

# Antitrust Law-Insurance-Policyholders May Maintain Sherman Act Antitrust Suit Against Insurer Under Boycott Exception of McCarran-Ferguson Act

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## RECENT DEVELOPMENTS

### **Antitrust Law—INSURANCE—POLICYHOLDERS MAY MAINTAIN SHERMAN ACT ANTITRUST SUIT AGAINST INSURER UNDER BOYCOTT EXCEPTION OF McCARRAN-FERGUSON ACT**

*Barry v. St. Paul Fire & Marine Insurance Co.*,  
555 F.2d 3 (1st Cir. 1977), *cert. granted*,  
46 U.S.L.W. 3283 (Nov. 1, 1977) (No. 77-240).

The McCarran-Ferguson Act<sup>1</sup> confers upon the “business of insurance”<sup>2</sup> a broad exemption from federal antitrust laws.<sup>3</sup> Under

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<sup>1</sup> 15 U.S.C. §§ 1011-1015 (1970) (originally enacted as Act of Mar. 9, 1945, Pub. L. No. 79-15, ch. 20, 59 Stat. 33).

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. . . .

[Section 2.]

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

(b) No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance: *Provided*, That after June 30, 1948, the Act of July 2, 1890, as amended, known as the Sherman Act, and the Act of October 15, 1914, as amended, known as the Clayton Act, and the Act of September 26, 1914, known as the Federal Trade Commission Act, as amended, shall be applicable to the business of insurance to the extent that such business is not regulated by State law. . . .

[Section 3.]

(a) Until June 30, 1948, the Act of July 2, 1890, as amended, known as the Sherman Act, and the Act of October 15, 1914, as amended, known as the Clayton Act, and the Act of September 26, 1914, known as the Federal Trade Commission Act, and the Act of June 19, 1936, known as the Robinson-Patman Anti-Discrimination Act, shall not apply to the business of insurance or to acts in the conduct thereof.

(b) Nothing contained in this [Act] shall render the said Sherman Act inapplicable to any agreement to boycott, coerce, or intimidate, or act of boycott, coercion, or intimidation.

*Id.* §§ 1011-1013. [Hereinafter section numbers refer to those of the Act.]

<sup>2</sup> The Supreme Court has construed “business of insurance” to mean the range of

section 3(b) of the Act, however, "any agreement to boycott, coerce, or intimidate, or act of boycott, coercion, or intimidation"<sup>4</sup> remains subject to the Sherman Antitrust Act.<sup>5</sup>

In recent years, courts have advanced the proposition that Congress never intended section 3(b) to authorize suits by policyholders against their insurers.<sup>6</sup> The First Circuit, in *Barry v. St. Paul Fire & Marine Insurance Co.*,<sup>7</sup> rejected that rule. The *Barry* decision suggests an expanded federal role in the regulation of insurance contracts.

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activities that grow out of or surround the relationship between policyholders and their insurers. *SEC v. National Sec., Inc.*, 393 U.S. 453, 460 (1969). *National Securities* held that an Arizona law aimed at protecting the interests of insurance companies' stockholders was not enacted for the purpose of regulating the business of insurance under § 2 of the McCarran-Ferguson Act. For discussions of the fate of "business of insurance" since *National Securities*, see Note, *Federal Regulation of Insurance Companies: The Disappearing McCarran Act Exemption*, 1973 DUKE L.J. 1340; Comment, *The McCarran Act's Antitrust Exemption for "the Business of Insurance": A Shrinking Umbrella*, 43 TENN. L. REV. 329 (1976); Note, *The McCarran-Ferguson Act: A Time for Procompetitive Reform*, 29 VAND. L. REV. 1271 (1976).

<sup>3</sup> The Sherman Act, the Clayton Act, and the Federal Trade Commission Act are applicable to the business of insurance only "to the extent that such business is not regulated by State law." McCarran-Ferguson Act § 2(b). Courts have been very liberal in finding state regulation. For a discussion of this tendency, see Crawford v. American Title Ins. Co., 518 F.2d 217, 224-27 (5th Cir. 1975) (dissenting opinion, Gobold, J.). Only where the insurance companies' conduct involves significant multistate activity have courts found a lack of state regulation. See *FTC v. Travelers Health Ass'n*, 362 U.S. 293, 297-99 (1960) (state regulation of insurer's interstate activities inadequate to preempt FTC jurisdiction); *Seasongood v. K & K Ins. Agency*, 548 F.2d 729, 738-39 (8th Cir. 1977) (greater connection to state than residence required for state regulation to preempt federal antitrust laws). See generally Note, *The Limits of State Regulation under the McCarran-Ferguson Act: Travelers Insurance Co. v. Blue Cross of Western Pennsylvania*, 42 GEO. WASH. L. REV. 427, 434-44 (1974).

<sup>4</sup> McCarran-Ferguson Act § 3(b) is commonly known as the "boycott exception" or the "boycott provision," and will be referred to as such throughout this Note.

<sup>5</sup> 15 U.S.C. §§ 1-7 (1970 & Supp. V 1975).

<sup>6</sup> E.g., *Addrisi v. Equitable Life Assurance Soc'y of the United States*, 503 F.2d 725 (9th Cir. 1974) (challenge to loan-insurance tie-in), cert. denied, 420 U.S. 929 (1975); *Pastor v. Hartford Fire Ins. Co.*, [1976-1] TRADE CAS. (CCH) ¶ 60,783 (C.D. Cal. 1976) (challenge to change in professional liability coverage); *Pierucci v. Continental Cas. Co.*, 418 F. Supp. 704 (W.D. Pa. 1976) (challenge to change in professional liability coverage); *Mathis v. Automobile Club Inter-Ins. Exch.*, 410 F. Supp. 1037 (W.D. Mo. 1976) (challenge to membership requirement); *Meidler v. Aetna Cas. & Sur. Co.*, 372 F. Supp. 509 (S.D. Tex. 1974), *aff'd*, 506 F.2d 732 (5th Cir. 1975) (challenge to risk classification scheme).

This proposition bars policyholder antitrust actions. Since the insurer-insured relationship is the core of "business of insurance" (see note 2 *supra*), and since courts are quick to find state regulation (see note 3 *supra*), policyholders can avoid the McCarran-Ferguson Act's antitrust exemption only through the boycott exception.

<sup>7</sup> 555 F.2d 3 (1st Cir. 1977), cert. granted, 46 U.S.L.W. 3283 (Nov. 1, 1977) (No. 77-240).

