* Battle v. Liberty Nat'l Life Ins. Co., 493 F.2d 39, 51 (5th Cir. 1974) (threat to provider to induce continuation of provider agreement), *cert. denied*, 419 U.S. 110 (1975).

328. *See* Virginia Academy of Clinical Psychologists v. Blue Shield, 624 F.2d 476, 484 (4th Cir. 1980) (insurer's policy requiring psychologists to submit bills through physicians, rather than directly), *cert. denied*, 450 U.S. 916 (1981); Proctor v. State Farm Mut. Auto Ins. Co., 561 F.2d 262, 275 (D.C. Cir. 1977) (agreement using certain high-rate providers), *vacated*, 440 U.S. 942 (1979); Ballard v. Blue Shield, 543 F.2d 1075, 1078 (4th Cir. 1976) (agreement between insurers and certain kinds of health providers that insurers would not provide coverage for certain other kinds of providers), *cert. denied*, 430 U.S. 922 (1977).

329. *See* Klamath-Lake Pharmaceutical Ass'n v. Klamath Medical Serv. Bureau, 701 F.2d 1276, 1287-88, 1290-92 (9th Cir.), *cert. denied*, 104 S. Ct. 88 (1983); Bartholomew v. Virginia Chiropractors Ass'n, 612 F.2d 812, 817 (4th Cir. 1979), *cert. denied*, 446 U.S. 938 (1980). The *Bartholomew* decision predates *Pireno*, *see supra* notes 137-53 and accompanying text. In *Bartholomew* the United States Court of Appeals for the Fourth Circuit held that peer review committees were part of

refusals by insurance companies to deal with an agent have not been regarded as "boycotts," even though agents were within the protected class even before *Barry*.[330] A substantial number of cases hold that the termination of an agent for failure to adhere to an exclusive agency contract[331]—or the insurer's failure to renew the agency agreement—is not within section 3(b).[332] Similarly, an agreement between two insurers to divide the market, whereupon one company exits the market and its former agent is denied the right to represent the surviving insurer, is not a "concerted refusal to deal" with that agent by the two insurers;[333] an agreement between two insurers only to offer certain kinds of policies so that a prospective policyholder either had to take more extensive coverage or no coverage at all was held not to be a "boycott" when other existing insurers

---

the "business of insurance" and further held that their use did not constitute a boycott, even though they made it less likely that policyholders would employ the services of certain providers. To the extent *Pireno* rejects this first holding, it also might implicitly cast some doubt on the second holding.

See also Quality Auto Body, Inc. v. Allstate Ins. Co., 660 F.2d 1195, 1206 (7th Cir. 1981) (defendant's unwillingness to pay more than competitive price is not a boycott), *cert. denied*, 455 U.S. 1020 (1982); Proctor v. State Farm Mut. Auto. Ins. Co., 561 F.2d 262, 275 (D.C. Cir. 1977) (boycott of shops that refused to abide by prevailing labor rules), *vacated*, 440 U.S. 942 (1979); Travelers Ins. Co. v. Blue Cross, 481 F.2d 80, 84 (3d Cir.) (offering economic inducements to hospitals not "coercion"), *cert. denied*, 414 U.S. 1093 (1973); Custom Auto Body, Inc. v. Aetna Casualty & Sur. Co., 1983-2 Trade Cas. (CCH) ¶ 65,629 (D.R.I. 1983) (insurer's use of preferred repair shops does not constitute a boycott). *See generally* Workman v. State Farm Mut. Auto. Ins. Co., 520 F. Supp. 610, 624 (N.D. Cal. 1981) (great difficulty exists in trying to prove conspiracy between insurer and insured to boycott provider).

330. *See supra* note 310 and accompanying text.

331. The status of exclusive dealing agreements between insurers and agents as within the "business of insurance" under § 2(b) of the Act is discussed *supra* notes 232-40 and accompanying text.

