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ANTI-TRUST SUIT STATUS

- 1) Letter: 11/21/1989 To: Sam Cotten From: Richard Monkman
- 2) Letter: 10/16/1989 To: David Rogers From: Thomas Slagle, enclosure
- 3) Memo: Decision and Order

ANTI-TRUST SUIT STATUS

STATE OF ALASKA

DEPARTMENT OF COMMERCE & ECONOMIC DEVELOPMENT

OFFICE OF THE COMMISSIONER

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November 21, 1989

Honorable Sam Cotton
Speaker of the House
House of Representatives
P.O. Box V
Juneau, AK 99811

Re: Multistate Insurance Antitrust Lawsuit

Dear Representative Cotton:

David Rogers asked that I give you some background and an update on the multistate insurance antitrust lawsuit, State of Alaska v. Hartford Insurance Company, et al. Although I have left the Department of Law, I am still representing the state in this case.

This litigation involves lawsuits filed by 19 states against four major American primary insurance companies and a wide variety of reinsurance companies. The reinsurance companies, for the most part, do business at Lloyd's of London. Additional defendants include the Insurance Services Office (ISO) and several insurance industry trade associations.

The case began with the so-called "insurance crisis" of the mid-1980s. As you may recall, during those years many state and local governments, school districts, corporations, and small businesses had great difficulty finding affordable insurance. In particular, casualty and pollution coverage were extraordinarily scarce. The rapid, simultaneous, nationwide withdrawal of these types of insurance from the marketplace led a group of five state attorneys general to investigate possible collusion among the insurers.

The investigation revealed a pattern of collusion which pervaded the casualty liability insurance industry on both sides of the Atlantic. In a nutshell, the allegations are that leading primary insurance companies and reinsurers conspired to withdraw casualty and pollution coverage from the United States market. Moreover, it is alleged that these defendants coerced others - notably the Insurance Services Office - to take actions which prevented other potential competitors from offering these types of coverage. As a result, consumers paid more premium for less insurance coverage than ever before.

All types of collusion between competitors are illegal under the federal and state antitrust laws. In this instance, all but one of the state attorneys general filed suit against the defendants in

November 21, 1989

federal court, alleging violations of the Sherman Act and the respective state laws. The exception was Texas, which filed suit in Texas state courts.

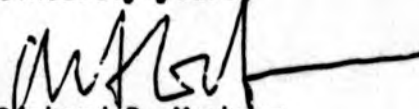
The federal cases were consolidated before Judge William Schwarzer in San Francisco. The case followed an unusual path. Judge Schwarzer stayed all discovery efforts by the states, and invited defense motions to dismiss the case "on the pleadings" under Federal Rule of Civil Procedure 12(b)(6). Essentially, a motion to dismiss under this rule accepts all facts pled by the plaintiff as true, but argues that as a matter of law the plaintiffs cannot prevail. The defendants filed a variety of motions to dismiss, the primary basis being immunity from antitrust liability under the federal McCarren - Ferguson Act.

In October of this year, Judge Schwarzer granted most of the motions to dismiss, and entered final judgment against the states. The main basis for his dismissal of the litigation was the McCarren - Ferguson Act, which allows the insurance industry wide latitude to engage in anticompetitive acts illegal in virtually every other industry. Judge Schwarzer's ruling construed this exemption very broadly, and took an extremely narrow view of the facts alleged by the attorneys general.

The states have appealed Judge Schwarzer's decision to the Ninth Circuit Court of Appeals. Briefing will begin shortly, and a decision on appeal should be rendered next fall. Alaska has participated actively in the case from its inception, and we intend to continue to do so.

Enclosed for your information is a copy of Judge Schwarzer's decision. If you need any more information, or if I can be of any further assistance, please do not hesitate to call.

Sincerely yours,


Richard D. Monkman
Deputy Commissioner

RDM/mst0266L
102189a
Enclosure

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October 16, 1989

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David Rogers, Esq.
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RE: Liability Insurance Task Force

Dear David:

This will follow up our recent telephone conversation regarding future agenda items for the task force. I will address the specific requests that you had for information from the insurance industry.

1. INSURANCE ANTITRUST LITIGATION

Nineteen states brought a lawsuit against various insurance companies alleging antitrust activities. The primary thrust of the lawsuit was that various insurance entities conspired to eliminate the "occurrence policy" for a "claims-made policy." An occurrence policy covers a claim that occurred during the policy period, although the claim or lawsuit may not be reported for several years after the specific occurrence. A claims-made policy, on the other hand, would cover any claim or lawsuit reported during a policy period. From the industry viewpoint, there has been a problem with "long-tail claims" which may not be reported for several years or, in some cases, several decades after the alleged occurrence. For example, this is a problem with the asbestos claims and many medical malpractice claims.

When the form changes were suggested by the Insurance Services Office (ISO), the issue was thoroughly discussed by the National Association of Insurance Commissioners (NAIC).

October 16, 1989

After the initial lawsuits were filed, Alaska and other states were approached to join into the litigations. Representatives of the industry, including myself, urged the State, through the Division of Insurance and the Department of Law, not to enter into the lawsuit. There did not seem to be a basis for the litigation. Alaska had the opportunity to wait and see how the other states fared in the legal arena before joining in. Finally, even if there was some scintilla of liability, there appeared to be no potential for dollar recovery. On the legislative side, Representative Gruenberg held hearings regarding the litigation and Craig Berrington from the American Insurance Association gave telephonic testimony.

The State of Alaska chose to join in the lawsuit. I am attaching a "Memorandum of Decision and Order" from United States District Court, Northern District of California, dismissing the lawsuit. Essentially, the court found that the cooperative development of the policy forms were under the control of state regulators as federal and state law requires. There was no evidence of boycott, coercion, or intimidation by the insurers.

It is my understanding that the State of Alaska plans on joining in on the appeal of the Federal Court's decision.

2. HOW INSURANCE RATES ARE FORMULATED

I submitted to you an explanatory booklet from ISO explaining how rates are formulated. The primary challenge of insurance rating is predicting future costs for as yet unknown occurrences. The starting point is the use of historical data. Loss development and trend analysis are two techniques utilized by actuaries to make their predictions. You should be aware that workers' compensation rates are generally tabulated by the National Council on Compensation Insurance (NCCI). The Division of Insurance is having hearings this month on the Alaska workers' compensation rates.

3. SETTLEMENT DISTRIBUTION

I am enclosing some information derived from the A.M. Best Rating and Insurance Organization. This information is based on the national figures for automobile premiums. Note that for \$1 of premium there is an additional 10 cents investment income. Out of the premium dollar and investment income, 83 cents goes to settlement costs, 21 cents goes to operating expenses, 4 cents goes to taxes, and 2 cents to net income. The article gives an additional breakdown of the operating expenses.

October 16, 1989

Be aware that a different line of coverage will have a different distribution of the premium dollar.

CHANGES IN THE INDUSTRY

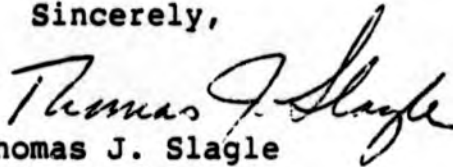
This is a broad inquiry with no easy answer. Proposition 103 in California demonstrates that a meaningful segment of the public is frustrated with the insurance industry. If there is one major emphasis or change that I have observed in the insurance industry in the past several years, it is a renewed emphasis on public relations. For an example, a broad-based group of insurers has recently joined with consumer organizations and safety groups to promote the adoption of effective highway safety legislation. There is an emphasis on explaining any change in insurance costs and an attempt to engage the public to help shape solutions to the mutual problems.

REMARKS

The major public entities in Alaska are "self-insured" and I suggest contacting the risk managers for information on recent claims payment and the effect of the 1986 tort reform. Among these entities are the State of Alaska, Municipality of Anchorage, Municipality of Juneau, the Anchorage School District, and the University of Alaska. In the private sector, Alyeska is self-insured. Be aware that a self-insured entity probably has some type of insurance for the potential of catastrophic loss.

I hope the above information is of use to the task force. Please call if you have any questions. I would appreciate being kept advised of the schedule for the task force meetings and the agenda.

Sincerely,



Thomas J. Slagle
Alaska Counsel

American Insurance Association

Enclosures

cc: Mike Thomas, Esq.
Mark Webb, Esq.
Gary Purdom
Dave Sever
Chuck Beytedieri

TJS:blh.058

Call Jeff Ash for copy of Decision

NEWS

FOR FURTHER INFORMATION, CONTACT: **Elisa Siegel** **RELEASE DATE Immediate**
or **Georgiana Smith**
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American Insurance Association (AIA) General Counsel Craig A. Berrington made the following statement in response to today's dismissal of the attorneys' general antitrust lawsuit:

"Today's court decision is welcome vindication for the insurance industry. For the past 18 months, the industry has been subjected to spurious and politically-motivated charges about boycotts and other violations of federal antitrust law. Today's decision puts the lie to those allegations.

"In dismissing the lawsuit, the court affirms what insurance companies have always known: that the charges were false; that when one reads beyond the 'pejorative allegations,' as Judge Schwarzer termed them, the case was only about the development of insurance policy forms. The cooperative development of these forms under the control of state regulators is precisely what federal and state law requires and in no way violates any antitrust laws.

"The messages from today's ruling are clear:

- o No boycott, coercion, or intimidation by insurers occurred in the process of revising and approving the commercial general liability (CGL) policy form. After reviewing a warehouse

(more)

full of materials gathered by the attorneys general for two years before bringing the suit, the court found no evidence of any kind of insurer conspiracy or boycott.

o The lawsuit shows what's right with the McCarran-Ferguson Act, not what's wrong with it. The act provided insurers with no protection from boycott, coercion, or intimidation. Rather, the law placed responsibility for approving the CGL policy where it belonged -- with the individual states, which are the best judges of their citizens' insurance needs. As the court noted, every challenged activity occurred under state regulation. Every state used its authority to control the process of developing and using the policy form.

o The court's decision is consistent with other findings that alleged insurer conspiracies did not cause the liability crisis. Studies by the Department of Justice, the Federal Trade Commission, and numerous state task forces repeatedly rejected claims that industry collusion caused the availability/affordability crisis.

o Competition flourishes within the insurance industry. More than 3500 companies are licensed to sell property/casualty insurance in the United States, with no firm holding more than 8.6% of the market.

(more)

"The court's decision stands as a stinging rebuke to the efforts of some to vilify the insurance industry for their own political gain. We regret the waste of millions of taxpayer dollars and other public resources in this needless attack, but hope today's decision brings this sorry episode to an end."

9/15/89: 64

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RICHARD A. WIEKING
CLERK
U.S. DISTRICT COURT
NO DIST OF CA

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

In re) MDL 767
INSURANCE ANTITRUST LITIGATION) MEMORANDUM OF
) DECISION AND ORDER

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1 **I. INTRODUCTION**

2 Nineteen states and numerous private plaintiffs have brought
3 actions against a group of insurance companies, reinsurance
4 companies, underwriters, brokers, and individuals, and the
5 Insurance Services Office, Inc. ("ISO"), charging them with
6 violations of the federal antitrust laws and state laws.¹ The
7 charges rest on alleged conspiracies, boycotts, threats,
8 intimidation, and other coercive conduct by defendants to
9 restrict the availability of certain coverage under policies for
10 commercial general liability insurance ("CGL") and property
11 insurance. The filing of these complaints followed lengthy
12 investigations conducted by the regulatory agencies of several
13 states.²

14 Defendants have moved to dismiss, for judgment on the
15 pleadings, and for summary judgment, and plaintiffs have made
16 cross-motions. For purposes of these motions, the well-pleaded
17 allegations of the complaints are accepted as true, and any
18 factual disputes and inferences are resolved in plaintiffs'
19 favor.

20 Copies of the Court's proposed ruling were distributed to
21 counsel well in advance of the hearing, and the Court has
22 considered the arguments of counsel in reaching the decision
23 reflected in this memorandum.

24 ¹ For a list of the parties and of the actions encompassed by
25 this ruling, see Appendix.

26 ² Moreover, under the Court's pretrial order, the parties
27 were free to conduct discovery insofar as necessary for these
28 motions.

1 **II. FACTUAL BACKGROUND**

2 CGL insurance protects the insured against the risk of
3 liability to third parties for bodily injury or property damage.
4 It is purchased by businesses, non-profit groups, and
5 governmental entities. Defendants Hartford Fire Insurance
6 Company ("Hartford"), Allstate Insurance Company ("Allstate"),
7 Aetna Casualty and Surety Company ("Aetna"), and CIGNA
8 Corporation ("CIGNA") are primary insurers who are major
9 providers of CGL insurance.³ CGL insurance is written
10 predominantly on standard policy forms developed by ISO.