## I

## HISTORICAL PERSPECTIVE

A. *The Act: A Hasty Compromise*

In *United States v. South-Eastern Underwriters Association*<sup>8</sup> the Supreme Court held, for the first time, that the business of insurance was subject to federal antitrust laws.<sup>9</sup> Congress responded swiftly to that decision by passing the McCarran-Ferguson Act.<sup>10</sup> The original bill,<sup>11</sup> introduced by Senators McCarran and Ferguson, clearly supported state control over insurance matters but was ambiguous as to the role of federal antitrust statutes. Under the bill's exemption provision,

[n]o 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 so provides.<sup>12</sup>

Another provision gave the insurance industry a two-year moratorium from antitrust liability *except* for "any agreement or act of boycott, coercion, or intimidation."<sup>13</sup> The exemption provision indicated that the antitrust laws were to bow to state insurance regu-

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

<sup>9</sup> For 75 years the Supreme Court maintained that insurance was not commerce. *See, e.g.,* Hooper v. California, 155 U.S. 648, 655 (1895); Paul v. Virginia, 75 U.S. (8 Wall.) 168, 183 (1869). Without authority under the commerce clause (U.S. CONST. art. 1, § 8, cl. 3) Congress could not regulate insurance transactions. *Id.* amend. X. Consequently the business of insurance enjoyed immunity from federal antitrust statutes. That immunity ended abruptly in 1944. The *South-Eastern Underwriters* decision sustained an indictment of the Association and nearly 200 member insurance companies for violations of the Sherman Act. The conspirators had fixed premium rates and agents' commissions. They had also blacklisted competitors and boycotted consumers who bought from non-Association members. 322 U.S. at 535-36.

<sup>10</sup> Congress was under considerable pressure to pass legislation quickly. *South-Eastern Underwriters* not only exposed the entire insurance industry to enormous antitrust liability but also cast doubt upon the continued validity of state regulation and taxation of insurance. Many insurance companies announced they would not pay state taxes until these constitutional issues were resolved. 91 CONG. REC. 484 (remarks of Senator Ferguson), 979 (remarks of Rep. Anderson), 1093 (remarks of Rep. Sumners) (1945). *See also* 90 CONG. REC. 6548 (1944) (remarks of Rep. Cravens).

<sup>11</sup> S. 340, 79th Cong., 1st Sess., 91 CONG. REC. 478 (1945). The bill was a modification of one drafted by the legislative committee of the National Association of Insurance Commissioners. *Id.* at 483 (remarks of Senator O'Mahoney), 1488 (remarks of Senator Barkley).

<sup>12</sup> S. 340 § 2(b), 79th Cong., 1st Sess., 91 CONG. REC. 478 (1945).

<sup>13</sup> *Id.* § 4(b), 91 CONG. REC. at 478.

lations. But the moratorium provision, with its boycott exception, suggested a strong federal interest in breaking up restraints of trade within the insurance industry.<sup>14</sup>

The Senate and the House lined up on opposite sides of the controversy.<sup>15</sup> The Senate bill made the Sherman Act<sup>16</sup> and the Clayton Act<sup>17</sup> fully applicable to the insurance business.<sup>18</sup> The House bill made the antitrust statutes effective only in the absence of conflicting state insurance laws.<sup>19</sup> Under tremendous pressure to enact legislation,<sup>20</sup> the two houses essentially split their differences. As enacted, section 2(b) made the Sherman Act, the Clayton Act, and the Federal Trade Commission Act<sup>21</sup> applicable to the business of insurance, *but only* "to the extent that such business is not regulated by State law."<sup>22</sup> This section, an apparent victory for the House, was limited by an expansion of the boycott exception. Whereas the exception had previously affected only the two-year moratorium,<sup>23</sup> it now modified the entire Act.<sup>24</sup> As a result, the phrase "boycott, coerce, or intimidate" became important to the meaning of the Act as a whole: if interpreted broadly, the Senate view would prevail; if interpreted narrowly, the House view would prevail. Congress enacted the bill without further clarification.<sup>25</sup>

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<sup>14</sup> Senator Ferguson, co-sponsor of the bill, evidently believed that § 2(b) did not allow states to negate the federal antitrust laws. 91 CONG. REC. at 479. He admitted, however, that the bill was ambiguous and proposed an amendment excluding the Sherman Act and the Clayton Act from the operation of § 2(b). *Id.* at 486. The Senate passed the amendment. *Id.* at 488. See note 18 *infra*. The House later rejected the amendment, and it did not appear in the conference bill. See notes 19-22 and accompanying text *infra*.

<sup>15</sup> In the previous session of Congress, the House passed a bill exempting insurance companies from federal antitrust liability. H.R. 3270, 78th Cong., 2d Sess., 90 CONG. REC. 6565 (1944). The bill died in the Senate. *Id.* at 8054.

<sup>16</sup> 15 U.S.C. §§ 1-7 (1970 & Supp. V 1975).

<sup>17</sup> 15 U.S.C. §§ 12-27 (1970).

<sup>18</sup> The Senate amended § 2(b) to read: "No act of Congress, except [the Sherman Act] and/or [the Clayton Act], shall be construed . . ." 91 CONG. REC. at 488.

<sup>19</sup> The House explicitly rejected the Senate's view on the proper scope of the federal antitrust laws, re-amending § 2(b) to read: "No act of Congress shall be construed . . ." *Id.* at 1085, 1093.

<sup>20</sup> See note 10 *supra*.

<sup>21</sup> 15 U.S.C. §§ 41-58 (1970 & Supp. V 1975).

<sup>22</sup> McCarran-Ferguson Act § 2(b).

<sup>23</sup> 91 CONG. REC. at 488, 1085. Before the bill went into conference, the exception was not very significant. In the Senate version, the Sherman Act and the Clayton Act would take full effect upon expiration of the moratorium. In the House version, the states could enact laws to preempt even the boycott exception.

<sup>24</sup> McCarran-Ferguson Act § 3(b).

<sup>25</sup> See 91 CONG. REC. at 1542, 1595.

### B. *Judicial Construction of Section 3(b): The Meicler Rule*

For nearly thirty years following passage of the McCarran-Ferguson Act, courts generally assumed that the boycott exception would reach any boycott illegal under the Sherman Act.<sup>26</sup> Only *Transnational Insurance Co. v. Rosenlund*<sup>27</sup> suggested otherwise: "The legislative history shows that the boycott, coercion and intimidation exception, [*sic*] 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."<sup>28</sup>

In 1974, *Meicler v. Aetna Casualty and Surety Co.*<sup>29</sup> adopted *Transnational's* blacklist analysis to dismiss a policyholder antitrust action. The Meiclors charged Texas automobile liability insurers with collusion in setting risk classifications<sup>30</sup> and claimed a right of action under the boycott exception.<sup>31</sup> Although admitting that the

<sup>26</sup> See *Monarch Life Ins. Co. v. Loyal Protective Life Ins. Co.*, 326 F.2d 841, 846 (2d Cir. 1963) (dictum), *cert. denied*, 376 U.S. 952 (1964); *Cooperativa de Seguros Multiples v. San Juan*, 294 F. Supp. 627, 628 (D.P.R. 1968); *Professional & Business Men's Life Ins. Co. v. Banker's Life Co.*, 163 F. Supp. 274, 281-83 (D. Mont. 1958). These three cases involved disputes between insurance companies. Prior to 1969, persons outside the industry rarely brought antitrust actions against insurers. The Supreme Court's decision in *SEC v. National Sec., Inc.*, 393 U.S. 453 (1969), opened insurance companies to liability for anticompetitive activity not falling within the "business of insurance." *Accord*, *Hill v. National Auto Glass Co.*, 293 F. Supp. 295 (N.D. Cal. 1968) (action by auto repair shop charging insurers with conspiracy to direct policyholders' business to particular shops). See note 2 *supra*. The years following *National Securities* saw an increasing number of challenges to insurance industry rate fixing, tie-ins, and other practices. See, e.g., *Battle v. Liberty Nat'l Life Ins. Co.*, 493 F.2d 39 (5th Cir. 1974) (funeral services and merchandise tied to burial insurance), *cert. denied*, 419 U.S. 1110 (1975); *Ohio AFL-CIO v. Insurance Rating Bd.*, 451 F.2d 1178 (6th Cir. 1971) (rate fixing), *cert. denied*, 409 U.S. 917 (1972); *Schwartz v. Commonwealth Land Title Ins. Co.*, 374 F. Supp. 564 (E.D. Pa. 1974) (fixing of fees charged at real estate closings); *Fleming v. Travelers Indem. Co.*, 324 F. Supp. 1404 (D. Mass. 1971) (rate fixing).