332. *See* Card v. National Life Ins. Co., 603 F.2d 828, 832-34 (10th Cir. 1979); Hopping v. Standard Life Ins. Co., 1984-1 Trade Cas. (CCH) ¶ 65,814 (N.D. Miss. 1983); Black v. Nationwide Mut. Ins. Co., 429 F. Supp. 458, 461-62 (W.D. Pa. 1977), *aff'd*, 571 F.2d 571 (3d Cir. 1978); Blackley v. Farmers Ins. Group, Inc., 1976-2 Trade Cas. (CCH) ¶ 61,061 (D. Utah 1976); *see also* Blackburn v. Crum & Forster, 611 F.2d 102, 104 (5th Cir.) (concerted agreement between insurers not to deal with agent, which would not be illegal under Sherman Act § 1, not "boycott" under McCarran-Ferguson Act § 3(b)), *cert. denied*, 447 U.S. 906 (1980). *But see* Ray v. Family Life Ins. Co., 430 F. Supp. 1353, 1358 (W.D.N.C. 1977) ("[D]efendant's threat to Ray that it would cut off Ray's agency . . . constituted 'coercion' as that term is used in § 1013(b).").

These decisions have been explained on the ground that they involve neither coercion of a "target" nor an intent to pressure others to adhere to certain conduct, but merely a choice by an insurer of those with whom it will do business. *See, e.g.*, Card v. National Life Ins. Co., 603 F.2d 828, 832-34 (10th Cir. 1979). This explanation oversimplifies the situation to the point of mischaracterization. The insurer normally would prefer to continue the exclusive agency relationship, but would like the agent to adhere to certain standards—exclusive representation of the insurer. Furthermore, termination of the agent will send a message to others in the industry of the insurer's "tough" policy regarding those who do not adhere to its exclusivity requirement. Thus, if the conduct is not to be treated as a "boycott," it would either be because the decision to terminate normally is unilateral—the required plurality for Sherman Act § 1 purposes comes from the agreement itself, between insurer and agent—or because exclusive dealing arrangements historically have been treated under Clayton Act § 3 and analyzed under a rule of reason, rather than under the per se approach applicable to most boycotts under Sherman Act § 1. The "boycott" under McCarran-Ferguson § 3(b) would extend only to Sherman Act, as opposed to Clayton Act, refusals to deal. It then follows that the § 3(b) boycott provision certainly should apply if the termination of an agent for failure to adhere to an exclusive agency contract is part of a broader agreement between the two insurance companies.

333. Owens v. Aetna Life & Casualty Co., 654 F.2d 218, 232 (3d Cir.), *cert. denied*, 454 U.S. 1092 (1981). *But cf.* Mac Adjustment, Inc. v. General Adjustment Bureau, Inc., 597 F.2d 1318, 1319 (10th Cir.) (conspiracy to drive independent insurance adjuster out of business would be "boycott" under § 3(b)), *cert. denied*, 444 U.S. 929 (1979).

offered alternate coverage;[334] and a requirement that applicants for insurance first join an organization as a prerequisite for eligibility for group or individual coverage from an insurer is not a "boycott" or act of "coercion."[335] Finally, a bare price-fixing agreement between insurers is not a "boycott," even though it could be characterized as a refusal to deal other than on certain specified price terms.[336] There may be a "boycott," however, if the price-fixing is accompanied by certain enforcement activities.[337]

Some of the general characteristics of a section 3(b) "boycott" have been discussed by the courts. In addition to the requirement of plurality of conduct identified by *Barry*,[338] there must be some element of duress or coercion.[339] The mere exercise of choice by insurers of whom to insure or the kinds of coverage to offer, with no intention of altering the conduct of others, is not a "boycott."[340]

---

334. *See* Anglin v. Blue Shield, 693 F.2d 315 (4th Cir. 1982).

335. Feinstein v. Nettleship Co., 714 F.2d 928, 933-34 (9th Cir. 1983), *cert. denied*, 104 S. Ct. 2346 (1984). The court also rejected the suggestion that the necessary "coercion" to deal with defendant existed because defendant was a monopolist and therefore the only insurer that offered that type of coverage. The "boycott" or "coercion" exception was not made out by proof of monopolization violative of Sherman Act § 2. *Id.* at 934-35.

