ORIGINAL

In the

Supreme Court of the United States

ST. PAUL FIRE AND MARINE INSURANCE CO., ET. AL.,

Petitioners,

v.

DAVID M. BARRY, ET. AL.,

Respondents.

No. 77-240

Washington, D.C.
March 27, 1978

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Washington, D. C.

Monday, March 27, 1978

The above-entitled matter came on for argument at 1:01 o'clock, p.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice
JOHN P. STEVENS, Associate Justice

APPEARANCES:

SIDNEY S. ROSDEITCHER, ESQ., 345 Park Avenue, New York, New York 10022, for the Petitioners.

LEONARD DECOF, ESQ., 111 Wayland Avenue, Providence, Rhode Island 02906, for the Respondents.

DANIEL M. FRIEDMAN, ESQ., Deputy Solicitor General, Department of Justice, Washington, D. C. 20530, as amicus curiae.

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in 77-240, St. Paul Fire & Marine Insurance Company against Barry.

Mr. Rosdeitcher.

ORAL ARGUMENT OF SIDNEY S. ROSDEITCHER, ESQ.,

ON BEHALF OF THE PETITIONER

MR. ROSDEITCHER: Mr. Chief Justice, and may it please the Court:

This case raises for the first time a question of interpretation of a central portion of the McCarran-Ferguson Act. Specifically, under Section 2(b) of that Act, Congress withdrew the Sherman Act and other Federal antitrust laws from the business of insurance if the States enacted regulatory legislation to specifically provide that the Sherman Act and other antitrust laws shall apply to the business of insurance to the extent not regulated by the States.

Under Section 3(b) of the Act, Congress provided an exception to this policy of deference to State regulation. It provided that Federal regulation, under the Sherman Act, would be reserved and would continue to apply in cases of boycott, coercion or intimidation.

In this case, we contend that the First Circuit Court of Appeals interpreted that exception so expansively that it nullified the policy of Section 2(b), to withdraw the Sherman Act

and the antitrust laws in most cases from the business of insurance where the States enacted regulations.

This afternoon, I hope to demonstrate that the result reached by the First Circuit was unnecessary, that it was not required by what the First Circuit believed was the plain meaning of the phrase "boycott, coercion, intimidation," that the history of the Act and use of those terms in this Court marked out a more reasonable boundary line which would have preserved and given meaning to both Section 3(b) and Section 2(b).

Before I turn to the specific facts of this case, I would like, if you will, to give a very brief history which I think will put those facts and the issues in this case in perspective.

For more than a century, the regulation of the business of insurance and particularly the relationship between the policyholder and the insurance company was assumed to be and was totally in the hands of the State. In 1944, this Court in the Southeastern Underwriters case, held that at least one set of Federal regulations would apply to the business of insurance, namely, the Sherman Act and the Federal antitrust laws.

The following year, in 1945, Congress reacted to that decision and it enacted the McCarran-Ferguson Act. This Court has already said that the purpose of that statute was to place the force of Federal law behind State regulations. It specifically recognizes that it is in the public interest that State

regulation of insurance be the policy in this country. And, finally, as this Court has said, the purpose of the statute was to turn back the clock in most part to where it stood prior to Southeastern Underwriters and place the regulation of insurance, and leave the regulation of the policyholder-insurance company relationship, particularly, in the hands of the State.

This case raises an issue about one portion of that Congressional endeavor. As I said, it relates to the decision of Congress to withdraw the Sherman Act from the business of insurance, with an exception for boycotts, coercion and intimidation.

The tension between those two provisions is presented starkly in this case. And let me briefly recite the facts of this case. The Plaintiffs are two groups. They purport to bring a class action on behalf of doctors in Rhode Island and patients of those doctors or future patients. The doctors claim that they were insured by the St. Paul Fire & Marine and that for sometime they were getting an insurance policy whose terms they were satisfied with, a policy known as an occurrence basis policy, which provides, briefly, that the claim will be paid by the insurance company for any events which occur during the term of the policy, whether or not the claim is made at a later time.

Sometime in April 1975, St. Paul announced to its insured that it would not renew their policies on that basis, it would renew only on a so-called "claims made" basis which

limited the liability of the company by providing that it would only pay for claims submitted during the term -- or claims which arose during the term of the policy.

QUESTION: That was a substantial change.

MR. ROSDEITCHER: It was a very substantial change.

QUESTION: In fact,had it been used by the insurance industry before this time?

MR. ROSDEITCHER: I am not sure whether it had been used by the insurance industry before this time elsewhere. It had not been used by these companies.

The doctors said they were dissatisfied with this policy and that they went to three other companies, my client Aetna, Hartford and Travelers, and that those companies would not sell them any insurance. They then filed this action.

QUESTION: At all?

MR. ROSDEITCHER: They said they would not sell them any insurance at all.

Then they filed this action under the Federal anti-trust laws.

Now, if I stop there before getting to the question of boycotts, I will go back to what I said as to why this case starkly raises the tension between Section 2(b) and 3(b). To start with, this case plainly involved the business of insurance. It is the very essence of the business of insurance. The question is what kind of insurance policies are the companies

willing to sell, at what terms? What policies will be issued?

Rhode Island regulated the business of insurance extensively. Everybody accepted it. It is worth considering how they did regulate it. They not only had a statute aimed at anticompetitive practice passed in direct response to the McCarran Act, but at the very time we had what looked like a race to see who could get there first. Consider the events. April 18, 1975, St. Paul makes its announcement. Somewhere in between, unspecified in the complaint, these Plaintiffs decide that there is some kind of conspiracy. June 1, 1975, the first complaint in this action was filed. June 16, 1975, Rhode Island commences to join Underwriting Association designed to take over the business of insurance and deal with some of the very problems which are dealt with here, namely, the so-called "medical malpractice insurance crisis."

So we have the spectacle of a Federal court action on the one hand, the gun directed at what they claim is a conspiracy as the cause of this crisis and --

QUESTION: I am wondering why you use the term "crisis." Is it because the cost of it has become so prohibitive, or because of other consequences?

MR. ROSDEITCHER: I think I call it a crisis, first, because the Rhode Island Administrator who issued the regulation shortly after the action began called it a crisis. I think it was a crisis because there was difficulty and I think it is fairly

well known,although it is not in the record, that there has been difficulty in obtaining medical malpractice insurance, the rates have gone very high. What the causes for that are is not the subject of this action. And, in our view, what the causes were are matters to be determined by the State of Rhode Island.

QUESTION: You were using the term "crisis" just with respect to Rhode Island, not as a national crisis?

MR. ROSDEITCHER: I think, if I may, I think there probably was, at the time, a national crisis. There is a list of statutes in one of the amicus briefs that something like 37 States, I believe, have enacted similar type of joint underwriting associations to deal with the problems of the availability and the costs of malpractice insurance. So to the extent that it is widespread, it is a national crisis. Whether everybody views it as such, I am not sure.

QUESTION: Was the policy change approved by the Insurance Commissioner of Rhode Island?

MR. ROSDEITCHER: All policy forms have to be approved. Whether this specific policy change was approved, I don't know.

QUESTION: Are they approved with or without a hearing or a general notice to the public?

MR. ROSDEITCHER: My recollection is that they are filed for approval, and that the hearings relate to rates, but that the policy terms, themselves, are filed for approval with the Commissioner.

QUESTION: Following up on just this file question, supposing Rhode Island Insurance Commissioner, or whatever the body is, had previously approved of two forms of policy, one a claims basis and the other an insurance basis policy. Would there be any requirement of Rhode Island law that the insurance companies, such as St. Paul, must seek the approval of the Commission if it discontinues the use of one of the two?

MR. ROSDEITCHER: I don't know.

QUESTION: That could be done independently by the company's own decision, as far as the record tells us, at least?

