

# The Burger Court Opinion Writing Database

## *St. Paul Fire & Marine Insurance Co. v. Barry*

438 U.S. 531 (1978)

Paul J. Wahlbeck, George Washington University  
James F. Spriggs, II, Washington University in St. Louis  
Forrest Maltzman, George Washington University



✓  
Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
THE CHIEF JUSTICE

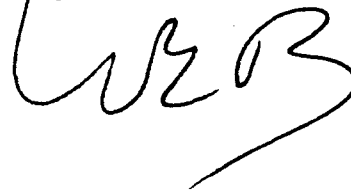
June 16, 1978

Re: 77-240 - St. Paul Insurance v. Barry

Dear Lewis:

I join.

Regards,



Mr. Justice Powell

Copies to the Conference

REPRODUCED FROM THE COLLECTIONS OF THE MANUSCRIPT DIVISION, LIBRARY OF CONGRESS

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE WM. J. BRENNAN, JR.

June 2, 1978

RE: No. 77-240 St. Paul Fire & Marine Ins. Co. v. Barry

Dear Lewis:

I want to join but have some problems.

Frankly I can't follow what you are trying to demonstrate in Part V-B. Maybe when I get a little more time to concentrate on it I can point up concretely what my difficulties are.

At page 10, line 1, you say:

"Petitioners define 'boycott' as embracing only those combinations which target competitors of the boycotters as objects of a concerted refusal to deal. This formulation may be an appropriate test for distinguishing the types of restraints that warrant per se invalidation from other practices, also referred to as boycotts, that are not inherently destructive of competition." (footnote omitted).

I gather this is only dictum and therefore unnecessary. But in any event it bothers me because it suggests a limitation on the per se rule since apparently it would be applicable only to boycotts that target competitors of the boycotters - a distinction inconsistent with decided cases or at least a distinction I don't think our cases make. For example, on the same page you refer to FMC v. Svenska Amerika Linien, 390 U.S. 238, 250 (1968), where we noted that "[u]nder the Sherman Act, any agreement by a group of competitors to boycott a particular buyer or group of buyers is illegal per se." Id., at 250 (emphasis added). It would appear from this language that the targets of the conspirators were customers, not competitors, but that the per se rule nevertheless is applicable. The same situation occurred in Fashion Originators Guild of America v. F.T.C., 312 U.S. 457 (1941), in which the targets of the boycott were customers of the Guild members. The object of the boycott was to induce the customers to with-

hold their trade from the Guild member's competitors - the style pirates - but the targets of the boycott were nevertheless the customers and not the competitors. Whether or not the target could be characterized as a competitor, moreover, is an inquiry which is uncertain and sophisticated. See Eastern States Retail Dealers' Ass'n v. United States, 234 U.S. 600 (1914); R. Posner, Antitrust Cases, Economic Notes & Other Material, 530-531 (1974). In light of these problems, isn't it advisable to delete the second sentence on page 10 together with footnote 14?

Finally, do you need anything of footnote 9 except the statement "respondents do not dispute that the requirements of §2(b) are met in this case." Isn't the rest also only dictum? It seems to me so and I'd prefer to drop it.

Sincerely,

Mr. Justice Powell

cc: The Conference

To: The Chief Justice  
Mr. Justice Stewart  
Mr. Justice White  
Mr. Justice Marshall  
Mr. Justice Blackmun  
Mr. Justice Powell  
Mr. Justice Brennan  
Mr. Justice Stevens

SUPREME COURT OF THE UNITED STATES

No. 77-240 O.T. 1977

From: Mr. Justice Brennan

Circulated: 6-13-78

Recirculated: \_\_\_\_\_

St. Paul Fire and Marine Insurance  
Company, et al.

v.

David M. Barry, et al.

On Writ of Certiorari to the  
United States Court of Ap-  
peals for the First Circuit

June \_\_\_\_ 1978

MR. JUSTICE BRENNAN concurring in part and concurring in the  
judgment.

I join the Court's opinion except Part V-B. Parts I through V-A  
establish that the conduct challenged here amounted to a boycott with-  
in the "tradition of meaning" evoked by the terminology Congress em-  
ployed in Sec. 3(b). Ante, at 9. But since "petitioners do not aver  
that state law or regulatory policy can be said to have required or  
authorized the concerted refusal to deal with St. Paul's customers,"  
ante, at 9, there is in my view no reason for Part V-B's discussion of  
the effect of state involvement upon the determination whether particu-  
lar conduct constitutes a "boycott" proscribed by Sec. 3(b).

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Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE WM. J. BRENNAN, JR.

June 15, 1978

RE: No. 77-240 St. Paul Fire & Marine Insurance Co.  
v. Barry

Dear Lewis:

Thank you very much for your note of June 14. Your suggested changes meet all of my difficulties. I therefore join and will withdraw my separate opinion.

Sincerely,

*Bill*

Mr. Justice Powell

cc: The Conference

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE POTTER STEWART

June 2, 1978

Re: No. 77-240, St. Paul Fire & Marine  
Ins. Co. v. Barry

Dear Lewis,

I expect to try my hand at a dissenting opinion  
in this case.

Sincerely yours,

P.S.

