OFFICIAL TRANSCRIPT

PROCEEDINGS BEFORE

THE SUPREME COURT

OF THE

UNITED STATES

CAPTION: HARTFORD FIRE INSURANCE CO., ET AL., Petitioner, V. CALIFORNIA, ET AL. and MERRETT UNDERWRITING AGENCY MANAGEMENT LIMITED, ET AL., Petitioners V. CALIFORNIA, ET AL.

CASE NO: 91-1111; 91-1128

PLACE: Washington, D.C.

DATE: February 23, 1993

PAGES: 1 - 73

ALDERSON REPORTING COMPANY

1111 14TH STREET, N.W.

WASHINGTON, D.C. 20005-5650

202 289-2260

IN THE SUPREME COURT OF THE UNITED STATES

- - - - - - - - - - - - - - - - - -X

HARTFORD FIRE INSURANCE CO., :

ET AL., :

Petitioners :

v. : No. 91-1111

CALIFORNIA, ET AL. :

- - - - - - - - - - - - - - - - - -X

MERRETT UNDERWRITING AGENCY :

MANAGEMENT LIMITED, ET AL., :

Petitioners :

v. : No. 91-1128

CALIFORNIA, ET AL., :

- - - - - - - - - - - - - - - - - -X

Washington, D.C.

Tuesday, February 23, 1993

The above-entitled matters came on for oral argument before the Supreme Court of the United States at 1:17 p.m.

APPEARANCES:

STEPHEN M. SHAPIRO, ESQ., Chicago, Illinois; on behalf of the Petitioners in No. 91-111.

MOLLY S. BOAST, ESQ., New York, New York; on behalf of the Petitioners in No. 91-1128.

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

APPEARANCES:

LAWRENCE G. WALLACE, ESQ., Deputy Solicitor General, Department of Justice, Washington, D.C.; on behalf of the United States, as amicus curiae, supporting the Respondents.

LAUREL A. PRICE, ESQ., Deputy Attorney General of New Jersey, Trenton, New Jersey; on behalf of the Respondents.

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

C O N T E N T S

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

PROCEEDINGS

(1:17 p.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument next in 91-1111, Hartford Fire Insurance Company v. California consolidated with Merrett Underwriting Agency v. California.

Mr. Shapiro, you may proceed.

ORAL ARGUMENT OF STEPHEN M. SHAPIRO

ON BEHALF OF THE PETITIONERS IN NO. 91-1111

MR. SHAPIRO: Thank you, Mr. Chief Justice and may it please the Court:

I appear on behalf of the domestic insurance defendants who are petitioners in Case Number 91-1111. We're hear today to contend that the Ninth Circuit's forfeiture ruling in this case was wrong, and in addition that the Ninth Circuit was wrong in overturning Judge Schwarzer's decision on the McCarran boycott issue.

As the Court is aware, the Ninth Circuit held in this case that the domestic defendants forfeited their McCarran Act immunity by acting in concert with foreign reinsurers, and it held in addition that their conduct amounted to a boycott within the meaning of the McCarran-Ferguson Act.

On the forfeiture issue, we agree with the Justice Department that the domestic defendants, which

both courts below found were engaged in the regulated business of insurance, did not forfeit their immunity simply by acting in concert with foreign reinsurers.

The Government properly points out that the McCarran immunity literally focuses on the regulated business of insurance and does not focus narrowly on the regulated status of each participant in that process. Congress understood when it passed the McCarran act that domestic insurers would enter into agreements with reinsurers, including foreign reinsurers, and it believed that antitrust immunity would extend to these insurance practices.

Under this statute, the exemption of domestic insurers does not simply vanish when they deal with entities such as consumer groups or risk managers or foreign reinsurers, all of which are vital participants in the forms-developmentprocess and each of which can easily be characterized as a nonexempt entity or a so-called coconspirator.

QUESTION: What, then, do you do with the language in Royal Drug Company, Mr. Shapiro, about when you conspire or agree with someone who's not protected the exempt party loses the exemption?

MR. SHAPIRO: Royal Drug, Your Honor, was talking about the business of insurance requirement, which

concededly is satisfied here, and the reason that it wasn't satisfied there was that there was an agreement between an insurance company and somebody outside of the insurance industry. Now, in this case everybody is within the insurance industry and the Justice Department properly points out that Royal Drug is not support for the forfeiture ruling here.

QUESTION: Well, excuse me, it isn't enough to be within the business of insurance. You have to be within the business of insurance regulated by the States --

MR. SHAPIRO: That's correct, Your Honor.

QUESTION: Isn't that right?

MR. SHAPIRO: Both courts --

QUESTION: And that is certainly not conceded that the foreign insurers, or the reinsurers generally, are within the business of insurance regulated by the State.

MR. SHAPIRO: Both courts below found that all domestic defendants, including the reinsurers, were regulated under State law, and the Justice Department agrees that these regulated entities that are acting within the business of insurance don't lose their immunity simply because they enter into discussions or agreements with foreign reinsurers.

The issue of whether they're regulated is not before the Court in our petition or in any cross-petition. Both courts below correctly decided that my clients, the domestic companies, were regulated.

QUESTION: It isn't whether your client is regulated, it's whether the business of reinsurance is regulated, isn't it? I mean, you can't play the game both ways. You're either talking about the business of insurance or you're talking about individuals, and we're talking about the business of insurance.

MR. SHAPIRO: Yes. The --

QUESTION: So -- so the question is whether the business of reinsurance is, number 1, part of the business of insurance, which I assume it is, and number 2, regulated by the States.

MR. SHAPIRO: It is indeed regulated by the States in two respects. My clients are accused of participating in the forms-developmentprocess. The reinsurers participated in the forms-developmentprocess along with the primary insurers.

The States had plenary jurisdiction over everybody who participated in the forms-developmentprocess, and if there were some interaction between a domestic company and a foreign company, that could be regulated with the unfair insurance practices

laws which all 50 States have enacted and which this Court squarely held is enough to predicate McCarran immunity.

QUESTION: The forms-developmentprocess cannot compel a reinsurer to reinsure something that he doesn't want to reinsure or that he's agreed with others not to reinsure, can it? The form process has nothing to do with that.

In fact, as I understand it, all the States except one permit the first kind of insurance that's been eliminated -- event occurrence insurance. All States but one permit it, but it's not offered by anybody, right?

MR. SHAPIRO: Well, as a matter of fact, 98 percent of the commercial general liability policies today are written on occurrence forms. It's wrong to say that they've been eliminated, although the complaint alleges that they have been reduced in quantity.

Now, if a State insurance regulator believed that there was some improper concerted action that was constricting the flow of this coverage into the marketplace, they have ample means under State unfair insurance practice laws to deal with any agreement that they believe is contrary to public policy.

These laws are passed in all 50 States for the very purpose of taking the place of Federal antitrust statutes in order to invoke the McCarran immunity for the

industry, and they reach reinsurers just as much as they reach primary insurers. The district court so concluded after extensive briefing, and the court of appeals didn't disagree with that.

QUESTION: This is general law, not peculiarly insurance regulation, right?

MR. SHAPIRO: Oh, no, sir, they are specifically focused on the insurance industry. These are model laws based on the National Association of Insurance Commissioners' proposed statute right after this Court's decision in the South-Eastern case. They focus precisely on insurance, and they deal with anticompetitive acts in the insurance industry.

This Court held squarely in the National Casualty case in the fifties that if the States pass these laws, and if these laws embrace the anticompetitive actions, that, standing by itself, is sufficient for McCarran immunity purposes, and that precedent has been followed ever since and the industry and regulators have relied on it.

QUESTION: But these laws do not cover the foreign reinsurers.

MR. SHAPIRO: They do cover the foreign reinsurers.

QUESTION: Well, do you say, then, that CA 9 was

wrong in holding that your clients conspired with some companies, some foreign companies that were not subject to regulation?

MR. SHAPIRO: Yes. As we explain in our reply brief, that is wrong, but our position doesn't depend on that, Justice White.

QUESTION: Well, all right, suppose -- suppose that it was true that your clients conspired with foreign companies that were not subject to State regulation.

MR. SHAPIRO: Yes.

QUESTION: Now, what is your position on that?

MR. SHAPIRO: We would still be entitled to McCarran Act --

QUESTION: Because --

MR. SHAPIRO: Because our behavior was regulated and our conduct was entirely within the business of insurance. If there was some interaction between a domestic company and a foreign company that was improper, we could be told --

QUESTION: Well, how is it -- why is it, then, that if you're -- that you wouldn't be entitled to this immunity if you conspired with somebody outside the insurance industry?

