

HUMANA, INC. v. FORSYTH:
THE INSURANCE BUSINESS IS NOW SUBJECT TO RICO
IS THIS THE END OF THE MCCARRAN-FERGUSON
DEFENSE FOR INSURERS?

*by Michael J. Mueller**

On January 20, 1999, the Supreme Court issued its latest pronouncement on RICO in the case of *Humana, Inc. v. Forsyth*.¹ In a unanimous opinion that likely will be read by plaintiffs as an invitation to commence a wave of RICO suits against insurers, the Court determined that RICO claims brought by 84,000 beneficiaries against their group health insurer were not precluded by the McCarran-Ferguson Act.² For the past decade, the lower courts had split on the issue of whether the Act—which grants those involved in the business of insurance certain limited exemption from federal laws—precludes plaintiffs from suing insurers under RICO, with its treble-damages remedy and other procedural benefits. The Supreme Court granted certiorari in *Humana* to address whether “a federal law, which proscribes the same conduct as state law, but provides materially different remedies, ‘impair[s]’ state law under the McCarran-Ferguson Act?”³ Various groups with a stake in insurance disputes weighed in as amici on this question, eager for a definitive answer that would support their respective views.⁴ The Court finally resolved the dispute over the proper test for determining the Act’s preclusive effect on federal statutes that are general in nature. By limiting its holding to the facts of the case, however, the Court’s decision gives insurers some room for invoking the McCarran-Ferguson Act as a defense in certain RICO cases.

The McCarran-Ferguson Act was enacted in 1945, with the purpose of generally securing to the States the regulation of the business of insurance. Congress passed the Act in response to the Supreme Court’s determination that the business of insurance is interstate commerce and, thus, was subject to the Sherman Act.⁵ Section 2(b) of the McCarran-Ferguson Act has two clauses, the first of which provides as follows: “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.”⁶ Through this language of “anti-preemption,”⁷ Congress sought to ensure that federal statutes not identified in the Act, or not yet enacted, would not automatically override state insurance regulation.⁸ Congress reserved its power to enact laws specifically relating to the business of insurance; if it enacts such a law, that law controls and the remainder of the above-quoted clause does not apply.⁹ This clause eventually became the focal point of a dispute among the lower courts—and the centerpiece of the Supreme Court’s decision in *Humana*¹⁰—regarding whether the Act precludes civil RICO claims against insurers.

Based on the Supreme Court's early construction of Section 2(b) in *SEC v. National Securities, Inc.*,¹¹ a number of lower courts have fashioned a four-factor test for determining whether the McCarran-Ferguson Act precludes a federal action. According to these courts, the Act bars the application of a federal statute if: 1) the statute does not specifically relate to the business of insurance; 2) the acts challenged under the statute constitute the business of insurance; 3) the State has enacted a law or laws regulating the challenged acts; and 4) the federal statute would invalidate, impair, or supersede the State law.¹² In light of the Supreme Court's more recent construction of the first clause of Section 2(b) in *United States Department of the Treasury v. Fabe*,¹³ other courts have adopted a three-part test under which the Act bars the application of a federal statute if: 1) the statute does not specifically relate to the business of insurance; 2) the State law has been enacted for the purpose of regulating the business of insurance; and 3) the federal statute would invalidate, impair, or supersede the State law.¹⁴ The first and last parts of these tests are identical.¹⁵ RICO is, quite obviously, not a law that "specifically relates to the business of insurance,"¹⁶ and thus Section 2(b) applies to RICO claims whichever test is used. In *Humana*, there also was no dispute over the middle portion of the test (although the Court cited *Fabe*'s three factors, thus implying that the four-factor test is no longer good law).¹⁷ Like many of the cases before it in which defendants invoked the McCarran-Ferguson Act to stave off RICO claims, *Humana* therefore turned on a proper analysis of whether the plaintiffs' claims would "invalidate, impair, or supersede" the relevant State laws.¹⁸

