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Group Life & Health Insurance Co. v. Royal Drug Co.

440 U.S. 205 (1979)

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

October 16, 1978

Re: 77-952 - Group Life & Health Insurance Co. v. Royal Drug Co.

MEMORANDUM TO THE CONFERENCE

Our vote was 4 to affirm, 2 to reverse, 1 to vacate and remand, and 1 (mine) to vacate and remand or reverse. One vote (WHR) passed.

I will await final action.

Regards,

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

CHAMBERS OF
THE CHIEF JUSTICE

October 16, 1978

RE: 77-952 - Group Life & Health Insurance Co.
v. Royal Drug Co.

MEMORNADUM TO THE CONFERENCE:

My line-up now stands:

to reverse (or possible vacate and remand)

LFP
TM
WEB

to affirm

JPS
HAB(?)
BRW
PS

to vacate and remand

WJB
WHR

I will await further clarification.

Regards,

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

CHAMBERS OF
THE CHIEF JUSTICE

October 19, 1978

Re: 77-952 - Group Life and Health Insurance v. Royal Drug Company

MEMORANDUM TO THE CONFERENCE:

In light of the present status of this case, it seems to me to be a candidate for a memo.

Bill Brennan has agreed to write a memo and, of course, anyone else is welcome to do the same.

Regards,

WEB

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

CHAMBERS OF
THE CHIEF JUSTICE

January 4, 1979

Re: 77-952 - Group Life & Health Ins. v. Royal Drug Co.

Dear Bill:

I suppose I am influenced by a considerable exposure to the operation of the insurance business, but I remain where I was and would join your view if converted to an opinion -- one way or the other.

Regards,

WEB

Mr. Justice Brennan

Copies to the Conference

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

CHAMBERS OF
THE CHIEF JUSTICE

February 2, 1979

Re: 77-952 - Group Life v. Royal Drug

Dear Bill:

This will confirm my memo of January 4, 1978, joining your position, which is now a dissent.

Regards,

WEB

Mr. Justice Brennan

Copies to the Conference

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

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

October 19, 1978

Re: No. 77-952, Group Life and Health Co. v. Royal Drug Co.

Dear Chief:

My conference vote to vacate and remand to the District Court was premised upon the view that the ambiguously phrased complaint might be read either of two ways: (1) to allege a conspiracy among drug stores to fix prices that was joined by Blue Shield, or (2) to allege that Blue Shield acted for its policy holders in negotiating provider contracts with drug stores. In my view if (1) was the correct reading, Blue Shield's conduct was not the "business of insurance". If (2) was the correct reading Blue Shield's conduct was the "business of insurance".

Lewis' memo persuades me, however, that the District Court had, in his words, "all the facts necessary to decide" which of the two theories was the gravamen of respondents' case. Lewis' memo also persuades me that the evidence presented to the District Court did not support the theory of collaboration among the drug-stores, but rather supported the theory that Blue Shield acted unilaterally in negotiating the provider contracts for its policy holders. I am prepared to change my vote from "vacate and remand" to "reverse" on the "business o insurance" issue.

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But I have considerable doubt that we should address either the state regulation or boycott questions. True, the district court did and found for petitioners on both. The Court of Appeals did not address either question, however, and I think it is preferable that the Court of Appeals do so before we consider either. Therefore, while I would reverse the Court of Appeals' holding that this was not the "business of insurance", I would remand to that court for determination of the state regulation and boycott issues.

Sincerely,

The Chief Justice

Copies to the Conference

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

Circulated: 27 NOV

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1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 77-952

Group Life & Health Insurance Company, Etc., et al., Petitioners, v. Royal Drug Company, Etc., et al.	On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

[December —, 1978]

Memorandum of MR. JUSTICE BRENNAN.

The McCarran-Ferguson Act, 59 Stat. 34 (1945), as amended, 15 U. S. C. §§ 1011–1015, renders the federal antitrust laws inapplicable to the "business of insurance" to the extent such business is regulated by state law and is not subject to the "boycott" exception stated in § 1013 (b).[1] The single question presented by this case is whether the "business of insurance" includes direct contractual arrangements ("pro-

[1] Section 2 (b) of the Act, 15 U. S. C. § 1012 (b) provides:

"(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 [15 U. S. C. 41 et seq.], shall be applicable to the business of insurance to the extent that such business is not regulated by State Law."

Section 3 (b), 15 U. S. C. § 1013 (b), provides:

"(b) Nothing contained in this chapter shall render the said Sherman Act inapplicable to any agreement to boycott, coerce, or intimidate, or act of boycott, coercion, or intimidation."