Mr. Justice Powell

Copies to the Conference

To: The Chief Justice  
Mr. Justice Brennan  
Mr. Justice White  
Mr. Justice Marshall  
Mr. Justice Blackmun  
Mr. Justice Powell  
Mr. Justice Rehnquist  
Mr. Justice Stevens

From: Mr. Justice Stewart

Circulated: 19 JUN 73

ST. PAUL FIRE & MARINE INSUR. CO., ET AL. V. BARRY, ET AL.

Recirculated: \_\_\_\_\_

NO. 77-240

MR. JUSTICE STEWART dissenting.

Section 2(b) of the McCarran-Ferguson Act provides that the Sherman Act "shall be applicable to the business of insurance to the extent that such business is not regulated by State law."<sup>1</sup> Section 3(b) limits the antitrust immunity which the States may confer by providing that the Sherman Act shall remain applicable to agreements or acts of "boycott, coercion, or intimidation."<sup>2</sup> Today the Court holds that the term "boycott" found in § 3(b) should be given the same broad meaning that it has been given in Sherman Act case law. It seems clear to me, however, that the "boycott, coercion, or intimidation" language of § 3(b) was intended to refer not to

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J 2, 3, 14-16

To: The Chief Justice  
Mr. Justice Brennan  
Mr. Justice White  
Mr. Justice Marshall  
Mr. Justice Blackman  
Mr. Justice Powell  
Mr. Justice Rehnquist  
Mr. Justice Stevens

From: Mr. Justice Stewart

Circulated: \_\_\_\_\_

ST. PAUL FIRE & MARINE INSUR. CO., ET AL. V. BARRY, ET AL. Recirculated: 21 JUN 1967

NO. 77-240

MR. JUSTICE STEWART, dissenting.

Section 2(b) of the McCarran-Ferguson Act provides that the Sherman Act "shall be applicable to the business of insurance to the extent that such business is not regulated by State law."<sup>1</sup> Section 3(b) limits the antitrust immunity which the States may confer by providing that the Sherman Act shall remain applicable to agreements or acts of "boycott, coercion, or intimidation."<sup>2</sup> Today the Court holds that the term "boycott" found in § 3(b) should be given the same broad meaning that it has been given in Sherman Act case law. It seems clear to me, however, that the "boycott, coercion, or intimidation" language of § 3(b) was intended to refer not to the practices defined and condemned by the Sherman Act, but to the narrower range of practices involved in United States v. South-Eastern Underwriters Assn, 322 U.S. 533, the case that prompted Congress to enact the McCarran-Ferguson Act.

10. The Chief Justice  
Mr. Justice Brennan  
Mr. Justice White  
Mr. Justice Marshall  
Mr. Justice Blackmun  
Mr. Justice Powell  
Mr. Justice Rehnquist  
Mr. Justice Stevens

From: Mr. Justice Stewart

Circulated: \_\_\_\_\_

1st DRAFT Recirculated: 2.7 JUN 1978 printed

## SUPREME COURT OF THE UNITED STATES

No. 77-240

St. Paul Fire & Marine Insurance Company et al.,  
Petitioners,

v.

David M. Barry et al.

On Writ of Certiorari to the  
United States Court of Appeals for the First Circuit.

[June —, 1978]

MR. JUSTICE STEWART, dissenting.

with whom MR. REHNQUIST joins

Section 2 (b) of the McCarran-Ferguson Act provides that the Sherman Act "shall be applicable to the business of insurance to the extent that such business is not regulated by State law."<sup>1</sup> Section 3 (b) limits the antitrust immunity which the States may confer by providing that the Sherman Act shall remain applicable to agreements or acts of "boycott, coercion, or intimidation."<sup>2</sup> Today the Court holds that the

<sup>1</sup> Section 2 provides in full:

"(a) The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business.

"(b) No 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, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance: *Provided*, That after June 30, 1948, the Act of July 2, 1890, as amended, known as the Sherman Act, and the Act of October 15, 1914, as amended, known as the Clayton Act, and the Act of September 26, 1914, known as the Federal Trade Commission Act, as amended, shall be applicable to the business of insurance to the extent that such business is not regulated by State law." 59 Stat. 34, 61 Stat. 448. 15 U. S. C. § 1012.

<sup>2</sup> Section 3 provides in full:

"(a) Until June 30, 1948, the Act of July 2, 1890, as amended, known as the Sherman Act, and the Act of October 15, 1914, as amended, known as the Clayton Act, and the Act of September 26, 1914, known as the Federal

✓  
Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE BYRON R. WHITE

June 20, 1978

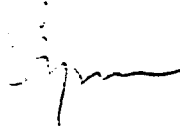
Re: 77-240 - St. Paul Fire & Marine  
Insurance Company v.  
David M. Barry

---

Dear Lewis,

Please join me in your circulation  
of June 7 as modified by your June 15  
amendments.

Sincerely yours,



Mr. Justice Powell

Copies to the Conference

REPRODUCED FROM THE COLLECTIONS OF THE MANUSCRIPT DIVISION, LIBRARY OF CONGRESS

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE THURGOOD MARSHALL

June 2, 1978

Re: No. 77-240 - St. Paul Fire & Marine Ins. Co.  
v. Barry

Dear Lewis:

I will wait for the dissent.