Before *Humana*, the lower courts had employed different analyses to decide the "impairment" component of the test. Although the cases defy clear categorization, they generally fall into three groups: 1) an assessment of whether there was a "direct conflict" between the substantive prohibitions of the federal statute and the State insurance scheme;¹⁹ 2) an approach that has been called an "upset the balance" analysis, which looks not only at whether there is direct conflict, but also whether the federal remedies and procedures would frustrate or supplant the State insurance scheme;²⁰ and 3) a "field preemption" approach, which simply looks to whether the State has occupied the field.²¹ These tests resulted in different outcomes when applied to civil RICO claims against insurers, even among courts that applied the same test.²² The Third and Ninth Circuits held that the McCarran-Ferguson Act did not bar such claims.²³ The Fourth, Sixth, and the Eighth Circuits held that the Act did bar such claims.²⁴ Before these appellate courts reached their decisions, the district courts in their respective circuits and elsewhere were almost evenly split. Judges in the First, Second, Third, Fourth, Seventh, Ninth, and Eleventh Circuits have held that the Act did not bar the civil RICO claims at issue,²⁵ while other judges in the Third, Fourth, Sixth, Eighth, Ninth, and Eleventh Circuits have held that the Act did bar such claims.²⁶

The posture of *Humana* presented an ideal opportunity for the Supreme Court to repair this fractured body of law. The plaintiffs were beneficiaries of group insurance policies issued by the defendant insurer. They alleged a scheme by the insurer to gain discounts for hospital services which it did not disclose and pass on to its policy beneficiaries. Under the group plans, *Humana* supposedly agreed to pay 80% of the beneficiaries' hospital charges over a designated deductible, and the beneficiaries were required to pay the remaining 20%. Pursuant to a secret agreement with its affiliated hospital codefendant, however, the hospital gave the insurer large discounts on the insurer's share of the hospital's charges. As a result, the insurer paid substantially less than 80% of the hospital's actual charges, and the plaintiffs paid substantially

more than their agreed 20%. Indeed, according to an amicus brief filed by the United States, the arrangement allowed Humana to impose as much as 65% of a charge on its beneficiaries, instead of the 20% that the beneficiaries were supposed to pay.²⁷

The plaintiffs alleged that this scheme violated both Nevada law and RICO. Both regimes permit victims of insurance fraud to pursue private actions. The only difference was over the remedial schemes: RICO authorizes treble damages, while Nevada law permits recovery in the form of compensatory and punitive damages. The prior split in the case law provided fertile ground for both sides, with the plaintiffs relying on those decisions finding no bar to RICO claims against insurers, and Humana relying on those decisions finding to the contrary. Unfortunately for insurers, the United States and the insurance commissioners of all 50 States argued that Humana—and insurers generally—should be subject to civil liability under RICO in such situations,²⁸ thus practically guaranteeing the outcome.

In her opinion for the Court, Justice Ginsburg noted that *Humana* concerned, in the context of insurance regulation, “the extent to which federal legislation, specifically [RICO], is compatible with state regulation.”²⁹ In addressing this issue, the Court was writing on a relatively clean slate. It had never decided whether RICO was preempted by either federal or state regulation. The closest the Court had come to balancing competing regimes in a RICO case was its decision in *Tafflin v. Levitt*,³⁰ in which the Court considered whether State courts have concurrent jurisdiction over civil RICO actions.³¹ In *Tafflin*, the Court answered that question in the affirmative. Although the analysis for determining whether Congress intended to deprive the State courts of concurrent jurisdiction is different than the analysis for determining McCarran-Ferguson preclusion, some common themes may be found. As in the later *Humana* case, the Court in *Tafflin* noted that there was nothing in the language of RICO to suggest that Congress had limited the statute, nor did RICO’s legislative history suggest that Congress had done so.³² Also similar to the *Humana* case, there was nothing that made the *Tafflin* plaintiffs’ invocation of RICO in state court “clearly incompatible” with the competing federal interests.³³ In particular, the Court rejected an argument that RICO’s “extended” procedural benefits to plaintiffs should affect the outcome (in that case, by precluding resort to the State courts).³⁴