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

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

November 29, 1978

MEMORANDUM TO THE CONFERENCE

Re: No. 77-952, Group Life and Health Co. v. Royal Drug Co.

I contemplate making the attached footnote additions and revisions in answer to Potter's memorandum. I circulate them in xerox copies because I expect that the printer may take a few days before completing the new circulation.

Sincerely,

Bill

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TES TO BE ADDED TO GROUP HEALTH MEMORANDUM OF
USTICE BRENNAN, IN RESPONSE TO MEMORANDUM OF MR.
ICE STEWART

New Footnote to be added at page 5, last text line (following "Congress' goal"):

There can be no quarrel with Mr. Justice Stewart's suggestion, ___ at 13-14 & n.23, that the McCarran-Ferguson Act was not intended to restore the law, in all respects, to what it had been before South-Eastern Underwriters. But the principal differences between pre-South-Eastern and post-McCarran-Ferguson law are irrelevant for purposes of this case, and do not detract from the Court's oft-repeated statement that the purpose of the Act was to preserve state regulatory schemes as they existed before South-Eastern Underwriters.

Before South-Eastern, insurance companies might boycott, coerce and intimidate without violating federal antitrust statutes since insurance was not considered "commerce" and hence was beyond the reach of federal law. For the same reason, even unregulated insurance transactions were free from antitrust attack. Finally, Congress, because of the "commerce" problem, could not otherwise regulate insurance. None of these elements survived the decision in South-Eastern, and none was revived by McCarran-Ferguson. These differences between pre-South-Eastern and post-McCarran-Ferguson law were what Senator Ferguson had in mind when he answered "no" to Senator McKellar's question, cited by Mr. Justice Stewart___ at n.23, asking whether the effect of the Act

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

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

December 6, 1978

MEMORANDUM TO THE CONFERENCE
Re: No. 77-952, Group Life v. Royal Drug.

In response to Potter's latest revision of his memorandum, I would add the following (and hopefully last) footnote to my own.

FN. The concession of Mr. Justice Stewart that transactions between insurers and agents might be within the business of insurance is, of course, an integral part of the theory developed in my own memorandum, supra at 12. It demonstrates the error in the S.G.'s argument that only horizontal transactions between insurers are within the exemption. However, this concession is directly contradictory to the theory of Justice Stewart's original memorandum, which insisted on "the underwriting or spreading of risk as an indispensable characteristic of insurance." ____ at 6 (emphasis added). The relationship between insurer and agent does not possess this characteristic. Recognizing this, Justice Stewart's memorandum seeks to cover the insurer/agent relationship not by arguing that it is a species of underwriting, but by arguing that such relationships with insurance companies are sufficiently "'close[] to their status as reliable insurers' as to be the 'business of insurance.'" The substitution of this "close enough" test for that in the prior memorandum vitiates any advantage that the prior memo had in providing a bright line guide.

WJB, Jr.
by MG

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Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun

Changes Throughout

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 77–952

Group Life & Health Insurance Company, Etc., et al., Petitioners, *v.* Royal Drug Company, Etc., et. al.	On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

[February —, 1979]

MR. JUSTICE BRENNAN, dissenting.

The McCarran-Ferguson Act, 59 Stat. 34 (1945), as amended, 15 U. S. C. §§ 1011–1015, renders the federal antitrust laws inapplicable to the "business of insurance" to the extent such business is regulated by state law and is not subject to the "boycott" exception stated in § 1013 (b).[1] The single question presented by this case is whether the "business of insurance" includes direct contractual arrangements ("provider agreements") between petitioner Blue Shield and third parties to provide benefits owed to the insurer's policyholders. The Court today holds that it does not.

[1] Section 2 (b) of the Act, 15 U. S. C. § 1012 (b) provides:

"(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 [15 U. S. C. 41 et seq.], shall be applicable to the business of insurance to the extent that such business is not regulated by State Law."

Section 3 (b), 15 U. S. C. § 1013 (b), provides:

"(b) Nothing contained in this chapter shall render the said Sherman Act inapplicable to any agreement to boycott, coerce, or intimidate, or act of boycott, coercion, or intimidation."

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Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

Mr. Justice Brennan

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 77–952

Group Life & Health Insurance Company, Etc., et al., Petitioners, *v.* Royal Drug Company, Etc., et. al.

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

[February —, 1979]

MR. JUSTICE BRENNAN, with whom THE CHIEF JUSTICE and MR. JUSTICE POWELL join, dissenting.