MR. ROSDEITCHER: As far as the record goes, that's all we know. This was on a motion to dismiss the complaint.

QUESTION: Does the record tell us anything about the practices of the Rhode Island Insurance Commission with respect to approval or disapproval of policy conditions that may be filed with it?

MR. ROSDEITCHER: No, it doesn't, except to the extent that it has the statutes and the regulations in it. But I might say, Mr. Justice Rehnquist, that in our view the practice in Rhode Island, the way that they enforce it, the effectiveness of the enforcement, are not pertinent to the question which is raised by the McCarran-Ferguson Act. Whether there is an effective method, whether the enforcement is vigorous or whether it is passive is really an issue which this Court has earlier decided in the National Casualty case is not a question appropriate

for a Federal court to review in a McCarran Act case.

QUESTION: You say, then, that the State of Rhode Island, under the McCarran-Ferguson Act, could simply say, "We are going to have total free enterprise in insurance in Rhode Island, so there will be no need for State regulation," and that would be sufficient to exempt it from the Antitrust Act?

MR. ROSDEITCHER: I am not sure whether if they simply said, "We are not going to pass any law," they could have done this. Let me review what they did do. They passed a statute which was directed at unfair methods and anticompetitive methods of competition. They defined certain of those methods, including boycott, coercion and intimidation, which they outlawed. Then they left to the Commissioner the same kind of power that the Federal Trade Commission has to define anticompetitive practices as they go. What I am saying is that that statute, that statute was enough, as many cases have held and as I believe this Court effectively held in the FTC-National Casualty case. And I am saying that that statute reflects Rhode Island policy and reflects a kind of regulation which meets the requirements of Section 2(b) to trigger the exemption.

I had come to the point where we -- or I pointed out that, first, the business of insurance was plainly involved, the heart of it, that Rhode Island extensively regulates in a variety of ways. And I must say that the unfair practices statute, itself, would have been enough regulation without more. I added

that this case is a starker situation because Rhode Island had actually taken steps to focus on the problems of cost and availability of malpractice insurance.

The First Circuit, however, held that these Plaintiffs could maintain the suit because they had alleged a concerted refusal by the three companies to sell malpractice insurance to the dissatisfied policyholders of St. Paul who, when they couldn't get the occurrence basis policy from St. Paul, sought coverage from the other three. In so doing, the First Circuit rejected not only the District Court and the views of the dissenting judge there, but a number of other decisions in other circuits which expressed this fear about that kind of interpretation, that "if you focus on just a concerted refusal to deal" without more, then virtually any corroborative conduct among insurance companies could be filed and pleaded as a boycott, if the boycott meant a concerted refusal to deal and is equivalent with it.

Now, some other courts have looked at Southeastern Underwriters in the legislative history and have concluded that it was limited -- that phrase "boycott, coercion and intimidation" was limited to type of conduct involved in Southeastern Underwriters, directed at insurance companies, at excluding insurance companies in the business, at forcing them to behave in the way the conspiracy dictated.

They limited the provision to insurance agents, aimed

at suppressing or dictating the policies of insurance companies and insurance agents. We do not say that that particular gloss is necessary. What we do say is that the result which the First Circuit achieved here, which was to define a boycott in the way which would virtually swallow up the rest of the 2(b) exemption, need not have occurred and that the First Circuit was wrong when it concluded that it was compelled to reach this result by the plain meaning of the phrase "boycott, coercion and intimidation."

Now, I start my statutory analysis where I think the Government does and probably my opponent and most of the commentators and Judge McGowan in the D.C. Circuit in the recent Proctor case. And that is with Southeastern Underwriters, because, lo and behold, the phrase "boycott, coercion and intimidation" appears in the Southeastern Underwriters case. Now there, what happendd was this. And it is crucial to focus on the two types of conduct which Southeastern Underwriters dealt with.

To start with, there was a price-fixing conspiracy on fire insurance throughout the Southeastern part of the United States. And the court called that price-fixing. In addition to the price-fixing conspiracy, there was a conspiracy among the members of the Southeastern Underwriters Association to tell everyone to do business on their terms. And that took two forms. First, there was conduct which was specifically directed at other insurance companies and agents. In the case of

insurance companies, one of the principal ways was to refuse to re-insure their risks. And this was vital and they withdrew reinsurance from any company which was unwilling to follow the price-fixing conspiracy.

In the case of the agents, they had something called the "separation." And they said to the agent, "If you handle the product of a price-cutter, we are going to put you out of business because we are not going to sell you any insurance." Another way they dealt with this was they sold fire insurance in allied lines. And they said to the consumer, "If you deal with one of these price-cutters on fire insurance, we are not going to sell you other products. We are just not going to deal with you at all," in order to induce those policyholders not to deal with the price-cutters.

Now, we think that Southeastern Underwriters, itself, demonstrates what the Court -- not only what the Court -- but what Congress must have meant by boycott, coercion and intimidation.

I'd like to draw a line, if I could. On the one hand, you have the question of the policy of competition. That's what the Sherman Act and the antitrust laws are all about, to foster competition between companies. Under the Sherman Act, if there were no McCarran Act, companies getting together and deciding they wouldn't compete, wouldn't sell insurance to their competitor's policyholders would be a violation of the Sherman Act.

Section 2(b) of the McCarran-Ferguson Act, however, says, "the general question of whether a State should have a policy of competition or non-competition insurance should be for the State." If the State enacts legislation dealing with that area, then the State occupies the field and the Sherman Act is withdrawn.

Now, what did Congress reserve? In the boycott section, it said one thing was different. That is, it is one thing for people not to compete with one another and for the State, either by an authorizing law or by a little Sherman Act or a little FTC Act to pursue a policy of competition-noncompetition, or a policy somewhere in between.

It is another thing for the private companies to take it into their own hands to say that those who do want to compete and are permitted to compete should be excluded from the business, and that pressure should be applied to those who want to compete not to deal with those people in order to exclude those who wish to compete.

In short, a boycott, coercion, and intimidation, however you use those phrases, whether separately or singly, is a kind of penal enforcement conduct aimed at regulating competition by excluding those who will want to compete. And as I see the line, on one side you have agreements between companies which the State either can prohibit or can apply rule of reasonableness tests of outlaw, per se, just as under the Sherman Act

are authorized, or on the other hand conduct which says, "We, the private industry, will decide who does business and we will decide who can compete."

And that, in our view, that pressure to prevent people who do want to compete from competing, is boycott, coercion and intimidation.

QUESTION: What if one of the reasons that they are putting the pressure on is because some of the companies are doing business with certain kinds of customers, that the boycotters or the pressure appliers don't think should be served at those rates?

MR. ROSDEITCHER: I think that there is this line to be drawn. If the pressure is being applied to the customer because he deals with the price-cutters --

QUESTION: He is identifying them both. Here are five companies that get together and say, "We don't want this sixth company doing business with that class of customer at those rates, so we are going to boycott them both."

MR. ROSDEITCHER: That never happened in this case.

QUESTION: I didn't --

MR. ROSDEITCHER: Your case is a boycott, Your Honor.

MR. ROSDEITCHER: Do you think the customer would have a course of action?

MR. ROSDEITCHER: The customer might. That might be a question for him.

QUESTION: Well, the boycotted company and the customer both sue. Can they both stay in court?

MR. ROSDEITCHER: I think that would raise a question of standing, Your Honor.

QUESTION: Well, they are both --

MR. ROSDEITCHER: In my circuit, we would argue that --

QUESTION: My question is whether the McCarran Act bars the suit by the customer in that case.