Sincerely,

*JM*  
T.M.

Mr. Justice Powell

cc: The Conference

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Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE THURGOOD MARSHALL

June 13, 1978

Re: No. 77-240 - St. Paul Fire & Marine Ins. Co.  
v. Barry

Dear Bill:

Please join me.

Sincerely,

*T.M.*  
T.M.

Mr. Justice Brennan

cc: The Conference

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE THURGOOD MARSHALL

June 16, 1978

Re: No. 77-240 - St. Paul Fire & Marine Ins. v. Barry

Dear Lewis:

Please join me.

Sincerely,

*JM.*  
T.M.

Mr. Justice Powell

cc: The Conference

✓  
✓  
Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE HARRY A. BLACKMUN

June 16, 1978

Re: No. 77-240 - St. Paul Fire and Marine  
Insurance Co. v. Barry

Dear Lewis:

At least for now, I shall continue to await the  
dissent.

Sincerely,

*Harry*

Mr. Justice Powell

cc: The Conference

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE HARRY A. BLACKMUN

June 20, 1978

Re: No. 77-240 - Saint Paul Fire & Marine Insurance Co.  
v. Barry

Dear Lewis:

Please join me.

Sincerely,



Mr. Justice Powell

cc: The Conference



1fp/ss 5/31/78

*LFP  
I need your  
file  
APL*

To: The Chief Justice  
Mr. Justice Brennan  
Mr. Justice Stewart  
Mr. Justice White  
Mr. Justice Marshall  
Mr. Justice Blackmun  
Mr. Justice Rehnquist  
Mr. Justice Stevens

From: Mr. Justice Powell

Circulated: 31 MAY 1978

Recirculated: \_\_\_\_\_

No. 77-240, St. Paul Fire & Marine Ins. Co. v. Barry

MR. JUSTICE POWELL delivered the opinion of the Court.

Respondents, licensed physicians practicing in the State of Rhode Island and their patients, brought a class action, in part under the Sherman Act, 26 Stat. 209, as amended, 15 U.S.C. § 1 et seq., against petitioners, the four insurance companies writing medical malpractice insurance in the State. The complaint alleged a private conspiracy of the four companies in which three of the petitioners refused to sell respondents insurance of any type as a means of compelling their submission to new ground rules of coverage set by the fourth. Petitioner insurers successfully moved in District Court to dismiss the antitrust claim on the ground that it was barred by the McCarran-Ferguson Act (Act), 59 Stat. 33, as amended, 15 U.S.C. §§ 1011-15. 1/ The Court of Appeals reversed, holding that respondents' complaint stated a claim within

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June 1, 1978

No. 77-240 St. Paul v. Barry

Dear John:

I so much appreciate your extremely prompt attention to my opinion circulated yesterday.

Most of your suggested changes are entirely agreeable including those you noted on pages 6, 20 (line 18), 21-22, 23, and footnote 10. I may change some of the wording slightly from your suggestions, but I will try to be faithful to your thinking.

The one suggested change that does give me substantive trouble relates to the labor cases. The truth is, as you recognize from your antitrust experience, there is no prior decision of this Court that defines "boycott" in a way that indisputably covers this case. Montague did not use the term "boycott". Although the labor cases are tangential, I do think they lend support to our position, particularly with respect to petitioners' contention that only competitors can be targets of boycotts. I therefore would like to retain a reference to them in the opinion. I would like to find some mutually agreeable language.

Rather than delete the sentence in the text on page 10, I think the language can be revised in a way satisfactory to you.

As to the second paragraph of footnote 14, again I am quite willing to try to find some mutually agreeable "slight" modification - as you suggest.

Finally, I have a suggested change for footnote 29 that I believe will meet your concern.

As I will be away at our son's wedding until Monday, I am asking Sam Estreicher - who has worked with me on this case - to consult with your clerk (Stu Baker, I believe) with the view to resolving these matters.

This case was not as easy to write as I had expected. The principal difficulty is that Congress clearly intended to give the states extremely wide regulatory authority. The amicus brief on behalf of the state regulatory commissions emphasizes the danger of our deciding this case too broadly.

With three of our Brothers in dissent, and with a couple of others who may view "boycott" more expansive than I do, I have tried to hold the middle ground in writing this opinion. I therefore particularly welcome your general approval and assistance.

Sincerely,

Mr. Justice Stevens

lfp/ss

6, 9, 10-11, 20, 23-25

To: The Chief Justice  
Mr. Justice Brennan  
Mr. Justice Stewart  
Mr. Justice White  
Mr. Justice Marshall  
Mr. Justice Blackmun  
Mr. Justice Rehnquist  
Mr. Justice Stevens

From: Mr. Justice Powell

Circulated: \_\_\_\_\_

Recirculated: 2 JUN 1978

1st PRINTED DRAFT

## SUPREME COURT OF THE UNITED STATES

No. 77-240

St. Paul Fire & Marine Insurance Company et al., Petitioners, v. David M. Barry et al.	}	On Writ of Certiorari to the United States Court of Appeals for the First Circuit.
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[June —, 1978]

MR. JUSTICE POWELL delivered the opinion of the Court.