The McCarran-Ferguson Act, 59 Stat. 34 (1945), as amended, 15 U. S. C. §§ 1011–1015, renders the federal antitrust laws inapplicable to the "business of insurance" to the extent such business is regulated by state law and is not subject to the "boycott" exception stated in § 1013 (b).[1] The single question presented by this case is whether the "business of insurance" includes direct contractual arrangements ("provider agreements") between petitioner Blue Shield and third

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

From: Mr. Justice Brennan

4th DRAFT

SUPREME COURT OF THE UNITED STATES

23 Feb 79

No. 77-952

Group Life & Health Insurance Company, Etc., et al., Petitioners, *v.* Royal Drug Company, Etc., et. al. | On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

[February —, 1979]

MR. JUSTICE BRENNAN, with whom THE CHIEF JUSTICE, MR. JUSTICE MARSHALL, and MR. JUSTICE POWELL join, dissenting.

The McCarran-Ferguson Act, 59 Stat. 34 (1945), as amended, 15 U. S. C. §§ 1011–1015, renders the federal antitrust laws inapplicable to the "business of insurance" to the extent such business is regulated by state law and is not subject to the "boycott" exception stated in § 1013 (b).[1] The single question presented by this case is whether the "business of insurance" includes direct contractual arrangements ("provider agreements") between petitioner Blue Shield and third

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Section 3 (b), 15 U. S. C. § 1013 (b), provides:

"(b) Nothing contained in this chapter shall render the said Sherman Act inapplicable to any agreement to boycott, coerce, or intimidate, or act of boycott, coercion, or intimidation."

HAB

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

CHAMBERS OF
JUSTICE POTTER STEWART

October 16, 1978

MEMORANDUM TO MR. JUSTICE WHITE
MR. JUSTICE BLACKMUN
MR. JUSTICE STEVENS

Re: No. 77-952, Group Life & Health Insurance Co. v. Royal Drug Co.

I shall undertake the preparation of an opinion setting out our views in this case. In view of Bill Rehnquist's letter of today, this will probably be a dissenting opinion, although I am not entirely sure of Bill Brennan's position.

P.S.

P.S.

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

CHAMBERS OF
JUSTICE POTTER STEWART

October 18, 1978

Re: No. 77-952, Group Life and Health Co. v. Royal Drug Co.

Dear Lewis,

The only question now before us in this case, as I understand it, is whether Blue Shield engages in the "business of insurance" within the meaning of the McCarran Act when it contracts with pharmacies to provide benefits in kind to its policy holders. The merits of the underlying antitrust claim are in no way now before us.

At the Conference I voted to affirm the judgment of the Court of Appeals, believing that this is not the "business of insurance." I adhere to that view and expect in due course to produce an opinion setting out my views. If those views were to prevail, the case would be remanded to the District Court for trial of the antitrust claim.

You voted to reverse the judgment of the Court of Appeals, since you believe that this is the "business of insurance." If your views prevail, it seems to me that the case would necessarily be remanded to the Court of Appeals so that that Court can consider the other two questions that must be decided before it can be determined that the defendant is exempt from liability under the antitrust laws: the extent to which this "business" is regulated by state law, and whether, even if it is so regulated, it amounts to a boycott not covered by the exemption.

I am in total agreement with you that the sole issue now before th Court is wholly ripe for decision.

Sincerely yours,

P.S.

Mr. Justice Powell

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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

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1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 77-952

Group Life & Health Insurance Company, Etc., et al., Petitioners, v. Royal Drug Company, Etc., et. al. | On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

[November —, 1978]

MR. JUSTICE STEWART.

The respondents, 18 owners of independent pharmacies in San Antonio, Tex., brought an antitrust action in a federal district court against the petitioners, Group Life and Health Insurance Company, known as Blue Shield of Texas ("Blue Shield"), and three pharmacies also doing business in San Antonio. The complaint alleged that the petitioners had violated § 1 of the Sherman Act, 15 U. S. C. § 1 *et seq.*, by entering agreements to fix the retail prices of drugs and pharmaceuticals, and that the activities of the petitioners had caused Blue Shield's policyholders not to deal with certain of the respondents, thereby constituting an unlawful group boycott. The trial court granted summary judgment to the petitioners on the ground that the challenged agreements are exempt from the antitrust laws under § 2 (b) of the McCarran-Ferguson Act, 15 U. S. C. § 1012 (b), because the agreements are the "business of insurance," are "regulated by [Texas] law," and are not "boycotts" within the meaning of § 3 (b) of the Act, 15 U. S. C. § 1013 (b).[1] 415 F. Supp. 343. The

[1] The Act provides in relevant part:

"Congress hereby declares that the continued regulation and taxation by the several States of the business of insurance is in the public interest,

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

CHAMBERS OF
JUSTICE POTTER STEWART

November 29, 1979

MEMORANDUM TO THE CONFERENCE

Re: No. 77-952, Group Life & Health Ins. Co. v. Royal Drug Co.

