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SUPREME COURT OF THE UNITED STATES

Nos. 91–1111 AND 91–1128

HARTFORD FIRE INSURANCE CO., ET AL., PETITIONERS
91–1111 *v.*
CALIFORNIA ET AL.

MERRETT UNDERWRITING AGENCY MANAGE-MENT LIMITED, ET AL., PETITIONERS
91–1128 *v.*
CALIFORNIA ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

[June 28, 1993]

JUSTICE SOUTER announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I, II(A), III, and IV, and an opinion with respect to Part II(B) in which JUSTICE WHITE, JUSTICE BLACKMUN and JUSTICE STEVENS join.

The Sherman Act makes every contract, combination, or conspiracy in unreasonable restraint of interstate or foreign commerce illegal. 26 Stat. 209, as amended, 15 U. S. C. §1. These consolidated cases present questions about the application of that Act to the insurance industry, both here and abroad. The plaintiffs (respondents here) allege that both domestic and foreign defendants (petitioners here) violated the Sherman Act by engaging in various conspiracies to affect the American insurance market. A group of domestic defendants argues that the McCarran-Ferguson Act, 59 Stat. 33, as amended, 15 U. S. C. §1011 *et seq.*, precludes application of the Sherman Act to the conduct alleged; a group of foreign defendants argues that the principle of international comity requires the District Court to refrain from exercising jurisdiction over certain claims

against it. We hold that most of the domestic defendants' alleged conduct is not immunized from antitrust liability by the McCarran-Ferguson Act, and that, even assuming it applies, the principle of international comity does not preclude District Court jurisdiction over the foreign conduct alleged.

The two petitions before us stem from consolidated litigation comprising the complaints of 19 States and many private plaintiffs alleging that the defendants, members of the insurance industry, conspired in violation of §1 of the Sherman Act to restrict the terms of coverage of commercial general liability (CGL) insurance[1] available in the United States. Because the cases come to us on motions to dismiss, we take the allegations of the complaints as true.[2]

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[1]CGL insurance provides "coverage for third party casualty damage claims against a purchaser of insurance (the `insured')." App. 8 (Cal. Complaint ¶4.a.).

[2]Following the lower courts and the parties, see *In re Insurance Antitrust Litigation*, 938 F. 2d 919, 924, 925 (CA9 1991), we will treat the complaint filed by California as representative of the claims of Alabama, Arizona, California, Massachusetts, New York, West Virginia, and Wisconsin, and the complaint filed by Connecticut as representative of the claims of Alaska, Colorado, Connecticut, Louisiana, Maryland, Michigan, Minnesota, Montana, New Jersey, Ohio, Pennsylvania, and Washington. As will become apparent, the California and Connecticut Complaints differ slightly in their presentations of background information and their claims for relief; their statements of facts are identical. Because the private party plaintiffs have chosen in their brief in this Court to use the California Complaint as a "representative model" of their claims, Brief for Respondents (Private Party Plaintiffs) 3, n. 6, we will assume that their complaints track that Complaint. On remand, the courts below will of course be free to take into account any relevant differences among the complaints that the parties may bring to their attention.

According to the complaints, the object of the conspiracies was to force certain primary insurers (insurers who sell insurance directly to consumers) to change the terms of their standard CGL insurance policies to conform with the policies the defendant insurers wanted to sell. The defendants wanted four changes.[3]

First, CGL insurance has traditionally been sold in the United States on an "occurrence" basis, through a policy obligating the insurer "to pay or defend claims, whenever made, resulting from an accident or `injurious exposure to conditions' that occurred during the [specific time] period the policy was in effect." App. 22 (Cal. Complaint ¶52). In place of this traditional "occurrence" trigger of coverage, the defendants wanted a "claims-made" trigger, obligating the insurer to pay or defend only those claims made during the policy period. Such a policy has the distinct advantage for the insurer that when the policy period ends without a claim having been made, the insurer can be certain that the policy will not expose it to any further liability. Second, the defendants wanted the "claims-made" policy to have a "retroactive date" provision, which would further restrict coverage to claims based on incidents that occurred after a certain date. Such a provision eliminates the risk that an insurer, by issuing a claims-made policy, would assume liability arising

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[3]The First Claim for Relief of the Connecticut Complaint, App. 88–90 (Conn. Complaint ¶¶115–119), charges all the defendants with an overarching conspiracy to force all four of these changes on the insurance market. The eight federal-law Claims for Relief of the California Complaint, *id.*, at 36–49 (Cal. Complaint ¶¶111–150), charge various subgroups of defendants with separate conspiracies that had more limited objects; not all defendants are alleged to have desired all four changes.

from incidents that occurred before the policy's effective date, but remained undiscovered or caused no immediate harm. Third, CGL insurance has traditionally covered “sudden and accidental” pollution; the defendants wanted to eliminate that coverage. Finally, CGL insurance has traditionally provided that the insurer would bear the legal costs of defending covered claims against the insured without regard to the policy's stated limits of coverage; the defendants wanted legal defense costs to be counted against the stated limits (providing a “legal defense cost cap”).

To understand how the defendants are alleged to have pressured the targeted primary insurers to make these changes, one must be aware of two important features of the insurance industry. First, most primary insurers rely on certain outside support services for the type of insurance coverage they wish to sell. Defendant Insurance Services Office, Inc. (ISO), an association of approximately 1,400 domestic property and casualty insurers (including the primary insurer defendants, Hartford Fire Insurance Company, Allstate Insurance Company, CIGNA Corporation, and Aetna Casualty and Surety Company), is the almost exclusive source of support services in this country for CGL insurance. See *id.*, at 19 (Cal. Complaint ¶38). ISO develops standard policy forms and files or lodges them with each State's insurance regulators; most CGL insurance written in the United States is written on these forms. *Ibid.* (Cal. Complaint ¶39); *id.*, at 74 (Conn. Complaint ¶50). All of the “traditional” features of CGL insurance relevant to this case were embodied in the ISO standard CGL insurance form that had been in use since 1973 (1973 ISO CGL form). *Id.*, at 22 (Cal. Complaint ¶¶51–54); *id.*, at 75 (Conn. Complaint ¶¶56–58). For each of its standard policy forms, ISO also supplies actuarial and rating information: it collects, aggregates, interprets, and distributes data on the

premiums charged, claims filed and paid, and defense costs expended with respect to each form, *id.*, at 19 (Cal. Complaint ¶39); *id.*, at 74 (Conn. Complaint ¶¶51–52), and on the basis of this data it predicts future loss trends and calculates advisory premium rates. *Id.*, at 19 (Cal. Complaint ¶39); *id.*, at 74 (Conn. Complaint ¶53). Most ISO members cannot afford to continue to use a form if ISO withdraws these support services. See *id.*, at 32–33 (Cal. Complaint ¶¶97, 99).

Second, primary insurers themselves usually purchase insurance to cover a portion of the risk they assume from the consumer. This so-called "reinsurance" may serve at least two purposes, protecting the primary insurer from catastrophic loss, and allowing the primary insurer to sell more insurance than its own financial capacity might otherwise permit. *Id.*, at 17 (Cal. Complaint ¶29). Thus, "[t]he availability of reinsurance affects the ability and willingness of primary insurers to provide insurance to their customers." *Id.*, at 18 (Cal. Complaint ¶34); *id.*, at 63 (Conn. Complaint ¶4(p)). Insurers who sell reinsurance themselves often purchase insurance to cover part of the risk they assume from the primary insurer; such "retrocessional reinsurance" does for reinsurers what reinsurance does for primary insurers. See *ibid.* (Conn. Complaint ¶4(r)). Many of the defendants here are reinsurers or reinsurance brokers, or play some other specialized role in the reinsurance business; defendant Reinsurance Association of America (RAA) is a trade association of domestic reinsurers.

