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## THE SCOPE OF THE INSURANCE INDUSTRY'S SHERMAN ACT EXEMPTION: NEW CONSIDERATIONS

The McCarran-Ferguson Act<sup>1</sup> (the McCarran Act) permits the states to exempt the insurance business from the Sherman Act.<sup>2</sup> However, the states cannot exempt all anticompetitive practices; section 3(b) of the McCarran Act makes the Sherman Act applicable to any anticompetitive practice that can be characterized as boycott, coercion, or intimidation.<sup>3</sup>

In the 1977 decision in *Barry v. St. Paul Fire and Marine Insurance*<sup>4</sup> the United States Court of Appeals for the First Circuit considered the extent to which anticompetitive practices in the insurance business are subject to the Sherman Act by virtue of section 3(b) of the McCarran Act. Prior to the decision in *Barry*, section 3(b) had been held to apply exclusively to the boycott, coercion and intimidation of insurance companies and agents by other insurance companies and agents.<sup>5</sup> This limitation on section 3(b) barred insurance policyholders from bringing an action under the Sherman Act even if they alleged that they had been boycotted, coerced or intimidated by a group of insurance companies.<sup>6</sup> In *Barry*, the First Circuit rejected the contention that this limitation on section 3(b) was necessary in order to avoid emasculation of the insurance business' antitrust exemption and held that policyholders who allege that they have been boycotted by a group of insurance companies can bring an action under the Sherman Act.<sup>7</sup>

This note will consider whether the *Barry* court was correct in rejecting the view that section 3(b) should be limited in order to avoid emasculation

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<sup>1</sup> 15 U.S.C. §§ 1011-15 (1970).

<sup>2</sup> 15 U.S.C. §§ 1-3 (Supp. V 1975), §§ 4-7 (1970).

<sup>3</sup> 15 U.S.C. § 1013(b) (1970).

<sup>4</sup> 555 F.2d 3 (1st Cir.), *cert. granted*, 98 S.Ct. 391 (1977).

<sup>5</sup> *Meidler v. Aetna Cas. & Sur. Co.*, 506 F.2d 732, 734 (5th Cir. 1975); *Addrisi v. Equitable Life Assurance Soc'y*, 503 F.2d 725, 728-29 (9th Cir. 1974), *cert. denied*, 420 U.S. 929 (1975); *McIlhenny v. American Title Ins. Co.*, 418 F. Supp. 364, 371 (E.D. Pa. 1976); *Frankford Hosp. v. Blue Cross*, 417 F. Supp. 1104, 1110 (E.D. Pa. 1976), *aff'd*, 554 F.2d 1253 (3d Cir. 1977); *Royal Drug Co. v. Group Life & Health Ins. Co.*, 415 F. Supp. 343, 350 (W.D. Tex. 1976), *rev'd on other grounds*, 556 F.2d 1375 (5th Cir. 1977); *Seasongood v. K & K Ins. Agency*, 414 F. Supp. 698, 702 (E.D. Mo. 1976), *rev'd on other grounds*, 548 F.2d 729 (8th Cir. 1977); *Mathis v. Automobile Club Inter-Ins. Exch.*, 410 F. Supp. 1037, 1041 (W.D. Mo. 1976); *Proctor v. State Farm Mut. Auto Ins. Co.*, 406 F. Supp. 27, 32 (D.D.C. 1975), *rev'd*, 561 F.2d 262 (D.C. Cir. 1977) (decided after *Barry*); *Mitgang v. Western Title Ins. Co.*, [1974-2] TRADE REG. REP. (CCH) ¶ 75,322, 98,026, (N.D. Cal. 1974); *Transnational Ins. Co. v. Rosenlund*, 261 F. Supp. 12, 26-27 (D. Ore. 1966).

*But see* *Battle v. Liberty Nat'l Life Ins. Co.*, 493 F.2d 39 (5th Cir. 1974), *cert. denied*, 419 U.S. 1110 (1975), involving business dealings that were not part of the business of insurance and therefore were not exempt from the Sherman Act by § 2(b) of the McCarran Act, where the court summarily observed in *dictum* that §3(b) would preclude dismissal of the complaint even if the business dealings were part of the business of insurance because coercion was involved. *Battle*, 493 F.2d at 50. Similarly, in *Ballard v. Blue Shield*, 543 F.2d 1075 (4th Cir. 1976), *cert. denied*, 430 U.S. 922 (1977), the court allowed chiropractors who alleged that they had been boycotted by an insurance company to bring an action under the Sherman Act. *Id.* at 1078. Neither the *Ballard* nor the *Battle* court considered whether § 3(b) applied only to conduct by insurance companies and agents aimed at other insurance companies and agents.

<sup>6</sup> *See, e.g.,* *Meidler v. Aetna Cas. & Sur. Co.*, 506 F.2d 732, 734-35 (5th Cir. 1975).

<sup>7</sup> 555 F.2d at 12. Nevertheless, the *Barry* court examined carefully the McCarran Act's legislative history. Based on this examination the court concluded that neither the Act itself nor its legislative history showed that Congress intended § 3(b) to apply solely to conduct by insurance companies and agents aimed at other insurance companies and agents. *Id.*

tion of the insurance business' antitrust exemption. First, this note will examine those provisions of the McCarran Act which deal with the applicability of the antitrust laws to the insurance business. Then the different interpretations courts have placed on section 3(b) in an effort to reconcile those provisions will be evaluated. Finally, the note will consider the extent to which the insurance business would be subject to liability for various common Sherman Act violations if no limitation were placed on section 3(b). Based on the extent of this liability, it will be submitted that the insurance industry's Sherman Act exemption would retain force even if section 3(b) were broadly construed and that therefore the First Circuit was correct in concluding that no limitation need be placed on section 3(b) in order to avoid emasculation of the insurance business' Sherman Act exemption.

I. THE CONFLICT BETWEEN THE EXEMPTION FROM THE SHERMAN ACT AND SECTION 3(b) OF THE MCCARRAN ACT

A. *The McCarran Act*

The McCarran Act was passed in the wake of the Supreme Court's decision in *United States v. South-Eastern Underwriters Association*<sup>8</sup> that the business of insurance is interstate commerce.<sup>9</sup> As a result of the *South-Eastern Underwriters* decision, the insurance industry, as well as members of Congress, feared that state regulation of the insurance business would be preempted by those federal laws which regulate interstate commerce<sup>10</sup> and by the broad sweep of the commerce clause.<sup>11</sup> Responding to these concerns, Congress passed the McCarran Act.<sup>12</sup>

The McCarran Act prevents federal preemption by providing that congressional silence with respect to insurance regulation is not to be construed as imposing any barrier to state regulation<sup>13</sup> and that existing federal laws shall not interfere with state regulation of insurance unless the federal statute relates specifically to insurance.<sup>14</sup> With respect to federal antitrust laws, section 2(b) of the McCarran Act provides that the Sherman Act, the Clayton Act, and the Federal Trade Commission Act are applicable

<sup>8</sup> 322 U.S. 533 (1944).

<sup>9</sup> *Id.* at 539.

<sup>10</sup> 91 CONG. REC. 483 (1945). Senator O'Mahoney expressly mentioned the Robinson-Patman Act, the National Labor Relations Act, and the Fair Labor Standards Act.