At appropriate points in my memorandum I shall probably add some or all of the following footnotes:

A. Mr. Justice Brennan's Memorandum states at page 3 that the National Securities case recognized that the legislative history of the Act "sheds little light" on the meaning of the "business of insurance." In National Securities, however, the Court went on to state that the legislative history indicated that "Congress was mainly concerned with the relationship between insurance ratemaking and the antitrust laws, and with the power of the States to tax insurance companies." 393 U.S. at 458-59. This description is entirely consistent with the discussion of the legislative history in Parts IIIB and C of this Memorandum.

B. Mr. Justice Brennan's Memorandum states in note 2 on page 3 that the "compelling explanation" for the lack of discussion of provider agreements in the legislative history was the Congressional concern about fire insurance companies. However, input from all types of insurance companies was sought through the Insurance Commissioners of the various States "because the Commissioners were aware of the chaotic condition which exists at the present time." 91 Cong. Rec. 484 (remarks of Senator Ferguson). Moreover, the National Association of Insurance Commissioners, whose concern was surely not limited to fire insurance, was certainly aware of provider agreements since it drafted model state enabling legislation to govern service benefit health plans. But this Association, which played a major role in the drafting of the McCarran-Ferguson Act, did not include provider agreements in its proposed Bill exempting specific practices of insurance companies from the scope of the antitrust laws. 90 Cong. Rec. A4406 (1944). Given this

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background, the failure of Congress to mention provider agreements, or anything in any way resembling them, suggests that Congress did not intend that provider agreements were to be exempt.

C. Mr. Justice Brennan's Memorandum at page 4 makes the argument that because Congress rejected Bills that would have limited the "business of insurance" to a specific list of insurance company practices, Congress intended that the exemption it finally enacted be interpreted "broadly." Precisely the opposite was true.

At the time Congress was considering one of the early versions of the Act, H.R. 3270, which would have wholly exempted from the antitrust laws "the business of insurance or acts in the conduct of that business," an amendment was introduced which would have exempted specific activities. 90 Cong. Rec. 6561 (1944). The proponent of the amendment, Rep. Anderson, explained that its purpose was to provide broader protection than provided by H.R. 3270:

> "But I say to this House that some legislation should be passed which asserts the right of the States to control the questions of risks, rates, premiums, commissions, policies, investments, reinsurance, capital requirements, and items of that nature. It is for that purpose I have insisted upon bringing this at this time to the attention of the House. If you pass H.R. 3270 as it now stands and go back home and any of your insurance friends ask you what you did to safeguard the protection of insurance by the State, you must answer them in all truth that all you did was to pass a bill which provided antitrust protection for companies now under indictment."

The amendment was defeated. 90 Cong. Rec. 6562.

Thus Congress rejected an amendment which exempted specific activities of insurance companies (not including anything remotely resembling the Pharmacy Agreements in this case) which was perceived to be broader than H.R. 3270. Since H.R. 3270 was itself broader than the Act as eventually enacted, it necessarily follows that the exemption of the Act is narrower than the Bills which would have exempted specific practices. This pattern is consistent with the entire legislative history of the McCarran-Ferguson Act which was characterized by a continual narrowing of the original blanket exemption.

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D. Mr. Justice Brennan's Memorandum at pages 8-10 argues that "regulation of the service-benefit plans was a part of the system of state regulation of insurance that the McCarran-Ferguson Act was designed to preserve." It is not at all clear that States that passed enabling statutes regarded the plans as insurance. These statutes typically authorized the plans to operate but did not specify whether or not they were insurance. E.g., 1935 Ill. Laws ("An Act to provide for the Incorporation and Regulation of non-profit Hospital Service Corporations"); Mich. Pub. Acts No. 109 ("An Act to provide for and to regulate the incorporation of non-profit hospital service corporations"); N.J. Laws ch. 366 ("An Act concerning hospital service corporations and regulating the establishment, maintenance and operation of health service plans"); H.R. 6266, 76th Cong., 1st Sess. (1939) ("Providing for the incorporation of certain persons as Group Hospitalization, Inc."). This latter statute enacted by Congress also provided that "This corporation shall not be subject to the provisions of statutes regulating the business of insurance in the District of Columbia, but shall be exempt therefrom unless specifically designated therein." See also note 30, infra.