11 ISO is an association of more than one thousand property or
12 casualty insurers, including Hartford, Allstate, Aetna, and
13 CIGNA. It is licensed as a rating, rate service, and advisory
14 organization in all fifty states. One of its primary functions
15 is to develop standardized policy forms for property and
16 casualty insurance that comply with state regulations and will
17 be accepted by state insurance departments. On behalf of its
18 members, ISO files standardized policy forms with state
19 insurance departments. ISO also collects historical loss data,
20 projects future loss trends, and calculates advisory rates for
21 insurance.

22 In the late 1970s, ISO began to develop a revision of the
23 standard CGL form then in use. In 1984, ISO filed or lodged
24 with state insurance departments two proposed new policy forms
25 for CGL insurance. These forms substantially modified coverage

27 ³ CIGNA is a holding company having subsidiaries which are
28 primary insurers.

1 previously available to the insured. One of the forms was a
2 "claims-made" policy under which coverage was limited to claims
3 made during the policy period regardless of when the occurrence
4 out of which the claim arose had taken place. This represented
5 a reduction in the coverage available under the previous CGL
6 policy form which was an "occurrence-based" form; under that
7 form, the insured was covered for claims arising out of
8 occurrences during the policy period, no matter when asserted,
9 thus exposing insurers to so-called "long tail risks" that could
10 arise long after the policy period. The proposed claims-made
11 form reduced that exposure and shifted the risk of future claims
12 to the insured. The other proposed form was a modified
13 occurrence policy.

14 These forms became the subject of widespread debate and
15 controversy in the insurance industry. Considerable differences
16 of opinion arose over what should trigger coverage, whether
17 retroactivity of claims-made coverage should be limited, whether
18 the pollution exclusion should be modified, and whether defense
19 costs should be limited by the policy limits.

20 In their complaint, plaintiffs charge defendants Hartford,
21 CIGNA, Allstate, and Aetna with engaging in a concerted effort
22 to block adoption of the 1984 forms because those forms did not
23 restrict coverage sufficiently. Plaintiffs allege that these
24 defendants entered into conspiracies with certain domestic and
25 foreign defendant reinsurance companies, underwriters, and their
26 representatives to "boycott" the 1984 forms unless a retroactive
27 date was added to the claims-made form and a pollution exclusion
28 and defense cost cap were added to both forms. Plaintiffs

1 allege that as a result of the efforts of Hartford, Allstate,
2 Aetna, and CIGNA, certain domestic and London reinsurers
3 threatened to "boycott" North American CGL risks unless these
4 changes were made in the claims-made form and the occurrence
5 form was eliminated. Also as a result of these efforts, the ISO
6 executive committee in September 1984 voted to include a
7 retroactive cut-off date in the claims-made policy form, to
8 exclude pollution coverage from both forms, but to defer until
9 later limiting defense costs, and to offer an occurrence form
10 along with the new claims-made form.

11 Following this agreement, ISO, Hartford, Aetna, and
12 representatives of the London reinsurers undertook joint efforts
13 to promote the new forms. Reinsurers refused to accept new
14 reinsurance business or renew old business unless the primary
15 carrier agreed to switch to the claims-made form when available.
16 Reinsurers also imposed "sunset dates" in their treaties
17 limiting their exposure to losses on occurrence policies.
18 Reinsurance underwriters also entered into an agreement to
19 exclude pollution liability coverage from reinsurance treaties.

20 During the period from 1984 through 1986, when these events
21 are alleged to have occurred, ISO lodged or filed the proposed
22 forms with the insurance departments of all states. Departments
23 in thirty-five states held public hearings and the policy terms
24 that are the subjects of the complaints were discussed within
25 the industry and in public forums. As a result ISO filed or
26 lodged several revisions of its proposed forms with the state
27 insurance departments. At the conclusion of the various states'
28 proceedings in 1986, all of the plaintiff states and the two

1 non-plaintiff states in which individual plaintiffs reside had
2 approved the ISO forms with the following exceptions:
3 Massachusetts and New Jersey disapproved them, New York approved
4 only the occurrence form, and California and Colorado, having no
5 procedure for approval, took no action. Thereafter ISO withdrew
6 its data collection and risk estimation support for the pre-1984
7 CGL form.

8 In 1986, ISO and certain defendants agreed that ISO should
9 also develop standard CGL umbrella and excess policy language.
10 In June 1986 ISO released policy language providing for a
11 retroactive date on claims-made policies, a pollution exclusion,
12 and defense costs within policy limits.

13 Finally, in 1987 domestic and London retrocessional
14 reinsurers⁴ are alleged to have entered into an agreement
15 regarding property insurance to use their "best endeavors to
16 ensure that all U.S.A. and Canadian exposed [property]
17 insurance/reinsurance business attaching on or after 1st
18 January, 1987 will only be written where the original business
19 includes a seepage and pollution exclusion wherever legal and
20 applicable."

21 III. THE FEDERAL LAW VIOLATIONS CHARGED

22 The state complaints fall into two groups depending on when
23 they were filed. The First Wave Complaints each contain eight
24 federal claims.⁵ The Second Wave Complaints each contain six

25 ⁴ Retrocessional insurance is insurance for reinsurers.

26 ⁵ First Wave Complaints were filed by Alabama, Arizona,
27 California, Massachusetts, New York, West Virginia, and
28 Wisconsin. Citations to First Wave Complaints are to the
California complaint.

1 federal claims.⁶ All complaints also contain pendent state law
2 claims. The private complaints track the state complaints.

3 The First Claim of the Second Wave Complaints alleges a
4 global conspiracy by all defendants in violation of Section One
5 of the Sherman Act, 15 U.S.C. § 1,

6 for the purpose and with the effect of shrinking the
7 scope of CGL property/casualty insurance and reinsurance
8 and retrocessional reinsurance, . . . to . . . reduce
financial exposure to such risks and to increase
underwriting profits therefrom.

9 (Conn. Compl't § 117.) Plaintiffs allege that defendants used
10 boycotts, coercion, and intimidation to limit available
11 coverage. (Id. § 118(a).) No corresponding claim is made in
12 the First Wave Complaints.

13 The Second Claim of the Second Wave Complaints and the
14 First through Fourth Claims of the First Wave Complaints allege
15 a conspiracy by defendants Hartford, Allstate, Aetna, CIGNA,
16 ISO, and certain others⁷ to manipulate the ISO design process

17 ⁶ Second Wave Complaints were filed by Alaska, Colorado,
18 Connecticut, Louisiana, Maryland, Michigan, Minnesota, Montana,
19 New Jersey, Ohio, Pennsylvania, and Washington. Citations to
Second Wave Complaints are to the Connecticut complaint.

20 ⁷ The defendants named in these claims are as follows:

21 The Second Claim of the Second Wave Complaints alleges
22 that defendants Robin A.G. Jackson, Merrett Syndicate, Three
23 Quays, Janson Green, Edwards & Payne, C.J.W., Thomas A. Greene,
24 R.K. Carvill, RAA, General Re, Constitution Re, Mercantile &
General Re, Prudential Re, North American Re, and Winterthur
Swiss and other co-conspirators were involved. Louisiana also
names INA.

25 The First Claim of the First Wave Complaints alleges
26 concerted action by domestic defendants and also names RAA,
General Re, Constitution Re, Mercantile & General Re, Prudential
Re, North American Re, Winterthur Swiss, and Thomas A. Greene.

27 The Second Claim of the First Wave Complaints alleges
28 concerted action by foreign defendants and also names Robin A.G.

1 for CGL forms to limit the available coverage. Plaintiffs
2 allege that defendants conspired to restrict the terms under
3 which reinsurance coverage would be provided for CGL risks, to
4 refuse to provide reinsurance unless the 1984 form were amended
5 to incorporate defendants' terms, to coerce ISO and its members
6 to adopt the coverage terms and exclusions agreed to by
7 defendants, and to boycott the forms unless amended. (Conn.
8 Compl't §§ 122-123; Cal. Compl't §§ 113-114, 118-119, 123-124,
9 128-129.)

10 The Third Claim of the Second Wave Complaints and the Fifth
11 Claim of the First Wave Complaints in substance charge certain
12 defendants⁸ engaged in the reinsurance business at Lloyd's of
13 London with a conspiracy to restrict the terms under which
14 reinsurance coverage would be provided for CGL risks and to
15 refuse to reinsure CGL risks on occurrence forms by coercion and
16 intimidation of primary insurers, among other things. (Conn.
17 Compl't §§ 127-128; Cal. Compl't §§ 133-134.)

18 The Fourth Claim of the Second Wave Complaints and the

19 Jackson, Merrett Syndicate, Three Quays, Janson Greene, Edwards
20 & Payne, C.J.W., J. Brian Hose, R.K. Carvill, and Thomas A.
21 Greene. New York and Wisconsin do not name J. Brian Hose;
Arizona does not name Robin A.G. Jackson.

22 The Third Claim of the First Wave Complaints alleges
23 concerted action by domestic and foreign defendants and names
the same defendants as in the First and Second Claims except for
C.J.W. and J. Brian Hose.

24 The Fourth Claim of the First Wave Complaints alleges
25 concerted action by domestic and foreign defendants and ISO and
names the same defendants as in the Third Claim.

26 ⁸ Peter N. Miller, Robin A.G. Jackson, Merrett Syndicate,
27 Three Quays, Janson Greene, Edwards & Payne, and Ballantyne
McKean. Arizona does not name Peter N. Miller or Robin A.G.
28 Jackson.

1 Sixth Claim of the First Wave Complaints in substance charge
2 certain defendants⁹ engaged in the reinsurance business at
3 Lloyd's of London with a conspiracy to restrict the terms under
4 which casualty reinsurance coverage would be provided for CGL
5 risks and to limit the availability of pollution coverage in
6 primary casualty insurance. No boycott, coercion, or
7 intimidation is alleged. (Conn. Compl't §§ 132-133; Cal.
8 Compl't §§ 138-139.)

9 The Fifth Claim of the Second Wave Complaints and the
10 Eighth Claim of the First Wave Complaints in substance charge
11 certain defendants¹⁰ engaged in the reinsurance business at
12 Lloyd's of London with a conspiracy to restrict the terms on
13 which property insurance and reinsurance coverage would be
14 provided and to limit its availability by, among other things,
15 agreeing to boycott the provision of retrocessional insurance
16 unless the primary insurance excluded seepage, pollution, and
17 contamination coverage. (Conn. Compl't §§ 137-138; Cal. Compl't
18 §§ 148-149.)

19 The Sixth Claim of the Second Wave Complaints and the
20 Seventh Claim of the First Wave Complaints charge ISO, Allstate,
21
22
23

24 ⁹ Merrett Syndicate, Murray Lawrence, Edwards & Payne,
25 D.P. Mann, C.J.W., Unionamerica, Terra Nova, Oxford, CNA Re, and
26 Ballantyne McKean. Wisconsin does not name CNA Re and does name
27 Robin A.G. Jackson.

28 ¹⁰ Unionamerica, Terra Nova, Excess, Edwards & Payne,
Kemper Re, Merrett Syndicate, and Continental Re. Oxford is
named only in all the Second Wave Complaints except Alaska's.
Wisconsin also names CNA Re.

1 Hartford, Aetna, and certain other defendants" with a
2 conspiracy to restrict terms and conditions under which umbrella
3 and excess insurance would be available. No boycott, coercion,
4 or intimidation is charged. (Conn. Compl't §§ 142-143; Cal.
5 Compl't §§ 143-144.)

6 **IV. THE MOTIONS BEFORE THE COURT**

7 Defendants have filed five motions to dismiss or for summary
8 judgment on the following grounds:

9 A. Asserting antitrust immunity under the McCarran-Ferguson
10 Act, 15 U.S.C. §§ 1011-1015 ("the McCarran Act"), all defendants
11 have moved under Federal Rules of Civil Procedure 12(b)(6) and
12 56 to dismiss or for summary judgment.

13 B. Asserting the state action immunity doctrine, all
14 defendants have moved under Rule 56 for summary judgment against
15 all plaintiffs except California, Alaska, Colorado, and Montana
16 on (a) the so-called global conspiracy claim of the Second Wave
17 complaints, and (b) the policy form development claims.