MR. SHAPIRO: Your Honor, because that is not deemed the business of insurance under the Royal Drug

case.

QUESTION: Well, I know, but what's the reason? The reason is that that person outside the insurance industry is not subject to regulation.

MR. SHAPIRO: No, Your Honor, that isn't the --

QUESTION: What's the reason, then?

MR. SHAPIRO: The reason is that this statute was focused on the insurance industry as such and not on other industries. Now, all of the participants here are within the insurance business.

QUESTION: You still haven't told me why, if your clients conspired with people outside the insurance industry, you would not have McCarran immunity.

MR. SHAPIRO: Well, because their own conduct is regulated by the States. Their activities are within the scope of regulation. Their action is the business of insurance. There's no dispute here that this is all the business of insurance. Both courts below concluded it was.

QUESTION: I thought you said that if your clients conspired with someone outside the insurance industry, you wouldn't have McCarran immunity?

MR. SHAPIRO: Well, later in the Pireno case --

QUESTION: Is that right, or not?

MR. SHAPIRO: It's not strictly correct,

because --

QUESTION: Well, did you say that, or not?

MR. SHAPIRO: I may have said Royal Drug looked in that direction, but there is a later case from this Court, the Pireno case, that said that that is merely one factor that the Court considers. It isn't decisive on the question --

QUESTION: Well, so Royal Drug looks in the direction. Then, why would it have said that you wouldn't have had McCarran immunity if you conspired with somebody outside the insurance industry?

MR. SHAPIRO: Because --

QUESTION: What's the reason?

MR. SHAPIRO: The reason is that Congress was focusing in on insurance and reinsurance, the spreading of risk. It wasn't focusing on pharmacy agreements of the kind that were in the Royal Drug case. That was beyond Congress' intent.

Now, insurers and reinsurers --

QUESTION: I don't --

MR. SHAPIRO: Are squarely --

QUESTION: You might -- I think you're just not answering the question, and I don't want to waste your time by insisting that you do, so go right ahead, Mr. Shapiro.

MR. SHAPIRO: Well, Your Honor, I think the point is the Justice Department agrees with us that you don't lose your immunity just because you have entered into an agreement with somebody that isn't regulated. The statute isn't focused that way.

There are many people that are not regulated, Justice White, that insurance companies routinely agree with -- risk managers, all -- consumer groups that are not regulated -- you can call them nonexempt entities, but they are still within the business of insurance.

QUESTION: Here's the statement from Royal Drug, Mr. Shapiro, and it's obviously one sentence out of a long opinion. It says, "In analogous context the court has held that an exempt entity forfeits antitrust exemption by acting in concert with nonexempt parties."

MR. SHAPIRO: Yes, Your Honor, and they -- what -- in context they are talking about persons that are not within the insurance business, they are talking about pharmacies, and in the subsequent case, in Pireno, this Court drew back on that statement and said that it doesn't matter. It isn't decisive if you deal with somebody even outside the insurance industry.

But here, everybody is within the insurance industry. This is exactly what Congress was focusing on. Congress thought insurance and reinsurance were within the

zone of immunity that it was creating.

Now, we submit to the Court that the principal question here is whether Judge Schwarzer or the Ninth Circuit got the McCarran boycott question right, and in assessing the legal sufficiency of that separate question in the case, it's essential to bear in mind the two different kinds of conduct that are being alleged in this case. The first is forms development.

Plaintiffs take the position that domestic and foreign defendants agreed that reinsurance would not be offered on certain advisory insurance forms that had been proposed unless changes were made in those forms.

Now, the second type of conduct is so-called market conduct. Plaintiffs claim that the foreign defendants jointly decided that certain coverages would not be reinsured. They tried to link these two kinds of activity together through a global conspiracy claim which the district court dismissed, and the court of appeals affirmed that dismissal with an opportunity for plaintiffs to offer a specific amended pleading in the future.

That is further down the road in this case. There is no validly stated claim of global conspiracy in the case at this time, and we've explained in the alternative in our reply brief that it wouldn't make any difference, even if this global conspiracy claim ran

everybody together in this case, domestic and foreigners, because plaintiffs have not alleged the elements of a McCarran Act boycott.

Now, the parties have spent a great deal of time and attention on the forms development --

QUESTION: May I ask you a question just on that? They have alleged, as I read the complaint, that the reinsurers agreed not to provide reinsurance to companies that wrote the kind of coverage that they didn't want.

MR. SHAPIRO: That's --

QUESTION: That's not -- what?

MR. SHAPIRO: The foreign companies are accused of that.

QUESTION: I guess that's -- yes.

MR. SHAPIRO: Yes.

QUESTION: Now, that would -- would you say that's a boycott within -- or not?

MR. SHAPIRO: No, we take the position that that is not, it's simply insisting on mutually acceptable terms of coverage --

QUESTION: But they could --

MR. SHAPIRO: For the customers.

QUESTION: But they won't write them even if they're not reinsuring the insurance they don't want to --

the -- you know, the kind they don't want. They will not reinsure the company if the company writes that kind of insurance that might be reinsured with someone else.

MR. SHAPIRO: Your Honor, I think if you read the complaints in context they're not saying that. That would be an absolute refusal to deal, if such a thing were asserted.

QUESTION: That's what 87A says --

MR. SHAPIRO: Well --

QUESTION: As I read it.

MR. SHAPIRO: I mean, if you read the whole thing in context, I believe they are saying that we will only write reinsurance with you, particular company, if you are willing to write on acceptable terms.

QUESTION: If they had alleged further we won't do business with you if you do this kind of business, that would be a boycott. You would agree with that. But you say that's not what they've alleged.

MR. SHAPIRO: That's not what's alleged here, and they declined to defend, or to argue here that there is some absolute refusal to deal. What they say is there is a conditional refusal to deal.

QUESTION: Well, if the refusal to deal, unless you, the insurance company, only writes that kind of insurance.

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

MR. SHAPIRO: Yes, if you want --

QUESTION: Is that a conditional or an absolute refusal, as you described it?

MR. SHAPIRO: Well, if all they are saying is, we will underwrite any insurance that you proffer as long as it has the following terms --

QUESTION: And as long as you don't write a different kind of insurance --

MR. SHAPIRO: That's what's not alleged here, the latter.

QUESTION: But you agree if that were alleged, that would be a boycott.

MR. SHAPIRO: I agree it would be a closer question. I wouldn't concede it's a boycott, but it would be a closer question. It sounds more like an absolute --

QUESTION: You agree that you ought to concede it's a boycott.

(Laughter.)

MR. SHAPIRO: I agree it would be a much more difficult case for us to defend. Now, the parties have --

QUESTION: There was an agreement to enter into whatever kind of a boycott this was, conditional or not.

MR. SHAPIRO: There was an agreement, but it -- for purposes of this motion that's conceded, but it isn't

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

a boycott -- that's our whole submission -- but the parties may agree upon acceptable trade terms and insist that others comply with them.

There's a vivid discussion of this in Sullivan's Antitrust Treatise at page 257, where he distinguishes between agreements on trade terms and boycotts, and he says, "The agreeing parties are not coercing anyone, at least in the usual sense of that word. They are merely, though concertedly, saying, we will deal with you only on the following trade terms," and he -- Professor Sullivan points out that that should not be deemed a boycott, even under the Sherman Act, and it can't be deemed a boycott under the McCarran act, because the McCarran act permits insurance companies to agree among themselves on acceptable terms and conditions and coverages.

QUESTION: So the Justice Department has just got it wrong.

MR. SHAPIRO: The Justice Department has this issue wrong, yes.

QUESTION: Yes.

MR. SHAPIRO: And particularly on the forms-developmentclaims that our clients are accused of participating in.

The parties have talked about this at great length, because it has special, practical importance to

this industry. Congress recognized that standardization of forms is critical to the regulated business of insurance, and it recognized that there must be agreement among insurers and reinsurers if these forms are going to be reinsured at the end of the day, and plaintiffs now seem to acknowledge that this process of forms standardization, even with blunt opposition to unacceptable terms in the policies, does not constitute a boycott, and in our view it makes absolutely no difference.

The primary insurers, "enlisted" or "encouraged" reinsurers to announce that they would only reinsure if certain changes were made in these proposed forms, and that's because insurers and reinsurers have inseparable interests in the underlying risks, and one of the very key purposes of forms standardization is to make sure that these forms will be reinsurable after the forms have been developed.

The McCarran act rests on Congress' judgment that this industry is unique, and agreements in this industry promote insurer solvency and consumer welfare even though they have anticompetitive effects. That was Congress' judgment in passing this law.