In *Humana*, the Court tackled a similar problem by first defining the limiting words in Section 2(b) of the McCarran-Ferguson Act. Using standard definitions of “invalidate” and “supersede,” the Court found that RICO does not invalidate or supersede Nevada’s insurance laws, since the application of RICO does not render those laws ineffective or displace them (thus rendering them ineffective).³⁵ The key question then became whether RICO’s application in the case at hand “impairs” Nevada’s laws. The Court answered that question in the negative, in part because the laws do not directly conflict: insurers can comply with both, since the defendant’s alleged acts are unlawful under both.³⁶ The Court analogized to a situation in which State employee benefit law and ERISA prohibit the same practices; if so, there is no preemption problem.³⁷

In addition, the Court found no evidence that Congress had intended to cede the entire field of insurance regulation to the States.³⁸ The Court found significant the fact that the second clause of Section 2(b) of the Act specifically limits the applicability of three antitrust statutes to the business of insurance.³⁹ Because Congress did not similarly limit other federal laws

generally, or RICO in particular, the Court rejected any suggestion that Congress intended to generally cede the field of insurance regulation to the States. Furthermore, the Court noted that it is entirely consistent with Section 2(b)—which also prevents impairment of State fees and taxes upon the insurance business—to impose *federal* tax liability that is in addition to or greater than imposed by State law.⁴⁰

As a result of the above considerations, the Supreme Court ended up rejecting *both* extremes that had been adopted by the lower courts (the pure “direct conflict” test, and a “field preemption” analysis). Instead, the Court adopted a blended test that includes components of the “direct conflict” test and the “upset the balance” analysis: “When federal law does not directly conflict with state regulation, and when application of the federal law would not frustrate any declared state policy or interfere with a State’s administrative regime, the McCarran-Ferguson Act does not preclude its application.”⁴¹ Unlike some of the lower courts’ application of the “upset the balance” analysis, however, the Supreme Court’s test does not contemplate that RICO frustrates or interferes with a State regime merely because RICO’s remedies or procedures differ from those afforded by the State.

It is important to recognize that, because of the way the McCarran-Ferguson Act is worded, the Supreme Court’s analysis in *Humana* is not necessarily implicated by every RICO claim connected to an insurance dispute. As a threshold matter, it still must be demonstrated that the McCarran-Ferguson Act applies. The Act does not broadly protect “the business of insurance companies.”⁴² Rather, as noted above, the issues involved in the suit must relate to the “business of insurance” before the Act, and now the *Humana* test, even applies. Six years ago, in its decision in *Fabe*, the Supreme Court restated the three criteria relevant to determining what activities constitute the “business of insurance,” borrowing from its earlier decision in *Union Labor Life Insurance Co. v. Pireno*: “first, whether the practice has the effect of transferring or spreading a policyholder’s risk; second, whether the practice is an integral part of the policy relationship between the insurer and the insured; and third, whether the practice is limited to entities within the insurance industry.”⁴³ The *Fabe* Court pointed out, however, that these factors had been developed in cases, such as *Pireno*, involving the scope of the antitrust immunity in the *second* clause of Section 2(b), and that the language containing the phrase “business of insurance” in the *first* clause of Section 2(b) was not as narrowly circumscribed.⁴⁴ The Court pointed out that the “broad category of laws” falling within that first clause—which is relevant here—are those laws “that possess the ‘end, intention, or aim’ of adjusting, managing, or controlling the business of insurance.”⁴⁵

