Insurance Law - Scope of McCarran-Ferguson Exemption for the "Business of Insurance" - Meaning of "Boycott"/International Law - Extraterritorial Application of the Sherman Act

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Insurance Law—Scope of McCarran-Ferguson Exemption for the "Business of Insurance"—Meaning of "Boycott"—The United States Supreme Court held that McCarran-Ferguson immunity did not attach for domestic insurance companies acting with foreign insurance companies based on activity-based analysis of the "business of insurance," but that such activity may have amounted to a "boycott."

International Law—Extraterritorial Application of the Sherman Act—The United States Supreme Court held that the Sherman Act regulates foreign conduct in the absence of a "true conflict" with foreign law.


In 1989, extensive antitrust allegations were leveled against four large domestic insurance companies, several foreign re-insurers, and two trade organizations ("Defendants"). More specifically, nineteen states, several corporations, and a number of individual plaintiffs (collectively "Plaintiffs"), filed complaints in the United States District Court for the Northern District of California, essentially alleging that the Defendants violated section 1 of the Sherman Act in conspiring to force primary insurers to accept

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3. Id. at 464.

4. See Ins. Antitrust Litig., 723 F. Supp. at 470-71 (detailing the Plaintiffs' claims more precisely). Section 1 of the Sherman Act provides:

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any
changes to standard commercial general liability ("CGL") insurance policies. The numerous complaints were consolidated into two representative actions.

The activity precipitating the antitrust charges began in the late 1970s, when Defendant Insurance Services Office, Inc. ("ISO") began to revise its 1973 CGL forms. Four major liability-reducing changes were considered: 1) replacing "occurrence" based triggers with "claims-made" triggers, 2) adding a "retroactive date" provision to the new "claims-made" trigger, 3) eliminating coverage for "sudden and accidental" pollution, and 4) providing a "legal defense cost cap."

In 1984, after having considered these proposed changes, ISO submitted two alternative forms to state regulators; one retaining the "occurrence" trigger and the other adopting the "claims-made" trigger, but both lacking any of the other proposed changes. Dissatisfied with the degree of change in the final forms, the four major Defendants, Hartford Fire Insurance Company ("Hartford"), Allstate Insurance Company, CIGNA Corporation, and Aetna Cas-
ualty and Surety Company, allegedly began taking steps to effectuate a conspiracy to force adoption of the proposed changes to the forms.14

Plaintiffs alleged that the four domestic insurance company Defendants took several steps to form a “boycott” in violation of the Sherman Act.15 First, Plaintiffs alleged that Hartford enlisted defendant General Reinsurance Corporation (“General Re”)16 to organize a boycott of the 1984 ISO forms unless the additionally desired changes were adopted.17 Secondly, Plaintiffs contended that General Re sought support for the boycott from another named defendant, the Reinsurance Association of America (“RAA”).18 Thirdly, Plaintiffs argued that all four domestic insurance company Defendants then convinced the London-based Defendants19 to participate in the conspiracy as well.20 Finally, Plaintiffs alleged that these steps amounted to several different conspiracies among the Defendants to withhold reinsurance unless the proposed additional changes were adopted.21

14. Id.
15. Hartford, 113 S. Ct. at 2897-98. The use of the term “boycott” denotes a kind of action prohibited by the Sherman Act and is used as a term of art in the McCarran-Ferguson Act. See notes 42-47 and 101-19 accompanying text discussing the meaning of the term in greater detail, and notes 23 and 24 for the text of the McCarran-Ferguson Act.
16. General Re is the largest domestic reinsurer. Id. at 2898.
17. Id.
18. Id. RAA is the trade association for domestic reinsurance companies. Id.
21. Id. at 2898-99. The Court looked at the following four different conspiracies similarly alleged in both the California and Connecticut complaints:
[1] The Fifth Claim for Relief of the California Complaint, . . . and the virtually identical Third Claim for Relief of the Connecticut Complaint, . . . charge a conspiracy among a group of London reinsurers and brokers to coerce primary insurers in the United States to offer CGL coverage only on a claims-made basis. . . .
[2] The Sixth Claim for Relief of the California Complaint, . . . and the nearly identical Fourth Claim for Relief of the Connecticut Complaint, . . . charge another conspiracy among a somewhat different group of London reinsurers to withhold reinsurance for pollution coverage. . . .
[3] The Seventh Claim for Relief in the California Complaint, . . . and the closely similar Sixth Claim for Relief in the Connecticut Complaint, . . . charge a group of domestic primary insurers, foreign reinsurers, and the ISO with conspiring to restrain trade in the markets for “excess” and “umbrella” insurance by drafting model forms and policy language for these types of insurance, . . .
[4] Finally, the Eighth Claim for Relief of the California Complaint, . . . and its
 Defendants moved for dismissal based on the contention that Plaintiffs had failed to state a claim upon which relief could be granted. The district court granted the motion, holding that the alleged conduct was "the business of insurance" and was sufficiently state-regulated that Defendants were afforded antitrust immunity under section 2(b) of the McCarran-Ferguson Act. Furthermore, the court found that Defendants' conduct as pleaded in Plaintiffs' complaints did not raise any triable issues of fact as to whether a "boycott," within the meaning of section 3(b) of the McCarran-Ferguson Act, had actually occurred. The court also dismissed the claims pertaining to the foreign Defendants, citing principles of international comity.

The Court of Appeals for the Ninth Circuit reversed the lower
counter-part in the Fifth Claim for Relief of the Connecticut complaint, . . . charge a
group of London and domestic retrocessional reinsurers with conspiring to withhold
retrocessional reinsurance for North American seepage, pollution, and property con-
tamination risks.

Id. (citations omitted).

22. Ins. Antitrust Litig., 723 F. Supp. at 471. Defendants' motion was based on Fed-
eral Rule of Civil Procedure 12(b)(6) which states:
Every defense, in law or fact, to a claim for relief in any pleading, whether a claim,
counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive
pleading thereto if one is required, except that the following defenses may at the
option of the pleader be made by motion: . . . (6) failure to state a claim upon which
relief can be granted.

FED. R. CIV. P. 12(b)(6).

23. Ins. Antitrust Litig., 723 F. Supp. at 474. Section 2(b) of the McCarran-Ferguson
Act provides:
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.

24. Ins. Antitrust Litig., 723 F. Supp. at 478. Section 3(b) of the McCarran-Ferguson
Act provides for an exception to the antitrust immunity it generally affords. It states that
"[n]othing 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." 15

25. Hartford, 113 S. Ct. at 2900. Specifically, the district court examined the claims
against the foreign Defendants in light of the Ninth Circuit Court of Appeals' analysis in
Timberlane Lumber Co. v. Bank of Am. N.T. & S.A., 549 F.2d 597 (9th Cir. 1976), on re-
mand, 574 F. Supp. 1453 (N.D. Cal. 1983), aff'd, 749 F.2d 1378 (9th Cir. 1984), cert. denied,
472 U.S. 1032 (1985), pertaining to the doctrine of international comity. Ins. Antitrust Li-
tig., 723 F. Supp. at 484.
court, finding that all domestic Defendants forfeited antitrust immunity by acting in conjunction with the foreign insurers who were not regulated by state law, notwithstanding the notion that the conduct alleged may have amounted to a boycott. Contrary to the district court, the court of appeals also found that international comity did not preclude the exercise of jurisdiction.