MR. ROSDEITCHER: The McCarran Act would not bar the suit by the customer. But that is a classic boycott, because what you have described is exactly what we believe a boycott is, that is, pressure applied to the customer not to deal with the price-cutter, to put the fellow who does want to compete out of business, to put the fellow who doesn't want to obey the price-fixing conspiracy out of business. And unless you draw some such line, you nullify, you erase any distinction between what was left out in Section 2(b) and withdrawn from the Sherman Act and what is covered by the Boycott Section.

And what you describe, Mr. Justice White, did not occur here. That was not the claim.

QUESTION: I am a little puzzled. When you look at the language of 2(b), it only talks about not invalidating any State law or regulation, and we don't know what the Rhode Island law is, as I understand the record. How do we know, without even reaching the boycott question, how do we know that 2(b)

withdraws an agreement among three competitors not to sell to a particular customer from the coverage of the Sherman Act?

MR. ROSDEITCHER: Let me take that in two stages.

The first problem is that 2(b) is divided into two parts. Notice that the first part is very different, or somewhat different, from the second part. The first part talks generally and says "Congress shall not invalidate, impair or supersede any State law."

QUESTION: Correct.

MR. ROSDEITCHER: Then you have the proviso --

QUESTION: Do you rely on that first part?

MR. ROSDEITCHER: No, we rely on the second part. Specifically on the second part which is different in that it says that "the Sherman Act shall apply to the extent the business of insurance is not regulated by the State." So put directly, that the Sherman Act shall not apply if the State regulates.

QUESTION: It doesn't say the latter. You say it implies the latter.

MR. ROSDEITCHER: I think you have to conclude that. If you look at the structure of the statute, how it came about, the initial bill that went to Congress didn't have that provision in there. It had the first half about invalidating and it had the 3(b), what is now the 3(b) exception. It had a 3(a) moratorium. It simply said the Sherman Act, Clayton Act, and so forth, will not apply at all. That meant that if you just read

it that way that at the end of the moratorium period you would have to have a statute which was invalidated, impaired or superseded, in order to be affected by the 2(b) provision. But they stuck another provision in there, the one I just read about the antitrust laws, which says that if the States regulate -- well, it says it backwards -- but it does say what happens at the end of the moratorium.

QUESTION: Does it not say: "At the end of the moratorium, the Sherman Act shall apply to the extent that the business is not regulated by State law"?

MR. ROSDEITCHER: Right.

QUESTION: Now, is this boycott, this alleged boycott -- I know you don't like the word "boycott" for this -- but I mean it is the refusal to deal -- is that regulated by State law?

MR. ROSDEITCHER: Yes. In this way and in a way accepted by this Court. I will leave out all the other statues I've talked about. The record is very clear that Rhode Island has an unfair practices statute which says, specifically, "We are passing this in response to the McCarran Act. We intend to regulate all competitive practices in the business of insurance. And we provide, among other things, incidentally, that boycotts are unlawful, coercion, intimidation are unlawful. And we give to the Insurance Commissioner the power, like the Federal Trade Commission, to decide on a case by case basis what other practices

should be struck down as unfair methods of competition."

Now, we know that price-fixing under the Federal Trade Commission Act has long ago been considered as unlawful, per se, under the FTC Act. We don't know what the policy is going to be in this particular case, if any, in the case of the conduct alleged here. But that is precisely what the McCarran-Ferguson Act leaves to that State Insurance Commission. He could decide a number of things. He could say this conduct is unlawful, per se, just like the Federal one. Well, if he does, then he's done one of the things that he could have done in light of the fact that Congress left him with the power to regulate. He could also have said, "I don't accept Federal law in this area. I'm closer to the ground," one of the courts has said about the reason for the McCarran Act. "I know things better. I understand this problem at lot better than the Federal Government does. There may be some reasonable justification here, so I am going to consider that." That's his prerogative.

QUESTION: What if he says it is not an unfair practice within the meaning of the Rhode Island statute? Then what happens?

MR. ROSDEITCHER: Then he has accepted the justification.

QUESTION: Is he regulating or not regulating when he says it?

MR. ROSDEITCHER: He's regulating, because that was the precise issue, Your Honor, in FTC v. Casualty. Let me go

back to that case because it has great application here. In FTC v. National Casualty, the question was whether certain advertising practices in insurance companies were regulated by the Federal Trade Commission Act. This Court said that because the States had a law which prohibits unfair and deceptive practices, that that law ousts the Federal jurisdiction altogether. This Court didn't say that the local administrator had to conclude, like the FTC that it was deceptive. In fact, one of the premises of the briefs before the court was that that was precisely where the conflict could arise, because the State Administrator could decide. I don't think this is deceptive; in my knowledge of the insurance business, this isn't deceptive.

And I say here the State should be free. And I think that was precisely the intent of Section 2(b), to leave under this regulatory law the power to the States to decide should this agreement alleging this complaint, should that conduct be deemed anticompetitive.

In fact, Rhode Island took a different course here. Rhode Island didn't look to hobgoblins of conspiracies. Instead it said, "There is a real problem here. We are going to deal with it with a joint underwriters association, the methods used by other States in other areas."

We think there is regulation. It is in the record. I am sorry if I misspoke myself about the question of policy

approvals earlier.

I think the line that we are trying to draw here between boycott, on the one hand, enforcement activity designed to pressure other people to stop competing, and competition and policies of competition, on the other side, is not only concerned by Southeastern Underwriters, it is equally concerned by other cases in this Court. Judge Kaufman was persuaded that his result was compelled by the plain meaning of the statute. The plain meaning, first of all, of boycott, coercion, intimidation isn't all that plain, in our view, but we went back and looked at the boycott cases, not only of Southeastern Underwriters where the conduct was entirely different from last year, but at Fashion Originators' Guild, at Eastern Retail Lumber, and so forth. And in each of those cases, you find the same common thread. You find conspirators getting together to try to dictate the terms on which someone will compete and to force out of business those who will not listen to the conspiracy terms dictated by the conspirators.

QUESTION: Does Broadway-Hale v. Klor's fit into that category?

MR. ROSDEITCHER: Broadway-Hale fits into the second part of the definition, to exclude them altogether. That is, where competitors get together to either refuse to deal entirely or refuse to deal in part, in order to exclude one of the competitors of one of the conspirators from business

entirely, regardless of what he does. And Broadway Hale was exactly that case. And, again, that case is not involved here.

I could suppose -- and there are cases, and this is what helped us change and modify our view a little bit in considering the Proctor case or in considering the Ballard case, where if it were alleged that the doctors got together and said,"Let's finish off this class of doctors over here, let's induce the insurance companies not to give them any insurance," that that would be a boycott, in my view, under the standard court case.

QUESTION: The doctors got together, you said?

MR. ROSDEITCHER: Let's suppose -- I am just making a hypothetical -- that a bunch of doctors in Providence who didn't like this group of doctors said, "Let's knock these fellows out of competition. And what we'll do is we'll go to insurance companies and induce them not to do business with this group of doctors, so that we can put them out of business." That would be a boycott. That would be Klor's. That was Klor's.

QUESTION: By putting them out of business, you mean refusing to issue malpractice insurance?

MR. ROSDEITCHER: Refusing to write the malpractice insurance for the purpose of putting them out of business.

QUESTION: Your hypothesis is that the first group of doctors would say, "We will not buy your malpractice insurance

unless you refuse to sell malpractice insurance to the other group of doctors."

MR. ROSDEITCHER: That would be one hypothesis. That would be one form of a boycott.

QUESTION: What was your particular hypothesis that you were just advancing?

MR. ROSDEITCHER: I actually didn't put that little extra touch on it. The doctors themselves -- If the doctors were able to persuade -- holding their own custom -- or simply out of their persuasive power to go to the -- with implied threat that they might not deal with these companies and said to the companies, "Don't deal with them because we want to put them out of business," that would be a boycott, in my view. That would be Klor's. That would be United States v. General Motors.