<sup>11</sup> U.S. CONST. art. I, § 8, cl. 3.

<sup>12</sup> 91 CONG. REC. 478-79, 481-82, 488, 1484, 1488 (1945).

The *South-Eastern Underwriters* Court, apparently in an effort to deal with the uncertainty that its decision would create, said that the long history of state regulation and taxation of the insurance business and the absence of conflicting congressional action would be strong reasons to uphold state regulatory and tax laws. 322 U.S. at 548-49.

<sup>13</sup> 15 U.S.C. § 1011 (1970) provides:

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

*Id.*

<sup>14</sup> *Id.* at § 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 . . ." *Id.*

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to the insurance business only to the extent that such business is not regulated by state law.<sup>15</sup> However, the exemption granted by section 2(b) of the McCarran Act is limited by section 3(b), which provides that "[n]othing 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."<sup>16</sup>

The limitation contained in section 3(b) creates a conflict between that section and section 2(b). Whereas section 2(b) provides for state regulation of the insurance business, section 3(b) provides that certain insurance practices are regulated by the Sherman Act. Accordingly the scope of these two sections of the McCarran Act depends on the interpretation of the boycott, coercion or intimidation language of section 3(b). If boycott, coercion and intimidation refer only to conduct by insurance companies and agents aimed at other insurance companies and agents, then the scope of section 3(b) is narrow and the insurance business is substantially exempt from the Sherman Act. If, however, any act of boycott, coercion or intimidation falls under section 3(b), then the insurance business' exemption from the Sherman Act is much more limited. Thus the scope of the insurance industry's Sherman Act exemption under section 2(b) of the McCarran Act depends upon what practices constitute boycott, coercion or intimidation so as to fall under section 3(b).

### B. *Judicial Resolution of the Conflict Between Sections 2(b) and 3(b)*

Prior to the First Circuit's 1977 decision in *Barry*, the Ninth and Fifth Circuit courts of appeals and several federal district courts considered the scope of the insurance industry's Sherman Act liability under sections 2(b) and 3(b) of the McCarran Act. The Ninth Circuit dealt with a policyholder's suit in which it was alleged that an insurance company's tying the granting of low interest mortgage loans to the purchase of life insurance policies fell under section 3(b).<sup>17</sup> The Fifth Circuit confronted a policyholder's allegation that his insurance company had increased his rate classification and that other insurance companies then had refused to sell him insurance at the original lower rate.<sup>18</sup> In addition, various federal district courts determined the scope of the insurance business' Sherman Act exemption in such contexts as a suit by a policyholder alleging that title insurance companies conspired to require mechanics' lien riders on all title policies,<sup>19</sup> suits by pharmacists<sup>20</sup> and hospitals<sup>21</sup> alleging that Blue Cross-

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<sup>15</sup> *Id.*

"[A]fter June 30, 1948, the Act . . . known as the Sherman Act and the Act . . . known as the Clayton Act, and the Act . . . known as the Federal Trade Commission Act, . . . shall be applicable to the business of insurance to the extent that such business is not regulated by State law." *Id.*

<sup>16</sup> *Id.* at § 1013(b).

<sup>17</sup> *Addrisi v. Equitable Life Assurance Soc'y*, 503 F.2d 725, 726 (9th Cir. 1974), *cert. denied*, 420 U.S. 929 (1975).

<sup>18</sup> *Meidler v. Aetna Cas. and Sur. Co.*, 506 F.2d 732, 733 (5th Cir. 1975).

<sup>19</sup> *McIlhenny v. American Title Ins. Co.*, 418 F. Supp. 364, 366 (E.D. Pa. 1976).

<sup>20</sup> *Royal Drug Co. v. Group Life and Health Ins. Co.*, 415 F. Supp. 343, 345 (W.D. Tex. 1976), *rev'd on other grounds*, 556 F.2d 1375 (5th Cir. 1977).

<sup>21</sup> *Frankford Hosp. v. Blue Cross*, 417 F. Supp. 1104, 1108 (E.D. Pa. 1976), *aff'd*, 554 F.2d 1253 (3d Cir. 1977).

Blue Shield's preferential reimbursement of vendors with whom it had entered into contracts violated the Sherman Act, and a suit by a policyholder alleging that a requirement that she purchase a membership in an automobile club in order to become insured violated the Sherman Act.<sup>22</sup> All of these courts dismissed the policyholders' suits and concluded that section 3(b) applied only to conduct of insurance companies and agents aimed at other insurance companies and agents. However, none of these courts provided sufficient support for their conclusion that the applicability of section 3(b) must be limited.

The first court to consider the question, the United States District Court for the District of Oregon, stated in dictum that the legislative history of the McCarran Act shows that section 3(b) was placed in the Act only to protect insurance companies and agents from blacklisting.<sup>23</sup> However, this dictum was accompanied neither by any analysis of the legislative history nor by an explanation of why it was necessary to consult the legislative history to construe the relatively straightforward statutory language. The Ninth Circuit cited the Oregon federal district court case and merely stated in a single sentence that a failure to limit section 3(b) would vitiate the concept of state regulation of the insurance business.<sup>24</sup> Similarly, the Fifth Circuit concluded, also in one sentence, that the failure to limit section 3(b) would emasculate the antitrust exemption in section 2(b).<sup>25</sup> As a result both the Fifth and the Ninth Circuit courts adopted the Oregon district court's conclusion and held that section 3(b) applied only to conduct by insurance companies and agents aimed at other insurance companies and agents. Thus, by the time the First Circuit considered the applicability of section 3(b) of the McCarran Act in *Barry*, an assertion that first appeared as dictum gradually had become well established. None of the courts which advanced a narrow construction of section 3(b), however, had analyzed either the legislative history upon which they had relied or the assertion that section 3(b) must be limited in order to avoid emasculating section 2(b).

The momentum for limiting the applicability of section 3(b) was diffused by the decision in *Barry*. Despite all of the contrary authority, the First Circuit refused to conclude that such a limitation was necessary to avoid emasculation of the antitrust exemption in section 2(b)<sup>26</sup> or to avoid vitiation of the policy of state regulation of the business of insurance.<sup>27</sup> Accordingly, the First Circuit allowed a group of physicians to maintain an action for injunctive relief and treble damages under the Sherman Act<sup>28</sup>

<sup>22</sup> *Mathis v. Automobile Club Inter-Ins. Exch.*, 410 F. Supp. 1037, 1038 (W.D. Mo. 1976).

<sup>23</sup> *Transnational Ins. Co. v. Rosenlund*, 261 F. Supp. 12, 26-27 (D. Ore. 1966).

<sup>24</sup> *Addrisi v. Equitable Life Assurance Soc'y*, 503 F.2d 725 (9th Cir. 1974), *cert. denied*, 420 U.S. 929 (1975).

<sup>25</sup> *Meidler v. Aetna Cas. & Sur. Co.*, 506 F.2d 732 (5th Cir. 1975).

<sup>26</sup> 555 F.2d at 7, 9.