After *Fabe*, both litigants and courts have demonstrated confusion about whether, by this language, the Supreme Court meant to change the analysis for determining what constitutes the “business of insurance” in cases involving the first clause of Section 2(b).⁴⁶ The Ninth Circuit is probably correct in concluding that, although *Fabe* intended for the “business of insurance” to be defined more broadly under the first clause, the distinction is a matter of degree rather than a wholesale change of analysis.⁴⁷ Thus, the Ninth Circuit allowed RICO claims to go forward where the plaintiff-employer alleged that the defendant insurance broker and claims administrator collected premiums on nonexistent policies, and falsely collected money from the plaintiff as a self-insurer without ever paying the money to any claimants.⁴⁸ The court determined that these acts did not constitute the “business of insurance.” In a pre-*Fabe* decision, the Sixth

Circuit allowed an employer-plaintiff's RICO claims to proceed against the provider of administrative services for its health care benefits, because the underlying agreement was for services only and did not involve risk underwriting.⁴⁹ A number of other decisions before and after *Fabe* likewise have found that the RICO claims at issue did not involve the "business of insurance" and thus allowed them to proceed in the face of a McCarran-Ferguson challenge.⁵⁰ These types of cases remain immune from the *Humana* "impairment" test described above because they do not even trigger the remainder of the analysis under the first clause of Section 2(b).

In *Humana*, the Supreme Court did not revisit the dispute over the definition of "business of insurance." In light of *Fabe*, however, it is probably safe to say that most RICO fraud claims by policyholders (as well as a variety of other types of RICO claims⁵¹) will relate to the business of insurance, thus inviting the remainder of the Section 2(b) analysis. The question now is whether *Humana* allows plaintiffs to use RICO in *all* situations where RICO and State law prohibit the same conduct, or whether there remains some argument for insurers that the McCarran-Ferguson Act bars such claims. Justice Ginsburg's opinion suggests the latter, since the Court was careful to limit its holding to the facts of the case.⁵²

Depending upon the facts of future cases, several possible defenses would seem consistent with the Court's decision in *Humana*. For example, the Nevada laws at issue allowed punitive damages in *excess* of RICO's treble damages,⁵³ so that allowing the plaintiffs there to pursue a RICO claim did not necessarily give them greater relief. Thus, it is possible that the Court might take a different view in a case where RICO's treble-damages provision necessarily would frustrate a State's policy on punitive damages in insurance cases. Even in Nevada, the Court's opinion holds open the possibility that a RICO claim could be precluded where RICO's treble-damages provision might render a defendant insolvent in the face of contrary State law regarding punitive damages, although the Court noted that "the record contains no evidence of insolvency here."⁵⁴

In addition, Nevada's insurance law allows victims of insurance fraud to pursue private actions. The Supreme Court noted that this law "does not exclude application of other state laws, statutory or decisional."⁵⁵ Thus, the outcome might be different if a State were to expressly deny private parties the right to go to court for insurance fraud, or if a State were to grant standing but limit the cause of action to one under the insurance code. A provision of RICO that was not codified to Title 18 of the United States Code—but which nonetheless remains the law—expressly dictates that RICO shall not supersede any other federal law or any State law affording civil remedies in addition to those in RICO,⁵⁶ and the insurance commissioners of the 50 States believe that the States are entitled by virtue of the McCarran-Ferguson Act to enact legislation that would pre-empt civil RICO actions for the business of insurance.⁵⁷ This possibility appears unlikely. In *Humana*, the National Association of Insurance Commissioners ("NAIC"), whose membership consists of the principal insurance regulatory officials of the 50 States, filed an amicus brief suggesting affirmance of the Ninth Circuit's ruling against *Humana*. The NAIC pointed out that the States have carefully chosen *not* to preclude private rights of action against insurers committing fraud, and that *no* State has attempted to totally "occupy the field" of legislation related to insurance fraud.⁵⁸

The Court in *Humana* also noted that the State of Nevada never took a position in the litigation that allowing the plaintiffs to pursue their RICO claim would interfere with the State's administrative regime.⁵⁹ Thus, it would appear to be helpful if a defendant were to secure the support of the relevant insurance commissioner in the litigation—through the form of a sworn statement or brief—to the effect that the plaintiff's RICO case would interfere with his or her administrative regime. Of course, as suggested above, such support may be difficult to obtain. In their amicus brief, the insurance commissioners of the 50 States argued that civil RICO improves, aids, complements, and enhances State regulation of the business of insurance and is used by them to fight fraud.⁶⁰