The prehistory of events claimed to give rise to liability starts in 1977, when ISO began the process of revising its 1973 CGL form. *Id.*, at 22 (Cal. Complaint ¶55). For the first time, it proposed two CGL forms

(1984 ISO CGL forms), one the traditional "occurrence" type, the other "with a new `claims-made' trigger." *Id.*, at 22–23 (Cal. Complaint ¶56). The "claims-made" form did not have a retroactive date provision, however, and both 1984 forms covered "`sudden and accidental' pollution" damage and provided for unlimited coverage of legal defense costs by the insurer. *Id.*, at 23 (Cal. Complaint ¶¶59–60). Within the ISO, defendant Hartford Fire Insurance Company objected to the proposed 1984 forms; it desired elimination of the "occurrence" form, a retroactive date provision on the "claims-made" form, elimination of sudden and accidental pollution coverage, and a legal defense cost cap. Defendant Allstate Insurance Company also expressed its desire for a retroactive date provision on the "claims-made" form. *Id.*, at 24 (Cal. Complaint ¶61). Majorities in the relevant ISO committees, however, supported the proposed 1984 CGL forms and rejected the changes proposed by Hartford and Allstate. In December 1983, the ISO Board of Directors approved the proposed 1984 forms, and ISO filed or lodged the forms with state regulators in March 1984. *Ibid.* (Cal. Complaint ¶62).

Dissatisfied with this state of affairs, the defendants began to take other steps to force a change in the terms of coverage of CGL insurance generally available, steps that, the plaintiffs allege, implemented a series of conspiracies in violation of §1 of the Sherman Act. The plaintiffs recount these steps as a number of separate episodes corresponding to different Claims for Relief in their complaints;[4] because it will become important to

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[4]The First Claim for Relief of the Connecticut Complaint, *id.,* at 88–90 (Conn. Complaint ¶¶115–119), charging an overarching conspiracy encompassing all of the defendants and all of the conduct alleged, is a special case. See n. 18, *infra*.

distinguish among these counts and the acts and defendants associated with them, we will note these correspondences.

The first four Claims for Relief of the California Complaint, *id.,* at 36–43 (Cal. Complaint ¶¶111–130), and the Second Claim for Relief of the Connecticut Complaint, *id.*, at 90–92 (Conn. Complaint ¶¶120–124), charge the four domestic primary insurer defendants and varying groups of domestic and foreign reinsurers, brokers, and associations with conspiracies to manipulate the ISO CGL forms. In March 1984, primary insurer Hartford persuaded General Reinsurance Corporation (General Re), the largest American reinsurer, to take steps either to procure desired changes in the ISO CGL forms, or "failing that, [to] `derail' the entire ISO CGL forms program." *Id.*, at 24 (Cal. Complaint ¶64). General Re took up the matter with its trade association, RAA, which created a special committee that met and agreed to "boycott" the 1984 ISO CGL forms unless a retroactive-date provision was added to the claims-made form, and a pollution exclusion and defense cost cap were added to both forms. *Id.*, at 24–25 (Cal. Complaint ¶¶65–66). RAA then sent a letter to ISO "announc[ing] that its members would not provide reinsurance for coverages written on the 1984 CGL forms," *id.*, at 25 (Cal. Complaint ¶67), and Hartford and General Re enlisted a domestic reinsurance broker to give a speech to the ISO Board of Directors, in which he stated that no reinsurers would "break ranks" to reinsure the 1984 ISO CGL forms. *Ibid.* (Cal. Complaint ¶68).

The four primary insurer defendants (Hartford, Aetna, CIGNA, and Allstate) also encouraged key actors in the London reinsurance market, an important provider of reinsurance for North American risks, to withhold reinsurance for coverages written on the 1984 ISO CGL forms. *Id.*, at 25–26 (Cal. Complaint ¶¶69–70). As a consequence, many

London-based underwriters, syndicates, brokers, and reinsurance companies informed ISO of their intention to withhold reinsurance on the 1984 forms, *id.*, at 26–27 (Cal. Complaint ¶¶71–75), and at least some of them told ISO that they would withhold reinsurance until ISO incorporated all four desired changes, see *supra*, at 3–4, into the ISO CGL forms. App. 26 (Cal. Complaint ¶74).

For the first time ever, ISO invited representatives of the domestic and foreign reinsurance markets to speak at an ISO Executive Committee meeting. *Id.*, at 27–28 (Cal. Complaint ¶78). At that meeting, the reinsurers "presented their agreed upon positions that there would be changes in the CGL forms or no reinsurance." *Id.*, at 29 (Cal. Complaint ¶82). The ISO Executive Committee then voted to include a retroactive-date provision in the claims-made form, and to exclude all pollution coverage from both new forms. (But it neither eliminated the occurrence form, nor added a legal defense cost cap.) The 1984 ISO CGL forms were then withdrawn from the marketplace, and replaced with forms (1986 ISO CGL forms) containing the new provisions. *Ibid.* (Cal. Complaint ¶84). After ISO got regulatory approval of the 1986 forms in most States where approval was needed, it eliminated its support services for the 1973 CGL form, thus rendering it impossible for most ISO members to continue to use the form. *Id.*, at 32–33 (Cal. Complaint ¶¶97, 99).

The Fifth Claim for Relief of the California Complaint, *id.*, at 43–44 (Cal. Complaint ¶¶131–135), and the virtually identical Third Claim for Relief of the Connecticut Complaint, *id.*, at 92–94 (Conn. Complaint ¶¶125–129), charge a conspiracy among a group of London reinsurers and brokers to coerce primary insurers in the United States to offer CGL coverage only on a claims-made basis. The reinsurers collectively refused to write new reinsurance contracts for, or to renew long-standing

contracts with, "primary . . . insurers unless they were prepared to switch from the occurrence to the claims-made form," *id.*, at 30 (Cal. Complaint ¶88); they also amended their reinsurance contracts to cover only claims made before a "`sunset date,'" thus eliminating reinsurance for claims made on occurrence policies after that date. *Id.*, at 31 (Cal. Complaint ¶¶90–92).

The Sixth Claim for Relief of the California Complaint, *id.*, at 45–46 (Cal. Complaint ¶¶136–140), and the nearly identical Fourth Claim for Relief of the Connecticut Complaint, *id.*, at 94–95 (Conn. Complaint ¶¶130–134), charge another conspiracy among a somewhat different group of London reinsurers to withhold reinsurance for pollution coverage. The London reinsurers met and agreed that all reinsurance contracts covering North American casualty risks, including CGL risks, would be written with a complete exclusion for pollution liability coverage. *Id.*, at 32 (Cal. Complaint ¶¶94–95). In accordance with this agreement, the parties have in fact excluded pollution liability coverage from CGL reinsurance contracts since at least late 1985. *Ibid.* (Cal. Complaint ¶94).