<sup>27</sup> 261 F. Supp. 12 (D. Ore. 1966).

<sup>28</sup> *Id.* at 26 (dictum) (emphasis in original). The court dismissed plaintiff's complaint on the ground that it failed to allege a boycott.

Entirely aside from the legislative history of the Act, and assuming that the exception is applicable to the arena in which we are working, there is absolutely nothing in this record which would indicate a boycott, coercion or intimidation. . . . The word "boycott," as used in this type of legislation, implies an urging or an agreement with another person to desist from doing business with another. The word does not apply to cases where persons are urged to do business with another. *Id.* at 27.

<sup>29</sup> 372 F. Supp. 509 (S.D. Tex. 1974), *aff'd*, 506 F.2d 732 (5th Cir. 1975).

<sup>30</sup> The Meicler's automobile liability insurer had put them in a higher risk class. After the reclassification, no other insurer would sell the Meiclors insurance at a lower rate.

<sup>31</sup> Only one reported decision prior to *Meicler* dealt with a boycott claim raised by policyholders under McCarran-Ferguson Act § 3(b). See *Steingart v. Equitable Life Assur-*

terms "boycott and coercion, as commonly defined, might be construed to encompass [the plaintiffs' allegations],"<sup>32</sup> the district court dismissed the complaint. The court cited *Transnational* and concluded that section 3(b) was intended to cover a "rather narrow area of activity bearing no resemblance to the situation described in Plaintiffs' Complaint."<sup>33</sup> The Court of Appeals for the Fifth Circuit affirmed: "Appellants' broad construction of Section [3(b)] would emasculate the antitrust exemption contained in Section [2(b)] of the McCarran-Ferguson Act."<sup>34</sup>

In rapid succession, policyholder complaints were dismissed by the Ninth,<sup>35</sup> Second,<sup>36</sup> and Fifth<sup>37</sup> Circuits, and by four district courts.<sup>38</sup>

## II

### BARRY V. ST. PAUL FIRE & MARINE INSURANCE CO.

In January 1975, St. Paul Fire & Marine Insurance Co. announced a change in its medical malpractice coverage.<sup>39</sup> The com-

ance Soc'y of the United States, 366 F. Supp. 790, 795 (S.D.N.Y. 1973) (boycott claim characterized by court as "last ditch effort to revive an otherwise moribund complaint").

<sup>32</sup> 372 F. Supp. at 513.

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

<sup>34</sup> 506 F.2d at 734.

<sup>35</sup> *Addrisi v. Equitable Life Assurance Soc'y of the United States*, 503 F.2d 725 (9th Cir. 1974) (challenge to loan tie-in), *cert. denied*, 420 U.S. 929 (1975).

<sup>36</sup> *Dexter v. Equitable Life Assurance Soc'y of the United States*, 527 F.2d 233 (2d Cir. 1975) (challenge to loan tie-in).

<sup>37</sup> *Crawford v. American Title Ins. Co.*, 518 F.2d 217 (5th Cir. 1975) (challenge to title insurance rate fixing).

<sup>38</sup> *Pierucci v. Continental Cas. Co.*, 418 F. Supp. 704 (W.D. Pa. 1976) (challenge to professional liability insurance scheme); *McIlhenny v. American Title Ins. Co.*, 418 F. Supp. 364 (E.D. Pa. 1976) (challenge to title insurance tie-in); *Mathis v. Automobile Club Inter-Ins. Exch.*, 410 F. Supp. 1037 (W.D. Mo. 1976) (challenge to membership requirement); *Pastor v. Hartford Fire Ins. Co.*, [1976-1] TRADE CAS. (CCH), ¶ 60,783 (C.D. Cal. 1976) (challenge to professional liability insurance scheme). In four other cases district courts adopted a narrow reading of § 3(b) in dismissing boycott complaints by non-policyholders. *See Frankford Hosp. v. Blue Cross*, 417 F. Supp. 1104 (E.D. Pa. 1976) (hospital), *aff'd per curiam*, 554 F.2d 1253 (3d Cir. 1977), *cert. denied*, 46 U.S.L.W. 3218 (Oct. 3, 1977) (No. 77-171); *Royal Drug v. Group Life & Health Ins. Co.*, 415 F. Supp. 343 (W.D. Tex. 1976) (pharmacists), *rev'd on other grounds*, 556 F.2d 1375 (5th Cir. 1977); *Seasongood v. K & K Ins. Agency*, 414 F. Supp. 698 (E.D. Mo. 1976) (insurance agent), *rev'd on other grounds*, 548 F.2d 729 (8th Cir. 1977); *Proctor v. State Farm Mut. Auto. Ins. Co.*, 406 F. Supp. 27 (D.D.C. 1975) (auto repair shops), *rev'd in pertinent part*, 561 F.2d 262 (D.C. Cir. 1977), *petition for cert. filed*, 46 U.S.L.W. 3294 (Oct. 19, 1977) (No. 77-580). *But see Ballard v. Blue Shield of S.W. Va., Inc.*, 543 F.2d 1075 (4th Cir. 1976) (chiropractor complaint challenging health insurance plan held to allege boycott under McCarran-Ferguson Act § 3(b); line of cases giving § 3(b) narrow reading not mentioned), *cert. denied*, 430 U.S. 922 (1977).

<sup>39</sup> N.Y. Times, Jan. 24, 1975, at 34, col. 1.

pany discontinued its "occurrence" type of policy; in the future it would offer only "claims made" insurance.<sup>40</sup> In June, physicians brought a \$100 million antitrust action challenging the change in coverage.<sup>41</sup> The class action<sup>42</sup> accused St. Paul and three other insurance companies<sup>43</sup> of "conspiring to shrink the malpractice coverage available to Rhode Island doctors."<sup>44</sup> According to the complaint, doctors who objected to St. Paul's innovation and tried to switch carriers found that none of the other companies would sell them policies of *any kind*.<sup>45</sup> Plaintiffs believed the refusals evidenced an unlawful agreement in restraint of trade.<sup>46</sup>

The district court<sup>47</sup> dismissed plaintiffs' complaint on the ground that policyholders have no right of action under section 3(b) of the McCarran-Ferguson Act.<sup>48</sup> In a dramatic departure from a "rather formidable array of authorities,"<sup>49</sup> the First Circuit reversed the dismissal and remanded to the district court.<sup>50</sup> Chief Judge Coffin's majority opinion<sup>51</sup> characterized the issue as "whether a 'consumer' of insurance can sue an insurance company for violating the antitrust laws."<sup>52</sup>

Judge Coffin blasted *Meicler* for venturing beyond the language of the McCarran-Ferguson Act,<sup>53</sup> claiming that the words "boycott, coerce, or intimidate" are unambiguous in the context of

<sup>40</sup> A one-year "occurrence" policy would protect a doctor from future liability for any act committed during that year. A one-year "claims made" policy would protect a doctor from future liability on claims filed during that year. *Barry v. St. Paul Fire & Marine Ins. Co.*, 555 F.2d at 5.