Insurers certainly can defend themselves, however, by raising any of the pleading defenses available in RICO cases generally. As pointed out by the United States in its amicus brief in *Humana*, "RICO reaches only a small subset of the conduct covered by state insurance laws; its greater remedies may be invoked only in exceptional cases where the elements of a RICO violation can be proved—cases in which the defendant has not merely committed a tort or regulatory violation, but has demonstrated extreme culpability by conducting an 'enterprise' through a 'pattern' of indictable criminal activity."⁶¹ Although the Supreme Court did not adopt every argument urged by the United States in its amicus brief,⁶² Justice Ginsburg's opinion draws heavily from the arguments made in that brief and cites to it repeatedly. Thus, insurers might find some solace in the fact that the federal government does not believe RICO applies to every insurance dispute, and that the Supreme Court has relied heavily on the government's view of the interplay between RICO and the McCarran-Ferguson Act.

One final note is in order. The concluding discussion in *Humana* suggests that those who live by the sword shall die by the sword. The Court justified allowing the plaintiff-beneficiaries to proceed with their RICO claim against *Humana* because *other* insurers had relied on RICO when they were victims.⁶³ Although it may be too late for insurers to argue that RICO has no application to their disputes, those who seek to best preserve their defenses should avoid invoking RICO themselves. Those who use RICO as a sword should not be surprised if the courts deprive them of their McCarran-Ferguson shield.

Endnotes

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1. 119 S. Ct. 710.
2. Act of Mar. 9, 1945, c. 20, § 1 *et seq.*, 59 Stat. 33, as amended, 15 U.S.C. § 1011 *et seq.*
3. 119 S. Ct. at 715.
4. Five amicus briefs were filed by various groups of insurers, policyholders, and insurance commissioners. (Briefs are available at 1998 WL 457677, 1998 WL 470131, 1998 WL 644642, 1998 WL 644644, and 1998 WL 644648.)

5. See *Humana*, 119 S. Ct. at 715-16 (citing *United States v. South-Eastern Underwriters Ass'n*, 322 U.S. 533, 553-62 (1944)); see also *Group Life & Health Ins. v. Royal Drug Co.*, 440 U.S. 205, 217-20 (1979) (explaining legislative history of McCarran-Ferguson Act's grant to insurance companies of a limited exemption from the antitrust laws). Since 1948, the second clause of Section 2(b) of McCarran-Ferguson Act has allowed the Sherman Act, Clayton Act, and Federal Trade Commission Act to apply "to the business of insurance to the extent that such business is not regulated by State Law." *Humana*, 119 S. Ct. at 716 n.7, 717 (quoting 15 U.S.C. § 1012(b) (second clause)).
6. 15 U.S.C. § 1012(b).
7. *United States Department of the Treasury v. Fabe*, 508 U.S. 491, 496-97 (1993).
8. *Humana*, 119 S. Ct. at 716.
9. *Id.*
10. *Id.*
11. 393 U.S. 453 (1969).
12. See *Merchants Home Delivery Serv. Inc. v. Frank B. Hall & Co.*, 50 F.3d 1486, 1489 (9th Cir.) (citing *Cochran v. Paco, Inc.*, 606 F.2d 460, 464 (5th Cir. 1979)), *cert. denied sub nom. Prometheus Funding Corp. v. Merchants Home Delivery Servs., Inc.*, 516 U.S. 964 (1995); *Sabo v. Metropolitan Life Ins. Co.*, 137 F.3d 185, 189-91 & n.2 (3rd Cir. 1998) (initially stating that a three-part test applies, but apparently applying four-part test), *cert. denied*, 119 S. Ct. 918 (1999). Based on *Cochran*, most district courts have applied this four-part test to determine if RICO claims against insurers were precluded. See *Dornberger v. Metropolitan Life Ins. Co.*, 961 F. Supp. 506, 516 & n.4 (S.D.N.Y. 1997).
13. 508 U.S. 491.
14. See *Autry v. Northwest Premium Servs., Inc.*, 144 F.3d 1037, 1040-42 (7th Cir. 1998) (non-RICO case); *Doe v. Norwest Bank Minnesota, N.A.*, 107 F.3d 1297, 1305 & n.8 (8th Cir. 1997); *Kenty v. Bank One, Columbus, N.A.*, 92 F.3d 384, 392 (6th Cir. 1996); *Ambrose v. Blue Cross & Blue Shield of Va.*, 891 F. Supp. 1153, 1158, 1161 n.5 (E.D. Va. 1995), *aff'd*, 95 F.3d 41 (4th Cir. 1996) (per curiam) (full text available at 1996 WL 482689).
15. *Autry*, 144 F.3d at 1041.
16. *Humana*, 119 S. Ct. at 716.
17. *Id.*
18. *Id.*
19. See, e.g., *Merchants*, 50 F.3d at 1492 ("the application of a federal statute prohibiting acts which are also prohibited under a state's insurance laws does not 'invalidate, impair or supersede' the state's laws under § 2(b) of the McCarran-Ferguson Act."). See also *Kenty*, 92 F.3d at 392 (apparently applying "direct conflict" test) ("In this case, [insurer-defendant] Transamerica has pointed to several substantive sections of the Ohio Revised Code that would be either impaired or superseded by application of RICO. ... In short, applying RICO to insurance companies would subject them to a different standard of behavior than the one envisioned by Ohio.").

