BARRY V. ST. PAUL FIRE & MARINE INSURANCE CO.: A RE-INTERPRETATION OF THE BOYCOTT EXCEPTION TO THE McCARRAN ACT

Under the protective auspices of the McCarran-Ferguson Insurance Regulation Act[1] of 1945 (McCarran Act), the insurance industry has avoided many of the federal laws that regulate other national industries. In particular, insurance companies have escaped the brunt of federal antitrust laws.[2]

Regulation of the "business of insurance" is largely vested in state governments under the provisions of the McCarran Act.[3] The Act also provides that the Sherman, Clayton and Federal Trade Commission Acts—the basic federal antitrust statutes—are only "applicable to the business of insurance to the extent that such business is not regulated by State law."[4] Thus, regulation of the insurance business is left to the states, and they are permitted to preempt federal antitrust requirements by adopting their own insurance regulations.[5] Because the states have exercised their preemptive powers, federal antitrust regulation of the insurance business has been displaced by state laws.[6]

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1. 15 U.S.C. §§ 1011-15 (1970). The McCarran Act states in pertinent part:

> § 1011. Congress hereby declares that the continued regulation and taxation by the several States of the business of insurance is in the public interest . . . .
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> § 1012 . . . (b) No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance: *Provided*, That . . . the Sherman Act, . . . the Clayton Act, and . . . the Federal Trade Commission Act . . . shall be applicable to the business of insurance to the extent that such business is not regulated by State law.
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> §1013 . . . (b) Nothing contained in this chapter shall render the said Sherman Act inapplicable to any agreement to boycott, coerce, or intimidate, or act of boycott, coercion, or intimidation.

2. *See generally* Note, *Federal Regulation of Insurance Companies: The Disappearing McCarran Act Exemption*, 1973 DUKE L.J. 1340; Note, *Applications of Federal Antitrust Laws to the Insurance Industry*, 46 MINN. L. REV. 1088 (1962); Comment, *The McCarran Act's Antitrust Exemption for "the Business of Insurance": A Shrinking Umbrella*, 43 TENN. L. REV. 329 (1976).

3. 15 U.S.C. §§ 1011-15 (1970). See note 1 *supra*.

4. *Id.* § 1012(b).

5. *See* McIlhenny v. American Title Ins. Co., 418 F. Supp. 364 (E.D. Pa. 1976); H.R. REP. No. 143, 79th Cong., 1st Sess. 3, *reprinted in* [1945] U.S. CODE CONG. SERV. 670, 672.

6. The extent of state regulation that is necessary to preempt federal control has been a subject of considerable debate. *See* Comment, *supra* note 2, at 330. One commentator has concluded that:

> Certain minimum standards must be met in order for the McCarran-Ferguson Act to oust federal jurisdiction in the antitrust area. The particular state involved must first

In recent years there has been considerable dissatisfaction with the present system of insurance regulation resulting in a movement toward greater federal control.[7] According to one analysis, the McCarran Act "has perpetuated a crazy-quilt pattern of regulation that has 50 state insurance agencies enforcing different state laws with widely varying degrees of effectiveness and zeal over a business that is national in scope."[8] There remains an inherent incongruity in a system which exempts insurance companies from the federal standards to which other similar businesses are subject. Most importantly, the antitrust exemption places potentially harmful anticompetitive abuses beyond the purview of those federal laws which were designed to control them.

The movement toward greater federal regulation in the insurance area has proceeded along several fronts.[9] This Note will examine one potential means of expanding federal antitrust control, the so-called "boycott exception" to the McCarran Act.[10] Recent case law suggests that the boycott exception may allow the federal government to play a greater role in insurance regulation. If that role is to be effective, the proper scope of the boycott exception must be firmly established.

I. REVITALIZING THE BOYCOTT EXCEPTION: *TRANSNATIONAL* REEXAMINED

The text of the McCarran Act itself provides one explicit exception to its general antitrust exemption for insurance. Section 1013(b) maintains the applicability of the Sherman Act to "any agreement to boycott, coerce, or intimidate, or act of boycott, coercion, or intimidation."[11] An expansive interpretation of this boycott exception would provide a potentially powerful means of effectuating federal antitrust policy in the insurance area. A recent

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have a statutory scheme of regulation . . . . Secondly, . . . there must be at least potentially effective enforcement by the state. Furthermore, the enforcement must be based on similar considerations to that of the federal act.

Atwell, *The McCarran-Ferguson Act—A Deceptive Panacea?*, 5 FORUM 339, 344 (1969); *see* R. KEETON, BASIC TEXT ON INSURANCE LAW 541-42 (1971).

7. *See, e.g.*, United States v. New Orleans Ins. Exch., 148 F. Supp. 915, 920 (E.D. La.), *aff'd*, 355 U.S. 22 (1957); Johnson, *Insurance Regulation at the Crossroads*, 1977 INS. L.J. 7; Note, *Insurance Regulation and Antitrust Exemptions: McCarran-Ferguson, the Boycott Exception, and the Public Interest*, 27 RUTGERS L. REV. 140 (1973); Comment, *supra* note 2; Comment, *State Regulation Under the McCarran Act*, 47 TULANE L. REV. 1069 (1973); Note, *The McCarran-Ferguson Act: A Time for Procompetitive Reform*, 29 VAND. L. REV. 1271 (1976).

8. Freed, *Federal Agencies Move to Expand Influence Over Insurance Firms*, Wall St. J., Sept. 1, 1977, at 1, col. 6.

9. Currently, Congress and the Federal Trade Commission are considering curtailing federal antitrust exemptions for insurance. *Id.* at 16, col. 1. By narrowly interpreting the term, "business of insurance," as used in the McCarran Act, the courts have subjected peripheral and non-insurance activities of insurance companies to federal antitrust regulation. *See* SEC v. National Sec., Inc., 393 U.S. 453 (1969).

10. 15 U.S.C. § 1013(b) (1970), *quoted in* note 1 *supra*.