<sup>41</sup> N.Y. Times, June 5, 1975, at 29, col. 1. Plaintiffs also requested injunctive relief. 555 F.2d at 5.

<sup>42</sup> Plaintiffs filed the action in the District of Rhode Island, and sought to represent all licensed physicians practicing in Rhode Island and all citizens of Rhode Island who were or were to come under a doctor's care. 555 F.2d at 5.

<sup>43</sup> The other insurance companies named were Aetna, Hartford, and Travelers. N.Y. Times, *supra* note 41, at 29, col. 1.

<sup>44</sup> 555 F.2d at 5.

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

<sup>47</sup> The opinion is unreported.

<sup>48</sup> 555 F.2d at 6. The district court relied on *Meicler*, *Transnational*, and *Addrisi v. Equitable Life Assurance Soc'y of the United States*, 503 F.2d 725 (1974), *cert. denied*, 420 U.S. 929 (1975).

<sup>49</sup> 555 F.2d at 7.

<sup>50</sup> *Id.* at 12.

<sup>51</sup> Judge Coffin was joined by Judge Gignoux, sitting by designation. Judge Campbell dissented.

<sup>52</sup> 555 F.2d at 5.

<sup>53</sup> "We would be justified in probing legislative history if the language were ambiguous or if, even though unambiguous, the language literally read produced a senseless or unworkable statute." *Id.* at 7.

federal antitrust law.<sup>54</sup> The Chief Judge denied that a literal reading of section 3(b) vitiates the Sherman Act exemption in section 2(b),<sup>55</sup> because not every practice condemned by the Sherman Act constitutes a boycott, coercion, or intimidation.<sup>56</sup> Nor does a literal interpretation shackle state regulatory authority—the state-action doctrine of *Parker v. Brown*<sup>57</sup> still insulates legitimate state regulatory schemes.<sup>58</sup>

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<sup>54</sup> *Id.* Judge Coffin stated: "In antitrust law, a boycott is a 'concerted refusal to deal' with a disfavored purchaser or seller. *Klor's, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207 . . . (1959)." *Id.* As Judge Campbell pointed out in dissent (*id.* at 14 n.2), the *Klor's* definition is "concerted refusal by traders to deal with other traders" and makes no mention of traders' refusals to deal with consumers. See 359 U.S. at 212. Judge Coffin responded in a footnote that "[t]he Ninth Circuit has held that a boycott of customers is a boycott for antitrust purposes. *Washington State Bowling Proprietors Ass'n v. Pacific Lanes, Inc.*, 356 F.2d 371, 376 (9th Cir.), *cert. denied*, 384 U.S. 963 . . . (1966)." 555 F.2d at 7 n.4. However, even *Washington State* involved an action by a trader, not a consumer. Judge Coffin acknowledged the paucity of cases dealing with boycotts directed at consumers. He suggested that such boycotts are rare because "a large class of victims cannot easily be coerced without destroying the secrecy on which illegal boycotts often depend." *Id.*

<sup>55</sup> *Contra*, *Addrissi 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).

<sup>56</sup> Judge Coffin suggested that predatory pricing or the use of benign means to maintain a monopoly does not involve boycott, coercion, or intimidation. 555 F.2d at 8.

<sup>57</sup> 317 U.S. 341 (1943). In *Parker*, the Court stated: "We find nothing in the language of the Sherman Act or in its history which suggests that its purpose was to restrain a state or its officers or agents from activities directed by its legislature." *Id.* at 350-51. From this observation grew the doctrine that legitimate and affirmative state involvement insulates an activity from liability under the Sherman Act. Many commentators have criticized the *Parker* doctrine. See Handler, *The Current Attack on the Parker v. Brown State Action Doctrine*, 76 COLUM. L. REV. 1, 1-3 (1976). The Supreme Court has recently narrowed the scope of the *Parker* exemption. See *Bates v. State Bar*, 97 S. Ct. 2691 (1977); *Cantor v. Detroit Edison Co.*, 428 U.S. 579 (1976); *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975). According to *Bates*, private conduct receives protection under *Parker* if state law requires such conduct, the state has a substantial interest in the particular conduct, and approval of the conduct takes the form of a visible, reviewable articulation of state policy. 97 S. Ct. at 2696-98. *Bates* supports Judge Coffin's view that *Parker* would insulate state-sanctioned rate setting. See 555 F.2d at 8-9. State regulation probably would exempt insurance companies from the Sherman Act, particularly regarding anticompetitive conduct identified by *National Securities* as the core of the business of insurance—"[t]he relationship between insurer and insured, the type of policy which could be issued, its reliability, interpretation, and enforcement" (393 U.S. at 460). States have traditionally had a substantial interest in these areas. But even here the breadth of the *Parker* umbrella will vary with the amount of freedom the regulatory scheme allows insurers and with the degree of insurance-company involvement in the promulgation of the regulations.

<sup>58</sup> Judge Coffin wrote, "[r]egulation by the state would be protected; concerted boycotts against groups of consumers not resting on state authority would have no immunity." 555 F.2d at 9.

Judge Coffin's broad reading of § 2(b) also comports with the judicial trend to narrow antitrust exemptions. See *Cantor v. Detroit Edison Co.*, 428 U.S. 579 (1976) (state-action exemption); *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975) (learned-profession exemption); *United States v. International Boxing Club of New York, Inc.*, 348 U.S. 236

Judge Coffin also found two points fatal to *Meicler's* reading of the legislative history of the McCarran-Ferguson Act. First, both houses of Congress debated extensively the scope of the boycott provision:

It was amended twice, in each case to make it broader, first by making it effective across the entire Act and second by restoring the agreement language. Time after time the concerns of 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.<sup>59</sup>

Second, throughout the debates congressmen mentioned industry blacklisting practices only twice.<sup>60</sup> The court concluded that neither the words of the statute nor its legislative history precludes policyholder suits.<sup>61</sup>

### III

#### THE CONTOURS OF THE BOYCOTT EXCEPTION

In rejecting *Meicler*, the First Circuit stands on solid ground.<sup>62</sup> The rule barring antitrust actions by policyholders draws an artifi-

(1955) (refusing to extend baseball exemption to boxing); *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U.S. 384 (1951) (Miller-Tydings fair-trade exemption).

<sup>59</sup> 555 F.2d at 12. Judge Coffin claimed that the Senate expanded the boycott exception to cover the entire Act. *Id.* at 10. He is not accurate. Senator Murdock suggested such an amendment (91 CONG. REC. 479 (1945)), but the Senate rejected it in favor of an amendment offered by Senator Ferguson making the Sherman and Clayton Acts fully applicable to the business of insurance. *Id.* at 488. See note 18 and accompanying text *supra*. Not until the bill emerged from conference did the boycott exception apply to the entire Act. See notes 11-22 and accompanying text *supra*.