The Seventh Claim for Relief in the California Complaint, *id.*, at 46–47 (Cal. Complaint ¶¶141–145), and the closely similar Sixth Claim for Relief in the Connecticut Complaint, *id.*, at 97–98 (Conn. Complaint ¶¶140–144), charge a group of domestic primary insurers, foreign reinsurers, and the ISO with conspiring to restrain trade in the markets for "excess" and "umbrella" insurance by drafting model forms and policy language for these types of insurance, which are not normally offered on a regulated basis. *Id.*, at 33 (Cal. Complaint ¶101). The ISO Executive Committee eventually released standard language for both "occurrence" and "claims-made" umbrella and excess policies; that language included a retroactive date in the claims-made version, and an

absolute pollution exclusion and a legal defense cost cap in both versions. *Id.*, at 34 (Cal. Complaint ¶105).

Finally, the Eighth Claim for Relief of the California Complaint, *id.*, at 47–49 (Cal. Complaint ¶¶146–150), and its counterpart in the Fifth Claim for Relief of the Connecticut complaint, *id.*, at 95–97 (Conn. Complaint ¶¶135–139), charge a group of London and domestic retrocessional reinsurers[5] with conspiring to withhold retrocessional reinsurance for North American seepage, pollution, and property contamination risks. Those retrocessional reinsurers signed, and have implemented, an agreement to use their "`best endeavors'" to ensure that they would provide such reinsurance for North American risks "`only . . . where the original business includes a seepage and pollution exclusion wherever legal and applicable.'" *Id.*, at 35 (Cal. Complaint ¶108).[6]

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[5]The California and Connecticut Complaints' Statements of Facts describe this conspiracy as involving "[s]pecialized reinsurers in London and the United States." App. 34 (Cal. Complaint ¶106); *id.*, at 87 (Conn. Complaint ¶110). The Claims for Relief, however, name only London reinsurers; they do not name any of the domestic defendants who are the petitioners in No. 91–1111. See *id.*, at 48 (Cal. Complaint ¶147); *id.*, at 96 (Conn. Complaint ¶136). Thus, we assume that the domestic reinsurers alleged to be involved in this conspiracy are among the "unnamed co-conspirators" mentioned in the complaints. See *id.*, at 48 (Cal. Complaint ¶147); *id.*, at 96 (Conn. Complaint ¶136).

[6]The Ninth, Tenth and Eleventh Claims for Relief in the California Complaint, *id.,* at 49–50 (Cal. Complaint ¶¶151–156), and the Seventh Claim for Relief in the Connecticut Complaint, *id.,* at 98 (Conn. Complaint ¶¶145–146), allege state-law violations not at issue here.

Nineteen States and a number of private plaintiffs filed 36 complaints against the insurers involved in this course of events, charging that the conspiracies described above violated §1 of the Sherman Act, 15 U. S. C. §1. After the actions had been consolidated for litigation in the Northern District of California, the defendants moved to dismiss for failure to state a cause of action, or, in the alternative, for summary judgment. The District Court granted the motions to dismiss. *In re Insurance Antitrust Litigation,* 723 F. Supp. 464 (1989). It held that the conduct alleged fell within the grant of antitrust immunity contained in §2(b) of the McCarran-Ferguson Act, 15 U. S. C. §1012(b), because it amounted to "the business of insurance" and was "regulated by State law" within the meaning of that section; none of the conduct, in the District Court's view, amounted to a "boycott" within the meaning of the §3(b) exception to that grant of immunity. 15 U. S. C. §1013(b). The District Court also dismissed the three claims that named only certain London-based defendants,[7] invoking international comity and applying the Ninth Circuit's decision in *Timberlane Lumber Co.* v. *Bank of America, N. T. & S. A.*, 549 F. 2d 597 (CA9 1976).

The Court of Appeals reversed. *In re Insurance Antitrust Litigation*, 938 F. 2d 919 (CA9 1991). Although it held the conduct involved to be "the business of insurance" within the meaning of §2(b), it concluded that the defendants could not claim McCarran-Ferguson Act antitrust immunity for two independent reasons. First, it held, the foreign reinsurers were beyond the regulatory jurisdiction of the States; because their activities could not be

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[7]These are the Fifth, Sixth, and Eighth Claims for Relief of the California Complaint, and the corresponding Third, Fourth, and Fifth Claims for Relief of the Connecticut Complaint.

"regulated by State law" within the meaning of §2(b), they did not fall within that section's grant of immunity. Although the domestic insurers were "regulated by State law," the court held, they forfeited their §2(b) exemption when they conspired with the nonexempt foreign reinsurers. Second, the Court of Appeals held that, even if the conduct alleged fell within the scope of §2(b), it also fell within the §3(b) exception for "act[s] of boycott, coercion, or intimidation." Finally, as to the three claims brought solely against foreign defendants, the court applied its *Timberlane* analysis, but concluded that the principle of international comity was no bar to exercising Sherman Act jurisdiction.

We granted certiorari in No. 91–1111 to address two narrow questions about the scope of McCarran-Ferguson Act antitrust immunity,[8] and in No. 91–1128 to address the application of the Sherman Act to the foreign conduct at issue.[9] 506 U. S. ___ (1992). We

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[8]We limited our grant of certiorari in No. 91–1111 to these questions: "1. Whether domestic insurance companies whose conduct otherwise would be exempt from the federal antitrust laws under the McCarran-Ferguson Act lose that exemption because they participate with foreign reinsurers in the business of insurance," and "2. Whether agreements among primary insurers and reinsurers on such matters as standardized advisory insurance policy forms and terms of insurance coverage constitute a `boycott' outside the exemption of the McCarran-Ferguson Act." Pet. for Cert. in No. 91–1111, p. i; see 506 U. S. ___ (1992).

[9]The question presented in No. 91–1128 is: "Did the court of appeals properly assess the extraterritorial reach of the U. S. antitrust laws in light of this Court's teachings and contemporary understanding of international law when it held that a U. S. district court may apply U. S. law to the conduct of a foreign

now affirm in part, reverse in part, and remand.

The petition in No. 91–1111 touches on the interaction of two important pieces of economic legislation. The Sherman Act declares "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, . . . to be illegal." 15 U. S. C. §1. The McCarran-Ferguson Act provides that regulation of the insurance industry is generally a matter for the States, 15 U. S. C. §1012(a), and (again, generally) that "[n]o Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance." §1012(b). Section 2(b) of the McCarran-Ferguson Act makes it clear nonetheless that the Sherman Act applies "to the business of insurance to the extent that such business is not regulated by State law," §1012(b), and §3(b) provides that nothing in the McCarran-Ferguson Act "shall render the . . . Sherman Act inapplicable to any agreement to boycott, coerce, or intimidate, or act of boycott, coercion, or intimidation." §1013(b).

Petitioners in No. 91–1111 are all of the domestic defendants in the consolidated cases: the four domestic primary insurers, the domestic reinsurers, the trade associations ISO and RAA, and the domestic reinsurance broker Thomas A. Greene & Company, Inc. They argue that the Court of Appeals erred in holding, first, that their conduct, otherwise immune from antitrust liability under §2(b) of the McCarran-Ferguson Act, lost its immunity when they conspired with the foreign defendants, and, second, that their conduct amounted to "act[s] of boycott" falling within

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insurance market regulated abroad?" Pet. for Cert. in No. 91–1128, p. i.

the exception to antitrust immunity set out in §3(b). We conclude that the Court of Appeals did err about the effect of conspiring with foreign defendants, but correctly decided that all but one of the complaints' relevant Claims for Relief are fairly read to allege conduct falling within the "boycott" exception to McCarran-Ferguson Act antitrust immunity. We therefore affirm the Court of Appeals's judgment that it was error for the District Court to dismiss the complaints on grounds of McCarran-Ferguson Act immunity, except as to the one Claim for Relief that the Court of Appeals correctly found to allege no boycott.