18 C. Asserting lack of standing, all defendants except ISO,
19 INA, Hartford, Allstate, Aetna, and CIGNA have moved under Rule
20 12(b)(6) for dismissal of all claims against them. (This motion
21 does not encompass the claims against Merrett and Three Quays
22 alleging an agreement in restraint of trade in the excess and
23 umbrella insurance market.)

24 D. Asserting that there is "no factual allegation linking
25 [them] in a 'global' conspiracy," foreign reinsurer defendants
26 have moved under Rule 12(b)(6) to dismiss the global conspiracy

27 ¹¹ Merrett Syndicate and Three Quays. CIGNA is named only
28 in the Second Wave Complaints. Louisiana also names INA.

1 claim of the Second Wave complaints.

2 E. Asserting lack of subject matter jurisdiction and
3 international comity, foreign reinsurer and retrocessional
4 reinsurer defendants and one broker have moved under Rule
5 12(b)(1) to dismiss the two claims alleging conspiracies to
6 eliminate pollution coverage.

7 The States have moved to strike the defense based on the
8 state action immunity doctrine.

9 V. DISCUSSION

10 A. THE MCCARRAN-FERGUSON ACT DEFENSE

11 Defendants have moved for summary judgment on all federal
12 claims on the ground that their conduct is immunized from
13 antitrust liability by the McCarran Act. Although the primary
14 thrust of the motion is said to be directed at those claims
15 which are based on policy form development activities, the
16 controlling principles apply to defendants' underwriting-related
17 actions as well.¹² Stripped of their pejorative allegations,
18 those claims charge a conspiracy to reduce the exposure of
19 defendant insurers and reinsurers under CGL policies. The
20 defendants sought to accomplish their objective by bringing
21 about changes in standard policy language and by avoiding
22 underwriting or reinsuring risks written on disfavored policy
23 terms. All of this they did in large part by collective action,
24 and it may be assumed that plaintiffs could prove a consequent
25 lessening of competition among defendants and a diminution of

26 ¹² Those defendants who are named in claims asserting
27 conspiracies in connection with the reinsurance markets have also
28 moved to dismiss on other grounds. They join in this motion as
an alternate ground for dismissal. See *infra* § V.C.

1 options available in the market for CGL insurance, resulting in
2 a restraint of trade.

3 In the absence of the McCarran Act, those allegations may
4 well state a claim for relief under the Sherman Act. The issue
5 raised by these motions is whether plaintiffs could prove a set
6 of facts under those general allegations that would entitle them
7 to relief notwithstanding the McCarran Act.

8 That Act states:

9 (a) The business of insurance, and every person engaged
10 therein, shall be subject to the laws of the several
11 States which relate to the regulation or taxation of
12 such business.
13 (b) No Act of Congress shall be construed to invalidate,
14 impair, or supersede any law enacted by any State for
15 the purpose of regulating the business of insurance
16 . . . : Provided, That . . . the Sherman Act, . . . the
17 Clayton Act, and . . . the Federal Trade Commission Act
18 . . . shall be applicable to the business of insurance
19 to the extent that such business is not regulated by
20 State law.

21 15 U.S.C. § 1012.

22 Section 1013(b) of the Act further provides:

23 Nothing contained in this chapter shall render the . . .
24 Sherman Act inapplicable to any agreement to boycott,
25 coerce, or intimidate, or act of boycott, coercion, or
26 intimidation.

27 The McCarran Act created limited antitrust immunity for the
28 business of insurance following the Supreme Court's departure,
29 in United States v. South-Eastern Underwriters Association, 322
30 U.S. 533 (1944), from prior holdings that insurance is not a
31 transaction in interstate commerce. See St. Paul Fire & Marine
32 Ins. Co. v. Barry, 438 U.S. 531, 538-39 (1978). It was passed
33 in response to widespread concern that the states should not be
34 precluded from continuing to regulate and tax the insurance
35 industry. It immunizes the business of insurance from the

1 antitrust laws but only to the extent that it is regulated by
2 the states and does not involve boycott, coercion, or
3 intimidation. See Feinstein v. Nettleship Co., 714 F.2d 928,
4 931 (9th Cir. 1983), cert. denied, 466 U.S. 972 (1984). Like
5 all antitrust immunities, it must, of course, be narrowly
6 construed. See Group Life & Health Ins. Co. v. Royal Drug Co.,
7 440 U.S. 205, 231 (1979).

8 The application of the McCarran Act immunity involves a
9 three step analysis:

10 (1) Whether the conduct is within the scope of the business
11 of insurance;

12 (2) Whether that business is regulated by the states; and

13 (3) Whether the conduct involves boycott, coercion, or
14 intimidation.

15 (1) The Business of Insurance

16 In Union Labor Life Insurance Co. v. Pireno, 458 U.S. 119
17 (1982), the Supreme Court stated the criteria for what
18 constitutes the business of insurance for purposes of the
19 McCarran Act as follows:

20 first, whether the practice has the effect of
21 transferring or spreading a policyholder's risk; second,
22 whether the practice is an integral part of the policy
23 relationship between the insurer and the insured; and
24 third, whether the practice is limited to entities
25 within the insurance industry.

26 458 U.S. at 129.

27 And in Group Life & Health Insurance Co. v. Royal Drug Co.,
28 the Court said:

References to the meaning of the "business of
insurance" in the legislative history of the McCarran-
Ferguson Act strongly suggest that Congress understood
the business of insurance to be the underwriting and

1 spreading of risk. Thus, one of the early House Reports
2 stated: "The theory of insurance is the distribution of
3 risk according to hazard, experience, and the laws of
averages. These factors are not within the control of
insuring companies in the sense that the producer or
manufacturer may control cost factors."

4 440 U.S. at 220-21 (citation omitted).

5 Plaintiffs do not dispute that the activities of defendants
6 insofar as they relate to the terms and conditions of primary,
7 excess, or umbrella insurance, are the business of insurance
8 within the meaning of the McCarran Act. (See Plaintiff States'
9 Unified Opposition Brief ("Unified Opp.") 37-40.) They contend,
10 however, that reinsurance is not the business of insurance
11 because it relates only indirectly to the spreading of the
12 policyholder's risk and because, they contend, it is not an
13 integral part of the policy relationship between the insurer and
14 the insured. (Id.)

15 There is no authority for excluding reinsurance from the
16 business of insurance. On the contrary, reinsurance was
17 specifically referred to as a part of the business of insurance
18 in the legislative history of the McCarran Act. See 90 Cong.
19 Rec. A4406 (1944); 89 Cong. Rec. 6528 (1943). The Ninth Circuit
20 applied the McCarran exemption to reinsurers as well as to the
21 primary insurer in Feinstein. 714 F.2d at 930.

22 Plaintiffs urge an unreasonably narrow application of the
23 Pireno test. Their own description establishes that reinsurance
24 is an integral and vital part of the business of insurance. The
25 complaints define reinsurance as "insurance for insurers."
26 (E.g., Conn. Compl't ¶ 4(p); Cal. Compl't ¶ 4(o).) They go on
27 to describe reinsurance as
28

1 a transaction whereby one insurance company, the
2 reinsurer, agrees to indemnify another insurance
3 company, the primary (or "ceding") insurer, for a
4 designated portion of the insurance risks underwritten
5 by the primary insurer. Reinsurance protects the
6 primary insurer from catastrophic losses, and is heavily
7 relied upon by prudent primary insurers. It also allows
8 the primary insurer to sell more insurance than its own
9 financial capacity might otherwise permit. Thus, the
10 availability of reinsurance affects the ability and
11 willingness of primary insurers to provide insurance to
12 their customers.

13 (Conn. Compl't § 4(p); see also Cal. Compl't §§ 26-29, 34.)

14 Thus, reinsurance is no less a part of the process of
15 underwriting and spreading risks than primary insurance.

16 Plaintiffs' allegations rest, moreover, on the premise that the
17 terms on which reinsurance is available affect the terms on
18 which primary insurance is written and that the terms and
19 availability of reinsurance directly affect the availability of
20 insurance coverage to consumers. (Unified Opp. 13-16.) As
21 plaintiffs' brief puts it, "by conspiracy to eliminate
22 reinsurance for the consumer-demanded coverages, the reinsurers
23 acted anticompetitively in reinsurance markets . . . [which] led
24 inexorably to an injury to the States in the interrelated
25 primary insurance markets." (*Id.* at 76.) Because reinsurance
26 is thus an element of the policy relationship with the insured,
27 it is part of the business of insurance. See also SEC v.

28 National Sec., Inc., 393 U.S. 453, 460 (1960) (business of
insurance includes "activities of insurance companies [that]
relate . . . closely to their status as reliable insurers").

By the same logic, retrocessional insurance, which is
"insurance for reinsurers" (Conn. Compl't § 4(r)), is part of

1 the business of insurance.¹³

2 (2) Regulation by the States

3 The condition of state regulation is satisfied by "a state
4 regulatory scheme possess[ing] jurisdiction over the challenged
5 practice." Feinstein, 714 F.2d at 933. "It is not necessary to
6 point to a state statute which gives express approval to a
7 particular practice." Id.; see Klamath-Lake Pharmaceutical
8 Ass'n v. Klamath Medical Service Bureau, 701 F.2d 1276, 1287
9 (9th Cir.), cert. denied, 464 U.S. 822 (1983); Dexter v.
10 Equitable Life Assur. Soc., 527 F.2d 233, 236 (2d Cir. 1975);
11 Lawyers Title Co. of Mo. v. St. Paul Title Ins. Co., 526 F.2d
12 795, 797-98 (8th Cir. 1975); Ohio AFL-CIO v. Insurance Rating
13 Bd., 451 F.2d 1178, 1181-84 (6th Cir. 1971), cert. denied, 409
14 U.S. 917 (1972); see also P. Areeda & H. Hovenkamp, Antitrust
15 Law § 210.1b (Supp. 1988) (McCarran immunity distinguished from
16 Parker v. Brown immunity; the former requiring only the
17 existence of a state regulatory scheme, without regard to the
18 intensity of state regulation).

19 This case involves the insurance business in twenty-one
20 states.¹⁴ The Ninth Circuit has held that California's scheme
21 of regulation satisfies the McCarran Act. Addrisi v. Equitable
22 Assur. Soc. of the United States, 503 F.2d 725, 728 (9th Cir.
23 1974), cert. denied, 420 U.S. 929 (1975). The Court takes

24 ¹³ The argument that the exemption is lost as a result of
25 joint action with non-exempt entities is without merit. Klamath-
26 Lake Pharmaceutical Association v. Klamath Medical Service Bureau,
701 F.2d 1276, 1288 n.12 (9th Cir.), cert. denied, 464 U.S. 822
(1983).

27 ¹⁴ The nineteen plaintiff states plus Florida and Illinois,
28 the two non-plaintiff states in which private plaintiffs reside.

1 judicial notice of the laws of the other jurisdictions.¹⁵ Each
2 state has an insurance department with jurisdiction over policy
3 forms. Sixteen of the plaintiff states and the two non-
4 plaintiff states in which private plaintiffs reside require
5 filing and review of policy forms, including umbrella and excess
6 policies offered by admitted insurers. All of the states have
7 licensed ISO and permit joint action by ISO and insurance
8 companies with respect to policy forms. All of the states have
9 unfair insurance trade practice statutes enabling them to
10 proceed against conduct such as that alleged in the complaints.
11 Although plaintiffs contend that reinsurance and umbrella and
12 excess insurance are not regulated by the states, these statutes
13 are broad enough to apply to any persons in the business of
14 insurance, including reinsurers.¹⁶ These statutory schemes are
15 sufficient to qualify under section 1082(b) of the McCarran Act.
16 See SEC v. National Securities, Inc., 393 U.S. 453, 459-60
17 (1969) (state laws protecting or regulating, directly or
18 indirectly, relationship between insurer and policy holder
19 qualify); FTC v. National Cas. Co., 357 U.S. 560, 564-65 (1958)

20
21 ¹⁵ See Defendants' State-by-State Appendix accompanying their
22 McCarran Act motion. The facts set forth in this paragraph have
23 not been disputed in plaintiffs' opposition brief.

24 ¹⁶ Cal. Insur. Code § 790.01 is typical:

25 This article applies to reciprocal and interinsurance
26 exchanges, Lloyds insurers, fraternal benefit societies,
27 fraternal fire insurers, grants and annuities societies,
insurers holding certificates of exemptions, motor clubs,
nonprofit hospital associations, agents, brokers,
solicitors, surplus line brokers and special lines surplus
line brokers as well as all other persons engaged in the
business of insurance.