336. *See* Proctor v. State Farm Mut. Auto. Ins. Co., 561 F.2d 262, 274 (D.C. Cir. 1977), *vacated*, 440 U.S. 942 (1979); *In re* Worker's Compensation Ins. Litig., 574 F. Supp. 525, 533-35 (D. Minn. 1983). As the latter court noted, if price-fixing agreements were characterized as "boycotts" under § 3(b), the very heart of McCarran-Ferguson would be eviscerated. The principal purpose of the statute was to reverse *South-Eastern Underwriters* and permit such joint rate-setting, subject to some state regulation. Indeed, the court could have gone further; the logical implication of plaintiff's reasoning—that any joint conduct might be characterized as a demand that others do business with defendants only on the terms that resulted from their joint agreement, be it on price, quality, quantity, territory, or something else—would have resulted in a "boycott" encompassing all joint activities. Very little conduct would be subject to the § 2(b) exemption. *See also* Grant v. Erie Ins. Exch., 542 F. Supp. 457, 465 (M.D. Pa. 1982) ("[A]n agreement to fix terms of coverage is comparable to an agreement to fix prices and, thus, does not constitute a boycott."), *aff'd*, 716 F.2d 890 (3d Cir.), *cert. denied*, 104 S. Ct. 349 (1983).

This potential for § 3(b) to swallow up § 2(b) was suggested by the dissent in *Barry* and rejected by the majority opinion. *Compare Barry*, 438 U.S. at 559 n.6 (Stewart, J., dissenting) ("Most practices condemned by the Sherman Act can be cast as an act or agreement of 'boycott, coercion, or intimidation.' For example, price fixing can be seen as either a refusal to deal except at a uniform price (*i.e.*, a boycott), or as an agreement to force buyers to accept an offer on the sellers' common terms (*i.e.*, coercion). Yet state-sanctioned price fixing immunized by § 2(b) was plainly not intended to fall within the § 3(b) exception.") *with Barry*, 438 U.S. at 545 n.18 ("Whatever the precise reach of the terms 'boycott,' 'coercion,' and 'intimidation,' the decisions of this Court do not support the dissent's suggestion that they are coextensive with the prohibitions of the Sherman Act. In this regard, we are not cited to any decision illustrating the assertion . . . that price fixing, *in the absence of any additional enforcement activity*, has been treated as 'a boycott' or 'coercion.' ") (emphasis added).

337. *In re* Workers' Compensation Ins. Litig., 574 F. Supp. 525, 533-35 (D. Minn. 1983). Indeed, although this suggestion that additional enforcement activity might turn price fixing into a § 3(b) "boycott" is found in the *Barry* opinion, *see supra* note 336, allowing this opportunity would open up the very real possibility of the exception swallowing the rule described in the *Barry* dissent and thus should be eschewed. Congress in 1945 certainly knew the difference between price fixing and a boycott; it is unlikely that even vigorous enforcement of rate-setting arrangements by insurance companies—the very thing that § 2(b) was intended to immunize if regulated by state law—would then have been subject to antitrust scrutiny because of a broad interpretation of § 3(b).

338. *See supra* note 316 and accompanying text.

339. *See* Bartholomew v. Virginia Chiropractors Ass'n, 612 F.2d 812, 817 (4th Cir. 1979), *cert. denied*, 446 U.S. 938 (1980); Card v. National Life Ins. Co., 603 F.2d 828, 832-34 (10th Cir. 1979).

340. Owens v. Aetna Life & Casualty Co., 654 F.2d 218, 233 (3d Cir.), *cert. denied*, 454 U.S. 1092 (1981); Doctors, Inc. v. Blue Cross, 431 F. Supp. 5, 10-11 (E.D. Pa. 1975), *aff'd per curiam*, 557 F.2d 1001 (3d Cir. 1976).