The Supreme Court then granted certiorari. The Court certified three issues for review: 1) whether the domestic insurers lost antitrust immunity by conspiring with foreign reinsurers, 2) whether a boycott had occurred, and 3) whether international comity precluded exercising jurisdiction over the foreign Defendants.

The Supreme Court affirmed in part, reversed in part, and remanded for further proceedings consistent with its opinion. In determining the loss of immunity issue, the Court focused on the nature of the “business of insurance” as employed in the McCar-

27. Id. at 927-28.
28. Id. at 930.
29. Id. at 934.
31. Hartford, 113 S. Ct. at 2900 n.8 (quoting from Pet. for Cert. at i, Hartford Fire Ins. Co. v. California, 113 S. Ct. 2891 (1993) (No. 91-1128)). Specifically, the Court framed the issue as “[w]hether domestic insurance companies whose conduct otherwise would be exempt from the federal antitrust laws under the McCarran-Ferguson Act lose that exemption because they participate with foreign reinsurers in the business of insurance.” Id.
32. Id. The Court stated the issue as “[w]hether agreements among primary insurers and reinsurers on such matters as standardized advisory insurance policy forms and terms of insurance coverage constitute a ‘boycott’ outside the exemption of the McCarran-Ferguson Act.” Id.
33. Hartford, 113 S. Ct. at 2900 n.9 (quoting from Pet. for Cert. at i, Hartford Fire Ins. Co. v California, 113 S. Ct. 2891 (1993)(No. 91-1128)). Specifically, the Court stated the issue as “[d]id the court of appeals properly assess the extraterritorial reach of the U.S. antitrust laws in light of this Court’s teachings and contemporary understanding of international law when it held that a U.S. district court may apply U.S. law to the conduct of a foreign insurance market regulated abroad?” Id.
34. Hartford, 113 S. Ct. at 2911. The structure of the opinion was very elaborate. Both Justice Souter and Justice Scalia wrote majority opinions. Justice Souter wrote for the majority on the “business of insurance” issue and the international comity issue. See notes 35-41 and accompanying text pertaining to the “business of insurance,” and notes 48-58 and accompanying text pertaining to international comity.

Justice Scalia wrote for the majority on the “boycott” issue. See notes 42-47 and accompanying text.

Justice Souter also wrote a concurring opinion on the “boycott” issue. See notes 59-60 and accompanying text.

Justice Scalia also wrote a dissenting opinion on the international comity issue. See notes 61-69 and accompanying text.
ran-Ferguson Act. The Court first considered whether the action taken by the domestic insurers in conjunction with the foreign Defendants was conduct encompassed within the "business of insurance," such that immunity attached. Writing for a unanimous Court on this issue, Justice Souter pronounced that the court of appeals had improperly used an entity-based analysis, as opposed to activity-based analysis, to conclude that the foreign entities were not afforded immunity because they were not subject to state-regulation. The Court found that the court of appeals took the Supreme Court's language in Group Life & Health Insurance Co. v. Royal Drug Co., that "an exempt entity forfeits antitrust exemption by acting in concert with nonexempt parties," out of context, to reason that the domestic Defendants had lost their immunity by acting with the nonexempt foreign Defendants. On this issue, the Court unanimously agreed that the court of appeals had erred in using an entity-based analysis, rather than an activity-based analysis.

Justice Scalia wrote for the majority on the issue of defining the nature of "boycott" within the context of the McCarran-Ferguson Act. The Court was required to determine whether a "boycott" had formed such that immunity was revoked in accordance with section 3(b) of the Act. The majority placed great emphasis on the idea that a necessary ingredient of a boycott was not just a refusal to deal, per se, but a refusal to deal on other, unrelated transactions; transactions which Justice Scalia termed "artifi-
Viewing the complaints in light of the motion to dismiss, the Court then cited allegations within the complaints that created triable issues to be litigated on remand, upon which the lower court could find that a "boycott" had occurred.

As to the third issue, regarding international comity concerns in applying the Sherman Act extraterritorially, Justice Souter, again writing for the majority, stated that international comity did not necessitate dismissal of the claims against the foreign Defendants. Citing \textit{Matsushita Electric Industrial Co. v. Zenith Radio Corp.}, section 415 Restatement (Third) of Foreign Relations Law of the United States, and section 402 of the Foreign Trade Anti-

\begin{quote}
refusal to work changes from strike to boycott only when it seeks to obtain action from the employer unrelated to the employment contract. 
\end{quote}

\textit{Id.} (preceding discussion of \textit{In re Debs}, 158 U.S. 564 (1895), and the famous strike at the Pullman Palace Car Company).

45. \textit{Hartford}, 113 S. Ct. at 2914.

46. \textit{Id.} at 2917. The Court abided by the general rule that a complaint should not be dismissed unless it appears that the plaintiff can prove no set of facts which could possibly support the claim. \textit{Id.} (citing Conley v. Gibson, 355 U.S. 41 (1957)).

47. \textit{Id.} at 2916-17. For example, Justice Scalia remarked that if the primary insurers writing insurance on the disfavored forms were refused reinsurance regarding other types of risks on other forms, this could be a boycott. \textit{Id.} at 2916. Or if the reinsurers refused to sell insurance on all CGL risks, not just those appearing on the disfavored forms, this could also amount to a boycott. \textit{Id.}


49. 475 U.S. 574 (1986) (following United States v. Aluminum Co. of America, 148 F.2d 416 (2d Cir. 1945) (Hand, L., J.)) See notes 131-35 for discussion of \textit{Aluminum Co. of America} [hereinafter \textit{Alcoa}].

50. Section 415 of the Restatement (Third) of Foreign Relations Law of the United States provides:

(1) Any agreement in restraint of United States trade that is made in the United States, and any conduct or agreement in restraint of such trade that is carried out in significant measure in the United States, are subject to the jurisdiction to prescribe of the United States, regardless of the nationality or place of business of the parties to the agreement or of the participants in conduct.

(2) Any agreement in restraint of United States trade that is made outside of the United States, and any conduct or agreement in restraint of such trade that is carried out predominantly outside of the United States, are subject to the jurisdiction to prescribe of the United States, if a principal purpose of the conduct or agreement is to interfere with the commerce of the United States, and the agreement or conduct has some effect on that commerce.

(3) Other agreements or conduct in restraint of United States trade are subject to the jurisdiction to prescribe of the United States if such agreements or conduct have substantial effect on the commerce of the United States and the exercise of the jurisdiction is not unreasonable.

