Hartford Fire Insurance Company v. California: Reassessing the Application of the McCarran-Ferguson Act to Foreign Reinsurers

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Introduction

The international aspects of the United States insurance industry stem from the business of reinsurance—the process by which domestic insurers protect their insurance risks by buying insurance for those risks from international insurers. Although many American companies provide reinsurance, foreign companies receive a large portion of U.S. reinsurance premiums. Given the magnitude of business between domestic and international insurers, it is important for the United States to monitor foreign reinsurers for any potential antitrust activity abroad that may increase the cost of reinsurance coverage and adversely affect U.S. insurers and consumers.

In theory, the international insurance industry is vulnerable to antitrust activity because of the nature of its business. Any anticompetitive

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2. Reinsurance involves more than 1,770 foreign reinsurers from 78 countries doing business with U.S. insurers. Id. The Reinsurance Association of America (RAA) reports that approximately 35% of U.S. reinsurance premiums go to foreign reinsurers and that U.S. insurers paid $6.83 billion in property/casualty premiums to foreign reinsurers in 1990. Id.
3. For a theoretical discussion of the elements of necessary collusion, see George A. Hay, Oligopoly, Shared Monopoly, and Antitrust Law, 67 COLUMBIA L. REV. 439, 451-57 (1982). Generally, large-scale reinsurance risks are costly and usually require large companies such as Lloyd’s of London with sufficient capital to underwrite these massive risks. Without proper regulation, these large companies may eliminate smaller ones with insufficient capital to compete in the market and provide alternative coverage. Alan M. Anderson, Insurance and Antitrust Law: The McCarran-Ferguson Act and Beyond, 25 WM. & MARY L. REV. 81, 83 (1983). In addition, since insurance companies tend to
activity by insurers can potentially produce harmful effects on U.S. consumers and the U.S. economy. Collusion among insurers results in the "unavailability and unaffordability" of property-casualty insurance which has characterized the recent "crisis" in the United States insurance market. For example, the U.S. market currently lacks environmental pollution coverage as well as certain policies insuring local government against private suits for failure to supply basic public health services such as police protection and roadway maintenance. In the insurance crisis of the mid-1980s "municipal swimming pools and skating rinks were closed, parades canceled, and police and fire vehicles idled" because cities could not find or afford coverage. These restrictions on the insurance trade forced consumers to bear the high costs of tort liability without any insurance protection.

Responding to this insurance crisis, various states investigated the matter and eventually filed suit in *Hartford Fire Ins. Co. v. California* against both domestic and foreign insurers and reinsurers, alleging that these defendants had agreed to boycott various insurance policies in violation of the McCarran-Ferguson Act. From its inception, commentators emphasized the importance of the *Hartford* case because of its potential to disrupt the way in which domestic and foreign insurers conduct their business. The case presented the U.S. Supreme Court with an opportunity to resolve two important legal issues with important ramifications for the international insurance industry. The first issue involved the scope of the McCarran-Ferguson Act which immunizes the insurance industry from federal antitrust laws. The Court considered whether domestic insurers lose their immunity under the Act when they transact business with foreign reinsurers. The Court also redefined the types of activities that constitute an unlawful boycott and nullify McCarran-Ferguson antitrust immunity.

The second issue facing the Court involved the application of U.S. antitrust laws to foreign entities. Individual states have traditionally regulated the insurance industry. These states, however, may be unable to regulate foreign reinsurers whose alleged antitrust activity occurs outside their territorial boundaries. Despite jurisdictional problems, the United

6. Clarke et al., supra note 4, at 368 (citing *Businesses Struggling To Adapt As Insurance Crisis Spreads*, WALL ST. J., Jan. 21, 1986, at 31).
States has applied federal antitrust laws to foreign companies in many of these situations. In Hartford, the Court endorsed a comity balancing test for determining when extraterritorial jurisdiction is appropriate.

This Note discusses the background of the U.S. insurance industry's exemption from federal antitrust laws under the McCarran-Ferguson Act, as well as the international comity factors courts consider in deciding when to apply U.S. antitrust laws extraterritorially. Next, this Note analyzes the Supreme Court's decision in Hartford and considers its future effect on international insurers. Finally, this Note sets forth two arguments. First, the Supreme Court, in deciding Hartford, should have narrowed the scope of the McCarran-Ferguson Act by denying foreign reinsurers its protection under section 2(b) and expanding the definition of the term "boycott" under section 3(b) of the Act. Second, the Court should have rejected the international comity balancing test for determining jurisdiction as non-justiciable and applied, instead, a pure "effects" standard.

I. Background

A. The McCarran-Ferguson Act

In 1945, Congress passed the McCarran-Ferguson Act in response to opposition by the insurance industry to United States v. South-Eastern Underwriters Ass'n. In that case, the Supreme Court determined that insurance fell within the Commerce Clause and was therefore subject to federal antitrust laws. The possibility of federal antitrust suits against the insurance industry heightened the controversy engendered during the New Deal era over the expansion of federal power and its interference with state sovereignty. In response, insurers lobbied in support of retaining state taxation and regulation of the industry. As a result, Congress passed the McCarran-Ferguson Act, intending that the states retain their traditional power of regulating the insurance business. An additional purpose of the Act was to protect from antitrust laws the industry's cooperative
ratemaking efforts, which are regulated by state agencies and considered necessary for the efficient underwriting of risks. Congress did not intend, however, for the McCarran-Ferguson Act to foreclose all antitrust scrutiny. Instead, federal antitrust laws including the Sherman Antitrust Act, the Clayton Act, and the Federal Trade Commission Act apply when insurers engage in acts of "boycott, coercion, or intimidation" under Section 3(b) of the McCarran-Ferguson Act. Thus, to qualify for McCarran-Ferguson Act immunity from federal antitrust laws, the insurer must satisfy the following three criteria:

(1) the defendant insurers must be in the "business of insurance";

and

(2) the state must regulate that business; and

(3) the defendant insurers must not engage in acts of "boycott, coercion, or intimidation."

As the following sections reveal, the meaning of these three criteria have been the subject of considerable judicial attention.

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25. Id. § 1012(b).

26. Id. § 1013(b).
1. The Business of Insurance

McCarran-Ferguson antitrust immunity depends on whether the challenged conduct is part of the "business of insurance." In recent cases, the Supreme Court has narrowly construed this phrase. In SEC v. National Sec., Inc., the Supreme Court limited the "business of insurance" to activity affecting the relationship between the insurer and the insured as distinguished from the general corporate practices of insurance companies. In addition to the relationship between the insurer and the insured, the Court determined in Group Life & Health Ins. Co. v. Royal Drug Co. that two other types of activity—risk underwriting and cooperative rate-making—also constitute the "business of insurance." The Court most recently narrowed the definition of the "business of insurance" in Union Labor Life Ins. Co. v. Pireno by asserting that these three factors (the relationship between the insurer and the insured, the underwriting of risks, and cooperative rate-making) are exhaustive in determining whether an insurer's activity is immune from federal antitrust laws.

2. State Regulation of the Insurance Business

In addition to the "business of insurance" requirement, the McCarran-Ferguson Act requires that states regulate the insurance business if insurers are to receive immunity from federal antitrust laws. However, the courts generally avoid reviewing the effectiveness of state regulation. For example, in FTC v. National Casualty Co., the Supreme Court rejected the Federal Trade Commission's attempt to justify federal regulation of the respondent's advertising practices on the grounds that state regulation was insufficient. In effect, the McCarran-Ferguson Act immunizes insurers so long as states satisfy a minimum standard of regulation described by the Ninth Circuit in Feinstein v. Nettleship Co. as "a state regulatory scheme...

30. Id. at 460.
34. Timothy H. Hiebert, The State Regulation Requirement Under Section 2(b) of the McCarran-Ferguson Act, 53 Ins. Couns. J. 234 (1986) (Section 2(b) is satisfied when states deliberately authorize insurers' conduct).
possess[ing] jurisdiction over the challenged practice." Furthermore, the Supreme Court in FTC v. Travelers Health Ass'n. defined state regulation as "regulation by the State where the business activities have their operative force." Each state must therefore regulate internally the effects of insurance activity occurring outside its borders.