11. *Id.*

decision from the Court of Appeals for the First Circuit has taken a significant step in that direction. In *Barry v. St. Paul Fire & Marine Insurance Co.*[12] the court emphasized the role of the boycott exception as "the all purpose safety valve" of the McCarran Act.[13] The court held that insurance companies which allegedly refused to sell medical malpractice insurance to a dissatisfied customer of another company were not exempt from the federal antitrust laws. By characterizing an alleged conspiratorial refusal to sell to a potential consumer as a boycott within the meaning of the McCarran Act boycott exception, the court concluded that the aggrieved party was entitled to seek relief under the federal antitrust laws.[14]

In reaching its holding in *Barry*, the court of appeals was compelled to reject an earlier line of case authorities beginning in 1966 with *Transnational Insurance Co. v. Rosenlund*[15] which placed a highly restrictive interpretation upon the boycott exception. If a more expansive reading is to gain acceptance, the narrow interpretation of *Transnational* and its progeny must first be clearly analyzed and discarded. As evidenced by the strong dissent in *Barry*[16] and recent cases relying upon *Transnational*,[17] there is little consensus in the courts on the proper scope of the boycott exception.[18]

Despite the seemingly comprehensive wording of the boycott exception,[19] the *Transnational* court imposed an important restriction upon its

12. 555 F.2d 3 (1st Cir.), *cert. granted*, 98 S. Ct. 391 (1977) (No. 77-240, 1977 Term).

13. 555 F.2d at 11-12. The plaintiff, a Rhode Island physician, brought a class action suit against four insurance companies who sold medical malpractice insurance in Rhode Island. After becoming dissatisfied with certain changes in one company's malpractice coverage, the plaintiff and other doctors attempted to purchase coverage from other insurers. These companies refused to sell them malpractice insurance of any kind. The plaintiff alleged that this refusal resulted from a conspiracy by all the insurance companies in restraint of trade and constituted an unlawful boycott in violation of the federal antitrust laws. *Id.* at 5.

14. *Id.* at 12.

15. 261 F. Supp. 12 (D. Ore. 1966).

16. 555 F.2d at 13.

17. McIlhenny v. American Title Ins. Co., 418 F. Supp. 364 (E.D. Pa. 1976); Royal Drug Co. v. Group Life & Health Ins. Co., 415 F. Supp. 343 (W.D. Tex. 1976), *rev'd*, 556 F.2d 1375 (5th Cir. 1977); Seasongood v. K & K Ins. Agency, 414 F. Supp. 698 (E.D. Mo. 1976), *rev'd on other grounds*, 548 F.2d 729 (8th Cir. 1977); Mathis v. Auto. Club Inter-Ins. Exch., 410 F. Supp. 1037 (W.D. Mo. 1976); Proctor v. State Farm Mut. Auto. Ins. Co., 406 F. Supp. 27 (D.D.C. 1975), *aff'd on other grounds*, 561 F.2d 262 (D.C. Cir. 1977).

18. The Supreme Court has granted certiorari to review the *Barry* decision. 98 S. Ct. 391 (1977) (No. 77-240, 1977 Term). A decision on the merits may resolve the split in the circuits. Among the questions presented to the Court was the following:

> Should the First Circuit's novel and broad interpretation of the boycott exception to the McCarran-Ferguson Act antitrust exemption be allowed to prevail in the face of its admitted conflict with "a formidable array of authorities," including at least two different but narrower constructions of the boycott exception adopted by four other courts of appeals?

[1977] 5 TRADE REG. REP. (CCH) ¶ 60,021, at 65,106.

19. The exception is worded so as to proscribe *any* agreement or act that involves a boycott, coercion, or intimidation. *See* § 1013(b), *quoted in* note 1 *supra*.

applicability. In denying the benefit of the exception to an insurance company which sought to restrain another insurer from persuading customers to switch their business, the court stated:

> It would seem that the Congress, when enacting the McCarran-Ferguson Act, was concerned with an activity which is not here indicated. The legislative history shows that the boycott, coercion and intimidation exception, was placed in the legislation to protect insurance agents from the issuance by insurance companies of a "black-list," which would name companies or agents which were beyond the pale.[20]

As authority for its conclusions, the court cited a single page from the Congressional Record.[21] That reference is to the remarks of a lone congressman who discussed blacklisting as an example of insurance company overreaching,[22] and who later expressed his intention to vote against the McCarran Act.[23] Although the legislative history does evidence a concern by some congressmen for the problem of blacklisting,[24] there is no hint that correcting such a limited class of abuses was the sole purpose of the Act. Indeed, the *Transnational* court ignored contrary remarks by both sponsors of the legislation[25] and the House committee report,[26] which discuss the boycott exception in unrestricted terms. Clearly, the basis in the legislative history for the court's narrow interpretation is tenuous at best.[27]

The *Barry* court refused to embark on an examination of the legislative history because it deemed such an inquiry inappropriate where the statutory language was clear.[28] However, contrary to the suggestion in *Barry*, the terms "boycott, coercion, or intimidation" are not self-explanatory, and therefore, in applying them, the courts must be guided by some sense of the legislative intent behind the McCarran Act. If too comprehensive a defini-

20. 261 F. Supp. at 26.

21. *Id.* at 27.

22. 91 CONG. REC. 1087 (1945) (remarks of Rep. Celler).

23. *Id.* 1088.

24. *See also id.* 1485-86 (remarks of Sen. O'Mahoney).

25. *Id.* 1443 (remarks of Sens. McCarran and Ferguson). Senator Ferguson states his interpretation of the boycott exception in unrestricted terms: "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 an act of boycotting, coercion, or intimidation." *Id.*

26. H.R. REP. NO. 143, *supra* note 5, at 3, *reprinted in* [1945] U.S. CODE CONG. SERV. 670, 672.

27. While arguing for a restrictive interpretation of the boycott exception, the dissenting judge in *Barry* could not find conclusive support for the *Transnational* interpretation in the legislative history of the McCarran Act: "[L]ike most legislative history, it is capable of being argued both ways depending on which legislator one reads and to whose views one ascribes final authority." 555 F.2d at 15 (Campbell, J., dissenting in part).