Congress left it to State insurance regulators to decide which agreements were permitted and which were

prohibited. Under the McCarran act, it is simply a contradiction in terms to talk about a boycott of unacceptable terms or coverages or forms as plaintiffs do through these complaints.

QUESTION: Excuse me, Mr. Shapiro, I can understand why an insurance company has an interest in getting the reinsurer to agree that he will insure this kind of insurance and will insure this kind of a form. I do not know why -- explain to me why it's important to the insurer to know that the reinsurer will not insure another kind of risk, or will not accept another kind of form. Why is that necessary?

MR. SHAPIRO: The rationale is the solvency rationale. Insurers and reinsurers are closely interlinked. The solvency of the reinsurer is vitally important to the insurer. If the reinsurer becomes insolvent, the insurer is left holding the bag, so if the reinsurer is writing imprudent coverages with great exposures to great risks that can't be quantified and underwritten, that is a risk to the primary insurer as well.

QUESTION: Oh, I see -- I see. I see. I gotcha.

MR. SHAPIRO: The boycott exception was focused on something completely different than agreements of this

kind that can promote solvency and rationale underwriting of risks. Congress was concerned with ganging up on disfavored persons, whether they were consumers or whether they were businesses, through organized refusals to deal with those persons or discrimination, especially where --

QUESTION: Well, are you saying -- is the thrust of your submission at this point that it's not a boycott because there was a legitimate reason for the action?

MR. SHAPIRO: No, Your Honor. Our position is it wasn't a boycott because this was a uniform, nondiscriminatory agreement that applied to everybody the same way. It didn't single anyone else out and disfavor anybody in the marketplace.

QUESTION: But that would be true whether or not the primary insurers had a legitimate interest in the solvency of the reinsurers.

MR. SHAPIRO: Yes, it's generically true if it is a general, uniform, nondiscriminatory agreement on terms and coverage. Congress meant State insurance regulators to decide if that is a good or bad thing.

Now, Congress' rationale, Justice Kennedy, was that there may be good societal purposes for such agreements, and if there is potential good, it's for the insurance regulator and not an antitrust court that applies the blunt sanction of Federal antitrust, just

looking to competition, not looking to solvency concerns, not looking for other societal concerns.

QUESTION: May I ask you, Mr. Shapiro, under your solvency point, are you arguing that if Hartford and Allstate agreed with the reinsurers that we will not do business with you because we're concerned about your solvency if you reinsure companies that write the kind of insurance we don't want written?

MR. SHAPIRO: We're not arguing that position, Justice Stevens. That sounds close to being an absolute, as we've discussed, an absolute refusal to deal, that we won't deal with you at all if --

QUESTION: No, we won't deal with you if you deal with competitors who write the insurance that we don't want to write.

MR. SHAPIRO: We're not defending that, because here something different is being asserted. Our clients merely said, we won't underwrite a particular kind of policy because it's a threat to our financial interest.

QUESTION: Right.

MR. SHAPIRO: And the reinsurers and the insurers both agreed as to that, as to the standardized advisory forms that they both used in their business. It was a threat to them because of the expansion of tort liability.

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

QUESTION: Well, I read paragraph 64 and that sequence of events as indicating that Hartford and Allstate went to the reinsurers and said we want to get you to stop reinsuring this other kind of insurance, and in effect we won't do business with you unless you --

MR. SHAPIRO: Oh, Your Honor, that isn't --

QUESTION: I'm misreading the complaint.

MR. SHAPIRO: Yes. There is no contention that Hartford and the other primaries twisted the arm of the reinsurers. What is alleged is that Hartford and the other primaries did not want to use this coverage in their business because it was not a prudent coverage. They conferred, they encouraged the reinsurers to examine the issue and state that they would not cover this particular risk in their own business, too.

QUESTION: At this meeting, Hartford and General Rate agreed to either coerce ISO to adopt their demands or, failing that, derail the entire ISO-CGL forms process.

MR. SHAPIRO: What plaintiffs mean by coerce is simply that the insurers and the reinsurers agree that certain coverages are unacceptable to them. They attach the --

QUESTION: Without any impact on third parties.

MR. SHAPIRO: Well, there always is an impact on third parties, but that is --

QUESTION: I mean, I don't mean by people who buy insurance, but with competitors.

MR. SHAPIRO: Every agreement among insurance companies as to terms and coverages is going to have an impact on somebody that wants to do business on different terms, and Congress well understood that there would be anticompetitive effects from these agreements, but it said because they may potentially serve other societal interests, it's as a jurisdictional matter. It's up to the State insurance regulators to decide this, not an antitrust court, and a jury that applies generalized antitrust criteria, and we think that --

QUESTION: Mr. Shapiro, I assume that the reason the contention was not even made that the United States insurers coerced the reinsurers to not handling certain types of coverage is that on its face it would be laughable.

MR. SHAPIRO: It would be laughable.

QUESTION: Because if you can't go to Lloyd's -- you're going to boycott Lloyd's of London for reinsurance.

MR. SHAPIRO: It would be preposterous.

QUESTION: You would not be able to reinsure anywhere. I mean --

MR. SHAPIRO: It would be preposterous. The -- if you look at Best's insurance company statistics, these

four American primaries have a minuscule piece of the market.

QUESTION: The coercion would go in the other direction, if anything.

MR. SHAPIRO: And there isn't any coercion alleged among the reinsurers and the insurers.

Now, we think it's very telling that in the Barry case this Court went to such great lengths to draw a distinction between terms of coverage and insurance policies and boycotts, and the carefully balanced opinion in this case, which plaintiffs are running roughshod over, was the product, in part, of an amicus submission from the National Association of Insurance Commissioners, and this is what they said in their amicus brief that preceded this Court's opinion in Barry, and if I may quote, "A broad construction of the boycott exception would place insurance forms development and the State approval mechanism in conflict with Federal antitrust."

They went further, and said, "Whenever a policyholder did not obtain the precise coverage he desired, such as a policy with unlimited coverage, the policyholder could easily frame an antitrust complaint in terms of alleged insurer refusal to deal."

Now, in this case, these very fears expressed by the National Association of Insurance Commissioners had

become realities, and I think it's also telling that my opponents, faced with the Barry opinion, concede that primary insurers may agree on acceptable terms. The Justice Department said it wouldn't matter if that completely eliminated a coverage from the marketplace in their brief in the court below.

They don't seem to doubt that reinsurers may agree as to their own terms without that being a boycott. The reason for that is that reinsurers are insurance companies engaged in the business of insurance. They don't dispute that insurers and reinsurers may agree as to their own terms, but they speculate that if the insurers cause the reinsurers to adopt general coverage terms that somebody else may not like, all of a sudden this is transformed into a boycott. We say --

QUESTION: Excuse me, doesn't --

MR. SHAPIRO: That's just an exercise in rhetorical characterization.

QUESTION: I guess I've confused some of the positions here. Does the Justice Department concede that the reinsurers alone could agree on all of these things and agree not to write certain kinds of coverage?

MR. SHAPIRO: It doesn't address that, but we understand the plaintiffs not to dispute that from --

QUESTION: Yes, but I think the Justice

Department might well say that the reinsurers are in the business of insurance but they're not regulated by the States --

MR. SHAPIRO: It's possible that --

QUESTION: And therefore can't do that.

MR. SHAPIRO: I don't think they would take the position it's a boycott, though, if we overcome the regulation hurdle. I don't think they would characterize just an agreement on terms among insurers --

QUESTION: Maybe not a boycott, but I understood that they would say that's a violation of the antitrust laws.

MR. SHAPIRO: They would take the position -- well, they left open in a footnote the question whether reinsurers are regulated. They didn't take a position on it.

The reason they didn't is that the courts below had dealt with this issue. No cross-petition was addressed to it, and we don't believe it's before the Court.

Now, Congress' rationale in making the --

QUESTION: But it does seem to me that there is a difference. If the primary insurer is involved, then the primary insurer is using its influence or economic force in order to impose standards on competitors, and

that is what a boycott is.

MR. SHAPIRO: Your Honor --

QUESTION: If the reinsurers all agree that they're going to issue only certain forms -- certain -- of insurance, that's not a boycott, but if the primary insurer is involved, then the primary insurer is forcing certain standards on its competitors, and that's a boycott.

MR. SHAPIRO: Justice Kennedy, the reason it can't be twisted into a boycott is that the agreement that's alleged is uniform. It treats everybody the same way, nobody is singled out and ganged up against, reinsurance is available, it's just a change in general coverage terms, and I hope I can convince the Court that Congress meant generically agreements relating to terms and coverage to be grist for the administrative mill and not for the antitrust court.