3. The "Boycott, Coercion, or Intimidation" Exception to the McCarran-Ferguson Act

Section 3(b) of the McCarran-Ferguson Act prohibits antitrust immunity when the insurers' activity constitutes "any agreement to boycott, coerce, or intimidate or act of boycott, coercion, or intimidation. In St. Paul Fire & Marine Ins. Co. v. Barry, the Supreme Court interpreted the term "boycott" expansively to include not only restrictive activity among competing insurers, but also restrictive actions taken by any person, including consumers of insurance services. The Court determined that the term "boycott" reflects "a tradition of meaning, as elaborated in the body of decisions interpreting the Sherman Act."

Recognizing, however, that Congress intended to protect certain activities of insurers such as cooperative rate-making that might otherwise qualify as a "boycott" under the traditional definition, the Court conceded that not "all concerted activity violative of the Sherman Act comes within § 3(b)" of the McCarran-Ferguson Act. Instead, the Court emphasized, "we are not citing to any decisions illustrating the assertion that price-fixing, in the absence of any additional enforcement activity, has been treated either as a 'boycott' or 'coercion.'" Thus, the Court suggested that proof of enforcement activity could cause some concerted activity protected by the McCarran-Ferguson Act to fall within the boycott exception, thereby voiding immunity.

The Supreme Court's discussion of enforcement activity in Barry is consistent with the Court's reasoning in the landmark case of United States v. South-Eastern Underwriters Ass'n., which triggered the passage of the McCarran-Ferguson Act. South-Eastern involved rate-setting and monopolization by the South-Eastern Underwriters Association (SEUA), composed of two-hundred member companies and twenty-seven individuals.

40. Id. at 301-02.
42. 438 U.S. 531 (1978). Rhode Island physicians and patients sued four medical malpractice insurers alleging that three of the four insurers had refused to deal at all with the policyholders of the fourth causing the policyholders to comply with new rules establishing coverage on a "claims made" basis rather than the old, "occurrence" basis. Id. at 533.
43. Id. at 541.
44. Id. at 555.
45. Id. at 559 n.6.
46. 322 U.S. 533 (1944).
47. See supra note 18 and accompanying text.
all of whom refused to deal with non-member insurance companies and forced persons who needed insurance to buy only from SEUA members and only on SEUA terms. The Court found that the coercive activity of SEUA members enforced the boycott by compelling non-member insurance companies to comply with SEUA terms for the sale of insurance.

B. The Crisis in the Insurance Industry and the Current Debate Over the McCarran-Ferguson Act

The insurance industry is unique in its exemption from federal antitrust laws under the McCarran-Ferguson Act. Whether or not this broad exemption is justified has been the topic of recent debate inspired by the mid-1980's crisis in the insurance industry. In fact, Hartford arose against the backdrop of this insurance crisis. Among the explanations offered for the shortage in insurance coverage resulting from the crisis are such systemic defects as collusion among insurers, imprudent business practices of insurers, inadequate state regulation, and changes in the tort system of liability.

Additionally, scholars, consumer advocates, and some business groups argue that the McCarran-Ferguson Act itself causes the cyclical crises in the insurance industry by granting insurers overly broad immunity from antitrust laws. In response, these groups recently lobbied for an amendment of the McCarran-Ferguson Act. A Bill (called the Insurance Competitive Pricing Act of 1993) to modify the antitrust exemption currently exists in both the House of Representatives and the Senate of the United States. The Bill proposes three new changes. First, the Bill defines certain harmful activities such as price-fixing, monopolization, allocation of territories among market competitors, and unlawful tying practices to which the federal antitrust laws will apply. Second, the Bill defines certain "safe harbors" of activity such as sharing "historical loss" statistics and "loss development" data to which the current McCarran-Ferguson antitrust exemption will continue to apply. Lastly, the Bill provides a "transitional 'phase-out' of the antitrust exemption for joint 'trending' activity." Although Congress has not yet acted on these amendments, Anne K. Bingaman, Assistant Attorney General of the Antitrust Division of

48. Id. at 534-35.
49. Id. at 535-36.
52. Miller, supra note 51.
53. Angoff, supra note 5.
56. Id.
57. Id.
the Department of Justice, recently expressed her support for amending the Act "so as to narrow the scope of the antitrust immunity that it affords to the business of insurance."\(^5\)

Proponents of repealing the McCarran-Ferguson Act claim that the statute is obsolete because the circumstances of its enactment have changed.\(^5\) First, Congress originally passed the Act under the highly politicized conditions of the New Deal Era, a time in which the states feared that the interventionist federal government would preempt the states' traditional power to tax and regulate the industry.\(^6\) Today, an understanding that the U.S. government functions best by sharing jurisdiction mitigates the conflict between state and federal control.\(^6\) Second, the insurance industry is no longer a nascent industry dominated by a few large firms and in need of special protection from antitrust laws. Instead, today many firms of different sizes compete freely within the industry providing a diverse array of insurance coverage.\(^6\) Third, federal regulation of the insurance industry would promote uniformity and efficiency by supplanting the widely inconsistent state regulatory schemes.\(^6\)

Furthermore, even if Congress repealed or modified the McCarran-Ferguson Act, some insurance activity could continue to be exempt from federal antitrust laws under the state action doctrine. This doctrine exempts anticompetitive activity from federal antitrust laws where the state clearly intends to permit such activity and actively supervises it.\(^6\) Thus, states could protect any anticompetitive conduct of insurers that they

\(^{58}\) Anne K. Bingaman, Statement Before the Subcommittee on Economic and Commercial Law and Committee on the Judiciary of the U.S. House of Representatives Concerning Legislation to Amend the Antitrust Exemption Provided by the McCarran-Ferguson Act, 1 (July 29, 1993) (transcript available from the Department of Justice).

\(^{59}\) Gilett, *supra* note 27, at 277.

\(^{60}\) For a discussion of the McCarran-Ferguson Act as a proper means of allocating regulatory power over the insurance industry between the federal government and the states, see Spencer L. Kimball & Barbara P. Heaney, *Emasculation of the McCarran-Ferguson Act: A Study in Judicial Activism*, 1985 UTAH L. REV. 1, 32-38.

\(^{61}\) Id.

\(^{62}\) Id.

\(^{63}\) Melendez, *supra* note 19, at 305.

deem necessary, so long as they actively regulate such activity.\textsuperscript{65}

C. International Comity

International comity refers to principles of courtesy and respect expressed in the willingness of one nation to grant a privilege to another nation (such as applying foreign laws to a domestic dispute involving foreign entities), not as a matter of right, but out of deference and good will.\textsuperscript{66} The practical value of international comity is that it permits the courts of one nation to give effect to laws and judicial decisions of another nation.\textsuperscript{67} In an increasingly interconnected global economy where activity that occurs within the boundaries of one nation may very likely have an economic affect on other nations, the principle of comity becomes very important.\textsuperscript{68} The United States confronts issues of international comity when it applies its federal antitrust laws extraterritorially. This section of the Note describes the judicial development of a balancing test for determining whether international comity should bar the extraterritorial application of U.S. antitrust laws.

1. Judicial Precedent

In American Banana Co. v. United Fruit Co., the U.S. Supreme Court determined that the Sherman Act did not apply to antitrust activity occurring outside the United States.\textsuperscript{69} According to Justice Holmes, "the general and almost universal rule is that the character of an act as lawful or unlawful must be determined wholly by the law of the country where the act is done."\textsuperscript{70} The Supreme Court did not consider, however, whether the outcome would differ if the alleged antitrust activity affected U.S. trade. The Second Circuit addressed this issue in a later case, United States v. Aluminum Company of America (Alcoa),\textsuperscript{71} in which the court decided that the

\textsuperscript{65} For an analysis of the state action doctrine as applied to title insurance companies, see FTC v. Ticor Title Ins. Co., 112 S. Ct. 2169 (1992) (state action immunity not available under the "negative options" regulatory scheme of two states).


\textsuperscript{67} BLACK'S LAW DICTIONARY 267 (6th ed. 1990).

\textsuperscript{68} Recognizing the need to respect the antitrust laws of other nations, on September 23, 1992, Attorney General William P. Barr, FTC Chairman Janet D. Steiger, and European Community Competition Commissioner Sir Leon Brittan signed an agreement to promote cooperation and coordination in antitrust enforcement between the United States and the Commission of the European Communities. Alden F. Abbott, The Commerce Department Speaks 1992: Developments in Import Administration; Export and Investment Abroad, in CORPORATE LAW AND PRACTICE COURSE HANDBOOK SERIES, Oct. 1-2, 1992.