\textit{Restatement (Third) of Foreign Relations Law of the United States} § 415 (1986). The Court also referred to Reporters' Note 3 which discusses the "effects doctrine" as posited in \textit{Alcoa}. See also notes 131-35 and accompanying text.
trust Improvements Act of 1982, the majority noted that it was clear that the Sherman Act was intended to be applicable to the activities of foreign entities which are intended to, or do in fact, produce a substantial economic effect in the United States. Thus, the majority concluded that there was no doubt that the district court could exercise jurisdiction. The Court also indicated that because Congress had issued no opinion as to whether a court, in applying the Sherman Act, should ever refuse to exercise jurisdiction because of international comity, the heart of the matter was merely whether there was a true conflict between the United States law and the English law. Citing again to Restatement (Third) of Foreign Relations Law of the United States, the Court concluded that because the foreign Defendants did not argue that they could not abide by both United States law and English law, there was no true conflict because the Defendants could abide by the laws of both sovereigns. According to the majority, no other considerations needed to be addressed in concluding that the principle of international comity would not bar prosecution of the foreign Defendants.

Justice Souter also wrote an opinion concurring in the decision that the complaints did sufficiently allege a "boycott" within the

51. The Foreign Trade Antitrust Improvements Act of 1982 provides:
Sections 1 to 7 of this title shall not apply to conduct involving trade or commerce (other than import trade or import commerce) with foreign nations unless—
(1) such conduct has a direct, substantial, and reasonably foreseeable effect—
(A) on trade or commerce which is not trade or commerce with foreign nations,
or on import trade or import commerce with foreign nations; or
(B) on export trade or export commerce with foreign nations, of a person engaged in such trade or commerce in the United States; and
(2) such effect gives rise to a claim under the provisions of sections 1 to 7 of this title, other than this section.
If sections 1 to 7 of this title apply to such conduct only because of the operation of paragraph (1)(B), then sections 1 to 7 of this title shall apply to such conduct only for injury to export business in the United States.
52. Hartford, 113 S. Ct. at 2909.
53. Id. The Court expressly stated that "[a]t the outset, we note that the District Court undoubtedly had jurisdiction of these Sherman Act claims . . . ." Id.
54. Id. at 2910 (citing Societe Nationale Industrielle Aerospatiale v. United States District Court, 482 U.S. 522, 555 (1987) (Blackmun, J., concurring in part and dissenting in part)).
55. Id. at 2910-11 (citing Restatement (Third) of Foreign Relations Law of the United States § 403 cmt. e (1986) (discussing specifically subsection (3) and conflicting exercises of jurisdiction)).
56. Hartford, 113 S. Ct. at 2911.
57. Id. at 2910.
58. Id. at 2911.
meaning of section 3(b) of the McCarran-Ferguson Act to survive a motion to dismiss, but differed with the majority as to how to properly define a boycott. In arguing for a more expansive view, he opined that the majority had narrowed the scope of "boycott" so far that the exception could effectively be lost in the future.

Justice Scalia also issued a dissenting opinion regarding the majority's approach to the international comity issue. He conceded that it was clear that the Sherman Act overcame the initial presumption against extraterritorial application, but he also considered the application of a second canon of statutory interpretation in relation to the Sherman Act. The second canon, as applied here, instructed that in passing laws, Congress was presumed to have refrained from exceeding international law limits on prescriptive jurisdiction. Justice Scalia explained that even though the initial presumption against extraterritoriality had been overcome, this second canon required the Court to consider whether the Sherman Act conflicted with or violated notions of international comity, even before exercising adjudicative jurisdiction.

He emphasized that United States jurisprudence had consistently recognized international law limits on the extraterritorial

59. In this portion of his opinion, Part II(B), Justice Souter was joined by Justices White, Blackmun, and Stevens. Id. at 2895 (Souter, J., dissenting). See notes 42-47 and accompanying text for discussion of the majority's approach.
60. Id. at 2908.
61. Hartford, 113 S. Ct. at 2917-22 (Scalia, J., dissenting). In this portion of his opinion, Part II, Justice Scalia was joined by Justices O'Connor, Kennedy, and Thomas. Id. at 2911.
62. Id. at 2918.
63. Id. at 2919. This canon originally appeared as "an act of congress ought never to be construed to violate the law of nations if any other possible construction remains." Id. (quoting Murray v. The Charming Betsy, 6 U.S. (2 Cranch) 137, 143 (1804)).
64. Id. at 2919.
65. Hartford, 113 S. Ct. 2919 (Scalia, J., dissenting). Justice Scalia cited to the Restatement (Third) of Foreign Relations Law of United States section 401(a) in referring to "legislative jurisdiction" or "jurisdiction to prescribe." Id. at 2918. "Prescriptive jurisdiction" must be distinguished from what is commonly referred to generally as "jurisdiction" or "jurisdiction to adjudicate."

"Prescriptive jurisdiction" is "jurisdiction to prescribe, i.e., [the authority of a state] to make its law applicable to the activities, relations, or status of persons, or the interests of persons in things whether by legislation, by executive act or order, by administrative rule or regulation, or by determination of a court." Restatement (Third) of Foreign Relations Law of the United States § 401(a) (1986).

"Jurisdiction to adjudicate" refers to the authority of a state "to subject persons or things to the process of its courts or administrative tribunals, whether in civil or in criminal proceedings, whether or not the state is a party to the proceedings." Id. See Hartford, 113 S. Ct. at 2918 (Scalia, J., dissenting).
66. Id. at 2919.
reach of United States statutory law.\textsuperscript{67} In reaching his conclusion, Justice Scalia applied section 403 of the Restatement (Third) of Foreign Relations Law of the United States,\textsuperscript{68} coupled with the presumption that Congress did not intend to exceed the limits of its prescriptive jurisdiction, to conclude that the substantive scope of the Sherman Act did not extend to the foreign Defendants in this case.\textsuperscript{69}

In order to better understand the rationale in \textit{Hartford}, it is necessary to examine certain aspects of insurance law from an historical perspective, tracing the development of this broad area, focusing on antitrust regulation. Additionally, historical perspective on extraterritorial application of United States law is proffered to illuminate the international comity issue presented in \textit{Hartford} regarding the Sherman Act.

\textsuperscript{67} \textit{Id.} at 2920.
\textsuperscript{68} \textit{Id.} at 2920-22. Section 403 of the Restatement (Third) of Foreign Relations Law of the United States provides:

(1) Even when one of the bases for jurisdiction under § 402 is present, a state may not exercise jurisdiction to prescribe law with respect to a person or activity having connections with another state when the exercise of such jurisdiction is unreasonable.