Indeed, courts have continued to hold that Blue Shield Plans are not insurance even in States that have enacted enabling statutes. E.g., Michigan Hospital Service v. Sharpe, 339 Mich. 357, 63 N.W. 2d 638 (1954). In that case, the court specifically rejected the proposition that the existence of the enabling statute was sufficient to demonstrate that the plan was insurance.

But even if certain aspects of a Blue Shield Plan are the "business of insurance," the Pharmacy Agreements in this case are not -- for all the reasons set out in this Memorandum. It is to be emphasized that the question whether provider agreements like the Pharmacy Agreements in this case, or other aspects of insurance companies, were in 1945 or are now regulated by state law is irrelevant to the issue before the Court in the present case. See note 33, infra.

P.S.

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

CHAMBERS OF
JUSTICE POTTER STEWART

No 77-952 - Group Life

November 30, 1978

MEMORANDUM TO THE CONFERENCE

I contemplate adding the following footnote at an appropriate place in my Memorandum:

There is no question that the primary purpose of the McCarran-Ferguson Act was to preserve state regulation of the activities of insurance companies, as it existed before the South-Eastern Underwriters case. The power of the States to regulate and tax insurance companies was threatened after that case, because of its holding that insurance companies are in interstate commerce. The McCarran-Ferguson Act operates to assure that the States are free to regulate insurance companies without fear of Commerce Clause attack. The question in the present case, however, is one under the quite different secondary purpose of the McCarran-Ferguson Act -- to give insurance companies only a limited exemption from the antitrust laws.

The repeated insistence in Mr. Justice Brennan's Memorandum that the McCarran-Ferguson Act should be read as protecting the right of the States to regulate what they traditionally regulated is thus entirely correct -- and entirely irrelevant to the issue now before the Court. For the question here is not whether the McCarran-Ferguson Act made state regulation of these Pharmacy Agreements exempt from attack under the Commerce Clause. It is the quite different question whether the Pharmacy Agreements are exempt from the antitrust laws.

In short, the McCarran-Ferguson Act freed the States to continue to regulate and tax the business of insurance companies, in spite of the Commerce Clause. It did not, however, exempt the business of insurance companies from the antitrust laws. It exempted only "the business of insurance." See SEC v. National Securities, Inc., 393 U.S. 453, and note 33 infra. At the risk of undue repetition, let it be emphasized again: The fact, if it is a fact, that Blue Shield is an insurer, and the fact

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that its Pharmacy Agreements are validly regulated by state law under the McCarran-Ferguson Act is quite irrelevant to the question here. That question, quite simply, is whether the Pharmacy Agreements are "the business of insurance" and thus exempt from examination under the antitrust laws. For the reasons stated in this memorandum, I believe that they are not.

P.S.

P.S.

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

CHAMBERS OF
JUSTICE POTTER STEWART

December 5, 1978

MEMORANDUM TO THE CONFERENCE

Re: No. 77-952, Group Life & Health Ins. v. Royal Drug

At Bill Rehnquist's suggestion, I shall add the following footnote on page 16, at the end of the section on legislative history (III C):

28a. One question not resolved by this legislative history is which of the various practices alleged in the South-Eastern Underwriters indictment Congress intended to be covered by the phrase "business of insurance." The indictment in that case had charged, for example, that the defendants had fixed their agents' commissions as well as premium rates. It is clear from the legislative history that the fixing of rates is the "business of insurance." The same conclusion does not so clearly emerge with respect to the fixing of agents' commissions.

The Bills introduced before the South-Eastern Underwriters decision which would have totally exempted the insurance industry from the antitrust laws specifically included agreements regarding agents' commissions as an exempt practice. E.g., H.R. 4444, 78th Cong., 2d Sess. (1944). Similarly, the Bill proposed by the National Association of Insurance Commissioners two months after the South-Eastern Underwriters case was decided would have also exempted agents' commissions. 90 Cong. Rec. A 4406 (1944). The subsequent Bill that followed the approach of the NAIC and exempted specific activities, however, was limited to traditional underwriting activities and made no mention of agreements with insurance agents:

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> § 4(b). "On and after March 1, 1946, the provisions of said Sherman Act shall not apply to any agreement or concerted or cooperative action between two or more insurance companies for making, establishing, or using rates for insurance, rating methods, premiums, insurance policy or bond forms, or underwriting rules. . . ." S. 12, 79th Cong., 1st Sess. (1945).

One inference that can be drawn from this pattern is that Congress was aware of the existence of agreements regarding agents' commissions, and chose not to include them within the exemption for the "business of insurance." On the other hand, the fact that the indictment in South-Eastern Underwriters had included a charge that insurance companies did boycott agents who insisted on selling other lines of insurance, together with the fact that § 3(b) presumably removes an exemption that, but for its absence, would be conferred by § 2, suggests that the "business of insurance" may have been intended to include dealings within the insurance industry between insurers and agents.