Finally, I would like to make one last point. I would like to return to the point I started. I know I am eating into my rebuttal time, but I think I'll do that, if the Court pleases.

And that is back where I started from to the policy of the Act. I think this Act does have a relatively clear purpose. In other words, to defer -- to have the Federal power to defer in the area of regulation of insurance business, and where the States have regulated it, to put policies of competition in the hands of the States.

In this case, I think the decision of the First Circuit nullifies that purpose, because, as I said earlier, the key area of regulation left to the States was the relationship between insurance companies and policyholders and matters affecting the terms, rates and availability of coverage for the policyholder.

That's exactly what's involved here. I think that Judge Kaufman's decision, although we don't have to show an actual conflict in the State regulatory policy and the Sherman Act, in order to trigger the 2(b) exemption, I think there is a conflict and there is an area of conflict involved here.

And that area is this. First, questions of conspiracy are always questions of fact. And different factfinders can view those facts differently, depending on what they understand to be the underlying conditions, and they could very well come to a very different factual conclusion from viewing all the facts. In any case, either under its unfair methods of competition law or in deciding whether to use that law or employ a joint underwriters' association. So there can be inconsistent conclusions of fact as to what the causes of the medical malpractice problems here were.

There could be different conclusions as to what standard of law should apply, whether we should apply the per se rule which applies to the agreements not to compete under the Federal antitrust laws, or whether you should apply some

rule of reason test. Perhaps there was some justification. Perhaps things were so bad that the Insurance Commissioner said, "Well, it isn't so bad if these guys said, 'Look let's stop selling these policies and drive us all insolvent and no one will have any malpractice insurance.'"

I think there are other areas where the decision of the First Circuit threatened accepted insurance practices. That is not crucial to my position, but I think it is true. Respondent has said if you have a joint insurance group, like the JUA, and if you take cancer to the one side and the First Circuit's decision to the other, that you have to conclude that in every case of refusal of coverage under the JUA, it is possible to commence a Federal antitrust suit and claim that that is a concerted refusal by the members of the JUA to deal with that policyholder.

It may be wrong. They say apply a rule of reason and that will save it. That won't save it at all, because the question of reasonableness is precisely the question which was left to the States' insurance departments. For all those reasons, reasons of policy, for reasons of making this statute meaningful and work, we suggest that the line we propose should be drawn, and that the boycott, coercion and intimidation should be limited to what was involved in Southeast Underwriters and other boycott cases, namely pressure by competitors to prevent other people from engaging in a policy of competition.

Thank you.

MR. CHIEF JUSTICE BURGER: Mr. Decof.

ORAL ARGUMENT OF LEONARD DECOF, ESQ.,

ON BEHALF OF THE RESPONDENTS

MR. DECOF: Mr. Chief Justice, and may it please the Court:

At the outset, this case seemed to revolve about a very finite and very limited issue, that is, the construction of Section 2(b) of the McCarran-Ferguson Act. But as it evolved, the position of the Petitioners shifted from one point to another. And I say this not in a pejorative way, but I think to give the context and the history of the case to the Court and to illustrate the weakness of the various positions that the Petitioners have retreated to, it would cast some light on the weakness of their present position.

First, the case was brought in the District Court of Rhode Island, and the case was dismissed upon Petitioner's motion, based on the so-called "blacklisting limitation" which Petitioners ascribed to 3(b) of McCarran-Ferguson.

And in the Circuit Court of Appeals the very same limitation was urged.

Now, Petitioners pointed to one thing in the Congressional Record, in the legislative history, to support their argument for blacklisting. And that was a statement of Congressman Celler which merely cited blacklisting as an example, when he said, "For example, where 3(b) prevents

blacklisting." But, at least, at that point, Petitioners were pointing to something in the legislative history which could support their position.

At the present stage, since Proctor -- and, by the way, there have been a number of cases which have taken the same position as Proctor. I think there are cases now in the First, Second, Third, Fourth Circuits, part of the Fifth Circuit, in the Battle case and the D.C. Circuit which is Proctor. They all take the position that "Well, we don't ask that the limitation of 3(b) be narrowed to blacklisting, but we say it should be narrowed to include all traders." And implicit in their argument, may it please the Court, is that it must exclude consumers.

Now, Petitioners, in the reply brief on page 3, state in the second paragraph, "The only issue here now is to draw the line between boycotts and other combinations and conspiracies in restraint of trade covered by the Sherman Act, so as to give meaning to the expressed exemption of 2(b) of the McCarran-Ferguson Act."

Petitioners are now asking this Court to go outside 3(b), outside McCarran-Ferguson and give a definition of a boycott under the Sherman Act, the Sherman Act itself, which will fit into their description and thereby exclude Petitioners.

And they set forth their proposed definition in the alternative. The first prong of their definition, I think --

QUESTION: Do you challenge the legitimacy of their suggestion that the word "boycott" be given interpretation, in view of the McCarran-Ferguson language?

MR. DECOF: Yes, Your Honor, we challenge this from the very outset. When the action was brought in the District Court, the Petitioners, then defendants, moved to dismiss on the grounds of McCarran-Ferguson. We replied -- Plaintiffs replied -- but there was boycott, coercion and intimidation alleged and therefore we came within the 3(b) exclusion. Petitioners, then defendants, rejoined by stating, "Yes, but that was limited to blacklisting under McCarran-Ferguson."

QUESTION: Doesn't the issue join then on the meaning of the word "boycott" in 3(b)?

MR. DECOF: The issue, at that time, was joined on the meaning of the word boycott in 3(b), and that issue was argued before the First Circuit.

QUESTION: Are we arguing it here now?

MR. DECOF: Well, if the Court please, our position is that the Petitioners have shifted from this because -- originally, their argument was bottomed on the assertion that boycott, under 3(b) had a different meaning than boycott under the Sherman Act.

Now, they state in their reply brief that the problem here is to define the limit of boycott under the Sherman Act. That leads us to the conclusion they now agree that boycott under

the Sherman Act is the same as boycott under 3(b). If they have come to that position, then they must take the position that Congress in enacting 3(b) meant to do something which was not just an illusion, and did not mean to give by one hand and take away by the other.

QUESTION: So you both get down to the question of the meaning of the word -- at least in part -- of the word "boycott" in 3(b).

MR. DECOF: Your Honor, we do get down to the question of the meaning of the word "boycott" in 3(b), but which is now, I believe, by Petitioners' position, correlated to the meaning of boycott under Sherman.

And I think their position before this Court is that the meaning of boycott is limited, but it is limited not because of 3(b), but because its meaning under Sherman should be limited.

QUESTION: What's your position?

MR. DECOF: Our position, if the Court please, is that if you apply -- first of all, our first position is that, even under the definition that Petitioners proposed, the Respondents here have standing and fall within that definition, within the second form of that definition.

Our second position is that the definition is unduly restrictive and unduly limiting, because by its very nature it excludes all consumers as victims of boycott. It injects into

the definition of boycott intent, which this Court has said on many, many occasions is not a consideration in the definition of boycott. The Court has said that the effect is a consideration, but that the intent is immaterial. They have said this in Silver. They have said it in Frankfurt Distilleries and many other cases, if the Court please.

We take the position that the simple answer to their proposed definition is we do not fall outside the limitation. The first prong of their definition is that there must be a competitor of the victim as one of the conspirators. As I say, the second prong, they say that the boycott must be an act which is directed to control the competitive activity of the victim.

Now, the act -- we fit within the second definition, if the Court please, because the act of boycott in this case controls the commercial activity of the victims, that is the doctors.

Since the Petitioners have raised the question of [illegible] an underwriting problem, I must put that into context as background to get into this. This was not a race, if the Court please. There was a medical malpractice crisis in the State of Rhode Island, but the crisis was ignited by this situation where almost half the doctors -- more than half the doctors in the State of Rhode Island were insured by St. Paul. Most of their policies were going to expire on June 30, 1975.