<sup>27</sup> *Id.*

<sup>28</sup> At the time Congress passed the McCarran Act, § 7 of the Sherman Act allowed a private party to bring an action for violation of the Sherman Act and to recover triple damages. In 1955 Congress repealed § 7 of the Sherman Act deeming it redundant in view of an identical provision in § 4 of the Clayton Act. S. REP. NO. 619, 84th Cong., 1st Sess. 2, reprinted in [1955] U.S. CODE CONG. & AD. NEWS 2328, 2329. Because § 2(b) of the McCarran Act makes the Clayton Act inapplicable to the insurance business it appeared that a private party could not bring an action for a violation of the Sherman Act in the insurance business. Nevertheless, courts have concluded that Congress did not intend to remove the right of private action and

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against insurance companies<sup>29</sup> who had refused to sell them malpractice insurance on any basis.<sup>30</sup>

The court supported its conclusion that it was not necessary to limit section 3(b) by pointing out that even if section 3(b) were not limited, the McCarran Act would continue to exempt the insurance business both from federal laws which do not relate specifically to insurance and from challenges based on the commerce clause.<sup>31</sup> In addition, the court reasoned, the exemption from the Clayton Act and the Federal Trade Commission Act also would remain intact.<sup>32</sup> With respect to the Sherman Act, the *Barry* court observed that failure to limit section 3(b) would not subject all insurance practices to the Sherman Act.<sup>33</sup> Rather, the First Circuit suggested that the insurance business would be partially exempt from the Sherman Act because predatory pricing and benign means to maintain a monopoly are Sherman Act violations that cannot be characterized as boycott, coercion or intimidation.<sup>34</sup> As such, the court reasoned that these practices would be exempt from the Sherman Act even if section 3(b) were not limited. The *Barry* court therefore concluded that the McCarran Act would not be emasculated if section 3(b) applied to more than just conduct by insurance companies and agents aimed at other insurance companies and agents.<sup>35</sup>

### C. *The Validity of the Barry Court's Resolution of the Conflict*

The holding in *Barry* limits the scope of the insurance business' Sherman Act exemption to a far greater extent than do the holdings of either the Fifth or the Ninth Circuits. In order to determine the proper scope of the Sherman Act exemption it is necessary to analyze the predicate for the differing interpretations of that scope: that is, it is necessary to analyze whether the failure to limit section 3(b) would result in the emasculation of the insurance business' Sherman Act exemption. In this light, there are two respects in which the First Circuit's opinion in *Barry* falls short of demonstrating that such a limitation is unnecessary.

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therefore they have not construed the repeal of § 7 as removing that right. *Monarch Life Ins. Co. v. Loyal Protective Life Ins. Co.*, 326 F.2d 841, 844 (2d Cir. 1963), *cert. denied*, 376 U.S. 952 (1964); *Professional and Businessmen's Life Ins. Co. v. Bankers Life Co.*, 163 F. Supp. 274, 295 (D. Mont. 1958).

<sup>29</sup> 555 F.2d at 5. The defendants all sold malpractice insurance to Rhode Island physicians. When St. Paul Fire and Marine Insurance changed its underwriting policies so as to effect a change in coverage, the plaintiffs sought coverage from the other defendants. *Id.*

<sup>30</sup> *Id.* The plaintiffs conceded that the defendants' conduct was within the business of insurance and was regulated by the State of Rhode Island. *Id.* at 6. In light of these concessions the defendants' conduct would have been exempt from the Sherman Act unless it was deemed to fall under § 3(b).

<sup>31</sup> *Id.* at 8.

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> *Id.* The court cited *Standard Oil Co. v. United States*, 221 U.S. 1, 43 (1911) as an example of predatory pricing and *United States v. Aluminum Co. of America*, 148 F.2d 416 (2d Cir. 1945) as an example of benign means to maintain a monopoly. *Id.*

<sup>35</sup> 555 F.2d at 8. The court also observed that the doctrine of *Parker v. Brown*, 317 U.S. 341 (1943) would protect state regulatory schemes from antitrust liability and that legislative and judicial policy had been to narrow rather than expand exceptions to the antitrust laws. 555 F.2d at 8-9.

First, the *Barry* court's observation that failure to limit section 3(b) would not emasculate those portions of the McCarran Act dealing with other federal laws, the commerce clause, the Clayton Act and the Federal Trade Commission Act<sup>36</sup> is not relevant to the conflict between sections 2(b) and 3(b). Section 3(b) affects only the Sherman Act's applicability to the business of insurance; it has no effect on the applicability of any other law. Therefore, the only exemption that section 3(b) has any potential of emasculating is the exemption from the Sherman Act. The applicability of other federal laws, the commerce clause, the Clayton Act or the Federal Trade Commission Act to the insurance business is neither increased nor diminished by placing any limitation on section 3(b).

The second weakness in the *Barry* court's analysis is the court's treatment of the conflict between section 3(b) and that portion of the McCarran Act which exempts the insurance business from the Sherman Act. By citing predatory pricing and benign means of maintaining a monopoly as examples of Sherman Act violations which would be exempt from the Sherman Act even if section 3(b) were not limited,<sup>37</sup> the *Barry* court demonstrated that section 3(b) could not render the Sherman Act exemption completely meaningless.

The fact that section 3(b) does not render the insurance business' Sherman Act exemption completely meaningless arguably defeats the rationale for limiting section 3(b). The rationale for limiting section 3(b) is defeated by showing that such limitation does not emasculate the exemption: it is not necessary, nor is it possible, to show that section 3(b) does not limit the Sherman Act exemption.<sup>38</sup> By providing two examples of Sherman Act violations that would remain exempt from the Sherman Act even if no limitation were placed on section 3(b), the *Barry* court has shown that the Sherman Act exemption would retain some meaning.

There are, nevertheless, two convincing reasons for believing that the First Circuit has not shown that a failure to limit section 3(b) will not render the Sherman Act exemption sufficiently meaningless to justify limiting section 3(b). First, the *Barry* court's examples of predatory pricing and benign means to maintain a monopoly both are violations of section 2 of the Sherman Act. Since the First Circuit's examples go only to section 2 liability, the *Barry* decision does not foreclose the argument that a failure to limit section 3(b) would render the insurance business completely subject to section 1 of the Sherman Act. Yet the language of section 3(b) makes it

<sup>36</sup> 555 F.2d at 8.

<sup>37</sup> *Id.*

<sup>38</sup> Section 3(b) necessarily conflicts with the insurance business' Sherman Act exemption. Even if the applicability of § 3(b) were limited to conduct by insurance companies and agents aimed at other insurance companies and agents, Sherman Act violations, exempt but for § 3(b), become subject to the Sherman Act by virtue of § 3(b). This is illustrated by *United States v. Insurance Bd.*, 144 F. Supp. 684 (N.D. Ohio 1956). There, the government attacked *inter alia* Insurance Board rules which prohibited insurance agents from doing business with either mutual insurance companies or companies that bypassed agents in writing policies. *Id.* at 687. These rules were subject to the Sherman Act not only because they were boycotts but because they were also conduct by insurance companies and agents aimed at other insurance companies and agents. *Accord*, *American Family Life Assurance Co. v. Blue Cross*, 346 F. Supp. 267, 268 (S.D. Fla. 1972), *aff'd*, 486 F.2d 225 (5th Cir. 1973); *United States v. New Orleans Ins. Exch.*, 148 F. Supp. 915, 917 (E.D. La.), *aff'd per curiam*, 355 U.S. 22 (1957).

