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DEVELOPING A CONSUMER RIGHT TO INVOKE THE BOYCOTT EXCEPTION TO THE INSURANCE COMPANY EXEMPTION FROM FEDERAL ANTITRUST LAWS

I. Introduction

The McCarran-Ferguson Act¹ provides that the business of insurance shall be subject to the laws of the several states which relate to the regulation or taxation of such business. The Act further provides that the business of insurance shall be exempt from federal antitrust laws if state regulation exists.² However, an exception to this exemption exists in section 3(b) of the McCarran Act.³ Section 3(b) provides that nothing within the McCarran Act shall render the Sherman Act inapplicable to any agreement to boycott, coerce, or intimidate, or any act of boycott, coercion, or intimidation.⁴

Despite the seemingly clear statutory language of section 3(b), the trend of judicial construction of this statute until recently had been to narrow substantially this exception to the federal antitrust exemption.

Until the decisions of the First Circuit in *Barry v. St. Paul Fire & Marine Ins. Co.*⁵ and the District of Columbia Circuit in *Proctor v. State Farm Mutual Automobile Ins. Co.*,⁶ the courts refused to permit consumers of insurance to invoke the McCarran Act's boycott exception.⁷ In the *Barry* decision however, Chief Judge Coffin

1. 15 U.S.C. §§ 1011-15 (1970) [hereinafter the McCarran Act or The Act.] *Id.* § 1012(a).

2. *Id.* § 1012(b).

3. *Id.* § 1013(b).

4. *Id.* The actual language of § 1013(b) reads as follows: "[N]othing contained in this chapter shall render the said Sherman Act inapplicable to any agreement to boycott, coerce, or intimidate, or act of boycott, coercion, or intimidation."

5. 555 F.2d 3 (1st Cir. 1977).

6. 561 F.2d 262 (D.C. Cir. 1977).

7. The court generally found that Congress's intent was to protect small insurance companies and agents from being placed on a blacklist by large insurance companies. Those companies and agents placed on the blacklist were not allowed to sell the products of the large companies which dominated the industry. See *Addrisi v. Equitable Life Assurance Soc'y*, 503 F.2d 725 (9th Cir. 1974), *cert. denied*, 420 U.S. 929 (1975); *Meicler v. Aetna Cas. & Sur. Co.*, 506 F.2d 732 (5th Cir. 1975); *Proctor v. State Farm Mut. Auto. Ins. Co.*, 406 F. Supp. 27 (D.D.C. 1975), *rev'd*, 561 F.2d 262 (D.C. Cir. 1977); *Mathis v. Automobile Club Inter-Ins. Exch.*, 410 F. Supp. 1037 (W.D. Mo. 1976); *McIlhenny v. American Title Ins. Co.*, 418 F.

allowed plaintiff doctors, to invoke section 3(b) in a suit in which they alleged that several insurance companies violated the federal antitrust laws by conspiring to shrink malpractice coverage available to Rhode Island doctors.⁸ In *Proctor*, after a close examination of the Act's legislative history, the District of Columbia Circuit also rejected the narrow construction of the boycott exception that only insurance agents and companies can invoke section 3(b).⁹

In allowing a broader scope to the boycott exception, these two circuits disagreed with what the *Barry* court described as a "formidable array of authorities."¹⁰ This Note will examine the legislative history of section 3(b) of the McCarran-Ferguson Act, the authorities which provided the traditional narrow interpretation of the boycott exception, and the effects of the *Barry* and *Proctor* decisions on insurance companies and consumers.

II. Legislative History of Section 3(b) of the McCarran-Ferguson Act

In 1869, the United States Supreme Court declared that "issuing a policy of insurance is not a transaction of commerce"¹¹ and that state regulation of insurance did not impinge upon the federal government's power to regulate interstate commerce. The Court held this view until 1944¹² when it decided *United States v. Southeastern Underwriters Ass'n*.¹³ In that decision, the Supreme Court declared that a fire insurance company which conducted a substantial part of its business across state lines was engaged in "commerce among the several States" and subject to Congressional regulation under the Commerce Clause.¹⁴ As a result, federal antitrust laws

Supp. 364 (E.D. Pa. 1976); *Royal Drug Co. v. Group Life and Health Ins. Co.*, 415 F. Supp. 343 (W.D. Tex. 1976); *Seasongood v. K & K Ins. Agency*, 414 F. Supp. 698 (E.C. Mo. 1976), *rev'd on other grounds*, 548 F.2d 729 (8th Cir. 1977); *Frankford Hosp. v. Blue Cross*, 67 F.R.D. 643 (E.D. Pa. 1975).

8. 555 F.2d at 12.

9. 561 F.2d at 272.

10. 555 F.2d at 7.

11. *Paul v. Virginia*, 75 U.S. (8 Wall.) 168, 183 (1869).

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

13. 322 U.S. 533 (1944). See note 39 *infra*.