28. The court felt that the probing of legislative history was proper only if the statutory language were ambiguous or if a literal reading would produce "a senseless or unworkable statute." 555 F.2d at 7.

tion is used, federal antitrust policy would displace a significant proportion of state insurance regulations.[29] Some courts have therefore expressed the concern that any expansion of the boycott exception beyond blacklisting would "vitiate"[30] or "emasculate"[31] the general antitrust exemption. For this reason, several courts have adopted the *Transnational* analysis[32] despite its tenuous legislative moorings, its appearance more than twenty years after the enactment of the McCarran Act, and the fact that it was clearly dicta to the *Transnational* court's holding.[33]

These objections cannot be lightly dismissed. The *Transnational* analysis has the advantage of providing well-defined limitations on the role of federal law in the insurance area. A broader application of federal antitrust laws to the insurance industry would undoubtedly encroach upon certain prerogatives that the states have heretofore enjoyed.[34] However, discarding the *Transnational* restrictions would hardly render the McCarran Act an impotent piece of legislation. There are definite bounds beyond which the boycott exception cannot extend.[35] Specifically, the exception applies only to those acts or agreements that amount to a boycott, coercion, or intimidation and violate the Sherman Act; other federal antitrust laws and

29. For example, industry rating bureaus or other concerted pricing arrangements are often mandated or permitted by state statute, *see, e.g.*, CAL. INS. CODE §§ 1850-1860.3 (West 1972); FLA. STAT. ANN. tit. 35, §§ 627.011-.391 (West 1972); ILL. ANN. STAT. ch. 73, §§ 1065.1-.35 (Smith-Hurd 1965); N.Y. INS. LAW art. VIII, §§ 180-189 (McKinney 1966), yet such arrangement might amount to price fixing or a boycott of certain consumers in violation of the Sherman Act. *See* Note, *The McCarran-Ferguson Act: A Time for Procompetitive Reform, supra* note 7, at 1287-91. Similarly, insurance policy cancellations permitted by state statute, *see, e.g.*, N.Y. INS. LAW art. VIII, § 168 (McKinney 1966); N.C. GEN. STAT. § 58-60 (1975), might also amount to a boycott of certain consumers in violation of the federal antitrust laws.

30. Addrisi v. Equitable Life Assurance Soc'y of the United States, 503 F.2d 725, 729 (9th Cir. 1974), *cert. denied*, 420 U.S. 929 (1975). Persons applying for low-interest home owner loans from Equitable were pressured to purchase at the same time relatively high cost life insurance as a condition to getting the loan. The court held this not to be the type of coercion excepted by § 1013(b) of the McCarran Act.

31. Meicler v. Aetna Cas. & Sur. Co., 506 F.2d 732, 734 (5th Cir. 1975). Two automobile owners challenged the refusal of auto insurers to sell them a policy at a rate lower than that set in accordance with a uniform rate classification system adopted by the state of Texas. They alleged that the refusal to deal on terms other than the uniform rate was an illegal boycott. A narrow definition of boycott avoided the necessity of resolving a conflict between the state regulation and the Sherman Act.

32. *See* cases cited in note 17 *supra*; Addrisi v. Equitable Life Assurance Soc'y of the United States, 503 F.2d 725 (9th Cir. 1974), *cert. denied*, 420 U.S. 929 (1975), Meicler v. Aetna Cas. & Sur. Co., 372 F. Supp. 509 (S.D. Tex. 1974), *aff'd*, 506 F.2d 732 (5th Cir. 1975).

33. Even assuming that the boycott exception was applicable, the court determined that "there is absolutely nothing in this record which would indicate a boycott, coercion or intimidation." 261 F. Supp. at 27.

34. See note 29 *supra*.

35. 555 F.2d at 8. The *Barry* court noted that state tax and regulatory programs are still shielded from attacks based on the dormant commerce clause and that the business of insurance is protected from many federal regulatory programs. *Id.* at 8-9.

other types of violations remain inapplicable to the insurance industry.[36] Therefore, adoption of a broad interpretation of the statutory language would not necessarily be contrary to the Act's general policy of encouraging state regulation—it would simply put some limit on the permissible scope of such legislation. The extent to which state regulation would be affected depends largely upon what activities may be subsumed under the terms "boycott, coercion, or intimidation."

The *Transnational* formulation cannot be supported by the legislative history of the McCarran Act or by the policy behind the boycott exception. One pre-*Transnational* commentator stated: "The primary reason for this exception was to insure that the safeguards provided by the 'core' of the Sherman Act were maintained."[37] A more literal reading of its terms and a straightforward application of the exception would effectuate that intent by maintaining federal antitrust control over a broader class of insurance abuses. The ability of the states to fulfill their regulatory function and combat anticompetitive practices in the industry has been sharply questioned.[38] The McCarran Act's commitment of the business of insurance to state regulation should be balanced against the need for stronger federal antitrust enforcement. Rather than rely upon a discredited legislative history, any limitations on the intrusion of antitrust law into the insurance area must be based on the necessity of accommodating state regulation. With the demise of *Transnational*, the courts must develop new, less mechanistic standards upon which to ascertain the proper scope of the boycott exception.

II. *BARRY* AND BEYOND: TOWARD A NEW STANDARD FOR APPLYING THE BOYCOTT EXCEPTION

In bluntly rejecting the qualifications imposed upon the boycott exception by *Transnational* and its progeny,[39] the *Barry* decision immediately raises the question of what new standards should be adopted by the courts. The *Barry* court failed to consider adequately the possible consequences of an overbroad application of the exception. If the McCarran Act's policy favoring state regulation is to be respected, the boycott exception must not be applied in such a way as to destroy such regulation.[40]

36. *Id.* at 8. For example, predatory pricing would still be an exempted violation although it might be illegal under state law.

37. Note, *Applications of Federal Antitrust Laws to the Insurance Industry, supra* note 2, at 1103 (footnote omitted).

38. *See* Freed, *supra* note 8, at 1 col. 6 & 16 col. 1; *cf.*, Note, *Insurance Regulation and Antitrust Exemptions: McCarran-Ferguson, the Boycott Exception, and the Public Interest, supra* note 7, at 140, 143, 156-57 (1973) (states have failed to use effectively their regulatory power). *See also* R. KEETON, *supra* note 6, at 540.

39. 555 F.2d at 7.