28 (Emphasis added.)

1 (state unfair insurance advertising laws qualify); Mackey v.
2 Nationwide Ins. Co., 724 F.2d 419, 421 (4th Cir. 1984) (state
3 unfair insurance practice laws that provide for administrative
4 supervision and enforcement qualify).

5 Plaintiffs' argument that the regulatory schemes of the
6 states do not reach the allegations of subversion of ISO's
7 decision-making process and concerted activity to restrict the
8 availability of coverages in the market is self-defeating. To
9 avoid McCarran Act immunity, plaintiffs rely on allegations of
10 boycott, coercion, and intimidation, and contend that this
11 conduct is prohibited by the states. That prohibition is indeed
12 contained in the unfair practice acts of each state, but the
13 fact that it is satisfies the regulation prerequisite to
14 immunity under section 1012.¹⁷ See In re Workers' Comp. Ins.
15 Antitrust Litig., 867 F.2d 1552, 1558-60 (8th Cir.), cert.
16 denied, 57 U.S.L.W. 3859 (1989).

17 Plaintiffs' argument that the standards for state action
18 immunity under Parker v. Brown, 317 U.S. 341 (1943), should
19 apply to the McCarran Act lacks any support. As Professors
20 Areeda and Hovenkamp point out, if the regulatory requirements
21 under McCarran "were to coalesce with the Parker requirements,
22 the scope of the McCarran-Ferguson Act would be largely
23 irrelevant as a practical matter." P. Areeda & H. Hovenkamp,

24

25 ¹⁷ Cal. Insur. Code § 790.03(c) is typical:

26 Entering into any agreement to commit, or by any
27 concrete action committing, any act of boycott, coercion
28 or intimidation resulting in or tending to result in
unreasonable restraint of, or monopoly in, the business
of insurance.

1 Antitrust Law § 210.1b, at 97 (Supp. 1988). (See infra §
2 V.B(1).) Such an interpretation would tend to nullify
3 Congressional intent in adopting the McCarran Act.

4 (3) The Exclusion of Boycott, Coercion, and
5 Intimidation

6 The States have submitted a Statement of Material Facts in
7 support of their unified opposition brief. (Unified Opp. 6-16.)
8 The following facts are material to this section of the opinion.

9 Twenty of the defendants, including primary insurers,
10 reinsurers, brokers, and underwriters, dissatisfied with the CGL
11 forms approved by ISO in 1984 because those forms failed to
12 eliminate occurrence and pollution coverage, "agreed to and
13 undertook a course of concerted action" to limit the
14 availability of certain CGL coverages, and twelve other
15 defendants ultimately joined in. (Id. at 10-11.) This course
16 of action included the following activities. To coerce ISO into
17 revising its 1984 CGL forms, defendant reinsurers agreed to and
18 did announce that reinsurance would not be provided for coverage
19 written on the 1984 form. (Id. at 11.) In addition, certain
20 defendants took "coercive action" by agreeing to announce and
21 announcing that they would not provide reinsurance on occurrence
22 policies and would impose sunset clauses in their coverage.¹⁸
23 (Id. at 12.) Certain defendants took "coercive action" by
24 agreeing to include and including a pollution exclusion in their
25 reinsurance treaties. (Id. at 13-14.) Certain defendants made
26 a "coercive statement of intention not to provide reinsurance

27 ¹⁸ A "sunset clause" limits the reinsurer's liability to those
28 claims presented to it by the primary insurer prior to a specified
date.

1 unless the primary policy excludes all property pollution
2 coverage." (Id. at 14-15.) Finally, certain defendants agreed
3 to eliminate the same coverage from excess and umbrella policy
4 forms. (Id. at 15-16.) And ISO withdrew statistical support
5 for its 1973 form. (Id. at 12.)

6 It will be noted that plaintiffs' statement does not allege
7 a boycott. Nor does it (or the complaints) describe conduct
8 that "accords with the common understanding of a boycott." St.
9 Paul Fire & Marine Ins. Co. v. Barry, 438 U.S. 531, 552 (1978).

10 As the Supreme Court described the conduct there in issue,

11 The four insurance companies that control the market in
12 medical malpractice insurance are alleged to have agreed
13 that three of the four would not deal on any terms with
14 the policyholders of the fourth. As a means of ensuring
15 policyholder submission to new, restrictive ground rules
16 of coverage, St. Paul obtained the agreement of the
17 other petitioners, strangers to the immediate dispute,
18 to refuse to sell any insurance to its policyholders.
19 "A valuable service germane to [respondents'] business
20 and important to their effective competition with others
21 was withheld from them by collective action."

22 The agreement binding petitioners erected a barrier
23 between St. Paul's customers and any alternative source
24 of the desired coverage, effectively foreclosing all
25 possibility of competition anywhere in the relevant
26 market. This concerted refusal to deal went well beyond
27 a private agreement to fix rates and terms of coverage,
28 as it denied policyholders the benefits of competition
in vital matters such as claims policy and quality of
service.

Id. at 552-53 (citation omitted) (emphasis added).

23 In contrast, plaintiffs here charge no more than an
24 agreement to restrict coverage. But they seek to piggyback this
25 charge on conclusory allegations of pressure and compulsion that
26 echo Barry. The decision in Barry, however, turned not on the
27 pressure and compulsion directed at policy holders to submit to
28 curtailed coverage, but on the agreement with competitors not to

1 deal with those policy holders on any terms. As the Court said:

2 Solely for the purpose of forcing physicians and
3 hospitals to accede to a substantial curtailment of the
4 coverage previously available, St. Paul induced its
5 competitors to refuse to deal on any terms with its
6 customers. This agreement did not simply fix rates or
7 terms of coverage; it effectively barred St. Paul's
8 policyholders from all access to alternative sources of
9 coverage and even from negotiating for more favorable
10 terms elsewhere in the market. The pact served as a
11 tactical weapon invoked by St. Paul in support of a
12 dispute with its policyholders. The enlistment of third
13 parties in an agreement not to trade, as a means of
14 compelling capitulation by the boycotted group, long has
15 been viewed as conduct supporting a finding of unlawful
16 boycott.

17 Id. at 544-45 (emphasis added).

18 Thus, the issue is not whether defendants used pressure to
19 reduce the coverage available to buyers of insurance. The issue
20 is whether they entered into concerted refusals to deal that
21 denied consumers access to the markets for the desired
22 coverages. The Ninth Circuit explained the meaning of boycott
23 in Feinstein: "Because [the agreement] in no way limited the
24 doctors' ability to deal with third parties, the agreement
25 itself is not an agreement to boycott or coerce the plaintiff to
26 purchase the defendants' insurance." 714 F.2d at 933.

27 The distinction between lawful joint action and prohibited
28 boycott and coercion is also explained in Proctor v. State Farm
Mutual Automobile Insurance Co., 561 F.2d 262 (D.C. Cir. 1977):

29 The facts in South-Eastern Underwriters are a
30 useful guidepost. Logically speaking, a simple
31 agreement among insurance companies to charge certain
32 premium rates could be viewed as a boycott agreement,
33 since its observance would result in a collective
34 refusal to deal with policyholders except at a fixed
35 price. But the Supreme Court's opinion in South-Eastern
36 Underwriters did not characterize the basic rate-fixing
37 agreement in that case in terms of "boycott, coercion,
38 or intimidation"; those terms were reserved for the
additional activities utilized to enforce the agreement.

1 Since the McCarran Act was passed in response to South-
2 Eastern Underwriters, and since a construction of the
3 boycott provision to encompass a simple rate-fixing
4 agreement would indeed emasculate the Act's antitrust
5 exemption, it is reasonable to infer that in a rate-
6 setting context something in the way of enforcement
7 activity would be required to make out a claim of
8 "boycott, coercion, or intimidation" within the meaning
9 of the Act.

10 Id. at 274 (citation omitted).¹⁹

11 This interpretation of boycott and coercion has been
12 consistently followed, in the context of coverage as well as
13 rates. See, e.g., Meicler v. Aetna Cas. and Sur. Co., 506 F.2d
14 732, 734 (5th Cir. 1975) (parallel actions of insurance
15 companies to refuse to offer insurance except under rate
16 regulation scheme adopted by state not a boycott); UNR Indus.
17 Inc. v. Continental Ins. Co., 607 F. Supp. 855, 862-63 (N.D.
18 Ill. 1984) (conspiracy among insurance companies to refuse to
19 offer occurrence policies not a boycott); Grant v. Erie Ins.
20 Exch., 542 F. Supp. 457, 464-66 (M.D. Pa. 1982) (conspiracy to
21 refuse to offer insurance covering work loss benefits of
22 individuals killed in motor vehicle accidents not a boycott)
23 aff'd mem., 716 F.2d 890 (3d Cir.), cert. denied, 464 U.S. 938
24 (1983).

25 Professors Areeda and Hovenkamp concur with this view and
26 reject the interpretation of Barry urged by plaintiffs:

27 The implications of St. Paul are not clear. On the
28 one hand, a horizontal agreement among competitors to

25 ¹⁹ The Proctor court referred to the Supreme Court's opinion
26 in United States v. South-Eastern Underwriters Association, 322
27 U.S. 533 (1944), which described the conduct of defendants as
28 consisting of coercion and intimidation to force non-member
insurance companies into the conspiracies and to compel persons
who needed insurance to buy only from South-Eastern Underwriters
on its terms.

1 set the terms of insurance policies--for example, price
2 fixing--is a collective agreement not to deal on any
3 other terms; by the agreement, each enlists the aid of
4 the other, a third party, "to compel capitulation by the
5 boycotted group," namely, insurance buyers. In this
6 sense, virtually any horizontal agreement among
7 competitors could be called a "boycott."

8 However, there are two reasons for supposing that
9 the Supreme Court did not mean to go that far. First,
10 such a reading would eviscerate the immunity for
11 horizontal agreements on the "business of insurance" and
12 thus seems inconsistent with the statute. Second, St. Paul
13 itself did not involve an agreement to adopt
14 similar terms. Instead, it was alleged that three
15 insurers withdrew from the market for an anticompetitive
16 purpose.

17 P. Areeda & H. Hovenkamp, Antitrust Law ¶ 210.2, at 107-08
18 (Supp. 1988).

19 The gravamen of the cases before the Court is alleged
20 horizontal agreements relating to the terms on which the
21 participants were willing to write insurance and reinsurance.
22 By joint action in the ISO and in the reinsurance and umbrella
23 and excess insurance markets, the various defendants sought to
24 bring about the use of policies that would limit their exposure.
25 There is no charge and no evidence that any defendants conspired
26 to refuse to do business with any person or firm to achieve
27 their objectives, or that by other improper means they enforced
28 their collective decisions against others.²⁰

29 ²⁰ At the hearing, plaintiffs argued that ISO's withdrawal
30 of statistical support for the 1973 policy forms after regulatory
31 approval had been given by the relevant states to new forms
32 amounted to coercion. The complaints allege in relevant part:

33 On July 1, 1987, ISO officially withdrew "support"
34 of the 1973 CGL form. "Support" in this context includes
35 the normal data collection and actuarial services
36 performed by ISO in aid of its member companies. Without
37 such support, most ISO members could not continue to use
38 the 1973 occurrence form, because it is very difficult
and expensive for any single company to duplicate the

1 The distinction between prohibited boycott and coercion and
2 immune joint activities is illustrated by In re Workers'
3 Compensation Insurance Antitrust Litigation, 867 F.2d 1552 (8th
4 Cir.), cert. denied, 57 U.S.L.W. 3859 (1989). That court held
5 that "the practice of mere price fixing, i.e. a refusal to deal
6 except at a specified price, without more," is not a McCarran
7 Act boycott. Id. at 1561. "The crucial element . . . [of a
8 boycott] is an effort to exclude or cause disadvantage to one or
9 more competitors by cutting them off from trade relationships
10 which are necessary to any firm trying to compete." Id. at
11 1561, n.14 (quotation omitted). In reversing a grant of summary
12 judgment of no boycott, the Workers' Compensation court relied
13 on evidence of an agreement to exclude competing insurers from

14 critical ISO support functions. (Cal. Compl't § 99; Conn.
15 Compl't § 103.)