14. *Id.* at 553. The Court distinguished *Paul v. Virginia* and its progeny as dealing with the constitutionality of state rather than federal legislation. The Court also viewed the nature and size of the insurance business and concluded that insurance was part of interstate commerce. *Id.* at 539-53.

were held to be applicable to insurance companies. The imposition of federal law where state taxation and regulation had governed raised many uncertainties.¹⁵

As a response to the *South-Eastern Underwriters* decision, Congress hurriedly passed the McCarran-Ferguson Act which returned primary responsibility for insurance regulation and taxation to the states.¹⁶ The Act stated that no act of Congress, other than a law specifically relating to the business of insurance was to be construed to invalidate, impair, or supercede state tax and regulatory laws.¹⁷ The possible application of the Sherman, Clayton, Federal Trade Commission, and Robinson-Patman Acts to the business of insurance was suspended until June 30, 1948.¹⁸ Thereafter, the Sherman, Clayton, and Federal Trade Commission Acts were not to apply to the business of insurance to the extent that it was regulated by state law.¹⁹ However, agreements or acts to boycott, coerce, or intimidate were to remain subject to the Sherman Act regardless of state regulation.²⁰

The draft of the bill introduced by Senators McCarran and Ferguson had originally been prepared by the National Association of Insurance Commissioners.²¹ The reports accompanying the two bills being debated in the House and the Senate both referred to the boycott provision, stating: "These provisions of the Sherman Act remain in full force and effect."²² These reports provide evidence

15. See Donovan, *Regulation of Insurance Under the McCarran Act*, 15 *Law & Contemp. Prob.* 473, 476-79. (1950). Many state officials and insurance executives feared that the foundations of state regulation and taxation had been shaken by the decision. *Id.* at 476. State government officials felt that the decision was motivated by the desire of the Washington bureaucrats to derive some benefit from "the huge pool of assets accumulated by the insurance companies." 44 *Col. L. Rev.* 772, 772-73. n. 10 (1944). Public opinion, as reflected by the press, was, in general, violently opposed to the decision. *Id.*

16. See Comment, *The McCarran-Ferguson Act: A Time for Pro-competitive Reform*, 29 *Vand. L. Rev.* 1271, 1277 (1976). In fact, even before the *South-Eastern Underwriters* opinion was announced, the House had passed a bill exempting the insurance industry from the antitrust laws. 90 *Cong. Rec.* 6565 (1944). However, the bill was killed in the Senate. *Id.* at 8054.

17. 15 U.S.C. § 1012(b) (1970).

18. *Id.* § 1013(b).

19. *Id.* § 1012(b).

20. *Id.* § 1013(b).

21. 29 *Vand. L. Rev.* 1271, 1276. The Senate version of the bill was printed in the *Congressional Record* on the first day of the Senate debate. 91 *Cong. Rec.* 478 (1945). The House version appears at 91 *Cong. Rec.* 1085 (1945).

22. S. Rep. No. 20, 79th Cong., 1st Sess. (1945), accompanying S. 340; and H. Rep. No.

that the boycott exception was not intended to be confined to blacklists of insurance companies and agents. In its analysis of the bill, the Senate Report describes the boycott provision as follows: "[T]he boycott section provides that at no time are the prohibitions in the Sherman Act against any agreement or act of boycott, coercion, or intimidation suspended. These provisions of the Sherman Act remain in full force and effect."²³

Amendments in both houses of Congress added provisions which broadened the coverage of section 3(b).²⁴ In the Senate, the amendment changed the language of the statute from "Nothing contained in this section shall render the Sherman Act inapplicable to any agreement or act of boycott . . ." to "[N]othing in this act . . ."²⁵ In the House, the language concerning "agreement" to boycott which had been stricken in committee was placed back in the bill. Congressman Celler had argued for restoration of the "agreement" language.²⁶ Celler was fearful of oral blacklists being issued by large companies which "[w]ould frighten the wits out of all these small companies."²⁷ He was also concerned with the possibility that agreements of "separation" would bar a company whose agent wrote insurance for a blacklisted company from participation in the self-governing organizations of the industry.²⁸

However, subsequent debates indicate that section 3(b) was not concerned merely with blacklists. In the debate on the conference report in the Senate, Senator Claude Pepper suggested that the states would take action during the moratorium period to defeat the purpose of the antitrust acts.²⁹ Senator Ferguson replied that the states could not, even during the moratorium, "interfere with the application of the Sherman Act to any agreement . . . or . . . act of boycotting."³⁰ Senator Pepper remained concerned that the state legislatures and the state rating bureaus, which were largely controlled by the influence of the insurance industry, would enact legis-

143, 79th Cong., 1st Sess. (1945).

23. S. Rep. No. 20, 79th Cong., 1st Sess. (1945).

24. 91 Cong. Rec. 479,1088 (1945).

25. *Id.* at 479.

26. *Id.* at 1087.

27. *Id.*

28. *Id.*

29. *Id.* at 1443.