In April, St. Paul announced that their policies would not be renewed except on a claims made basis, and I must touch on the nature of the claims made policy to illustrate what this meant.

The claims made policy would insure the doctor only in the year in which the policy was in effect, even if the doctor had been insured by the same company in the year in which the occurrence took place. The doctors' position was that this locked them in for life with the company, because once the first claims made policy was issued, the doctors must stay with that company. If they decided, for example, to change jurisdictions and move to a State in which, for example, St. Paul did not sell medical malpractice insurance, they would have to have double coverage for this reason. Since the claims made policy insured them only for one year at a time, if they should retire of if they should die, or if they should leave the company they would have to buy coverage for any action which might be brought against them in later years, whether because the statute had not expired, whether because it was a discoverability type action, for whatever reason. And this coverage could be afforded to them by means of a so-called "three reporting involvement." They had to be bought in three installments. And so if a doctor wanted to leave the jurisdiction, once he had signed up with St. Paul on a claims made basis, he would have to buy three reporting endorsements which would cover him for any actions that were brought after the

year in which he left, because he had been insured in the year -- Now, if he went to another State, he would have to have double coverage and the cost of these reported endorsements would come to about 150%. And so the pernicious feature of this plan -- and it was an ingenious plan -- was that the doctor was locked in. He couldn't leave the State. He couldn't retire from practice. If he died, his wife or his heirs would have 30 days to decide whether or not they would buy the reported endorsements which would cover actions which were brought after.

QUESTION: What if all the malpractice insurers in the country had jointly announced the same policies that St. Paul announced? Wouldn't that have had precisely the same effect on the doctors?

MR. DECOF: If the Court please, I think, in that situation, this Court or the Federal court would have the right to look at the factual situation to see if it did, in fact, constitute a boycott, in the first instance. The defendant's position is that this Court should be frozen to the definition of boycott which has been established in previous cases because of the fact situation in those cases. In many instances, the Court has looked to the fact -- In the first instance, this Court applied the rule of reason and decided originally in the Northern Pacific Railway case that if the activity was pernicious and had no redeeming features, it was a boycott.

Now, we can't say now -- I don't think the Court

would be willing to say now -- but everything outside those circumscribed fact situations is not a boycott.

In the situation in our proposal, it would be a fact situation on which the Court could decide whether or not this was a boycott, and if it was a boycott then it came within the protection of 3(b) of the McCarran-Ferguson Act. We are not at that question at the moment.

My definition of a boycott -- if the Court cares to hear it -- I don't think the Court has to go this far. We are saying that what happens here was a classic boycott. It was a denial of 75% of the insurance market to the doctors. And the thing that we kept within the second category of the Petitioners' definition -- because in our society doctors cannot practice their profession without medical malpractice insurance. It is the same to them as buying a scalpel or stethoscope. And this is what propelled Rhode Island into a medical malpractice crisis. The JUA was formed as a result of this set of facts. It was not something that was boiling in the pot while this action was taking place. The JUA resulted from this set of facts. The JUA is a creature of emergency. It was promulgated by the Director of Business Regulations of the State of Rhode Island, because the situation was that the doctors had asked the State to put a freeze on legislation so that the matter could be looked into and the insurance companies had threatened to pull out of the State of Rhode

Island if the freezing legislation was put in.

So the JUA is really inimical to the idea of free enterprise, because the way the JUA was set up all companies in the State of Rhode Island had to belong to a risk pool. And this was a condition of their doing business in the State. The fact of the matter is that the companies vociferously complained about the JUA, rebelled against it. And it is an emergency type of legislation, a police state type of thing. The State of Rhode Island certainly doesn't want to be in the insurance business. And this isn't the kind of thing that should happen. Our argument is if the balance were restored there wouldn't be any JUA. But, again, the simple answer to the question of the JUA is that it is immaterial here because when this action was brought there wasn't a JUA.

QUESTION: One point you emphasize, or seem to emphasize, leads me to ask you what States in the country are there in which the St. Paul Company does not do business?

MR. DECOF: There are a number of States in the country, if the Court please, to my knowledge, in which the St. Paul does not do business. There are only four companies in the State of Rhode Island which sell medical malpractice insurance. Throughout the United States -- and here, again, this is something that has never been gotten into. And I think because of McCarran-Ferguson there seems to be a territorial allocation in which certain companies deal in certain States.

In my opinion -- and I am very familiar with the malpractice scene in the State of Rhode Island. I was on the Governor's Commission which ended up enacting the new legislation -- the claims experience in the State of Rhode Island, to my knowledge, has been an excellent one. And I wonder why haven't there been other companies, besides these four Respondents, these four Petitioners.

But my answer to Your Honor's question, sir, is that there are a number of jurisdictions in the United States where St. Paul does not sell medical malpractice insurance. By the same token, companies like Argenot (?) which deal heavily in malpractice insurance are not in the State of Rhode Island.

Now, we say, if the Court please, that the definition of boycott, even if you limit it, is a concerted refusal to deal, which has as its effect a restraint on commerce, a restraint on trade. Purpose has been counted immaterial, as I said before, in many cases by this Court. And the effect of this boycott -- the only boycott that is before this Court is where the companies refuse, absolutely, to sell insurance of any kind to the doctors who were insured by St. Paul, a classic boycott. And the only way that this could be removed from that definition is to say a consumer cannot be the victim of a boycott.

This leads us to the anomalous conclusion that a consumer who is protected under the Sherman Act -- this is square one law and the Petitioners perceived this -- may be

protected against an act which harms him by virtue of an indirect boycott, but cannot be protected from the identical harm when it's aimed directly at him.

Now, Chief Justice Hughes in the Appalachia case stated that "the Sherman Act deals in substance." And we are here dealing with substance. And this is why I am urging to this Court that we have a very grave issue here. Petitioners are asking that the Court examine boycott, the definition of boycott, and arrive at -- pronounce a definition which will exclude consumers from protection, either because they are not competitive of the boycotter or because they are not engaged in some competing business with the boycotter.

QUESTION: The answer to that question turns on the meaning of boycott, as used in the McCarran-Ferguson Act; does it not?

MR. DECOF: Yes, Your Honor. But the legislators, in adopting the McCarran-Ferguson Act, we submit, intended boycott to have the same meaning that it has in the Sherman Act. We answer the emasculation idea this way. First of all, to answer Petitioners' contention that almost anything could be defined in terms of a boycott, the Court many times has distinguished between the act or the grievance, for example, price-fixing and the concerted activity to carry it out. There are many proscribed actions under Sherman which are not boycott, for example, a conspiracy to crush a competitor. This could be

carried out without a boycott, in any number of ways, by stealing trade secrets, by stealing employees, by false advertising and so forth. Tie-in agreements need not be enforced by the boycott. The entire Section 2 on monopolies, that's not boycott. So, even if you gave the fullest range to the meaning of boycott in the McCarran-Ferguson, and therefore insured the protection that Sherman guaranteed to the public, there is still a vast area of insulation for the insurance companies reserved by the McCarran-Ferguson. Besides this, McCarran-Ferguson insulated the insurance companies against any action brought under the other antitrust acts, the Clayton Act, the Federal Trade Commission Act, the Robinson-Patton Act. This, again, is a vast area of protection.

Finally, the insurance companies were insulated by McCarran-Ferguson against any action brought under any other Federal legislation that didn't relate directly to insurance. So, with reference to the emasculation argument, I believe it is an artificial argument. There is a great area of protection still reserved to the insurance companies.

Again, with reference to the definition of boycott, if we put that aside, there have been allegations of intimidation and coercion. And the legislators made it plain that boycott, coercion and intimidation were not the same thing. As a matter of fact, Senator O'Mahoney said, "We are talking about six things here that the State doesn't have power to regulate,

boycott, coercion, intimidation or the agreement to do any of these things."