Respondents, licensed physicians practicing in the State of Rhode Island and their patients, brought a class action, in part under the Sherman Act, 26 Stat. 209, as amended, 15 U. S. C. § 1 *et seq.*, against petitioners, the four insurance companies writing medical malpractice insurance in the State. The complaint alleged a private conspiracy of the four companies in which three refused to sell respondents insurance of any type as a means of compelling their submission to new ground rules of coverage set by the fourth. Petitioner insurers successfully moved in District Court to dismiss the antitrust claim on the ground that it was barred by the McCarran-Ferguson Act (Act), 59 Stat. 33, as amended, 15 U. S. C. §§ 1011-1015.<sup>1</sup> The Court of Appeals reversed, holding that respondents' complaint

<sup>1</sup> The McCarran-Ferguson Act provides in relevant part:

"Sec. 2. (a) The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business.

"(b) No 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 or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance: *Provided*, That after June 30, 1948, the Act of July 2, 1890, as amended, known, as

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE LEWIS F. POWELL, JR.

June 5, 1978

No. 77-240, St. Paul Fire & Marine Ins. Co. v. Barry

Dear Bill:

As I have been away at Lewis III's wedding, I have not been able to respond to your letter of June 2 until today. Nor could the circulation of the printed draft on Friday incorporate your suggestions.

With respect to specific suggestions, I do not think we are far apart. I will make the deletion in footnote 9 that you suggest. Your discussion of my language on page 10 suggests that the draft intimates an approval of Professor Sullivan's view that boycotts per se violative of the Sherman Act are limited to practices directed at uncooperative competitors. I do not intend such an intimation, and perhaps on rereading you will agree. Also, footnote 14 makes clear that other commentators have suggested a broader definition of the per se offense in this area.

While I find the Court's boycott decisions a bit more complicated than your letter suggests to be the case, and even respondents suggest that a per se rule may not be applicable to all "boycotts" (pp. 45-47 of respondents' brief), I do not believe that the language of page 10 and footnote 14 fairly may be read to "suggest ... a limitation on the per se rule ...." I discuss the Sullivan view only to make the point that his writing addresses the question of the proper scope of a per se offense in this area, whereas our task is to decide the types of conduct that Congress intended to reach by using the word "boycott" in § 3(b).

I hope that the new language on page 10 makes clear the above point. I propose to amend further the sentence in question to indicate that the distinction

Sullivan draws is between "the types of restraints that warrant per se invalidation" and "other concerted refusals to deal that are not inherently destructive of competition." I will add a disclaimer to footnote 14, stating that "we express no opinion, however, as to the merit of any of these definitions."

I am more troubled by your expression of inability to "follow" Part V-B. I would have thought that the purpose of that section is clear, although it may be written more artfully. In my view, the "boycott" clause refers only to unsupervised, unauthorized private conduct that may be characterized as a "boycott" within the customary antitrust usage at the time of enactment. As Senator O'Mahoney put it, the clause reaches certain forms of "regulation by private combinations or groups" or certain "combinations and agreements" not "in the open and approved by law." The essentially private nature of a boycott is reflected in the language of South-Eastern Underwriters. Hugo Black's opinion for the Court noted: "No states authorize combinations of insurance companies to coerce, intimidate, and boycott competitors and consumers in the manner here alleged ...." 322 U.S., at 562 (emphasis supplied). Justice Jackson, dissenting in part, foresaw no difficulty with Sherman Act "prosecution of all combinations in the course of the insurance business to commit acts not required or authorized by state law, such as intimidation, disparagement, or coercion...." Id., at 588-589 (emphasis supplied).

Part V-B is important to my understanding of the case. I would come out quite differently had the Rhode Island insurance commissioner - pursuant to state law - authorized private companies to form a bureau to pool rate and claims data, and make decisions based on that data to deny coverage to particular classes of risks, (e.g., medical malpractice), or particular policyholders, (e.g., automobile insureds with a history of repeated traffic offenses). Absent the element of state regulatory authorization, the conduct of insurance companies in such a scheme is not significantly different from the conduct alleged in this case. But that element cannot be ignored. Such a regulation would have to be specifically authorized by state law, and subject to ongoing regulatory supervision. But it would not involve the type of unsupervised, unauthorized collaborative conduct present in this case, and that Congress intended to reach in §3(b).

There are two approaches that could be taken to the hypothetical outlined above. My view is that conduct directed or authorized by state regulatory policy is protected by § 2(b), and is not a "boycott" within the meaning of § 3(b).

Another view might be that such conduct may be a "boycott," but it receives an antitrust immunity by virtue of the Parker v. Brown doctrine. There are several reasons why I have not adopted the latter position. First, as footnote 28 indicates and as Harry recognized in his separate opinion in Cantor, Congress at the time took a very narrow view of Parker, and intended the McCarran-Ferguson Act to provide protection thought to be unavailable under Parker. Second, if one reaches the conclusion that particular conduct is a "boycott," without reference to the element of state regulatory direction or oversight, some difficulty remains in explaining the repeated references in the legislative history to the view that the States cannot authorize conduct amounting to a "boycott, coercion, or intimidation"; my explanation of those references is offered in footnote 25.