Even if it be assumed, however, that transactions between an insurer and its agents, including independent agents, are the "business of insurance," it still does not follow that the Pharmacy Agreements also fall within the definition. Transactions between an insurer and an agent, unlike the Pharmacy Agreements, are wholly intra-industry; an insurance agent sells insurance while a pharmacy sells goods and services. Thus it may be that business relationships between insurers and agents who have the primary responsibility for the sale of policies "relate so closely to their status as reliable insurers" as to be the "business of insurance." S.E.C. v. National Securities, Inc., supra, 393 U.S. at 460. Moreover, there are historical reasons why the Pharmacy Agreements should not be considered the "business of insurance," whatever may be the status of agreements between an insurer and its agents. See Part III D, infra.

P.S.

P.S.

COURTESY OF THE MANUSCRIPT DIVISION, LIBRARY OF CONGRESS

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: _____

2nd DRAFT Recirculated: 9 JAN 1979

SUPREME COURT OF THE UNITED STATES

No. 77-952

Group Life & Health Insurance Company, Etc., et al., Petitioners, v. Royal Drug Company, Etc., et. al. | On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

[November —, 1978]

MR. JUSTICE STEWART delivered the opinion of the Court.

The respondents, 18 owners of independent pharmacies in San Antonio, Tex., brought an antitrust action in a federal district court against the petitioners, Group Life and Health Insurance Company, known as Blue Shield of Texas ("Blue Shield"), and three pharmacies also doing business in San Antonio. The complaint alleged that the petitioners had violated § 1 of the Sherman Act, 15 U. S. C. § 1 *et seq.*, by entering agreements to fix the retail prices of drugs and pharmaceuticals, and that the activities of the petitioners had caused Blue Shield's policyholders not to deal with certain of the respondents, thereby constituting an unlawful group boycott. The trial court granted summary judgment to the petitioners on the ground that the challenged agreements are exempt from the antitrust laws under § 2 (b) of the McCarran-Ferguson Act, 15 U. S. C. § 1012 (b), because the agreements are the "business of insurance," are "regulated by [Texas] law," and are not "boycotts" within the meaning of § 3 (b) of the Act, 15 U. S. C. § 1013 (b).[1] 415 F. Supp. 343. The

[1] The Act provides in relevant part:

"Congress hereby declares that the continued regulation and taxation by the several States of the business of insurance is in the public interest,

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23-24

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: _____

Recirculated: 18 JAN 1979

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 77-952

Group Life & Health Insurance Company, Etc., et al., Petitioners, *v.* Royal Drug Company, Etc., et. al.

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

[November —, 1978]

MR. JUSTICE STEWART delivered the opinion of the Court.

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2, 3, 24

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: _____

Recirculated: 23 JAN 1979

4th DRAFT

SUPREME COURT OF THE UNITED STATES

No. 77–952

Group Life & Health Insurance Company, Etc., et al., Petitioners, *v.* Royal Drug Company, Etc., et. al.	On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

[November —, 1978]

MR. JUSTICE STEWART delivered the opinion of the Court.

The respondents, 18 owners of independent pharmacies in San Antonio, Tex., brought an antitrust action in a federal district court against the petitioners, Group Life and Health Insurance Company, known as Blue Shield of Texas ("Blue Shield"), and three pharmacies also doing business in San Antonio. The complaint alleged that the petitioners had violated § 1 of the Sherman Act, 15 U. S. C. § 1 *et seq.*, by entering agreements to fix the retail prices of drugs and pharmaceuticals, and that the activities of the petitioners had caused Blue Shield's policyholders not to deal with certain of the respondents, thereby constituting an unlawful group boycott. The trial court granted summary judgment to the petitioners on the ground that the challenged agreements are exempt from the antitrust laws under § 2 (b) of the McCarran-Ferguson Act, 15 U. S. C. § 1012 (b), because the agreements are the "business of insurance," are "regulated by [Texas] law," and are not "boycotts" within the meaning of § 3 (b) of the Act, 15 U. S. C. § 1013 (b).[1] 415 F. Supp. 343. The

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"Congress hereby declares that the continued regulation and taxation by the several States of the business of insurance is in the public interest,

HAB

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

CHAMBERS OF
JUSTICE POTTER STEWART

February 26, 1979

MEMORANDUM FOR THE CONFERENCE

Case held for No. 77-952, Group Life and Health Ins. Co. v. Royal Drug Co.