40. Repealing the McCarran Act antitrust exemption completely would not render all forms of state regulation of insurance violative of the antitrust laws. The states would still have the

The impact of the boycott exception as a means of expanding federal antitrust regulation of the insurance industry depends on how broadly the statutory terms are defined. The most important operative term is "boycott," yet an appropriate definition is elusive. Several formulations will be examined as possible approaches to the problem. The first is the broad definition of boycott which is generally applied under the antitrust laws and which was adopted by the *Barry* court. The second formulation is a more restrictive definition, advocated by some commentators, which would carefully define "boycott" in terms of its effect upon competitors and would apply a per se rule against such conduct. A third alternative, expressed by the District of Columbia Circuit in *Proctor v. State Farm Mutual Automobile Insurance Co.*,[41] would require some form of "enforcement activity" by the insurers before their concerted actions would be deemed a boycott under the McCarran Act. Finally, it is suggested that the most appropriate interpretation of the boycott exception can be found by examining the policies behind the McCarran Act: those concerted actions by insurers which do not further the legitimate purposes of the Act should not be shielded from antitrust attack.

A. *The* Barry *Formulation.*

In interpreting the McCarran Act boycott exception, the *Barry* court declined to adopt a narrow or special meaning for the terms as used in that statute. Instead, relying on general antitrust case law, it defined "boycott" as "a 'concerted refusal to deal' with a disfavored purchaser or seller."[42]

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benefit of the so-called "state action" exemption enunciated in Parker v. Brown, 317 U.S. 341 (1943). An analysis of this doctrine and its development is beyond the scope of this Note, *see* Comment, *The State Action Exemption in Antitrust: From* Parker v. Brown *to* Cantor v. Detroit Edison Co., 1977 DUKE L.J. 871, but in light of the Court's recent decision in Cantor v. Detroit Edison Co., 428 U.S. 579 (1976), it seems apparent that only those few states in which a state official sets insurance rates, *e.g.*, TEX. INS. CODE ANN. arts. 5.01, 5.25 & 5.55 (Vernon 1963) (automobile, fire and allied lines, and workmen's compensation insurance) can be confident their regulatory program is within the *Parker* exemption. Johnson, *supra* note 7, at 25.

41. 561 F.2d 262 (D.C. Cir. 1977).

42. 555 F.2d at 7 (citing Klor's, Inc. v. Broadway-Hale Stores, 359 U.S. 207 (1959)). The *Barry* court was not the first to suggest that the boycott exception should be applied in a straightforward manner, but previous statements to that effect have been dicta. In a pre-*Transnational* opinion, the Court of Appeals for the Second Circuit interpreted the boycott exception to provide that "all boycotts or agreements to boycott condemned by the Sherman Act are rendered subject to federal law. . . ." 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). However, the issue before the court was whether a private treble damage action was available, and the alleged illegal conduct was directed at another insurance company, not a policyholder. 326 F.2d at 842.

A recent court opinion determined that "'boycott' in the [McCarran] Act means the same as it does in antitrust law generally," Professional Adjusting Systems of America, Inc. v. General Adjusting Bureau, Inc., 64 F.R.D. 35, 43 (S.D.N.Y. 1974), but the conduct at issue would have fit the *Transnational* blacklisting definition. *See also* Battle v. Liberty Nat'l Life Ins. Co., 493 F.2d 39 (5th Cir. 1974), *cert. denied*, 419 U.S. 1110 (1975); Cooperativa De

Although the definitions of boycotts articulated by the Supreme Court[43] and other courts[44] imply that boycotts are primarily directed by one group of businesses against another business or group of businesses,[45] the *Barry* court rejected this restriction and included actions directed at consumers.[46]

The court clearly felt that the type of activity involved in *Barry*[47] ought not to be protected by the McCarran Act, and the definition of "boycott" which it adopted was broadly stated to encompass the fact situation at hand. The *Barry* formulation, however, is essentially unbounded—*all* concerted refusals to deal are condemned. The problem with this formulation is that the legislative history of the McCarran Act reveals that the Congress did not intend to prohibit all agreements among insurers which could conceivably be subsumed under the elastic phrase, "concerted refusal to deal." Indeed, the Act specifically provided for a three year suspension of the antitrust laws' application to the business of insurance to give the states an opportunity, in the words of the House committee report, "to permit agreements and contracts by insurance companies which otherwise might be in violation of the Sherman and Clayton Acts."[48] To the extent the states enacted legisla-

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Seguros Multiples De Puerto Rico v. San Juan, 294 F. Supp. 627 (D.P.R. 1968) ("Boycott" in McCarran Act not narrower than under Sherman Act; boycott alleged against insurance company, not policyholder).

43. Klor's, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207, 212 (1959) ("concerted refusals by traders to deal with other traders").

44. Professional & Business Men's Life Ins. Co. v. Banker's Life Co., 163 F. Supp. 274, 282 (D. Mont. 1958) (" 'concerted refrainment from business relations with another' ") (quoting W.E. Anderson Sons Co. v. Local Union 311, Int'l Bhd. of Teamsters, 156 Ohio St. 541, 561, 104 N.E.2d 22, 32-33 (1952)).

45. As the *Barry* court noted, the reluctance to label other conduct a "boycott" may stem from the Supreme Court's holding in Klor's, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207 (1959) that group boycotts are per se illegal. The solution, the court suggests, is not artificially to restrict the meaning of "boycott" but rather to recognize that some boycotts may not be anticompetitive and should not be judged under a per se rule. 555 F.2d at 8 n.4. *See* P. AREEDA, ANTITRUST ANALYSIS ¶ 371 at 380-81 (2d ed. 1974); notes 84-93 *infra* and accompanying text.

46. 555 F.2d at 7 n.4. Under the *Transnational* doctrine, insurance consumers were not afforded relief under the boycott exception. The lower court in Meicler v. Aetna Cas. & Sur. Co., 372 F. Supp. 509 (S.D. Tex. 1974), *aff'd*, 506 F.2d 732 (5th Cir. 1975), asserted: "Neither party has cited nor can this Court locate any decision applying § 1013(b) in the context of an alleged combination of insurance companies to boycott, coerce, or intimidate policyholders at large." 372 F. Supp. at 514 n.9. Yet the same court, in discussing the consumer allegations of price-fixing, could observe: "It cannot be disputed that the terms boycott and coercion, as commonly defined, might be construed to encompass the type of activity attributed to [the insurers] in the instant case." *Id.* at 513. In the absence of the *Transnational* limitations, the *Meicler* court would apparently have been receptive to consumer challenges to industry price-fixing schemes.

47. *Barry* essentially involved an agreement to divide the market. See note 13 *supra*; text accompanying note 90 *infra*.