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clear that Congress did not intend that section to expose completely the business of insurance to section 1 liability. Had Congress intended to do so it would have provided for the application of section 1 by specifically referring to it in section 3(b)<sup>39</sup> rather than using "boycott, coercion or intimidation" language which has no counterpart in section 1. Thus, preventing section 1 of the Sherman Act from complete application to the insurance business would be in accord with congressional intent as manifested by the language of section 3(b) and therefore would constitute a justification for limiting section 3(b).

Another argument for limiting section 3(b) which the *Barry* opinion does not foreclose is the possibility that, if no limitation were placed on section 3(b), the insurance business would be subject to liability for all of the more common violations of the Sherman Act such as price fixing,<sup>40</sup> tying arrangements,<sup>41</sup> allocation of markets,<sup>42</sup> resale price maintenance,<sup>43</sup> conspiracies to crush competitors,<sup>44</sup> and the granting of exclusive territories.<sup>45</sup> If the failure to limit section 3(b) left the insurance business subject to all of these Sherman Act violations, the insurance business would be subject to the Sherman Act to virtually the same extent as a business that did not have the benefit of any exemption. Yet the very fact that the McCarran Act was passed shows that Congress intended that the insurance business' liability to the Sherman Act be different from the Sherman Act liability of other businesses. Thus, expanding the scope of the insurance business' Sherman Act exemption so as to distinguish the Sherman Act liability of the insurance business from the Sherman Act liability of other businesses is in accord with the purposes of the McCarran Act as a whole and therefore would constitute a justification for limiting section 3(b).

That the insurance business might be completely subject to section 1 of the Sherman Act or that it might be subject to liability for all of the more common violations of the Sherman Act indicates that the *Barry* opinion has not foreclosed the possibility that it may be necessary to limit section 3(b) in order to avoid rendering the insurance business' antitrust exemption meaningless. To the extent that those business practices which ordinarily violate section 1 of the Sherman Act can be characterized as boycott, coercion or intimidation, they will be subject to the Sherman Act by virtue of section 3(b) of the McCarran Act. If section 3(b) exposes those practices to the Sherman Act it emasculates the insurance business' exemption from the Sherman Act. To determine whether a broad construction of section 3(b) would emasculate this exemption thus requires determining whether common violations of section 1 of the Sherman Act can be characterized as boycott, coercion or intimidation.

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<sup>39</sup> See 555 F.2d at 14 (Campbell, J., dissenting). Judge Campbell pointed out in dissent that the language of § 3(b) ("boycott, coercion and intimidation") did not track the language of § 1 of the Sherman Act ("contract, combination . . . or conspiracy"). *Id.*

<sup>40</sup> See, e.g., *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 223 (1940).

<sup>41</sup> See, e.g., *Northern Pac. Ry. Co. v. United States*, 356 U.S. 1, 5-7 (1958).

<sup>42</sup> See, e.g., *United States v. Topco Assocs., Inc.*, 405 U.S. 596, 608 (1972).

<sup>43</sup> See, e.g., *Dr. Miles Medical Co. v. Park & Sons Co.*, 220 U.S. 373, 400 (1911).

<sup>44</sup> See, e.g., *Atlantic Heel Co. v. Allied Heel Co.*, 284 F.2d 879, 884 (1st Cir. 1960).

<sup>45</sup> See, e.g., *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 97 S. Ct. 2549, 2562-63 (1977).



## II. MEASURING THE IMPACT OF SECTION 3(b) ON THE INSURANCE BUSINESS' EXEMPTION FROM THE SHERMAN ACT

### A. What Constitutes a Boycott

To determine whether a particular business practice may be characterized as boycott, coercion or intimidation it is necessary to determine whether that practice comports with the definitions of boycott, coercion or intimidation. Because most Sherman Act violations do not involve coercion or intimidation, no matter how these terms are defined, the critical determination is whether the business practice comports with the definition of boycott.<sup>46</sup>

The Supreme Court has defined a boycott as a concerted refusal to deal.<sup>47</sup> Since violations of section 1 of the Sherman Act, by that section's own terms, must involve a contract, combination or conspiracy,<sup>48</sup> and since this requirement is substantially identical to the concerted action require-

<sup>46</sup> Neither coercion nor intimidation have Sherman Act definitions. The word "coerce" does appear in § 8(b)(1)(A) of the National Labor Relations Act, 29 U.S.C. § 158(b)(1) (1970), and there are many cases which find that specific acts constitute coercion under that act. *See, e.g.*, National Cash Register Co. v. NLRB, 466 F.2d 945, 960 (6th Cir. 1972), *cert. denied*, 410 U.S. 966 (1973); *Booster Lodge No. 405, Int'l Ass'n of Machinists v. NLRB*, 459 F.2d 1143, 1154-55 (D.C. Cir. 1972), *aff'd per curiam*, 412 U.S. 84 (1973).

Construing a Colorado law making it illegal for a manufacturer to "induce or coerce, or attempt to induce or coerce" a dealer, the court in *General Motors Corp. v. Blevins*, 144 F. Supp. 381 (D. Colo. 1956) said that "inducing" was "the process of salesmanship" and persuasion "by legitimate argument or demonstration" whereas to "coerce" was to "compel by threat or other wrongful action." *Id.* at 394. Courts also have defined coercion in a criminal context, *Rhode Island Recreation Center, Inc. v. Aetna Cas. and Sur. Co.*, 177 F.2d 603, 605 (1st Cir. 1949), the coercion necessary to make a confession involuntary and therefore inadmissible into evidence, *Garrity v. New Jersey*, 385 U.S. 493, 496 (1967), and the coercion necessary to make a payment involuntary, *Radich v. Hutchins*, 95 U.S. 210, 213 (1877).

The word "intimidation" occurs frequently in criminal statutes, *see, e.g.*, 18 U.S.C. § 2113(a) (1970), where it means to "make fearful or put into fear." *See United States v. Jacquillon*, 469 F.2d 380, 385 (5th Cir. 1972), *cert. denied*, 410 U.S. 938 (1973).

The words "coercion" and "intimidation" do appear together in the Automobile Dealer Suits against Manufacturers Act, 15 U.S.C. §§ 1221-1225 (1970), which provides for a mutual duty "to guarantee the one party freedom from coercion, intimidation, or threats of coercion or intimidation from the other party . . ." *Id.* at § 1221(e). The court in *Berry Bros. Buick, Inc. v. General Motors Corp.*, 257 F. Supp. 542 (E.D. Pa. 1966), *aff'd per curiam*, 377 F.2d 552 (3d Cir. 1967) distinguished coercion from arbitrary behavior and said that coercion involved "a wrongful demand which will result in sanctions if not complied with." *Id.* at 546.

In *Frankford Hosp. v. Blue Cross*, 417 F. Supp. 1104, 1111-12 (E.D. Pa. 1976), *aff'd*, 554 F.2d 1253 (3d Cir. 1977), the court dealt with the terms "coercion" and "intimidation" as they appear in § 3(b) of the McCarran Act. The plaintiff in *Frankford Hospital* alleged that Blue Cross' refusal to fully reimburse its subscribers for the cost of plaintiff's services unless the plaintiff signed Blue Cross' standard contract was coercion. *Id.* The court rejected this claim, saying that Blue Cross was using its subscribers' business to induce the plaintiff to sign the contract. *Id.* at 1111. The court also rejected the plaintiff's claim that Blue Cross' placing newspaper ads advising its subscribers that they would not be reimbursed fully for the cost of plaintiff's services was intimidation. *Id.*

<sup>47</sup> *Klor's, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207, 212 (1959). This is the definition under the Sherman Act but the word has the same meaning under the McCarran Act. *Cooperative De Seguros Multiples De P.R. v. San Juan*, 294 F. Supp. 627, 628 (D. P.R. 1968). *See 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); *Transnational Ins. Co. v. Rosenlund*, 261 F. Supp. 12, 27 (D. Ore. 1966).