\textsuperscript{69} American Banana Co. v. United Fruit Co., 213 U.S. 347 (1909). American Banana alleged that the United Fruit Company incited Costa Rican soldiers to destroy American Banana's plantation as part of a plot to monopolize and restrain banana imports from Central America into the United States Id. at 354.

\textsuperscript{70} Id. at 356.

\textsuperscript{71} United States v. Aluminum Co. of America, 148 F.2d 416 (2d Cir. 1945). The United States challenged the antitrust activity of Alcoa's Canadian subsidiary, Alumi-
Sherman Act applied to antitrust activity occurring abroad so long as such anticompetitive conduct was "intended to affect imports and did affect them." Thus, the court in *Alcoa* developed the "effects test" of subject matter jurisdiction.

Commentators have criticized the effects test because it does not specify how much effect on U.S. commerce is sufficient to warrant the extraterritorial application of U.S. antitrust laws. Foreign nations have criticized the effects test as "a wholesale exportation of U.S. competition policy" which ignores "the policies and concerns of foreign governments." In fact, the United States did not consider the interests of foreign nations before applying antitrust laws to foreign entities until the Ninth and Third Circuit courts decided *Timberlane Lumber Co. v. Bank of America (Timberlane I)* and *Mannington Mills, Inc. v. Congoleum Corp.* respectively. In these two cases, the Ninth and Third Circuits incorporated international comity factors into the *Alcoa* "intended effects test" for the first time.

In the Ninth Circuit case of *Timberlane I*, Judge Choy criticized the "effects test" as being "by itself... incomplete because it fails to consider other nations' interests." He proposed, in the alternative, a three-part test which included international comity considerations. The Ninth Circuit recommended that the district court weigh the following factors in determining whether international comity bars the extraterritorial application of U.S. antitrust laws:

1. The degree of conflict with foreign law or policy, the nationality or allegiance of the parties and the locations or principal places of business of corporations, the extent to which enforcement by either state can be expected to achieve compliance, the relative significance of the effects on American foreign commerce required before jurisdiction may be asserted.
2. The antitrust laws require in the first instance that there be some effect—actual or intended—on American foreign commerce before the federal courts may legitimately exercise subject matter jurisdiction under those statutes. Second, a greater showing of burden or restraint may be necessary to demonstrate that the effect is sufficiently large to present a cognizable injury to the plaintiffs and, therefore, a civil violation of the antitrust laws.... Third, there is the additional question which is unique to the international setting of whether the interests of, and links to, the United States—including the magnitude of the effect on American foreign commerce—are sufficiently strong, vis-a-vis those of other nations, to justify an assertion of extraterritorial authority.
the United States as compared with those elsewhere, the extent to which there is explicit purpose to harm or affect American commerce, the foreseeability of such effect, and the relative importance to the violations charged of conduct within the United States as compared with conduct abroad.\textsuperscript{80}

In balancing these factors, the district court determined on remand in \textit{Timberlane II} that the United States should not exercise jurisdiction.\textsuperscript{81} The Ninth Circuit affirmed the district court's dismissal of the antitrust suit because the balancing test favored abstention.\textsuperscript{82}

Whereas the simple "effects test" permitted the exercise of jurisdiction even when the effect of antitrust activity on U.S. trade was minimal, the new \textit{Timberlane} test introduced the "concept of abstention" which restrained U.S. courts from exercising jurisdiction by showing deference to foreign interests where appropriate.\textsuperscript{83} This concept of abstention is also known as the "jurisdictional rule of reason" because it permits the courts to determine on a case by case basis whether application of U.S. antitrust laws to foreign entities (in light of foreign interests) is reasonable under the circumstances.\textsuperscript{84}

In \textit{Mannington Mills},\textsuperscript{85} the Third Circuit interpreted the \textit{Timberlane I} comity factors as being relevant in determining whether the court should abstain from exercising jurisdiction, not in determining whether subject matter jurisdiction exists in the first place.\textsuperscript{86} Thus, after finding in \textit{Mannington Mills} that jurisdiction existed because the foreign antitrust activity

\textit{Id.} at 613 (citations omitted).

\textsuperscript{80} \textit{Id.} at 614.

\textsuperscript{81} \textit{Timberlane Lumber Co. v. Bank of America (Timberlane II), 574 F. Supp. 1453 (N.D. Cal. 1983), aff'd, 749 F.2d 1378 (9th Cir. 1984) cert. denied, 472 U.S. 1032 (1985).} The plaintiffs in \textit{Timberlane} were an Oregon partnership which purchased lumber through two of its subsidiaries located in Honduras and sold the lumber in the United States. 749 F.2d at 1380. The plaintiffs alleged that defendants interfered with their operations in Honduras by attaching plaintiffs' property in a judicial proceeding with the intent of preventing plaintiffs from milling lumber so as to create a competitive advantage for the defendants. \textit{Id.}

\textsuperscript{82} The Ninth Circuit reasoned:

[\textit{A}ll but two of the factors in \textit{Timberlane I}'s comity analysis indicate that we should refuse to exercise jurisdiction over this antitrust case. The potential for conflict with Honduran economic policy and commercial law is great. The effect on the foreign commerce of the United States is minimal. The evidence of intent to harm American commerce is altogether lacking. The foreseeability of the anticompetitive consequences of the allegedly illegal actions is slight. Most of the conduct that must be examined occurred abroad. The factors that favor jurisdiction are the citizenship of the parties and, to a slight extent, the enforcement effectiveness of United States law. We do not believe that this is enough to justify the exercise of federal jurisdiction over this case.]

\textit{Id.} at 1386.


\textsuperscript{84} \textit{Id.} at 154.

\textsuperscript{85} 595 F.2d 1287 (3d Cir. 1979).

\textsuperscript{86} "Therefore, under the Third Circuit's view, even though subject matter jurisdiction is found to exist, international comity factors must be weighed in deciding whether to exercise such jurisdiction." Shin, \textit{supra} note 75, at 184-85.
harmed the U.S. export business, the Third Circuit considered the following factors (which are very similar to those specified in Timmelane I) to decide if it should exercise jurisdiction:

1. Degree of conflict with foreign law or policy;
2. Nationality of the parties;
3. Relative importance of the alleged violation of conduct here compared to that abroad;
4. Availability of a remedy abroad and the pendency of litigation there;
5. Existence of intent to harm or affect American commerce and its foreseeability;
6. Possible effect upon foreign relations if the court exercises jurisdiction and grants relief;
7. If relief is granted, whether a party will be placed in the position of being forced to perform an act illegal in either country or be under conflicting requirements by both countries;
8. Whether the court can make its order effective;
9. Whether an order for relief would be acceptable in this country if made by the foreign nation under similar circumstances;
10. Whether a treaty with the affected nations has addressed the issue.

The Third Circuit further developed the "concept of abstention" discussed in Timmelane II by allowing the lower courts to refuse to apply U.S. antitrust laws extraterritorially even when U.S. jurisdiction over subject matter exists. Thus, the Mannington Mills test "functions as a self-imposed restraint on the court's finding of antitrust extraterritorial jurisdiction to avoid unnecessary international conflicts." The Mannington Mills cases did not provide binding precedent.

Although the Third and Ninth Circuits have devised an international comity balancing test for purposes of determining when to exercise jurisdiction over foreign entities, other circuits have rejected this elaborate analysis. In the case of In re Uranium Antitrust Litigation (Uranium Antitrust I) the district court found the Timmelane analysis “unworkable” in balancing the competing domestic and international interests and instead relied on the Alcoa effects test. On interlocutory appeal, the Seventh Circuit agreed with the district court that the Timmelane I and Mannington Mills cases did not provide binding precedent. Similarly, in Laker Air-

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88. Shin, supra note 75, at 186.
89. 749 F.2d at 1382-83.
91. 480 F. Supp. at 1148.
92. In re Uranium Antitrust Litigation, 617 F.2d 1248 (7th Cir. 1980). The court distinguished the Timmelane and Mannington Mills decisions because in those cases the defendants appeared and contested jurisdiction, whereas in the Uranium Antitrust case,
ways Ltd. v. Sabena, Belgian World Airways the D.C. Circuit rejected a comity analysis as "useless in allocating jurisdiction when concurrent jurisdiction exists between different nations." Thus, some circuits have not adopted the comity balancing test and continue to rely on the effects doctrine.