And the reason for that was that Congress believed that these agreements have the potential to rationalize underwriting, and this is a perfect example, because there was a tort liability crisis, insolvencies were skyrocketing in the insurance industry in 1984, it was the worst year in history for the commercial general liability insurers, and when they respond to the tort liability crisis with these general coverage terms that

don't single anyone out and punish anyone or discipline anyone, that isn't a boycott.

What Congress was worried about when it prohibited a boycott was the kind of thing that you saw in South-East Underwriters, where there were trial-type proceedings and people were expelled from the industry. They couldn't get reinsurance at all. They were singled out and they were penalized in that fashion, and that's light years removed from a general, nondiscriminatory agreement changing terms and coverage, which is exactly what Congress meant to immunize, and I think this Court's opinion in Barry recognizes that.

QUESTION: Well, Mr. Shapiro, I know you've gone over this already, but I'm still not sure. It appeared to me that what the plaintiffs below alleged was that your client tried to alter the terms that other primary insurers would offer, and alleged that your clients tried to compel ISO to change the forms that all primary insurers would offer.

MR. SHAPIRO: Yes, Your Honor, there is alleged an agreement between primaries and reinsurers that would change general coverage terms in these forms that ISO had submitted to the States. Everybody would --

QUESTION: Those are the allegations.

MR. SHAPIRO: Those are -- but these forms, by

the way, are advisory forms. They're not binding on anybody. They preserve all the options, including claims made --

QUESTION: Well, if those are the allegations, does that not fit what was said in Barry, that there was pressure brought on ISO and the uncooperative other primary insurers to change their conduct by enlisting reinsurers and so forth?

MR. SHAPIRO: I think Barry is fundamentally different. In Barry, the boycotting defendants were strangers to the controversy. They singled out the doctors, and they treated them with an absolute refusal to deal. They said, we will not give you any kind of insurance under any circumstances.

What the defendants here allege to have done is to insist on acceptable coverage terms that would protect everybody's solvency on the insurer side and treat everybody identically on the customer side, and Barry says that's different. That's a uniform agreement on terms.

QUESTION: Is it wrong to say that the reinsurers under the allegations of the complaint, together with some of the primary insurers, were trying to change the market practices of their competitors?

MR. SHAPIRO: That isn't alleged. There's no attempt -- the complaints don't say that --

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

QUESTION: You can't get that out of the allegations.

MR. SHAPIRO: I don't think so. The complaints don't say that there was striking out at particular independent primary insurers. What they say is that there was an agreement to change general coverage terms which of course would affect everybody in the same way, but there was no singling out or targeting or striking out at any competitor, which was what was going on in the South-Eastern Underwriters case. It was focused discipline of persons who violated SEUA rules. They were kicked out of the industry and denied any reinsurance. That's light years removed from this case.

I wonder if the Court would allow me to reserve a moment for rebuttal? We thank the Court.

QUESTION: Thank you, Mr. Shapiro. Ms. Boast.

ORAL ARGUMENT OF MOLLY S. BOAST

ON BEHALF OF THE PETITIONERS IN NO. 91-1128

MS. BOAST: Mr. Chief Justice, and may it please the Court:

The claims at issue in this petition allege agreements among the London reinsurer defendants in these cases, in whose behalf I speak, to exclude coverages desired by respondents from treaty reinsurance written in London.

The question before the Court on this petition --

QUESTION: Whom do you represent?

MS. BOAST: The London reinsurer defendants.

QUESTION: Thank you.

MS. BOAST: The question before the Court in this petition is whether the reach of the United States antitrust laws should be restrained to require a dismissal of these claims, which attack British subjects for conduct openly undertaken in a British-regulated market. We submit that the answer to that question must be yes.

The claims at issue -- it is important to give a little bit of context to this. Treaty reinsurance is written to cover large bundles of risks presented by primary insurers. The subscription nature of the Lloyd's marketplace gives it the capacity to absorb risks of a magnitude that probably cannot be absorbed elsewhere. There is no allegation in this claims that plaintiffs sought to purchase treaty reinsurance. There is also no allegation in these claims that these agreements were entered at the behest of any American actor, or that these London reinsurer defendants sought to serve anyone's interest but their own. This Court has never upheld the exercise of antitrust jurisdiction in comparable circumstances.

The process that is employed to assess the limits of jurisdictional reach -- the weighing of competing sovereign interests, the search for links of nationality and territory, and the discerning consideration of the expectations of the parties in the international system, is not new to this Court. It is reflected in decisions ranging from Lauritzen v. Larsen to Mitsubishi v. Soler Chrysler-Plymouth to, most recently, the Asahi case.

All of these cases were decided by this Court in favor of the result that would lend the greatest stability to international commerce, even where that meant foregoing the United States' interest in the application of its own laws or the availability of the United States courts as a forum. If the Court applies the rationale of those cases here, it will be compelled to dismiss these claims.

This case was decided by the courts below on the authority of Timberlane Lumber Company v. Bank of America, the Court of Appeals for the Ninth Circuit decision that created a jurisdictional rule of reason for determining when the full reach of jurisdiction should be moderated.

Under Timberlane and under the Restatement (Third) of the Foreign Relations Law of the United States, the existence of effects in the forum State is only the beginning of the analysis. Both authorities ask, even if

a basis for jurisdiction exists, is the interest of another State so overwhelming that the exercise of jurisdiction would be unreasonable?

Here, that inquiry leads to the inevitable conclusion that the potential reach of the Sherman Act must be tempered. The primary consideration in the inquiry is the avoidance of conflict with the law and policy of another State.

The conflict in this case is graphic. Here, the application of American competition policy would conflict with the United Kingdom's interest, which it has quite vehemently stated, in protecting its regulatory scheme from the intrusion of incompatible standards under the U.S. antitrust laws. Those standards are incompatible for two reasons.

First, the United Kingdom's entire regulatory framework is designed to accommodate collective underwriting and to encourage prudent risk-taking within that framework. That's the very essence of the conduct respondents seek to deter with the treble damages remedy in these claims.

Second, the United Kingdom takes the position that it is the guardian of its own internal markets. It has not chosen unfettered competition for this market because it considers that incompatible with its duty to

protect the solvency and reliability of this very important segment of its industry.

QUESTION: Ms. Boast, I assume just sort of by the way that if you contend that these foreign reinsurers are not subject to the Sherman Act, I assume you also contend that they are not subject to State regulation.

MS. BOAST: In these claims, that's correct.

The United Kingdom considers itself the authority which should alter the competitive conditions in the marketplace if they are to be altered at all.

Now, respondents in the United States complain that this conflict is not severe enough to be recognized. There are really three answers to this. The first is the obvious. The United Kingdom says there is a conflict and their statement should be determinative of their view, at least, that there's a conflict.

Secondly, the standard that's advanced by the United States and by the respondents wouldn't really require the interest balancing that we advocate because the sovereign would have acted and that act would have been -- have to be given deference.

Thirdly, this Court has recognized just this kind of conflict before. In Lauritzen v. Larsen, this Court held that the Workers Compensation laws of the American States should not apply to reward a Danish seaman

because the American award, even though greater, would have been inconsistent with Denmark's interest in the exclusivity of its own scheme. There was no question there that the two sets of laws could have been applied without imposing conflicting commands on the shipowner.

The court of appeals gutted the significance of this conflict, although -- in the jurisdictional analysis, although it accepted it by applying the Foreign Trade Antitrust Improvements Act in a manner that was contrary to that statute's terms and legislative history.

The statute was designed to limit the application of the Sherman Act to United States companies doing business abroad --

QUESTION: Excuse me, Lauritzen was what, Jones Act?

MS. BOAST: It was a Jones Act.

QUESTION: Jones Act, but the holding was the Jones Act didn't apply, wasn't it?

MS. BOAST: That's correct.

QUESTION: But you're not contending that the Sherman Act doesn't apply abroad. I -- it seems to me it's one thing to say, having considered all the pros and cons, this legislation does not apply abroad. It's another thing to say well, it does apply sometimes, and it doesn't apply other times. I don't know how I can do that

with the Sherman Act. It either applies or it doesn't apply.

MS. BOAST: Our position is not that the Sherman Act does not apply in the sense that a minimal basis for the exercise of jurisdiction doesn't exist here. Our position is that there are certain circumstances, and that this is one of them, in which the interests of another State are sufficient that the exercise of that jurisdiction should be restrained.

QUESTION: Is it the exercise of the jurisdiction, or maybe it's just not an unreasonable restraint of trade? That is to say, it becomes a reasonable restraint. I mean, we've always had a lot of room not to fiddle around with our jurisdiction but to fiddle around with what constitutes a restraint of trade under the Sherman Act. It's essentially a common law antitrust that we've developed ourselves.