30. *Id.*

lation that would permanently usurp the applicability of the Sherman, Clayton, and Federal Trade Commission Acts.³¹ In reply, Senator O'Mahoney, one of the bill's managers, tried to make clear that while the McCarran Act approved state regulation of the business of insurance, it did not sanction "regulation by private combinations and groups."³² Senator O'Mahoney assured Senator Pepper that private agreements enforcing certain rates would remain violations as a result of the restoration by the House of the "agreement" language.³³ He assessed the importance of the boycott provision as follows: "[A]ny attempt by a small group of insurance companies to enter into an agreement by which they would penalize any person or business in the insurance field in a way that was disapproved by them, would be absolutely prohibited by this provision."³⁴

Senator Pepper still remained adamant in his opposition to the bill because it allowed state rating bureaus to set prices.³⁵ Senator O'Mahoney believed that "[t]he vice in the insurance industry . . . was not that there were rating bureaus, but that there was in the industry a system of private government which had been built up by a small group of insurance companies, which companies undertook by their agreements and understandings to invade the field of Congress to regulate commerce."³⁶

In response to an inquiry by Senator Barkley about whether the boycott provision was sufficient to prevent combinations that did not involve boycott, coercion, or intimidation, Senator O'Mahoney took a very broad view of the scope of section 3(b).³⁷ He stated: "[M]y judgment is that every effective combination or agreement to carry out a program against the public interest of which I have had any knowledge in this whole insurance study would be prohibited by the [boycott] section . . ."³⁸

Soon after this exchange, the conference report was accepted. Clearly, while blacklists were a concern of Congress, the debates reflect that they were only one of many concerns. Fears of price-

31. *Id.* at 1480.

32. 91 Cong. Rec. 1483 (1945).

33. *Id.* at 1480.

34. *Id.*

35. *Id.* at 1484.

36. *Id.* at 1485.

37. *Id.* at 1486.

38. *Id.*

fixing and private regulation by insurance combinations through private rules also shaped the final language of the boycott provision.

An examination of the impetus for the passage of the McCarran Act also discloses a concern with more than just blacklists. The boycott provision was intended to preserve *South-Eastern Underwriters* to the extent that the latter subjected acts of "boycott, coercion, or intimidation" to the prohibitions of the Sherman Act.³⁹ While a blacklist of insurance companies and agents had been alleged in that case, another type of boycott was also involved.⁴⁰ Policyholders of insurance companies that were not members of the association "[w]ere threatened with boycotts and withdrawal of all patronage."⁴¹ The Supreme Court explicitly addressed itself to such conduct and found it to be illegal.⁴²

III. Judicial Construction of the Boycott Exception

A. The Narrow View

Despite the seemingly clear and broad scope of section 3(b), a split in the circuit courts developed as to the proper scope of the McCarran Act's boycott exception. The Fifth Circuit in *Meicler v. Aetna Casualty & Surety Co.*⁴³ and the Ninth Circuit in *Addrisi v. Equitable Life Assurance Society of the United States*⁴⁴ took a narrow view of the exception. They limited standing to invoke the exception to insurance companies and agents who have been the subject of blacklists by other insurance companies. The courts based their views on their reading of the legislative history of the boycott exception. Several district courts followed this line of interpretation.⁴⁵

39. The indictment in the case alleged a conspiracy by an association of insurance companies and agents to fix premiums and to monopolize the insurance business. The indictment also charged additional violations of the Sherman Act, involving practices in aid of the price-fixing and monopolization scheme. The Supreme Court used the terms "boycott", "coercion", and "intimidation" to describe these additional practices. 322 U.S. at 535-36.

40. *Id.* at 535.

41. *Id.* at 536. The Court described the acts of boycott, coercion, and intimidation as follows: "[T]he conspirators not only fixed premium rates and agent's commissions, but 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. members on S.E.U.A. terms." *Id.*

42. *Id.* at 562.

43. 506 F.2d 732 (5th Cir. 1975).

44. 503 F.2d 725 (9th Cir. 1974), *cert. denied*, 420 U.S. 929 (1975).

45. See note 6 *supra*.

The line of cases which gives a narrow construction to the boycott exception began with a District Court decision, *Transnational Ins. Co. v. Rosenlund*.⁴⁶ In that case, plaintiff insurance company entered into an agreement by which two individuals and the Maclund Corporation agreed to maintain a general agency for the solicitation and underwriting of mobile-home insurance.⁴⁷ After sales in this line of insurance began to decline, the individuals sold the Maclund Corporation to a third party, the Foremost Insurance Company.⁴⁸ As part of the sales agreement, Rosenlund and MacTarnahan agreed to work diligently with Foremost to use their best efforts for a period of four years from the effective date of the agreement to persuade all existing accounts to write all future mobile-home business with Foremost.⁴⁹ Transnational claimed that this sale was a breach of its agreement with Maclund and the two individuals.⁵⁰ Transnational also claimed that the covenant not to compete in the Maclund-Foremost contract amounted to an agreement to boycott and as such fell within the boycott exception of section 3(b) of the McCarran Act.⁵¹ As a result, plaintiff claimed that the Sherman Act applied to this conduct.⁵²

The district court referred to the legislative history of section 3(b) of the McCarran Act and determined that it dealt with the black-listing of companies and agents and not with the activity described in the complaint.⁵³ Even when it assumed that the exception was applicable the court found that there was nothing in the record to indicate a boycott, coercion, or intimidation.⁵⁴ The court viewed the

46. 261 F. Supp. 12 (D. Ore. 1966).

47. *Id.* at 16-17. The two individuals were Ralph E. Rosenlund and Robert M. MacTarnahan.