Finally, I believe that Congress intended to recognize in the States a measure of flexibility in designing regulatory policy in the insurance field that may be unavailable, under the judicial "state action" doctrine, in light of Goldfarb and Cantor. This point is not emphasized in my draft, for the precise contours of that measure of flexibility need not be identified in this case. But rather than dilute the force of Goldfarb and Cantor in contexts other than insurance, it seems to me that the better course is to recognize that the McCarran-Ferguson Act is a specific congressional enactment addressed to state regulation of the insurance business that supplants the judge-made Parker doctrine.

While the substance of Part V-B, is essential to my view of this case, I invite any suggestions as to language.

I do appreciate your writing, and see no reason why we can't get together.

Sincerely,

*Lewis*

Mr. Justice Brennan

lfp/ss

cc: The Conference

To: The Chief Justice  
 Mr. Justice Brennan  
 Mr. Justice Stewart  
 Mr. Justice White  
 Mr. Justice Marshall  
 Mr. Justice Blackmun  
 Mr. Justice Rehnquist  
 Mr. Justice Stevens

From: Mr. Justice Powell

**Stylistic Changes Throughout**

Circulated: \_\_\_\_\_

2nd DRAFT

Recirculated: 7 JUN 1978

# SUPREME COURT OF THE UNITED STATES

No. 77-240

St. Paul Fire & Marine Insurance Company et al.,	} On Writ of Certiorari to the United States Court of Appeals for the First Circuit.
Petitioners,	
v.	
David M. Barry et al.	

[June —, 1978]

MR. JUSTICE POWELL delivered the opinion of the Court.

Respondents, licensed physicians practicing in the State of Rhode Island and their patients, brought a class action, in part under the Sherman Act, 26 Stat. 209, as amended, 15 U. S. C. § 1 *et seq.*, against petitioners, the four insurance companies writing medical malpractice insurance in the State. The complaint alleged a private conspiracy of the four companies in which three refused to sell respondents insurance of any type as a means of compelling their submission to new ground rules of coverage set by the fourth. Petitioner insurers successfully moved in District Court to dismiss the antitrust claim on the ground that it was barred by the McCarran-Ferguson Act (Act), 59 Stat. 33, as amended, 15 U. S. C. §§ 1011-1015.<sup>1</sup> The Court of Appeals reversed, holding that respondents' complaint

<sup>1</sup> The McCarran-Ferguson Act provides in relevant part:

"Sec. 2. (a) The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business.

"(b) No 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 or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance: *Provided*, That after June 30, 1948, the Act of July 2, 1890, as amended, known as



*Supreme Court of the United States*  
Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE LEWIS F. POWELL, JR.

June 14, 1978

No. 77-240 St. Paul v. Barry

*Wad for  
WLB*

Dear Bill and Thurgood:

As you have been good enough to join all of my opinion except Part V(B), and also as we were together at Conference in voting to affirm, I would like to do what I reasonably can to accommodate your views as to V(B).

As I understand it, from what Bill had said to me and also from discussions among our clerks, you would prefer to reserve for a future case the question as to the effect of state authorization of what otherwise might be deemed "a boycott" under §3(b). I included the present discussion because of the deep concern expressed in the amicus brief on behalf of the state regulatory agencies as to the consequences, upon state regulation, of an affirmance in this case.

I have concluded, however, that we can leave the question open in such a manner as to allay substantially these fears, and still reserve freedom of future action by the Court. I am asking Sam Estreicher to deliver to your respective clerks, working on this case, copies of my suggested changes in the opinion.

If these meet with your approval, I will try to clear them with John who has joined me and then recirculate promptly.

I appreciate your cooperation.

Sincerely,

*Lewis*

Mr. Justice Brennan  
Mr. Justice Marshall

LFP/lab

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There was no state authorization  
of the conduct in question.

77-240—OPINION

20

ST. PAUL FIRE & MARINE INS. CO. v. BARRY

"agreements or combinations in the public interests [sic] which can safely be permitted," *id.*, at 1486.

B

We emphasize that the conduct with which petitioners are charged appears to have occurred outside of any regulatory or cooperative arrangement established by the laws of Rhode Island. ~~That~~ <sup>This</sup> was the explicit premise of the Court of Appeals' decision, see 555 F. 2d, at 9, and petitioners do not aver that state law or regulatory policy can be said to have required or authorized the concerted refusal to deal with St. Paul's customers.<sup>24</sup>

We do not agree with petitioners that the issue of state authorization *vel non* is irrelevant to the § 3 (b) inquiry: The element of state regulatory direction or oversight of the particular practice cannot be disregarded in the process of determining whether that conduct constitutes a "boycott" within the meaning of § 3 (b). The distinction here is between the type of general regulation of the insurance industry that is sufficient to preclude generally the application of federal law under § 2 (b), see *F. T. C. v. National Casualty Co.*, *supra*, and specific regulatory focus on a particular course of conduct that otherwise would fall within the "boycott" exception of § 3 (b).<sup>25</sup>

<sup>24</sup> Counsel for petitioners stated at oral argument that he was not sure whether St. Paul had filed the specific policy change in issue with the Director of the state insurance division. Tr. of Oral Arg. 8. Even if we assume that such a filing had been made, there is no suggestion that the State, in furtherance of its regulatory policies, authorized the concerted refusal to deal on any terms with St. Paul's policyholders.