So that again, is an issue that transcends the issue of boycott.

Now, Petitioners have relied greatly and spent a great deal of their time in their briefs and in their arguments on the question of whether or not this is State regulation, and whether or not we are in an area of State regulation.

We don't deny this and never have. Respondent's position is not that the State of Rhode Island is not engaged in the regulation of insurance. However, the fact that they are engaged in the regulation of insurance does not permit them to authorize acts of boycott, coercion and intimidation. This has been specifically carved out of that protection.

And this Court has not been reluctant to look at McCarran-Ferguson cases. For example in SEC v. Variable Annuities, the Court determined what the scope of insurance was. There was no question there was regulation of insurance, but,in that case,the Court determined the Variable Annuity policy was not within the scope of the business of insurance.

In SEC v. Travelers, the Court determined the scope of State regulation. And, again, in that situation, the question was whether or not the Travelers and some of these policies, outside of State by mail -- although it had an Act which purported to regulate these things, what was the extent and what

was the limit of that regulation?

And in a most important case, the Frankfort Distillery case--it was not a McCarran case, but it was a Millard Tydings Act case -- in the Frankfort Distillery case, the State of Colorado had a Fair Trade Practices Act which allowed the fixing of prices, and the Millard Tyings Act gave them the right to do this, so they were regulating in this area. There was a boycott involved in forcing the fixing of prices. And the State said that even though they are permitted by the provisions of Millard Tydings to fix prices -- and even though they are permitted by the Twenty-first Amendment to do this, that, still and all, that didn't permit them to engage in activities of boycott, coercion or intimidation which would be beyond the scrutiny of the Federal court.

Again, the third case I wanted to cite with reference to McCarran-Ferguson was SEC v. National Securities, in which the Court determined what was an insurance policy. And this was a case in which there was a prosecution by the SEC against the defendant company for misstatements and misrepresentations made to stockholders of the company which it was going to merge with. And there was a law that the director of insurance in the State had to approve any mergers. Now, the SEC first brought an action for injunction and this was denied because it was held to be insurance and regulated by the State. And when the merger went through, the SEC then brought an action to unwind the merger.

And this Court said, "Even though it was the insurance director's obligation to approve the merger, and even though he did approve the merger" -- he didn't say to these people, "You must merge," all he said was, "You can," and I find it to be adequate. But the Court held also that this could be reviewed and that McCarran-Ferguson did not insulate the State from the action.

Now, this case is not even as strong on its facts as the Barry case, because in the SEC v. National Securities case, the State had passed legislation authorizing and directing the Director of Insurance to approve such a merger and he had acted and had done it. In the Barry case, there has never been any action by the State of Rhode Island to authorize the act here. And, as a matter of fact, I believe that Petitioners will concede this. There couldn't be. If the State of Rhode Island did say, "We authorize boycott, coercion and intimidation to enforce this price-fixing," this would be a nullity.

QUESTION: Mr. Decof, of course, the problem is: What is a boycott? In your view, under the statute, if four companies got together and agreed on a territorial allocation, each took a quarter of the State and each agreed not to sell in the other three quarters; would that be a boycott?

MR. DECOF: If the Court please, my position would be -- and I hope that it is not a quibbling one, that this would present a new set of facts which should be looked at to see whether or not they are so pernicious and so without redeeming

virtue that they would be a boycott. I don't know if this Court is ready --

QUESTION: Well, it would clearly be without sufficient redeeming virtue to avoid a violation of the Sherman Act if you didn't have the McCarran Act. It would be a per se violation if we used those terms. How do you decide whether it's a boycott, or not?

MR. DECOF: In my opinion, if the Court please -- I say in this case, you don't have to -- but if the Court wants to circumscribe or define the limits of boycott, I would say a boycott would be a concerted refusal to deal which deprives the victim of the freedom of choice in a market.

QUESTION: Well, my example would be a boycott?

MR. DECOF: Yes, Your Honor.

Again, the Court doesn't have to go to these extremes.

QUESTION: Well, it's pretty close, because I assume your allegation is that the three companies agreed not to sell to former customers of St. Paul.

MR. DECOF: Exactly.

QUESTION: But that's about the same as an agreement not to sell to people outside their geographical territory, the same kind of agreement, isn't it?

MR. DECOF: Yes.

I have in mind, if the Court please, the Schwin case and its subsequent overruling by GTE Sylvania, where we had

horizontal territorial -- we had vertical territorial allocations. And the Court in GTE Sylvania said we will apply the rule of reason. The Court said, at the same time, "We are not saying that a vertical restriction cannot be a per se violation. We will apply rule of reason." And I would not take issue with applying the rule of reason. I would say, in this case, a rule of reason could be applied. There have been some lower court cases, like Macke v. NFL, in which the Court held that the Roselle rule was a boycott, but applied a rule of reason. I would only say that this Court has not taken that step. And I can understand the Court's reasons for the per se rule. I think there are excellent reasons for it, to have a bright line so that business and the courts can conduct themselves by some standard in an area that is, at best, very murky. But I don't take the position that we have to rigidly freeze a definition into which all sorts of facts that come hereafter must fit or must be rejected as not a boycott.

And it may be that the rule of reason would be the answer in a case such as Your Honor's. I know the Court, after Schwin, was very much bothered because in the White Motors case the Court had said, "We are unfamiliar with this area. We have to know a lot more about it before we can decide it."

QUESTION: You are really discussing the question of whether a per se or a rule of reason approach applies. But that's not the problem. The problem is whether it is a boycott or not,

which is, I suppose, a species of a per se violation.

MR. DECOF: If the Court please, the per se violation and the rule of reason get us into a circular argument in semantics which I noticed earlier in the research in this case. At some time the Court applied a rule of reason to describe what a boycott is. That was at Level One. Maybe -- now, certain things are a boycott and we get into an exercise as to whether something is a boycott and you may undo the pernicious nature of it by applying a rule of reason at the second step. Or, whether or not, you say something when you determine that something is a boycott. The Court, in the first instance, applied a rule of reason and said, "Because of these facts, we have a boycott." To me, it is immaterial at which step you apply the rule of reason. Or, what I am saying is that we may be, because of changing times, launched into a situation where a set of facts occurs -- and this is as good an example as I can think -- this new creature, this claims made policy, this ingenious device -- a set of facts occurs which was not anticipated originally. And then I say maybe the Court is in the position, without abandoning the per se rule, of saying, "We are back where we were when we decided fact situation A,B and C was a boycott. But this is a new fact situation, so let's look at it, see if it has any redeeming virtue, see what the pernicious effect is and in accordance with Northern Pacific, decide whether this is a boycott."

I see my time has expired.

Thank you, Your Honor.

MR. CHIEF JUSTICE BURGER: Mr. Friedman.

ORAL ARGUMENT OF DANIEL M. FRIEDMAN, ESQ.

FOR THE UNITED STATES AS AMICUS CURIAE

MR. FRIEDMAN: Mr. Chief Justice, and may it please the Court.

The Government's position in this case is that a boycott under Section 3(b) of McCarran-Ferguson means a concerted refusal to deal, when people get together and refuse to deal with someone, a situation which means that the victim of the boycott finds himself excluded from the section of the market which is represented by the people who are combining in this endeavor to exclude him.

And that's, we think, precisely what is alleged in this case. The charge in this case is that the three insurance companies, other than St. Paul, even refused to entertain applications for insurance from any of the doctors, hospitals and other medical personnel whom St. Paul represented.

This is not a charge that the insurance companies refused to deal with these customers except on particular terms and conditions.

QUESTION: Would that be a boycott?