48. *Id.* at 17-18.

49. *Id.* at 17.

50. Transnational also alleged a violation by the defendants of fiduciary duties owed Transnational by them as its agents. A third cause alleged that Rosenlund and MacTarnahan were unjustly enriched by the payment by Foremost of valuable consideration for their performance of the Foremost-Maclund agreement. *Id.* at 18-19.

51. *Id.* at 27.

52. *Id.* at 25-26.

53. *Id.* at 26. The court stated, "[t]he legislative history shows that the boycott, coercion and intimidation exception, was placed in the legislation to protect insurance agents . . . " *Id.*

54. *Id.* at 27. The court felt that to fall within the accepted meaning of boycott, there must be: (1) a concerted refrainment from business relations with another, or (2) a concerted persuasion of third persons outside the combination to so refrain.

covenant not to compete as an agreement in which Rosenlund and MacTarnahan were urged to do business with Foremost, and not as an agreement in which a competitor was urged not to do business or to refrain from doing business with another.⁵⁵

Although *Transnational* made broad references to "the legislative history" of section 3(b), it cited only a single page from the *Congressional Record* which contained a floor speech by Congressman Emanuel Celler.⁵⁶ In that speech, Congressman Celler urged that the boycott exception be drafted so as to cover both agreements and acts of boycott, coercion, and intimidation.⁵⁷ However, there is nothing in Congressman Celler's speech to indicate that these were the only activities to be covered by the boycott exception. In fact, other speeches pointed out that such blacklists were not the sole concern of Congress.⁵⁸

The *Transnational* view stood alone until 1974 when the Ninth Circuit followed this narrow view of the scope of section 3(b) in *Addrisi v. Equitable Life Assurance Society*.⁵⁹ In *Addrisi*, a policyholder sought Clayton and Sherman Act damages against Equitable because of its insurance-lender enterprises.⁶⁰ As a condition to making Assured Home Owner loans for the purpose of purchasing homes, Equitable required the purchase of a type of "cash value" life insurance policy known as the "Adjustable Whole Life Policy."⁶¹ This policy was costly to the purchaser.⁶² Because of the tie-in requirement of the purchase of such a policy with the making of the loan, the plaintiff alleged that the agent exerted economic coercion upon prospective borrowers to purchase the policy.⁶³

55. *Id.* The Court distinguished *Maryland & Virginia Milk Producers Ass'n v. United States*, 362 U.S. 458 (1960). In that case, there was a ten year covenant not to compete in connection with the purchase of assets in a scheme of acquisitions. The *Transnational* court noted that the Supreme Court did not call that covenant a "boycott". The *Maryland & Virginia* case also involved different claims. The defendants were charged with an attempt to monopolize under section 2 of the Sherman Act and it was claimed that the defendant's gathering of assets might tend to substantially lessen competition under section 7 of the Clayton Act. *Id.* at 28.

56. 91 Cong. Rec. 1087 (1945).

57. *Id.*

58. See notes 30-39 and accompanying text *supra*.

59. 503 F.2d 725 (9th Cir. 1974), *cert. denied*, 420 U.S. 929 (1975).

60. *Id.* at 726.

61. *Id.*

62. *Id.*

63. *Id.*

The Ninth Circuit found that Equitable was engaged in the business of insurance at the time of such conduct, and as a result was subject to state regulation.⁶⁴ The court also found that the State of California regulated the business of insurance and therefore Equitable's activities were exempt from the federal antitrust laws.⁶⁵ The court next addressed the issue of whether the claim of alleged economic coercion against the policyholder was viable under section 3(b). Here the court followed the narrow reading of the statute. It stated:

[i]t is evident from an examination of the legislative history behind § 1013 (b) that the intent of Congress was to reserve into the reach of the Sherman Act only a narrow area of restraint of trade activity among those in the business of insurance, namely, antitrust acts among insurance companies and agents for the purpose of boycott or coercion among insurance companies and agents.⁶⁶

Thus, the court refused to allow the plaintiff policyholder-consumer to invoke the boycott exception.

The Fifth Circuit in *Meicler v. Aetna Casualty and Surety Co.*⁶⁷ also relied on the examination of the legislative history provided by *Transnational*.⁶⁸ In *Meicler*, the plaintiffs were automobile owners who were covered by automobile insurance. When they reapplied for auto insurance, they discovered that they had been reclassified and placed in a less favorable risk category.⁶⁹ When the plaintiffs attempted to purchase insurance from several other companies under their old classification and premium rate, they were told that they could only obtain insurance at the higher premium rate in the less favorable risk classification category.⁷⁰ Plaintiffs tried to invoke the boycott exception provision of the McCarran Act. However, the court affirmed the district court's view that policyholders or members of the public could not seek the benefit of this provision.⁷¹ The court stated: ". . . [t]he legislative history indicates that the

64. *Id.* at 727-28; see 15 U.S.C. § 1012(a) (1970).

65. *Id.* at 728; see 15 U.S.C. § 1012(b) (1970).

66. *Id.* at 728-29.

67. 506 F.2d 732 (5th Cir. 1975).

68. The Fifth Circuit specifically referred to the district court's use of the *Transnational* analysis. *Id.* at 734.

69. *Id.* at 733.