By its terms, the antitrust exemption of §2(b) of the McCarran-Ferguson Act applies to "the business of insurance" to the extent that such business is regulated by state law. While "business" may mean "[a] commercial or industrial establishment or enterprise," Webster's New International Dictionary 362 (2d ed. 1942), the definite article before "business" in §2(b) shows that the word is not used in that sense, the phrase "the business of insurance" obviously not being meant to refer to a single entity. Rather, "business" as used in §2(b) is most naturally read to refer to "[m]ercantile transactions; buying and selling; [and] traffic." *Ibid.*

The cases confirm that "the business of insurance" should be read to single out one activity from others, not to distinguish one entity from another. In *Group Life & Health Ins. Co.* v. *Royal Drug Co.*, 440 U. S. 205 (1979), for example, we held that §2(b) did not exempt an insurance company from antitrust liability for making an agreement fixing the price of prescription drugs to be sold to Blue Shield policyholders. Such activity, we said, "would be exempt from the antitrust laws if Congress had extended the coverage of the McCarran-Ferguson Act

to the `business of insurance companies.' But that is precisely what Congress did not do." *Id.*, at 233 (footnote omitted); see *SEC* v. *National Securities, Inc.,* 393 U. S. 453, 459 (1969) (the McCarran-Ferguson Act's "language refers not to the persons or companies who are subject to state regulation, but to laws `regulating the *business* of insurance'") (emphasis in original). And in *Union Labor Life Ins. Co* v. *Pireno*, 458 U. S. 119 (1982), we explicitly framed the question as whether "a particular *practice* is part of the `business of insurance' exempted from the antitrust laws by §2(b)," *id.,* at 129 (emphasis added), and each of the three criteria we identified concerned a quality of the practice in question: "*first*, whether the practice has the effect of transferring or spreading a policyholder's risk; *second*, whether the practice is an integral part of the policy relationship between the insurer and the insured; and *third*, whether the practice is limited to entities within the insurance industry." *Ibid.* (emphasis in original).

The Court of Appeals did not hold that, under these criteria, the domestic defendants' conduct fell outside "the business of insurance"; to the contrary, it held that that condition was met.[10] See 938 F. 2d, at 927. Nor did it hold the domestic defendants' conduct to be "[un]regulated by State law." Rather, it constructed an altogether different chain of reasoning, the middle link of which comes from a sentence in our opinion in *Royal Drug Co.* "[R]egulation . . . of foreign reinsurers," the Court of

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[10]The activities in question here, of course, are alleged to violate federal law, and it might be tempting to think that unlawful acts are implicitly excluded from "the business of insurance." Yet §2(b)'s grant of immunity assumes that acts which, but for that grant, would violate the Sherman Act, the Clayton Act, or the Federal Trade Commission Act, are part of "the business of insurance."

Appeals explained, "is beyond the jurisdiction of the states," 938 F. 2d, at 928, and hence §2(b) does not exempt foreign reinsurers from antitrust liability, because their activities are not "regulated by State law." Under *Royal Drug Co.*, "an exempt entity forfeits antitrust exemption by acting in concert with nonexempt parties." 440 U. S., at 231. Therefore, the domestic insurers, by acting in concert with the nonexempt foreign insurers, lost their McCarran-Ferguson Act antitrust immunity. See 938 F. 2d, at 928. This reasoning fails, however, because even if we were to agree that foreign reinsurers were not subject to state regulation (a point on which we express no opinion), the quoted language from *Royal Drug Co.*, read in context, does not state a proposition applicable to this case.

The full sentence from *Royal Drug Co.* places the quoted fragment in a different light. "In analogous contexts," we stated, "the Court has held that an exempt entity forfeits antitrust exemption by acting in concert with nonexempt parties." 440 U. S., at 231. We then cited two cases dealing with the Capper-Volstead Act, which immunizes from liability under §1 of the Sherman Act particular activities of certain persons "engaged in the production of agricultural products."[11] §1 of the Capper-Volstead

[11]We also cited two cases dealing with the immunity of certain agreements of labor unions under the Clayton and Norris-LaGuardia Acts. See 440 U. S., at 231–232. These cases, however, did not hold that labor unions lose their immunity whenever they enter into agreements with employers; to the contrary, we acknowledged in one of the cases that "the law contemplates agreements on wages not only between individual employers and a union but agreements between the union and employers in a multi-employer bargaining unit." *Mine Workers* v. *Pennington*, 381 U. S. 657, 664 (1965). Because the

Act, 42 Stat. 388, 7 U. S. C. §291; see *Case-Swayne Co.* v. *Sunkist Growers, Inc.,* 389 U. S. 384 (1967); *United States* v. *Borden Co.,* 308 U. S. 188 (1939). Because these cases relied on statutory language referring to certain "persons," whereas we specifically acknowledged in *Royal Drug Co.* that the McCarran-Ferguson Act immunizes activities rather than entities, see 440 U. S., at 232–233, the analogy we were drawing was of course a loose one. The agreements that insurance companies made with "parties wholly outside the insurance industry," *id.,* at 231, we noted, such as the retail pharmacists involved in *Royal Drug Co.* itself, or "automobile body repair shops or landlords," *id.,* at 232 (footnote omitted), are unlikely to be about anything that could be called "the business of insurance," as distinct from the broader "`business of insurance companies.'" *Id.,* at 233. The alleged agreements at issue in the instant case, of course, are entirely different; the foreign reinsurers are hardly "wholly outside the insurance industry," and respondents do not contest the Court of Appeals's holding that the agreements concern "the business of insurance." These facts neither support even the rough analogy we drew in *Royal Drug Co.*, nor fall within the rule about acting in concert with nonexempt parties, which derived from a statute inapplicable here. Thus, we think it was error for the Court of Appeals to hold the domestic insurers bereft of their McCarran-Ferguson Act exemption simply because they agreed or acted with foreign reinsurers that, we assume for the sake of argument,

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cases stand only for the proposition that labor unions are not immune from antitrust liability for certain types of agreements with employers, such as agreements "to impose a certain wage scale on other bargaining units," *id.*, at 665, they do not support the far more general statement that exempt entities lose immunity by conspiring with non-exempt entities.

were "not regulated by State law."[12]

That the domestic defendants did not lose their §2(b) exemption by acting together with foreign reinsurers, however, is not enough reason to reinstate the District Court's dismissal order, for the Court of Appeals reversed that order on two independent grounds. Even if the participation of foreign reinsurers did not affect the §2(b) exemption, the Court of Appeals held, the agreements and acts alleged by the plaintiffs constitute "agreement[s] to boycott" and "act[s] of boycott [and] coercion" within the meaning of §3(b) of the McCarran-Ferguson Act, which makes it clear that the Sherman Act applies to such agreements and acts regardless of the §2(b) exemption. See 938 F. 2d, at 928. I agree with the Court that, construed in favor of the plaintiffs, the First, Second, Third, and Fourth Claims for Relief of the California Complaint, and the First and Second Claims for Relief of the Connecticut Complaint, allege one or more §3(b) "act[s] of boycott," and are thus sufficient to survive a motion to dismiss. See *infra,* at 23; *post,* at 13.