16 The conduct alleged, termination of statistical support for a
17 superseded policy form, is on its face reasonable conduct that one
18 would expect in the normal course of business. There is nothing
19 inherently coercive or wrongful about it. There is no allegation
20 that any insurer desired to continue to write insurance on the
21 1973 policy form but was coerced by defendants into not doing so
22 by means of this conduct, and plaintiffs did not offer to amend
23 their complaints or conduct specific discovery on this point. The
24 allegation that "most ISO members" would find it "difficult and
25 expensive . . . to duplicate the critical ISO support functions"
26 is not sufficient to warrant subjecting these defendants to an
27 antitrust action. See Ocean State Physicians Health Plan Inc. v.
28 Blue Cross & Blue Shield of Rhode Island, No. 88-1851, 1989 U.S.
App. LEXIS 12419, at 24 n.9 (1st Cir. Aug. 21, 1989) ("Coercion
[under the McCarran Act] has not generally been interpreted to
include situations where options have not been entirely closed off
to the allegedly coerced parties, even though such options may
have been made more expensive"). To hold otherwise would be
somewhat ironic, for it is the McCarran Act that allows the
insurance industry, including defendants, to provide through ISO
the support functions which plaintiffs regard as critical; it
makes little sense then to impose antitrust liability on
defendants, who are permitted by the McCarran Act to agree to
provide the support, for agreeing to discontinue it as to a policy
form no longer in use.

1 membership in the Minnesota Rating Association; such membership
2 was required by Minnesota law as a condition to writing workers'
3 compensation insurance in the state. *Id.* at 1563. In contrast,
4 in the instant case the allegations are limited to collective
5 refusals to do business except upon terms acceptable to
6 defendants. There is not even a suggestion that any underwriter
7 or reinsurer (or anyone else) was prevented from having free and
8 unimpaired access to any market.

9 The purpose of McCarran Act immunity is to permit joint
10 action by insurers and underwriters within the states'
11 regulatory schemes to formulate policy terms and determine
12 coverage. It follows that an agreement not to underwrite
13 particular risks is a likely corollary to any collective policy
14 form development. It makes no sense, therefore, for the
15 plaintiffs to rest their boycott claim on the allegation of such
16 an agreement. It is also implicit that joint action comprehends
17 efforts to seek agreement by others, including those who might
18 be unwilling to agree were it not for economic exigencies, and
19 again it makes no sense to assert that such efforts constitute
20 non-immune coercion.

21 What the McCarran Act leaves unprotected is conduct which
22 goes beyond the making and implementation of agreements to do
23 business only on terms acceptable to the participant (even if
24 such agreements would otherwise violate Section 1), such as
25 refusals to deal on any terms and exclusion from alternative
26 sources. *See Barry*, 438 U.S. at 544-45. Such conduct is not
27 charged here.

28 Dismissal of a complaint for failure to state a claim is not

1 proper unless it appears beyond doubt that the plaintiff can
2 prove no set of facts in support of its claim which would
3 entitle it to relief. Conley v. Gibson, 355 U.S. 41, 45-46
4 (1957). But judgment of dismissal is appropriate if it is clear
5 that no relief could be granted under any set of facts that
6 could be proven consistent with the allegations. McGlinchy v.
7 Shell Chemical Co., 845 F.2d 802, 810 (9th Cir. 1988).
8 Conclusory allegations without more are insufficient to defeat a
9 motion to dismiss for failure to state a claim. Id.

10 Under the well-pleaded allegations of these complaints,
11 plaintiffs could prove no boycott or coercion. Plaintiffs do
12 not suggest that their pleadings could be amended to cure their
13 deficiencies.

14 Nor have plaintiffs come forward with specific facts which
15 raise a triable issue as to boycott or coercion. And
16 this is true though plaintiffs in their capacity as state
17 regulators conducted lengthy investigations under their
18 regulatory laws which gave them extensive access to the files
19 and records at least of the domestic defendants as well as to
20 other sources of relevant information. Plaintiffs have been
21 given the opportunity also to conduct relevant discovery and
22 have not suggested that they needed discovery to be able fairly
23 to meet this motion.

24 Accordingly, all defendants are entitled to dismissal of the
25 complaints without leave to amend, or in the alternative summary
26 judgment (considering defendants' submissions outside the
27 pleadings), on all federal law claims in the various complaints.
28 In addition all defendants are entitled to judgment on the Sixth

1 and Seventh Claims of the First Wave Complaints and the Fourth
2 and Sixth Claims of the Second Wave Complaints for failure to
3 allege boycott, coercion, or intimidation. See Fraier v. New
4 York Life Ins. Co., 679 F.2d 780, 783 (9th Cir. 1982).

5 The foreign reinsurer defendants named in the Fifth, Sixth,
6 and Eighth Claims of the First Wave Complaints and the Third,
7 Fourth, and Fifth Claims of the Second Wave Complaints have
8 joined in this motion as an alternate ground for dismissal.
9 They have also made a motion to dismiss on the ground of
10 international comity which the Court grants. (See infra §
11 V.E(3).) Because that motion rests on the proposition that
12 those defendants are not subject to the antitrust laws, it
13 raises the question whether, as a result, they also are not
14 subject to state regulation to a degree sufficient to be
15 entitled to McCarran Act immunity. It does not appear necessary
16 to resolve that issue here, however; if the dismissal on comity
17 grounds is sustained, the alternative ground for dismissal under
18 the McCarran Act will be moot. Conversely, if it is not
19 sustained, it will be because American regulatory laws apply to
20 them and hence the McCarran Act as well.

21 B. STATE ACTION IMMUNITY, STATUTORY INTERPRETATION, AND
22 CAUSATION

23 Defendants have moved for summary judgment with respect to
24 those claims which "relate to the collective form-making process
25 in those states that took action to approve, disapprove or
26 withhold approval of the revised ISO CGL forms." (Def. Memo.
27 1.) This motion, therefore, is limited in its scope; it does
28 not reach conduct outside of the collective activities to revise

1 the CGL policy forms and it does not apply to plaintiff states,
2 or plaintiffs in states, that do not have a procedure for
3 approval, disapproval, or withholding approval of policy forms,
4 namely Alaska, California, Colorado, and Montana. Because
5 plaintiffs' opposition memorandum either misconceives or ignores
6 the narrow scope of this motion, its arguments are in large part
7 irrelevant.

8 (1) State Action Immunity

9 In Parker v. Brown, 317 U.S. 341 (1934), the Supreme Court
10 held that the Sherman Act was not intended to prohibit states
11 from imposing restraints on competition. The circumstances
12 under which this state action immunity extends to private
13 parties were defined in California Retail Liquor Dealers
14 Association v. Midcal Aluminum, Inc., 445 U.S. 97 (1980):
15 "First, the challenged restraint must be 'one clearly
16 articulated and affirmatively expressed as state policy,' and,
17 second, the State 'must supervise actively any private
18 anticompetitive conduct.' " 445 U.S. at 105 (quoting City of
19 Lafayette v. Louisiana Power & Light Co., 435 U.S. 389, 410
20 (1978) (Brennan, J.)).

21 (a) State Policy

22 There is no question that all of the states have clearly
23 articulated and affirmatively expressed policies permitting
24 collective policy form development activities. Each of the
25 states has licensed ISO and its members to engage in certain
26 collective activities, including filing of rates and policy
27 forms and developing policy forms.

28 These actions are governed by Southern Motor Carriers Rate

1 Conference v. United States, 471 U.S. 48 (1985). There the
2 Supreme Court applied state action immunity to collective rate
3 making activities under state laws permitting--but not
4 requiring--motor carriers to agree on rates subject to the
5 supervision of the state public service commission having
6 authority to accept, reject, or modify the agreed rates. The
7 same situation is presented here. The states have authorized
8 the insurers to agree on policy forms subject to the supervisory
9 authority of the insurance regulators. Most of the states
10 require regulatory approval before a form may be used; others
11 permit a form to be used unless or until the regulators
12 disapprove it. (Def. Memo. 5-6.) And here, as in Southern
13 Motor Carriers Rate Conference, insurers were not required to
14 participate in the collective activities of ISO and were free to
15 use policies other than those developed and sponsored by ISO.

16 Plaintiffs argue that the states have authorized only
17 voluntary joint action, not coercion or boycotts. But the fact
18 that the states prohibit coercion and boycotts does not diminish
19 the immunity flowing from the authority to conduct collective
20 policy development activities. That immunity depends on the
21 presence of active state supervision, as discussed below, and
22 the states' prohibition of coercion and boycott is simply one
23 aspect of this supervision. To argue that the presence of such
24 state law prohibitions nullifies the state action immunity would
25 be to turn the doctrine on its head. The premise of that
26 doctrine is that it immunizes conduct that might otherwise run
27 afoul of the antitrust laws. It does so "to resolve conflicts
28 that may arise between principles of federalism and the goal of

1 the antitrust laws, unfettered competition in the marketplace."
2 Southern Motor Carriers Rate Conference, 471 U.S. at 61. It
3 achieves that end by allowing states "to adopt policies that
4 permit, but do not compel, anticompetitive conduct by regulated
5 private parties." Id. at 66. Under the regulatory schemes of
6 the relevant states, insurers are permitted to engage in
7 collective policy development but are not required to do so or
8 to adopt the collectively produced policies; activities directed
9 to an insurer's individual decision what coverage to offer, as
10 distinct from what terms to include in ISO policy forms, are not
11 claimed to be covered by state action immunity and are not
12 addressed by this motion.

13 Plaintiffs' reliance on Medic Air Corp. v. Air Ambulance
14 Authority, 843 F.2d 1187 (9th Cir. 1988), is misplaced. That
15 case held that defendant did not, by reason of having been
16 designated by the state as an exclusive ambulance dispatcher,
17 become immune against a claim that it had restrained competition
18 in the market for air ambulance services. The immunity which
19 attached to dispatch services did not extend to activities in
20 the separate and distinct market for ambulance services. But
21 that reasoning does not apply where, as here, the restraint
22 complained of occurred (though not exclusively) in the course of
23 the protected conduct, i.e. the collective development of terms
24 for policies to be issued by the participating insurers, which
25 was exactly what the states permitted to be done.

26 (b) State Supervision

27 State action immunity applies only where the state actively
28 supervises "to ensure that [it] will shelter only the particular

1 anticompetitive acts of private parties that, in the judgment of
2 the State, actually further state regulatory policies." Patrick
3 v. Burget, 108 S. Ct. 1658, 1663 (1988). Plaintiffs argue that
4 state supervision in this case does not reach the restraints
5 alleged, i.e., "the agreements and acts to limit or eliminate
6 the availability of consumer-demanded coverages." (Unified Opp.
7 58.) But in Patrick, the Court specifically referred to the
8 state public service commission's "ultimate authority and
9 control over all intrastate rates" in Southern Motor Carriers
10 Rate Conference as an example of what constitutes active
11 supervision. Id. (quoting Southern Motor Carriers Rate
12 Conference, 471 U.S. at 51). As noted above, there, as here,
13 supervision took the form of approval, disapproval, or
14 modification of the end product of the collective action. That
15 degree of supervision was sufficient protection of the public
16 interest, without the necessity of additional supervision of the
17 manner in which the participants conducted the collective
18 process.

19 Plaintiffs contend that, even if the state action immunity
20 otherwise applied, its application here is barred by the
21 McCarran Act which, they contend, specifically reserves
22 application of the Sherman Act to boycott and coercion. Cf.
23 Ballard v. Blue Shield of Southern W. Va., Inc., 543 F.2d 1075,
24 1078-79 (4th Cir. 1976), cert. denied, 430 U.S. 922 (1977). The
25 two immunity doctrines are not congruent and need to be
26 distinguished with care. The McCarran Act, as discussed in
27 section V.A., supra, grants to the insurance business a limited
28 immunity from the antitrust laws, conditioned on a degree of

1 state regulation. State action immunity, as discussed here,
2 permits the states to displace the antitrust laws with respect
3 to specified activities actively supervised by the states. See
4 generally P. Areeda & H. Hovenkamp, Antitrust Law §§ 210.1b,
5 212.1f, at 113 (Supp. 1988) ("The [Supreme] Court's view of
6 federalism [under Parker v. Brown] has left enormous discretion
7 to the states to displace competition."). Plaintiffs'
8 contention was most recently addressed and rejected in Health
9 Care Equalization Committee v. Iowa Medical Society, 851 F.2d
10 1020, 1027 n.10 (8th Cir. 1987), where the court stated that it
11 would be anomalous to hold that Congress, by adopting the
12 McCarran Act, intended to subject insurance companies to
13 antitrust liability for actions that would be exempt if engaged
14 in by others.