<sup>48</sup> 15 U.S.C. § 1 (Supp. V 1975).

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ment in the definition of boycott, it would seem that whenever the former has been met that the latter also will have been met.<sup>49</sup> Contracts, combinations or conspiracies that violate section 1 of the Sherman Act but are not "concerted" as that term is used in the definition of boycott could not be characterized as boycotts and therefore would be exempt from the Sherman Act whether or not any limitation is placed on section 3(b). To the extent that such section 1 violations exist, they add support to the *Barry* court's contention that it is not necessary to limit section 3(b) in order to avoid emasculatation of the insurance business' Sherman Act exemption.

Examination of trade restraints involving a contract, combination or conspiracy, however, indicates that most such restraints seem to satisfy the concerted action component of a boycott. For these restraints, the determination of whether they can be characterized as boycotts depends on whether they satisfy the other component of a boycott, that is whether they also involve a refusal to deal. In determining whether a Sherman Act violation involves a refusal to deal, it is not sufficient to rely on the judicial characterization of the violation. A Sherman Act violation involving both concerted action and a refusal to deal often is not characterized as a boycott if the refusal to deal has been used to implement another trade restraint.<sup>50</sup>

The use of a refusal to deal to implement another Sherman Act violation was clearly illustrated in *United States v. Parke, Davis and Company*.<sup>51</sup> In *Parke, Davis*, a pharmaceutical manufacturer refused to supply retailers who did not maintain the manufacturer's suggested minimum resale prices.<sup>52</sup> The Court concluded that the manufacturer had violated section 1 of the Sherman Act, characterizing the violation as a conspiracy between the manufacturer and the retailers to maintain resale prices.<sup>53</sup> Although the manufacturer in *Parke, Davis* conspired to maintain resale prices, the

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<sup>49</sup> Section 2 of the Sherman Act, 15 U.S.C. § 2 (Supp. V 1975), provides that "[e]very person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize . . . shall be deemed guilty of a felony . . ." *Id.* Violations of § 2 of the Sherman Act, therefore, unlike violations of § 1, need not involve a contract, combination or conspiracy; § 2 may be violated by a firm acting alone. If a single firm violates § 2, the violation could not be characterized as a boycott because it would not involve concerted action. If more than one firm violates § 2, whether or not the violation could be characterized as a boycott would depend on whether the violation involved a refusal to deal. See text at notes 50-81 *infra*.

<sup>50</sup> Whether a particular business practice is deemed a violation of the Sherman Act may depend on how the court characterizes what was done. For example, whether the sharing of information on the quantity and prices at which goods have been sold is deemed a Sherman Act violation depends on whether the sharing is characterized as price fixing. Compare *American Column and Lumber Co. v. United States*, 257 U.S. 377 (1921) with *Maple Flooring Mfrs. Assoc. v. United States*, 268 U.S. 563 (1924).

However, determining whether a business practice may be characterized as a boycott for the purposes of the McCarran Act does not determine whether that business practice is a violation of the Sherman Act. A business practice may be deemed to be a boycott but not deemed to be a Sherman Act violation. See *Joseph E. Seagram & Sons, Inc. v. Hawaiian Oke & Liquors, Ltd.*, 416 F.2d 71 (9th Cir. 1969), *cert. denied*, 396 U.S. 1062 (1970); *Molinas v. National Basketball Assoc.*, 190 F. Supp. 241 (S.D.N.Y. 1961).

<sup>51</sup> 362 U.S. 29 (1960).

<sup>52</sup> *Id.* at 34.

<sup>53</sup> *Id.* at 45. The Court found that when *Parke, Davis* secured adherence to its suggested resale prices it created a combination among its retailers to maintain resale prices. *Id.*

violation also could have been characterized as a conspiracy to refuse to deal. This alternative characterization stems from *Parke, Davis'* refusal to sell to retailers who resold its products for less than the suggested resale prices.<sup>54</sup> Similar conduct was characterized as a boycott in *Fashion Originators' Guild v. FTC.*<sup>55</sup> In *Fashion Guild*, dress manufacturers refused to sell to retailers who bought from dress manufacturers who copied dress designs.<sup>56</sup> Holding that such conduct violated section 1 of the Sherman Act, the Court characterized the violation as a boycott because the dress manufacturers, acting in concert, refused to deal with certain retailers.<sup>57</sup> By exactly the same reasoning, the violation in *Parke, Davis* could have been characterized as a boycott.

In both *Parke, Davis* and *Fashion Guild* a refusal to deal was used as a means to another end. In *Fashion Guild* the dress manufacturers sought to protect their property rights in dress designs, while in *Parke, Davis* the manufacturer sought to maintain minimum resale prices. But whatever its ultimate purpose, the restraint in *Parke, Davis* involved a concerted refusal to deal and therefore, like the restraint in *Fashion Guild*, could have been characterized as a boycott.<sup>58</sup>

Although *Parke, Davis* illustrates that there are Sherman Act violations which are not characterized as boycotts which do involve concerted refusals to deal, it does not indicate the extent to which refusals to deal are necessary elements of anticompetitive practices. Whether a refusal to deal is a necessary component of a particular Sherman Act violation is important because if it were necessary to refuse to deal in order to implement the violation then the violation always could be characterized as a boycott. And if a violation always can be characterized as a boycott then, unless some limitation is placed on section 3(b) of the McCarran Act, that violation always will be subject to Sherman Act liability notwithstanding the insurance business' Sherman Act exemption. On the other hand, if a violation need not be implemented by a refusal to deal, then it falls within the insurance business' exemption from the Sherman Act even if no limitation is placed on section 3(b). Accordingly, the extent to which refusals to deal are necessary to implement Sherman Act violations will determine the extent to which section 3(b) interferes with the insurance business' Sherman Act exemption.

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<sup>54</sup> Arguably *Parke, Davis'* refusal to deal was not "concerted" as that term is used in the definition of boycott because only *Parke, Davis* refused to deal, albeit pursuant to a conspiracy with its retailers. Cf. *Webster Motor Car Co. v. Packard Motor Car Co.*, 243 F.2d 418 (D.C. Cir.), cert. denied, 355 U.S. 822 (1959) (finding no boycott where one party urged another party to refuse to deal with a single third party). But it seems unlikely that the behavior in, for example, *Klor's, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207 (1959) would not have been characterized as a boycott had *Broadway-Hale* induced only one manufacturer to refuse to deal with *Klor's*.

<sup>55</sup> 312 U.S. 457 (1941).

<sup>56</sup> *Id.* at 461.

<sup>57</sup> *Id.* at 465.