<sup>60</sup> 91 CONG. REC. 1087 (Rep. Celler), 1480 (Senator O'Mahoney) (1945).

<sup>61</sup> "We simply do not find in these debates or reports any evidence that would justify our reading the boycott provision in the special way urged by appellees. . . . We therefore reverse the lower court on this issue." 555 F.2d at 12.

<sup>62</sup> Other courts have criticized *Meicler*. See *Proctor v. State Farm Mut. Auto. Ins. Co.*, 561 F.2d 262, 272-74 (D.C. Cir. 1977) (*Meicler* rests on paltry legislative analysis; boycott exception covers restraints of trade including element of coercive enforcement), *petition for cert. filed*, 46 U.S.L.W. 3294 (Oct. 19, 1977) (No. 77-580); *Frankford Hosp. v. Blue Cross*, 417 F. Supp. 1104, 1110 n.14 (E.D. Pa. 1976) (dictum) (§ 3(b) can reach "practices which have the same purpose and effect as blacklisting or which are equally pernicious in violating the most fundamental notions of competition and fair play"), *aff'd per curiam*, 554 F.2d 1253 (3d Cir. 1977), *cert. denied*, 46 U.S.L.W. 3218 (Oct. 3, 1977) (No. 77-171). In 1976, the Fourth Circuit ignored *Meicler* and held that "boycott" in the Act means the same as it does in antitrust law generally. *Ballard v. Blue Shield of S.W. Va., Inc.*, 543 F.2d 1075, 1078 (4th Cir. 1976), *cert. denied*, 430 U.S. 922 (1977). See also *Monarch Life Ins. Co. v. Loyal Protective Life Ins. Co.*, 326 F.2d 841, 846 (2d Cir. 1963) (dictum) (section 3(b) reaches all

cial line between sections 2(b) and 3(b) of the McCarran-Ferguson Act.<sup>63</sup> The boycott exception addresses conduct; nothing in the provision suggests that antitrust liability hinges on the status of the plaintiff.<sup>64</sup> Whether the victim is a customer who was denied insurance or an agent who was denied a sale should not affect section 3(b) liability.<sup>65</sup> Nor does the legislative history support the distinction between policyholder suits and non-policyholder suits.<sup>66</sup> De-

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boycotts or agreements to boycott illegal under Sherman Act), *cert. denied*, 376 U.S. 952 (1964); *Professional Adjusting Sys. of America, Inc. v. General Adjustment Bureau, Inc.*, 64 F.R.D. 35, 43 (S.D.N.Y. 1974) (same).

Other courts, while not criticizing *Meicler*, have limited its effect. Three district court cases applying *Meicler* in order to dismiss antitrust actions have been reversed on other grounds. *Royal Drug Co. v. Group Life & Health Ins. Co.*, 556 F.2d 1375 (5th Cir. 1977) (alleged conduct did not fall within business of insurance), *rev'g* 415 F. Supp. 343 (W.D. Tex. 1976); *Zelson v. Phoenix Mut. Life Ins. Co.*, 549 F.2d 62 (8th Cir. 1977) (complaint did not establish activities as business of insurance), *rev'g* 410 F. Supp. 1343 (E.D. Mo. 1976); *Seasongood v. K & K Ins. Agency*, 548 F.2d 729 (8th Cir. 1977) (complaint did not establish that activities regulated by state law), *rev'g* 414 F. Supp. 698 (E.D. Mo. 1976). By narrowly construing the phrases "business of insurance" and "regulated by state law," these courts circumvented the boycott issue.

<sup>63</sup> As the legislative history makes clear, §§ 2(b) and 3(b) of the McCarran-Ferguson Act embody respectively the desire to leave insurance regulation to the states and the desire to protect the federal interest in competitive markets. See notes 9-25 and accompanying text *supra*. Because the two provisions conflict, defining the contours of the boycott exception will determine the limits of the antitrust exemption. *Meicler* recognized the tension between the two sections: "Appellants' broad construction of Section [3(b)] would emasculate the antitrust exemption contained in Section [2(b)] . . ." 506 F.2d at 734. The Fifth Circuit attempted to solve the problem by limiting the types of parties who could invoke the boycott exception, rather than by specifying the substantive content of the words "boycott, coerce, or intimidate."

<sup>64</sup> See *Proctor v. State Farm Mut. Auto. Ins. Co.*, 561 F.2d 262 (D.C. Cir. 1977), *petition for cert. filed*, 46 U.S.L.W. 3294 (Oct. 19, 1977) (No. 77-580).

Certainly there is no hint in the plain language of the [boycott exception] that only acts and agreements directed against insurance companies or agents were to be subject to the exception. And our examination of the legislative history of the provision, and the target at which it was aimed, convinces us that no such limitation was intended.

*Id.* at 272. In *Proctor*, auto repair shopowners sued five insurance companies for price-fixing and group boycotts. The insurers had agreed to use a "prevailing labor rate" in paying damage claims. They implemented the agreement by informing customers of certain "preferred" shops which would charge the "prevailing rate." The D.C. Circuit held that the McCarran-Ferguson Act did not bar the shopowners' boycott claim, but affirmed a district court grant of summary judgment against the plaintiffs on the merits. *Id.* at 274-76.

<sup>65</sup> Standing presents an entirely different question. Whether a customer has standing to sue under the Sherman Act becomes an issue only after he gets past the McCarran-Ferguson Act. See *Barry v. St. Paul Fire & Marine Ins. Co.*, 555 F.2d at 14 n.2 (dissenting opinion, Campbell, J.) (broad reading of boycott exception does not solve question of plaintiffs' standing).

<sup>66</sup> One possible justification for the *Meicler* rule is that a reading broad enough to permit policyholder suits conflicts with *National Securities*, because Congress intended to leave the insurer-insured relationship to state, not federal, regulation. *Meicler v. Aetna*

spite *Meidler's* insistence that Congress aimed the boycott exception at industry blacklisting practices,<sup>67</sup> the debates in the House and Senate reveal no such narrow focus.<sup>68</sup>

Recognizing the boycott exception as something more than an anti-blacklisting provision raises sensitive issues as to its proper scope. As the District of Columbia Circuit Court of Appeals recently noted, "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."<sup>69</sup> Congress certainly intended to give the insurance industry some relief from federal antitrust liability. Unlike the Senate bill, which would have made the Sherman Act and the Clayton Act fully applicable to the business of insurance,<sup>70</sup> the final version of the McCarran-Ferguson Act exposes insurance companies to liability only under the Sherman Act<sup>71</sup> and only for acts or agreements to boycott, coerce, or intimidate. To give the words "boycott, coerce, or intimidate" their broadest possible reading would largely negate this change in the statute.<sup>72</sup>

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Cas. & Sur. Co., 506 F.2d at 735; *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). This argument confuses the boycott issue with the "business of insurance" issue. As *National Securities* makes clear, the McCarran-Ferguson Act applies only to the business of insurance; conduct outside the scope of "business of insurance" will not benefit from § 2(b) exemptions. Consequently, not even state statutes that regulate or protect the insurer-insured relationship will preempt the Sherman Act as to "boycott, coercion, or intimidation."