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

In Proctor, the District of Columbia Court of Appeals held, inter alia, that the "business of insurance exemption of the McCarran-Ferguson Act extends to contractual arrangements between insurers and participating auto body repair shops. This arrangement is essentially indistinguishable from the agreements between insurers and participating pharmacies held not to be within the exemption in Group Life. I therefore recommend that Proctor be vacated and remanded in light of Group Life.

P.S.

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

CHAMBERS OF
JUSTICE BYRON R. WHITE

January 3, 1979

Re: No. 77-952 - Group Life & Health Insurance Co. v. Royal Drug Co.

Dear Potter,

After much backing and filling, I shall not write separately, and I join your November 27 circulation with the changes you have subsequently indicated you will make.

Sincerely yours,

Mr. Justice Stewart

Copies to the Conference

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

CHAMBERS OF
JUSTICE BYRON R. WHITE

January 9, 1979

Re: No. 77-952 - Group Life & Health Ins. Co. v. Royal Drug Co.

Dear Potter,

I am with you.

Sincerely yours,

Mr. Justice Stewart

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

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

October 19, 1978

Re: No. 77-952, Group Life and Health Co. v. Royal Drug Co.

Dear Chief:

My first vote was to reverse.

My second choice was to join Brennan to vacate and remand.

I now return to my first vote to reverse (period).

Sincerely,

T.M.

The Chief Justice

cc: The Conference

MANUSCRIPT DIVISION, LIBRARY OF CONGRESS

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

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

February 22, 1979

Re: No. 77-952 - Group Life v. Royal Drug

Dear Bill:

Please join me in your dissent.

Sincerely,

T.M.

Mr. Justice Brennan

cc: The Conference

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

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

October 19, 1978

Re: No. 77-952 - Group Life and Health Insurance Co.
v. Royal Drug Co.

Dear Chief:

Your lineup letter of October 16 indicated that I was to affirm with a question mark. My vote was to affirm without a question mark, and I adhere to that position.

Sincerely,

H. A. B.

The Chief Justice

cc: The Conference

THE HARRY A. BLACKMUN PAPERS, LIBRARY OF CONGRESS

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

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

December 11, 1978

Re: No. 77-952 - Group Life and Health Ins. Co.
v. Royal Drug Co.

Dear Potter:

I am still with you and shall be glad to join an opinion along the lines of your memorandum.

Sincerely,

Harry

Mr. Justice Stewart

cc: The Conference

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

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

January 9, 1979

Re: No. 77-952 - Group Life & Health Insurance Co.
v. Royal Drug Co.

Dear Potter:

I am still with you.

Sincerely,

Harry

Mr. Justice Stewart

cc: The Conference

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

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

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

October 16, 1978

No. 77-952 Group Life and Health Co. v. Royal Drug Co.

MEMORANDUM TO THE CONFERENCE

This refers to the Chief's memorandum of this date in which he summarizes the "line-up", and states that he awaits "further clarification".

My vote was to reverse, although I did say that possibly I could join a "vacate and remand" subject to clarification of the purpose of a remand. I join the Chief in saying that I would welcome a further clarification as to why and for what purpose some of you would remand.

I believe it was stated that further evidence was required to clarify the facts as the case was decided on a motion to dismiss. Such a motion was made, but my understanding is that it was treated as one for summary judgment. At the end of its rather full opinion, the district court stated explicitly that "defendant's motions shall be treated as motions for summary judgment and disposed of as provided in Rule 56". A. 115a.

Moreover, near the beginning of its opinion, the district court said:

> "Extensive discover has been completed on the issue presently before the court. The record includes numerous depositions, affidavits and documents, and all parties have had full opportunity to present all materials pertinent to the defendant's motions. . . . The facts relevant to defendants motions are undisputed." Petn. for cert. 2a, 3a.

THE SUPREME COURT OF THE MANUSCRIPT DIVISION, LIBRARY OF CONGRESS

The district court made quite full findings of fact and conclusions of law. The appendix, filed with the petition for certiorari, consists of 481 pages, including the opinions. In sum, it seems to me that the courts below had all of the facts necessary to decide the only question before us: Whether Blue Shield engages in the "business of insurance" within the meaning of the McCarran Act, when it contracts with pharmacies to provide policy benefits in kind to its insureds.

Both courts below thought, as I do, that the record is satisfactory and adequate for the purpose of answering the foregoing question. Apparently the parties were of like mind, as I find no objection to the statements by the district court as to the relevent facts being undisputed and all parties having been given a full opportunity to present all pertinent material.