MR. FRIEDMAN: I would think probably not, Mr. Justice. I think it would have to vary from case to case. It would

depend on what it was. It's possible, of course, that the particular terms and conditions were so unreasonable that, as a practical matter, it constituted a refusal to deal.

QUESTION: Well, from the Plaintiff's point of view, if it weren't unreasonable in his view, he wouldn't have sued. So, from your point of view, it would be a boycott, wouldn't it? They refuse to deal with me except on these conditions. They are boycotting me from dealing with them on a reasonable basis.

MR. FRIEDMAN: I don't think that is how this Court has treated boycott in its decisions under the antitrust laws. And this, of course, is one of the main points that Petitioners make here. They say the problem with defining boycott as Respondents and the Government define it is that everything, virtually, that involves joint action can be framed as a boycott. And as we say, that is not how we think boycott has been defined.

They give their precise example. They say, "Well, an agreement to fix prices could be framed as an agreement not to sell except upon those prices," and therefore you could describe this as a boycott. And if that's what boycott means -- it has this open-ended meaning -- it would come close to swallowing up the entire McCarran-Ferguson Act provision giving the States broad discretion to regulate insurance.

That's not what we think boycott means and that's not how we think this Court has defined it.

QUESTION: Mr. Friedman, if I could just interrupt for a second, under your definition, as I understand it, three out the four are refusing to deal on any terms at all and, therefore, they are participants in the boycott. But, if we assume that the claims only offer by St. Paul was a reasonable way of doing business, St. Paul should be entitled to the exemption; should it not?

MR. FRIEDMAN: Except that St. Paul wasn't a party to the illegal understanding that the other three wouldn't, but I would think St. Paul's -- I would put it this way. I would think that St. Paul, standing alone, its refusal to sell except on a claims made basis, I would not think that standing alone is a boycott.

QUESTION: (inaudible) -- group action. I mean an individual can't engage in a boycott, no matter what he does. He might engage in very illegal action, but it is not a boycott unless there are two or more. Isn't that right?

MR. FRIEDMAN: That's right. That's what I tried to suggest, that St. Paul may be participating in the illegal boycott --

QUESTION: Does that even hold water? Because the four of them have agreed that only St. Paul will sell to them on this set of terms. So the four of them have not agreed to a total refusal to sell to this Plaintiff.

MR. FRIEDMAN: But the four of them have agreed that

the three will refuse to sell at all.

QUESTION: But if your definition requires the total refusal, the group has not made such a total refusal.

MR. FRIEDMAN: I suggested that it requires a refusal on the part of the people to allow the customers into that segment of the market. In other words, the illegal restraint is that they have refused to permit the doctors access to the portion of the medical malpractice insurance market represented by the other three, which is something like 40 or 50% of the Rhode Island market. That's the essence of it.

QUESTION: Why is that any different than saying we will refuse to let them deal with any portion of the market that's willing to sell at less than $1 a thousand, or whatever the premium rate.

MR. FRIEDMAN: Because I think, traditionally, the concept of boycott has been used by this Court in the anti-trust field to deal with the situation where a group of competitors get together --

QUESTION: And all of them refuse to sell.

MR. FRIEDMAN: All of those who get together.

QUESTION: Presume you've got one willing to sell.

MR. FRIEDMAN: The one who is willing to sell is not boycotting but the one, nevertheless, may participate in the understanding by the others.

As far as this case is concerned, the charge in this

case, and the only question at this point, I stress, is whether or not the Respondents should be permitted to go to trial on their claim. The charge in this case is that the three companies, other than St. Paul, refused to deal on any terms, on any terms, with the large number of doctors to whom St. Paul was selling insurance.

QUESTION: Was it ever alleged what the purpose was of the agreemen?

MR. FRIEDMAN: There is an allegation -- there is no charge with respect to the specific boycott by the three of them. There is a charge that the four of them conspired to try to sell insurance on a claims only basis and to eliminate --

QUESTION: Well, is it alleged that the purpose of the agreement among the three, the refusal of the three was to force the doctors to do business on St. Paul's terms?

MR. FRIEDMAN: I'd have to check that and see. I don't think that was specifically alleged, but that, of course, is the practical consequence of it because the allegation --

QUESTION: Well, whether it was a boycott or not, then would it have been coercion?

MR. FRIEDMAN: I'm not sure that that kind of economic coercion is what Congress had in mind in the coercion language of McCarran-Ferguson.

QUESTION: It is either a boycott or it is nothing under 3(b).

MR. FRIEDMAN: I think it is clearly a boycott.

QUESTION: Mr. Friedman, what if the big four auto makers all get together and agree that, "We will not sell a car to any buyer for less than $10,000"? Is that a boycott?

MR. FRIEDMAN: I wouldn't think that would be a boycott. If it reached the point --

QUESTION: It's keeping buyers out of the automobile market.

MR. FRIEDMAN: It's keeping some buyers out, but it seems to me the point could be reached at which it might be a boycott. For example, the big four automobile makers got together and agreed they wouldn't sell automobiles to anyone in a particular city for less than $100,000. It seems to me, at some point, you could say that what seemed to be just a price-fixing agreement transcended the line because it is something different now than just fixing the price. It is obviously something designed and with the effect of excluding.

Let me come to the other point the Petitioners make and the amicae as well. They say if you construe McCarran-Ferguson to treat this kind of thing -- this absolute refusal to deal -- as a boycott, this, as a practical matter is going to wipe out the careful system of regulation the States have built up over the years. And, again, it's in terms of everything can be framed as a boycott. And, therefore, all you have to do is allege that an agreement among insurance companies to include

particular terms in their policies or particular types of insurance is a boycott and, therefore, it is no longer within the State's exclusive jurisdiction but is subject to McCarran-Ferguson.

Now, we come back and say as we interpret boycott, boycott is not this open-ended. You can't just take any conceivable thing that results from joint action and say that it is a boycott. We think, under the decisions of this Court, it is considerably narrower than that, and is best construed -- this definition, this provision -- to give the States the authority to continue, basically, what they have been doing, what they were doing at the time of Southeastern Underwriters. They can continue to insure the financial solvency of the insurance companies, which is an important thing. They can continue to control the rates of the insurance.

QUESTION: Can they ever, though, unless specifically authorized by State law, can they ever jointly refuse to deal with a group of possible customers?

MR. FRIEDMAN: Well, if it's a boycott, State law makes no difference.

QUESTION: Even if State law purported to expressly authorize that, approve it, it would still be subject to the antitrust laws.

QUESTION: Well, it wouldn't if it was -- I take it you still think the Parker v. Brown approach would be --

MR. FRIEDMAN: If it were State action --

QUESTION: That's what I'm saying. If it is a State action -- If a State law specifically ordered the companies to act in a certain way. You would say if they got together and refused to deal with a group of customers at all, they are subject to the Sherman Act boycott provisions?

MR. FRIEDMAN: Yes. Unless the State ordered them to do that. If the State ordered them to --

QUESTION: And it wouldn't be an illegal boycott if they refused to deal except on certain terms?

MR. FRIEDMAN: That's right. Unless the terms were so oppressive that, as a practical matter, the refusal to deal except on certain terms amounted to a refusal to deal at all.

QUESTION: Who is going to decide that? An antitrust court, right?

MR. FRIEDMAN: An antitrust court.

QUESTION: So there is not an exemption?

MR. FRIEDMAN: It would depend whether the particular course of conduct --

QUESTION: Somebody has to decide that. So anybody is free to bring an antitrust action, under your theory. And, thus concerted refusal to deal is tantamount to a boycott. All you have to do is allege that in your complaint and you are in the antitrust court and the McCarran-Ferguson Act is out the window.

MR. FRIEDMAN: Well, that would depend --

QUESTION: Correct?

MR. FRIEDMAN: No. I would say you may be in a court but you might be out very quickly.

