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INTRODUCTION

In 1964, the Committee on Quackery, a committee of the American Medical Association, proposed to target Iowa for a pilot project. In 1967, a member of the committee delivered a speech in Iowa. In addition, a slide show, prepared by a member of the Committee on Quackery, was shown in Iowa. The goals of the Committee on Quackery were the containment and the ultimate elimination of chiropractic.

The Iowa Chiropractic Society picked up the gauntlet. The Health Care Equalization Committee, a committee of the Iowa Chiropractic Society, sued fourteen defendants, including the American Medical Association, Blue Cross and Blue Shield of Iowa, the Iowa Medical Society, and individual physicians. The Health Care Equalization Committee (Committee) alleged the defendants violated sections 1 and 2 of the Sherman Antitrust Act. Specifically, the Committee claimed that the defendants had conspired to eliminate or prevent the growth of the chiropractic profession through a group boycott or concerted refusal to deal with chiropractors. In addition, the Committee alleged that Blue Cross and Blue Shield of Iowa (BCBS) conspired to monopolize, attempted to monopolize, and monopolized


2. See infra notes 83-132 and accompanying text, discussing this case in detail.

3. Wilk v. American Medical Ass'n, 719 F.2d 207, 213 (7th Cir. 1983). The Committee on Quackery was established by a vote of the AMA Board of Trustees in November of 1963, and was active until 1974. Id. In December of 1966, the AMA House of Delegates adopted a resolution asserting that chiropractic is an unscientific cult whose practitioners lack the necessary training and background to diagnose and treat human disease. Id. This resolution was supported by the AMA Committee on Quackery and the AMA Board of Trustees. Id.


5. See infra notes 83-132 and accompanying text, discussing this case in detail.

the health care insurance business in Iowa.\(^7\)

The federal district court for the southern district of Iowa held that the Committee did have standing to bring the antitrust claims.\(^8\) The district court dismissed the claims against BCBS, holding that the state action doctrine and the McCarran-Ferguson Act exempted BCBS from scrutiny for antitrust violations.\(^9\) The Committee appealed the dismissal of the actions against BCBS. The Eighth Circuit affirmed the district court's holdings.\(^10\) This Comment will briefly recount the history of antitrust law and of the Sherman Antitrust Act. The origins and development of the state action doctrine, as it relates to antitrust law, and the McCarran-Ferguson Act will be discussed in detail. The Eighth Circuit's application of these doctrines to relieve BCBS from liability for alleged antitrust violations will be examined. In addition, an alternative analysis of the case will be presented.

I. HISTORY OF ANTITRUST LAW

A. The Common Law

The history of antitrust law extends at least as far back as the fifteenth century.\(^11\) The common law of antitrust developed along two branches: one that discouraged restraint of trade, and one which prohibited monopolies.\(^12\) Although the economic theories that are the basis for antitrust law are beyond the scope of this Comment,\(^13\) the goal of antitrust law can be summarized as the efficient allocation of resources.\(^14\) Stated simplistically, antitrust law rests on the premise that if one supplier controls the market for a particular good or service, he will be able to charge an unreasonably high price for his

\(^7\) Id.
\(^8\) Iowa Medical, 501 F. Supp. at 977-79.
\(^9\) Id. at 991, 995.
\(^10\) Id. at 1027, 1029.
\(^12\) Dyer's case, discussed in footnote 11, is an example of a case concerned with restraint of trade. Sullivan traces the history of monopoly cases to Darcy v. Allein, 77 Eng. Rep. 1260 (K.B. 1602). Queen Elizabeth I granted Darcey, her groom, the exclusive right to import playing cards into England. When Allein made and sold playing cards, Darcey sued to stop Allein. A unanimous court held that Darcey's monopoly was void and dismissed the suit. L. Sullivan, supra note 11, at 157-58.
\(^13\) Gellhorn provides an explanation of the relationship between antitrust law and economics that even an economic illiterate can understand. See E. Gellhorn, Antitrust Law and Economics in a Nut Shell (3d ed. 1986).
\(^14\) See L. Sullivan, supra note 11, at 2.
product or deliver a product of inferior quality, and the consumer will have no recourse. Competition is viewed as the primary means to keep prices down, quality up, and prevent any one supplier from controlling a market.\(^{15}\)

The inadequacy of the protection provided by the common law became apparent in the United States with the construction of the railroads.\(^{16}\) Because railroads were expensive to build, and access to land in populated areas was limited, the railroads were free from competition in many areas of the country.\(^{17}\) The public was concerned that the railroads were abusing their monopoly power.\(^{18}\) In addition, trade abuses by the Standard Oil company and other "trusts" in the second half of the nineteenth century, made it clear that the common law was not sufficient to protect the consumer.\(^{19}\) Legislation on a national scale was needed to address the interstate activities of the large trusts.\(^{20}\)

**B. The Sherman Antitrust Act**

In response to growing public concern, Congress passed the Sherman Antitrust Act of 1890.\(^{21}\) Section 1 of the Act proscribes restrictive trade agreements, including boycotts.\(^{22}\) Section 2 of the Act

\(^{15}\) See id at 2–3.

\(^{16}\) E. GELLOHORN, supra note 13, at 15–16.

\(^{17}\) Id.

\(^{18}\) See id. at 16. Specifically, the public thought the railroads discriminated among shippers when setting rates. There was also concern that railroads tried to eliminate competitors by artificially inflating their rates in areas of the country where they had a monopoly so they could undercut prices on competitive routes. Id. at 16–18, n.2.

\(^{19}\) See W. LETWIN, LAW AND ECONOMIC POLICY IN AMERICA 54–59 (1980). The trusts were a legal innovation created by Standard's attorneys. Id. at 55. The trusts allowed competitors to combine their companies and be managed by a central board of trustees. The trusts were condemned by the public for the predatory tactics they used to obtain monopolies. For example, it was alleged that Standard Oil drove the price of kerosene far below cost in isolated areas of the country until all the competitors had been forced out of business. Standard Oil would then raise the price of kerosene way above the previous market level and enjoy monopoly profits. See E. GELLOHORN, supra note 13, at 16–18.

\(^{20}\) See W. LETWIN, supra note 19, at 68. Several states had passed statutes to deal with abuse of trade by the railroads, but the statutes proved ineffective for interstate commerce. Id.


\(^{22}\) Section 1 of the Sherman Antitrust Act currently reads as follows: Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Provided, Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars, or by imprisonment not
outlaws monopolies. These two sections of the Act were an attempt by Congress to codify the existing common law of antitrust. However, the penalty associated with antitrust activity was changed. In contrast to the common law, which merely refused to enforce anticompetitive contracts, the Sherman Act made trade restraint and monopolization punishable as crimes.

It is important to realize that the Sherman Antitrust Act is not an absolute prohibition against restraint of trade or formation of monopolies. Congress' authority to promulgate the Act is based on the Commerce Clause of the Constitution. Therefore, the Act applies only to activities which can be characterized as interstate or foreign commerce. In addition, exceptions to the Act have been carved out by judicial interpretation, and subsequent legislation. Two such exceptions are the state action doctrine and the McCarran-Ferguson Act.

exceeding three years, or by both said punishments, in the discretion of the court.