Why couldn't we say that, that the Sherman Act applies fully, and we have full jurisdiction, however, it's not an unreasonable restraint of trade given that these people are acting in England and subject to English regulation?

MS. BOAST: If the Court is comfortable with that conclusion on this record, I'd be perfectly happy --

QUESTION: I may be more comfortable with that.

(Laughter.)

MS. BOAST: But the difference is simply that some might not be comfortable with that conclusion on this point on the record. That is to say that that reflects a merits determination.

The rule we're advocating is designed to make courts ask the question at the outset, is there a sufficient United States interest here to warrant proceeding, or should it give way, and that inquiry we believe should be undertaken at the earliest possible alternative in any case.

The Foreign Trade Antitrust Improvements Act, as I mentioned, was designed to limit the application of the Sherman Act to United States companies doing business abroad, but it left unaffected the jurisdictional determination for import commerce from other nations.

No new jurisdictional hurdle needed to be overcome, but the international character of the transaction was to be fully considered and the legislative history explicitly referred to the Timberlane decision as the kind of analysis that might be undertaken.

The district court held that this act did not apply, and hence made its findings of effects under the first two steps of Timberlane's rule of reason the governing authority for that court.

The court of appeals somehow found that the -- without identifying how, found its effects under the Foreign Trade Antitrust Improvements Act. It perceived these effects to be effects that surpassed this new threshold in the statute and, thus, it gave them such weight that it vitiated the United Kingdom's interest in the course of applying the remainder of the balancing process.

We think this was plainly wrong, but we also think the court of appeals decision would be wrong even if there were no conflict and even if the Ninth Circuit hadn't misapplied the Foreign Trade Antitrust Improvements Act.

Unlike every other case that has come before this Court, the claims at issue here involve only British actors in alleged conspiracies implemented only in London and undertaken for what both courts acknowledged were legitimate business purposes.

The court of appeals completely ignored the significance of these features. First, it did not consider at all the wholly foreign center of the activity, even though the locus of the conduct is fundamental in international law. Second, the court of appeals applied the nationality of the parties --

QUESTION: Excuse me, why is it exclusively in

Britain? Wasn't there asserted to be any connection between the conspiracy with the foreign reinsurers and the domestic reinsurers? Wasn't it part of one plan?

MS. BOAST: Other than the global conspiracy which Mr. Shapiro addressed and which is not before this Court, there is no allegation linking these three claims I'm talking about to the other claims that are at issue in this case.

The nationality of the factor's party is designed to determine which State has the greater interest in regulating the conduct at issue. The focal point of the inquiry should be the nationality of the parties who would be regulated by the application of U.S. law, and in a case where you had both American and foreign defendants, that inquiry would be illuminating. Here, it doesn't happen to teach us very much because we have only British nationals as defendants and obviously the United Kingdom's interest is bigger -- greater.

The court of appeals attached significance to the fact that petitioners had not contested the foreseeability of effects in the United States, but London reinsurers do business every day with brokers presenting risks from around the world, and exclusions of all sorts are included in treaty terms. This enables the foreseeability of remote impacts in locales around the

world, but it does not mean that reinsurers foresee the possibility of violating the law or of being hailed into courts around the world.

If each nation that felt such an impact felt that it was permitted to try to change the rules and practices in the London market, the players in the market would be subject to multiple and overlapping sets of instructions, and it would grind to a halt. If the same kinds of intrusions were inflicted on, for example, the New York Stock Exchange, surely this Nation would object.

Only one State's rules can govern here. The United Kingdom is the only State with a persistent, continuing interest in the economic regulation of its own reinsurance markets. It has asserted that United States antitrust laws conflict with its economic regulatory goals. Where the economic interests of the United States are as minimal as they are here, this Nation's greater interest in the orderly allocation of jurisdiction in the international system requires that the claims be dismissed.

If there are no further questions, thank you.

QUESTION: Thank you, Ms. Boast. Mr. Wallace, we'll hear from you.

ORAL ARGUMENT OF LAWRENCE G. WALLACE

ON BEHALF OF THE UNITED STATES

AS AMICUS CURIAE SUPPORTING THE RESPONDENTS

MR. WALLACE: Thank you, Mr. Chief Justice, and may it please the Court:

In looking into this case as amicus curiae, what we view as most significant in these complaints are allegations that the collaborators agreed upon an enforcement mechanism, namely the cutting off of reinsurance, to ensure compliance with a privately imposed trade restraint restricting the kinds of commercial liability insurance that would be available, and in the questioning, members of the Court have put their finger on the relevant allegations in the complaints.

They're on pages 24 and 25 of the Joint Appendix, particularly paragraphs 64 through 69, which shows that the enforcement mechanism of cutting off the availability of reinsurance was allegedly imposed at the behest of the primaries, Hartford and its allies, which were seeking to restrict the kind of coverage being offered by their competitors.

Now, enforcement mechanisms pose special dangers to competition and to consumer interests, and this is because, in general, the greater the consumer need or desire for particular products or services that the trade

restraint withholds, the more likely it is that the restraint will tend to break down through a sort of centrifugal force as individual firms respond to the resulting competitive opportunity posed by these unmet consumer needs, and enforcement mechanisms as part of the conspiracy really presuppose this and are designed to apply countervailing pressure to preserve the effectiveness of the restraint against this centrifugal force, if you will.

And here the allegations go beyond the normal hypothesis that members of the agreement must be restrained from the temptation to break out, and charge that the enforcement mechanism was applied not only to the conspirators themselves, but also to force capitulation by firms that were not parties to the agreement that had resisted Hartford's effort to get the ISO to limit the forms in the same way and, therefore, fairly reading the complaint, that continued to desire to offer the kinds of coverage that the restraint was designed to eliminate.

Now, that, to us, is conduct at the core of the exception from McCarran-Ferguson Act immunity that Congress took special care to specify by expressly withholding immunity from any act of boycott, coercion, or intimidation, or agreement to boycott, coerce or intimidate.

This is language, as this Court recognized in Barry, that was picked up by Congress from this Court's opinion in South-Eastern Underwriters.

It was the part of the holding of South-Eastern Underwriters that Congress concluded it should preserve in the McCarran-Ferguson Act, and our principal authority for stating that it's conduct at the core of the exception is the way this Court, both in the majority opinion and in the dissenting opinion in St. Paul Insurance v. Barry, construed the exception for boycott coercion or intimidation. It is the one case that this Court has had occasion to address that exception and construe it in some detail.

QUESTION: Mr. Wallace, as I understand it, it's perfectly okay for the insurers to agree among themselves that no matter how many consumers might want a particular coverage, it will not be offered, right?

MR. WALLACE: Yes.

QUESTION: So the consumer is left at the mercies of insurers plus State --

MR. WALLACE: If that --

QUESTION: Regulation to that extent, right?

MR. WALLACE: If they are -- if they are regulated by the States.

QUESTION: Right.

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

MR. WALLACE: To the extent regulated by the States, the business of insurance is given antitrust immunity.

QUESTION: Because it is thought, I suppose, that if they can't make that kind of an arrangement the company coming in with the more attractive coverage may be a fly-by-night company and they will all be tempted into insolvency, right? That's probably the theory behind it.

MR. WALLACE: Well, there may be something of that, but --

QUESTION: But if that's a problem -- I mean, if that's a problem downstream, why isn't that a problem upstream? Are you any better off with an insurance industry that goes bust at the reinsurance level than at one that goes -- than you are with one that goes bust at the insurance -- I mean, that -- the whole scheme doesn't seem to me to make much sense unless the insurance companies have the ability to ensure solvency at the reinsurance level just as well as at the insurance level.

MR. WALLACE: Well it's quite possible that the reinsurers will be the primary protectors of what is needed for assuring solvency at the reinsurance level and that the motives of the primaries could be mixed at best in entering into that endeavor, but --

QUESTION: Well, I could understand it if the

primaries are coercing the reinsurers, but there's no allegation of their coercing the reinsurers. They're just trying to persuade the reinsurers, look, you fellas, if you insure this kind of coverage, you are going to get burned so badly you're going to go down and we're going to go down with you.

Now, why is that an evil kind of a boycott that we should say the Government comes down on, given the scheme -- given the scheme?

MR. WALLACE: The question that you're posing, Mr. Justice, suggests a possible way of defending a boycott as one which under the standards of Northwest Stationers is not one to which a per se condemnation should be applied, and is one that is justified under the circumstances under a rule of reason analysis if that hypothesis can be substantiated by proof in the particular case.