48. H.R. REP. NO. 143, *supra* note 5, at 3, *reprinted in* [1945] U.S. CODE CONG. SERV. 670, 672. In a similar vein, Senator O'Mahoney remarked that under the Act "there are certain agreements which can normally be made in the insurance business which are in the public

tion in this moratorium period which regulated such concerted conduct, that conduct became exempt from the antitrust laws under the McCarran Act.[49]

The most obvious example of the type of agreement Congress intended to permit is concerted uniform rate-making by insurance companies through rating bureaus licensed and regulated by the states.[50] Under this arrangement, the bureau determines premium rates based on data supplied by its members and then files the rates with the state insurance commissioner. Members and subscribers to the bureau are required to comply with the filed rates.[51] Under the broad definition of boycott adopted by the *Barry* court, such price fixing agreements could well be deemed to constitute a "concerted refusal to deal" with insurance consumers except at the prevailing rates.[52]

It seems clear that the definition of boycott should not be structured in such a way as to preclude rate fixing and other types of concerted behavior which Congress intended to permit. The difficulty with relying solely upon general antitrust law is that a precise definition of boycott does not exist. The reason for this may be that antitrust analysis focuses on the anticompetitive purposes and effects of conduct without any need to label it.[53] The

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interest, but which might conceivably be a violation of the antitrust law, which prohibits combinations and agreements in restraint of trade." 91 CONG. REC. 1444 (1945).

49. See notes 1, 5-6 *supra* and accompanying text.

50. The insurance industry has consistently maintained that the antitrust laws are inappropriate for rate-setting and other industry practices. During congressional hearings on the McCarran Act, one industry spokesman vigorously defended this position in the following terms:

> [C]ooperation in arriving at the proper rate which is to cover the hazard or the risk to be insured is absolutely essential if a rate anywhere nearly correctly measuring that hazard is to be developed.
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> . . . .
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> The application of the Sherman Act to insurance rate-making procedure [*sic*] would destroy practically all cooperative rate-making machinery no matter how efficiently and how fairly such machinery functions in the public interest . . . . The destruction of all this rating machinery . . . would encourage indiscriminate rating practices which might ruin many companies and cause great loss to policyholders.

Insurance: Joint Hearing on S. 1362, H.R. 3269, and H.R. 3270 Before the Subcomms. of the Comms. on the Judiciary, 78th Cong., 1st Sess. 219-20 (1943) (statement of A.V. Gruhn). *See also* R. KEETON, *supra* note 6, at 559-60; Note, *Insurance Regulation and Antitrust Exemptions: McCarran-Ferguson, the Boycott Exception, and the Public Interest*, *supra* note 7, at 142-43. Congress apparently agreed. Senator Ferguson, a sponsor of the bill, remarked: "I think that under this bill [the state legislatures] could allow a rate-making bureau . . . to fix the rates [for insurance premiums]." 91 CONG. REC. 1484 (1945); *accord, id.* 1483 (remarks of Sen. O'Mahoney) ("The State may authorize agreements for rate making [of insurance premiums] just as the Congress . . . authorized rate making by combinations in the railroad field. . . .").

51. Note, *The McCarran-Ferguson Act: A Time for Procompetitive Reform*, *supra* note 7, at 1287-91.

52. At least one court has held that for McCarran Act purposes, a concerted refusal to deal except at a fixed price is the same as a concerted absolute refusal to deal. California League of Independent Ins. Producers v. Aetna Cas. & Sur. Co., 179 F. Supp. 65 (N.D. Cal. 1959).

53. *See generally* P. AREEDA, *supra* note 45, at ¶ 370, at 380; L. SULLIVAN, HANDBOOK OF THE LAW OF ANTITRUST §§ 68, 70 (1977).

terminology generally associated with boycotts—"concerted refusal to deal"—is overbroad in the context of the McCarran Act because it may reach justifiable insurance company agreements.

B. *The Sullivan Definition.*

Professor Sullivan has criticized the classic definition of a boycott—"concerted refusal to deal"—as "too imprecise to be very useful as a legal category."[54] It is, he observes, at the same time too narrow and too broad: it does not reach all conduct which has the elements of boycott, and it includes concerted refusals to deal which have purposes other than the exclusion of competitors.[55] For that reason, Sullivan would carefully define a boycott in such a way that the term would only include actions directed by businesses against a competitor. According to Sullivan, boycott law deals with concerted efforts by traders at one level to keep others out or inhibit their competitive efforts at that level by making it more difficult for them to meet their needs for customers, suppliers, or access to transactions with other traders at the same level.[56] Using this restrictive definition, Sullivan would hold that all "explicit boycotts"—where the perpetrators agree not to deal with the victims or demand that others not deal with the victims—should be per se unlawful.[57] This approach would exclude from the term "boycott" conduct directed at consumers. It must be noted, however, that this definition was developed only for the purpose of determining when to apply a per se rule.[58] Sullivan's approach in no way implies that other agreements, including those directed against consumers, are permitted by the antitrust laws; it merely requires that they not be adjudged per se unlawful.[59]

Sullivan's restrictive definition should not be used to determine the scope of the McCarran Act boycott exception. His analysis deals with the question of when to apply a per se rule to concerted actions. That question is quite different from the question of whether to scrutinize an activity at all under the antitrust laws, and the two require different definitional standards.

The word "boycott" does not appear anywhere in the Sherman Act, section 1 of which speaks only of "contract, combination . . . or conspiracy in restraint of trade . . . ." 15 U.S.C. § 1 (1970).

54. L. SULLIVAN, *supra* note 53, at § 83, at 231.

55. *Id.*

56. *Id.* § 83, at 232.

57. *Id.* § 85, at 241, § 86, at 241 n.1.

58. *Id.* § 90, at 256.

59. If the *per se* rule respecting boycotts is to become coherent, we must recognize that it applies only where competitors engage together to inhibit others with whom they compete . . . . This is not to say that other concerted refusals may not be illegal; many will be, some of them plainly so. It is only to insist that we look at the others, each for what it is, and do not suppose that as some distant relative of the classic boycott it must be cursed with the same baleful characteristics.

Id. § 90, at 259.