<sup>67</sup> See *Meidler v. Aetna Cas. & Sur. Co.*, 506 F.2d at 734. See also *Addrisi v. Equitable Life Assurance Soc'y of the United States*, 503 F.2d 725, 728-29 (1974), *cert. denied*, 420 U.S. 929 (1975). The blacklist analysis first appeared in *Transnational Ins. Co. v. Rosenlund*, 261 F. Supp. 12, 26-27 (D. Ore. 1966). See note 28 and accompanying text *supra*. In support of its thesis, the *Transnational* court cited only a single page of the *Congressional Record*. See 261 F. Supp. at 27 n.1.

<sup>68</sup> See *Barry v. St. Paul Fire & Marine Ins. Co.*, 555 F.2d at 12 ("While the vice of insurance company self-government outside the law obviously lay in their minds as a major evil to be combated by the legislation, there is no suggestion that the legislation was limited to that evil."); note 75 and accompanying text *infra*.

<sup>69</sup> *Proctor v. State Farm Mut. Auto. Ins. Co.*, 561 F.2d 262, 274 (D.C. Cir. 1977), *petition for cert. filed*, 46 U.S.L.W. 3294 (Oct. 19, 1977) (No. 77-580). See *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); *Frankford Hosp. v. Blue Cross*, 417 F. Supp. 1104, 1110 (E.D. Pa. 1976), *aff'd per curiam*, 554 F.2d 1253 (3d Cir. 1977), *cert. denied*, 46 U.S.L.W. 3218 (Oct. 3, 1977) (No. 77-171); *Meidler v. Aetna Cas. & Sur. Co.*, 372 F. Supp. at 513. *But see Barry v. St. Paul Fire & Marine Ins. Co.*, 555 F.2d at 7 (words "boycott, coercion, or intimidation" not ambiguous).

<sup>70</sup> See note 18 and accompanying text *supra*.

<sup>71</sup> The McCarran-Ferguson Act does, however, permit recovery of treble damages, even though this remedy is technically part of the Clayton Act. *Monarch Life Ins. Co. v. Loyal Protective Life Ins. Co.*, 326 F.2d 841, 845-46 (2d Cir. 1963), *cert. denied*, 376 U.S. 952 (1964).

<sup>72</sup> Insurance companies would still be protected from the Clayton Act, since the boycott exception relates only to the Sherman Act.

Although the boycott exception is susceptible to a wide range of interpretations, the legislative history suggests upper and lower bounds to the scope of the provision. At the very least, Congress intended the McCarran-Ferguson Act to protect rate setting by state regulatory bodies. Shortly before its enactment, Senator Ferguson said of the bill: "[It] would permit—and I think it is fair to say that it is intended to permit—rating bureaus. . . . I think the insurance companies have convinced many members of the legislature that we cannot have open competition in fixing rates on insurance."<sup>73</sup> Price, however, is only one term in an insurance contract; states could also approve the standardization of other terms, such as types of coverage, limits of the policy, and conditions of eligibility.

On the other hand, Congress clearly did not intend to insulate from antitrust attack purely private decisionmaking by insurance company cartels. This was the evil addressed in *South-Eastern Underwriters*:

The conspirators . . . employed boycotts together with other types of coercion and intimidation to force non-member insurance companies into the conspiracies, and to compel persons who needed insurance to buy only from S. E. U. A. [the association] members on S. E. U. A. terms. Companies not members of S. E. U. A. were cut off from the opportunity to reinsure their risks, and their services and facilities were disparaged; independent sales agencies who defiantly represented non-S. E. U. A. companies were punished by a withdrawal of the right to represent the members of S. E. U. A.; and persons needing insurance who purchased from non-S. E. U. A. companies were threatened with boycotts and withdrawal of all patronage.<sup>74</sup>

Congress undoubtedly extracted the language of the boycott exception from this description of the indictment in *South-Eastern Underwriters*, and therefore intended the boycott exception to reach such conduct and agreements.<sup>75</sup>

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<sup>73</sup> 91 CONG. REC. 1481 (1945).

<sup>74</sup> *United States v. South-Eastern Underwriters Ass'n*, 322 U.S. at 535-36 (describing indictment).

<sup>75</sup> *See id.* at 562 ("No states authorize combinations of insurance companies to coerce, intimidate, and boycott competitors and consumers in the manner here alleged . . ."); *Proctor v. State Farm Mut. Auto. Ins. Co.*, 561 F.2d 262, 273-74 (D.C. Cir. 1977), *petition for cert. filed*, 46 U.S.L.W. 3294 (Oct. 19, 1977) (No. 77-580); *Barry v. St. Paul Fire & Marine Ins. Co.*, 555 F.2d at 11; U.S. DEP'T OF JUSTICE, REPORT ON THE PRICING AND MARKETING OF INSURANCE 20 (1977). The indictment covered more than blacklisting—it also accused the defendants of threatening to boycott policyholders. As the *Proctor* court said, "[w]e find it hard to believe that Congress would have intended a construction of the

But the *Barry* court used this legislative history to discredit the *Meicler* rule, not to refine the meaning of the boycott exception. For the latter task, *Barry* looks to section 3(b) itself and finds its terms unambiguous within the context of the Sherman Act.<sup>76</sup> In upholding the plaintiff doctors' right of action, the court defined "boycott" simply as "a 'concerted refusal to deal' with a disfavored purchaser or seller."<sup>77</sup>

Despite Judge Coffin's "plain meaning" analysis, the term "boycott," as used in the Sherman Act, is anything but unambiguous.<sup>78</sup> Boycotts involve concerted refusals to deal<sup>79</sup> and, as a gen-

boycott provision which excludes from its sweep activities explicitly addressed in the case from which its language is drawn." 561 F.2d at 274. See Note, *supra* note 3, at 445.

*Meicler* did not involve such grossly anticompetitive activities. The Meiclars had purchased automobile liability insurance at a particular rate. Upon expiration of the policy, the Meiclars' insurer informed them that they had been placed in a more expensive risk class, evidently as a result of a driving accident. Following the reclassification, no other Texas insurance company would sell the Meiclars insurance at the previous rate. The district court found that the defendants had acted pursuant to a risk classification scheme adopted by the State Insurance Board. 372 F. Supp. at 510-12.

State regulatory plans of this type perform a rate-setting function and are no more objectionable than other arrangements falling within the antitrust exemption of the McCarran-Ferguson Act. See text accompanying note 73 *supra*. Thus the rule barring all policyholder actions under the boycott exception was unnecessary to the result in *Meicler*. *Proctor v. State Farm Mut. Auto. Ins. Co.*, 561 F.2d 262, 274 n.21 (D.C. Cir. 1977), *petition for cert. filed*, 46 U.S.L.W. 3294 (Oct. 19, 1977) (No. 77-580).

<sup>76</sup> See note 54 and accompanying text *supra*. Several courts disagree. See, e.g., *Proctor v. State Farm Mut. Auto. Ins. Co.*, 561 F.2d 262, 274 (D.C. Cir. 1977), *petition for cert. filed*, 46 U.S.L.W. 3294 (Oct. 19, 1977) (No. 77-580); *Frankford Hosp. v. Blue Cross*, 417 F. Supp. 1104, 1110 (E.D. Pa. 1976), *aff'd per curiam*, 554 F.2d 1253 (3d Cir. 1977), *cert. denied*, 46 U.S.L.W. 3218 (Oct. 3, 1977) (No. 77-171); *Meicler v. Aetna Cas. & Sur. Co.*, 372 F. Supp. at 513.