15 The state action immunity motion must therefore be granted.

16 (2) Statutory Interpretation

17 Defendants also contend that because the effects complained
18 of resulted from the actions of the states which approved the
19 use of the revised policy forms, there could have been no
20 restraint of trade. Their reliance on In re Airport Car Rental
21 Antitrust Litigation, 521 F. Supp. 568 (N.D. Cal. 1981), aff'd.,
22 693 F.2d 84 (9th Cir. 1982), cert. denied, 462 U.S. 1133 (1983),
23 is, however, misplaced. The restraint complained of in that
24 case flowed from the decision of airport authorities not to
25 lease space to plaintiffs. The fact that that decision may have
26 been influenced by a conspiracy among defendants did not make
27 the defendants responsible for the airport authorities'
28 independent exercise of judgment to exclude plaintiffs. In the

1 instant actions, however, the restraints complained of did not
2 flow from the actions of state regulators who approved or
3 disapproved policy forms; they flowed from the collective
4 actions of defendants by which they allegedly sought to bring
5 about the use of policy forms that restricted available
6 insurance coverage. To the extent that their conduct is not
7 immune from antitrust scrutiny, defendants would be responsible
8 for its consequences.

9 Defendants also argue that plaintiffs cannot demonstrate the
10 existence of a restraint in the policy form development process.
11 (Reply 1-10.) The argument seems to rest on confusion between
12 Sherman Act liability and the effect of the McCarran Act. There
13 is little question that, in the absence of McCarran Act
14 immunity, allegations of collective action by defendants to
15 bring about reduced coverage for purchasers of insurance would
16 state a claim under Section 1:

17 There is no doubt that the members of such [trade]
18 associations often have economic incentives to restrain
19 competition and that the product standards set by such
20 associations have a serious potential for
21 anticompetitive harm. Agreement on a product standard
22 is, after all, implicitly an agreement not to
23 manufacture, distribute, or purchase certain types of
24 products. Accordingly, private standard-setting
25 associations have traditionally been objects of
26 antitrust scrutiny.

27 Allied Tube & Conduit Corp. v. Indian Head, Inc., 108 S. Ct.
28 1931, 1937 (1988). It would not matter for purposes of Section
1 that, as defendants argue, the collective action of defendants
did not limit an individual insurer's ability to offer broader
coverage. (Reply 5.) The individual insurer's continued
freedom is relevant only to application of Section 1013(b) of

1 the McCarran Act, the boycott exclusion, not to liability for
2 anticompetitive agreements.

3 The motion based on statutory interpretation must therefore
4 be denied.

5 (3) Causation

6 The foregoing analysis also disposes of defendants'
7 contention that plaintiffs were not injured "by reason of
8 anything forbidden in the antitrust laws." 15 U.S.C. § 15(a).
9 No states required insurers to adopt the approved forms. Hence,
10 injury flowing from prohibited collective action to coerce
11 competitors to restrict coverage or deny consumers access to
12 insurance coverage, unless otherwise immune, would fall within
13 Section 4 of the Clayton Act.

14 There being no disputed issues of fact material to the
15 disposition of this motion, and for the reasons stated,
16 defendants' motion for summary judgment on all claims based on
17 defendants' participation in the collective policy development
18 process asserted by states, and plaintiffs in states, other than
19 Alaska, California, Colorado, and Montana must be granted on the
20 ground of state action immunity, but will otherwise be denied.

21 C. STANDING

22 The domestic and foreign reinsurer defendants²¹ have moved
23 to dismiss the complaints against them on the ground that
24 plaintiffs do not have standing to complain of actions taken in
25
26

27 ²¹ All defendants other than ISO, INA, Hartford, Allstate,
28 Aetna, and CIGNA.

1 the reinsurance and retrocessional insurance markets.²²

2 The reinsurer defendants characterize the complaints as
3 alleging three distinct insurance markets: primary insurance,
4 reinsurance, and retrocessional insurance. They contend that
5 plaintiffs claim to have participated only in the primary
6 insurance market and that the defendant reinsurers are alleged
7 to have conspired only in the reinsurance and retrocessional
8 insurance markets. On this basis, defendants contend that
9 plaintiffs do not claim to have been directly affected by the
10 alleged conduct of these defendants and that, therefore,
11 plaintiffs do not have standing to assert the antitrust claims
12 pleaded.

13 To have standing to assert an antitrust claim, a plaintiff
14 must allege that it has suffered harm as a direct result of the
15 defendant's conduct and that this harm is within the scope of
16 the protection of the antitrust laws. Blue Shield of Virginia
17 v. McCready, 457 U.S. 465, 478 (1982). Accepting, as the Court
18 must, the allegations of the complaint, they establish that the
19 terms and availability of reinsurance directly affect the
20 availability of insurance coverage to consumers. As discussed
21 in section V.A(1), supra, plaintiffs' contention is that the
22 reinsurers' alleged conspiracy to eliminate reinsurance for
23 certain CGL coverages "led inexorably to an injury . . . in the
24 interrelated primary insurance market."

25 The claims against these defendants therefore fall within

26
27 ²² This motion does not include the claims against Merrett and
28 Three Quays alleging an agreement in restraint of trade in the
excess and umbrella insurance market.

1 the analysis in McCready, in which a Blue Cross subscriber was
2 found to have standing to challenge an alleged conspiracy
3 between Blue Cross and psychiatrists to deny reimbursement of
4 psychologists' services. Though the restraint occurred in a
5 market (the market for psychiatrists' services) in which
6 plaintiff was not a consumer, the Court reasoned that plaintiff
7 had standing:

8 McCready claims that she has been the victim of a
9 concerted refusal to pay on the part of Blue Shield
10 motivated by a desire to deprive psychologists of the
11 patronage of Blue Shield subscribers. Denying
12 reimbursement to subscribers for the cost of treatment
13 was the very means by which it is alleged that Blue
14 Shield sought to achieve its illegal ends. The harm to
15 McCready and her class was clearly foreseeable; indeed,
16 it was a necessary step in effecting the ends of the
17 alleged illegal conspiracy. Where the injury alleged is
18 so integral an aspect of the conspiracy alleged, there
19 can be no question but that the loss was precisely
20 " 'the type of loss that the claimed violations . . . would
21 be likely to cause.' "

22 457 U.S. at 479 (citations omitted). And that was true even
23 though plaintiff's plan coverage was purchased and paid for by
24 her employer; as a consumer of psychotherapy services, she
25 nevertheless was within the area of the economy threatened by a
26 breakdown of competitive conditions resulting from Blue Cross's
27 refusal to reimburse for services she desired.

28 Plaintiffs' allegations suffice to establish agreements the
direct effect of which, if true, would be to restrain the
availability of desired coverages in the markets in which
plaintiffs purchase insurance. Associated General Contractors
of California, Inc. v. California State Council of Carpenters,
459 U.S. 519 (1983), is distinguishable. There the plaintiff
unions complained of a conspiracy by defendants to abrogate or

1 weaken the collective bargaining relationship between the unions
2 and employers. As the Court there observed, "the Union was
3 neither a consumer nor a competitor in the market in which trade
4 was restrained." Id. at 539. And it was "not clear" whether
5 the Union's interests would be served or disserved by enhanced
6 competition in that market. Moreover, the claim of causation
7 between the Union's injury and the alleged restraint contained
8 "somewhat vaguely defined links." Id. at 540.

9 On the face of the allegations, plaintiffs have standing.
10 The motion based on lack of standing must be denied.

11 D. GLOBAL CONSPIRACY CLAIM

12 Foreign reinsurer defendants have moved to dismiss the First
13 Claim of the Second Wave Complaints, the so-called global
14 conspiracy claim. That claim alleges that all defendants,
15 including the moving defendants, engaged in a conspiracy to
16 restrain the market for CGL property and casualty risks and for
17 reinsurance and retrocessional reinsurance by agreeing to limit
18 or eliminate occurrence, pollution, retroactive, and long-tail
19 coverage, which are the subjects of the allegations of the
20 complaints. In other words, this claim links all of the various
21 specific claims of wrong-doing by various groups of defendants
22 in various markets to allege one global conspiracy among all
23 defendants.

24 The moving defendants are foreign reinsurers doing business
25 in London. They are named in the Second, Third, and Sixth
26 claims of the Second Wave Complaints in connection with discrete
27 conspiracy claims. They make this motion on the ground that the
28 First Claim merely lumps together the separate conspiracies

1 elsewhere alleged without any allegation indicating how the
2 separate conspiracies became a single global conspiracy. (Def.
3 Memo. 4.) No question is raised as to the sufficiency of the
4 pleading of the discrete conspiracies in the other claims.

5 Plaintiffs respond that the complaints "allege that all of
6 the defendants were conspirators who intended to prevent the
7 States from obtaining consumer-demanded insurance coverages."
8 (Unified Opp. 106.) Plaintiffs' theory is that because "the
9 conspiracies alleged are linked by a common purpose, by
10 overlapping defendants and by interconnected acts," a jury could
11 find a single global conspiracy among all the participants in
12 the separate conspiracies. (*Id.* at 109-10.)

13 A conspiracy is a combination of two or more persons acting
14 in concert to accomplish a common unlawful purpose. A
15 coconspirator need not know the identity of all other
16 conspirators or the full extent of the conspiracy. E.g., United
17 States v. Metropolitan Enterprises, Inc., 728 F.2d 444, 450-51
18 (10th Cir. 1984). But there must be a common agreement and
19 understanding. Mere identity of purpose, interconnected events,
20 and shared participants, on which plaintiffs base their claim,
21 do not link separate conspiracies into one overall, single
22 conspiracy. (*See* Unified Opp. 110-12.) For separate activities
23 to result in a single conspiracy, the allegations and proof must
24 reflect a wheel and spoke arrangement in which a single person
25 at the hub implements the conspiracy by a series of arrangements
26 with others to carry out the purpose of their conspiracy. See,
27 e.g., United States v. Levine, 546 F.2d 658, 662-63 (5th Cir.
28 1977). But such separate activities, even if for a common

1 purpose, do not constitute a conspiracy "without the rim of the
2 wheel to enclose the spokes." Kotteakos v. United States, 328
3 U.S. 750, 755 (1946). There must be a connection among all the
4 alleged participants sufficient to support a finding that they
5 had entered into the alleged conspiracy. Id. at 754. See also
6 Pinhas v. Summit Health, Ltd., No. 87-6530 (9th Cir. July 26,
7 1989) ("Pinhas alleges . . . that as a result of his refusal to
8 sign the 'sham' contract, appellees entered into a conspiracy
9 . . . to suspend and terminate his medical staff privileges . .
10 . and to have the report of his termination disseminated . . .
11 .") (emphasis added).

12 Plaintiffs have made no attempt to show the existence of
13 such a connection to support a finding of a single overall
14 conspiracy, and the allegations of the complaint would not
15 permit proof of one. They allege a number of different
16 conspiracies having different members and different subject
17 matter. For example, the Fifth Claim of the Second Wave
18 Complaints charges some defendants, some of whom are not named
19 elsewhere, with having conspired to restrict the terms under
20 which property insurance and reinsurance would be provided for
21 North American risks. Property insurance has not been alleged
22 to have a connection with CGL insurance or with the market in
23 which CGL insurance is sold. Thus, if all of the facts alleged
24 in the complaint were proved at trial, a conspiracy verdict
25 against these defendants under the First Claim could not stand.
26 The motion of these defendants to dismiss the First Claim of the
27
28

1 Second Wave Complaints must therefore be granted.²³

2 **E. SUBJECT MATTER JURISDICTION AND COMITY**

3 The defendants named in the Sixth and Eighth Claims of the
4 First Wave Complaints and the Fourth and Fifth Claims of the
5 Second Wave Complaints²⁴ have moved to dismiss those claims for
6 lack of subject matter jurisdiction or on the basis of
7 international comity. The motion is based on the Foreign Trade
8 Antitrust Improvements Act of 1982, Pub. L. No. 97-290, 96 Stat.
9 1246 ("FTAIA"), and on the doctrine of international comity as
10 stated in Timberlane Lumber Co. v. Bank of America.²⁵

11 The following allegations are relevant:

12 In the Sixth Claim, plaintiffs allege that, at a meeting in
13 London, the defendant London reinsurers and one reinsurance
14 broker agreed that all North American casualty reinsurance
15 treaties would be written with a pollution exclusion (Conn.
16 Compl't ¶ 99; Cal. Compl't ¶ 95) lessening the availability and
17 affordability of pollution liability coverage from primary
18 insurers throughout the United States (Conn. Compl't ¶ 97; Cal.
19 Compl't ¶ 93).