That the defendant-insurer's policyholders continue to do some, albeit diminished, business with the plaintiff-provider in the face of the complained-of conduct also is evidence of the absence of a "boycott."[341]

On the other hand, the large majority of cases have held that an absolute refusal to deal is not required to bring the conduct within section 3(b); a partial or conditional refusal to deal, if it is designed to coerce the target to conform to certain conduct, still will be deemed a "boycott."[342] Similarly, it is not necessary that the boycott result in complete displacement of the plaintiff from the market; partial success is sufficient.[343] Finally, the insurers engaged in the alleged concerted refusal to deal need not be competitors of the target; it is enough if there is a vertical relationship between the parties.[344]

The definition of a "boycott" under section 3(b), then, should be at least as broad as the scope of that term under the Sherman Act generally. Although it should not reach every "refusal to deal" in its full semantic sense, it should encompass concerted activities by competitors who use their joint market power to coerce, discipline, or eliminate from the market other factors in the industry.[345] To the extent that such use of economic power may displace market forces and enable competitors in the insurance industry to achieve through their joint refusal to deal what they could not achieve acting separately, that conduct cannot be shielded by McCarran-Ferguson, but should be subject to the full scrutiny of the antitrust laws.

3. Legality of Underlying Conduct

Traditional rhetoric is that once conduct is characterized as a "group boycott" or "concerted refusal to deal," it is unreasonable per se.[346] In making this

341. *See* Quality Auto Body, Inc. v. Allstate Ins. Co., 660 F.2d 1195, 1206 (7th Cir. 1981), *cert. denied*, 455 U.S. 1020 (1982); Proctor v. State Farm Mut. Auto. Ins. Co., 561 F.2d 262, 276 (D.C. Cir. 1977), *vacated*, 440 U.S. 942 (1979); Workman v. State Farm Mut. Auto. Ins. Co., 520 F. Supp. 610, 623 (N.D. Cal. 1981).

342. *See* Virginia Academy of Clinical Psychologists v. Blue Shield, 624 F.2d 476, 484 (4th Cir. 1980), *cert. denied*, 450 U.S. 916 (1981); *In re* Workers' Compensation Ins. Litig., 574 F. Supp. 525, 534 (D. Minn. 1983); Trident Neuro-Imaging Laboratory v. Blue Cross & Blue Shield, 568 F. Supp. 1474, 1479 (D.S.C. 1983); Hoffman v. Delta Dental Plan, 517 F. Supp. 564, 572 (D. Minn. 1981).

343. *See* Trident Neuro-Imaging Laboratory v. Blue Cross & Blue Shield, 568 F. Supp. 1474, 1479 (D.S.C. 1983); Nurse Midwifery Assocs. v. Hibbett, 549 F. Supp. 1185, 1190 (M.D. Tenn. 1982); Hoffman v. Delta Dental Plan, 517 F. Supp. 564, 572 (D. Minn. 1981).

344. *See Barry*, 438 U.S. at 543 ("[T]he boycotters and the ultimate target need not be in a competitive relationship with each other."); Trident Neuro-Imaging Laboratory v. Blue Cross & Blue Shield, 568 F. Supp. 1474, 1479 (D.S.C. 1983); Nurse Midwifery Assocs. v. Hibbet, 549 F. Supp. 1185, 1190 (M.D. Tenn. 1982); *cf.* Surety Title Ins. Agency, Inc. v. Virginia State Bar, 431 F. Supp. 298, 309 n.18 (E.D. Va. 1977) (rules adopted by state bar association inhibiting issuance of title insurance policies resulted in "boycott"; McCarran-Ferguson exemption unavailable to shield association's conduct even if it affected the "business of insurance"), *vacated*, 571 F.2d 205 (4th Cir.), *cert. denied*, 436 U.S. 941 (1978). *But see* Hopping v. Standard Life Ins. Co., 1984-1 Trade Cas. (CCH) ¶ 65,814 at 67,413 (N.D. Miss. 1983) (no "boycott" because conduct not "unreasonable when defendant insurers were not competitors either of one another or with plaintiff agent").

345. *Cf.* Sullivan & Wiley, *supra* note 326, at 279 ("Simply stated, *the employment of substantial unregulated economic power by insurance industry members* should be considered 'boycott, coercion or intimidation' for the Act's purposes.").