70. *Id.*

71. *Id.* at 734.

boycott exception was designed to reach insurance company 'black-lists' rather than refusal to sell to a particular segment of the public at other than a specified price.⁷² Clearly, a very narrow approach was being taken although the focus of the McCarran Act was on the relationship between an insurance company and its policyholders.⁷³

The *Meicler* court also stated that a broad construction of the boycott exception would emasculate the antitrust exemption contained in section 2(b) of the Act.⁷⁴ The reasoning behind this view is that if a broad reading is given to section 3(b), federal antitrust laws would be applicable to the business of insurance if a plaintiff stated the occurrence of a boycott, coercion, or intimidation. The court feared that a broad construction of the exception would swallow the antitrust exemption.⁷⁵

B. Broad Construction of the Boycott Exception.

Another line of decisions concerning the scope of section 3(b) exception gave a broader range to the boycott exception. This line of reasoning is gaining wider acceptance.⁷⁶

Even prior to the *Transnational* decision, the Second Circuit in *Monarch Life Ins. Co. v. Loyal Protective Life Ins. Co.*⁷⁷ gave a broad reading to the boycott exception by stating that section 3(b) covered "all boycotts or agreements to boycott condemned by the Sherman Act".⁷⁸ The court also allowed the treble-damage provision

72. *Id.*

73. 503 F.2d at 728.

74. 506 F.2d at 734.

75. 561 F.2d at 274. In addition to these circuit court decisions, several district courts have followed a narrow construction of the boycott exception by limiting it to the blacklist situation. See note 7 *supra*. These decisions interpret the legislative history in a manner similar to the *Transnational* decision. They also state a fear of emasculation or vitiation of the McCarran antitrust exemption if a broad reading is given to section 3(b) of the Act. See 506 F.2d at 734 and 503 F.2d at 729. None of these cases appear to have made a thorough, independent investigation into the legislative history of the boycott exception. Instead they rely heavily on the language used in *Transnational*.

76. *Proctor v. State Farm Mut. Auto Ins. Co.*, 561 F.2d 262 (D.C. Cir. 1977); *Barry v. St. Paul Fire & Marine Ins. Co.*, 555 F.2d 3 (1st Cir. 1977); *Ballard v. Blue Shield of W. Va., Inc.*, 543 F.2d 1075 (4th Cir. 1976).

77. 326 F.2d 841 (2d Cir. 1963), *cert. denied*, 376 U.S. 952 (1964).

78. *Id.* at 846. The issue in the case involved whether private treble damage action was available for illegal boycotts in the insurance industry. If the Second Circuit had read section 3(b) narrowly, it could have found that the section 3(b) exception related only to the Sherman Act and could not be construed to embrace the treble damages provision of section 4 of the Clayton Act, 15 U.S.C. § 15 (1970).

of the Clayton Act to remain applicable to boycott actions despite its non-inclusion in section 3(b).⁷⁹ Although this decision did not deal with standing to invoke section 3(b), it did show by implication the willingness of the Second Circuit to adopt a broad view of the coverage of the boycott exception.⁸⁰

In *Battle v. Liberty National Life Ins. Co.*,⁸¹ the Fifth Circuit in a pre-*Meicler* decision⁸² appeared to allow standing to plaintiffs other than insurance companies and agents under section 3(b).⁸³ In *Battle*, the circuit court reinstated a complaint which had been dismissed by the district court for failure to state a claim on which relief could be granted.⁸⁴ The complaint alleged boycott, coercion, and intimidation activity on the part of an insurance company and its wholly-owned subsidiary, Brown-Service Funeral Homes Company, Inc., against funeral homes and funeral directors.⁸⁵ The court in *Battle* showed a willingness to interpret literally the language of the boycott provision.

The Fourth Circuit in *Ballard v. Blue Shield of S. W. Va., Inc.*⁸⁶ also took a broad view of whom has standing to invoke the boycott exception. In *Ballard*, a group of West Virginia chiropractors sued Blue-Cross-Blue Shield alleging a conspiracy to refuse health insurance coverage for chiropractic services.⁸⁷ The district court dismissed the case on the pleadings, holding that the McCarran Act exempted the defendants' activities from the antitrust laws.⁸⁸ How-

79. *Id.*; See also 15 U.S.C. § 1013(b) (1970). The court reasoned that the treble damages provision of the Clayton Act is a significant part of the antitrust law and as such should apply.

80. It should be noted that the parties to this suit were both insurance companies. Therefore, even if the issue of narrow standing had been raised here, Monarch Life would still have had standing to invoke section 3(b).

81. 493 F.2d 39 (5th Cir. 1974), *cert. denied*, 419 U.S. 1110 (1975).

82. See note 67 *supra*.

83. 493 F.2d at 44.

84. 493 F.2d at 42-43. The Liberty National Insurance Co. issued burial insurance policies. Brown-Service Funeral Homes contracted with Liberty National to furnish merchandise and services required by the burial insurance policies. Brown-Service then contracted with independent funeral homes in Alabama. Any funeral home which signed with Brown-Service became an "authorized" home for servicing and furnishing merchandise to Liberty National burial insurance policyholders. The services provided under the policy differed significantly, depending on whether an insured uses an authorized or unauthorized funeral home.