2. The Foreign Trade Antitrust Improvements Act

Congress responded to the "inherent tensions between considerations of jurisdiction and considerations of comity" by passing the Foreign Trade Antitrust Improvements Act (FTAIA). The FTAIA amends the Sherman Act and the Federal Trade Commission Act by providing that those Acts do not apply to conduct involving trade or commerce with foreign nations unless that conduct has a "direct, substantial, and reasonably foreseeable effect" on commerce within the United States. This standard provides a "jurisdictional threshold that must be crossed before comity considera-

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93. Laker Airways Ltd. v. Sabena, Belgian World Airlines, 731 F.2d 909, 948 (D.C. Cir. 1984). Laker Airways sued the members of the International Air Transport Association (IATA) for conspiring to set unreasonably low rates for transatlantic flights, thereby causing Laker Airways to liquidate its business. Id. at 916-17. Laker Airways sued foreign airlines including some British airlines in the United States because the alleged activities were not illegal under British law. Id. The British courts, however, granted an injunction restraining Laker Airways from continuing its suit against the British airlines in the United States. Id. at 918. Also, the British government prohibited any airlines doing business in England from providing Laker Airways with documents relevant to the suit. Id. In retaliation, the U.S. district court issued antisuit injunctions against other foreign defendants, Sabena Belgian Airlines and KLM Royal Dutch Airlines, preventing them from obtaining similar relief from foreign courts. Id.

94. Schmidt, supra note 12, at 333.


Sections 1 to 7 of this title shall not apply to conduct involving trade or commerce (other than import trade or import commerce) with foreign nations unless—

(1) such conduct has a direct, substantial, and reasonably foreseeable effect—

(A) on trade or commerce which is not trade or commerce with foreign nations, or on import commerce with foreign nations; or

(B) on export trade or commerce with foreign nations, of a person engaged in such trade or commerce in the United States; and

(2) such effect gives rise to a claim under the provisions of sections 1 to 7 of this title, other than this section.

If sections 1 to 7 of this title apply to such conduct only because of the operation of paragraph (1)(B), then sections 1 to 7 of this title shall apply to such conduct only for injury to export business in the United States.


This subsection shall not apply to unfair methods of competition involving commerce with foreign nations (other than import commerce) unless—

(A) such methods of competition have a direct, substantial, and reasonably foreseeable effect—

(i) on commerce which is not commerce with foreign nations, or on import commerce with foreign nations; or

(ii) on export commerce with foreign nations, of a person engaged in such commerce in the United States; and

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tions would be appropriate or necessary.\textsuperscript{9} Thus, the FTAIA may be interpreted as preventing the \textit{Timberlane} comity analysis from expanding jurisdiction to foreign conduct that produces only a minimal effect on the U.S. economy.\textsuperscript{97} However, Congress’ intent that the FTAIA apply exclusively to U.S. export transactions may limit the FTAIA’s jurisdictional reach.\textsuperscript{98}

\section{Hartford Fire Ins. Co. v. California}

\textit{Hartford} has been considered one of the most important antitrust cases since the breakup of American Telephone and Telegraph (AT&T) in the 1980s.\textsuperscript{99} Prior to the Supreme Court’s decision, the case had been called the “mother of all antitrust cases,” as well as a “nuclear attack on the insurance industry” because of its potential to disrupt the way in which domestic and foreign insurers conduct their business.\textsuperscript{100} Referred to by the lower courts as \textit{In re Insurance Antitrust Litigation},\textsuperscript{101} the case consolidated two separate but related actions: (1) the suit against domestic primary insurers and reinsurers initiated in \textit{Hartford Fire Insurance Co. v. California}, and (2) the suit against foreign reinsurers initiated in \textit{Merrett Underwriting Agency Management Limited v. California}.\textsuperscript{102}

\subsection{A. Facts of the Case}\textsuperscript{103}

The complaints originated in the city of Lafayette, just north of San Francisco, California, in 1988 when the town could not obtain liability insurance after contacting many different companies.\textsuperscript{104} California and other states began to investigate similar complaints of shortages in insurance coverage and filed suit against various defendants for antitrust violations.\textsuperscript{105} Four defendants were sellers of commercial general liability insurance.

\begin{itemize}
\item \textsuperscript{96} George E. Garvey, \textit{The Foreign Trade Antitrust Improvements Act of 1981}, 14 LAW \& POL’y INT’L Bus. 1, 40 (1982).
\item \textsuperscript{97} Id.
\item \textsuperscript{99} Gottlieb, \textit{supra} note 10, at 10.
\item \textsuperscript{100} Thomas H. Sear, \textit{Antitrust Questions for Insurers}, N.Y. L.J., Jan. 15, 1993, at 2.
\item \textsuperscript{102} 113 S. Ct. 2891 (1993).
\item \textsuperscript{103} All the facts of the case described herein are allegations charged by the plaintiff states in their complaint and taken as true by the Supreme Court in assessing the defendants’ motion to dismiss. Unless otherwise cited, all references to the facts alleged are recorded in 113 S.Ct. 2891, 2891-2901 (1993).
\item \textsuperscript{104} Gottlieb, \textit{supra} note 10.
\item \textsuperscript{105} \textit{See} 113 S. Ct. at 2895 n.2 for a complete listing of the nineteen states which filed suit.
\end{itemize}
insurance (CGL) which protects the insured from liability to third parties for bodily injury or property damage.\textsuperscript{106} Other defendants included two domestic trade associations: the Reinsurance Association of America (RAA), an insurance lobbying group, and the Insurance Service Office (ISO), an organization that collects statistical data and estimates risks for standardized insurance policy forms that it develops and submits to state regulatory agencies for approval.

Plaintiffs alleged that, in 1984, defendant Hartford Fire Insurance Company (Hartford) sought to change ISO's standard "occurrences" CGL form, which insured against occurrences of liability arising during the life of the policy, to a "claims made" form that insured only claims made during the life of the policy. Insurers prefer "claims made" forms because they limit exposure to so-called "long tail risks" which are claims arising from an occurrence during the life of the policy that are reported long after the policy period has expired. Hartford also wanted to include a retroactive date provision in the new claims-made forms which would limit coverage to claims made after a certain date. Additionally, Hartford sought to change the standard CGL form's liability coverage for accidental pollution because it exposed insurers to costly risks. Lastly, Hartford wished to limit the legal costs of defending claims to the amount of coverage provided.

To achieve its goals, Hartford exerted pressure on ISO to modify its CGL form by persuading domestic insurers and foreign reinsurers to boycott the ISO form. As a result, ISO succumbed to the pressure and changed its forms while also withdrawing its data collection for the older forms. Without the availability of such support data, the use of the old "occurrences" form became impractical because insurers did not have the statistical information they need to help them assess the risk of insurance under such policies.

Additionally, London reinsurers conspired to provide retrocessional reinsurance only for U.S. insurers who signed a letter of intent to exclude a seepage and pollution clause from their insurance policies. Over forty retrocessional reinsurers at Lloyd's and the London Company Market signed an agreement called the "Non Marine London Market Agreement 1987," which stated: "We hereby agree that we will use our best endeavors to ensure that all U.S.A. and Canadian exposed insurance/reinsurance business attaching on or after 1st January 1987 will only be written where the original business includes a seepage and pollution exclusion clause wherever legal and applicable."\textsuperscript{107} In effect, foreign reinsurers agreed to boycott both "occurrence" form policies and "accidental pollution" insurance coverage for consumers in the United States.

The plaintiff States argued that the domestic insurers lost their McCarran-Ferguson immunity by conducting business with foreign rein-

\textsuperscript{106} Some defendants were domestic and foreign reinsurers. Among the foreign insurers were six "London Company Market" corporations—all subsidiaries of American corporations.

\textsuperscript{107} In re Insurance Antitrust Litigation, 938 F.2d 919, 924 (9th Cir. 1991).
surers who are not exempt under the Act. Plaintiffs further argued that the pressure tactics used by the defendants to coerce the ISO to change its insurance policy forms constituted a boycott in violation of section 3(b) of the McCarran-Ferguson Act. Lastly, the plaintiffs contended that the Court should exercise jurisdiction over the foreign reinsurers because the comity factors favored extraterritorial application of U.S. antitrust laws.