346. *See* Silver v. New York Stock Exch., 373 U.S. 341 (1963); Klor's, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207 (1959).

characterization, however, courts have had to look to the defendant's purpose or intent in imposing the restraint and at the effect of the restraint on competition.[347] More recent cases have concluded that the per se approach does not apply to all group boycotts and that some such restraints might be tested directly under the rule of reason.[348] The Supreme Court in *Barry* contributed to some of this confusion and uncertainty by suggesting that the per se approach to group boycotts generally might be subject to reexamination.[349] The Court also suggested that the test for a "boycott" under section 3(b) of McCarran-Ferguson might be different from the test for those "group boycotts" found unreasonable per se under prior Supreme Court decisions.[350]

In evaluating the applicability of section 3(b) to the conduct of insurance companies, the courts have differed on the significance of the legality of the underlying conduct and on the elements that would be used in characterizing the conduct. Several decisions have examined the alleged "boycott" to determine if it would be unlawful; then, having concluded that the insurer was violating neither the per se standard nor the rule of reason, these courts have held that the conduct did not constitute a section 3(b) "boycott."[351] Other decisions have looked at the indicia used to characterize conduct for Sherman Act section 1 purposes. Thus, a finding that the defendants intended to coerce or discipline the target of the boycott or a finding that the refusal to deal had an adverse effect on competition has been used to bring the conduct within section 3(b).[352]

This approach initially appears to be inconsistent with the Supreme Court's statement that the determination whether McCarran-Ferguson immunity exists

---

347. *See generally* 2 E. KINTNER, *supra* note 193, §§ 10.27-.38 (discussing cases that consider the adverse effects on competition and intent factors of per se boycotts); Bauer, *Per Se Illegality of Concerted Refusals to Deal: A Rule Ripe for Reexamination*, 79 COLUM. L. REV. 685 (1979) (discussing cases that consider the effects of boycotts on competitors' existence and ability to compete).

348. *See, e.g.*, Com-Tel, Inc. v. DuKane Corp., 669 F.2d 404 (6th Cir. 1982); Smith v. Pro Football, Inc., 593 F.2d 1173 (D.C. Cir. 1978); Worthen Bank & Trust Co. v. National BankAmericard, Inc., 485 F.2d 1179 (8th Cir. 1973), *cert. denied*, 415 U.S. 918 (1974). The Supreme Court may reexamine the scope of the per se rule regarding group boycotts in Pacific Stationery & Printing Co. v. Northwest Wholesale Stationers, Inc., 715 F.2d 1393 (9th Cir. 1983), *cert. granted*, 105 S. Ct. 77 (1984).

349. *See supra* note 326 and accompanying text.

350. *Id. See generally* Blue Cross v. Kitsap Physicians Serv., 1982-1 Trade Cas. (CCH) ¶ 64,588 (W.D. Wash. 1981) (applying rule of reason approach to boycott by health care insurer); Cooperativa de Seguros Multiples de Puerto Rico v. San Juan, 294 F. Supp. 627, 628-29 (D.P.R. 1968) (term "boycott" not narrower than meaning of that term under Sherman Act).

351. *See* Blackburn v. Crum & Forster, 611 F.2d 102, 104-05 (5th Cir.), *cert. denied*, 447 U.S. 906 (1980); Hopping v. Standard Life Ins. Co., 1984-1 Trade Cas. (CCH) ¶ 65,814 (N.D. Miss. 1983).

352. *See* Malley-Duff & Assocs., Inc. v. Crown Life Ins. Co., 1983-1 Trade Cas. (CCH) ¶ 65,302 (W.D. Pa. 1983) (look to anticompetitive effects to determine existence of "boycott"), *rev'd on other grounds*, 734 F.2d 133 (3d Cir. 1984); Nurse Midwifery Assocs. v. Hibbett, 549 F. Supp. 1185, 1190-92 (M.D. Tenn. 1982) (purpose of excluding competitor); Hoffman v. Delta Dental Plan, 517 F. Supp. 564, 572 (D. Minn. 1981) (applying rule of reason to insurer's refusal to afford coverage to plaintiff provider; look to purpose and effect of restriction); *see also* General Glass Co. v. Globe Glass & Trim Co., 1978-2 Trade Cas. (CCH) ¶ 62,231 (N.D. Ill. 1978) (rule of reason applied to reasonableness of restraints); *cf.* Owens v. Aetna Life & Casualty Co., 654 F.2d 218, 233 (3d Cir.) (fact that defendant's division of markets may have had effect of excluding plaintiff broker-agent from market does not make conduct a § 3(b) "boycott"), *cert. denied*, 454 U.S. 1092 (1981).