<sup>58</sup> Resale price maintenance is itself a violation of the Sherman Act. *Dr. Miles Medical Co. v. Park & Sons Co.*, 220 U.S. 373, 400 (1911). Thus when the Supreme Court characterized what was done in *Parke, Davis* as a conspiracy to maintain resale prices it was characterizing what was done as a Sherman Act violation. On the other hand, protecting property rights in dress designs is not a Sherman Act violation. Therefore in order to characterize what was done in *Fashion Guild* as a Sherman Act violation the Court characterized what was done as a conspiracy to refuse to deal.

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Thus, whether the *Barry* court was correct in rejecting the contention that it is necessary to limit section 3(b) in order to avoid emasculating the insurance business' antitrust exemption can be answered by examining various Sherman Act violations to determine whether refusals to deal are necessary for their implementation.

### B. *The Necessity of Refusing to Deal*

#### 1. Price Fixing, Resale Price Maintenance, Fixing the Terms of Trade

The question whether a refusal to deal is necessary to implement resale price maintenance, price fixing, or any agreement which establishes terms of sale<sup>59</sup> can be answered by an examination of the nature and function of price. A refusal to deal is a component of these trade restraints because a price is an announcement of the terms upon which a seller will deal and, by implication, the terms upon which a seller will not deal.<sup>60</sup> If a seller says that it sells widgets for five dollars, it is saying that it will not sell them for less than five dollars. The five dollar price is, therefore, a refusal to deal for less than that price.<sup>61</sup>

Because a refusal to deal is inherent in the concept of price, a price fixing agreement can be implemented only by a refusal to deal. Thus, if two or more firms fix the price of certain goods and a buyer offers to buy at a price lower than the fixed price, the sellers either can sell at the price offered by the buyer or they can refuse to sell. If the sellers sell at the price offered, the price fixing agreement is not being implemented. But if the sellers refuse to sell at the price being offered, their refusal is pursuant to the agreement fixing the price and constitutes a concerted refusal to deal.<sup>62</sup> A refusal to deal thus is necessary to implement a price fixing agreement. Accordingly, agreements which fix prices always can be characterized as boycotts.

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<sup>59</sup> There are other means to implement resale price maintenance or agreements fixing either price or other terms of sale, but these other means are outside the bounds of the market. For example, coercion or intimidation can be used to implement resale price maintenance. Of course § 3(b) would apply to such conduct regardless of whether there were a refusal to deal. Price fixing could also be implemented by enlisting the aid of the government. However, government cannot violate the Sherman Act, therefore the applicability of § 3(b) is immaterial. *Parker v. Brown*, 317 U.S. 341, 352 (1943).

<sup>60</sup> In *United States v. Trans-Missouri Freight Ass'n*, 166 U.S. 290 (1897), involving price-fixing in the railroad industry, the government's bill alleged that the defendants had "declined and refused to fix or establish and maintain or give on their railroads rates and prices for the carrying of freight . . ." *Id.* at 299. *But see* *Daily Press, Inc. v. United Press Int'l*, 412 F.2d 126, 135 (6th Cir.), *cert. denied*, 396 U.S. 990 (1969) (dictum that a willingness to deal but only under certain conditions is not a refusal to deal).

<sup>61</sup> Setting a price is not a Sherman Act violation unless it is done pursuant to a contract, combination or conspiracy. But if a price is pursuant to a contract, combination or conspiracy, the refusal to sell for less than that price is also pursuant to the same contract, combination or conspiracy. And if the refusal to sell for less than that price is pursuant to a contract, combination or conspiracy, the conduct is a boycott.

<sup>62</sup> The boycott is present whether the prices are fixed by direct agreement as in *United States v. Trans-Missouri Freight Ass'n*, 166 U.S. 290, 292 (1897) or by indirect methods as in *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 224 (1940) or whether the agreement is horizontal as in *Trans-Missouri* or vertical as in *Dr. Miles Medical Co. v. Park & Sons Co.*, 220 U.S. 373, 375 (1911).

An agreement fixing a term of sale other than the price must be implemented by a refusal to deal in the same way that an agreement fixing the price must be so implemented. Whenever a seller is confronted with a buyer who requests terms of sale different from the terms fixed by the agreement, the seller either must sell on the terms proposed by the buyer and not implement the agreement or it must refuse to deal. A restriction on the price at which a product may be resold is a term of sale, and such restrictions, like agreements fixing any other term of sale, therefore, can be implemented only by a refusal to deal.<sup>63</sup> Because refusals to deal are necessary to implement agreements fixing prices and other terms of sale, such activities in the insurance business will not be exempt from the Sherman Act unless some limitation is placed on section 3(b) of the McCarran Act.<sup>64</sup>

Although a refusal to deal is necessary to implement agreements fixing price and other terms of sale, an examination of various other Sherman Act violations reveals that a refusal to deal is not a necessary component of these violations. If these violations are implemented by means other than refusals to deal, they cannot be characterized as boycotts and accordingly, if undertaken in the insurance business, would be exempt from the Sherman Act regardless of whether any limitation is placed on section 3(b).

## 2. Allocation of Markets

Agreements among competitors allocating the total market among themselves, as exemplified by *Timken Roller Bearing Co. v. United States*,<sup>65</sup> provide an example of a frequently occurring Sherman Act violation that commonly is implemented by a refusal to deal but which need not be so implemented. *Timken* involved an agreement dividing the market for friction bearings along territorial lines.<sup>66</sup> In addition to dividing the market among themselves, the defendants also agreed "not to sell bearings directly, or to others for shipment into the other party's territory . . ."<sup>67</sup> This agreement not to sell to customers allocated to other defendants was an

<sup>63</sup> If even one buyer is not bound by a restriction on resale prices, the whole price maintenance scheme will probably collapse. If the buyer who is not bound lowers its prices, it will force its competitors to lower their prices also. In *Parke, Davis*, the unwillingness of one or two large retailers to observe the suggested resale prices caused the whole scheme to collapse. 362 U.S. at 36.

<sup>64</sup> The implications of this are rather startling. R.I. GEN. LAWS § 27-6-9 (1956) provides that an insurance company may join a rating association and adopt the rates filed by the association as its own. R.I. GEN. LAWS § 27-6-26 specifically allows cooperation among rating associations and insurers in establishing rates. Many other states have similar laws. *E.g.*, N.H. REV. STAT. ANN. § 414.4(E) (1955); ME. REV. STAT. tit. 24-A, c. 25 § 2309 (1974). See 6 ABA INS. NEG. AND COMP. LAWS SECTION 153, 225-227, 230-31 (1964).

The First Circuit's assertion that the insurance industry has relied on the limited applicability of § 3(b) only since the decision in *Transnational Ins. Co. v. Rosenlund*, 261 F. Supp. 12 (D. Ore. 1966), 555 F.2d at 7, indicates that the court may not have recognized that its holding had far-reaching implications. These statutes allowing price fixing in the insurance industry indicate reliance on the proposition that § 3(b) does not apply to price fixing.

<sup>65</sup> 341 U.S. 593 (1951).

<sup>66</sup> *Id.* at 595. The agreements also fixed prices and provided for cooperation to protect each other's markets, to eliminate outside competition and to eliminate exports from and imports to the United States. *Id.* at 596.