 Defendants countered by claiming that the McCarran-Ferguson Act immunizes the activities of insurers, and therefore, the fact that foreign entities were parties to the transaction did not preclude protection under the Act. Furthermore, defendants argued that their contract reflected independent business judgments not to insure risky policies and, consequently, did not constitute a boycott. Lastly, the foreign reinsurers argued that foreign interests outweighed any U.S. interests in exercising jurisdiction over them, and thus the Court should not apply U.S. antitrust laws extraterritorially in this case.

B. Prior Proceedings

The district court dismissed the action, holding (1) that McCarran-Ferguson immunity applied to the domestic defendants and (2) that international comity considerations barred the action against the foreign reinsurers. The Ninth Circuit reversed the dismissal of the suit, holding that (1) McCarran-Ferguson immunity did not apply where foreign reinsurers and insurance brokers had allegedly agreed to boycott; (2) domestic insurers lost immunity when they conspired with foreign defendants; and (3) international comity did not prevent U.S. courts from exercising jurisdiction over British reinsurers.

In granting certiorari, the Supreme Court, on its own motion, expanded argument time from the usual sixty to ninety minutes, underscoring the importance of the case. The Court limited its review to the following three legal questions:

1. Do domestic insurance companies whose conduct otherwise would be exempt from federal antitrust law under McCarran-Ferguson Act lose that exemption because they participate with foreign reinsurers in the business of insurance?
2. Do agreements among primary insurers and reinsurers on such matters as standardized advisory insurance policy forms and terms of insurance cov-

109. Id.
110. Brief for Respondent States (No. 91-1128), available in LEXIS, Genfed Library, USPlus File.
111. Brief for the Petitioners (No. 91-1111), available in LEXIS, Genfed Library, USPlus File.
112. Id.
113. Brief for the Petitioners (No. 91-1128), available in LEXIS, Genfed Library, USPlus File.
115. 938 F.2d at 919.
erage constitute a "boycott" outside the exemption of the McCarran-Ferguson Act? (3) Was the extraterritorial reach of U.S. antitrust law properly determined in light of Supreme Court precedent and contemporary understanding of international law when the Court of Appeals held that the district court could apply U.S. law to the conduct of a foreign insurance market regulated abroad?117

The remainder of this Note describes the Supreme Court's decision regarding these three legal issues and analyzes its implications for the international insurance industry.118

C. The State Regulation Issue in Hartford

The Supreme Court unanimously reversed the appellate court on the issue of state regulation by deciding that domestic reinsurers do not lose their protection under the McCarran-Ferguson Act simply because they conduct business with foreign reinsurers.119 The Supreme Court strictly construed the language of section 2(b), which states that federal antitrust laws apply "to the business of insurance to the extent that such business is not regulated by state law."120 The Court determined that the Act immunizes "activities" rather than "entities" under this language.121 Thus, as long as the states regulate the activities of foreign reinsurers, then section 2(b) of the McCarran-Ferguson Act protects such insurance activity from federal antitrust laws.122

Writing for a unanimous Court, Justice Souter began his analysis by defining the word "business."123 Although conceding that the term "business" may mean "[a] commercial or industrial establishment or enterprise," he argued that "the definite article before 'business' in § 2(b) shows that the word is not used in that sense, the phrase 'the business of insurance' obviously not being meant to refer to a single entity."124 Instead, Justice Souter decided that "business" as used in section 2(b) is most naturally read to refer to "mercantile transactions; buying and selling; [and] traffic."125 By focusing on the "mercantile transactions" themselves, instead of the actual entities conducting such transactions, the Supreme Court provided McCarran-Ferguson immunity to domestic insur-

118. Since both the lower courts and the Supreme Court agreed that the activity involved in Hartford constituted the "business of insurance," the focus of the case became the other two criteria for determining whether the McCarran-Ferguson Act grants immunity: (1) state regulation of the insurance business and (2) alleged boycott activity. 938 F.2d at 927; 113 S. Ct. at 2901.
119. 113 S. Ct. at 2892.
121. Id. at 2902.
123. 113 S. Ct. at 2901.
124. Id.
125. Id.
ers conducting international transactions, provided that the states regulate such transactions.

D. The Boycott Issue in *Hartford*

Construing the facts of the case liberally, the Supreme Court concluded that the complaint sufficiently alleged misconduct by the defendant insurers that could potentially constitute a boycott. The Supreme Court unanimously affirmed the appellate court’s refusal to dismiss the action and remanded the issue for further consideration under the new definition of boycott provided by Justice Scalia (writing for a majority of five Justices including Rehnquist, O’Connor, Kennedy, and Thomas). In defining the term “boycott,” Justice Scalia relied on the historical derivation of the word, meaning to “combine in refusing to hold relations of any kind” with the target so as to punish that target for its position. While acknowledging that different kinds of boycotts exist, Justice Scalia distinguished between a “boycott” and a “concerted agreement to seek particular terms in particular transactions.” He argued that a “concerted agreement” is not a boycott but rather a “way of obtaining and exercising market power by concertedly exacting terms.” Such an agreement does not coerce anyone into compliance but rather declares that the instigators will deal with others only on specific trade terms. Therefore, a concerted agreement becomes a boycott only when the actors refuse to deal beyond the given transaction, thereby using “unrelated transactions . . . as leverage to achieve the terms desired” on the initial transaction.

Writing for a minority of the Court on this point, Justice Souter (joined by Justices White, Blackmun, and Stevens) provided an alternative definition of boycott. Instead of focusing, as the majority does, on

126. *Id.* at 2911. See footnote 7 for one count in the complaint that was dismissed for failure to allege a boycott. *Id.* at 2917. This Court alleged that some domestic primary insurers conspired with foreign reinsurers and the ISO to draft restrictive form and policy language for retrocessional insurance. *Id.* at 2906 n.18. Because the complaint, however, did not allege that defendants “refused to deal” in connection with drafting these forms and policies, the Court found insufficient evidence of a boycott.

127. *Id.* at 2911. In 1880, an Irish organization, the Land League, requested a reduction of rents by landlords. *Id.* When Captain Charles Boycott, a manager of real estate in Ireland refused to comply with the request, his tenants and “the population of the region for miles around resolved not to have anything to do with him, and . . . not to allow anyone else to have anything to do with him . . . No one would work for him; no one would supply him with food.” *Id.*

128. *Id.*

129. Justice Scalia described a conditional boycott (where the refusal to deal with the target may be conditioned upon a promise to renew dealings if and when the target mends its ways) and a partial boycott (where the target is isolated in part, but not wholly, from certain transactions). *Id.*

130. *Id.*

131. *Id.*

132. *Id.*

133. *Id.*

134. Although the minority and majority have different conceptions of what types of behavior make a boycott effective, both sides agree that the following four elements
refusals to deal with the target that are "collateral" or "unrelated" to the objective sought by the boycott, Justice Souter focused on any "enforcement activities" that would raise the claimed attempts to fix terms to the level of section 3(b) boycotts. Thus, Justice Souter's definition would permit a finding of boycott even in a case involving a single transaction so long as the concerted activity coerced others to comply with a specific objective.

E. The International Comity Issue in Hartford

Writing for the majority, Justice Souter (joined by Justices Rehnquist, White, Blackmun, and Stevens) affirmed the appellate court's decision that international comity does not bar the exercise of extraterritorial jurisdiction under the Sherman Act. The Court determined that subject matter jurisdiction existed since the London reinsurers themselves conceded this point and, also, because the alleged conduct of the reinsurers produced a "substantial effect" in the United States, thus satisfying the FTAIA jurisdictional requirement.