Although the dissenting opinion below noted "that Rhode Island has exercised its right to regulate all material aspects of the business of insurance and that the actions complained of relative to withholding malpractice insurance were all part of such regulated business," 555 F. 2d, at 14, this statement refers to the requirements of the proviso to § 2 (b). The dissent did not argue that the agreement in question was within the contemplation of any state regulatory scheme.

<sup>25</sup> Petitioners intimate that since Congress intended to prevent the States

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE LEWIS F. POWELL, JR.

June 15, 1978

No. 77-240, St. Paul Fire & Marine Ins. Co. v. Barry

MEMORANDUM TO THE CONFERENCE

I enclose pp. 20-25 of my circulation of June 7 with the indicated revisions, including a revised note 25 set out in a separate sheet. These changes have been sent to the printer with stylistic changes.

*L.F.P.*  
L.F.P., Jr.

SS

lfp/ss 6/15/78

No. 77-240, St. Paul Fire & Marine Ins. v. Barry--Note 25

25. Since this case does not involve state direction or authorization of the conduct in question, we do not address the question whether the element of state regulatory direction or oversight of the particular practice is a factor to be considered in the definitional process of deciding that particular activity constitutes a "boycott" within the meaning of § 3(b), or whether it comes into play as part of a possible defense under the "state action" doctrine, as elaborated in Parker v. Brown, 317 U.S. 341 (1943), and its progeny.

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE LEWIS F. POWELL, JR.

June 20, 1978

No. 77-240, St. Paul Fire & Marine Ins. Co. v. Barry

MEMORANDUM TO THE CONFERENCE

Absent dissent, I propose to add the following, by way of response to Potter's dissent. These changes, set out in separate sheets, have been sent to the printer with stylistic changes.

*L. F. P.*  
L.F.P., Jr.

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New Footnote 18 to appear at the end of the first sentence  
of the first complete paragraph on p. 13:

We note our disagreement with MR. JUSTICE STEWART'S expression of alarm that a reading of the operative terms of § 3(b), consistent with traditional Sherman Act usage, "would plainly devour the broad antitrust immunity bestowed by § 2(b)." Post, at 5. As with "boycott," the words "coercion" and "intimidation" have acquired a discernible meaning in this Court's antitrust decisions. See, e.g., Eastern States Lumber Ass'n v. United States, 234 U.S. 600, 611 (1914), quoting Gompers v. Buck Stove & Range Co., 221 U.S. 418, 438 (1911). Whatever the precise reach of these terms, the decisions of this Court do not support the dissent's suggestion that they are coextensive with the prohibitions of the Sherman Act. In this regard, we are not cited to any decision illustrating the assertion, post, at 5 n.6., that mere price-fixing, in the absence of any additional enforcement activity, has been treated either as "a boycott" or "coercion."

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE LEWIS F. POWELL, JR.

June 23, 1978

Re: No. 77-240, St. Paul Fire & Marine Ins. v. Barry

MEMORANDUM TO THE CONFERENCE

Because of the backlog at the printer, I have been unable to recirculate a third draft of my opinion. Minor changes made in the material circulated on June 20 are set out in separate sheets. In addition, I have streamlined the language of the last footnote (now footnote 27). The final page of the opinion, reflecting this change, also is attached.

Sincerely,

*L. F. P.*

L.F.P., Jr.

— lfp/ss 6/23/78 .

New Footnote 18 to appear at the end of the first sentence of the first complete paragraph on p. 13:

18. We note our disagreement with MR. JUSTICE STEWART'S expression of alarm that a reading of the operative terms of §3(b), consistent with traditional Sherman Act usage, "would plainly devour the broad antitrust immunity bestowed by §2(b)." Post, at 5.

Whatever the precise reach of the terms "boycott, coercion and intimidation", the decisions of this Court do not support the dissent's suggestion that they are coextensive with the prohibitions of the Sherman Act. See, e.g., Eastern States Lumber Ass'n v. United States, 234 U.S. 600, 611 (1914), quoting Gompers v. Buck Stove & Range Co., 221 U.S. 418, 438 (1911). In this regard, we are not cited to any decision illustrating the assertion, post, at 5 n. 6, that price-fixing activity, has been treated either as "a boycott" or "coercion."



22

New Footnote 21 to appear at the end of the incomplete paragraph on p. 17:

22 <sup>1/1</sup>. The dissenting opinion of MR. JUSTICE STEWART advances the view, abandoned by petitioners in this Court, see pp. 13-14, and n. 18, supra, that § 3(b) applies only "to the kinds of antitrust violations alleged in South-Eastern Underwriters ...." Post, at 13. The dissent refers to no statement, either in the committee reports or the debates, asserting that § 3(b)'s only purpose was to keep alive the South-Eastern Underwriters indictment or restricting its scope to the practices specifically alleged therein. There is nothing in the proposal of the National Association of Insurance Commissioners, identified by the dissent as the model for the Senate bill, S.340, that evinces such a limited purpose. Removing the dissent's ellipsis, that proposal stated in pertinent part:

"No exemption is sought nor expected for oppressive or destructive practices. On the whole, insurance has been conducted on a high plane, with great benefit to the public, and if inconsistent procedures are found they must be eradicated. Provision is made that the Sherman Act shall not now or hereafter be inapplicable to any act of boycott, coercion, or intimidation." 90 Cong. Rec. A4406 (1944) (emphasis supplied).