<sup>77</sup> 555 F.2d at 7 (quoting *Klor's, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207, 212 (1959)).

<sup>78</sup> In *State v. Glidden*, 55 Conn. 46, 8 A. 890 (1887), the first American case to use the word, the court remarked that "[boycotting] is not easily defined." *Id.* at 76, 8 A. at 896. Subsequent judicial use of the word supports that observation. Compare *Smythe Neon Sign Co. v. Local 405*, 226 Iowa 191, 197, 284 N.W. 126, 130 (1939) (intimidation and coercion necessary elements of boycott), and *Walsh v. Association of Master Plumbers*, 97 Mo. App. 280, 292, 71 S.W. 455, 459 (1902) (boycott defined as illegal conspiracy in restraint of trade), with *Butterick Pub. Co. v. Typographical Union No. 6*, 50 Misc. 1, 10, 100 N.Y.S. 292, 298 (Sup. Ct. 1906) (boycott does not necessarily involve violence, intimidation, or other unlawful coercive means), and *Denver Local 13 v. Perry Truck Lines, Inc.*, 106 Colo. 25, 42-46, 101 P.2d 436, 444-46 (1940) (boycott not necessarily illegal).

<sup>79</sup> Loosely defined, "boycott" can include even individual refusals to deal. See *Paramount Enterprises, Inc. v. Mitchell*, 104 Fla. 407, 412, 140 So. 328, 330 (1932) (boycott includes "a mere withdrawal of business by an individual"). Individual refusals to deal do not violate the Sherman Act, unless they involve monopolization or attempts to monopolize. 15 U.S.C. § 2 (Supp. V 1975). See *Times-Picayune Publishing Co. v. United States*, 345 U.S. 594, 625 (1953). Concerted refusals to deal, on the other hand, run afoul of the prohibition against contracts, combinations, and conspiracies in restraint of trade. 15

eral rule, are *per se* restraints of trade.<sup>80</sup> But not all concerted refusals to deal are illegal, particularly where there is no purpose to coerce trade policy or to remove competition.<sup>81</sup> As a result, courts have used the word in two different senses. The first sense restricts "boycott" to refusals to deal that are *per se* illegal by requiring some demonstration of anticompetitive purpose.<sup>82</sup> The second takes the

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U.S.C. § 1 (Supp. V 1975). See *Times-Picayune Publishing Co. v. United States*, 345 U.S. at 625. Perhaps to make this distinction between individual and collective actions, the Supreme Court in *Times-Picayune* described concerted refusals to deal as "group boycotts." *Id.* This terminology appeared again in *Northern Pac. Ry. v. United States*, 356 U.S. 1, 5 (1958), and in *Klor's, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207, 212 (1959). Since then, courts have generally preferred "group boycott" to "boycott" when discussing concerted refusals to deal. *But see, e.g.*, *United States v. General Motors Corp.*, 216 F. Supp. 362, 364 (S.D. Cal. 1963) ("A boycott is a *per se* violation of the antitrust laws for which there can be no justification. It consists of a 'concerted refusal to deal.'").

<sup>80</sup> Section 1 of the Sherman Act condemns contracts, combinations, or conspiracies that restrain trade. 15 U.S.C. § 1 (Supp. V 1975). Courts have taken two basic approaches in applying § 1. The "rule of reason" approach prohibits concerted conduct that in purpose or effect significantly restricts competition. *United States v. American Tobacco Co.*, 221 U.S. 106, 179-80 (1911). Under the "*per se*" doctrine, certain agreements or practices are presumed unreasonable, and therefore illegal, because they have such a "pernicious effect on competition." *Northern Pac. Ry. v. United States*, 356 U.S. 1, 5 (1958). *Per se* analysis avoids an extended inquiry into commercial reasonableness of the activity and its effect on the market.

The rule that boycotts are *per se* illegal developed gradually. See generally L. SULLIVAN, *HANDBOOK ON THE LAW OF ANTITRUST* § 84 (1977). In *Klor's, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207 (1959), the Supreme Court wrote: "Group boycotts, or concerted refusals by traders to deal with other traders, have long been held to be in the forbidden category. They have not been saved by allegations that they were reasonable in the specific circumstances, nor by a failure to show that they [significantly hindered competition]." *Id.* at 212 (footnote omitted). Courts have, however, applied the *per se* doctrine flexibly to cases involving refusals to deal:

[The rule that group boycotts are *per se* illegal] seems sensible if [it refers] to true boycotts: concerted refusals to deal undertaken for the purpose of coercing the object of the boycott to accede to the action or inaction desired by the group or with the purpose or effect of excluding a competitor of a group member from competition. On the other hand, there is a growing awareness in the lower courts that many so-called "refusal to deal" cases are not boycotts at all, but are simply the inevitable result of legitimate business decisions.

*Media Networks, Inc. v. A.T. & T. Co.*, [1976-1] *TRADE CAS. (CCH)* ¶ 60,780, at 68,383-84 (D. Minn. 1976).

<sup>81</sup> See Barber, *Refusals to Deal Under the Federal Antitrust Laws*, 103 U. PA. L. REV. 847, 876-77 (1955) ("When the element of purpose to coerce the trade policy of third parties or to secure their removal from competition is absent, the policy question raised by agreements under which the parties mutually limit their own freedom to deal with outsiders becomes more difficult, and the courts have appropriately outlined wider limits before declaring such agreements illegal."); L. SULLIVAN, *supra* note 80, § 90. See, e.g., *Joseph E. Seagram & Sons, Inc. v. Hawaiian Oke & Liquors, Ltd.*, 416 F.2d 71 (9th Cir. 1969) (refusal by liquor company subsidiaries to deal with former exclusive agent), *cert. denied*, 396 U.S. 1062 (1970); *Las Vegas Sun, Inc. v. Summa Corp.*, [1977-2] *TRADE CAS. (CCH)* ¶ 61,556 (D. Nev. 1977) (concerted refusal by resorts to advertise in newspaper).

<sup>82</sup> See, e.g., *De Filippo v. Ford Motor Co.*, 516 F.2d 1313, 1318 (3d Cir.), *cert. denied*,

broader view that all concerted refusals to deal are boycotts, but cautions that not all boycotts are illegal.<sup>83</sup> For the most part this difference is semantic, since under either definition only certain kinds of refusals to deal are *per se* violations.<sup>84</sup> In the context of the McCarran-Ferguson Act, however, the choice of definition determines section 3(b) liability.

Broadly defined, "boycott" can cover a wide range of policyholder complaints. As one court observed, "a simple agreement among insurance companies to charge certain premium rates could be viewed as a boycott agreement, since its observance would result in a collective refusal to deal with policyholders except at a fixed price."<sup>85</sup> This result defeats the congressional intention to limit the antitrust exposure of state-regulated rate agreements.<sup>86</sup> To guard against such an overextension of the boycott exception, the *Barry* court relied on the *Parker* doctrine, expecting state regulation to protect most rate-setting schemes from Sherman Act liability.<sup>87</sup> But even if the *Parker* doctrine is fit for that task,<sup>88</sup> it comes into play only after the plaintiff has passed the McCarran-Ferguson hurdle. Thus, the *Parker* doctrine is powerless to prevent emasculation of section 2(b) by an unnecessarily broad interpretation of section 3(b).