20 In the Eighth Claim, plaintiffs allege that a group of
21 London retrocessional reinsurers, including the seven named

22
23 ²³ At the hearing, the remaining defendants joined in this
24 motion. No objection having been made, this claim will be
dismissed against all defendants.

25 ²⁴ These claims will be referred to collectively as the Sixth
26 Claim and the Eighth Claim, respectively.

27 ²⁵ Timberlane Lumber Co. v. Bank of America, N.T. & S.A., 549
28 F.2d 597, 614 (9th Cir. 1976) ("Timberlane I"), on remand, 574 F.
Supp. 1453 (N.D. Cal. 1983), aff'd, 749 F.2d 1378 (9th Cir. 1984)
("Timberlane II"), cert. denied, 472 U.S. 1032 (1985).

1 defendants, agreed in 1987 to boycott retrocessional reinsurance
2 treaties which included coverage for North American property
3 risks, unless the original insurance coverage contained a
4 seepage, pollution, and contamination exclusion clause. (Conn.
5 Compl't § 138(b); Cal. Compl't § 149(b).) As a result, seepage
6 and pollution coverage has been excluded from policies on
7 American risks, and prices for such coverage have been
8 increased. (Conn. Compl't § 139; Cal. Compl't § 150.)

9 (1) The Factual Background

10 The London insurance markets in which the defendants named
11 in the Sixth and Eighth Claims conduct their reinsurance and
12 retrocessional reinsurance business are composed of underwriters
13 at Lloyd's of London, other London insurance firms ("London
14 Company Market" firms), and brokers who obtain coverage in these
15 markets. See, e.g., Edinburgh Assurance Co. v. R.L. Burns
16 Corp., 479 F. Supp. 138, 144 (C.D. Cal. 1979), aff'd in part and
17 rev'd in part on other grounds, 669 F.2d 1259 (9th Cir. 1982);
18 Syndicate 420 at Lloyd's, London v. Early American Ins. Co., 796
19 F.2d 821, 824 (5th Cir. 1986); Travelers Indemnity Co. v.
20 Booker, 657 F. Supp. 280, 282-83 (D.D.C. 1987).

21 As described in Edinburgh Assurance, the purchase and sale
22 of insurance in London takes place on the floor of the
23 underwriting room at Lloyd's and in the offices of individual
24 insurance companies. A Lloyd's or London Company Market agent
25 evaluates and negotiates proposed insurance placements brought
26 by brokers for the consideration of the syndicate of

1 underwriters that the agent represents.²⁶ 479 F. Supp. at 145.
2 A "slip" (a broker-originated document containing the essential
3 features of the coverage sought) is presented to each
4 underwriter. Id. Because many risks are too large to be
5 insured by just one London market participant, the broker
6 circulates the slip among numerous underwriting agents, each of
7 whom makes the individual decision whether to underwrite a
8 portion of the risk. See id. Because the spreading of large
9 risks in the London reinsurance and retrocessional insurance
10 markets necessarily requires numerous subscribers (see Conn.
11 Compl't § 4(w); Cal. Compl't § 28), negotiations over the terms
12 and conditions on which risks will be accepted and insured are
13 integral to the functioning of the market. Underwriters
14 negotiate with brokers over the terms on which they are willing
15 to accept a risk. Because different underwriters may be willing
16 to accept a particular risk on different terms, brokers and
17 underwriters may have to negotiate mutually agreeable terms and
18 conditions on which that risk will be accepted. See Edinburgh
19 Assurance, 479 F. Supp. at 145.

20 The sequence of insurance transactions resulting in the
21 purchase of reinsurance and retrocessional reinsurance in the
22 London markets begins with the purchase of primary insurance by
23 the consumer. The primary insurer in the United States may then
24 elect to reinsure some portion of the portfolio of risks it has

25 ²⁶ Underwriters at Lloyd's must be individuals trading for
26 their own accounts. However, underwriters band together into
27 syndicates represented by one or more underwriting agents.
28 Department of the Treasury, Report to Congress on the Taxation of
Income Earned by Members of Insurance or Reinsurance Syndicates
5-6 (February, 1989).

1 underwritten. (Conn. Compl't § 4(p); Cal. Compl't § 26.) The
2 form of reinsurance most pertinent to these cases is known as
3 "treaty" reinsurance (Cal. Compl't § 27), in which the
4 reinsurance company agrees in advance to indemnify a primary
5 insurance company for a defined portion of the risks to be
6 assumed by the primary carrier during the treaty period (Conn.
7 Compl't § 4(w); Cal. Compl't § 4(p), 27). As a participant in
8 a reinsurance treaty, a reinsurer does not deal directly with
9 primary insurance consumers or individual risks and may never
10 know the identity of individual risks within the portfolio of
11 risks included in the treaty. See Excess and Casualty
12 Reinsurance Ass'n v. Ins. Comm'r, 656 F.2d 491, 492, 495 (9th
13 Cir. 1981); American Re-Insurance Co. v. Insurance Comm'r, 527
14 F. Supp. 444, 453 (C.D. Cal. 1981). When the primary insurer
15 seeks reinsurance coverage in the London market, one of several
16 reinsurance centers, it initiates the type of reinsurance
17 transaction which is the subject of the Sixth Claim.

18 Reinsurers also purchase reinsurance. This step in the
19 sequence of reinsurance transactions, and the one which is the
20 subject of the Eighth Claim, may occur in the London market for
21 retrocessional reinsurance. Retrocessional reinsurance means
22 reinsurance of the business written by reinsurers. (See also
23 Conn. Compl't § 4(r); Cal. Compl't § 107.) Plaintiffs' Eighth
24 Claim refers to the so-called LMX market which consists of those
25 retrocessional reinsurers who specialize in providing
26 retrocessional reinsurance for Lloyd's of London and the London
27 Company Market firms. (Conn. Compl't § 111; Cal. Compl't §
28 107.) At this level, the purchaser of retrocessional

1 reinsurance is a Lloyd's or London Company Market reinsurer.

2 (2) Subject Matter Jurisdiction

3 By virtue of the FTAIA, the Sherman Act does "not apply to
4 conduct involving trade or commerce (other than import trade or
5 import commerce) with foreign nations . . ." unless that conduct
6 has a "direct, substantial, and reasonably foreseeable effect"
7 on commerce within the United States, import trade into the
8 United States, or export trade engaged in by a person within the
9 United States. 15 U.S.C. § 6a.

10 Plaintiffs contend that the conduct alleged involved
11 agreements to restrain the provision of reinsurance for American
12 risks, and hence the import into the United States of insurance
13 services. These allegations are sufficient to invoke the import
14 exception of the FTAIA.

15 Defendants contend that the FTAIA applies nevertheless
16 because the conduct complained of in these claims is wholly
17 foreign commerce. The subject matter of the alleged agreement,
18 however, concerned the provision of reinsurance within the
19 United States, and the allegations of effects in United States
20 markets are sufficient to preclude a characterization of wholly
21 foreign commerce.

22 The First Wave Complaints allege that the London market is
23 one of the three principal markets for the supply of reinsurance
24 (Cal. Compl't § 29), and all complaints allege that the
25 agreements made in the London market had the effect of limiting
26 the ability of primary insurers to obtain reinsurance except on
27 certain terms, and for a higher price (Conn. Compl't §§ 97, 100,
28 134, 139; Cal. Compl't §§ 138, 140, 148, 150). The complaints

1 further allege that the availability of primary coverage hinges
2 on the primary insurers' ability to obtain reinsurance of risks
3 (Conn. Compl't § 4(p); Cal. Compl't § 34), and that the
4 availability of reinsurance hinges on the availability of
5 retrocessional reinsurance (Conn. Compl't §§ 110, 114; ~~see~~ Cal.
6 Compl't § 150). Thus, plaintiffs have adequately alleged that a
7 decision not to provide reinsurance or retrocessional
8 reinsurance to cover certain types of risks in the United States
9 has a direct effect on the availability of primary insurance in
10 the United States. Cf. McGlinchy v. Shell Oil Co., 845 F.2d
11 802, 815 (9th Cir. 1988) (no direct, substantial, and reasonably
12 foreseeable effect on United States commerce where agreements
13 involved orders for products in South East Asia and other areas
14 outside the United States). Therefore, the FTAIA does not
15 apply.

16 Where the FTAIA does not apply, the Court must determine
17 whether it has subject matter jurisdiction under the analysis in
18 Timberlane I: (1) whether the alleged restraint affected or was
19 intended to affect the foreign commerce of the United States,
20 and (2) whether it is a cognizable violation of the Sherman
21 Act.²⁷ 549 F.2d at 615. The allegations that establish a direct

22 ²⁷ There is some uncertainty whether the Timberlane analysis
23 for extraterritorial application of the antitrust laws has been
24 superseded by the FTAIA. It is arguable that the FTAIA codifies
25 the standard for determining whether there is extraterritorial
26 jurisdiction for all cases, not only for those cases involving
27 non-import trade. See P. Areeda & H. Hovenkamp, Antitrust Law §
28 236, at 235 (Supp. 1988) ("The most interesting question about the
new statute is whether its standard for appraising export
restraints differs from that for appraising import restraints or
whether it merely 'codifies' a general understanding of when
American antitrust should be concerned about restraints abroad
that might affect United States interests only indirectly,

1 effect in the United States are sufficient to establish this
2 Court's subject matter jurisdiction under Timberlane I.

3 (3) International Comity

4 Regardless of whether subject matter jurisdiction exists,
5 this Court may determine that its jurisdiction under the
6 antitrust laws should not be exercised on the ground of
7 international comity. See Timberlane I, 549 F.2d at 613-14.²⁸
8 This issue is properly raised and disposed of by a Rule 12(b)(1)
9 motion so long as the merits of plaintiffs' antitrust claims are
10 not reached. Timberlane II, 749 F.2d at 1382.

11 Timberlane I established a rule of reason controlling the
12 extraterritorial application of the antitrust laws. It requires
13 an analysis of whether, as a matter of international comity and
14 fairness, extraterritorial jurisdiction should be asserted.
15 Timberlane I, 549 F.2d at 615.

16 insubstantially, or unforeseeably."); Hawk, International
17 Antitrust Policy and the 1982 Acts: The Continuing Need for
18 Reassessment, 51 Fordham L. Rev. 201, 222 (1982) ("[i]t is . . .
19 not clear whether the specific effect test set forth in the Act
20 is limited to determining whether export transactions of purely
21 foreign transactions have the requisite effect on United States
22 trade. The test might also be used in determining whether import
23 transactions . . . have the requisite effect on United States
24 trade.") See also the dictum in McGlinchy, 845 F.2d at 813 n.8,
25 that the FTAIA was passed "[i]n an effort to provide a single
26 standard for the issue of extraterritorial application of the
27 Sherman Act." In that case, however, the FTAIA clearly applied
28 because export and foreign transactions were involved.

29 Until there is a clearer indication that Timberlane I no
30 longer controls, however, this Court must follow it.

31 ²⁸ The legislative history of the FTAIA states that "[i]f a
32 court determines that the requirements for subject matter
33 jurisdiction are met, this bill would have no effect on the
34 courts' ability to employ notions of comity, see, e.g., Timberlane
35 Lumber Co. v. Bank of America, 549 F.2d 1287 (3rd Cir. 1979)
36 [sic]." H.R. Rep. No. 97-686 at 13 (1982), reprinted in 1982
37 U.S. Code Cong. & Admin. News at 2487, 2498.

1 This analysis is governed by seven factors:

2 [T]he degree of conflict with foreign law or policy, the
3 nationality or allegiance of the parties and the
4 locations or principal places of business of
5 corporations, the extent to which enforcement by either
6 state can be expected to achieve compliance, the
7 relative significance of effects on the United States as
8 compared with those elsewhere, the extent to which there
9 is explicit purpose to harm or affect American commerce,
10 the foreseeability of such effect, and the relative
11 importance to the violations charged of conduct within
12 the United States compared with conduct abroad.