It is difficult to view this language as "echoing the Court's opinion in South-Eastern Underwriters ...." Post, at 9.

It also is asserted that the "boycott" clause in

lfp/ss 6/23/78

Footnote 22 continued

the Senate bill was intended to apply only during the moratorium period, a fact which supposedly supports the dissent's narrow reading of the clause. Id., 10-11, and n. 20. But the dissent concedes that "[w]hatever its initial impetus . . . , there is no indication that that provision was finally thought to be applicable only to the South-Eastern litigation." Ibid. Moreover, neither the committee report, see p. 14, supra, nor the insurance commissioners' proposal, quoted above, suggest<sup>s</sup> an intent to suspend the operation of the "boycott" clause at any time. Certainly Senator Ferguson disclaimed such an intent. See 91 Cong. Rec., at 479. There simply is no persuasive evidence of an original intention merely to preserve the South-Eastern Underwriters indictment.

Changes made in circulations  
of June 15, 20, and 23, 1978:  
included in this draft.

To: The Chief Justice  
Mr. Justice Brennan  
Mr. Justice Stewart  
Mr. Justice White  
Mr. Justice Marshall  
Mr. Justice Blackmun  
Mr. Justice Rehnquist  
Mr. Justice Stevens

From: Mr. Justice Powell

Circulated: \_\_\_\_\_

3rd DRAFT

Recirculated 26 JUN 1978

## SUPREME COURT OF THE UNITED STATES

No. 77-240

St. Paul Fire & Marine Insurance Company et al., Petitioners, v. David M. Barry et al.	}	On Writ of Certiorari to the United States Court of Appeals for the First Circuit.
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[June —, 1978]

MR. JUSTICE POWELL delivered the opinion of the Court.

Respondents, licensed physicians practicing in the State of Rhode Island and their patients, brought a class action, in part under the Sherman Act, 26 Stat. 209, as amended, 15 U. S. C. § 1 *et seq.*, against petitioners, the four insurance companies writing medical malpractice insurance in the State. The complaint alleged a private conspiracy of the four companies in which three refused to sell respondents insurance of any type as a means of compelling their submission to new ground rules of coverage set by the fourth. Petitioner insurers successfully moved in District Court to dismiss the antitrust claim on the ground that it was barred by the McCarran-Ferguson Act (Act), 59 Stat. 33, as amended, 15 U. S. C. §§ 1011-1015.<sup>1</sup> The Court of Appeals reversed, holding that respondents' complaint

<sup>1</sup> The McCarran-Ferguson Act provides in relevant part:

"Sec. 2. (a) The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business.

"(b) No 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 or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance: *Provided*, That after June 30, 1948, the Act of July 2, 1890, as amended, known as

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE LEWIS F. POWELL, JR.

June 26, 1978

MEMORANDUM TO THE CONFERENCE:

Case Held for No. 77-240, St. Paul v. Barry

The only hold is No. 77-580, Proctor v. State Farm Mut. Auto. Ins. Co.

Petitioners, owners of four automobile repair shops, brought an antitrust action against five insurers charging that their claims adjustment and settlement practices involved price fixing and a group boycott of repair shops who would not adhere to the set labor rates for repair work. After three years of discovery, respondents moved for summary judgment on two grounds: (i) the asserted failure of petitioners to adduce evidence in support of their charges; and (ii) immunity from the antitrust laws by virtue of the McCarran-Ferguson Act. The District Court granted the motion, relying primarily on the second ground.

The Court of Appeals affirmed. 561 F.2d 262 (CA DC 1977). It held that under SEC v. National Securities, Inc., 393 U.S. 463 (1969), the activities in question were part of the "business of insurance" within the meaning of § 2(b), because they were intimately related to the claims adjustment and settlement process and to the insurers' rate-making structure. There was no dispute as to the adequacy of state regulation under § 2(b). On the § 3(b) issue, the court ruled that while the price-fixing allegations did not state a claim, the allegation of a group boycott of nonconforming repair shops did state a claim of "boycott" within the meaning of the exception. Nonetheless, it determined that the District Court did not err in granting summary judgment because of petitioners' failure to produce any evidence of the alleged boycott. Judge Wright dissented on the summary judgment question.

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE LEWIS F. POWELL, JR.

June 26, 1978

Case Held for No. 77-240, St. Paul v. Barry

MEMORANDUM TO THE CONFERENCE

I would like to correct an oversight in the memo relating to No. 77-580, Proctor v. State Farm Mut. Auto Ins. Co. That case is a hold for No. 77-952, Group Life and Health Ins. Co. v. Royal Drug Co. In Group Life the Fifth Circuit held that an insurer's arrangements for the provision of prescription drugs to its insureds was not within the "business of insurance," and thus not covered by the antitrust exemption provided in the McCarran-Ferguson Act. That ruling arguably is in conflict with Proctor and decisions in other Circuits.