As the *Barry* court noted,[60] there is no policy justification for a highly restrictive interpretation of the boycott exception—one which would exclude concerted actions directed at insurance consumers. Ultimately, the antitrust laws are designed to protect consumers and society as a whole from abusive business practices. To apply the boycott exception only when abuses are directed at competitors would have the anomalous effect of protecting consumers when they are injured indirectly through the elimination of competition, but not when they are the direct objects of abuse.[61]

It is particularly significant that the Supreme Court case which precipitated the passage of the McCarran Act, *United States v. South-Eastern Underwriters Association*,[62] involved, in part, an insurer boycott against consumers. In that case, the Court held that the antitrust laws were applicable to a conspiracy in which an association of insurance companies "employed boycotts together with other types of coercion and intimidation . . . to compel persons who needed insurance to buy only from [association] members on [association] terms."[63] The association's scheme directed against insurance consumers was found to violate the federal antitrust laws.

This holding clearly implied that insurance would be fully subject to the federal antitrust laws. In order to obviate that implication and to reestablish the primacy of state regulation, the McCarran Act was swiftly adopted by Congress.[64] Even though the Act substantially diminished the impact of *South-Eastern Underwriters*, it did not completely nullify the Court's decision. The terms of the boycott exception—"boycott, coercion or intimidation"[65]—are the same as the language used by the Court. This suggests that Congress intended to preserve the Court's holding that insurance company boycotts are subject to federal antitrust scrutiny notwithstanding the general McCarran Act exemption.[66] The boycott in *South-Eastern*

60. 555 F.2d at 8 n.4.

61. As the *Barry* court noted, *id.*, at least one court of appeals previously determined that a boycott of customers may be violative of the antitrust laws. Washington State Bowling Proprietors Ass'n v. Pacific Lanes, Inc., 356 F.2d 371, 376 (9th Cir.), *cert. denied*, 384 U.S. 963 (1966). The finding that a state bowling association boycotted non-member bowling establishments was based, in part, on allegations that the association restricted eligibility to participate in its tournaments to customers of member establishments.

62. 322 U.S. 533 (1944). The Court held, for the first time, that the insurance business involved interstate commerce and, thus, was subject to federal antitrust laws.

63. *Id.* at 535.

64. *See* R. KEETON, *supra* note 6, at 538.

65. 15 U.S.C. § 1013(b) (1970).

66. *See* Barry v. St. Paul Fire & Marine Ins. Co., 555 F.2d 3, 11 (1st Cir. 1977). In fact, Congress first considered bills which would have provided a complete exemption for the insurance industry from the Sherman and Clayton Acts before passing the McCarran-Ferguson Act in its final form. The first of these complete exemption bills, H.R. 3270, 78th Cong., 1st Sess. (1943), proposed by the insurance companies themselves, was passed by the House of Representatives seventeen days after the *Southeastern Underwriters* decision, 90 CONG. REC.

Underwriters was directed at consumers of insurance. It would therefore seem appropriate to include such conduct within the boycott exception. In the words of the District of Columbia Circuit, it is "hard to believe that Congress would have intended a construction of the boycott provision which excludes from its sweep activities explicitly addressed in the case from which its language is drawn."[67] This would render untenable any interpretation of the boycott exception so narrow as to exclude boycotts of insurance consumers. Finally, as the *Barry* court pointed out, the boycott exception was conceived of as an "all purpose safety valve."[68] "Time after time the concerns of the skeptics and opponents were met by reference to this provision. We cannot imagine that they would have been at all satisfied if they had understood that 'boycott' was a code word confined to industry personnel."[69]

C. Proctor.

The *Proctor* court also has attempted to delineate the scope of the boycott exception. In that case, decided one month after *Barry* and apparently without any knowledge of that decision,[70] the Court of Appeals for the District of Columbia rejected the narrow *Transnational* interpretation of the boycott exception. In so doing, the court noted:

> Although we recognize that the terms of the [boycott] provision are not self-defining, and are capable of being read in such a way as to swallow the antitrust exemption, we do not think the solution is to restrict the boycott exception in a manner unsupported by its plain language, its legislative history, or the historical context in which it was passed.[71]

Although the court concluded on the particular facts of *Proctor* that there was no evidence of a boycott, its analysis of what constitutes a boycott is quite helpful. The court recognized the potential abuses of a broader interpretation of the boycott exception and attempted to establish limitations to prevent them. Thus, the court concluded that "the terms [of the boycott exception] must be applied in such a way as to accommodate the respective purposes of the Act's antitrust exemption, on the one hand, and the boycott exception to that exemption, on the other."[72]

6565 (1944), but was passed over by the Senate, 90 CONG. REC. 8054 (1944). The final bill therefore represented a compromise, "preserving state regulation, [and] at the same time not emasculating Federal Anti-trust laws." NATIONAL ASSOC. OF INS. COMM'RS, PROCEEDINGS OF THE SEVENTY-SIXTH ANNUAL SESSION 143 (1945) (statement of NAIC President Johnson).

67. Proctor v. State Farm Mut. Auto. Ins. Co., 561 F.2d 262, 274 (D.C. Cir. 1977).

68. 555 F.2d at 12.

69. *Id.*

70. Neither of the opinions in *Proctor* cites *Barry*.

71. 561 F.2d at 274.

72. *Id.*

In *Proctor*, the owners of automobile repair shops alleged that a group of insurers sought to fix repair prices, coerced and intimidated repair shops to enforce the fixed prices, and boycotted those shops which did not adhere to them.[73] The court was required to determine whether the boycott exception should be interpreted broadly enough to make these allegations cognizable under the Sherman Act. The district court had followed the *Transnational* analysis in determining that the insurers' actions were not subject to federal sanction.[74] The court of appeals, however, emphasized the role of the *South-Eastern Underwriters* decision in precipitating passage of the McCarran Act. Noting that *South-Eastern Underwriters* was the apparent source of the boycott exception language, the court concluded that that decision should provide a "useful guidepost"[75] to determine the scope of the exception. Although the court of appeals in *Proctor* admitted that "a simple agreement among insurance companies to charge certain premium rates could be viewed as a boycott agreement,"[76] it interpreted the holding in *South-Eastern Underwriters* to require a higher level of coercive behavior on the part of the companies. Its analysis was guided by both the facts in *South-Eastern Underwriters* and the need to accommodate state regulation. Thus, the court stated:

> Since the McCarran Act was passed in response to *South-Eastern Underwriters*, and since a construction of the boycott provision to encompass a simple rate-fixing agreement would indeed emasculate the Act's antitrust exemption, it is reasonable to infer that in a rate-setting context something in the way of *enforcement activity* would be required to make out a claim of "boycott, coercion, or intimidation" within the meaning of the Act.[77]

The court concluded that the allegations of a group boycott directed against repair shops involved sufficient "enforcement activity" to "state a claim within the boycott exception."[78]

Although the *Proctor* court properly recognized the need to place limitations upon the scope of the boycott exception, its "enforcement activity" formulation is an elusive norm by which to test concerted behavior by insurers. There are degrees of enforcement which may be apparent, even

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73. *Id.* at 264-65.