23. Section 2 of the Sherman Antitrust Act currently reads:

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.


24. Senator Sherman, the author of the Act, told Congress that the Act "does not announce a new principle of law, but applies old and well recognized principles of the common law." 21 Cong. Rec. 2456 (1890).

25. Currently, violations of Sections 1 or 2 of the Sherman Antitrust Act are felonies punishable by a fine of up to one million dollars, up to three years imprisonment, or both. 15 U.S.C. §§ 1, 2 (West Supp. 1989).

26. The commerce clause states that Congress shall have power to "regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." U.S. Const. art I, section 8, cl. 3.

27. Originally, the Sherman Antitrust Act was in danger of being rendered ineffective by the Supreme Court's narrow interpretation of interstate commerce. See United States v. E.C. Knight Co., 156 U.S. 1, 17 (1895) (Court refused to apply the Sherman Act to the sugar trust, holding that the law did not extend to manufacture of products).

28. For example, labor unions are allowed to monopolize the labor supply to negotiate for better wages and working conditions without violating the Sherman Antitrust Act. See Norris-LaGuardia Act of 1932; Clayton Act of 1914; United States v. Hutcheson, 312 U.S. 219 (1941); Apex Hosiery Co. v. Leader, 310 U.S. 469 (1940).

29. The state action doctrine is discussed infra in notes 30-49 and accompanying text. The McCarran-Ferguson Act is discussed infra in notes 50-83 and accompanying text.
C. The State Action Doctrine

The state action doctrine is a judicially created exception to the Sherman Antitrust Act. It is based on concerns of federalism, and can be traced to *Parker v. Brown*. In that case, Brown, a raisin farmer, brought suit to restrain the Agricultural Department of California from enforcing the Agricultural Prorate Act of 1940. The object of the Act was to restrict competition among growers and maintain prices in the distribution of produce. The stated purpose of the Act was to conserve the agricultural wealth of the state and to prevent economic waste in the marketing of crops. The Act divided the state into production zones. It became effective only after 65% of the producers within the zone consented. Brown claimed the California Act violated the Sherman Antitrust Act. The Supreme Court of the United States disagreed:

We find nothing in the language of the Sherman Act or in its history which suggests that its purpose was to restrain a state or its officers or agents from activities directed by its legislature. In a dual system of government in which, under the Constitution, the states are sovereign, save only as Congress may constitutionally subtract from their authority, an unexpressed purpose to nullify a state's control over its officers and agents is not lightly to be attributed to Congress.

The Sherman Act makes no mention of the state as such, and gives no hint that it was intended to restrain state action or official action directed by a state.

Although the Court's opinion suggests that a state can exempt any activity from antitrust scrutiny by enacting appropriate legislation, it should not be interpreted so broadly. Later in the opinion the Court cautioned: "a state does not give immunity to those who violate the Sherman Act by authorizing them to violate it, or by declaring that

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31. *Id.* at 344.
32. *Id.* at 346.
33. *Id.*
34. More specifically, the statute was written so that the petition of ten producers within a defined zone for a particular crop would start the process of bringing that zone under the control of the Agricultural Prorate Advisory Commission. After the petition was filed, the statute required a public hearing, and a showing that the institution of a program for the proposed zone would further the goals of the Act before the Commission could grant the petition. After a plan for the zone was prepared, it would not go into effect unless 65% of the producers in the zone, owning at least 51% of the acreage in the zone devoted to that crop, consented to the plan. *Id.* at 346-7.
35. *Id.* at 344.
36. *Id.* at 350-51.
their action is lawful." Ever since *Parker*, the courts have struggled with identifying the factors that must be present for a practice to fall under the protection of the state action doctrine.

In 1980, the United States Supreme Court set out a two-pronged test to determine when the anti-competitive conduct of private parties should be deemed state action. In *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, a wholesale wine producer challenged a California statute that prevented wholesalers from selling wine at a price less than the one stated in an effective fair trade contract or an effective price schedule. The Supreme Court noted that the threshold question was whether or not the California statute violated the Sherman Antitrust Act. The Court held that the statute constituted an illegal restraint of trade because it was a plan for resale price maintenance. Then the Court went on to consider whether California's involvement in the price maintenance program was sufficient to establish antitrust immunity under *Parker*.

The Supreme Court determined that in order for the state action doctrine to protect the challenged activity from antitrust liability, two standards must be met. First, the activity must be "clearly articulated and affirmatively expressed as state policy," and second, "the policy must be actively supervised by the state itself." The Court held that the price maintenance scheme in *Midcal* satisfied the first prong of the state action doctrine test. The scheme, however,
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failed to satisfy the second prong:

The State simply authorizes price setting and enforces the prices established by private parties. The State neither establishes prices nor reviews the reasonableness of the price schedules; nor does it regulate the terms of fair trade contracts. The State does not monitor the market conditions or engage in any "pointed reexamination" of the program.48

Holding that the price maintenance program was a violation of the Sherman Antitrust Act, the Court stated, "The national policy in favor of competition cannot be thwarted by casting such a gauzy cloak of state involvement over what is essentially a private price-fixing arrangement."49

This two-pronged test continues to be used by the Supreme Court in determining if challenged anti-competitive activity qualifies for immunity under the state action doctrine.50 The Supreme Court has continued to define each prong. In Southern Motors Carriers Rate Conf. v. United States,51 the Court held that an anti-competitive activity did not have to be compelled by the state in order to meet the first prong of the test.52 In Patrick v. Burget,53 the Supreme Court stressed that the active supervision prong requires that state officials have and exercise the power to review private parties' particular anti-competitive acts and disapprove of those that do not comply with the state policy.54 Although the state action doctrine is still undergoing definition, it appears to be the model of stability when compared to interpretations of the McCarran-Ferguson Act.

D. The McCarran-Ferguson Act

The McCarran-Ferguson Act is a legislatively promulgated exception to the Sherman Antitrust Act.55 It exempts certain practices of insurance companies from antitrust liability.56 When the Sherman Antitrust Act was passed, the common law did not consider issuing insurance policies to be part of interstate commerce.57 However, in

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48. Id. at 105–06 (footnotes omitted).
49. Id. at 106.
52. Id. at 62.
54. Id. at 1663–64.
57. The leading case standing for the premise that issuing insurance policies is not a commercial transaction is Paul v. Virginia, 75 U.S. 168 (1868).
United States v. South-Eastern Underwriters Ass'n., the Supreme Court held that insurance companies were engaged in interstate commerce.

In South-Eastern Underwriters, a private association of fire insurance companies was being prosecuted under sections 1 and 2 of the Sherman Antitrust Act. The member companies controlled ninety percent of the fire insurance market in the six states where the conspiracies were successful. The companies fixed premium rates and agents' commissions. They employed boycotts, coercion, and intimidation to force nonmember companies into the conspiracies as well as trying to compel people to purchase insurance only from association companies. The companies tried to defend their behavior on the grounds that Congress did not intend the Sherman Antitrust Act to be applied to insurance transactions. The Supreme Court disagreed, and held that the association was subject to the Sherman Antitrust Act.