As I believe the petn in Group Life will provide adequate opportunity to consider whether the "business of insurance" extends to arrangements between insurers and independent suppliers of services to insureds, I will vote to hold Proctor for that case.

L.F.P.  
L.F.P., Jr.

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE WILLIAM H. REHNQUIST

June 7, 1978

Re: No. 77-240 St. Paul Fire & Marine Insurance Co. v.  
Barry

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Dear Lewis:

I shall await Potter's dissent in this case.

Sincerely,



Mr. Justice Powell

Copies to the Conference

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE WILLIAM H. REHNQUIST

June 21, 1978

Re: No. 77-240 St. Paul Fire & Marine Insurance  
Co. v. Barry

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Dear Potter:

Please join me in your dissent in this case.

Sincerely,



Mr. Justice Stewart

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Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE JOHN PAUL STEVENS

June 1, 1978

PERSONAL

RE: No. 77-240 - St. Paul Fire & Marine Ins. Co. v. Barry

Dear Lewis:

Although I agree with all of the substance and most of the language in your opinion, and I am sure I will join it, I do have some suggestions. I realize that they are somewhat trivial, but on the other hand, they may require only small language changes. Let me just list them in order:

Page 6 - In the middle of the page you refer to the holding in South-Eastern Underwriters that a fire insurance company conducting interstate transactions is "subject to federal regulation under the Commerce Clause." I wonder if you would substitute something like "engaged in interstate commerce." My reason is that I have always felt very deeply that one of the great virtues of the Sherman Act is that it is a nonregulatory statute which prohibits private regulation of the market and I always try to avoid describing it as a species of federal regulation. OK

Page 9 - I wonder if you might consider omitting or minimizing the reliance on the labor cases. I do not think it is quite accurate that the term "boycott" first entered the lexicon of antitrust law in labor cases because, as you note in footnote 12, Montague v. Lowry was a boycott case that was decided in 1904, and the labor cases arose later. Frankly I do not think the opinion would suffer if you simply deleted everything on page 9 after the reference to footnote 11. ??

NO. Montague did not use the term "boycott." As far as I can tell, the term was first used in the labor cases, see Loewe v. Lawlor (1908). I told this to JPS' clerk, and JPS may relent on this.



Page 10 - Would you consider simply deleting the second sentence on page 10? I think it is unnecessary and I would prefer not to speculate on whether or not the test is appropriate for the purpose that you indicate.

NO. I would simply say "may or may not state an appropriate test"

Page 20, Line 18 - Because I question whether a state's "sanction" of a boycott will always be enough to save it from antitrust scrutiny, I would be happier if you could omit the word "sanction" at the end of the line, or perhaps insert the words "indeed, even" ahead of it. OK - WJB is going to insist on this, too.

Pages 21-22 - The sentence at the bottom of page 21 and top of page 22 may be a little broader than necessary to make your point. I wonder if you would consider revising the two lines at the bottom of 21 and top of 22 to read this way "clear that such conduct of insurance companies is immunized from the reach of the . . . ." OK, but I don't see why this is desirable. ~~type~~

Page 23 - Because the word "sanction" may be read more broadly than we intend, I wonder if you would consider changing the last sentence of the opinion to read: "Nor does our holding involve insurance practices that are compelled, authorized, or sanctioned by state regulatory policy."

I would simply drop "sanctioned".

I also have some problem with these footnotes:

In footnote 10, I wish you would eliminate the second sentence. I think it is perfectly clear that the words "coercion" and "intimidation" refer to something more than a "boycott." Specifically, they would refer to individual conduct that might violate § 2 of the Sherman Act whereas a boycott is basically a § 1 offense. I would not like even to imply that § 2 is totally inapplicable to the insurance industry. OK, but I wrote this footnote because

JPS clerk indicated to me that his boss wanted an explicit reservation. In footnote 14, I wonder if you would consider simply omitting the second paragraph, or possibly modifying it slightly. I have always regarded the per se analysis as a species of the rule of reason. In other words, pricefixing is per se unreasonable, and therefore unlawful. This is not

NO. I would like to leave open the possibility that a per se rule does not apply where the boycott practice is not aimed at competitors.

It seems desirable to make clear that

whether "per se" or "rule of reason" analysis is involved. Perhaps we could change language

terribly important but I am not sure the second paragraph adds anything to the opinion.

Footnote 29, although I think it is probably correct, really is gratuitous advice that I believe we should not be giving when no such issue is presented. I would not object to retaining it if you revised it to indicate that those issues are not before us or something of that character.

I'm not sure how to  
do it. But I'll work  
on it. Try

Respectfully,



Mr. Justice Powell

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE JOHN PAUL STEVENS

June 2, 1978

RE: No. 77-240 - St. Paul v. Barry

Dear Lewis:

Please join me.

Respectfully,



Mr. Justice Powell

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Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE JOHN PAUL STEVENS

June 16, 1978

Re: 77-240 - St. Paul Fire & Marine v. Barry

Dear Lewis:

I am still with you.

Respectfully,



Mr. Justice Powell

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