is a separate inquiry from the underlying merits of the antitrust claim.[353] Nonetheless, this merger of analysis is not only healthy, but often necessary for satisfactory application of the section 3(b) limitation. Difficulties would arise if the Court seriously meant that a McCarran-Ferguson "boycott" and a Sherman Act "boycott" are different.[354] The Court probably intended, however, that insurance company refusals to deal not necessarily fall within the per se unreasonable category, but rather sometimes be tested by the rule-of-reason approach. In these latter situations, there could be some repetition of analysis if the courts looked at purpose and effect to determine whether McCarran-Ferguson should apply and then reexamined these factors to determine legality. In fact, courts have collapsed the analysis.

If the Court ultimately will find no Sherman Act section 1 violation on the merits, it would be pointless to characterize this conduct as a section 3(b) "boycott." On the other hand, Congress, by adding section 3(b), intended to deny a shield to the insurance industry in those situations in which the conduct points to a substantive violation of the section 1 Sherman Act prohibition of concerted refusals to deal. Substantial confusion, however, would be introduced if the Court did apply different standards to the two "boycott" provisions. Such an approach should be rejected.

IV. APPLICABILITY OF THE "STATE ACTION" DOCTRINE

In a series of decisions beginning with *Parker v. Brown*,[355] the Supreme Court has held that certain state conduct or the authorization by a state of certain private conduct could preempt the application of the antitrust laws. This principle, known as the state-action doctrine,[356] may affect the McCarran-Ferguson exemption in two ways. First, both the McCarran-Ferguson Act and the state-action doctrine require certain levels of state involvement before federal law can be preempted. Second, Congress in 1945 arguably may have intended to limit the state-action doctrine to foreclose the states from preempting section 3(b) of the Act.[357] Thus, notwithstanding the state-action doctrine, a state could not authorize concerted refusals to deal by insurance companies, and such refusals therefore would be examined under the antitrust laws.

It is unlikely that the state-action doctrine will confer any additional exemption on insurance company activities if they otherwise are regulated insufficiently by state law to obtain immunity under section 2(b). The amount of state involvement required by these two exemptive doctrines differs substantially. To

353. *See supra* note 84.

354. *See supra* note 350 and accompanying text.

355. 317 U.S. 341 (1943).

356. Although the terms "*Parker* doctrine" and "state action" doctrine or exemption often are used interchangeably, the latter is somewhat broader than the former. In *Parker*, the Supreme Court held that certain actions of the state itself—or, as indicated by subsequent decisions, its subdivisions, municipalities, and the like—will be exempt from the antitrust laws. The state-action doctrine incorporates this immunity, but also extends it to certain private activities undertaken pursuant to state command and supervision.

357. *See supra* notes 300-54 and accompanying text.

invoke section 2(b), courts have required only a general state regulatory scheme.[358] On the other hand, for the state-action doctrine to apply, the conduct actually must be compelled and supervised by the state.[359] Thus, it is difficult to imagine a situation in which the state-action requirement of state compulsion would be satisfied, but that also would not meet the less demanding "regulated by State law" standard of McCarran-Ferguson.[360]

The federal courts are split on the ability of a state to immunize a group boycott—otherwise subject to antitrust scrutiny because of section 3(b)—pursuant to the state-action doctrine. In *Barry v. St. Paul Fire & Marine Insurance Co.*[361] the United States Court of Appeals for the First Circuit stated that the state-action defense may be asserted even if the challenged conduct amounts to boycott, coercion, or intimidation.[362] Although the court concluded that the *Parker* doctrine did not apply because the state of Rhode Island had not actually authorized defendants' conduct, the court stated in dictum that the state-action doctrine was not affected by the passage of the McCarran-Ferguson Act.[363] In

358. *See supra* notes 254-99 and accompanying text.

359. *See, e.g.*, Cantor v. Detroit Edison Co., 428 U.S. 579 (1976).