Congress was concerned that the Court's decision in South-Eastern Underwriters might be interpreted to mean that state regulation and taxation of insurance companies was unconstitutional. In response, Congress passed the McCarran-Ferguson Act the next year. The Act exempts the "business of insurance" from antitrust scrutiny if the activity is regulated by the state and is not in the form of a boycott. While determining what constitutes a boycott within the meaning of the Act has presented some difficulties, the primary

58. 322 U.S. 533 (1944).
59. Id. at 539.
60. Id. at 535-36.
61. Id. at 553.
62. Id.
63. Within one year of South-Eastern Underwriters, court actions had been filed in eleven states challenging tax laws, and in thirty-one states taxes were paid under protest. Weller, The McCarran-Ferguson Act's Antitrust Exemption for Insurance: Language, History and Policy, 1978 DUKE L.J. 587, 591 (1978).
65. The relevant portions of section 1012(b) currently read:
No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance: Provided, That after June 30, 1948, the Act of July 2, 1890, as amended, known as the Sherman Act, . . . shall be applicable to the business of insurance to the extent that such business is not regulated by state law.
Id. (emphasis added).
Section 1013(b) provides, "Nothing contained in this chapter shall render the said Sherman Act inapplicable to any agreement to boycott, coerce, or intimidate, or act of boycott, coercion, or intimidation." Id.
66. In St. Paul Fire & Marine Ins. Co. v. Barry, 438 U.S. 531 (1979), four insurance companies agreed that three of the companies would refuse to sell insurance to
In Group Life & Health Ins. Co. v. Royal Drug Co., the Supreme Court applied the McCarran-Ferguson Act to a new type of insurance company. In Royal Drug, several pharmacies that did not have a contract with Blue Shield alleged that Blue Shield and several of its participating pharmacies violated antitrust laws. Specifically, the non-participating pharmacies claimed that Blue Shield and the participating pharmacies entered into agreements to fix the retail price of drugs, and these agreements caused Blue Shield’s customers to boycott the non-participating pharmacies. Blue Shield sought to invoke the protection of the McCarran-Ferguson Act, claiming that its contracts with the pharmacies were the “business of insurance.”

The Court noted that at the time the McCarran-Ferguson Act was passed, corporations organized to provide health care plans were not customers of the fourth company, so that the fourth company could force its customers to accept new policy terms. The customers sued the insurance companies for violation of the Sherman Antitrust Act. Id. at 533. The insurance companies claimed that they were protected by the McCarran-Ferguson Act. The companies argued that the boycott exception to the McCarran-Ferguson Act should be narrowly construed to include only boycotts against competitors. Id. at 550-51. The Supreme Court construed “boycott” more broadly, and held that the insurance companies were not exempt from antitrust scrutiny. Id. at 552-53. The Court explicitly refused to address whether the companies would have been exempt if the boycott could have been classified as state action. Id. at 554-55.

67. In Securities & Exchange Comm’n v. Variable Annuity Life Ins. Co., 359 U.S. 65 (1959), the Supreme Court held that annuity contracts sold by insurance companies were not the “business of insurance” because they placed all the risk on the buyer and none on the company. Id. at 71. A variable annuity policy is one where the insured is paid periodically, in varying amounts, depending upon the success of the investments of the insurance company. BLACK’S LAW DICTIONARY 83 (5th ed. 1979). The Court based this holding on the premise that the concept of insurance requires some spreading of the risk from the buyer to the company. Variable Annuity, 359 U.S. at 71. The distinction between the insurance business and the “business of insurance” was reinforced in Securities and Exchange Comm’n v. National Securities, Inc., 393 U.S. 453 (1969). In National Securities, the Supreme Court, in deciding the applicability of the McCarran-Ferguson Act to state law, stated: The statute did not purport to make the States supreme in regulating all the activities of insurance companies; its language refers not to the persons or companies who are subject to state regulation, but to laws “regulating the business of insurance.” Insurance companies may do many things which are subject to paramount federal regulation; only when they are engaged in the “business of insurance” does the statute apply. Id. at 459-60 (emphasis in original). The Court determined that the core of the “business of insurance” involved “the relationship between insurer and insured, the type of policy which could be issued, [and] its reliability, interpretation, and enforcement. . . .” Id. at 460.

69. Id. at 207.
70. Id.
71. Id.
considered to be in the insurance business.\textsuperscript{72} The Court also observed that companies such as Blue Shield incur two types of obligations: subscriber contracts, between Blue Shield and its customers, which insure against the risk that the policyholders would be unable to pay for health care during the period of coverage, and provider contracts, between Blue Shield and the participating pharmacies, which serve to minimize the cost Blue Shield incurs in fulfilling its subscriber contracts.\textsuperscript{73} The Supreme Court held that the provider contracts were not the "business of insurance."\textsuperscript{74}

In reaching this decision, the Court observed that the provider contracts did not involve underwriting risks.\textsuperscript{75} The Court noted further that protection of insurance companies which cooperate in underwriting risks was one of the primary reasons the McCarran-Ferguson Act was passed.\textsuperscript{76} If cost reduction alone were enough to make an agreement the "business of insurance," then almost all contracts entered into by insurance companies would be exempt from antitrust law.\textsuperscript{77} The Court supported its holding by noting that exemptions from the antitrust laws are to be narrowly construed.\textsuperscript{78} In addition, the Court observed that the McCarran-Ferguson Act exempted the "business of insurance" and not the "business of insurance companies" from the antitrust laws.\textsuperscript{79}

Following its decision in \textit{Royal Drug}, the Supreme Court narrowly interpreted the "business of insurance" exemption from the Sherman Antitrust Act in \textit{Union Labor Life Ins. Co. v. Pireno}.\textsuperscript{80} In \textit{Pireno}, a chiropractor claimed that an insurance company's use of a peer review board to recommend customary and reasonable charges for medical care violated section 1 of the Sherman Antitrust Act.\textsuperscript{81} The claim alleged that the review board constituted a conspiracy to fix prices.\textsuperscript{82} The insurance company argued that the peer review board was an essential component of risk spreading, because it determined the extent of the insurance company's liability to the insured.\textsuperscript{83} The Court rejected this argument, however, and stated that the "peer review arrangement [was] logically and temporarily unconnected to

\begin{itemize}
\item \textsuperscript{72} \textit{Id.} at 226.
\item \textsuperscript{73} \textit{Id.} at 213.
\item \textsuperscript{74} \textit{Id.} at 232-33.
\item \textsuperscript{75} \textit{Id.} at 214.
\item \textsuperscript{76} \textit{Id.} at 221.
\item \textsuperscript{77} \textit{Id.} at 232-33.
\item \textsuperscript{78} \textit{Id.} at 231.
\item \textsuperscript{79} \textit{Id.} at 232-33.
\item \textsuperscript{80} \textit{Union Labor Life Ins. Co. v. Pireno}, 458 U.S. 119 (1982).
\item \textsuperscript{81} \textit{Id.} at 123.
\item \textsuperscript{82} \textit{Id.}
\item \textsuperscript{83} \textit{Id.} at 130.
\end{itemize}
the transfer of risk..."84 Thus, the Court held that the peer review board did not qualify as the "business of insurance."85