Having established subject matter jurisdiction under the Sherman Act, the Court then found that "Congress expressed no view on the question whether a court with Sherman Act jurisdiction should ever decline to exercise such jurisdiction on grounds of international comity" when it enacted the FTAIA. Even assuming, however, that a court could decline to exercise jurisdiction in certain cases, the Supreme Court decided that this was not such a case. The appellate court had applied the Timberlane test and found that all factors but one supported exercising jurisdiction in this case. The one exception was whether a conflict existed between domestic and foreign law. The Supreme Court failed to discuss the other factors, apparently accepting the appellate court's analysis of them, but it briefly addressed the conflict factor and found that no conflict existed between British and American law. Justice Souter reasoned that no conflict existed in this case because the foreign reinsurers could comply with the laws of both England and the United States.

characterize § 3(b) boycotts. Id. at 2903. First, "only those refusals to deal involving the coordinated action of multiple actors" constitute § 3(b) boycotts. Id. Second, a § 3(b) boycott need not involve an absolute refusal to deal or, in other words, a refusal to deal can be conditional. Id. at 2903-04, 2912. Third, a § 3(b) boycott "need not entail unequal treatment of the targets of the boycott and its instigators." Id. at 2904. For example, instigators of a boycott may treat all insurers equally by inviting them all to join the boycott or else be subjected to it. Id. Fourth, "concerted activity" is not by itself a boycott, although it is a necessary aspect of any boycott. Id.

135. Id. at 2905.
136. Id. at 2908.
137. Id. at 2909.
138. Id. at 2910.
139. Id.
140. 938 F.2d at 934.
141. Id.
142. 113 S.Ct. at 2910.
By contrast, Justice Scalia (joined by Justices O'Connor, Kennedy, and Thomas) dissented, arguing that the exercise of jurisdiction in this case would be unreasonable. The minority's approach focused on a distinction between "adjudicative comity," which would allow judges to decline the exercise of jurisdiction even though it exists, and "prescriptive comity," which would limit the substantive reach of U.S. laws abroad. Whereas the majority apparently utilized the former, Justice Scalia argued that courts must look solely at the statute itself to determine if jurisdiction exists, and any comity considerations should be included in that determination. In applying this test, the minority relied on the international comity factors listed in section 403(2) of the Restatement (Third) of Foreign Relations Law (codifying the Timberlane factors) to determine that British interests outweighed those of the United States since the activity involved British parties and occurred in Britain, where British laws regulate the London reinsurance market. Justice Scalia criticized the majority for focusing on the conflicts of law question in deciding whether to abstain from exercising jurisdiction instead of considering the substantive question of whether the Sherman Act covers the reinsurers' conduct.

III. Analysis
A. Limiting The Scope of the McCarran-Ferguson Act Through the Requirement of State Regulation

The Supreme Court's distinction between an entity-based and an activity-based state regulation elicits two criticisms. First, by not realizing that activities of insurers are inseparable from the entities themselves, the Supreme Court failed to consider the inherent difficulty of regulating activities occurring abroad. Second, the Supreme Court remanded, instead of deciding, the difficult question of whether states regulate the activity of foreign reinsurers.

1. Activity v. Entity-Based State Regulation

The trend prior to the Supreme Court's decision in Hartford was to limit the scope of the McCarran-Ferguson Act. Given the recent debate over the value of the McCarran-Ferguson Act, the Supreme Court should have followed this trend by limiting the scope of section 2(b) to those activities occurring within the states' borders. In fact, the appellate court favored such an entity-based approach by arguing that states can only regulate

143. Id. at 2921.
144. Id. at 2920.
145. Id. at 2919-20.
146. Justice Scalia asserted that the result would be the same under any system of evaluating international choice-of-law issues, including Timberlane. Id.
147. Id. at 2921.
148. Id.
activity occurring within their borders.  

Claiming that one state cannot regulate acts occurring within another state, the appellate court concluded that states similarly could not regulate activity occurring in foreign countries.

Furthermore, the appellate court cited *Royal Drug* for the proposition that "an exempt entity forfeits [its] antitrust exemption by acting in concert with non-exempt parties." The Supreme Court, however, rejected this analysis, claiming that the appellate court misinterpreted the analogy made in *Royal Drug* between the McCarran-Ferguson Act and the Capper-Volstead Act. The Court claimed that the analogy was a "loose" one because the McCarran-Ferguson Act immunizes activities not persons, whereas the Capper-Volstead Act immunizes persons.

Although the Supreme Court properly distinguished *Royal Drug*, it did not consider the possibility that an entity-based and an activity-based interpretation of the McCarran-Ferguson Act are not mutually exclusive. The Supreme Court could have limited the scope of the Act by applying an entity-based approach to foreign insurers while at the same time retaining an activity-based definition for domestic insurers. However, the Supreme Court probably decided against developing such a dichotomy in analyzing § 2(b) of the Act so as not to disrupt the manner in which domestic insurers conduct business with foreign reinsurers. Still, an entity-based approach might have improved state regulation of the international insurance business by encouraging domestic insurers to transact their business in the United States when dealing with foreign reinsurers, or instead it might have encouraged domestic insurers to transact more business with domestic reinsurers.

2. The Quality of State Regulation

The second criticism of the Supreme Court’s decision is its failure to assess the extent to which states regulate foreign reinsurers. Under current precedent, states satisfy the regulation requirement of section 2(b) of the McCarran-Ferguson Act so long as they provide a minimal regulatory

150. 938 F.2d at 928.
151. The appellate court believed that state insurance schemes “could not purport to regulate the bulk of international insurance transactions.” Id. (citing J. Atwood & K. Brewster, Antitrust and American Business Abroad 1, 78 (1981)).
152. Id. (citing Group Life & Health Ins. Co. v. Royal Drug, 440 U.S. 205, 231 (1979)).
153. 113 S. Ct. at 2902.
154. The Capper-Volstead Act immunizes agricultural cooperatives from antitrust liability under the Sherman Act. Donald A. Frederick, Legal Rights of Producers to Collectively Negotiate, 9 WM. MITCHELL L. REV. 433 (1993). To qualify for Capper-Volstead protection, members of a cooperative must be producers of agricultural products. Id. These producers include “farmers, planters, ranchers, dairymen, and nut or fruit growers.” Id. Unlike the McCarran-Ferguson Act which immunizes activities of insurers, the Capper-Volstead Act immunizes individuals. Therefore, the Supreme Court rejected the appellate court’s reasoning derived from a “loose analogy” drawn between the two Acts in *Royal Drug*. 113 S. Ct. at 2902.
155. Miller, supra note 51.
156. Id.
scheme. It is unclear, however, whether most states would satisfy even this minimal requirement with regard to regulating foreign reinsurers. Most states provide limited regulation of reinsurers even when the reinsurer's activity occurs within the United States. States primarily regulate the solvency of foreign reinsurers, albeit indirectly, through domestic insurers who receive "credit for reinsurance" on their financial statements upon showing that their reinsurer meets the minimum standards for solvency.

Although states may regulate the solvency of foreign reinsurers, they often do not regulate the type of insurance coverage provided by these reinsurers for several reasons. First, reinsurance agreements involve sophisticated business parties capable of protecting their own interests. Second, reinsurance agreements are generally not contracts of adhesion, but rather are tailored to meet the specific needs of the parties involved, and therefore should not be hindered by rigid regulatory requirements. Third, it is impractical for states to regulate the diverse policies produced by reinsurers requiring flexibility to change their agreements to reflect rapid changes in the market. Thus, the states do not regulate the substance of reinsurance coverage as extensively as they regulate domestic insurance policies provided directly to consumers.

Given the complex nature of international transactions, courts should apply a higher standard of state regulation to foreign reinsurers under section 2(b). The minimal standard currently applied to domestic insurers would not adequately protect U.S. consumers from antitrust activities occurring abroad, such as the alleged "London Market Agreement" in which foreign reinsurers agreed to insure only those policies that excluded pollution coverage. Thus, by failing to decide whether states satisfy the section 2(b) regulation requirement of the McCarran-Ferguson

157. See supra note 37 and accompanying discussion of the state regulation requirement under § 2(b) of the McCarran-Ferguson Act.


The offshore reinsurance industry is grossly unregulated by the current U.S. regulatory system.... Clearly, State attempts at regulation, even to the extent they exist, are inherently inadequate. Even if it had the resources to do so, a State insurance commission lacks the jurisdiction to pursue these alien reinsurers and their unlicensed brokers. Each insurance commission cannot possibly investigate the type of vast interstate and international networking and money flow that the Subcommittee found in its investigation.


162. Id.

163. See supra note 158 (quoting a Senate Report concluding that states lack the resources to investigate adequately international reinsurance transactions).
Act, the Supreme Court missed an opportunity to limit the scope of the Act as it applies to foreign reinsurers.