QUESTION: Well, that's true any time you go into any court. It's true now. You can get into court and the question is how fast he gets out now.

MR. FRIEDMAN: It can always be phrased that way, but it seems to me if that's all that it is, if it in fact turns out to be a price-fixing agreement, I would think such a complaint could be rather easily dismissed, either on a motion to dismiss or a summary judgment.

QUESTION: But you wouldn't say just a widespread agreement among insurance companies in Rhode Island, as to the rate at which they would sell medical malpractice insurance, would be a boycott?

MR. FRIEDMAN: No, we think not.

QUESTION: Even though all of them agree not to do business with anybody except on those terms?

MR. FRIEDMAN: That's right. We think that would not be a boycott. That would be a traditional price-fixing agreement. And the one thing that's clear from McCarran-Ferguson, it seems to us, is that Congress intended to take that kind of an agreement, that kind of a price-fixing agreement out from under the Sherman Act and leave it to the discretion of the

States directly, because that, of course, was the essence. That was one of the most important things in State regulation -- at the time that Southeastern Underwriters -- was the rate bureaus to which the insurance companies could --

QUESTION: But if St. Paul is willing to sell at certain rates or in a certain way and three other companies just get together and say, "We refuse to deal with those putative customers of St. Paul," that's a boycott?

MR. FRIEDMAN: That's a boycott. If they say, "We refuse to deal with those customers of St. Paul," that, we think, is a boycott.

QUESTION: Do you think the Federal Court of the District of Columbia in the Proctor case, that its criteria that it worked out were right or wrong?

MR. FRIEDMAN: I probably would have to disagree with it, but --

QUESTION: You don't have to.

MR. FRIEDMAN: -- I would point out this distinction, that what Proctor said was in a rate-fixing context, in a rate-fixing context, it believes that boycott requires some enforcement action. That was a case where the insurance companies said they wouldn't pay more than a certain going rate for retired beneficiearies. And we think that is not a proper limitation. We think that even in the rate-fixing context if they refused to deal with certain customers, that we think that

is a boycott.

QUESTION: Judge McDonough's opinion seemed to require some sort of coercion, at least in that context.

MR. FRIEDMAN: He suggested you had to do something more -- in the rate case -- you had to do something more than just refuse to deal. You had to do something more. You had to enforce it some way, put pressure. And he suggested there wasn't a claim, for instance, that they wouldn't refer customers except to the repair firms who agreed to their terms and conditions. But he said that was not established by the record in the case. And he left open, I take it, that might have been the kind of enforcement procedure that --

QUESTION: Well, that was an affirmative summary judgment for the defendant.

MR. FRIEDMAN: I think it was -- there was a lot of evidence taken in that case.

QUESTION: It was the affirmance of a summary judgment. And that was the basis of Judge Wright's dissent.

QUESTION: Mr. Friedman, following up on Mr. Justice Stewart's question, supposing the Plaintiff here had alleged that all four companies had refused to do business on any terms except the claims made basis and this had never been tried in any other part of the country. Would that be a boycott?

MR. FRIEDMAN: I think not.

QUESTION: So you distinguish the fact that there is

a total refusal by the three?

MR. FRIEDMAN: A total refusal.

Let me just, if I may, in conclusion, come back again to Southeastern Underwriters where, of course, the boycott was not only of the insurance company holders, but of the policy-holders. And while it is true that was the context in which it was done, the fact is that the boycott was just not so limited.

And I would like to close with what the Court stated in that case. In answering a similar argument to that made there, the contention was that if you applied the Sherman Act, itself, to the business of insurance, this would uproot and destroy State regulation. Speaking for the Court, Justice Black stated, "No States authorize combinations of insurance companies to coerce, intimidate and boycott competitors and consumers in the manner here alleged."

Thank you.

MR. CHIEF JUSTICE BURGER: Very well, Mr. Friedman.

Mr. Rosdeitcher, do you have anything further?

REBUTTAL ORAL ARGUMENT OF SIDNEY S. ROSDEITCHER, ESQ.,

ON BEHALF OF THE PETITIONERS

MR. ROSDEITCHER: Your Honor, we've come a long way from what Judge Kaufman said was the plain meaning of boycott, because one of the questions Justice Stevens asked was whether a market allocation is a boycott. Under the Solicitor General's definition, a market allocation which this Court in Topco and

Sealy and other cases treated as a market allocation and per se violation of the antitrust law, becomes a boycott. So much for the plain meaning.

I also would like to add that we now have a situation where conduct which is economically indistinguishable is treated as a boycott. And while it is suggested that we have come to an artificial meaning, in fact, I believe, the Government's position and Respondents' position aremost artificial, because the examples we've had of where you have four people -- four companies -- I think my co-respondents here would like to get out because, apparently, they are not part of the boycott. You have four companies. One of them is willing to sell claims made and three don't want to sell occurrence since they don't want to sell anything. So they have to buy claims made.

All four had agreed to sell only claims made. According to the Solicitor General, that is not a boycott. The other is. So, I say there is no logical distinction.

I'd like to just go back to our position as to why there is a sound and logical dividing line between what we say is a boycott and what we say is covered by the 2(b) exemption. Under our definition, a boycott is exactly what this Court has used it in the past for, situations where, although the competitors, a group of conspirators, agree among themselves that they won't sell except at a fixed price, or fixed terms, they do more. They prevent the fellow who does want to sell at a

different price from coming in. They decide, in Senator O'Mahoney's words, "to engage in private regulation." They are going to punish that fellow in a variety of ways. In the Southeastern Underwriters case, as Mr. Friedman correctly points out, they punish that fellow by cutting off the consumer. But it wasn't just a concerted refusal to deal with the consumer. It was a concerted refusal to deal with the consumer who had the temerity to deal with the price-cutter. That's what Southeastern Underwriters calls a boycott. That's what this legislative history is all about. That's where Congress drew the line and said, "If insurance companies agree"--

QUESTION: Is it really that Congress drew that line? Am I not correct in believing you've changed your position since the Court of Appeals, too, have you not?

MR. ROSDEITCHER: Yes, I have, in this respect.

QUESTION: Then it became clear between the argument there and here where Congress drew the line.

MR. ROSDEITCHER: I think Judge McGowan opened my eyes to something that I hadn't seen before. And that was this. My definition of a boycott, in most cases, would be very much like the Fifth and Ninth Circuit definitions which went into insurance agents and insurance companies, because in most cases, other than Southeastern Underwriters, my description and this Court's definition in use of boycott in past cases -- in the insurance business, typically, the fellow who is going to be

boycotted or pressured not to compete is a competing agent or a competing insurance company. I realize, in reading Proctor, that that's not always the case. But you can reach out into another business, which is what happened in Proctor and do the same thing they did in Southeastern Underwriters.

Now, Judge McGowan's opinion, in my view, as I read it, says exactly what we are saying.

QUESTION: Let me test your theory for a moment.

Supposing the insurance companies thought brain surgery was particularly risky business, or something like that. They all agreed that none of them would insure brain surgeons, total exclusion. Would that be a boycott?

MR. ROSDEITCHER: No, Your Honor, that would be an agreement to fix the terms of a product, which is a --

QUESTION: They wouldn't insure this particular category of risk, no brain surgery at all. What if they said no doctors? No malpractice insurance at all, would that be a boycott?

MR. ROSDEITCHER: That would be an agreement not to compete.

QUESTION: It would not be a boycott?

MR. ROSDEITCHER: It would not be a boycott, in my view.

I think I am through, unless the Court has further questions.

Thank you.

MR. CHIEF JUSTICE BURGER: Very well.

Thank you, gentlemen.

The case is submitted.

(Whereupon, at 2:26 o'clock, p.m., the case in the above-entitled matter was submitted.)