The state-action defense was rejected because of an absence of state compulsion of supervision in Ratino v. Medical Serv., 718 F.2d 1260, 1267-68 (4th Cir. 1983); *see also* United States v. Title Ins. Rating Bureau, 700 F.2d 1247, 1252-53 (9th Cir. 1983), *cert. denied*, 104 S. Ct. 3509 (1984); Ballard v. Blue Shield, 529 F. Supp. 71, 76 (S.D.W. Va. 1981).

360. *See generally* Allstate Ins. Co. v. Lanier, 361 F.2d 870, 872 (4th Cir.) (state regulation of insurance through rating bureaus not foreclosed by the McCarran Act's application of federal antitrust laws to insurance companies), *cert. denied*, 385 U.S. 930 (1966).

361. 555 F.2d 3 (1st Cir. 1977), *aff'd*, 438 U.S. 531 (1978).

362. *Id.* at 8.

363. "The boycott provision merely neutralizes [the McCarran-Ferguson] Act, leaving intact the doctrine of *Parker v. Brown* . . . which today insulates state regulatory schemes outside the insurance context from antitrust liability." *Id.*

On review, the Supreme Court expressly declined to consider this issue:

> We have no occasion here to decide whether the element of state regulatory direction or authorization of the particular practice, absent in this case, is a factor to be considered in the definition of "boycott" within the meaning of § 3(b), or whether it comes into play as part of a possible defense under the "state action" doctrine . . . .

Barry, 438 U.S. at 554 n.27.

The Court's opinion, however, at least suggests that *Parker* would preempt antitrust scrutiny of certain boycotts by insurance companies. The Court did "emphasize that the conduct with which petitioners are charged appears to have occurred outside of any regulatory or cooperative arrangement established by the laws of Rhode Island. There was no state authorization of the conduct in question." *Id.* at 553. Later in its opinion, in describing the limits on its holding, the Court stated: "Nor does our decision address insurance practices that are compelled or specifically authorized by state regulatory policy." *Id.* at 555.

In a different context, in *Royal Drug*, 440 U.S. at 233 n.41, the Court noted: "It might be argued that some [provider] agreements are exempt from the antitrust laws under state-action exemption . . . . But that exemption would exist because of the extent of state regulation and not because the agreements are the 'business of insurance.' "

In Surety Title Ins. Agency, Inc. v. Virginia State Bar, 431 F. Supp. 298 (E.D. Va. 1977), *vacated*, 571 F.2d 205 (4th Cir.), *cert. denied*, 436 U.S. 941 (1978), the court considered the applicability of the *Parker* doctrine to insurance company conduct, but concluded that the requirements for its application were not satisfied. *Id.* at 304-08. Separately, the court noted that the conduct involved the kind of boycott that is condemned by § 3(b) of McCarran-Ferguson. *Id.* at 309 n.18.

In Kartell v. Blue Shield, 592 F.2d 1191 (1st Cir. 1979), the court noted the *Parker* issue, but then decided that abstention was appropriate in view of concurrent state court litigation involving related questions. After determination of certain certified questions by the Massachusetts Supreme Judicial Court, the district court found on remand that the *Parker* exemption was available for some

Ballard v. Blue Shield[364] defendants also argued that even if their conduct fell within section 3(b), the state-action doctrine still was an available defense. Rejecting this argument, the United States Court of Appeals for the Fourth Circuit stated that *Parker* was inapplicable in light of the express prohibition in the McCarran-Ferguson Act against insurance companies engaging in boycotts violative of the Sherman Act.[365]

Resolution of these conflicting views involves consideration of the policies underlying two different statutes. On the one hand, there is evidence in the legislative history of McCarran-Ferguson that its draftsmen did not intend to permit the states to authorize activities that offended the boycott provision.[366] On the other hand, *Parker* stands for the proposition that it was not the intent of Congress in 1890 to apply the antitrust laws either to the activities of states or to the acts of private individuals undertaken pursuant to the directives of a state.