(2) Whether exercise of jurisdiction over a person or activity is unreasonable is determined by evaluating all relevant factors, including, where appropriate:

(a) the link of activity to the territory of the regulating state, \textit{i.e.}, the extent to which the activity takes place within the territory, or has substantial, direct, and foreseeable effect upon or in the territory;

(b) the connections such as nationality, residence, or economic activity, between the regulating state and the person principally responsible for the activity to be regulated, or between that state and those whom the regulation is designed to protect;

(c) the character of the activity to be regulated, the importance of regulation to the regulating state, the extent to which other states regulate such activities, and the degree to which the desirability of such regulation is generally accepted;

(d) the existence of justified expectations that might be protected or hurt by the regulation;

(e) the importance of the regulation to the international political, legal, or economic system;

(f) the extent to which the regulation is consistent with the traditions of the international system;

(g) the extent to which another state may have an interest in regulating the activity; and

(h) the likelihood of conflict with regulation by another state.

(3) When it would not be unreasonable for each of two states to exercise jurisdiction over a person or activity, but the prescriptions by the two states are in conflict, each state has an obligation to evaluate its own as well as the other state's interest in exercising jurisdiction, in light of all the relevant factors, Subsection (2); a state should defer to the other state if that state's interest is clearly greater.

\textsuperscript{69} \textit{Hartford}, 113 S. Ct. at 2920-21 (Scalia, J., dissenting).
The business of insurance was not subject to federal regulation to any extent until 1944. Before that time, the Supreme Court held that the "business of insurance" was not interstate commerce, and therefore not subject to federal regulation. This proposition was established in *Paul v. Virginia*, when the Supreme Court first looked at the issue of whether Congress had the power to regulate the business of insurance. In *Paul*, the defendant had been convicted in Virginia state court for violating a statute requiring the local agents of foreign insurance companies to obtain a license. Before the United States Supreme Court, the defendant argued that the Virginia statute he was convicted under violated the Commerce Clause of the United States Constitution. In affirming the conviction, the Supreme Court found that insurance policies were not interstate transactions, and therefore, the insurance business was not interstate commerce and not subject to federal regulation.


71. *See, e.g.*, Bothwell v. Buckbee, Mears Co., 275 U.S. 274 (1927) (upholding a Minnesota statute requiring foreign insurance companies to obtain a license to do business in Minnesota); New York Life Ins. Co. v. Deer Lodge County, 231 U.S. 495 (1913) (upholding a Montana tax on foreign insurance companies while finding that the great magnitude of transactions and the use of interstate mail was not sufficient to make the business of insurance a burden on interstate commerce); Hooper v. California, 155 U.S. 648 (1894) (upholding a California Penal Code section making it a misdemeanor for one to obtain insurance for a resident from a foreign insurance company that had not filed a bond with the California insurance commissioner); Fire Ass'n of Philadelphia v. New York, 119 U.S. 110 (1886) (upholding a New York statute requiring a foreign insurance company to pay a tax rate equal to the rate applied to New York insurance companies in that foreign state when that foreign rate imposed on the New York companies was higher); Ducat v. Chicago, 77 U.S. (10 Wall.) 410 (1871) (upholding Illinois statutes for foreign insurance company licensing fees and taxing insurance companies on premiums collected).

72. 75 U.S. (8 Wall.) 168 (1868).

73. *Paul*, 75 U.S. at 182-85. The state of Virginia required that foreign insurance companies or their local agents wishing to do business in the state obtain a license to do so. *Id.* at 168. To obtain the license, the insurance company was required to deposit a sum of between $30,000 and $50,000 with the state treasurer. *Id.* The defendant was convicted in the circuit court for the city of Petersburg under the criminal provisions of the statute for acting as an agent of a foreign insurance company doing business without a license. *Id.* at 169. The supreme court of appeals affirmed and appeal was brought to the United States Supreme Court on writ of error. *Id.*

74. *Id.* at 168-69.

75. *Id.* at 168. The Commerce Clause of the United States Constitution appears in Article I, giving Congress the power "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." U.S. CONST. art. I, § 8, cl. 3.

76. *Paul*, 75 U.S. at 183. Justice Field wrote that:

Issuing a policy of insurance is not a transaction of commerce . . . . These [insurance] contracts are not articles of commerce in any proper meaning of the word . . . .
The rationale of Paul v. Virginia was the controlling view held by the Court through 1944. It is widely believed that from 1868 to 1944, the Court was reluctant to hold that the business of insurance was interstate commerce because this would have resulted in complete de-regulation of the insurance business. But finally, in 1944, the landmark case of United States v. South-Eastern Underwriters Association, ("SEUA"), significantly changed the entire business of insurance and of course, insurance law. The issue before the Court was whether insurance transactions were subject to Sherman Act regulation. The defendants in this case were alleged to have conspired to fix and maintain premium rates on fire insurance policies issued throughout several southern states in violation of the Sherman Act. In a lengthy opinion considering the historical development of Paul v. Virginia, the Supreme Court found that the business of insurance transgressed state lines and was interstate commerce subject to regulation according to the Commerce Clause.

As a result of SEUA, the constitutionality of all state statutes regulating the insurance business was called into question and a
state of confusion reigned. SEUA caused the states's fear of insurance de-regulation to be realized because Congress, unlike the states, had passed no laws specifically regulating the business of insurance. As a direct result of SEUA, the McCarran-Ferguson Act ("Act") was promulgated to dispel the confusion and assuage states' fears. Section 2(b) of the Act created an exemption from Sherman Act regulation for the "business of insurance" to the extent that such conduct was regulated by state law. This exemption was tempered by section 3(b) which eliminated the exemption for purposes of the Sherman Act, where the conduct in question amounts to "boycott, coercion, or intimidation." Thus, the Act provided Sherman Act immunity for the "business of insurance" to the extent that the conduct in question was state regulated and did not amount to "boycott, coercion, or intimidation."

The purpose of the Act was largely to restore the state of the law before the SEUA decision: that is, to preserve state authority to tax and regulate the insurance business, and to exempt the insurance business from antitrust prosecution to a certain extent. But

84. See, e.g., Francis Achampong, The McCarran-Ferguson Act and the Limited Insurance Antitrust Exemption: An Indefensible Aberration?, 15 SETON HALL LEGIS. J. 141 (1991). Professor Achampong has written that "[i]nvariably, confusion and uncertainty followed the South-Eastern Underwriters Association decision as to the constitutionality of state laws and the validity of state tax laws and regulatory provisions. Many insurance companies refused, and others threatened refusal to comply with state tax laws and other regulatory provisions." Id. at 144 (citations omitted).

85. See, e.g., Howard, cited at note 78. The SEUA decision was not welcomed by anyone, including Congress. As one author has stated:

The concerns expressed by the dissenters in SEUA mirrored those of insurers, state legislators, insurance commissioners, the NAIC and other insurance organizations, as well as Congress itself, whose members did not relish the prospect of being responsible for regulating an industry that operated in forty-eight different states and a variety of territories.

Id. at 27.

86. See, e.g., Howard cited at note 78. It has been written that "[t]he combination of these fears resulted in the enactment of the McCarran-Ferguson Act, which was signed into law nine months after the SEUA decision was announced and five months after the Supreme Court denied a widely supported motion for reconsideration." Id. at 27-28.