The boycott exception clearly does not protect the pernicious activities described in *South-Eastern Underwriters*, yet falls short of allowing attacks on state-regulated rate setting.<sup>89</sup> Its proper scope lies somewhere in between. To fix the exact locus of section 3(b), courts should weigh the judicial trend to narrow antitrust exemptions against the long tradition of leaving insurance matters to state, not federal, regulation.<sup>90</sup> Different courts have struck different balances,<sup>91</sup> but the *Barry* case presents the Supreme Court with

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423 U.S. 912 (1975); *Media Networks, Inc. v. A.T. & T. Co.*, [1976-1] TRADE CAS. (CCH) ¶ 60,780, at 68,383-84 (D. Minn. 1976).

<sup>83</sup> See, e.g., *Sum of Squares, Inc. v. Market Research Corp.*, 401 F. Supp. 53, 56-57 (S.D.N.Y. 1975); *Instant Delivery Corp. v. City Stores Co.*, 284 F. Supp. 941, 947 (E.D. Pa. 1968).

<sup>84</sup> However, semantics can become substance if courts confuse one usage of "boycott" with another. For an argument that boycott should be narrowly defined, see L. SULLIVAN, *supra* note 80, §§ 83 & 90, at 231-32, 259.

<sup>85</sup> *Proctor v. State Farm Mut. Auto. Ins. Co.*, 561 F.2d 262, 274 (D.C. Cir. 1977), *petition for cert. filed*, 46 U.S.L.W. 3294 (Oct. 19, 1977) (No. 77-580).

<sup>86</sup> See text accompanying note 73 *supra*.

<sup>87</sup> See *Barry v. St. Paul Fire & Marine Ins. Co.*, 555 F.2d at 8-9.

<sup>88</sup> See note 57 *supra*.

<sup>89</sup> See notes 69-75 and accompanying text *supra*.

<sup>90</sup> See note 58 and accompanying text *supra*.

<sup>91</sup> See, e.g., *Proctor v. State Farm Mut. Auto. Ins. Co.*, 561 F.2d 262, 274 (D.C. Cir.

its first opportunity to determine the meaning of the boycott exception.<sup>92</sup>

The Supreme Court should apply the "heavy presumption against implicit [antitrust] exemptions"<sup>93</sup> to affirm the First Circuit's holding that consumers have an antitrust right of action against insurers. Neither statutory language nor legislative history recommends retention of the *Meicler* rule.<sup>94</sup> However, Judge Coffin's broad definition of boycott, by relying on the *Parker* doctrine to protect state regulation of insurance contracts, nullifies the effect of section 2(b).<sup>95</sup> The Court should endorse instead a narrow definition of boycott, one which requires plaintiffs to assert some anticompetitive purpose behind the defendants' refusals to deal.<sup>96</sup> In refining this purpose requirement, courts should draw liberally upon *per se* boycott cases.<sup>97</sup> Because concerted activities sanctioned by state regulation are not "anticompetitive" in purpose, they will not fall within the boycott exception.

#### CONCLUSION

The First Circuit held in *Barry v. St. Paul Fire & Marine Insurance Co.* that policyholders alleging an illegal boycott may maintain

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1977) (price-fixing arrangement including some element of enforcement constitutes illegal boycott), *petition for cert. filed*, 46 U.S.L.W. 3294 (Oct. 19, 1977) (No. 77-580); *Barry v. St. Paul Fire & Marine Ins. Co.*, 555 F.2d 3, 7-12 (1st Cir. 1977) (any concerted refusal to deal constitutes illegal boycott), *cert. granted*, 46 U.S.L.W. 3283 (Nov. 1, 1977) (No. 77-240); *Ballard v. Blue Shield of S.W. Va., Inc.*, 543 F.2d 1075, 1078 (4th Cir. 1976) (§ 3(b) includes any boycott illegal under Sherman Act); *Addrisi v. Equitable Life Assurance Soc'y of the United States*, 503 F.2d 725, 728-29 (9th Cir. 1974) (§ 3(b) includes only blacklisting), *cert. denied*, 420 U.S. 929 (1975); *Frankford Hosp. v. Blue Cross*, 417 F. Supp. 1104, 1110 n.14 (E.D. Pa. 1976) (§ 3(b) reaches practices violating most fundamental notions of competition and fair play), *aff'd per curiam*, 554 F.2d 1253 (3d Cir. 1977), *cert. denied*, 46 U.S.L.W. 3218 (Oct. 3, 1977) (No. 77-171).

<sup>92</sup> The Supreme Court has granted certiorari. 46 U.S.L.W. 3283 (Nov. 1, 1977) (No. 77-240). The Court has construed the McCarran-Ferguson Act five times, but never the boycott exception. *See* SEC v. National Sec., Inc., 393 U.S. 453 (1969) ("business of insurance"); FTC v. Travelers Health Ass'n, 362 U.S. 293 (1960) ("regulated by state law"); SEC v. Variable Annuity Life Ins. Co., 359 U.S. 65 (1959) ("business of insurance"); FTC v. National Cas. Co., 357 U.S. 560 (1958) (§ 2); Prudential Ins. Co. v. Benjamin, 328 U.S. 408 (1946) (§ 2).

<sup>93</sup> *Abbott Labs. v. Portland Retail Druggists Ass'n, Inc.*, 425 U.S. 1, 12 (1976) (quoting *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 787 (1975)). Statutory exceptions to the antitrust laws should be narrowly construed. *Abbott Labs. v. Portland Retail Druggists Ass'n, Inc.*, 425 U.S. at 11-12; *Federal Maritime Comm'n v. Seatrain Lines, Inc.*, 411 U.S. 726, 733 (1973); *United States v. McKesson & Robbins, Inc.*, 351 U.S. 305, 316 (1956).

<sup>94</sup> *See* notes 62-75 and accompanying text *supra*.

<sup>95</sup> *See* text accompanying notes 73, 85-88 *supra*.

<sup>96</sup> *See* notes 78-84 and accompanying text *supra*.

<sup>97</sup> *See* notes 80-83 and accompanying text *supra*.

a Sherman Act antitrust suit against insurers. In so doing, the First Circuit raised the important question of the proper scope of the term "boycott." Having granted certiorari,<sup>98</sup> the Supreme Court should affirm the rule in *Barry* allowing "consumers" of insurance to rely on the McCarran-Ferguson Act's boycott exception. But the Court must also strike an appropriate balance between the antitrust exemption in section 2(b) and the boycott exception in section 3(b). To avoid depriving section 2(b) of all utility, the Court should narrow the First Circuit's definition of boycott by requiring plaintiffs under section 3(b) to assert some anticompetitive purpose behind defendants' refusals to deal.

*Gregory S. Fryer*

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<sup>98</sup> 46 U.S.L.W. 3283 (Nov. 1, 1977) (No. 77-240).