<sup>67</sup> *United States v. Timken Roller Bearing Co.*, 83 F. Supp. 284, 293 (N.D. Ohio 1949).

agreement to refuse to deal with such customers. Thus, the violation in *Timken* could have been characterized as a boycott.<sup>68</sup>

Although the conduct in *Timken* could have been characterized as a boycott, *Timken* itself suggests a mechanism other than a refusal to deal which could be used to implement an agreement allocating markets. In addition to dividing the market among themselves, each defendant in *Timken* agreed to pay any other defendant five percent of the sales price of any sales it made to that other defendant's customers.<sup>69</sup> Had the defendants in *Timken* not agreed to refuse to deal with customers allocated to each other but merely agreed to the five percent penalty provision, buyers could have bought from whomever they wished and sellers could have sold to whomever they wished.<sup>70</sup> Hence, there would have been no boycott.

The hypothetical suggested by *Timken* indicates that market allocation schemes do not necessarily involve refusals to deal and therefore cannot be characterized a fortiori as boycotts. Market allocation schemes in the insurance business implemented without refusals to deal would be exempt from the Sherman Act regardless of whether section 3(b) were limited to conduct by insurance companies and agents aimed at other insurance companies and agents.

### 3. Tying Arrangements

Tying arrangements, like market allocation schemes, often have been implemented by a refusal to deal, but, as in the case of market allocation schemes, a refusal to deal may not be essential for their implementation.<sup>71</sup> *International Salt Co. v. United States*<sup>72</sup> provides an example of a tying arrangement that need not have been implemented by a refusal to deal.

In *International Salt* the defendant utilized equipment leases containing a provision which required the lessee to use only International's salt in the leased equipment.<sup>73</sup> A lessee who agreed to this provision essentially agreed

<sup>68</sup> The market allocation schemes in other cases also have involved agreements not to deal with customers allocated to a competitor and therefore, like the market allocation scheme in *Timken*, can be characterized as boycotts. See *United States v. Holophane Co.*, 119 F. Supp. 114, 117 (S.D. Ohio 1954), *aff'd per curiam*, 352 U.S. 903 (1956).

Exclusive territories are imposed "vertically" by a common supplier whereas allocated markets are established "horizontally" by agreement among competitors. See *United States v. Sealy, Inc.*, 388 U.S. 350, 352 (1967). Agreements establishing exclusive territories, like those establishing market allocation schemes, have involved a further agreement not to deal with customers allocated to another dealer. *Id.* See *White Motor Co. v. United States*, 372 U.S. 253, 255-56 (1963).

<sup>69</sup> 83 F. Supp. at 294.

<sup>70</sup> The penalty provision would deter a defendant from soliciting or encouraging business from customers allocated to another defendant. To the extent that the volume of business was dependent on such solicitation buyers would tend to buy from the defendant to which they had been assigned. To the extent that buyers bought from defendants to which they were not assigned, the defendant to which they had been assigned would benefit by receiving the penalty from the defendant who actually made the sale.

<sup>71</sup> In *Northern P. Ry. Co. v. United States*, 356 U.S. 1 (1958) the Court defined a tying arrangement as "an agreement by a party to sell one product but only on the condition that the buyer also purchases a different (or tied) product, or at least agrees that he will not purchase that product from any other supplier." *Id.* at 5-6.

<sup>72</sup> 332 U.S. 392 (1947).

<sup>73</sup> *Id.* at 394-95. Some of the leases provided that the lessee could deal with another supplier, but only if International failed to match that supplier's price. *Id.* at 394 n.5. Even

to refrain from buying salt from the defendant's competitors. As a result, the violation in *International Salt* involved a refusal to deal and could have been characterized as a boycott.<sup>74</sup>

The defendant in *International Salt* could have employed means other than a refusal to deal to deter its lessees from purchasing salt from its competitors. For example, International could have imposed an additional rental charge based on the volume of salt used in the machines and used the proceeds of this additional charge to reduce the price of its own salt.<sup>75</sup> The effect of this charge would have been to lower the price of defendant's salt, thereby increasing the likelihood that the lessee would buy defendant's salt.<sup>76</sup> This hypothetical suggests that tying arrangements, like market allocation schemes, do not necessarily involve refusals to deal and therefore cannot be characterized a fortiori as boycotts. Thus, such tying arrangements in the insurance business would be exempt from the Sherman Act regardless of whether section 3(b) were limited to conduct by insurance companies and agents aimed at other insurance companies and agents.

#### 4. Conspiracies to Crush Competitors

While tying arrangements and agreements allocating markets frequently have involved refusals to deal, conspiracies to crush competitors generally have been implemented by means other than refusals to deal.<sup>77</sup>

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though these lessees could deal with other suppliers under some circumstances the leases may still be characterized as agreements to refuse to deal. The refusal to deal in *Fashion Originators' Guild v. FTC*, 312 U.S. 457 (1941), which was characterized as a boycott, was not a refusal to deal under all circumstances; the manufacturers refused to deal only if the retailers dealt with certain other manufacturers. *Id.* at 461. If refusals to deal under limited circumstances were distinguished from refusals to deal under all circumstances, it would be an easy matter to fashion circumstances that made the refusal to deal under those circumstances the functional equivalent of a refusal to deal under all circumstances.

<sup>74</sup> In holding that International's leases were per se violations of the Sherman Act, the Court said that they foreclosed competitors from a substantial market. 322 U.S. at 396, citing *Fashion Originators' Guild v. FTC*, 114 F.2d 80 (1940), *aff'd*, 312 U.S. 457 (1941). In *Fashion Guild* manufacturers refused to deal with retailers who had dealt with certain other manufacturers; the court characterized this conduct as a boycott. 312 U.S. at 461.

<sup>75</sup> The prerequisite for a successful tying arrangement is a quantum of monopoly power in the market of the tying product. The ability to impose an additional rental charge and to make the proceeds of this charge available to reduce the price of the salt is the result of this monopoly power. In *International Salt* monopoly power was provided by a patent on the machines. Even if International already were charging the monopoly price for its machines it could still raise the price of the machines and not affect revenue or the amount demanded if it lowered the price of the salt a corresponding amount.

<sup>76</sup> Such a scheme would have been successful to the extent that the salt used in the machines could be differentiated, for pricing purposes, from other salt. One of the machines used a salt "tablet." This suggests that it was possible to design the machine so that it would use tablets not readily usable elsewhere.

There were probably other ways to implement the tying arrangement without refusing to deal. In *International Salt*, the Court recognized that International had a legitimate interest in controlling the quality of the salt used in the machines because International was responsible for their repair and maintenance. 322 U.S. at 397. A requirement that all salt not supplied by International be inspected by International probably would increase the chance that only salt supplied by International would be used in the machines. An inspection fee would certainly accomplish this objective.

<sup>77</sup> *Forgett v. Scharf*, 181 F.2d 754, 755 (3d Cir.), *cert. denied*, 340 U.S. 825 (1950); *Northeast Airlines, Inc., v. World Airways, Inc.*, 262 F. Supp. 316, 317-18 (D. Mass. 1966); *Caldwell-Clements, Inc. v. Cowan Publishing Corp.*, 130 F. Supp. 326, 328 (S.D.N.Y. 1955).