But the same claim could be made in a case where the primaries are simply trying to gain a competitive advantage and follow more lucrative practices and prevent their competitors from competing on terms that some of their customers might prefer, so that the claim is not one that on its face would justify a boycott as permissible under the Sherman Act or prevent the conduct from being boycott, coercion, or intimidation within the meaning of

the exception to McCarran-Ferguson.

QUESTION: Well, just from the standpoint of defining the word, boycott, or the juridical concept, boycott, if the reinsurers had come up with this idea on their own, and they had met, and they had said, we're not going to offer reinsurance for this particular kind of coverage, boycott or no?

MR. WALLACE: Well, certainly they -- the answer gets a little complicated, if you'll permit me, Mr. Justice. Certainly they could agree among themselves as to what they will offer, and that would not be a boycott, even though there may be a question of whether there is implied in that an agreement that there's something they will not offer.

At the other extreme, if they include an enforcement mechanism so that one of the parties to the agreement who breaks ranks and decides to go ahead and offer that reinsurance will be penalized by the other coconspirators, that would, in our view, be a boycott, but the simple case that you put arguably would not, although it's very similar to what happened in the Barry case --

QUESTION: All right, well, if --

MR. WALLACE: And is called a boycott by this Court.

QUESTION: If we take the simple case and assume

for discussion that that is not a boycott, does it become a boycott when a primary insurer participates in the agreement?

MR. WALLACE: We would definitely say yes.

QUESTION: Why is that? What is the definitional part of "boycott" that makes this distinction for me?

MR. WALLACE: It's the enforcement mechanism that has made this a boycott, and in this case it's because you've got participants at the primary level and there is an enforcement mechanism against their competitors to prevent their competitors from offering certain products.

You don't really have that kind of disciplining of anyone when only the reinsurers are involved, but when you've got the two-level conspiracy with an enforcement mechanism against competitors at one of the levels, you've converted just a refusal to do business on terms that are unacceptable to the reinsurers into an enforcement mechanism that coerces competitors of some of the collaborators into not being able to compete in ways that they want to compete.

Now, since my time is running short, I think I should say a word or two about the comity issue, which is raised with respect to some other counts here.

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

The principal of comity was recognized, even if in a rather rudimentary way, when the Sherman Act was enacted, and the legislative history of the Foreign Trade Antitrust Improvements Act of 1982 suggests that Congress thought comity principals could be employed in antitrust litigation in accordance with decisions such as the Ninth Circuit's Timberlane case. We agree with that if comity is properly conceived and properly cabined.

The important point I want to make is that comity is not an invitation to other nations to decide which of our laws they like or dislike and thereby to determine whether their nationals need or need not comply with particular laws when they're nationals are engaged in commerce in this country.

It's not a device for ceding to other nations the making of legal policy for engaging in commerce here, but instead comity analysis should apply objective criteria which have been formulated in multifactor tests that we have discussed in our brief.

Here, the Ninth Circuit applied its own test in Timberlane, which has been a leading decision on the subject, and we think it reached the correct result in applying the test and, if anything, was too generous to the claim of comity in holding that there was a conflict at all.

We have to remember that this was a conspiracy allegedly directed entirely at the U.S. market, where the respondent states claim that Lloyd's does at least 50 percent of its reinsurance business, and the effects to be felt in the U.S. market were very substantial and foreseeable. They have been interestingly documented in one of the amicus briefs in support of the States filed by the service industry counsel, to which I would refer the Court, and there we think that the jurisdiction was properly exercised by the Ninth Circuit in this case.

If there are no further questions --

QUESTION: Thank you, Mr. Wallace. Mr. Price, we'll hear from you.

ORAL ARGUMENT OF LAUREL A. PRICE

ON BEHALF OF THE RESPONDENTS

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

When a group of insurers enlist third parties to refuse to continue to supply their competitors in order to enforce upon them changes in their competitors' behavior, this Court has always found that that described a boycott within the meaning of the Sherman Act.

In these cases in particular, four primary insurance companies decided that they no longer wanted to write particular coverages, but they also knew that they

couldn't simply walk away from those coverages because if their competitors continued to write them, they would lose significant share of the market that they currently possessed.

In order to forestall that eventuality, they went to reinsurers, and they went to reinsurers precisely because reinsurance is one of the things that an insurer needs in order to be able to effectively write coverage, reinsurance was at the particular time at issue in these cases in short supply, and reinsurance is not effectively regulated by the States. Thus, it was the specific and best means immediately available by which they could compel their competitors to also cease writing this coverage, and that is precisely the definition of what constitutes a boycott that this Court found in Barry.

Indeed, when this Court offered what described as the generic definition of a boycott, it said it was a method of pressure by withholding or enlisting others to withhold patronage or services from the target, and the purpose of that withholding --

QUESTION: What pressure was applied here? Pressuring others to withhold -- what pressure was applied against, in particular, Lloyd's?

MR. PRICE: The complaint does not allege that pressure was applied against Lloyd's --

QUESTION: At all. I don't see how it could be. Would it have been unlawful for the American insurers just to call to the attention of the reinsurers the fact that in their view it would be financially disastrous to continue to reinsure this kind of contract?

MR. PRICE: Your Honor is raising the difficult question of whether an agreement or a conspiracy was formed. The allegations of the complaint specifically allege an agreement which in a procedural posture have to be taken as true, but if there was no agreement --

QUESTION: What was the agreement? You and I agree that you will not do something. Is that an agreement?

MR. PRICE: The agreement was that I, as an insurer, agree with you, as a reinsurer --

QUESTION: Right.

MR. PRICE: That you will not offer reinsurance for particular coverages which I do not want my competitors to offer in the market in competition against me.

QUESTION: I don't see how that's an agreement. That's just the reinsurer telling the insurer, you're right, it's a good idea, I will not insure these -- it's not an agreement. One side has to do something, the other side does something else.

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

QUESTION: What's the insurer's remedy for breach, if the reinsurer breaks the agreement?

MR. PRICE: He would then -- presumably he'd be left in the position of cutting off reinsurance to --

QUESTION: But he could do that without any agreement.

QUESTION: Well, that's precisely the question.

QUESTION: I mean, there's no consideration, though, the way you've described it. What consideration flows from the reinsurer to the insurer?

MR. PRICE: The question Your Honor is raising, as is Justice Scalia, is the question of what was the motivation of the reinsurer to enter into this agreement?

QUESTION: What were the two -- to have an agreement, you have an exchange of promises or performance on both sides, in contract law.

MR. PRICE: That's correct.

QUESTION: What was to be -- what did the insurer agree to do or perform in exchange for the reinsurer's agreement to not write the claims-made forms?

MR. PRICE: The agreement at issue was an agreement that they were seeking to enlist the aid of the reinsurers in compelling changes in American reinsurance markets.

QUESTION: Okay --

MR. PRICE: What the --

QUESTION: And you say that was an agreement.

MR. PRICE: Yes.

QUESTION: And you've said that what the reinsurers agreed to do was not to reinsure any more claims-made forms, but what did the insurers agree to do?

MR. PRICE: The insurers agreed amongst themselves not to offer claims-made coverage, and they also agreed to attempt to keep other people from using those forms and offering that coverage as well.

QUESTION: Well, was that an agreement they made with the reinsurers?

MR. PRICE: They went to the reinsurers to obtain the coercive enforcement mechanism which they themselves didn't possess over their competitors.

QUESTION: Well, you're saying, then, that there wasn't an agreement between the insurers and the reinsurers, that the insurers agreed among themselves and then went to the reinsurers to put muscle into the agreement.

MR. PRICE: Yes, and that the reinsurers agreed to provide that muscle. That's precisely --

QUESTION: In exchange for what?

MR. PRICE: The agreement.

QUESTION: They agreed in exchange for what?

MR. PRICE: In exchange, they would have an American market which possessed them with less risk and potentially more profit, so that the mere fact --

QUESTION: And someone had to talk them into that.

MR. PRICE: That it is mutually advantageous --

QUESTION: Someone had to talk them into that.

(Laughter.)

MR. PRICE: Yes, Your Honor, somebody had to --

QUESTION: I mean, it seems to me it's just somebody coming in and telling them, look, you're going to get into real trouble in the American market, and they say, my God, you're right, we better do that, and --

MR. PRICE: And they hadn't done it previously on their own and, indeed, there are matters which are outside this record which would show that they had previously been asked whether they thought changes needed to be made in the 1973 forms and they had said that that worked.

So now why, a few years later, do they all of a sudden change and say the sky is falling?

QUESTION: Maybe they were saying to one another, look, if there's any real problem in the American market, certainly the American insurers will let us know. I mean, basically these are sophisticated companies, and

if there's some kind of coverage that we shouldn't be handling, they'll come and tell us, and sure enough, that's what happened.