B. Redefining the Term "Boycott"

A proper definition of the term "boycott" as used in section 3(b) of the McCarran-Ferguson Act should reflect the purpose of the Act, as well as the special nature of the insurance industry.\(^{164}\) Congress passed the Act intending to protect certain types of collective activity necessary for the proper functioning of the insurance business.\(^{165}\) Both lower courts analyzed the boycott issue in light of the protection intended by the McCarran-Ferguson Act. The district court concluded that the defendant insurers' activity consisted of "collective development of terms for policies" which the McCarran-Ferguson Act intended to protect.\(^{166}\) The appellate court, however, decided that the defendants' concerted activity had "gone beyond joint action to their own regulation of the terms on which CGL and property insurance will be offered" and that the McCarran-Ferguson Act did not protect such activity.\(^{167}\)

Unlike the lower courts, the Supreme Court failed to define the term "boycott" in light of the legislative purpose of the McCarran-Ferguson Act. Instead, Justice Scalia derived his definition of boycott from its historical roots without considering the special nature of the insurance industry or judicial precedent interpreting the term "boycott." The Supreme Court had previously construed the boycott exemption in \textit{St. Paul Fire \& Marine Ins. Co. v. Barry} stating that "\textit{the generic concept of boycott refers to a method of pressuring a party with whom one has a dispute by withholding, or enlisting others to withhold, patronage or services from the target.}\(^{168}\)"

The activity in \textit{Barry} constituted a boycott because competing insurers had agreed not to deal with the plaintiff policyholders on any terms.\(^{169}\) The \textit{Barry} definition of boycott, however, failed to consider that a boycott may include not only "a concerted refusal to deal on any terms, but also a


\(^{165}\) \textit{Id.} at 1077.

\(^{166}\) The district court stated:

"What the McCarran Act leaves unprotected is conduct which goes beyond the making and implementation of agreements to do business only on terms acceptable to the participant (even if such agreements would otherwise violate Section 1), such as refusals to deal on any terms and exclusion from alternative sources. Such conduct is not charged here."

\textit{723 F. Supp.} at 479.

\(^{167}\) Although conceding that cooperation among insurers, "including those who might be unwilling to agree were it not for economic exigencies," may be immune under the Act, the appellate court determined that such cooperation becomes a boycott when the "'economic exigencies' are produced by conspirators who refuse to supply reinsurance if the unwilling insurer does not agree." \textit{938 F.2d} 919, 950. \textit{See also News \& Analysis, \textit{Oral Arguments Heard From British Reinsurance Industry On Forfeiture of Antitrust Immunity}, U.S. LAW WEEK, Feb. 26, 1993.}

\(^{168}\) \textit{438 U.S.} at 541.

\(^{169}\) \textit{Id.} at 552.
refusal to deal except on certain terms."\textsuperscript{170}

The Supreme Court confronted this possibility in \textit{Hartford}. The Court reasoned that a refusal to deal except on certain terms may constitute a boycott under certain conditions. The majority and minority, however, disagreed about the conditions necessary to transform a "concerted refusal" to deal, except on certain terms, into a boycott.\textsuperscript{171} The majority defined these conditions in terms of unrelated, collateral transactions while the minority focused on "enforcement activity."\textsuperscript{172}

Under the majority's definition, foreign reinsurers could collectively refuse to reinsure CGL forms that they did not approve because "the terms of the primary coverages are central elements of the reinsurance contract."\textsuperscript{173} By characterizing the interdependent relationship between primary insurers and foreign reinsurers as a single transaction, Justice Scalia concluded that the foreign reinsurers' refusal to deal under these conditions did not involve a collateral transaction.\textsuperscript{174} Their activity thus did not constitute a boycott.\textsuperscript{175} Justice Scalia conceded, however, that the foreign reinsurers' actions may establish a boycott under different conditions. For example, a boycott would exist if the foreign reinsurers "refused all reinsurance, even as to risks written on other forms" which they approved.\textsuperscript{176} Also, a boycott would occur if the foreign reinsurers "linked their demands" so as to refuse reinsurance for some policies until their terms were met on other insurance policies.\textsuperscript{177}

By contrast, the minority's definition of boycott relies on the precedent in \textit{Barry}. In \textit{Barry}, the Supreme Court had decided that the term "boycott" did not describe a "unitary phenomenon," but rather depended on the facts of the case.\textsuperscript{178} Similarly, the minority in \textit{Hartford} relied on the fact-specific "enforcement activity" standard to argue that the interests of insurers and reinsurers are not always inseparable.\textsuperscript{179} Justice Souter assumed that foreign reinsurers would ordinarily act independently to serve their best business interests. In \textit{Hartford}, however, the reinsurers' refusal to provide reinsurance represented the interests of the domestic insurers seeking to coerce their competitors to accept their terms on the ISO forms. Thus, under Justice Souter's definition, the foreign reinsurers' conduct established a boycott because it enforced the goals of the domestic insurers.

Under the majority's definition of boycott, however, the foreign reinsurers would be immune in these circumstances so long as they had some

\textsuperscript{171} 113 S. Ct. at 2912-13.
\textsuperscript{172} \textit{Id.} at 2904, 2912-13.
\textsuperscript{173} \textit{Id.} at 2914.
\textsuperscript{174} \textit{Id.}
\textsuperscript{175} \textit{Id.} at 2915.
\textsuperscript{176} \textit{Id.} at 2916.
\textsuperscript{177} \textit{Id.} at 2916-17.
\textsuperscript{178} 438 U.S. at 543.
\textsuperscript{179} 113 S. Ct. at 2907.
motive for their involvement in the transaction with the primary insurers. The minority's definition provides a more reasonable approach for determining when a boycott exists. This definition permits the courts to delve beyond the facial justifications of the defendants' conduct to decide if, in fact, this conduct is the type that the McCarran-Ferguson Act intended to protect. In addition to considering the purpose of the Act, the minority's broader definition of boycott also limits the scope of the Act's immunity, a trend established in Barry which the majority failed to acknowledge.

Given the tension between the majority and minority definitions of boycott in this five-to-four decision, Hartford may not provide stable precedential value in the long run. Perhaps, the struggle between the two sides should "serve as a serious wake-up call to Congress that America needs to deal with the McCarran-Ferguson Act's excessive antitrust exemption." Until Congress responds to Hartford, however, the majority's "overly narrow" definition presents a difficult standard for the states to meet on remand. It is not clear whether the states can satisfy the Hartford standard by showing that the foreign reinsurers exercised a "kind of extraneous second-transaction muscle."

Assuming the states cannot satisfy the new "boycott" standard, their best strategy may be to prove that the defendants' conduct amounted to "coercion and intimidation" under section 3(b) of the McCarran-Ferguson Act. Although Justice Scalia dismissed this possibility without much explanation in his opinion, the lower courts may be convinced by such arguments since the threshold for establishing coercion or intimidation may be lower than the standard for proving a boycott. Additionally, the plaintiff states may shift their focus to the section 3(b) language which prohibits an "agreement to boycott, coerce, or intimidate." Given the evidence of the "London Market Agreement," the states may have less difficulty establishing an "agreement" under section 3(b) than an actual "boycott." Thus, the Supreme Court may have left open some possibilities for limiting the scope of the McCarran-Ferguson Act's exemption from the federal antitrust laws.

185. 113 S. Ct. at 2915 n.6 (Justice Scalia concluded that a concerted agreement to terms did not coerce anyone in the usual sense of the word).
C. Rejecting the International Comity Balancing Test

Although the court properly decided the international comity issue, the majority's opinion was primarily fact-based and failed to resolve three important legal issues. First, the Supreme Court failed to determine whether the "direct, substantial and reasonably foreseeable effect" standard of the FTAIA amends the existing "effects test" or merely codifies it.\(^{186}\) Second, the Court did not decide whether, under the FTAIA, judges still have the authority to decline jurisdiction due to comity considerations.\(^{187}\) Third, even if comity is still a valid doctrine in the antitrust context, the Court seemed to ignore the dissent's focus on the type of comity utilized (prescriptive or adjudicative). In other words, the Court did not settle whether the international comity balancing test should be applied in determining whether jurisdiction exists in the first place or whether it should be applied only after jurisdiction has been established.\(^{188}\)

By focusing on the specific facts of the case, the Supreme Court in Hartford failed to formulate a clear legal standard for lower courts to follow in cases that involve strong foreign interests. It is unclear how much of the Timberlane analysis survives the Court's decision. The lower courts may now focus primarily or exclusively on the majority's lenient test of a "true conflict" among nations.\(^{189}\) Also, the Supreme Court failed to guide lower courts in deciding cases where, unlike Hartford, the facts do not overwhelmingly favor the extraterritorial application of the law.