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In *Atlantic Heel Co. v. Allied Heel Co.*,<sup>78</sup> the plaintiff alleged that the defendant conspired with others to crush the plaintiff by establishing a competing business, inducing the plaintiff's employees to quit, visiting its plant to obtain trade secrets and interfere with production, falsely disparaging plaintiff, wooing away salesmen, instituting lawsuits in bad faith, interfering with sources of supplies, seeking to obtain credit under the pretense that defendant was affiliated with plaintiff, and breaching defendant's fiduciary duty as plaintiff's director.<sup>79</sup> While some of the defendant's alleged activities may have involved refusals to deal,<sup>80</sup> establishing a competing business, obtaining trade secrets, instituting lawsuits, claiming affiliation to get credit, interfering with production and breaching fiduciary duties do not.<sup>81</sup> Had the defendant confined itself to these means that do not involve a refusal to deal its actions could not be characterized as a boycott. And if the defendant's actions could not be characterized as a boycott, such actions, had they occurred in the business of insurance, would be exempt from the Sherman Act regardless of whether section 3(b) were limited to conduct by insurance companies and agents aimed at other insurance companies and agents.

### III. THE NECESSITY OF LIMITING SECTION 3(b)

In *Barry*, the First Circuit used predatory pricing and benign means to maintain a monopoly as examples to support its conclusion that the failure to limit section 3(b) to conduct by insurance companies and agents aimed at other insurance companies and agents would not emasculate the insurance business' antitrust exemption. The analysis in this note has revealed that tying arrangements, market allocation schemes and conspiracies to crush competitors, each common violations of section 1 of the Sherman Act, also could be exempted from the Sherman Act regardless of whether section 3(b) were limited.

Despite all this support for the *Barry* court's contention that section 3(b) need not be limited it still might be argued that unless section 3(b) were limited it would render the Sherman Act exemption sufficiently nugatory to justify limiting the scope of section 3(b). While as a theoretical matter it may be possible to devise market allocation schemes and tying arrangements that do not involve refusals to deal, as a practical matter these restraints generally have involved refusals to deal. Hence, unless some limitation were placed on section 3(b) the insurance business effectively would be completely subject to section 1 of the Sherman Act and would be subject to the Sherman Act to virtually the same extent as a business that did not

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<sup>78</sup> 284 F.2d 879 (1st Cir. 1960). For an example of the use of a refusal to deal to crush a competitor, see *United States v. General Motors Corp.*, 384 U.S. 127, 136 (1966).

<sup>79</sup> 284 F.2d at 879-80.

<sup>80</sup> Thus, for example, inducing employees to quit may have involved urging the employees not to deal with the plaintiff or it may have involved offering them higher salaries to work for the defendant. The opinion does not provide enough information to determine whether inducing employees to quit involved a refusal to deal.

<sup>81</sup> The nature of the allegations in *Atlantic Heel* suggests that coercion or intimidation may have been involved. If either were, the defendant's activities would be subject to the Sherman Act whether or not they involved a refusal to deal.



have the benefit of any exemption. Such a result would be in direct conflict with the legislative purpose in enacting the McCarran Act and thus would argue for a limitation on section 3(b).

The force of this argument, however, is diminished by observing that outside the insurance business there is no reason for one seeking to establish a tying arrangement or market allocation scheme to avoid incorporating a refusal to deal because these restraints are Sherman Act violations whether or not they involve refusals to deal. Within the insurance business, however, if section 3(b) were not limited to conduct by insurance companies and agents aimed at other insurance companies and agents, a tying arrangement or market allocation scheme would be exempt from the Sherman Act only if it did not involve a refusal to deal. An insurance company's ability to avoid Sherman Act liability by avoiding refusals to deal would be an incentive to avoid such refusals that is not present outside of the insurance business where Sherman Act liability cannot be avoided by avoiding refusals to deal.<sup>82</sup> This incentive is likely to result in tying arrangements and market allocation schemes in the insurance business that do not involve refusals to deal.

To the extent that insurance companies ignore this incentive and engage in market allocation schemes and tying arrangements that involve refusals to deal and to the extent that they fix prices and other terms of sale they would be subject to the Sherman Act, absent some limitation on section 3(b). However, the fact that insurance companies cannot avoid liability for certain violations if they persist in implementing them by means of refusals to deal, and the fact that they cannot avoid Sherman Act liability for certain other violations at all does not establish that section 3(b) emasculates the insurance business' antitrust exemption. To the contrary, the Sherman Act exemption would retain importance even if no limitations were placed on section 3(b) because insurance companies nevertheless could avoid liability for significant violations<sup>83</sup> of both section 1 and section 2 of the Sherman Act.<sup>84</sup>

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<sup>82</sup> In other words if there is a loophole by which insurance companies can avoid the Sherman Act, insurance company behavior will tend to fall within this loophole.

<sup>83</sup> Tying arrangements and market allocations schemes are per se violations of the Sherman Act. *United States v. Topco Assocs., Inc.*, 405 U.S. 596, 608 (1972); *International Salt Co. v. United States*, 332 U.S. 392, 396 (1947). There is some authority that a conspiracy to crush a competitor is also a per se violation. *Atlantic Heel Co. v. Allied Heel Co.*, 284 F.2d 879, 884 (1st Cir. 1960). A per se violation is one "which because of [its] pernicious effect on competition and lack of any redeeming virtue [is] conclusively presumed to be unreasonable and therefore illegal . . ." *Northern P. Ry. Co. v. United States*, 356 U.S. 1, 5 (1958). The sheer magnitude of the harm caused by these restraints on competition is sufficient reason to characterize them as significant violations of the Sherman Act.

<sup>84</sup> See text at note 26 *supra*. Even assuming that the word "boycott" in § 3(b) was intended to include those activities traditionally referred to as boycotts, limiting § 3(b) to boycotts by insurance companies and agents aimed at other insurance companies and agents would not effectuate this intent. What was done in *Barry* was a "traditional" boycott: the defendants refused to deal with the plaintiffs. But the boycott could have been an effort to implement an agreement fixing the terms of sale (an agreement to issue only a certain type of policy), a market allocation scheme (Dr. Barry was assigned to St. Paul Fire and Marine Insurance Co.), or it could have resulted from some other motive (Dr. Barry was a poor insurance risk). This suggests that the difference between a "traditional" boycott and price fixing, market allocation schemes and other Sherman Act violations is how the court characterizes what was done. See text at notes 51-59 *supra*.

CONCLUSION

In *Barry v. St. Paul Fire & Marine Insurance Co.*, the First Circuit justified its conclusion that no limitation need be placed on section 3(b) in order to avoid emasculation of the insurance business' antitrust exemption by citing two examples of violations of section 2 of the Sherman Act that could not be characterized as boycott, coercion or intimidation. These examples did not foreclose the argument of other courts that failure to limit section 3(b) would completely subject the insurance business to section 1 of the Sherman Act or that it would render the insurance business subject to the Sherman Act to virtually the same extent as a business not enjoying any exemption. Comparison between various violations of section 1 of the Sherman Act and the definition of boycott, however, demonstrates that significant section 1 violations do not necessarily involve refusals to deal and therefore cannot be characterized as boycotts. Since section 3(b) of the McCarran Act chiefly requires that anticompetitive practices must involve a boycott in order to nullify the insurance business' Sherman Act exemption, these violations would remain exempt from the Sherman Act whether or not any limitation were placed on section 3(b). Accordingly, the *Barry* court was correct in concluding that a failure to limit section 3(b) would not emasculate the insurance business' Sherman Act exemption.

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