Nevertheless, I do not foreclose the possiblity of joining in a remand if someone will elucidate its purpose. Until then, my vote remains to reverse. Of course, a reversal would leave the boycott issue for resolution below as that issue is not before us.

Sincerely,

L. Lewis

LFP/lab

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

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

November 29, 1978

No. 77-952 Group Life v. Royal Drug

Dear Bill:

I agree with John that both you and Potter have written fine memoranda in this case.

As yours conforms to the views I expressed at Conference and still hold, I would appreciate your joining me when you convert your memorandum to an opinion.

Sincerely,

Lewis

Mr. Justice Brennan

lfp/ss

cc: The Conference

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

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

January 8, 1979

77-952 Group Life v. Royal Drug Co.

Dear Bill:

I am still with you.

Sincerely,

Lewis

Mr. Justice Brennan

lfp/ss

cc: The Conference

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

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

January 30, 1979

77-952 Group Life v. Royal Drug

Dear Bill:

I am still with you.

Sincerely,

Lewis

Mr. Justice Brennan

lfp/ss

cc: The Conference

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

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

October 16, 1978

MEMORANDUM TO THE CONFERENCE

Re: No. 77-952 Group Life & Health Insurance Co. v. Royal Drug Co.

Having passed at Conference on Friday, I now vote to vacate the judgment of the Court of Appeals for the Fifth Circuit and remand the case to that court for further proceedings. My position is still somewhat tentative, but it seems to me that if the McCarran-Ferguson Act was designed to overturn the result in Southeastern Underwriters (except for boycotts) the provider agreement in the instant case is included within the phrase "the business of insurance". In Southeastern Underwriters, one of the charges against the defendants was fixing agents' commissions in addition to fixing premiums. Since as I understand the insurance business, agents' commissions are usually the subject of third party bargaining between the insurer and the agent, and are not covered in the policy, I would think that if they are included as "the business of insurance" the provider agreements in this case are likewise included.

Sincerely,

WHR

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

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

December 6, 1978

MEMORANDUM TO THE CONFERENCE

Re: No. 77-952 Group Life & Health Ins. Co. v. Royal Drug Co.

Having passed when this case was voted on at Conference, and then having later cast a tentative vote for the proposition that the "provider agreements" in this case were "the business of insurance" within the meaning of the McCarran-Ferguson Act, I have now decided, not without embarrassment, to again change my position. I have found both Bill's and Potter's memoranda far more enlightening than the briefs on either side of the case were; I was concerned with the notion that since the indictment in South-Eastern Underwriters had included charges of boycotting insurance agents, intra-industry agreements not confined just to underwriters might well have been intended to be "the business of insurance",

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in order for Congress to feel the necessity of affirmatively excluding boycotts from the exemption. I am satisfied that Potter's present treatment of that point leaves it open, and therefore find myself in substantial agreement with that memorandum: I would join it as an opinion of the Court.

Sincerely,

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

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

January 10, 1979

Re: No. 77-952 Group Life & Health Ins. Co. v. Royal Drug Co.

Dear Potter:

Please join me.

Sincerely,

Mr. Justice Stewart

Copies to the Conference

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

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

January 10, 1979

Re: No. 77-952 Group Life & Health Ins. Co. v. Royal Drug Co.

Dear Potter:

Please join me.

Sincerely,

Mr. Justice Stewart

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

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

January 10, 1979

Re: No. 77-952 Group Life & Health Ins. Co. v. Royal Drug Co.

Dear Potter:

Please join me in your opinion.

Sincerely,

Mr. Justice Stewart

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

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

November 28, 1978

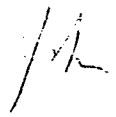
MEMORANDUM TO THE CONFERENCE

Re: 77-952 - Group Life & Health Ins. v. Royal Drug Co.

The two excellent memoranda that have been circulated demonstrate that reasonable men can differ about the meaning of the "business of insurance." The question may well boil down to choosing between Bill's suggestion that this particular exemption should be construed "broadly" (see p. 4 of his memorandum) and Potter's more traditional view that this is merely another species of exemption from the antitrust laws that should be construed narrowly (see p. 21 of his memorandum).

In the end, I agree with Potter that Congress did not intend to exempt the business of insurance companies, even to the extent that they were subject to state regulation in the 1940's. Accordingly, I will adhere to my Conference vote and join Potter's circulation.

Respectfully,



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

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

January 10, 1979

Re: 77-952 - Group Life & Health Ins.
v. Royal Drug Co.

Dear Potter:

Please join me.

Respectfully,

Mr. Justice Stewart

Copies to the Conference

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