85. *Id.* at 51-52.

86. 543 F.2d 1075 (4th Cir 1976).

87. *Id.* at 1077.

88. *Id.* The district court also found that the alleged conduct did not affect interstate

ever, the circuit court found that the allegations sufficiently stated a group boycott in violation of the Sherman Act.⁸⁹ It also found that the federal antitrust laws were applicable and reinstated the action.⁹⁰ The allegations in *Ballard* would not have fallen into the narrow interpretation of the section 3(b) exception since plaintiffs were not insurance companies or agents. The Fourth Circuit used the broader approach and construed the exception to cover any boycott prohibited by the Sherman Act.

Although these cases followed a broad construction of the boycott exception, none of them specifically discussed in depth the issue of standing to invoke section 3(b). However, they did signal the development of a different, more liberal approach to the issues of standing and the scope of the boycott exception.

IV. *Barry v. St. Paul Fire & Marine Ins. Co.*

In May 1977, the First Circuit rendered its decision in *Barry v. St. Paul Fire & Marine Ins. Co.*⁹¹ This decision was the first case to discuss thoroughly the legislative history of section 3(b) and examine the policy reasons behind the provision. After doing so, the court opted for a broad construction of the boycott exception.⁹²

In *Barry*, plaintiffs alleged that St. Paul Fire & Marine Insurance Co. and other insurance companies doing business in Rhode Island unlawfully conspired in restraint of trade by jointly attempting to shrink malpractice coverage available to Rhode Island doctors.⁹³ St. Paul changed its future malpractice policies to cover only on a

commerce and that the learned profession doctrine exempted the defendant's activity from the antitrust laws.

89. *Id.* at 1078.

90. *Id.*

91. 555 F.2d 3 (1st Cir. 1977).

92. *Id.* at 8.

93. *Id.* at 5. The court defined a boycott as a "concerted refusal to deal" with a disfavored purchaser or seller. *Id.*, citing *Klor's Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207 (1959). The Ninth Circuit has specifically held that a boycott of customers is a boycott for antitrust purposes. *Washington State Bowling Proprietors Ass'n v. Pac. Lanes, Inc.*, 356 F.2d 371, 376 (9th Cir. 1966), *cert. denied*, 384 U.S. 963 (1966).

The court in *Barry* stated that although consumers are less frequently the prey of illegal boycotts than are retailers, the features that make boycotts objectionable do not disappear when consumers are boycotted. *Id.* at 7-8, n. 4. These include: restraint on traders "ability to sell in accordance with their own judgment", the depriving of a free and competitive market in which consumers may buy, and "interference with the natural flow of interstate commerce." *Id.*, citing *Klor's, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. at 212-13.

“claims made” basis rather than on an “occurrence” basis.⁹⁴ When disgruntled policyholders attempted to obtain occurrence basis coverage from other companies, the other companies refused to sell policies of any type. Plaintiffs sought injunctive relief and treble damages.⁹⁵ Although the claim involved a violation of federal anti-trust statutes by insurance companies, the plaintiffs sought to invoke the section 3(b) boycott exception.

Writing for the majority, Chief Judge Coffin emphatically rejected the narrow reading given to the boycott provision by *Transnational* and its progeny.⁹⁶ The court carefully pointed out that *Transnational's* narrow reading of the boycott provision was a relatively recent development in the case law and that the source of this narrow reading was first announced by only a district court.⁹⁷ The chief reason for the reluctance of the First Circuit to follow the *Transnational* interpretation was that the decision in *Transnational* failed to “go behind the statutory language” of section 3(b).⁹⁸ The First Circuit saw no need to probe into the legislative history of the statute to determine the true meaning of its language. Such an investigation was only necessary if the language was ambiguous or “[i]f . . . the language literally read produced a senseless or unworkable statute.”⁹⁹ Here, the court found the words “agreement to boycott, coerce, or intimidate, or act of boycott, coercion, or intimidation” within the context of the Sherman Act to be unambiguous.¹⁰⁰ Therefore there was no reason to delve into the legislative history on the grounds of ambiguous language.

The reason stated by the *Transnational* cases for their excursion into the legislative history was the supposed “vitiating” of the McCarran Act if the boycott exception were given its normal Sherman Act scope.¹⁰¹ The First Circuit examined this alleged justification and concluded that the fears of the other courts of

94. *Id.*

95. *Id.*

96. *Id.* at 7.

97. *Id.*

98. *Id.*

99. *Id.*, citing *Massachusetts Financial Service, Inc. v. Securities Investor Protection Corp.*, 545 F.2d 754 (1st Cir. 1976).

100. *Id.* The court defined boycott as a “[c]oncerted refusal to deal” with a disfavored purchaser or seller.” *Klor's Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207 (1959).

101. *Id.* at 8. See *Meicler v. Aetna Cas. & Sur. Co.*, 506 F.2d 732, 734 (5th Cir. 1975); *Addrisi v. Equitable Life Assurance Soc'y*, 503 F.2d 725, 729 (9th Cir. 1974).