74. Proctor v. State Farm Mut. Auto. Ins. Co., 406 F. Supp. 27 (D.D.C. 1975), *aff'd on other grounds*, 561 F.2d 262 (D.C. Cir. 1977).

75. 561 F.2d at 274.

76. *Id.*

77. *Id.* (emphasis added).

78. *Id.* at 275. The court believed that the collective refusal to permit policyholders to use their reimbursement checks at repair shops other than preferred ones unnecessarily penalized nonfavored shops and stifled competition. However, the court of appeals affirmed the lower court decision on the ground that the record did not support the allegations. *Id.* at 276.

without a complete refusal to deal on the part of insurance companies. In *Proctor*, the court stated that insurance companies could properly establish a uniform formula to determine repair rates and could establish arrangements with those preferred repair shops that would accept the uniform rates as full payment.[79] Even though other repair shops "would be under economic pressure to accede to the terms of the horizontal agreements and thereby achieve favored status," the court concluded that this arrangement did not involve "the degree of coercive enforcement activity" necessary to constitute a boycott.[80] This test appears to draw a line between absolute refusals to deal, where the coercion is exclusion from the market, and refusals to deal except on specific terms, where the coercion is only economic.[81] But at some point, mere economic pressure must rise to the level of enforcement. If, in *Barry*, for example, the companies had charged doctors who switched insurers twice the normal rate instead of refusing them insurance, then under *Proctor* the companies would be exerting only economic pressure.[82] The effect, however, is the same—consumers are denied a real choice in the marketplace. A test which looks solely to the existence of "enforcement activity" fails to address the effect of economic pressure. Thus, the test is too narrow.[83]

79. *Id.* at 274-75. It was the refusal to pay anything for repairs performed by nonpreferred shops that the court found objectionable. *Id.*

80. *Id.* at 276.

81. The court cites Traveler's Ins. Co. v. Blue Cross, 481 F.2d 80 (2d Cir.), *cert. denied*, 414 U.S. 1093 (1973), for the proposition that economic pressure is not "coercion" within the meaning of the McCarran Act. In that case a private insurer alleged that Blue Cross coerced hospitals into signing standard contracts at low rates by refusing to reimburse non-signing hospitals for services rendered to Blue Cross subscribers. The court held that this economic pressure on hospitals was not actionable.

82. Perhaps this device could be dismissed as a sham, amounting to nothing more than an absolute refusal to deal. However, lower sign-up fees would be more difficult to treat in this fashion. Ultimately, one must look at effects, not just types of conduct.

83. This standard may also require courts to make very fine distinctions among degrees of enforcement activity. The history of another enforcement doctrine illustrates the problem. In United States v. Colgate & Co., 250 U.S. 300 (1919), the Court held that a manufacturer who announces the prices at which he expects retailers to sell his products and implements that pricing policy by refusing to deal with retailers who cut prices does not violate the Sherman Act. Later cases made it clear, however, that the range of conduct permissible under *Colgate* was quite narrow. For example, the Act was violated if attempts were made to police a resale price maintenance policy by coding shipments to permit tracing back to offenders, Federal Trade Commission v. Beech-Nut Packing Co., 257 U.S. 441 (1922), or by cutting off wholesalers who sold to price-cutting retailers, United States v. Bausch & Lomb Optical Co., 321 U.S. 707 (1943); *accord*, United States v. Parke, Davis & Co., 362 U.S. 29 (1959). The facts of these later cases do not in any realistic sense show greater coercion of retailers or more clearly evidence an agreement to fix prices than do the facts of *Colgate*. L. SULLIVAN, *supra* note 53, at § 139, at 394. Thus, application of the *Colgate* test became difficult and strained because the original doctrine was not based on a sound analysis of the policies at stake. *Proctor* has the same potential.

D. *A Proposed Alternative—A Functional Definition.*

Because no general definition of boycott is adequate, it would seem appropriate to rely directly upon the purposes of the McCarran Act in construing the boycott exception. Only those concerted refusals to deal which are in conflict with the legitimate purposes of the Act should be deemed boycotts subject to federal antitrust law. In other words, a boycott in this context is a concerted refusal to deal, the effect of which is inconsistent with the intended purposes of the McCarran Act. Inherent in such a definition is a theory of "ancillary restraints" and "less restrictive alternatives."[84] In scrutinizing a particular concerted action by insurers, the courts must deal with two distinct questions. First, it must be determined whether the concerted behavior of insurers is ancillary to a legitimate goal under the McCarran Act.[85] For example, the concerted behavior involved in rate fixing may be ancillary to the legislative goal of keeping insurance costs down and avoiding insurer insolvency resulting from excessive competition. Even if the concerted action has many of the characteristics of a classic boycott, it should not be prohibited if it is a reasonable means to effect a legitimate purpose under the Act's antitrust exemption. Secondly, the courts should consider whether a less restrictive alternative to the concerted behavior would be adequate to effectuate the legislative purpose. An insurer agreement should not be protected from the antitrust laws if policy objectives can be achieved by a means which is clearly less anticompetitive in its effect.

Proctor is particularly helpful in understanding this proposed approach because, although the court phrased its definition in terms of "enforcement activity," much of its analysis is consistent with the proposed functional approach. The court viewed the goal of the alleged concerted behavior to be the legitimate purpose of "controlling their spiraling claims payments."[86] Moreover, the court essentially adopted a theory of a "less restrictive

84. These two concepts are familiar ones in antitrust analysis. The legality of ancillary restraints derives from the common law. *See* United States v. Joint-Traffic Ass'n, 171 U.S. 505 (1898); United States v. Addyston Pipe & Steel Co., 85 Fed. 271 (6th Cir. 1898), *aff'd*, 175 U.S. 211 (1899). The search for less restrictive alternatives is part of the rule of reason analysis. *See* P. AREEDA, *supra* note 45, at ¶ 349(b)(3). *See generally* Chicago Bd. of Trade v. United States, 246 U.S. 231 (1918).