In addition to these flaws with the Supreme Court's decision in Hartford, the international comity balancing test is also inherently flawed. Generally, the comity test produces highly discretionary and unpredictable outcomes in cases.\(^{190}\) This is evident in Hartford where the lower courts and the Supreme Court came to different conclusions by relying on the same Timberlane factors. For example, the lower courts in Hartford

\(^{186}\) 113 S. Ct. at 2909 n.23 (the Court decided it was not necessary to resolve this issue because even assuming that FTAIA affects this case and also that the FTAIA differs from prior law, the alleged conduct satisfied the FTAIA's requirements).

\(^{187}\) Id.

\(^{188}\) The Supreme Court failed to resolve the tension between the lower court decisions in Aloha and Mannington Mills (which distinguished whether jurisdiction exists from whether a court should exercise it) and Timberlane (which combined the comity analysis with the jurisdictional question). 113 S. Ct. 2891, 2910 n.24. However, this tension may have little practical significance. Ultimately, the majority and minority both apply the Timberlane factors after determining that the Sherman Act applies extraterritorially. Id. at 2910, 2920. They merely disagree as to the outcome of applying those factors to the facts of this case. The dispute over the theoretical placement of the comity test does not appear to affect this result, and it is difficult to imagine a situation where it would.


\(^{190}\) Kadish, supra note 83, at 156.
decided that the "degree of conflict with foreign law or policy" was great since Britain regulates the reinsurance market and also because British laws protect antitrust defendants against punitive damages. Yet, under these same facts, the Supreme Court found that no conflict existed because the foreign reinsurers could comply with both British and U.S. laws.

Another criticism of the comity test is that it requires the courts to make policy decisions about (1) the degree of conflict with foreign law; (2) the extent to which enforcement of the judgment will achieve compliance; and (3) the possible effect upon foreign relations if the court exercises jurisdiction. Often the courts are not well-suited for resolving such non-justiciable political issues. For example, the courts did not predict the backlash that ensued from the Uranium Antitrust decision which motivated the passage of foreign retaliatory "blocking statutes." These laws threaten diplomatic relations between the United States and other nations. Because of this threat the courts should not be using the balancing test in deciding whether to exercise jurisdiction over foreigners.

One solution to the problem of foreign retaliation against the extraterritorial application of U.S. antitrust laws may be to permit the executive branch to intervene before prosecutors file a suit. This would allow the executive branch to resolve any potential international conflict through diplomatic channels. For example, the United States has developed diplomatic agreements with Australia, Canada, and the EEC to facili-

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191. The district court found that the British Department of Trade and Industry regulates the marketplace through various acts, including the Lloyd's Acts (1870-1982), the Companies Act (1985), and the Insurance Companies Act (1982), and that these British laws exempt agreements among insurers, reinsurers, and retrocessional insurers about provisions in insurance policies from antitrust regulation. 723 F. Supp. 464, 488.

192. The district court cited Britain's "unmitigated hostility to the extraterritorial application of American antitrust laws" as evidenced in England's passage of the Protection of Trading Interests Act (1980), a blocking statute that permits British antitrust defendants to recover from plaintiffs the punitive portion of a damage judgment stemming from activities that occurred outside the enforcing nation's territory. 113 S. Ct. at 2910.


194. Id.

195. Carl A. Cira, Jr., The Challenge of Foreign Laws to Block American Antitrust Actions, 18 Stanford J. Int'l L. 247 (1982). In response to the extraterritorial application of U.S. antitrust laws, Britain enacted the Protection of Trading Interests Act 1980 to retaliate against the extraterritorial application of U.S. antitrust laws. Id. at 249. Similarly, the Australian Parliament enacted the Foreign Antitrust Judgments (Restriction of Enforcement) Act 1979. Id. at 254 n.41. These Acts, called blocking statutes, generally achieve two purposes. Id. at 255. One purpose is to prevent compliance with foreign state requests for documents or information required for evidentiary purposes during discovery or the trial. Id. The other purpose is to prevent the enforcement in whole, or in part, of decisions issued by foreign courts, particularly the punitive or treble damages portion of U.S. antitrust judgments. Id. at 254.


197. Id. at 66 n.75.
tate cooperation in antitrust matters. These agreements generally provide for (1) future consultations to avoid potential conflicts among nations; (2) notification prior to the initiation of an antitrust suit affecting the other nation's interests; and (3) exchange of information about activities affecting international trade.200

Despite the problems with the comity analysis, it serves the limited purpose of eliminating from judicial consideration those antitrust cases that have only slight economic impact on the U.S. economy but involve strong foreign interests.

In practice, the American courts focus on the extent to which there is a direct and substantial effect on American commerce; United States courts declining or asserting jurisdiction is not a result of a balancing process but of the extent of an effect on the United States commerce. The balancing process excludes only conduct with de minimis effects on American commerce. This result has already been achieved by the traditional effects test.201

Arguably, the comity balancing test does nothing more than sensitize the courts to the competing interests of foreign nations. The test provides no meaningful method to assimilate these foreign interests beyond acknowledging their existence.202 Perhaps, then, the best approach for the Supreme Court in Hartford would have been to reject the Timberlane approach in favor of a pure "effects" test for subject matter jurisdiction. If the foreign conduct has only a limited effect on the United States, then courts could apply a "mild" comity balancing test to limit jurisdiction in these extreme cases.203 As other countries develop more sophisticated forms of economic regulation, the courts will need to defer to their judgment on the most effective way to promote free trade on an international level.204

Conclusion
The Supreme Court's decision in Hartford has important implications for the international insurance industry. The Court determined that domestic insurers do not lose their McCarran-Ferguson immunity from antitrust laws when they transact business with foreign reinsurers. The Court rea-
soned that the Act protects the "activities" of insurers not the insurance "entities" themselves. Therefore, the McCarran-Ferguson Act protects foreign reinsurers under section 2(b) so long as the states regulate their activities.

At first glance, the Court's interpretation of the scope of the McCarran-Ferguson Act presents a victory for domestic insurers who regularly conduct business transactions with foreign reinsurers. In reality, however, this victory may be hollow because the states generally do not regulate the activities of foreign reinsurers, particularly those activities occurring outside the states' borders. Therefore, such international transactions will not be protected under the state regulation requirement of section 2(b) of the McCarran-Ferguson Act. A better approach would have been for the Supreme Court to follow the previous trend of limiting the Act's scope by requiring that international transactions be conducted within the jurisdiction of the various states which must regulate such transactions under section 2(b).

Additionally, the Court reassessed the meaning of the term "boycott" under section 3(b) of the McCarran-Ferguson Act. In a five to four decision, the Court provided a narrower definition of boycott which will probably allow a wide array of anticompetitive practices to be exempt from the federal antitrust laws. A better approach would have been for the Supreme Court to limit the scope of the McCarran-Ferguson Act by providing a broader definition of boycott thereby minimizing the section 3(b) exemption from federal antitrust laws. Instead, under the new boycott standard, the suing states on remand will have greater difficulty proving a boycott. Their best strategy may be to focus on proving that the defendants' conduct constituted "intimidation" or "coercion" in violation of section 3(b) of the McCarran-Ferguson Act.

Lastly, the Court indirectly endorsed a comity analysis for determining when to apply U.S. antitrust laws extraterritorially. The Court focused on one aspect of the comity analysis in particular—the potential conflict between U.S. and foreign laws—to determine that foreign interests did not favor a refusal to exercise jurisdiction over the foreign defendants in this case. Although the Court implicitly endorsed the comity approach, it failed to provide any guidance to the lower courts about when to apply this comity analysis. Given the non-justifiable diameter of the comity test and the highly discretionary results produced by its application, the Supreme Court should have rejected the comity test altogether in favor of a pure "effects" test for determining jurisdiction.