Following *Royal Drug*,86 the Court began its analysis by identifying three factors to consider in determining whether a challenged activity is the "business of insurance."87 Although no one factor is determinative, the important factors are as follows: whether the practice has the effect of transferring or spreading a policyholder's risk; whether the practice is an integral part of the policy relationship between the insurer and the insured; and whether the practice is limited to entities within the insurance industry.88

As previously mentioned, the Court determined that the review board was completely unrelated to the spreading of risk.89 In addition, the peer review board was found not to be an integral part of the relationship between the insurer and insured.90 Finally, the Court resolved the third factor in favor of Pireno by recognizing that the peer review committee involved entities wholly outside the insurance industry.91

The *Pireno* factors represent the current test for determining whether a particular practice qualifies as the "business of insurance" under the McCarran-Ferguson Act. This is a difficult test to apply, and the Eighth Circuit Court of Appeals used it in determining if the practices of BCBS were exempt from antitrust scrutiny in *Health Care Equalization Comm. of the Iowa Chiropractic Soc'y v. Iowa Medical Soc'y*.92 The court of appeals' task was complicated by BCBS also claiming exemption from antitrust liability based on the state action doctrine. There is little case law concerning defendants who claim to be exempt from antitrust laws based on both the state action doctrine and the McCarran-Ferguson Act.93 The interaction of these two exemp-

84. *Id.*
85. *Id* at 134.
86. *Id* at 129.
87. *Id*.
88. *Id*.
89. *Id* at 130.
90. *Id* at 131.
91. *Id* at 132.
92. 851 F.2d 1020 (8th Cir. 1988).
93. In addition to the case that is the topic of this Note, this writer's research has uncovered only two other cases dealing with both of these exemptions: *Ratino v. Medical Serv.*, 718 F.2d 1260, 1265 (4th Cir. 1983) and *Ballard v. Blue Shield*, 543 F.2d 1075, 1078-79 (4th Cir. 1976).

In *Ratino*, a physician appealed from the granting of an insurance company's motions for summary judgment. The physician had challenged the use of a "usual, customary and reasonable" insurance plan to govern reimbursements to doctors as violative of antitrust law. The district court granted the insurance company's motions for summary judgment on the grounds that the plan was exempt from antitrust scrutiny under the McCarran-Ferguson Act and the state action doctrine. *Id.* The
tions makes this case an interesting one to study.

II. STATEMENT OF THE CASE

A. The District Court Proceedings

When the Health Care Equalization Committee of the Iowa Chiropractic Society (Committee) brought the antitrust claim in the District Court for the Southern District of Iowa, fourteen defendants were named, including Blue Cross and Blue Shield of Iowa. The Committee, as assignee of the claims of 120 Iowa chiropractors, charged that the defendants had conspired in violation of section 1 of the Sherman Antitrust Act to eliminate or prevent the growth of the chiropractic profession. The Committee alleged that the defendants boycotted chiropractors by:

1. refusing to permit medical doctors to refer patients to chiropractors, to accept patient referrals from chiropractors, or to treat patients in cooperation with chiropractors;
2. denying chiropractors access to hospitals and hospital services;
3. attempting to block accreditation of chiropractic educational institutions;
4. promoting public statements critical of chiropractors; and
5. refusing to include coverage for chiropractic services in health care service plans.

The Committee also alleged that BCBS violated section 2 of the Sherman Act by conspiring to monopolize, attempting to monopolize, and monopolizing the health care insurance business in Iowa. Specifically, the Committee alleged that BCBS had "taken over cov-

Fourth Circuit Court of Appeals reversed the district court on both of these issues. Id. at 1265.

In Ballard, chiropractors appealed from the dismissal of their antitrust action against insurance companies for failure to provide chiropractic coverage. Ballard, 543 F.2d at 1077. The district court dismissed the actions based on the grounds that the insurance companies were protected by the McCarran-Ferguson Act and the state action doctrine. Id. at 1078—79. The Fourth Circuit Court of Appeals reversed the district court on both grounds. Id.

94. Iowa Medical, at 1022. The original list of defendants is as follows: the Iowa Medical Society; the American Medical Association; Blue Cross of Iowa and Blue Shield of Iowa; the American Hospital Association; the Iowa Hospital Association; the American College of Radiology; the Joint Commission on Accreditation of Hospitals; Norman L. Pawlewska (the Iowa Commissioner of Health); Joseph Sabatier, Jr., M.D.; Donald C. Young, M.D.; Nelson H. Chesney, M.D.; Clarence R. Denser, Jr., M.D.; and H. Doyl Taylor. Id. at 1022, n.2.

95. Id. at 1022. The Committee also brought claims under the Iowa common law of tort and the federal civil rights statute, 42 U.S.C. § 1983. However, these claims are not addressed in the Eighth Circuit decision. In 1986, the district court granted the Committee’s motion to dismiss its tortious interference claim and entered summary judgment in favor of all defendants on the federal civil rights claim. The Committee did not appeal from those orders. Id. n.3.

96. Id. at 1022.

97. Id.
verage of groups of patients previously afforded third party coverage . . . by private insurers, thereby creating an economic bias favoring competing medical doctors, depriving the insured Iowans of a reasonable election between chiropractic and medical health care, and depriving [chiropractors] of patients and income."98

All of the defendants joined in a motion to dismiss based on the grounds that the Committee lacked capacity and standing to assert the antitrust claims.99 BCBS also filed a motion to dismiss on the grounds that their activity was protected by the state action doctrine and by the McCarran-Ferguson Act.100 The district court held that the Committee did have standing to assert the claims of the individual chiropractors.101 The district court, however, dismissed the antitrust claims against BCBS. It held that the state action doctrine and the McCarran-Ferguson Act protected BCBS from liability for alleged violations of sections 1 and 2 of the Sherman Antitrust Act, respectively.102 The Committee appealed the dismissal of the antitrust claims against BCBS.103

B. The Court of Appeals Analysis

The Eighth Circuit Court of Appeals applied the two-pronged Midcal test and determined that the exclusion of chiropractic coverage from the policies offered by BCBS qualified for the state action exemption from antitrust scrutiny. Therefore, the court of appeals

98. Id. at 1027.
99. Iowa Medical, 501 F. Supp. at 975. The AMA, Dr. Sabatier, and the American College of Radiology filed motions to dismiss for lack of personal jurisdiction and improper venue. Id. at 980. The district court dismissed the claims against the American College of Radiology, but denied the motions to dismiss the AMA and Dr. Sabatier. Id. at 997.
100. Id. at 988. Norman Pawlewski, the Commissioner of Public Health for the State of Iowa, also moved to dismiss on the grounds that his conduct was protected by the state action doctrine. The court denied his motion. Id. at 991–93.
101. Id. at 979–80.
102. Id. at 988–95. For a discussion of the state action doctrine, see supra notes 36–54 and accompanying text. For a discussion of the "business of insurance" exemption, see supra notes 65–88 and accompanying text.
103. Iowa Medical, 851 F.2d at 1022. The Committee also appealed the dismissal of the claims against the American College of Radiology. Id. at 1029. The Eighth Circuit Court of Appeals affirmed the dismissal for lack of personal jurisdiction. Id. at 1031.