If McCarran-Ferguson never had been enacted, the antitrust laws would apply with the same force, both in a positive and a negative sense, to insurance companies as to firms in other industries.[367] That statute, of course, confers a limited exemption on the "business of insurance," itself limited by section 3(b) so as not to exempt boycotts by insurers. If *Parker* prohibits the application of the antitrust laws to certain state-directed private activities, such as price fixing, however, then the existence of the McCarran-Ferguson exemption should not

---

conduct of defendant insurers, but was unavailable for other conduct. Kartell v. Blue Shield, 542 F. Supp. 782, 785-92 (D. Mass. 1982).

In First Am. Title Co. v. South Dakota Land Title Ass'n, 714 F.2d 1439, 1455 & n.16 (8th Cir. 1983), *cert. denied*, 104 S. Ct. 709 (1984), and Health Care Equalization Comm. v. Iowa Medical Soc'y, 501 F. Supp. 970, 993 n.20 (S.D. Iowa 1980), the courts found that the *Parker* doctrine shielded defendant insurers' conduct, and therefore they did not reach the McCarran-Ferguson defense.

364. 543 F.2d 1075 (4th Cir. 1976), *cert. denied*, 430 U.S. 922 (1977).

365. The doctrine of *Parker v. Brown* deals with ascertaining the extent to which Congress intended a state's displacement of competition to be exempt from the Sherman Act. Section 1013(b) of the McCarran-Ferguson Act expresses congressional intention to subject boycotts by insurance companies to the Sherman Act. Consequently, there can be no justification for utilizing the principles of *Parker v. Brown* to impute a contrary intent to Congress.

Id. at 1079.

366. The following exchange during the Conference Committee proceedings is illustrative:

Mr. FERGUSON: There are certain things which a state cannot interfere with. It cannot interfere with the application of the Sherman Act to any agreement to boycott, coerce, or intimidate, or any act of boycotting, coercion, or intimidation.

Mr. McCARRAN: Not at any time.

Mr. FERGUSON: Not at any time.

91 CONG. REC. 1443 (1945). Senator Ferguson later reiterated this view: "In other words, there are six things on which a State cannot legislate. They are boycott, coercion, or intimidation, or agreements to boycott, coerce, or intimidate." *Id.* at 1481; *see also id.* at 1483 (statement of Sen. Radcliffe: "If [the states] should attempt to enact any laws which would permit boycotting or unjust discrimination, this bill would intervene and prevent [it].").

367. In United States v. South-Eastern Underwriters Ass'n, 322 U.S. 533, 562 (1944), the Court hinted at what that treatment might be:

> The argument that the Sherman Act necessarily invalidates many state laws regulating insurance we regard as exaggerated. Few states go as far as to permit private insurance companies, without state supervision, to agree upon and fix uniform insurance rates . . . . No states authorize combinations of insurance companies to coerce, intimidate, and boycott competitors and consumers in the manner here alleged . . . .

impose a higher burden on insurers with respect to other activities, such as boycotts.[368] Under *Parker*, the Sherman Act does not reach certain noninsurer boycotts; the existence of McCarran-Ferguson should not expand the reach of the Sherman Act with respect to this particular activity of insurance companies.

V. CONCLUSION

The McCarran-Ferguson Act was passed over four decades ago, in immediate response to the Supreme Court's landmark *South-Eastern Underwriters* decision. In an attempt to accommodate both the interests of the states and the perceived needs of the insurance industry, the Act conferred a rather broad immunity from antitrust scrutiny on many of the activities of insurance companies. Congress has not changed one word of the Act since then and it has been the subject of only limited congressional reexamination. Since 1944, however, both the national mood towards regulation and competition and the needs of the insurance industry have changed significantly. In a series of decisions beginning in 1978, the Supreme Court has interpreted the Act to limit the antitrust immunity extended. Nonetheless, the general contours of the broad exemption for the insurance industry remain. In light of these developments, serious congressional reconsideration of the need for, and the scope of, this exemption is needed.

368. *See* Allstate Ins. Co. v. Lanier, 361 F.2d 870, 873 (4th Cir.) ("while the antitrust laws were made applicable by section 2(b) to insurance companies, the debates explicitly recognized the continuing vitality of Parker v. Brown"), *cert. denied*, 385 U.S. 390 (1966).