In reviewing the motions to dismiss, however, the Court has decided to use what I believe to be an overly narrow definition of the term "boycott" as used in §3(b), confining it to those refusals to deal that are "unrelated" or "collateral" to the objective sought by

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[12]The Court of Appeals's assumption that "the American reinsurers . . . are subject to regulation by the states and therefore prima facie immune," 938 F. 2d, at 928, appears to rest on the entity-based analysis we have rejected. As with the foreign reinsurers, we express no opinion whether the activities of the domestic reinsurers were "regulated by State law" and leave that question to the Court of Appeals on remand.

those refusing to deal. *Post,* at 4–5. I do not believe that the McCarran-Ferguson Act or our precedents warrant such a cramped reading of the term.

The majority and I find common ground in four propositions concerning §3(b) boycotts, as established in our decisions in *St. Paul Fire & Marine Ins. Co.* v. *Barry*, 438 U. S. 531 (1978), and *United States* v. *South-Eastern Underwriters Assn.*, 322 U. S. 533 (1944). First, as we noted in *St. Paul,* our only prior decision construing "boycott" as it appears in §3(b), only those refusals to deal involving the coordinated action of multiple actors constitute §3(b) boycotts: "conduct by individual actors falling short of concerted activity is simply not a `boycott' within [the meaning of] §3(b)." 438 U. S., at 555; see *post,* at 2 ("boycott" used "to describe . . . collective action"); *ibid.* ("To `boycott' means `[t]o combine in refusing to hold relations'") (citation omitted).

Second, a §3(b) boycott need not involve an absolute refusal to deal.[13] A primary goal of the alleged conspirators in *South-Eastern Underwriters*, as we described it, was "to force nonmember insurance companies into the conspiracies."[14] 322

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[13]Petitioners correctly concede this point. See Brief for Petitioners in No. 91–1111, p. 32, n. 14.

[14]As we have noted before, see *Group Life & Health Ins. Co.* v. *Royal Drug Co.*, 440 U. S. 205, 217 (1979); *SEC* v. *National Securities, Inc.*, 393 U. S. 453, 458 (1969), the McCarran-Ferguson Act was precipitated by our holding in *South-Eastern Underwriters* that the business of insurance was interstate commerce and thus subject generally to federal regulation under the Commerce Clause, and to scrutiny under the Sherman Act specifically. Congress responded, both to "ensure that the States would continue to have the ability to tax and regulate the business of insurance," *Royal Drug Co.*, 440 U. S., at 217–218 (footnote omitted), and to limit the application of the antitrust

U. S., at 535; cf. Joint Hearing on S. 1362, H. R. 3269, and H. R. 3270 before the Subcommittees of the Senate Committee on the Judiciary, 78th Cong., 1st Sess., pt. 2, p. 335 (1943) (statement of Edward L. Williams, President, Insurance Executives Assn.) ("[T]he companies that want to come into the Interstate Underwriters Board can come in there. I do not know of any company that is turned down"). Thus, presumably, the refusals to deal orchestrated by the defendants would cease if the targets agreed to join the Association and abide by its terms. See *post,* at 3 ("[t]he refusal to deal may . . . be conditional") (emphasis omitted).

Third, contrary to petitioners' contentions, see Brief for Petitioners in No. 91–1111, pp. 32, n. 14, 34, 38–39, a §3(b) boycott need not entail unequal treatment of the targets of the boycott and its instigators. Some refusals to deal (those, perhaps, which are alleged to violate only §2 of the Sherman Act[15]) may have as their object the complete destruction of the business of competitors; these may well involve unconditional discrimination against the targets. Other refusals to deal, however, may seek simply to

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laws to the insurance industry. *Id.*, at 218. In drafting the §3(b) exception to the §2(b) grant of antitrust immunity, Congress borrowed language from our description of the indictment in *South-Eastern Underwriters* as charging that "[t]he conspirators not only fixed premium rates and agents' commissions, but employed boycotts together with other types of coercion and intimidation to force nonmember insurance companies into the conspiracies." 322 U. S., at 535.

[15]Section 2 of the Sherman Act, 15 U. S. C. §2, prohibits monopolization of, or attempts or conspiracies to monopolize, "any part of the trade or commerce among the several States, or with foreign nations."

prevent competition as to the price or features of the product sold; and these need not depend on unequal treatment of the targets. Assuming, as the *South-Eastern Underwriters* Court appears to have done, that membership in the defendant Association was open to all insurers, the Association is most readily seen as having intended to treat all insurers equally: they all had the choice either to join the Association and abide by its rules, or to be subjected to the "boycotts," and acts of coercion and intimidation, alleged in that case. See *post,* at 10 (describing *South-Eastern Underwriters* as involving a "boycott, by primary insurers, of competitors who refused to join their price-fixing conspiracy").

Fourth, although a necessary element, "concerted activity" is not, by itself, sufficient for a finding of "boycott" under §3(b). Were this the case, we recognized in *Barry*, §3(b) might well "`devour the broad antitrust immunity bestowed by §2(b),'" 438 U. S., at 545, n. 18 (quoting *id.,* at 559 (Stewart, J., dissenting)), since every "contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce," 15 U. S. C. §1, involves "concerted activity." Thus, we suggested, simple price fixing has been treated neither as a boycott nor as coercion "in the absence of any additional enforcement activity." 438 U. S., at 545, n. 18; see *post,* at 5 (contending that simple concerted agreements on contract terms are not properly characterized as boycotts).

Contrary to the majority's view, however, our decisions have suggested that "enforcement activity" is a multifarious concept. The *South-Eastern Underwriters* Court, which coined the phrase "boycotts[,] . . . coercion and intimidation," 322 U. S., at 535; see n. 14, *supra,* provides us with a list of actions that, it finds, are encompassed by these terms. "Companies not members of [the Association],'' it states, "were cut off from the opportunity to

reinsure their risks, and their services and facilities were disparaged; independent sales agencies who defiantly represented non-[Association] companies were punished by a withdrawal of the right to represent the members of [the Association]; and persons needing insurance who purchased from non-[Association] companies were threatened with boycotts and withdrawal of all patronage." 322 U. S., at 535–536. Faced with such a list, and with all of the other instances in which we have used the term "boycott," we rightly came to the conclusion in *Barry* that, as used in our cases, the term does not refer to a "`unitary phenomenon.'" 438 U. S., at 543 (quoting P. Areeda, Antitrust Analysis 381 (2d ed. 1974)).