The Committee appealed from a summary judgment granted against it on August 4, 1986, in favor of the Iowa Hospital Association. Id. at 1031. The circuit court affirmed the summary judgment. Id. at 1032. The defendants cross-claimed from the district court's holding that the Committee was capable of bringing the antitrust claims. Id. at 1032 n.16. However, the circuit court never addressed this issue, because after ruling on all the issues raised by the Committee on appeal, there were no defendants remaining. Id.
affirmed the district court's dismissal of the boycott claim. The court of appeals also affirmed the dismissal of the monopolization claim against BCBS. It held that BCBS met the "business of insurance" criteria set out in *Pireno*, and that BCBS was protected under the McCarran-Ferguson Act.

1. State Action Doctrine

When the Eighth Circuit Court of Appeals considered whether the state action doctrine protected BCBS from liability for a boycott of chiropractors in violation of section 1 of the Sherman Antitrust Act, the court noted that BCBS are non-profit health care service corporations, governed by Iowa Code Chapter 514. The court of appeals applied the two-prong test for state action immunity that was set out in *Midcal*.

Applying the first prong of the *Midcal* test, the court of appeals concluded that Iowa Code Chapter 514 reflected a clearly articulated and affirmatively expressed state policy to displace competition with regulation in the health care service industry. The court interprets the language of Chapter 514.1 to find a state policy favoring BCBS's refusal to include chiropractors in their health care plans. Chapter 514.1 of the Iowa Code authorized health care corporations to provide four types of plans: a hospital service plan; a medical and surgical plan; a pharmaceutical plan; and an optometric plan. Chiropractors were not listed among the qualified health care providers in the medical and surgical plan.

In addition to the language of the statute, the court of appeals considered the legislative history of Chapter 514. Health care service corporations were initially authorized to provide medical and surgical service plans to subscribers in 1945. The statute limited the plans to the services of "physicians and surgeons, osteopathic physicians, or osteopathic physicians and surgeons." Subsequently, a

104. *Id.* at 1032.
105. *Id.* at 1029.
106. *Id.* at 1023. BCBS organized under Iowa Code Chapters 504 and 504A. *Id.*
107. *Id.* at 1024. The *Midcal* case is discussed *supra*, in notes 39-49 and accompanying text.
108. *Id.* at 1024–25.
109. *Id.* at 1025–26.
110. *Id.* at 1025 (quoting *Iowa Code § 514.1 (1945)*).
111. *Id.* at 1025. The specific language of the statute was a medical and surgical plan "whereby medical and surgical service may be provided at the expense of said corporation, by duly licensed physicians and surgeons, dentists, podiatrists, osteopathic physicians, or osteopathic physicians and surgeons, to subscribers under contract, entitling each subscriber to medical and surgical service, as provided in said contract." *Iowa Code § 514.1 (1945).*
112. *Id.* (quoting 1945 Iowa Acts Ch. 209, section 1).
113. *Id.*
series of services has been added: dental services were added in 1955; podiatric services were added in 1965; pharmaceutical services were added in 1967; optometric services were added in 1969; and chiropractic services were finally included in 1986.

The court of appeals concluded that the omission of chiropractic coverage until 1986 directly suggested that the legislature intended to prevent the participation of chiropractors in the health care service corporations.

The court of appeals supported this conclusion with interpretations of Chapter 514 by the Attorney General and the Governor of Iowa. The Iowa Attorney General stated: "Being creatures of statutes, service corporations under section 514.1 can contract for these services only and only with those persons or entities listed in Chapter 514." The Governor of Iowa wrote: "eligibility for [chiropractic] benefit under Chapter 514 is prevented as a matter of law." Based on the language of the statute, the legislative history, and the opinions of the Attorney General and the Governor, the court of appeals held that the exclusion of chiropractors from coverage by the BCBS was a clearly articulated and affirmatively expressed policy of the State of Iowa, therefore satisfying the first prong of the Midcal test.

The Eighth Circuit Court of Appeals also held that the second prong of the Midcal test, which requires active state supervision, was satisfied. The court of appeals supported this conclusion by language in the statute that requires each corporation to report annually to the Commissioner of Insurance, and the requirement that the Commissioner approve every contract entered into by the corporations, including the rates charged to the subscribers. On the basis of the Commissioner's role and authority under the statute, the court of appeals distinguished Midcal, 324 Liquor Corp., and Patrick, where the Supreme Court found no active state supervision. Concluding

114. Id. (quoting 1955 Iowa Acts Ch. 244, sec. 1).
115. Id. (quoting 1965 Iowa Acts Ch. 397, sec. 1).
116. Id. (quoting 1967 Iowa Acts Ch. 369, sec. 1).
117. Id. (quoting 1969 Iowa Acts Ch. 271, sec. 1).
118. Id. (quoting 1986 Iowa Acts Ch. 1180, sec. 3).
119. Id.
120. Id. (quoting Op. Att'y Gen. (March 31, 1979)).
121. Id. (quoting II Iowa Admin. Bull., No. 9, at 527 (1979)).
122. Id.
123. Id. at 1026-27. Iowa law provides that the contracts between a health care service corporation and its subscribers are subject at all times to the approval of the Iowa Commissioner of Insurance. Iowa Code § 514.7 (1988). And the Commissioner of Insurance has the same authority over contracts between health care service corporations and participating providers. Iowa Code § 514.8 (1988).
124. Health Care Equalization Comm. v. Iowa Medical Soc'y, 851 F.2d 1020, 1027 (8th Cir. 1988). For a discussion of Midcal and Patrick, see supra notes 39-54, and
that both prongs of the test were satisfied, the Eighth Circuit Court of Appeals affirmed the district court, and held that the state action doctrine protected BCBS from the claim that BCBS boycotted the chiropractors in violation of section 1 of the Sherman Antitrust Act.\footnote{125

\textit{Iowa Medical Soc'y,} 851 F.2d at 1027.}

2. \textit{McCarran-Ferguson Act}

The Eighth Circuit Court of Appeals next considered whether the McCarran-Ferguson Act protected BCBS from a claim of monopolization under section 2 of the Sherman Antitrust Act.\footnote{126

\textit{Id.}} The court stated that the McCarran-Ferguson Act removes from antitrust scrutiny all conduct which is part of the "business of insurance," regulated by state law, and not in the form of coercion, intimidation, or boycott.\footnote{127

\textit{Id. at 1028. For a discussion of the McCarran-Ferguson Act, see supra notes 55-65 and accompanying text.}} Although the monopolization claim can be broken down into claims of monopolization of the health care provider market and the health care insurance market, the court characterized the monopolization claim as primarily a challenge directed against the contractual relationship between BCBS and Iowa subscribers.\footnote{128

\textit{Id. Specifically, the court said that the "[section 2] allegations are essentially aimed at the contractual relationship between [BCBS] as insurers and their Iowa subscribers as insureds." \textit{Id. For a discussion on the dual nature of the monopolization claim, see infra notes 156-63 and accompanying text.}}

To determine if the subscriber contracts were the "business of insurance," the court of appeals examined these contracts under the three factors set out in \textit{Pireno}.\footnote{129

\textit{Id. For a discussion of \textit{Pireno, see supra, notes 80-85 and accompanying text.}} The court held that the first factor was met, because the contracts clearly had the effect of transferring or spreading a subscriber's risk.\footnote{130