13 Id. at 614. Each of these seven factors, discussed below, must
14 be balanced in every case. Timberlane II, 749 F.2d at 1383 n.3;
15 see also Star-Kist Foods, Inc. v. P.J. Rhodes & Co., 769 F.2d
16 1393, 1395 (9th Cir. 1985) (applying Timberlane factors to
17 extraterritorial application of the Lanham Act); Wells Fargo &
18 Co. v. Wells Fargo Express Co., 556 F.2d 406, 428-29 (9th Cir.
19 1977) (same). The object of this analysis is to determine
20 whether "the contacts and interests of the United States are
21 sufficient to support the exercise of extraterritorial
22 jurisdiction." Timberlane I, 549 F.2d at 614-15.²⁹

23 (a) Degree of Conflict With Foreign Law or Policy

24 The London reinsurance and retrocessional reinsurance
25 business, the subject of these claims, takes place in a
26 regulatory and competitive framework established by the British

27 ²⁹ Timberlane has been criticized for requiring courts to
28 balance American and foreign interests which they are not equipped
or qualified to do. Laker Airways Ltd. v. Sabena, Belgian World
29 Airlines, 731 F.2d 909, 948-50 (D.C. Cir. 1984) (substantial
limits on court's ability to conduct balancing); Aldisert, Federal
30 Courts and Extraterritorial Antitrust Law: Enlightened Self
31 Interest or Yankee Imperialism?, 5 J. L. & Com. 415, 419-20, 426-
32 29 (1985) (courts unaccustomed to evaluating interests of other
nations); Note, Forum Non Conveniens and the Extraterritorial
33 Application of United States Antitrust Law, 94 Yale L.J. 1693
34 (1985) (courts poorly equipped). Its authority in this circuit,
35 however, remains unimpaired.

1 government. In 1870, Parliament, by the Lloyd's Act,
2 established the Society of Lloyd's and empowered it to regulate
3 the marketplace composed of its members. The Lloyd's governing
4 body continues to be empowered to exercise quasi-governmental
5 authority in regulating the activities of its members. Lloyd's
6 Acts, 1870-1982. The London Company Market companies are
7 incorporated in the United Kingdom in accordance with the
8 Companies Act, 1985, are regulated by the Insurance Companies
9 Act, 1982, and associated regulations, and are supervised by the
10 British Department of Trade and Industry. Agreements among
11 British insurers, reinsurers, and retrocessional reinsurers
12 (including both Lloyd's and London Company Market underwriters)
13 relating to the provision of insurance services are expressly
14 exempted from British regulation of anticompetitive agreements.
15 See Restrictive Trade Practices (Services) Order 1976, S.I. 1976
16 No. 98, Schedule ¶ 8.

17 Plaintiffs argue that, because the Treaty of Rome of 1957,
18 which governs trade regulation in the European Economic
19 Community, is part of the law of England, In re Westinghouse
20 Uranium Contract [1978] A.C. 547, 564, there is no conflict with
21 English law or policy. Article 85 of the treaty prohibits
22 all agreements . . . and concerted practices . . . which
23 have as their object and effect the prevention,
24 restriction or distortion of competition within the
25 common market and in particular those which: (a) . . .
26 fix purchase or selling prices or any other trading
27 condition; [or] (b) limit or control production,
28 markets, technical development, or investments
(Emphasis added.) Article 85 has been held to outlaw
restrictive practices in the insurance industry notwithstanding
its regulation by the state in which it is located. Verband der

1 Sachversicherung v. E.C. Commission, 4 Common Mkt. Rep. (CCH)
2 264 (1988). Article 85, plaintiffs contend, establishes that
3 enforcement of American antitrust law is consistent with
4 applicable foreign law.

5 It seems doubtful, however, that this Article would be
6 applied to outlaw long-standing practices in the London
7 reinsurance market, openly conducted in conformity with English
8 law. Moreover, the Treaty of Rome by its terms applies only to
9 trade between member states, not to trade with a non-member such
10 as the United States, and Article 85 applies only to restriction
11 of competition within the common market.

12 With respect to the relevant United States-English trade,
13 the evidence of conflict between the antitrust laws and English
14 law and policy is substantial. English courts have repeatedly
15 expressed unmitigated hostility to the extraterritorial
16 application of American antitrust laws. See In re Westinghouse
17 Uranium Contract, 1978 A.C. 547, 591 (counsel for the
18 government), 616 (Judgement of Lord Wilberforce), 639 (Judgement
19 of Lord Diplock), 650 (Judgement of Lord Fraser of Tullybelton);
20 British Nylon Spinners, Ltd. v. Imperial Chemical Industries,
21 Ltd., [1952] 2 All E.R. 780 (CA), (LEXIS, Enggen library, Cases
22 file at 10) (Judgement of Sir Evershed, M.R.). See also Laker
23 Airways Ltd. v. Sabena, Belgian World Airlines, 731 F.2d 909,
24 946 (D.C. Cir. 1984).

25 An English "blocking" statute restricts the availability of
26 evidence and production of documents for use in judicial
27 proceedings in the United States. Protection of Trading
28 Interests Act, 1980, ch. 11, § 2, reprinted in Antitrust & Trade

1 Reg. Rep. (BNA) No. 959, at F-1; see Note, Power to Reverse
2 Foreign Judgments: The British Clawback Statute Under
3 International Law, 81 Colum. L. Rev. 1097, 1106-09 (1981)
4 (describing the blocking provision of the Protection of Trading
5 Interests Act). The Protection of Trading Interests Act
6 provides a remedy to English antitrust defendants to recover
7 from plaintiffs the punitive portion of a foreign multiple
8 damage judgment against them where the foreign judgment concerns
9 activities outside the enforcing nation's territory.³⁰
10 Protection of Trading Interests Act, supra, at § 6; see Note, 81
11 Colum. L. Rev. at 1109-13 (describing section 6 of the Act).
12 This Act has been applied several times notwithstanding the
13 Treaty of Rome. See Cira, The Challenge of Foreign Laws to
14 Block American Antitrust Actions, 18 Stan. J. Int'l L. 247, 251-
15 52 & n.29 (1982) (between its passage and 1982, the Act applied
16 to issuance of directives barring compliance with American
17 orders, some of which involved U.K. subsidiaries of U.S.
18 parents).

19 On balance, the Court concludes that enforcement of the
20 antitrust laws against the type of extraterritorial conduct
21 alleged would lead to significant conflict with English law and
22 policy. This conflict, unless outweighed by other factors in
23 the comity analysis, is itself a sufficient reason to decline
24 exercise of jurisdiction. Timberlane II, 749 F.2d at 1384.

25 ³⁰ This ("clawback") provision was aimed at the "pernicious
26 extraterritorial effect doctrine" of American antitrust law. 973
27 Parl. Deb., H.C. (5th Series) 1535 (1979). It also reflects a
28 view that multiple damages are penal and should be imposed only
in proceedings incorporating the protections of criminal
proceedings. See Note, 81 Colum. L. Rev. at 1103-04.

1 (b) The Nationality or Allegiance of the Parties
2 and the Locations of Principal Places of
3 Business of Corporations

4 All plaintiffs are located in the United States. Although
5 all defendants named in the Sixth and Eighth Claims are located
6 in England and are of English nationality, many of the corporate
7 defendants are subsidiaries of American corporations and may be
8 influenced by the allegiance of their American parents.³¹ But
9 it is also true that adjudication of this claim would require
10 the testimony of witnesses and the production and analysis of
11 documents located in England. See Timberlane II, 749 F.2d at
12 1384; Star-Kist, 769 F.2d at 1396.

13 On balance this factor weighs against the exercise of
14 jurisdiction.

15 (c) The Extent to Which Enforcement by Either
16 State Can Be Expected to Achieve Compliance

17 A number of barriers stand in the way of enforcement of any
18 judgment against these defendants by English courts. Those
19 courts have previously refused to aid in the enforcement of the
20 judgment of an American court where that court had exercised
21 what the English court considered unlawful extraterritorial
22 jurisdiction. See British Nylon Spinners, Ltd. v. Imperial
23 Chemical Industries, Ltd., 1 Ch. 19 (1953); 1 Ch. 37 (1955);
24 see also the discussion at section V.E.(3)(b), supra.

25 ³¹ Note that England, however, does not recognize the
26 extraterritorial application of the laws of the parent
27 corporation's state based on the parent's control of the
28 subsidiary. Note, 81 Colum. L. Rev. at 1100-01. English
authorities, moreover, take the position that, in any event, the
laws and policies of the territorial state must be accorded
primacy. See Griffin, Possible Resolutions of International
Disputes Over Enforcement of U.S. Antitrust Law, 18 Stan. J. Int'l
L. 279, 286 (1982).

1 Plaintiffs could collect a judgment by enforcing it against
2 such assets of defendants as may be found in the United States.
3 But it is improbable that there could be enforcement of the
4 requested injunctive relief against activities in London.
5 Indeed, the Protection of Trading Interests Act allows the
6 British Secretary of State for Industry to forbid British
7 nationals from complying with foreign antitrust judgments.
8 Protection of Trading Interests Act, supra, at § 1; see Note, 81
9 Colum. L. Rev. at 1104-06.

10 Thus this factor tips slightly against the exercise of
11 jurisdiction.

12 (d) The Relative Significance of Effects on the
13 United States as Compared With Those
14 Elsewhere

15 This factor requires a comparison of the effect of the
16 alleged illegal conduct on the commerce of the United States
17 with its effect abroad. Timberlane II, 749 F.2d at 1384.

18 Plaintiffs allege that half of the reinsurance business
19 covers North American risks. (Conn. Compl't § 4(h); Cal.
20 Compl't § 4(t).) There are no allegations showing what
21 percentage of those risks involved reinsurance for CGL policies
22 covering risks within the United States. And there are no
23 allegations with respect to the relative effects of
24 retrocessional reinsurance agreements. It is clear, however,
25 that the conduct of defendants had a sufficiently significant
26 effect in the United States to make this factor weigh in favor
27 of the exercise of jurisdiction.

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1 (e) The Extent to Which There is Explicit Purpose
2 to Harm or Affect United States Commerce

3 As in Timberlane II, the conduct of defendants complained of
4 in these claims was directed primarily at reducing their
5 exposure to certain risks and controlling losses, a legitimate
6 business purpose. Their actions (as described in section V.E(1)
7 supra) were "consistent with [local] customs and practices."
8 Timberlane II, 749 F.2d at 1385. The allegations of the
9 complaints that defendants' purpose was to restrict the
10 availability of certain types of CGL coverage (Conn. Compl't ¶¶
11 132, 137; Cal. Compl't ¶¶ 138, 148) is not inconsistent with the
12 existence of a legitimate business purpose for their actions.

13 This factor, therefore, weighs against the exercise of
14 jurisdiction.

15 (f) Foreseeability of Such Effect

16 Defendants concede that the factor of foreseeability of the
17 effect in the United States of their conduct weighs in favor of
18 the exercise of jurisdiction. (Def. Memo. 23.)

19 (g) The Relative Importance to the Violation
20 Charged of Conduct Within the United States
21 as Compared with Conduct Abroad

22 None of the conduct by the reinsurers or retrocessional
23 reinsurers complained of in these claims is alleged to have
24 occurred within the United States. Some of these defendants are
25 alleged also to have engaged in conduct relevant to other claims
26 which occurred in the United States, but that conduct is not
27 alleged to have played a part in the subject matter of these
28 claims. Accordingly, it is not relevant to the instant
analysis.

1 This factor weighs against the exercise of jurisdiction.

2 (h) Conclusion

3 All but two of the factors weigh against the exercise of
4 jurisdiction. The potential for conflict with English law and
5 policy and with the operation of the London reinsurance market
6 is great. The activities occurred abroad, were carried out by
7 foreign actors, and were conducted in a manner consistent with
8 local law and practice. Though the conduct complained of had
9 effects in the United States, it has not been shown to have
10 barred competitors or consumers from the market and was not
11 carried out for that purpose. Finally, enforcement of any
12 judgment would be difficult and limited at best.

13 The balance of the factors clearly weighs against the
14 exercise of jurisdiction. The Sixth and Eighth Claims will
15 therefore be dismissed.

16 The pendent state law claims assert claims similar to those
17 arising under the federal antitrust laws. To the extent that
18 they are based on the conduct alleged in the Sixth and Eighth
19 Claims, they should be dismissed for the same reasons. See
20 United Mine Workers of America v. Gibbs, 383 U.S. 715, 727
21 (1966); Salveson v. Western States Bankcard Ass'n, 731 F.2d
22 1423, 1430 (9th Cir. 1984).

23 VI. CONCLUSION

24 For the reasons stated, judgment will be entered for all
25 defendants dismissing the federal claims in these actions in
26 accordance with the foregoing ruling. The pendent state claims

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1 will be dismissed for lack of subject matter jurisdiction,
2 except as otherwise ordered.

3 IT IS SO ORDERED.

4 DATED: September 20, 1989

5
6 William W. Schwarzer
7 WILLIAM W SCHWARZER
8 United States District Judge
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