"emasculating" the McCarran Act were unfounded.¹⁰⁷ The court stated that the states continued to have vast powers to tax and to regulate the business of insurance even if the boycott exception is construed broadly.¹⁰³

The court next found that the narrow reading of the boycott exception lacked support in public policy.¹⁰⁴ The primary aim of anti-trust laws is the assurance to consumers of the benefits of a free market economy.¹⁰⁵ The court stated that excluding consumers of insurance from the protection afforded by the boycott exception was against a basic policy of antitrust law.¹⁰⁶ In addition, the court found the narrow anti-consumer interpretation to conflict with the Supreme Court's view that the McCarran-Ferguson Act as a whole is meant to apply to the relationship between policyholders and their insurers.¹⁰⁷ In general, the court saw the boycott provision as conforming with the nation's antitrust policies and that therefore there was no need to look to the legislative history for a special and narrow meaning.¹⁰⁸

Despite these reasons for not focusing on the legislative history of the boycott provision, the court felt compelled to examine it in response to *Transnational's* use of such history.¹⁰⁹ The First Circuit noted that the reports accompanying the bills both stated that the "provisions of the Sherman Act [were to] remain in full force and effect" when the boycott exception was invoked.¹¹⁰ Turning to the debates in Congress, the court determined that the bills had been broadened during this stage.¹¹¹ The court pointed out the exchanges between Senators O'Mahoney and Pepper on the conference bill concerning the continuing application of the Sherman Act to

102. *Id.* at 8.

103. *Id.* The court noted that only the Sherman Act was made applicable by the boycott provision. The Clayton and Federal Trade Commission Acts could still be pre-empted by state regulation. In addition, not every violation of the Sherman Act can be characterized as an act of boycott, coercion, or intimidation.

104. *Id.* at 9.

105. *Id.*

106. *Id.*

107. *Id.* The court viewed the narrow interpretation of section 3(b) as an artificial reading of the boycott provision.

108. *Id.*

109. *Id.*

110. *Id.* at 10.

111. *Id.* See notes 25-26 and accompanying text *supra*.

“private regulation by combinations” of insurance companies.¹¹² To emphasize the broad scope of section 3(b), the court closed its examination of the exception with an excerpt from Senator O’Mahoney’s speech concerning his view that the boycott section would be sufficient to prevent even combinations that did not involve boycott, coercion, or intimidation.¹¹³ In summation the court stated, “[W]e 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 the appellees.”¹¹⁴ The court therefore rejected the narrow interpretation given to section 3(b) by *Transnational* and the line of cases which followed its lead.

V. *Proctor v. State Farm Mutual Automobile Ins. Co.*

Soon after the *Barry* decision,¹¹⁵ the Court of Appeals for the District of Columbia decided *Proctor v. State Farm Mutual Automobile Ins. Co.*¹¹⁶ In *Proctor*, owners of four automobile repair shops brought suit against five insurers and two claims adjusters.¹¹⁷ They alleged that the claims adjustment and settlement practices of the insurers involved price-fixing and a group boycott in violation of section 1 of the Sherman Act.¹¹⁸ The plaintiff-appellants contended

112. *Id.* See notes 32-37 and accompanying text *supra*.

113. *Id.* See note 35 and accompanying text *supra*.

114. *Id.* at 12. A dissent by Circuit Judge Campbell pointed out that because Rhode Island regulated the business of insurance, “[u]nder the clear implication of § 1012, neither the Sherman Act nor the other antitrust laws apply except insofar as the § 1013(b) exception permits.” *Id.* at 14. Judge Campbell felt that the exception was not meant to encompass all activities in violation of the Sherman Act because Congress did not use the Sherman Act’s broad “contract, combination . . . or conspiracy” language in section 3(b). *Id.*

His view of the legislative history resulted in a narrow reading of the exception because he felt this was more consistent with section 1012 and with “[t]he purpose and structure of the act generally.” *Id.* Judge Campbell believed that to introduce a new category of federal antitrust suits would further strain the already over-crowded federal courts. In addition, he felt that this could have “unforeseeable effects” upon state regulation policies. *Id.* at 15.

115. The *Proctor* decision was announced 32 days after *Barry*. The decision did not expressly utilize the *Barry* decision.

116. 561 F.2d 262 (D.C. Cir. 1977).

117. *Id.* at 263-65.

118. *Id.* at 263. See 15 U.S.C. § 1 (1970). Plaintiffs charged that the defendants had engaged in a combination and conspiracy to (1) fix the hourly labor rates paid to auto repair shops; (2) coerce and intimidate repair shops to complete work for insured parties at fixed rates; and (3) boycott shops which refused to accede to the fixed rates. *Id.* at 264. The actual price-fixing allegation was that “[t]he five insurance companies had entered into a horizontal agreement to pay or reimburse their policyholders according to a common formula which involved the ‘prevailing labor rate,’ a standardized estimate of the amount of labor required,

that the Sherman Act was applicable against these insurers because of the boycott exception and they sought treble damages and injunctive relief pursuant to section 4 of the Clayton Act.¹¹⁹ The district court granted summary judgment in favor of the insurance companies on the basis of the McCarran Act's antitrust exemption.¹²⁰