\textit{Id. at 1029 (emphasis in original).}} The second factor, requiring that the challenged practice be an integral part of the policy relationship between the insured and the insurers, was met because the "contracts are the policy relationship between the insurer and insured."\footnote{131

\textit{Id. at 1029 (emphasis in original).}} The court of appeals also held that the third factor was satisfied because the contracts "by definition, are limited to insur-

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\textit{supra} notes 55-65 and accompanying text. In 324 Liquor Corp. v. Duffy, 479 U.S. 355 (1987) the Supreme Court examined a New York statute which required liquor retailers to charge at least 112 percent of the wholesalers' posted bottle price. The Court held that the practice violated section 1 of the Sherman Antitrust Act as a price fixing scheme. The Court also held that the state action doctrine did not protect the program because New York did not monitor market conditions or engage in any pointed re-examination of the program. \textit{Id. at} —.
\end{flushleft}
The court of appeals decided that there was no boycott within the meaning of the McCarran-Ferguson Act, because the Committee's monopolization claim did not allege that BCBS acquired a monopoly on the health care market by boycott, coercion, or intimidation. The court stated that the Committee did not allege that BCBS's "boycott of the chiropractors was related to the alleged... monopolization of the health care insurance market." The court of appeals concluded that the subscriber contracts were part of the "business of insurance," were regulated by the state of Iowa, and were not obtained by boycott. Therefore, the court held that the McCarran-Ferguson Act protected BCBS from any claim of monopolization under section 2 of the Sherman Antitrust Act.

In a footnote to the opinion, the court of appeals conceded that the Committee did allege that BCBS attempted and conspired with their co-defendants to monopolize the health care provider market by boycotting chiropractors. Arguably, this behavior would not be protected by the McCarran-Ferguson Act. However, the court reasoned that since it had already determined that this boycott behavior was protected by the state action doctrine for the section 1 Sherman Antitrust Act claim, the boycott would also be protected by the state action doctrine under a section 2 claim. Therefore, the Eighth Circuit Court of Appeals concluded that the challenged activity was the "business of insurance" within the meaning of the McCarran-Ferguson Act.

Next, the court of appeals considered whether the McCarran-Ferguson Act requirement of regulation by the state was satisfied. The court held that any monopolization conduct on the part of BCBS was regulated by the state. It supported this conclusion by using the language in sections 514.6 and 514.7 of the Iowa Code. These sections regulate the contracts between BCBS and their subscribers.

The court of appeals decided that there was no boycott within the meaning of the McCarran-Ferguson Act, because the Committee's monopolization claim did not allege that BCBS acquired a monopoly on the health care market by boycott, coercion, or intimidation. The court stated that the Committee did not allege that BCBS's "boycott of the chiropractors was related to the alleged... monopolization of the health care insurance market." The court of appeals concluded that the subscriber contracts were part of the "business of insurance," were regulated by the state of Iowa, and were not obtained by boycott. Therefore, the court held that the McCarran-Ferguson Act protected BCBS from any claim of monopolization under section 2 of the Sherman Antitrust Act.

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III. Analysis of the Case

Portions of the Eighth Circuit Court of Appeals' opinion are excellent. However, the opinion as a whole suffers from a failure of the court to unravel the tangle of issues presented by this case. The court of appeals addressed only two issues in depth. Actually, there are five issues that must be resolved before the Committee's antitrust claims against BCBS can properly be dismissed. In determining whether to dismiss the section 1 Sherman Antitrust Act claim against BCBS, it is valuable to consider whether the state action doctrine or the McCarran-Ferguson Act provide BCBS with immunity. The section 2 Sherman Antitrust Act claim is concerned with the monopolization of two distinct markets, the health care provider market and the health care subscriber market. One should consider whether the McCarran-Ferguson Act or the state action doctrine relieve BCBS of antitrust liability for monopolization of the health care insurance market. If these doctrines do not protect BCBS, the final question is whether the Committee, a member of the provider market, has a cause of action against BCBS for wrongfully monopolizing the insurance market. Each of these issues will be addressed in the following discussion.

A. The Section 1 Sherman Act Claim

In order to determine if BCBS were exempt from the boycott claim, it is necessary to analyze the issue using both the state action doctrine and the McCarran-Ferguson Act. Initially, this seems counter-intuitive, one would think a single exemption would be enough to shield BCBS. However, the McCarran-Ferguson Act specifically refuses antitrust protection for insurance companies engaged in certain boycott activities. If the McCarran-Ferguson Act applies to BCBS's boycott, the Act might impose antitrust liability where the state action doctrine would offer immunity for the same conduct. Therefore, it is dangerous to decide that the practices of BCBS were exempt from antitrust liability for the boycott claim with-

143. Id. at 1027, 1029.

144. The court only considered whether the state action doctrine protected BCBS from the boycott claim, and whether the McCarran-Ferguson Act protected BCBS from the monopolization claim. See supra notes 104-143 and accompanying text.

145. The Supreme Court has declined to decide whether the state action doctrine or the McCarran-Ferguson Act would take precedence if the two were in conflict. St. Paul Fire & Marine Ins. Co. v. Barry, 438 U.S. 531, 554 n.27 (1978). For a discussion of this case, see supra note 66.
out considering both the state action doctrine and the McCarran-Ferguson Act.

1. Availability of State Action Doctrine Protection

The court of appeals' holding that the state action doctrine protects BCBS from antitrust liability for boycotting chiropractors in violation of section 1 of the Sherman Act is correct. The language of Iowa Code Chapter 514.1, the legislative history, and the interpretations the Chapter by the state officials support a holding that the state had a clearly articulated policy to exclude chiropractors from participating in the health care service programs. BCBS could have reasonably assumed that Chapter 514.1 required them to boycott the chiropractors. Although compulsion is not required to satisfy the first prong of the *Midcal* test, it is strong evidence of a state policy.

The second prong of the *Midcal* test is also satisfied, because Chapter 514 of the Iowa Code requires that BCBS report annually to the Commissioner of Insurance. In addition, all the contracts entered into by BCBS are subject to approval by the Commissioner of Insurance. Therefore, it is reasonable to conclude that the state actively supervised the contents of the contracts, including the exclusion of chiropractors. Both prongs of the *Midcal* test are met, therefore the state action doctrine did protect BCBS from the claim of boycott in violation of section 1 of the Sherman Antitrust Act.

2. The Applicability of the McCarran-Ferguson Act

The court of appeals did not address whether the McCarran-Ferguson Act protected BCBS from the Committee's boycott claim. Application of the *Pireno* factors to the boycott make it clear that the boycott was not the "business of insurance." The boycott is not connected to risk spreading. The risk of a back injury is spread when BCBS agrees to insure against that health problem. The boycott

146. Southern Motors Carriers Rate Conf., Inc. v. United States, 471 U.S. 48, 66 (1985) (insurance companies' collective rate making activities were not held compelled by the state, but were immune from antitrust liability under the state action doctrine).


150. This situation is analogous to that in *Royal Drug*, where the Supreme Court held that provider contracts with pharmacies were not the "business of insurance."