85. The apparent goals of the McCarran Act are to permit concerted activity to protect the insurance fund so that policyholders can be assured that the insurer will be able to pay his obligations. This includes the sharing of loss experience and joint rate making to prevent rate wars, rate discrimination and insufficient loss reserves. See notes 50-51 *supra* and accompanying text.

It has been suggested that the McCarran Act antitrust exemption is unnecessary to protect the practice of pooling loss experience since the joint use of common experience would not violate the Sherman Act. Johnson, *supra* note 7, at 27.

86. 561 F.2d at 276.

alternative" in drawing a line between the types of activity that would and would not be permitted. The court stated that it would be permissible for insurance companies to enter into a horizontal agreement to reimburse insureds according to a common formula and to make arrangements with preferred shops. However, a refusal by the companies to allow policyholders to use their reimbursement checks at "nonpreferred" shops would not be permissible.[87] The court then went on to discuss the unnecessarily restrictive effects of a total refusal to deal:

> Whereas the former merely exerts economic pressure on the shops, the latter unnecessarily penalized nonfavored shops, and stifles any market pressure in the direction of increased prices by preventing policyholders from dealing with shops which charge more than the prevailing rate. Moreover, in the latter situation, legitimate increases in the actual labor rate are less likely to get reflected in the amounts paid by the insurance companies, and the profit margins of even the preferred shops might get squeezed unfairly.[88]

Although the court characterized the distinction between permissible and impermissible action as the amount of enforcement, it seems that the court was far less concerned with how "coercive" the insurance companies' actions were than it was with the anticompetitive *effects* of those actions.

A functional definition of "boycott" is also consistent with statements in the legislative history. Senator O'Mahoney, who was on the conference committee, stated:

> [M]y judgment is that every effective combination or agreement to carry out a program against the public interest of which I have had any knowledge in this whole insurance study would be prohibited by the [boycott] section . . . . There are agreements and combinations in the public interests [sic] which can safely be permitted . . . .[89]

Senator O'Mahoney's concept of a boycott, then, is a combination "against the public interest." With the modification that the "public interest" be examined in the context of the purposes of the McCarran Act, this is essentially the test that is being proposed here.

This functional definition may be applied to the facts in *Barry*. The concerted behavior alleged in *Barry* involved a division of the malpractice insurance market among a group of insurance companies by preventing their customers from switching insurers. Physicians who were dissatisfied with their malpractice coverage were prevented from switching their business to another insurer. Each insurer, therefore, was free to alter the terms of its coverage without fear of losing customers to its competitors who might offer

87. *Id.* at 274-75.
88. *Id.* at 275.
89. 91 CONG. REC. 1486 (1945).

their own insureds more desirable terms.[90] This arrangement essentially constituted a market division; the companies agreed to divide the market according to the then existing distribution of customers and not to compete in each other's markets. This type of market division eliminates all competition and is thereby one of the most restrictive forms of anticompetitive behavior.[91] It is difficult to find any legitimate purpose embodied in the McCarran Act which would be advanced by such an agreement. Conceivably, the insurance companies might argue that their arrangement would lower costs by avoiding the "start-up" costs associated with new accounts. Even if that argument is accepted, the market division should be prohibited because there are other less restrictive alternatives—such as a temporary surcharge for new accounts—which would fulfill the same purpose.[92] The boycott exception should open the insurers' actions to scrutiny under the federal antitrust laws because their concerted refusal to deal with the potential customers does not comport with the purposes of the antitrust exemption of the McCarran Act.

An evaluation of the Act's purposes and of the alternative means of achieving those purposes is essentially a "rule of reason" analysis.[93] This attempt to delineate the scope of the boycott exception requires the courts to determine whether a particular concerted action is "reasonable" in light of its purposes and alternatives. Although the appropriate analysis may often be difficult, this approach is preferable because no other definition of boycott is adequate to preserve the competing purposes of the antitrust exemption. The courts must look toward the McCarran Act itself to determine what concerted behavior otherwise illegal under the antitrust laws is consistent with the Act's goals.

IV. CONCLUSION

Under *Transnational*, the potential impact of the boycott exception to the McCarran Act has been stifled by an artificially restrictive interpretation

90. 555 F.2d at 5.

91. Compare United States v. Topco Assocs., Inc., 405 U.S. 596 (1972), where a group of 25 regional supermarket chains formed a cooperative private label association. Each member was assigned an exclusive territory in which to market Topco brand products. Members were free to expand into other members' territories but could not sell the Topco brand there. Although less restrictive than an absolute territorial division, the Court struck it down as an impermissible per se violation of section 1 of the Sherman Act. *But see* United States v. Pan American World Airways, Inc., 193 F. Supp. 18 (S.D.N.Y. 1961), *rev'd on other grounds*, 371 U.S. 296 (1963) (absolute territorial division by joint venturers entering market in which neither had previously operated held not unlawful, at least for initial period of venture).

92. The danger of a sham barrier to transfers still exists, see note 82 *supra*, but placing the burden on the company to defend this suspect practice with supporting cost data would meet the problem. Only a surcharge in the amount of actual extra cost would be justified.

93. *See* L. SULLIVAN, *supra* note 53, at § 65, at 172 for a discussion of the application of the rule of reason to evaluate the legality of concerted arrangements.

of its provisions. The decision in *Barry*, by revitalizing the boycott exception, opens the insurance industry to increased federal antitrust regulation. However, the *Barry* court failed to recognize adequately the need to accommodate the McCarran Act's policy of deference to state insurance regulation. The meaning of "boycott" within the McCarran Act must be carefully formulated to prevent the boycott exception from displacing the Act's antitrust exemption for the business of insurance. By evaluating the purposes behind the Act and the anticompetitive effects of alternative means to achieve those purposes, the courts can best determine what concerted practices should be subject to federal antitrust law as a prohibited boycott.

Even with these limitations, a broader interpretation of the boycott exception may have a significant impact on practices affecting insurance consumers. State regulatory systems have often inadequately protected the public and have fostered anticompetitive practices in the insurance industry. The public interest may be better served with a more generous application of federal antitrust policy to the business of insurance.