87. 15 U.S.C. § 1012(b). See note 23 and accompanying text for brief discussion and text of section 2(b). Justice Souter has stated that "[b]y its terms, the antitrust exemption of § 2(b) of the McCarran-Ferguson Act applies to "the business of insurance" to the extent that such business is regulated by state law." Hartford, 113 S. Ct. at 2901.


89. See, e.g., 15 U.S.C. § 1011 (1988). The policy declared in the Act states: Congress declares that the continued regulation and taxation by the several States of the business of insurance is in the public interest, and that silence on the part of the Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several States.
the extent to which the exemption was to apply became a subject for extensive litigation leading to *Hartford*.

Judicial interpretation was needed to precisely define the meaning of the "business of insurance," as comprehended within the McCarran-Ferguson Act. The Supreme Court did not specifically address this phrase until 1969, in *SEC v. National Securities, Inc.* The issue was whether McCarran-Ferguson immunity attached to National Securities, Inc. in an action brought by the SEC for alleged misrepresentations of fact made to insurance company shareholders while attempting to merge the insurance company with National Securities. In reversing the court of appeals decision that National Securities was immune, the Supreme Court indicated that to decide whether a defendant has immunity for being within the "business of insurance," one must focus primarily on the insurer/policyholder relationship.

Years later, the Court attempted to clarify the scope of the McCarran-Ferguson "business of insurance" in *Group Life and Health Insurance Co. v. Royal Drug Co., Inc.* The issue was whether an agreement between insurance companies and certain pharmacies was part of the "business of insurance" such that the

*Id.* See also Joseph E. Coughlin, *Losing McCarran Act Protection Through "Boycott, Coercion, Or Intimidation,"* 54 Antitrust L. J. 1281 (1985). One author has stated:

Congress enacted the McCarran Act, to alleviate the concern of state governments that their regulation and taxing of the insurance industry might be invalidated as an unconstitutional burden on interstate commerce . . . . As part of this revitalization of state insurance regulation, Congress limited application of the Sherman, Clayton, and Federal Trade Commission Acts.

*Id.* at 1281.


91. 393 U.S. at 455. After the trial court dismissed an amended complaint essentially alleging violations of the Securities Exchange Act, the court of appeals affirmed the dismissal, attributing McCarran-Ferguson immunity to National Securities. *Id.* at 455-56.

92. *Id.* at 460. The Court discussed what Congress' intent was in using the "business of insurance" phrase, stating "whatever the exact scope of the statutory term, it is clear where the focus was--it was on the relationship between the insurance company and the policyholder." *Id.*

93. 440 U.S. 205 (1979). This case involved an agreement between the insurance company and certain pharmacies, which provided for the insurance company to reimburse the pharmacies for distributing discounts to policyholders. *Royal Drug*, 440 U.S. at 209. Where the insurance company was Blue Shield, the Court stated:

Under the Agreement, a participating pharmacy agrees to furnish prescription drugs to Blue Shield's policyholders at $2 for each prescription, and Blue Shield agrees to reimburse the pharmacy for the pharmacy's cost of acquiring the amount of the drug prescribed. Thus, only pharmacies that can afford to distribute prescription drugs for less than this $2 markup can profitably participate in the plan.

*Id.*
McCarran-Ferguson immunity would attach. In concluding that this particular insurer/pharmacy agreement was not part of the "business of insurance," the Court indicated two important considerations: whether the agreement was made in order to underwrite or spread the risk, and whether the agreement was essentially between the insured and the policyholder.

Subsequently, the Court in Union Labor Life Insurance Co. v. Pireno, elaborated on the Royal Drug test. In Pireno, the issue the Court advanced was whether an alleged conspiracy between a life insurance company and the New York State Chiropractic Association was part of the "business of insurance" so as to be exempt from Sherman Act prosecution. In deciding that the alleged conduct was not part of the "business of insurance," the Court interpreted the Royal Drug test to include not only considerations of whether the conduct was engaged in to spread risk, and whether the conduct essentially concerned the insurer/policyholder relationship, but also whether the conduct was limited to the insurance industry. The caselaw development culminates in Hartford, where the Supreme Court affirmed the use of the Royal Drug criteria while agreeing with the court of appeals that the alleged activity was within the meaning of the "business of insurance."

Another area of extensive judicial interpretation is defining the meaning of "boycott" as used in the McCarran-Ferguson Act. One of the earliest cases that examined the scope of "boycott" was the 1914 case of Eastern States Retail Lumber Dealers Association v.
United States. The issue in this case was whether an agreement among several lumber retailers to boycott certain lumber wholesalers was a "boycott" such that it violated the Sherman Act. The Court indicated that the agreement rose to the level of an antitrust violation because in seeking to increase profits for agreement participants, it sought to restrict competition.

Likewise, in Fashion Originators' Guild of America, Inc. v. FTC, decided shortly before SEUA, the Court affirmed a cease and desist order to a group of designers who had violated the Sherman Act by boycotting certain retailers because they sold competing designers' garments. Once again, the Court noted that the conduct and plan of the guilty designers rose to the level of a violation because in striving to increase profits, it unfairly suppressed competition.

The most significant decision on the "boycott" issue as it pertains to insurance law was St. Paul Fire & Marine Insurance Co.

101. 234 U.S. 600 (1914).
102. Lumber Dealers Ass'n, 234 U.S. at 601. The agreement was to boycott certain lumber wholesalers who were selling retail as well. Id. at 605-06.
103. Id. at 614. The Court stated:

[T]he present case shows that the trade of the listed wholesalers is hindered or impeded; that competition is suppressed and the natural flow of commerce interfered with . . . . When the retailer goes beyond his personal right, and, conspiring and combining with others of like purpose, seeks to obstruct the free course of interstate trade and commerce and to unduly suppress competition . . . . he exceeds his lawful rights.

Id. (emphasis added).

104. 312 U.S. 457 (1941).
105. SEUA focused more on the "business of insurance" issue, but the point of the boycott-type activity in SEUA was also to increase profits and suppress competition. See notes 79-86 and accompanying text. As Professor Priest has stated: "South-Eastern Underwriters Association, was of exactly the same nature as Fashion Originators' Guild. . . . [T]he boycott was designed to increase Association profits by reducing the extent of insurance competition." George L. Priest, The Antitrust Suits and the Public Understanding of Insurance, 63 Tul. L. Rev. 999, 1018 (1989).

Post-SEUA decisions, such as Northwest Wholesale Stationers, Inc. v. Pacific Stationary & Printing Co., 472 U.S. 284 (1985), continued along the same lines. The question in Northwest Stationers again centered on the issue of competition. The Court stated that "[t]he question presented in this case is whether Northwest's decision to expel Pacific should fall within this category of activity that is conclusively presumed to be anticompetitive." Northwest Stationers, 472 U.S. at 290. The issue once again was narrowed down to a question of competitiveness.