151. See *Hahn* v. Oregon Physicians Serv., 689 F.2d 840, 843 (9th Cir. 1982) (there is no evidence of risk-related reasons to distinguish between the services of M.D.'s and the services of podiatrists for care of the foot); *Virginia Academy of Clinical Psychologists v. Blue Shield of Virginia*, 624 F.2d 476, 483-84 (4th Cir.)
of the chiropractors is not an integral part of the policy relationship between BCBS and their insureds. The insureds are primarily concerned with having their health care costs paid by BCBS. Therefore, the types of illness covered by the policy are essential to the relationship, while limitations on the providers is secondary.\textsuperscript{152} Finally, the boycott involved entities wholly outside the insurance industry, the chiropractors. Because the boycott did not satisfy any of the criteria set out in \textit{Pireno}, the boycott was not the "business of insurance." The McCarran-Ferguson Act did not cover the alleged boycott by BCBS.

As the McCarran-Ferguson Act did not apply to the boycott of the chiropractors by BCBS, there was no potential for conflict between the McCarran-Ferguson Act and the state action doctrine.\textsuperscript{153} Therefore, even though the court of appeals did not completely analyze the issue, it correctly dismissed the section 1 Sherman Antitrust Act claim against BCBS.

**B. The Section 2 Sherman Act Claim**

In considering the section 2 Sherman Act claim, it is important to distinguish between the two markets involved in this case. There was a health care provider market, composed of doctors, chiropractors, and other medical professionals. In addition, there was a health care insurance market, made up of insurance companies who offered coverage to subscribers. The Committee represented members of the health care provider market. BCBS did not participate directly in the health care provider market.

A claim that BCBS attempted to monopolize the health care provider market required a showing that BCBS engaged in unlawful behavior to unfairly aid health care providers in competing in the provider market. The Committee attempted to show the unlawful

\textsuperscript{152} Compare Metropolitan Life Ins. Co. v. Massachusetts, 471 U.S. 724, 743 (1985) (state statute requiring health care policies to include coverage for mental illness was an integral part of the relationship between insurers and insureds) with Group Life & Health Ins. Co. v. Royal Drug Co., 440 U.S. 205, 213-14 (1979) (limitations on where insureds could fill prescriptions and have the cost reimbursed by the insurer was not an essential part of the subscriber contract).

\textsuperscript{153} In Ballard v. Blue Shield of Southern West Virginia, Inc., 543 F.2d 1075, 1079 (1976), the Fourth Circuit Court of Appeals was faced with conflict between the state action doctrine and the boycott exception to the McCarran-Ferguson Act. The court held that the McCarran-Ferguson Act should govern, and that the insurance companies were subject to liability for violations of the Sherman Antitrust Act. \textit{Id.}
activity through BCBS’s boycott of the chiropractors in the health care provider contracts. As discussed in the previous section, this behavior was protected by the state action doctrine. Therefore, no liability for a section 2 Sherman Act violation would attach to BCBS for the boycott.

Alternatively, the Committee might be able to pursue a section 2 Sherman Act violation by showing that BCBS unlawfully monopolized the health care insurance market, and that this monopoly caused injury to the chiropractors in the health care provider market. The theory of the claim is that BCBS is competing with private insurers and for-profit insurers in the health care insurance market. These other insurers are not governed by Iowa Code chapter 514 and are free to include chiropractors in their health insurance plans. A complete analysis of this theory requires determining if BCBS was protected from a claim of monopolization of the health care insurance market by either the state action doctrine, or the McCarran-Ferguson Act. If BCBS were not protected from antitrust liability, then one must consider whether this claim gives the Committee the right to bring an action against BCBS.

1. Monopolization of the Health Care Insurance Market

The Eighth Circuit Court of Appeals considered only the McCarran-Ferguson Act in determining if BCBS was shielded from antitrust liability for the section 2 Sherman Act claim. In a footnote, the court stated, without a separate analysis, that the monopolization activities of BCBS were protected by the state action doctrine. The court’s failure to conduct a separate Midcal analysis led to an improper dismissal of the monopolization claim against BCBS.

a. Availability of State Action Doctrine Protection

Application of the two-pronged Midcal test shows that BCBS was not protected from the monopolization claim by the state action doctrine. Chapter 514 of the Iowa Code may be evidence of a state policy to displace competition with regulation in the health care industry, but it is not a clearly articulated and affirmatively expressed policy favoring monopolization of the health care subscriber market.

154. Chapter 514 governs only corporations organized under chapter 504 (not for pecuniary profit) and chapter 504A (nonprofit) for the purpose of providing nonprofit medical services. IowA CODE § 514.1 (1988).

155. The monopolization of the health care insurance market could in and of itself be illegal activity, and subject BCBS to antitrust liability. However, in order to have standing to bring the section 2 claim, the Committee must show that this monopoly caused their members to be harmed.

156. Iowa Medical Soc’y, 851 F.2d at 1029 n.11.

157. Midcal case is discussed supra in notes 39–54 and accompanying text.
The majority of Chapter 514 regulates the terms of the provider and subscriber contracts, the rates that can be charged, and the taxation of the health care corporations. Only section 514.14 arguably relates to monopolization. It states, “[a]ny dissolution, merger, or liquidation of a corporation organized under the provisions of said chapter shall be under the supervision of the commissioner of insurance who shall have all powers with respect thereto granted to the commissioner under the insurance laws of this state.” This language does not qualify as a clearly and affirmatively expressed policy by Iowa to promote monopolization; therefore, the first prong of the Midcal test was not satisfied. It is impossible to actively supervise a non-existent policy, so the second prong was not satisfied either. The state action doctrine did not protect BCBS from a violation of section 2 of the Sherman Antitrust Act.

b. Availability of McCarran-Ferguson Act Protection

BCBS’s alleged monopolization of the health care insurance market was not protected by the McCarran-Ferguson Act. Application of the Pireno factors illustrates that monopolization of a health care insurance market is not the “business of insurance.” Monopolization of a health care insurance market has no relationship to the transfer of risk between the insured and the insurer. The risk is transferred when the contract between the insured and the insurer is made, and this event is independent of when an insurer may obtain a monopoly over the market. Monopolization of the health care market is not an integral part of the relationship between the insured and insurer. That relationship is determined by the terms of the contract, not the percentage of the market controlled by the insurer. Finally, the monopolization of the health care market by BCBS can have adverse consequences to entities outside of the insurance industry, as the discussion in the next section will show. Since the alleged monopolization of the health care subscriber market by BCBS is not the “business of insurance” the McCarran-Ferguson Act does not apply.

The Eighth Circuit Court of Appeals reached the opposite result because it equated the monopolization claim with the subscriber contracts. This result is not consistent with the Supreme Court’s narrow interpretation of what constitutes the “business of insurance,” or with the legislative intent of the McCarran-Ferguson Act.

160. The *Pireno* case is discussed *supra* in notes 80–85 and accompanying text.
161. *Iowa Medical Soc’y*, 851 F.2d at 1028.
162. *See supra* notes 65–88 and accompanying text.
Act. By using the "business of insurance" exception to dismiss the Committee's claim, the court of appeals did not address whether the Committee's claim constitutes a cause of action. This is the most interesting issue of the case.