MR. PRICE: But that doesn't answer the further part of the problem.

Assuming that the predicate is correct that there is a "problem in the American industry," and that problem, the way it has been posited, is that it's unprofitable to write this kind of coverage both at the insurer and reinsurance level, and if that's true, then it is in the economic self-interest of everyone in the industry to abandon that coverage, and if I and my immediate competitors, the four primary defendants in this case, agree that it's in our interest to stop writing this coverage, we agree it is in our interest to get reinsurance for this less coverage, why would they care whether their competitors continued to write this unprofitable coverage which might bankrupt them and leave them a bigger market to control for themselves?

QUESTION: Because there are some risk-averse people and some nonrisk-averse people, and the whole theory of insurance regulation is that nonrisk-averse people shouldn't be running insurance companies.

MR. PRICE: But reinsurers are smart people, too. They know how to identify a risk-averse and a risk-

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

careful person. They know which people they should or shouldn't insure risks for. Why do they need a uniform rule in a market which generally does not admit to such uniform rules?

Normally, when you contract for reinsurance, you as an insurer go to London. You get a broker. He goes around and assembles a ad hoc joint venture, if you will, who'll subscribe to a reinsurance treaty to reinsure my book of business, and their willingness to reinsure my book of business in no way depends on their refusing to reinsure any other insurer's book of business, and I don't see why that agreement follows from the fact that there might be some plausible efficiency in the arrangements which you posit, and if there were those efficiencies you wouldn't need these kind of coercive means to compel the market to reach that rational conclusion and, indeed, the State regulators, who also have those same interests, didn't go out and compel the industry to avoid these coverages as well.

QUESTION: Well, but the whole antitrust exemption is based on a quite different philosophy. The whole antitrust exemption is based on the philosophy that this kind of interaction and cooperation is beneficial to the industry as a whole.

MR. PRICE: The kind of cooperation that the

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

exemption posits as beneficial for the industry is voluntary cooperation. it's cooperation based on mutually perceived joint needs. It is not cooperation induced with the heavy club of coercion.

Indeed, when you look at the structure of the regulation and you look at the structure of the statute, while the statute may permit the States to allow insurers to cooperate in a variety of efficiency-enhancing means, it expressly prohibits boycott, coercion, and intimidation.

It was the fears in Congress born of the experience in the South-East Underwriters case that insurers, because they needed certain levels of cooperation to efficiently function, were in a position of danger, that they had a power through cooperation which could be abused, and the way you abuse it is precisely the way it was abused in South-Eastern Underwriters.

You withhold from competitors who won't conform their behavior to your private standards, reinsurance, which is a necessary incidence needed, and you withhold from them further the services of rating organizations such as the ISO defendant in this case, which are also necessary, and those are the precise means utilized to enforce the agreements which we allege in the complaints in this case.

Turning to the definition of the phrase, "boycott," one must start with looking at the statute and what the statute itself says. The statute simply uses the phrase, "any act or agreement of boycott, coercion, and intimidation." It does not offer any adjectives such as "total, "partial," or "discriminatory."

It derives those terms expressly from the Sherman Act cases itself. Indeed, it comes directly from this Court's language in the South-Eastern Underwriters case, and more specifically it was the congressional purpose to preclude the kind of private regulatory activity that we see in this case.

In the Barry case, this Court defined "boycott" with reference to the Sherman Act cases, and it did so because it found that the Sherman Act language had been utilized by the Congress and that the particular purpose the Congress had wished to serve derives specifically from this Court's decision in South-Eastern Underwriters.

Further, the petitioners cite no case law whatsoever which is contrary to this definition of "boycott" focusing on the use of coercive means. When one looks at the distinction of "partial" and "absolute," one cannot find that as a consistent thread through this Court's antitrust boycott jurisprudence. Indeed, the only common thread which ties those cases together, if at all,

is the notion of coercive enforcement activity.

This Court specifically noted in Barry both that boycotts were not a unitary phenomenon and that the case law showed a marked lack of uniformity, and it is not a unitary phenomenon, and it shows that marked lack of uniformity precisely because what is a boycott is circumstantial to a significant extent. What is coercive and effective against one party in one market circumstance might not be as effective against another party in a different circumstance.

When you look at that definition in relationship to the facts in this case, it is precisely what we've pled here -- an agreement by a small group of insurers seeking to preclude their competitors from offering coverages against which they did not wish to compete.

I would like to now turn to the comity portion of the decision.

QUESTION: Before you do that, Mr. Price --

MR. PRICE: Yes, sir.

QUESTION: You've talked about the boycott issue. I don't think you've talked about the -- maybe the prior issue of whether these are even the business of insurance regulated by State law. What is your position on that?

MR. PRICE: Our position is that the court of

appeals was quite correct in holding that the re -- the foreign reinsurers specifically --

QUESTION: Just the foreign. What about the domestic --

MR. PRICE: Were not regulated.

QUESTION: What about the domestic reinsurers? Do you concede that they are regulated by State law?

MR. PRICE: We do not concede that their reinsurance business is regulated by State law in the way that is required by the McCarran act, and there's a distinction there that is important to understand.

They are -- the domestic reinsurers are all licensed insurers under the law of each State, and the State has a variety of regulations that applies to their business activities as insurers.

QUESTION: Right, but not as reinsurers.

MR. PRICE: But specifically regulation of what kind of reinsurance contracts they offer, to whom they offer them, at what premium rates and under what terms and conditions, those simply are not regulated.

QUESTION: That raises an interesting question, though. Is it the reinsurance you should look to, or the insurance? The alleged object of the conspiracy, the alleged object of it, is not to fix reinsurance. The vice is fixing insurance, right?

MR. PRICE: Reinsurance is the means utilized --

QUESTION: Is the means, right --

MR. PRICE: To compel that end.

QUESTION: But since the object is to fix insurance, shouldn't the proper question be whether that is regulated by State law?

MR. PRICE: No, because --

QUESTION: Why not?

MR. PRICE: The reason not is, where you use an unregulated means to change conditions in a regulated market, you have taken it beyond the power of the regulator to put --

QUESTION: How have you?

MR. PRICE: -- the case back to the status quo ante.

QUESTION: How have you? Couldn't the regulators require insurance companies to offer particular types of coverage?

MR. PRICE: And they could make the situation worse in that circumstance.

If the reinsurers have decided, pursuant to the agreement, not to offer reinsurance, and if insurers need reinsurance in order to offer that coverage, then a regulator saying, offer that coverage, would put the insurers in the position of very quickly using up all

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

their available capacity to write this one narrow line of coverage, and would put them in a position where the total amount of coverage they could write was substantially less.

So yes, they could order it, and the net effect might well be an absolute constriction of the total output in the market because of the inability to access the reinsurance market.

QUESTION: You think Lloyd's is going to kiss goodbye to half of all of its reinsurance business.

MR. PRICE: One doesn't know what they might do in the short run if they thought they could get a long-term benefit of restructuring a market in a way they liked better than what they currently saw, and section 1 of the Sherman Act punishes those short-term kind of expedients to gain long-term advantages.

So the mere fact that you can't find an absolute and totally consistent motivation for them independent of the primary insurers isn't the question. The question is whether they had a shared, unlawful interest which they concluded by prohibited means and which the Sherman Act would remedy.

QUESTION: Suppose the allegation and the proof were that the sole motive of the primary insurers in making these overtures was the continued solvency of the

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

reinsurers, would that be an unlawful boycott?

MR. PRICE: If their sole -- in other words, if there were simply an agreement on terms of coverage for the purpose of continued solvency.

QUESTION: Right. The primary insurers said, there is a glitch in a lot of these policies, our principal concern is the preservation of Lloyd's as an effective reinsurer, we are advising you that in your interest and in ours from the standpoint of the solvency of reinsurers, you should not offer this coverage. Is that unlawful?

MR. PRICE: In that circumstance it would not be a boycott because you don't have any additional activity designed to enforce that agreement on unwilling parties, and indeed, under the precise facts --

QUESTION: Well, suppose as a result of those overtures the reinsurers got together and said, you know, Hartford and its -- other companies like it are absolutely correct. We will now agree together not to offer this other form of insurance.

MR. PRICE: Well, the mere fact that --

QUESTION: In that hypothesis, are the primary insurers violating the antitrust laws?

MR. PRICE: What makes the arrangement unlawful in our view is not when they agree with Hartford not to

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

offer the coverage, but when they agree with Hartford not to offer the coverage as the means of prohibiting Hartford's competitors from offering the coverage.