The question in this case is whether the alleged activities of the domestic defendants, acting together with the foreign defendants who are not petitioners here, include "enforcement activities" that would raise the claimed attempts to fix terms to the level of §3(b) boycotts. I believe they do. The core of the plaintiffs' allegations against the domestic defendants concern those activities that form the basis of the First, Second, Third, and Fourth Claims for Relief of the California Complaint, and the Second Claim for Relief of the Connecticut Complaint: the conspiracies involving both the primary insurers and domestic and foreign brokers and reinsurers to force changes in the ISO CGL forms. According to the complaints, primary insurer defendants Hartford and Allstate first tried to convince other members of the ISO that the ISO CGL forms should be changed to limit coverage in the manner we have detailed above, see *supra*, at 5–6; but they failed to persuade a majority of members of the relevant ISO committees, and the changes were not made. Unable to persuade other primary insurers to agree voluntarily to their terms, Hartford and Allstate, joined by Aetna and CIGNA, sought the aid of other individuals and entities who were not members of ISO, and who would not ordinarily be parties to an

agreement setting the terms of primary insurance, not being in the business of selling it. The four primary insurers convinced these individuals and entities, the reinsurers, to put pressure on ISO and its members by refusing to reinsure coverages written on the ISO CGL forms until the desired changes were made. Both domestic and foreign reinsurers, acting at the behest of the four primary insurers, announced that they would not reinsure under the ISO CGL forms until changes were made. As an immediate result of this pressure, ISO decided to include a retroactive-date provision in its claims-made form, and to exclude all pollution coverage from both its claims-made and occurrence forms. In sum, the four primary insurers solicited refusals to deal from outside the primary insurance industry as a means of forcing their fellow primary insurers to agree to their terms; the outsiders, acting at the behest of the four, in fact refused to deal with primary insurers until they capitulated, which, in part at least, they did.

This pattern of activity bears a striking resemblance to the first act of boycott listed by the *South-Eastern Underwriters* Court; although neither the *South-Eastern Underwriters* opinion, nor the underlying indictment, see Transcript of Record, O. T. 1943, No. 354, p. 11 (¶22(e)), details exactly how the defendants managed to "cut off [nonmembers] from the opportunity to reinsure their risks," 322 U. S., at 535, the defendants could have done so by prompting reinsurance companies to refuse to deal with nonmembers, just as is alleged here.[16] Moreover, the

[16]The majority claims that this refusal to deal was a boycott only because "membership in the association [had] no discernible bearing upon the terms of the refused reinsurance contracts." *Post,* at 11. Testimony at the hearings on the bill that became the McCarran-Ferguson Act indicates that the insurance companies thought otherwise. "We say `You do not

activity falls squarely within even the narrow theory of the §3(b) exception Justice Stewart advanced in dissent in *Barry*. Under that theory,[17] the §3(b) exception should be limited to "attempts by members of the insurance business to force other members to follow the industry's private rules and practices." 438 U. S., at 565 (Stewart, J., dissenting). I can think of no better description of the four primary insurers'

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issue insurance to a company that does not do business the way we think it should be done and belong to our association.' . . . It is for the protection of the public, the stockholders, and the companies. . . . You know when those large risks are taken that they have to be reinsured. We do not want to have to take a risk that is bad, or at an improper rate, or an excessive commission, we do not want our agents to take that, nor do we want to reinsure part of the risk that is written that way. We feel this way — that some groups are doing business in what is not the proper way, we feel it is not in the interest of the companies and it is not in the interest of the public, and we just do not want to do business with them." Joint Hearing on S. 1362, H. R. 3269, and H. R. 3270 before the Subcommittees of the Senate Committee on the Judiciary, 78th Cong., 1st Sess., pt. 2, p. 333 (1943) (statement of Edward L. Williams, President, Insurance Executives Assn.).

[17]In passing the McCarran-Ferguson Act, Justice Stewart argued, "Congress plainly wanted to allow the States to authorize anticompetitive practices which they determined to be in the public interest." *St. Paul Fire & Marine Ins. Co.* v. *Barry*, 438 U. S. 531, 565 (1978) (Stewart, J., dissenting). Hence, §2(b) provides that the federal antitrust laws will generally not be applicable to those insurance business practices "regulated by State law," and presumably state law could, for example, either mandate price-fixing, or specifically authorize voluntary price-fixing

activities in this case. For these reasons, I agree with the Court's ultimate conclusion that the Court of Appeals was correct in reversing the District Court's dismissal of the First, Second, Third, and Fourth Claims for Relief of the California Complaint, and the Second Claim for Relief of the Connecticut Complaint.[18]

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agreements. On the other hand, Congress intended to delegate regulatory power only to the States; nothing in the McCarran-Ferguson Act suggests that Congress wanted one insurer, or a group of insurers, to be able to formulate and enforce policy for other insurers. Thus, the enforcement activities that distinguish §3(b) "boycotts" from other concerted activity include, in this context, "*private enforcement* . . . of industry rules and practices, even if those rules and practices are permitted by state law." *Id.,* at 565–566 (emphasis in original) (footnote omitted).

[18]The First and Sixth Claims for Relief of the Connecticut Complaint, and the Seventh Claim for Relief of the California Complaint, which also name some or all of the petitioners, present special cases. The First Claim for Relief of the Connecticut Complaint alleges an overarching conspiracy involving all of the defendants named in the complaint and all of the conduct alleged. As such, it encompasses "boycott" activity, and the Court of Appeals was correct to reverse the District Court's order dismissing it. As currently described in the Complaint's statement of facts, however, some of the actions of the reinsurers and the retrocessional reinsurers appear to have been taken independently, rather than at the behest of the primary insurer defendants. I express no opinion as to whether those acts, if they were indeed taken independently, could amount to §3(b) boycotts; but I note that they lack the key element on which I rely in

The majority concludes that, so long as the reinsurers' role in this course of action was limited to "a concerted agreement to seek particular terms in particular transactions," *post,* at 3, the course of action could never constitute a §3(b) boycott. The majority's emphasis on this conclusion assumes an artificial segmentation of the course of action, and a false perception of the unimportance of the elements

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this case to find a sufficient allegation of boycott.

The Seventh Claim for Relief of the California Complaint, and the virtually identical Sixth Claim for Relief of the Connecticut Complaint, allege a conspiracy among a group of domestic primary insurers, foreign reinsurers, and the ISO to draft restrictive model forms and policy language for "umbrella" and "excess" insurance. On these claims, the Court of Appeals reversed the District Court's order of dismissal as to the domestic defendants solely because those defendants "act[ed] in concert" with nonexempt foreign defendants, 938 F. 2d, at 931, relying on reasoning that the Court has found to be in error, see *supra*, at 13–17. The Court of Appeals found that "[n]o boycotts [were] alleged as the defendants' modus operandi in respect to [excess and umbrella] insurance." 938 F. 2d, at 930. I agree; even under a liberal construction of the complaint in favor of plaintiffs, I can find no allegation of any refusal to deal in connection with the drafting of the excess and umbrella insurance language. Therefore I conclude that neither the participation of unregulated parties nor the application of §3(b) furnished a basis to reverse the District Court's dismissal of these claims as against the domestic insurers, and I would reverse the judgment of the Court of Appeals in this respect. The Fifth, Sixth, and Eighth Claims for Relief of the California Complaint and the Third, Fourth, and Fifth Claims for Relief of the Connecticut Complaint also allege concerted refusals to deal; but because

of that course of action other than the reinsurers' agreement. The majority concedes that the complaints allege, not just implementation of a horizontal agreement, but refusals to deal that occurred "at the behest of," or were "solicited by," the four primary insurers, who were "competitors of the target[s]." *Post,* at 10 (citations and internal quotation marks omitted). But it fails to acknowledge several crucial features of these events that bind them into a single course of action

recognizable as a §3(b) boycott.