106. Fashion Guild, 312 U.S. at 468.
107. Id. at 465. The Guild's plan, "[s]ubject[ed] all retailers and manufacturers who decline[ed] to comply with the Guild's program to an organized boycott [citing Lumber Dealers' Ass'n.] . . . and has both as its necessary tendency and as its purpose and effect the direct suppression of competition . . . ." Id. (emphasis added).
This case revolved around the issue of determining the scope of the McCarran-Ferguson exemption in relation to the meaning of "boycott." This class action was brought by doctors and their patients against four insurance companies alleging a conspiracy in which three of the companies refused to sell the plaintiffs' malpractice insurance coverage, compelling them to accept the terms of the fourth company. The district court dismissed the case for McCarran-Ferguson immunity, but the court of appeals reversed because the conduct alleged amounted to a "boycott," thereby removing the immunity. Accordingly, the Supreme Court was required to determine whether the "boycott" exception to McCarran-Ferguson immunity applied to relations between insurance companies and policyholders. The Court specifically decided that "boycott-type" conduct was not limited to activity directed against competitors, but also included activity directed against policyholders. Once again the Court placed great emphasis on the fact that the conduct suppressed competition, especially because of its detrimental effect on policyholders. This decision made a great leap from limiting "boycott" to conduct directed against competitors to conduct directed against policyholders, thereby expanding the potential liability of insurers and significantly reducing the effective scope of antitrust immunity.

The scope of "boycott" was further refined by the Court's decision in FTC v. Indiana Federation of Dentists. The defendant

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110. Id. at 553.
111. Id. at 534.
112. Id.
113. Id. at 552-554.
114. St. Paul, 438 U.S. at 553. In referring to the agreement the Court stated: The agreement . . . erected a barrier between . . . customers and any alternative source of the desired coverage, effectively foreclosing all possibility of competition anywhere in the relevant market. This concerted refusal to deal went well beyond a private agreement to fix rates and terms of coverage, as it denied policyholders the benefits of competition in vital matters such as claims policy and quality of service.
115. See Coughlin, cited at note 89, at 1281. Even in St. Paul, the notion that McCarran-Ferguson immunity had been limited was noted. St. Paul, 438 U.S. at 559 (Stewart, J. dissenting). In fact, it has been recognized that the language of the section 3(b) exception severely encroaches on the immunity. It has been asserted that "[t]his exception to the McCarran Act exemption carries with it a recognized threat to render meaningless the basic antitrust protection found in Section 2(b) of the McCarran Act." Coughlin, cited at note 89, at 1281.
organization adopted a policy of withholding patients' x-rays from dental insurance claims agents, severely hindering the insurance companies' ability to assess the monetary value of claims and, as a result, allowing dentists to reduce competition, and potentially, charge higher fees. The Court refused to accept the dentists' argument that Indiana had a policy against review of x-rays and concluded that, even if it did, "[a]nticompetitive collusion" would not be afforded antitrust immunity unless it was statutorily supervised. Once again, the determination of "boycott" rested on a policy to increase profits that unduly suppressed competition.

In order to grasp the significance of the international comity issue present in Hartford, and specifically the disagreement between Justice Scalia and the majority, it is necessary to consider the relevant historical development of extraterritorial application of the Sherman Act. The application of domestic law in a foreign territory has been traced as far back as the Twelfth and Thirteenth Centuries, B.C. when Egypt granted the merchants of Tyre rights to establish factories on the Nile. But significant examination of extraterritorial application of American law did not occur until the late Nineteenth and early Twentieth Centuries A.D.

The first case to specifically examine the reach of United States antitrust law was American Banana Co. v. United Fruit Co. Justice Holmes used a strictly territorial approach in addressing the issue of whether the Sherman Act could be applied to a monopoly resulting from conduct taking place outside the borders of the United States. In considering the "comity of nations," Justice Holmes, writing for the Court, as-
Holmes recognized that all laws were presumed to be territorial in application.\textsuperscript{127} He posited that general words employed in the Sherman Act, such as “Every contract,” and “Every person,” must be strictly construed to apply only to those actually subject to the legislation, and not just those who happen to be caught within the immediate jurisdiction.\textsuperscript{128} In affirming dismissal of the action,\textsuperscript{129} Justice Holmes concluded that because the allegedly unlawful conduct took place either in Panama or Costa Rica, it was not prohibited by the Sherman Act.\textsuperscript{130}

This territorialist view of legislative prescription reigned until 1945 when Judge Learned Hand delivered the opinion in the landmark case of \textit{United States v. Aluminum Co. of America, (“Alcoa”).}\textsuperscript{131} The question was again whether the Sherman Act could be construed to apply to a conspiracy with foreign entities.\textsuperscript{132} After considering the 40,000 page record below, Judge Hand ruled that the Sherman Act was applicable to agreements formed abroad which were intended to, and did in fact, affect commerce in the United States.\textsuperscript{133} Judge Hand’s opinion in \textit{Alcoa} has become widely known for providing the “effects doctrine” test for extraterritorial application of the Sherman Act,\textsuperscript{134} while greatly expanding

\textsuperscript{126.} \textit{American Banana}, 213 U.S. at 356. It is important to recognize a distinction between “comity of nations” and “judicial comity” or the “comity of courts,” as Justice Scalia pointed out in his dissent in \textit{Hartford. Hartford}, 113 S. Ct. at 2920 n.9 (Scalia, J., dissenting). “Comity of nations” is defined as: “The recognition which one nation allows within its territory to the legislative, executive, or judicial acts of another nation, having due regard both to international duty and convenience and to the rights of its own citizens or of other persons who are under the protection of its laws.” \textit{BLACK’S LAW DICTIONARY} 267 (6th ed. 1990). Whereas “judicial comity” is: “The principle in accordance with which courts of one site or jurisdiction will give effect to the laws and judicial decisions of another, not as a matter of obligation, but out of deference and respect.” \textit{Id.}

\textsuperscript{127.} \textit{American Banana}, 213 U.S. at 357.

\textsuperscript{128.} \textit{Id.}

\textsuperscript{129.} \textit{Id.} at 359.

\textsuperscript{130.} \textit{Id.} at 357.

\textsuperscript{131.} 148 F.2d 416 (2d Cir. 1945). The case was decided by this court by virtue of Supreme Court certification to the Second Circuit Court of Appeals. \textit{Alcoa}, 148 F.2d at 421.

\textsuperscript{132.} \textit{Id.} at 422.

\textsuperscript{133.} \textit{Id.} at 444.