So the mere fact that you may have multiple levels of the distribution system involved in the agreement isn't what makes it lawful or unlawful.

QUESTION: Well, but many effects can follow from a single motive, and I'm hypothesizing a single motive which I suggest to you may be lawful.

MR. PRICE: But that doesn't mean that the single motive and lawful objective would necessarily be obtained by lawful means.

The antitrust laws permit a wide variety of results to occur, but still prohibits those same results when the results are obtained by means prohibited by the antitrust law, and that's the primary difference between section 1 of the law and section 2.

Section 2 comes closer, sometimes, to prohibiting specific results, but section 1 always focuses almost exclusively on the means utilized to obtain those results, and thus means are very important.

Further addressing the general area that Justice Scalia has directed me to, I would just briefly say that where unregulated conduct becomes an integral part of an unlawful scheme, then all the parties to that scheme are

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

jointly and severally liable for it.

The mere fact that some of them might have had an exemption for some conduct doesn't change the fact that they're jointly and severally liable for the full scope of the conspiracy, and where regulated and otherwise exempt activities are engaged in in furtherance of the underlying unlawful scheme, then whatever exemption they enjoy has been lost, and that's simply a specialized application of the general proposition that acts lawful in themselves lose that character when they become a constituent element of an overriding and otherwise unlawful scheme.

QUESTION: Well, what's your authority for that, Mr. Price? I mean, in the antitrust context?

MR. PRICE: In the antitrust context, specifically that language is a paraphrase from the Continental Ore v. Union Carbide case, which we cited in our brief both for that proposition and for several related principles in the international comity area.

QUESTION: And it involved exempt and nonexempt -- MR. PRICE: It did not involve exempt and nonexempt, it involved the combination of lawful and unlawful.

QUESTION: Why does one principal necessarily carry over to the other?

MR. PRICE: The cases that deal with the exempt

and nonexempt, this case's whole -- or, statement in Royal Drug, the Pennington -- United --

QUESTION: Well, but --

MR. PRICE: Mineworkers v. Pennington, and the whole host of labor and related --

QUESTION: How about the statement in Perino, coming after Royal Drug, that the fact that an exempt -- deals with nonexempt is a factor, but it isn't controlling?

MR. PRICE: But in Perino, the only question before the Court was whether or not the activity engaged in was the business of insurance, and so this Court said, in determining the first prong of the McCarran test for exemption, the mere fact that a party to the agreement was not an insurer was not itself dispositive of whether the activity engaged in was the business of insurance.

It didn't address the additional question of whether that party in activity was entitled the exemption, because it hadn't addressed whether or not its activity was subject to regulation by the State within the meaning of McCarran, so I don't believe that Perino is dispositive for that purpose.

QUESTION: So Royal Drug is your principal authority for the proposition that you stated a moment ago.

MR. PRICE: It is the only authority where this Court has directly addressed that proposition in the context of the insurance industry.

QUESTION: Were you going to get to the comity issue?

MR. PRICE: Yes, sir. In fact, I'll turn to that now.

Where foreign parties conspire, intending to and substantially restraining American commerce, this Court has consistently applied our antitrust laws to that conduct. Indeed, the test that the Sherman Act cases have applied have generally applied a two-pronged analysis: whether there was an intent to harm American commerce, and whether the conduct charged had a substantial effect on American commerce.

When you look at the facts in this case, Americans went to London to solicit the participation of London reinsurers for the purpose of disciplining American reinsurance markets. The agreements were specifically targeted at the United States. If one looks at the nonmarine London agreement 1987, the very words of the agreement itself were, "To use their best endeavors to ensure that all USA and Canadian-exposed risks would not have reinsurance for pollution available."

When one looks at the effects in this case,

50 percent of Lloyd's business is in North America. Lloyd's is the largest reinsurer of American business. All the competitive effects addressed in the complaint occurred in the United States. It was Americans rather than Britons who were unable to obtain long-tail and pollution coverage as a result of this conspiracy.

When one looks at reinsurance markets, one thing that is immediately apparent is that they are international in nature, and that includes the London market. Indeed, defendants concede as much.

What I would posit to the Court is that, given the international nature of this market and American markets' dependence on it, the statement that the British Government possesses the sole regulatory interest in how business is conducted in that market is misleading and, indeed, false.

I would hypothesize the following case. Assume the British adopted a statute which said that it was in Britain's interest to promote the manufacture of products for sale in the United States which were inherently dangerous and which were not required to be done with adequate safeguards.

I don't think this Court would waste a great deal of time and effort concluding that American State product liability law should apply to that conduct even

though the British have articulated a regulatory interest in that conduct.

When you look at the jurisdictional test which derives from Alcoa, from the Continental Ore case, and the other cases cited in our brief, the notion of comity is inherent in that test because the comity question as a jurisdictional matter is the question of whether the exercise of jurisdiction is reasonable under the circumstance of a particular case.

And the way that we have determined reasonableness is by looking to see whether there was an intent to harm American commerce and whether American commerce was substantially affected, and I suggest that to the extent that there is any confusion in the lower courts, it relates not to the intent and effects standard, but a failure to give meaning to the substantiality of the effect before the exercise of jurisdiction is appropriate.

When you look at the Timberlane case itself, you didn't need a 9-factor or a 7-factor or a 10-factor test to tell you 11/100ths of 1 percent of American lumber coming from Honduras probably wasn't a substantial effect and probably wasn't the sort of circumstance where it would be reasonable for an American court to exercise its jurisdiction.

QUESTION: I suppose you would say that the

foreign reinsurers are subject to the Sherman Act and I guess would be liable as a contract combination or conspiracy even if the American insurers had not been part of the scheme, right? I mean, it's contrary to the Sherman Act for all of these reinsurers to agree upon the terms of reinsurance, whether at the instance of American insurers or not.

MR. PRICE: It would clearly be subject to scrutiny under the antitrust laws.

QUESTION: Yes, I would think so.

MR. PRICE: Whether or not it's unlawful, we don't have a record that will tell us that at this point. We certainly could, sir.

Indeed, in a related and analogous case this Court unanimously said in Kirkpatrick that this Court would not allow vague notions of comity to serve as the basis by which American courts would abstain from the exercise of its jurisdiction, and indeed expressly allowed as how courts in the United States have the power and ordinarily the obligation to decide the cases presented to them.

QUESTION: An unflagging obligation.

(Laughter.)

MR. PRICE: I wouldn't -- I wouldn't wish to say whether it's unflagging or not. It does admit to at least

some narrow exceptions, and the exceptions that this Court has recognized are the active State cases where it's narrowly confined to its role as a rule of decision, and we would also submit that circumstances which related to foreign sovereign compulsion might also, as a matter of due process, be cases where jurisdiction might be inappropriate.

But the level of conflicts posited in this case by the British Government I do not believe are the sort that this Court ought to give deference to. The policy posited by the United Kingdom is one of a system of self-regulation, and thus the British Government is, at best, merely neutral as to whether this conduct occurred or did not occur. It was within the discretion of the actors under that self-regulatory system to decide for themselves whether or not to act.

Thank you.

QUESTION: Thank you, Mr. Price. Mr. Shapiro, you have 1 minute remaining.

REBUTTAL ARGUMENT OF STEPHEN M. SHAPIRO

ON BEHALF OF THE PETITIONERS IN NO. 91-1111

MR. SHAPIRO: Thank you, Mr. Chief Justice. I think it's critical for the Court to distinguish the seat of distinction between this case and Barry. In Barry, the defendant singled out one group of doctors, treated them

differently from everybody else in the market. They penalized them by a complete cut-off of insurance.

That's so different from this case, where the thing that is alleged is a general change in insurance coverage that applies to everybody in exactly the same way, and in the Barry case this Court said that is a critical distinction, and yet our friends are just overriding that distinction completely.

Justice Scalia put his finger on a critical idea as well. That's the solvency point. One theme that goes throughout this legislative history is that if a consumer's house burns down and he can't get his insurance money because the company is insolvent, it is cold comfort to tell that person that vigorous Sherman Act competition has saved him 5 percent on his premiums.

Congress meant these agreements on terms and coverage that can preserve solvency to be considered by specialized insurance regulators who can weigh these sensitive questions of public policy that were debated a few moments ago.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Shapiro. The case is submitted.

(Whereupon, at 2:45 p.m., the case in the in the above-entitled matter was submitted.)

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of The United States in the Matter of:

HARTFORD FIRE INSURANCE V. CALIFORNIA MERRETT UNDERWRITING LIMITED

and that these attached pages constitutes the original transcript of the proceedings for the records of the court.

BY Ann Mari Federico

(REPORTER)