2. The Connection between the Markets

The Eighth Circuit Court of Appeals refused to acknowledge that the Committee alleged that its members were injured by BCBS's monopolization of the health care subscriber contracts. However, the language of the complaint can easily be construed to include such an allegation. The Committee alleged that an illegal monopoly by BCBS of the health insurance market, coupled with the boycott of chiropractors by BCBS, reduced the number of patients who sought chiropractic services. There are two difficulties with this allegation. First, there is a question of causation. Second, it doesn't look like a traditional antitrust claim.

The causation issue arises because both the boycott and the monopolization are necessary for the chiropractors to suffer injury. The boycott of the chiropractors by BCBS is protected by the state action doctrine. One could argue that the alleged illegal monopolization of the health insurance market was not the cause of the chiropractor's injury. The protected boycott was the cause, therefore the Committee should not be able to bring the claim against BCBS. However, the sounder analysis is to recognize that both factors are partial causes of the chiropractor's injury. The question then becomes whether or not BCBS should be liable to the Committee when a portion of BCBS's conduct was protected. Since illegal monopolization is a violation of antitrust law, distinct from boycott activity, it should create liability for BCBS.

The more difficult hurdle faced by the Committee in bringing this claim is the novelty of the fact pattern. Because the health care industry has been conceptualized as including both provider markets and insurance markets, the Committee is in the unenviable position of arguing that a monopoly in one market caused injury to another market. This is not a traditional antitrust claim. Allowing the

163. See supra notes 55-65 and accompanying text.
164. See Iowa Medical Soc'y, 851 F.2d at 1029 n.11.
165. See generally supra notes 68-79 and accompanying text.
166. Individuals who have insurance coverage tend to patronize health care providers who participate in the same insurance plan. The Eighth Circuit Court of Appeals should have inferred this, since everything is to be taken in the light most favorable to the non-moving party in a motion to dismiss. See, e.g., Sturm v. Clark, 835 F.2d 1009, 1011 (3d Cir. 1987).
167. This is not a "tying" claim. In tying cases, an entity with monopoly power in one market uses that power to force consumers to purchase a second product in another market in order to obtain the first product. See, e.g., Jefferson Parish Hospital
Committee to bring this claim would stretch antitrust law. However, such a relaxation would probably not create a large amount of additional antitrust litigation. In order to win the case the Committee would have to prove BCBS had illegally gained a monopoly in the health insurance market, a concrete injury to the chiropractor's ability to compete in the provider market, and that the injury was caused by the monopolization by BCBS.

If the facts alleged by the Committee are true, chiropractors' ability to compete in the health care business has been impaired and consumers' freedom in choosing health care has been restricted by BCBS's monopolization. This supports allowing the Committee to go forward with the claim. In addition, the health care insurance business is a new arrival in antitrust litigation and the law may need to evolve further to achieve the objectives of antitrust law in this area. Therefore, the Committee's section 2 claim against BCBS should not have been dismissed.

CONCLUSION

While the Eighth Circuit Court of Appeals correctly affirmed the dismissal of the section 1 Sherman Act claim against BCBS on the basis of state action doctrine immunity, the dismissal of the section 2 Sherman Act claim was incorrectly affirmed. Health Care Equalization Comm. of the Iowa Chiropractic Soc'y v. Iowa Medical Soc'y provided the Eighth Circuit Court of Appeals with a rare opportunity to lay down a template for analyzing antitrust violations when there is potential protection from both the state action doctrine and the McCarran-Ferguson Act. BCBS had no product of their own to promote in the provider market. Therefore, BCBS was not engaged in tying.

168. A monopoly is not illegal unless there is a possession of monopoly power in the relevant market and the acquisition of that power was not a consequence of a superior product or superior business judgment. A monopoly must have been obtained in a way that harms competition to be illegal. See, e.g., United States v. Grinnell Corp., 384 U.S. 563, 570—71 (1966).

There are cases which hold that proof of monopoly power, plus proof of exclusion of a competitor without a valid business reason for doing so violates section 2 of the Sherman Act. See, e.g., Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585, 610-11 (1985). The Committee could not use this theory because BCBS had a legitimate business reason for excluding chiropractors from provider contracts—Iowa Code chapter 514 prohibited it.

169. When the McCarran-Ferguson Act was passed in 1945, corporations that were organized for the purpose of providing their members with pre-paid medical services were not considered to be engaged in the insurance business. See, e.g., Jordan v. Group Health Ass'n, 107 F.2d 239, 242—43 (D.C. Cir. 1939). In less than fifty years this business has been characterized as the "health care insurance" business and has been divided into two markets. The "provider market" and "insurance market" may not be the best conceptualization of the structure of these corporations.
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Ferguson Act. In addition, a new type of antitrust claim was presented by the Committee. The court did not take advantage of either opportunity. Some of the issues necessary to the resolution of the case were not expressly addressed. In addition, assumptions made by the court, which were critical for understanding its analysis, were placed in the footnotes of the opinion. This served to complicate, rather than clarify, the difficult issues of antitrust liability.

However, there is merit in the decision of the court of appeals. By the time the Committee's appeal was before the court, Chapter 514 of the Iowa Code had been amended to include chiropractors as health care providers. Therefore, any monopolization of the health care insurance market by BCBS should no longer prejudice the chiropractors. In addition, allowing the Committee to collect treble damages from BCBS would ultimately mean higher health insurance costs to Iowa subscribers, because BCBS is a non-profit organization. While the chiropractors have a right to recover their damages, it is inequitable for individual subscribers to bear this cost. It also seems to run counter to the objectives of antitrust law for consumers, who have been injured by a violation of antitrust law, to have to pay damages for that violation.

Dismissal of both the antitrust claims against BCBS may have been the equitable and judicially efficient way to handle this case. However, the case sets a murky precedent. The Eighth Circuit Court of Appeals gave no indication of whether or not the Committee stated a monopolization claim that could be recognized under antitrust law. The court's failure to analyze a boycott claim against an insurance company under both the state action doctrine and the McCarran-Ferguson Act suggested that an analysis of such a situation is complete after one exemption is found. Such an analysis may result in missing a conflict between the two exemptions. The determination that monopolization of an insurance market is equivalent to a contract between the insurer and the insured, and therefore protected under the McCarran-Ferguson Act, will undoubtedly cause problems in the future. Raising the "business of insurance" rule as a shield precludes investigating the illegality of monopolies obtained by means other than boycott, intimidation, or coercion. The Eighth

170. There is little case law in this area.
172. As discussed supra note 66, the Supreme Court has not determined the outcome of this conflict. The Fourth Circuit Court of Appeals has held that the McCarran-Ferguson Act should take priority. Ballard v. Blue Shield, 543 F.2d 1075, 1079 (4th Cir. 1976). In a footnote of the case discussed in this paper, the Eighth Circuit Court of Appeals expressed disagreement with the position of the Fourth Circuit on this issue. See Iowa Medical Soc'y, 851 F.2d at 1027 n.10. It would expedite the resolution of this issue if conflict between the circuits were expressed in a more conspicuous manner.
Circuit will have to reconsider its analysis if it is faced with a for-profit insurance company engaged in monopolization of an insurance market.

Mary Maloney Huss