\textsuperscript{134.} \textit{See, e.g.,}, Jonathan Turley, “When In Rome”: Multinational Misconduct and the Presumption Against Extraterritoriality, 84 NW. U. L. REV. 598 (1990). Professor Turley writes:

Sometimes called the “intended effects” test (since the defendant must intend mar-
the reach of prescriptive jurisdiction.\textsuperscript{135}

Similarly to \textit{Alcoa} and \textit{American Banana}, \textit{Timberlane Lumber Co. v. Bank of America National Trust and Savings Ass'n}\textsuperscript{136} turned on whether the Sherman Act was applicable to foreign action.\textsuperscript{137} But in \textit{Timberlane} the Ninth Circuit Court of Appeals adopted a three-pronged analysis for extraterritoriality which tempered the general holding of \textit{Alcoa}.\textsuperscript{138} The court disputed the notion that, since \textit{Alcoa}, it was "settled law" that the Sherman Act always applied extraterritorially, and recognized the importance of considering "international law, comity, and good judgment" in deciding whether to apply the Sherman Act in a given situation.\textsuperscript{139} The court indicated that the "effects doctrine" was lacking in necessary consideration of the effect of extraterritorial application upon other nations.\textsuperscript{140} In deciding for or against extraterritorial application in the modern era, the court illustrated three factors that should be considered: 1) whether there was some intended or actual effect on United States commerce,\textsuperscript{141} 2) whether the effect was significant enough to warrant prosecution under the Sherman Act,\textsuperscript{142} and 3) the significance of the effect in terms of United States interests against the interests of foreign states.\textsuperscript{143} The court noted that the importance of this new three-pronged analysis, and specifically the third prong, appears when determining the impact on foreign relations of extending the reach of United States law in private suits where the Executive Branch cannot weigh foreign re-

\begin{footnotesize}
\textsuperscript{135} See note 65 for the definition of "prescriptive jurisdiction."

\textsuperscript{136} 549 F.2d 597 (9th Cir. 1977), on remand, 574 F. Supp. 1453 (N.D. Cal. 1983), aff'd, 749 F.2d 1378 (9th Cir. 1984), cert. denied, 472 U.S. 1032 (1985).

\textsuperscript{137} \textit{Timberlane}, 549 F.2d at 600-01.

\textsuperscript{138} Id. at 613.

\textsuperscript{139} Id. at 610.

\textsuperscript{140} Id. at 611-12.

\textsuperscript{141} Id. at 613.

\textsuperscript{142} \textit{Timberlane}, 549 F.2d at 613.

\textsuperscript{143} \textit{Id.} See also Russell J. Weintraub, \textit{The Extraterritorial Application of Antitrust and Securities Laws: An Inquiry into the Utility of a "Choice-of-Law" Approach}, 70 Tex. L. Rev. 1799, 1810 (1992) (citation omitted), wherein Professor Weintraub summarizes these factors as follows: "(1) whether there was 'some effect—actual or intended—on American foreign commerce'; (2) the magnitude of the effect and the type of anticompetitive conduct; and (3) a comparison of United States and foreign interests in a comity analysis." \textit{Id.}
\end{footnotesize}
lations consequences.\textsuperscript{144}

However, some contemporary courts have continued to adhere to a purist approach in utilizing the "effects doctrine" derived from \textit{Alcoa}. For example, the District of Columbia Court of Appeals in \textit{Laker Airways Ltd. v. Sabena, Belgian World Airlines},\textsuperscript{145} declined to consider the kind of "interest balancing" used in \textit{Timberlane}.\textsuperscript{146} Instead, the court stated that it was "settled law" that domestic legislation like the Sherman Act can regulate foreign action.\textsuperscript{147}

In analyzing the precedential effect of \textit{Hartford}, the two areas of disagreement within the opinion are interesting. First, however, it must be briefly noted how the court of appeals erred in its approach to finding that Defendants lost McCarran-Ferguson immunity solely because their conduct with the foreign Defendants was outside the scope of the "business of insurance."\textsuperscript{148} In \textit{Hartford}, the Supreme Court agreed that the domestic Defendants lost immunity.\textsuperscript{149} The problem, though, was that the court of appeals misapplied the language of the \textit{Royal Drug} three-pronged approach to the task by taking a sentence out of the context of the \textit{Royal Drug} opinion to indicate that the three criteria amounted to an entity-based analysis rather than an activity-based analysis.\textsuperscript{150} \textit{Hartford}

\textsuperscript{144} \textit{Timberlane}, 549 F.2d at 613. The court stated that awareness of foreign relations implications "is especially required in private suits, like this one, for in these cases there is no opportunity for the executive branch to weigh the foreign relations impact . . . ." \textit{Id.}

\textsuperscript{145} 731 F.2d 909 (D.C. Cir. 1984). In a lengthy opinion, this case examined "a head-on collision between the diametrically opposed antitrust policies of the United States and United Kingdom, and is perhaps the most pronounced example in recent years of the problems raised by the concurrent jurisdiction held by several states over transactions substantially affecting several states' interests." \textit{Laker Airways}, 731 F.2d at 916.

\textsuperscript{146} \textit{Id.} at 948. In addressing interest balancing, the court stated that:

The suggestion has been made that this court should engage in some form of interest balancing, permitting only a "reasonable" assertion of prescriptive jurisdiction to be implemented. [citation to section 403 \textit{RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES} omitted] However, this approach is unsuitable when courts are forced to choose between a domestic law which is designed to protect domestic interests, and a foreign law which is calculated to thwart the implementation of the domestic law in order to protect foreign interests allegedly threatened by the objectives of the domestic law.

\textit{Id.}

\textsuperscript{147} \textit{Id.} at 922.

\textsuperscript{148} See note 37 for a brief summation of the court of appeals' reasoning.

\textsuperscript{149} \textit{Hartford}, 113 S. Ct. at 2901. The majority stated that "[w]e therefore affirm the Court of Appeals's judgement that it was error for the District Court to dismiss the complaints on grounds of McCarran-Ferguson Act immunity," but that "the Court of Appeals did err about the effect of conspiring with foreign defendants . . . ." \textit{Id.} (emphasis added).

\textsuperscript{150} \textit{Id.} at 2901. In \textit{Hartford}, the Court stated that the "cases confirm that the 'business of insurance' should be read to single out one activity from others, not to distinguish one entity from another." \textit{Id.} (emphasis added).
now affirms the use of the *Royal Drug* three-pronged test to analyze allegedly unlawful activity.\(^{151}\) Therefore, in the future, courts must be careful to analyze allegedly unlawful conduct in terms of the conduct itself, rather than making a categorical determination based on the nature of the implicated parties.

Concerning the first area of disagreement in the opinion, it may be that the majority has narrowed the definition of "boycott" so far as to render McCarran-Ferguson immunity practically non-existent.\(^{152}\) But this proposition had been addressed even before the Court's decision in *Hartford* and the exemption has always been construed narrowly.\(^{153}\)

The most consequential portion of the *Hartford* decision is the split in the Court over the international comity issue.\(^{154}\) Interestingly, before *Hartford*, the Supreme Court had not specifically endorsed either the balancing approach of *Timberlane*\(^{155}\) and the Restatement, or the "purist" approach of *Laker Airways*.\(^{156}\) Writing for the majority, Justice Souter leaned toward the "purist" or "absolutist" approach. In doing so, the majority correctly asserted subject-matter jurisdiction, but failed to consider the consequences to foreign relations by refusing to address the question of prescriptive jurisdiction.