First, the allegation that the reinsurers acted at the behest of the four primary insurers excludes the possibility that the reinsurers acted entirely in their own independent self-interest, and would have taken exactly the same course of action without the intense efforts of the four primary insurers. Although the majority never explicitly posits such autonomy on the part of the reinsurers, this would seem to be the only point of its repeated emphasis on the fact that "the scope and predictability of the risks assumed in a reinsurance contract depend entirely upon the terms of the primary policies that are reinsured." *Post,* at 9. If the encouragement of the four primary insurers played no role in the reinsurers' decision to act as they did, then it is difficult to see how one could describe the reinsurers as acting at the behest of the primary insurers, an element I find crucial to the §3(b) boycott alleged here. From the vantage point of a ruling on motions to dismiss, however, I discern sufficient allegations in the complaints that this is not the case. In addition, according to the complaints, the four primary insurers were not acting out of concern for the reinsurers' financial health when they

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they do not name any of the petitioners in No. 91–1111, the Court has no occasion to consider whether they allege §3(b) boycotts.

prompted the reinsurers to refuse reinsurance for certain risks; rather, they simply wanted to ensure that no other primary insurer would be able to sell insurance policies that they did not want to sell. Finally, as the complaints portray the business of insurance, reinsurance is a separate, specialized product, "[t]he availability [of which] affects the ability and willingness of primary insurers to provide insurance to their customers." App. 18 (Cal. Complaint ¶34). Thus, contrary to the majority's assertion, the boundary between the primary insurance industry and the reinsurance industry is not merely "technica[l]." *Post,* at 9.

The majority insists that I "disregar[d] th[e] integral relationship between the terms of the primary insurance form and the contract of reinsurance," *post,* at 9, a fact which it seems to believe makes it impossible to draw any distinction whatsoever between primary insurers and reinsurers. Yet it is the majority that fails to see that, in spite of such an "integral relationship," the interests of primary insurer and reinsurer will almost certainly differ in some cases. For example, the complaints allege that reinsurance contracts often "layer" risks, "in the sense that [a] reinsurer may have to respond only to claims above a certain amount . . . ." App. 10 (Cal. Complaint ¶4.q); *id.*, at 61 (Conn. Complaint ¶4(f)). Thus, a primary insurer might be much more concerned than its reinsurer about a risk that resulted in a high number of relatively small claims. Or the primary insurer might simply perceive a particular risk differently from the reinsurer. The reinsurer might be indifferent as to whether a particular risk was covered, so long as the reinsurance premiums were adjusted to its satisfaction, whereas the primary insurer might decide that the risk was "too hot to handle," on a standardized basis, at any cost. The majority's suggestion that "to insist upon certain primary-insurance terms as a condition of writing

reinsurance is in no way `artificial,'" *post,* at 9–10; see *post,* at 8, simply ignores these possibilities; the conditions could quite easily be "artificial," in the sense that they are not motivated by the interests of the reinsurers themselves. Because the parties have had no chance to flesh out the facts of this case, because I have no *a priori* knowledge of those facts, and because I do not believe I can locate them in the pages of insurance treatises, I would not rule out these possibilities on a motion to dismiss.

Believing that there is no other principled way to narrow the §3(b) exception, the majority decides that "boycott" encompasses just those refusals to deal that are "unrelated" or "collateral" to the objective sought by those refusing to deal. *Post,* at 4–5. This designation of a single "`unitary phenomenon,'" *Barry*, 438 U. S., at 543, to which the term "boycott" will henceforth be confined, is of course at odds with our own description of our Sherman Act cases in *Barry*.[19] See *ibid.* Moreover, the limitation to "collateral" refusals to deal threatens to shrink the §3(b) exception far more than the majority is willing to admit. Even if the reinsurers refused all reinsurance to primary insurers "who wrote insurance on disfavored forms," including insurance "as to risks written on other forms," the majority states, the reinsurers would not be engaging in a §3(b) boycott if "the primary insurers' other business were relevant to the proposed insurance contract (for example, if the reinsurer bears greater risk where the primary insurer engages in riskier businesses)." *Post,* at 12. Under

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[19] The majority contends that its concept of boycott is still "multifaceted" because it can be modified by such adjectives as "punitive," "labor," "political," and "social." *Post,* at 5, n. 3. This does not hide the fact that it is attempting to concoct a "precise definition" of the term, *post,* at 2, composed of a simple set of necessary and sufficient conditions.

this standard, and under facts comparable to those in this case, I assume that reinsurers who refuse to deal at all with a primary insurer unless it ceases insuring a particular risk would not be engaging in a §3(b) boycott if they could show that (1) insuring the risk in question increases the probability that the primary insurer will become insolvent, and that (2) it costs more to administer the reinsurance contracts of a bankrupt primary insurer (including those unrelated to the risk that caused the primary insurer to declare bankruptcy). One can only imagine the variety of similar arguments that may slowly plug what remains of the §3(b) exception. For these reasons, I cannot agree with the majority's narrow theory of §3(b) boycotts.

Finally, we take up the question presented by No. 91–1128, whether certain claims against the London reinsurers should have been dismissed as improper applications of the Sherman Act to foreign conduct. The Fifth Claim for Relief of the California Complaint alleges a violation of §1 of the Sherman Act by certain London reinsurers who conspired to coerce primary insurers in the United States to offer CGL coverage on a claims-made basis, thereby making "occurrence CGL coverage . . . unavailable in the State of California for many risks." App. 43–44 (Cal. Complaint ¶¶131–135). The Sixth Claim for Relief of the California Complaint alleges that the London reinsurers violated §1 by a conspiracy to limit coverage of pollution risks in North America, thereby rendering "pollution liability coverage . . . almost entirely unavailable for the vast majority of casualty insurance purchasers in the State of California." *Id.*, at 45–46 (Cal. Complaint ¶¶136–140). The Eighth Claim for Relief of the California Complaint alleges a further §1 violation by the London reinsurers who, along with domestic retrocessional reinsurers,

conspired to limit coverage of seepage, pollution, and property contamination risks in North America, thereby eliminating such coverage in the State of California.[20] *Id.*, at 47–48 (Cal. Complaint ¶¶146–150).

At the outset, we note that the District Court undoubtedly had jurisdiction of these Sherman Act claims, as the London reinsurers apparently concede. See Tr. of Oral Arg. 37 ("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").[21] Although the proposition was perhaps not always free from doubt, see *American Banana Co.* v. *United Fruit Co.*, 213 U. S. 347 (1909), it is well established by now that the Sherman Act applies to foreign conduct that was meant to produce and did in fact produce

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[20]As we have noted, see *supra*, at 8–10, each of these claims has a counterpart in the Connecticut Complaint. The claims each name different groups of London reinsurers, and not all of the named defendants are petitioners in No. 91–1128; but nothing in our analysis turns on these variations.