Although the Court of Appeals for the District of Columbia Circuit affirmed the district court's granting of summary judgment because of the failure of appellants to adequately support in the record their allegation of a group boycott,¹²¹ Nevertheless, it rejected the district court's narrow reading of the boycott exception.¹²²

The *Proctor* decision closely followed the reasoning of the *Barry* court in adopting a broadened construction of the boycott exception. The court pointed to the "plain language"¹²³ of section 3(b) as being the true embodiment of the meaning of the statute. The *Proctor* court was as disdainful of *Transnational's* scanty examination of section 3(b)'s legislative history as was the *Barry* court.¹²⁴ *Proctor*, like *Barry*, thoroughly examined the legislative history of the boycott exception and did not merely rely on Congressman Celler's blacklist speech, the only speech to mention blacklists.¹²⁵ The court found that a narrow construction was not intended by Congress. It specifically pointed to the remarks of Senator O'Mahoney which indicated that his concern was more general. In assessing the importance of the boycott exception, he stated, ". . . [a]ny attempt by a small group of insurance companies to enter into an agreement by which they would penalize *any person or business* which was attempting to do business in the insurance field in a way that was disapproved by them, would be absolutely prohib-

and a compulsory discount on parts." *Id.*

119. *Id.* See 15 U.S.C. § 15 (1970).

120. 406 F. Supp. 27, 30 (D.D.C. 1975). The court found the practices involved here to be within the meaning of the business of insurance. *Id.* It found that "[t]he challenged practices are regulated by state law to the degree required to support an exemption from federal law under the Act." *Id.* at 30-31. The district court felt that "[t]he claims of dispute as to a material fact . . . are vague and lack adequate record support." *Id.* at 31. In addition, the court, relying on *Transnational*, held that even if appellants' charges were sufficiently documented, the boycott exception would be inapplicable as a matter of law. *Id.* at 32.

121. 561 F.2d at 276.

122. *Id.* at 272.

123. *Id.*

124. *Id.*

125. *Id.* at 272-73.

ited by this provision."¹²⁶

The court further supported the view of a broad construction of section 3(b) by pointing to the *South-Eastern Underwriters* decision.¹²⁷ The indictment in that case alleged a conspiracy by an association of insurance companies and agents to fix premium rates and monopolize the insurance business.¹²⁸ The indictment also charged additional violations of the Sherman Act involving practices in aid of the price-fixing and monopoly scheme. The *Proctor* court noted that the Supreme Court used the terms "boycott," "coercion," and "intimidation" to describe these additional practices.¹²⁹ The court felt that the "boycott provision of the McCarran Act was intended to preserve *South-Eastern Underwriters* to the extent that the latter subjected acts of 'boycott, coercion or intimidation' to the prohibitions of the Sherman Act."¹³⁰ It also noted that "while a blacklist of insurance companies and agents was alleged in *South-Eastern Underwriters* another type of boycott was also involved: *policyholders* of insurance companies that were not members of the association 'were threatened with boycotts and withdrawal of all patronage!'"¹³¹

However, the court did not characterize the basic rate-fixing agreement in *South-Eastern Underwriters* as an instance of "boycott, coercion, or intimidation."¹³² It reasoned that there must be "something in the way of enforcement activity" in a rate-setting context before a claim can sufficiently be made which falls within the Act's meaning of boycott, coercion, or intimidation.¹³³

The scope which the District of Columbia Circuit gave to section 3(b) was not as broad as the one given by the First Circuit. The *Proctor* court believed that the exception did not cover all acts of boycott, coercion, or intimidation and all agreements to boycott, coerce, or intimidate.¹³⁴ To avoid the swallowing of the antitrust exemption by the boycott exception, the court suggested that the

126. *Id.* at 273, n. 19, citing 91 Cong. Rec. 1480 (1945) (emphasis in original).

127. 322 U.S. 533 (1944).

128. *Id.* at 535-36.

129. 561 F.2d at 273, citing 322 U.S. at 535-36.

130. *Id.*

131. *Id.*

132. *Id.* at 274.

133. *Id.*

134. *Id.*

terms of section 3(b) "must be applied in such a way as to accommodate the respective purposes of the Act's antitrust exemption, on the one hand, and the boycott exception to the exemption, on the other."¹³⁵ It concluded that to find a claim based on the boycott exception "something in the way of enforcement activity" in a rate-setting context must be found.¹³⁶ This test marks a moderate path in the application of the exception.

VI. Conclusion

The narrow construction given to the boycott provision in *Transnational* and its progeny has come under serious attack approximately eleven years after it was first espoused. The well-reasoned and researched decisions in both *Barry* and *Proctor* reflect a rejection of the idea of limiting standing to invoke section 3(b) to insurance agents and companies who are the subjects of a blacklist. The rise of consumer awareness, the notion that the antitrust laws were created primarily for the protection of the consumer, as well as the McCarran Act's focus on the insurer-policyholder relationship have led the District of Columbia Circuit and the First Circuit to uphold the right of consumers to invoke this exception in certain circumstances. The reasoning used by these courts seems more closely in line with the plain language of the statute and the true intent of Congress.

Brian J. McCarthy

135. *Id.*

136. *Id.*