In his dissent, Justice Scalia utilized a different approach which does address international comity and foreign relations concerns. The inquiry is not simply whether Congress intended to exercise jurisdiction extraterritorially, and whether such an exercise would directly conflict with the laws of a foreign nation. Rather, the analysis begins with consideration of Congressional intent, and proceeds to query whether Congress can exercise jurisdiction extraterritorially.

The majority's misinterpretation on this issue stems from Jus-

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151. *Id.*
152. See notes 42-47 and accompanying text for discussion of the majority's interpretation of "boycott," and notes 59-60 and accompanying text for Justice Souter's minority approach noting the concern of eliminating the immunity altogether.
154. See notes 48-58 and accompanying text for discussion of Justice Souter's majority approach, and notes 61-69 and accompanying text for discussion of Justice Scalia's approach.
155. See notes 136-44 and accompanying text.
156. See notes 145-47 and accompanying text.
tice Holmes' original articulation of the standard for extraterritorial application in *American Banana*, nearly a century ago. When Justice Holmes first examined extraterritorial application of the Sherman Act, he premised his analysis on a question of whether Congress had intended extraterritorial antitrust regulation. His articulation was phrased so as to require clear congressional intent to override the strict rule against extraterritorial regulation; consideration for prescriptive jurisdiction was implied in this phrasing. Through the years, the strict rule was reduced to a presumption against extraterritoriality. In relation to the Sherman Act, this conversion culminated in *Alcoa*, where the question of intent was resolved: Congress intended to regulate monopoly conduct which did or was intended to have effect in the United States. Today, it is rare that any substantial foreign economically-based action is not intended to affect the U.S. economy. Foreign business arrangements often contemplate exploiting the United States economic market. Today, there is no need to consider what was the threshold question for Holmes.

Therefore, in following congressional intent and applying the Sherman Act extraterritorially, the long-presumed and implied prescriptive power must be considered. The question is whether Congress can regulate a particular foreign conduct. That is, whether it is permissible and prudent for the United States to regulate the particular foreign conduct in question. Resolution of this question must begin with a factual determination to establish the extent and nature of the conduct in question, and subsequently

157. See notes 124-30 and accompanying text.


> It is obvious that, however stated, the plaintiff's case depends on several rather startling propositions. In the first place, the acts causing the damage were done, so far as appears, outside the jurisdiction of the United States, and within that of other states. It is surprising to hear it argued that they were governed by the act of Congress.

*Id.* at 355 (emphasis added).

159. *Id.* at 355-59. As Professor Turley has stated:

> The Supreme Court initially required clear expressions of congressional intent because all extraterritorial claims were viewed as running afoul of international law.

> The change in the scope of prescriptive jurisdiction after *American Banana* was brought about by judicial recognition that the world was no longer as Justice Holmes understood it to be in 1909.

Turley, cited at note 134, at 655-56.

160. See notes 131-35 and accompanying text.

161. See note 168 for Professor Turley's comments on the out-dated need for considering congressional intent.
proceed to a judicial determination of whether such conduct is of a type that can and should be regulated. This second step requires an examination of international interests and foreign consequences; not merely whether, as Justice Souter states, a true conflict of laws exists.

It would appear that the majority has inappropriately used sovereign compulsion defense analysis to decide whether a conflict of laws exists such that the Court would not exercise jurisdiction over the foreign Defendants. But this type of analysis is used only to decide whether that defense exists, not in deciding whether to exercise jurisdiction and subject the defendants to United States law in the first place. Where a court considers whether the defense exists for a particular defendant, jurisdiction is necessarily already obtained. This analysis for whether the sovereign compulsion defense exists is of a more highly refined nature used only when jurisdiction exists, not to determine whether jurisdiction exists in the first place. Clearly, Justice Souter has "put the cart before the horse."
horse," in this instance. 166

The international interest balancing required in this type of case is illustrated in *Timberlane.* 167 Appropriately, in that case the Ninth Circuit made no inquiry into congressional intent. 168 *Alcoa* and the subsequently codified Foreign Trade Antitrust Improvements Act 169 are dispositive of this threshold issue. As there is no doubt about congressional intent, the following inquiry is to establish to what extent congressional intent can be carried out. That is, whether Congress can be permitted to apply its regulatory schemes to persons and conduct beyond U.S. borders. This is a question of prescriptive jurisdiction.

The reasons for such an approach are manifest in the modern global economy. Where the Executive branch has no opportunity to consider the foreign relations consequences of a particular extension of U.S. regulatory law, the responsibility falls to the judiciary. The courts must consider the foreign relations impact and consequences of applying an American law passed in 1890 to foreign conduct taking place in 1990. In doing so, the judiciary acts to check and balance Congressional intent. In *Hartford,* the majority's limited "true conflict" approach neglects to adequately address this necessary responsibility; whereas, in his dissent, Justice

166. *Hartford,* 113 S. Ct. at 2910 n.25.
167. See notes 136-44 and accompanying text. In discussing the balancing process used in *Timberlane,* the court in *Mannington Mills,* stated:

The factors we believe should be considered include: 1. Degree of conflict with foreign law or policy; 2. Nationality of the parties; 3. Relative importance of the alleged violation of conduct here compared to that abroad; 4. Availability of a remedy abroad and the pendency of litigation there; 5. Existence of intent to harm or affect American commerce and its foreseeability; 6. Possible effect upon foreign relations if the court exercises jurisdiction and grants relief; 7. If relief is granted, whether a party will be placed in the position of being forced to perform an act illegal in either country or be under conflicting requirements by both countries; 8. Whether the court can make its order effective; 9. Whether an order for relief would be acceptable in this country if made by the foreign nation under similar circumstances; 10. Whether a treaty with the affected nations has addressed the issue.

*Mannington Mills,* 595 F.2d at 1297-98 (footnote omitted).

168. Professor Turley has indicated that:

After *American Banana,* however, courts expanded the potential scope of prescriptive jurisdiction to encompass behavior within the effects or conduct tests.

. . . .

With the liberalization of prescriptive jurisdiction courts today rarely even mention, let alone apply, the clear congressional intent standard in market cases. The courts find ample grounds for jurisdiction under the prescriptive principle, making the question of extraterritorial intent less significant.


Scalia shoulders it with the appropriate aid of the Restatement.

The Restatement supplies factors which serve to justify extraterritorial regulation in a given situation. Blind adherence to these factors is not required, but a level of deference to them substantiates extraterritorial regulation and provides a basis for international recognition of United States sovereign capacity to defend against domestic economic injury. In conclusion, it is not argued here that the judicial branch must defer to international concerns in all cases, but that judicial recognition of those concerns in United States courts provides a more substantial basis for foreign states to defer to the international reach of United States law.

Kevin J. McKeon

170. See note 68 for the text of section 403 of the Restatement. See also note 167 for factors used by circuit courts in Timberlane and Mannington Mills.