[21]One of the London reinsurers, Sturge Reinsurance Syndicate Management Limited, argues that the Sherman Act does not apply to its conduct in attending a single meeting at which it allegedly agreed to exclude all pollution coverage from its reinsurance contracts. Brief for Petitioner Sturge Reinsurance Syndicate Management Limited in No. 91–1128, p. 22. Sturge may have attended only one meeting, but the allegations, which we are bound to credit, remain that it participated in conduct that was intended to and did in fact produce a substantial effect on the American insurance market.

some substantial effect in the United States. See *Matsushita Elec. Industrial Co.* v. *Zenith Radio Corp.*, 475 U. S. 574, 582, n. 6 (1986); *United States* v. *Aluminum Co. of America*, 148 F. 2d 416, 444 (CA2 1945) (L. Hand, J.); Restatement (Third) of Foreign Relations Law of the United States §415, and Reporters' Note 3 (1987) (hereinafter Restatement (Third) Foreign Relations Law); 1 P. Areeda & D. Turner, Antitrust Law ¶236 (1978); cf. *Continental Ore Co.* v. *Union Carbide & Carbon Corp.*, 370 U. S. 690, 704 (1962); *Steele* v. *Bulova Watch Co.*, 344 U. S. 280, 288 (1952); *United States* v. *Sisal Sales Corp.*, 274 U. S. 268, 275–276 (1927).[22] Such is the conduct alleged here: that the London reinsurers engaged in unlawful conspiracies to affect the market for insurance in the United States and that their conduct in fact produced substantial effect.[23] See 938 F. 2d, at

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[22]JUSTICE SCALIA believes that what is at issue in this case is prescriptive, as opposed to subject-matter, jurisdiction. *Post,* at 15. The parties do not question prescriptive jurisdiction, however, and for good reason: it is well established that Congress has exercised such jurisdiction under the Sherman Act. See G. Born & D. Westin, International Civil Litigation in United States Courts 542, n. 5 (2d ed. 1992) (Sherman Act is a "prime exampl[e] of the simultaneous exercise of prescriptive jurisdiction and grant of subject matter jurisdiction").

[23]Under §402 of the Foreign Trade Antitrust Improvements Act of 1982 (FTAIA), 96 Stat. 1246, 15 U. S. C. §6a, the Sherman Act does not apply to conduct involving foreign trade or commerce, other than import trade or import commerce, unless "such conduct has a direct, substantial, and reasonably foreseeable effect" on domestic or import commerce. 15 U. S. C. §6a(1)(A). The FTAIA was intended to exempt from the Sherman Act export transactions that did not injure the United States economy, see H.

933.

According to the London reinsurers, the District Court should have declined to exercise such jurisdiction under the principle of international comity.[24] The Court of Appeals agreed that courts should look to that principle in deciding whether to exercise jurisdiction under the Sherman Act. *Id.*, at 932. This availed the London reinsurers nothing, however. To be sure,

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R. Rep. No. 97–686, pp. 2–3, 9–10 (1982); P. Areeda & H. Hovenkamp, Antitrust Law ¶236'a, pp. 296–297 (Supp. 1992), and it is unclear how it might apply to the conduct alleged here. Also unclear is whether the Act's "direct, substantial, and reasonably foreseeable effect" standard amends existing law or merely codifies it. See *id.*, ¶236'a, p. 297. We need not address these questions here. Assuming that the FTAIA's standard affects this case, and assuming further that that standard differs from the prior law, the conduct alleged plainly meets its requirements.

[24]JUSTICE SCALIA contends that comity concerns figure into the prior analysis whether jurisdiction exists under the Sherman Act. *Post,* at 19–20. This contention is inconsistent with the general understanding that the Sherman Act covers foreign conduct producing a substantial intended effect in the United States, and that concerns of comity come into play, if at all, only after a court has determined that the acts complained of are subject to Sherman Act jurisdiction. See *United States* v. *Aluminum Co. of America*, 148 F. 2d 416, 444 (CA2 1945) ("it follows from what we have . . . said that [the agreements at issue] were unlawful [under the Sherman Act], though made abroad, if they were intended to affect imports and did affect them"); *Mannington Mills, Inc.* v. *Congoleum Corp.*, 595 F. 2d 1287, 1294 (CA3 1979) (once court determines that jurisdiction exists under the Sherman Act, question remains whether comity precludes its exercise); H. R. Rep. No. 97–686, p. 13

the Court of Appeals believed that "application of [American] antitrust laws to the London reinsurance market `would lead to significant conflict with English law and policy,'" and that "[s]uch a conflict, unless outweighed by other factors, would by itself be reason to decline exercise of jurisdiction." *Id.*, at 933 (citation omitted). But other factors, in the court's view, including the London reinsurers' express purpose to affect United States commerce and the substantial nature of the effect produced, outweighed the supposed conflict and required the exercise of jurisdiction in this case. *Id.*, at 934.

When it enacted the Foreign Trade Antitrust Improvements Act of 1982 (FTAIA), 96 Stat. 1246, 15 U. S. C. §6a, Congress expressed no view on the question whether a court with Sherman Act jurisdiction should ever decline to exercise such jurisdiction on grounds of international comity. See H. R. Rep. No. 97–686, p. 13 (1982) ("If a court determines that the requirements for subject matter jurisdiction are met, [the FTAIA] would have no effect on the court['s] ability to employ notions of comity . . . or otherwise to take account of the international character of the transaction") (citing *Timberlane*). We need not decide that question here, however, for even assuming that in a proper case a court may decline to exercise Sherman Act jurisdiction over foreign conduct (or, as JUSTICE SCALIA would put it, may conclude by the employment of comity analysis in the first instance that there is no jurisdiction), international comity would not counsel

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(1982). But cf. *Timberlane Lumber Co.* v. *Bank of America, N. T. & S. A.*, 549 F. 2d 597, 613 (CA9 1976); 1 J. Atwood & K. Brewster, Antitrust and American Business Abroad 166 (1981). In any event, the parties conceded jurisdiction at oral argument, see *supra*, at 28–29, and we see no need to address this contention here.

against exercising jurisdiction in the circumstances alleged here.

The only substantial question in this case is whether "there is in fact a true conflict between domestic and foreign law." *Société Nationale Industrielle Aérospatiale* v. *United States District Court*, 482 U. S. 522, 555 (1987) (BLACKMUN, J., concurring in part and dissenting in part). The London reinsurers contend that applying the Act to their conduct would conflict significantly with British law, and the British Government, appearing before us as *amicus curiae*, concurs. See Brief for Petitioners in No. 91–1128, pp. 22–27; Brief for Government of United Kingdom of Great Britain and Northern Ireland as *Amicus Curiae* 10–14. They assert that Parliament has established a comprehensive regulatory regime over the London reinsurance market and that the conduct alleged here was perfectly consistent with British law and policy. But this is not to state a conflict. "[T]he fact that conduct is lawful in the state in which it took place will not, of itself, bar application of the United States antitrust laws," even where the foreign state has a strong policy to permit or encourage such conduct. Restatement (Third) Foreign Relations Law §415, Comment *j;* see *Continental Ore Co.*, *supra*, at 706–707. No conflict exists, for these purposes, "where a person subject to regulation by two states can comply with the laws of both." Restatement (Third) Foreign Relations Law §403, Comment *e*.[25] Since the London reinsurers do not argue that British law requires them to act in

[25]JUSTICE SCALIA says that we put the cart before the horse in citing this authority, for he argues it may be apposite only after a determination that jurisdiction over the foreign acts is reasonable. *Post,* at 23–24. But whatever the order of cart and horse, conflict in this sense is the only substantial issue before the Court.

some fashion prohibited by the law of the United States, see Reply Brief for Petitioners in No. 91–1128, pp. 7–8, or claim that their compliance with the laws of both countries is otherwise impossible, we see no conflict with British law. See Restatement (Third) Foreign Relations Law §403, Comment *e*, §415, Comment *j*. We have no need in this case to address other considerations that might inform a decision to refrain from the exercise of jurisdiction on grounds of international comity.

The judgment of the Court of Appeals is affirmed in part and reversed in part, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.