20. In *Doe*, the Eighth Circuit found that “[i]n the case at bar, Minnesota has not commanded anything which RICO would prohibit; in other words, there is no direct conflict between federal and state law.” 107 F.3d at 1307. The court then applied the dictionary definition of “impair” and held “that the extraordinary remedies of RICO would frustrate, and perhaps even supplant, Minnesota’s carefully developed scheme of regulation.” *Id.* at 1308. *See also Sabo*, 137 F.3d at 193-95 (acknowledging that a “direct conflict” would fall within the ambit of laws that invalidate, impair, or supersede state insurance law, but continuing in dictum to consider whether “RICO may affect, in a more abstract sense, Pennsylvania’s overall implementation of insurance norms”); *Ambrose*, 891 F. Supp. at 1164-68, *aff’d*, 1996 WL 482689 (“Allowing a RICO action under the circumstances, the district court reasoned, would ‘greatly impair the [state’s] ability to enforce Virginia’s insurance code’ Similarly, because of the dramatic disparity in the cause of action and remedies available to RICO plaintiffs, RICO would effectively supplant Virginia’s chosen system of redress.”).

21. *See, e.g., Doe*, 909 F. Supp. 668, 673 (D. Minn. 1995) (“in a legal environment raising renewed issues of federalism, it is concluded that the Congress would not have intended that comprehensive state regulation of insurance would be supplemented by the remedies in RICO”); *Forsyth v. Humana, Inc.*, 827 F. Supp. 1498, 1521 (Nev. 1993) (“it is not necessary that a state have a specific statute banning a particular practice. The inquiry is whether the state involved has adopted a regulatory scheme which possesses jurisdiction over the challenged activity.”); *Wexco Inc. v. IMC, Inc.*, 820 F. Supp. 194, 202-03 & n.15 (M.D. Pa. 1993) (noting that State had intended to “occupy the field” and that, under some prior case law, the mere existence of such a State regulatory scheme would be sufficient to bar application of federal law without requiring an examination of whether the State’s insurance law would be affected by the federal law).

22. *Compare Merchants*, 50 F.3d at 1492 (adopting “direct conflict” test and finding that McCarran-Ferguson Act did not bar RICO claims) *with Kenty*, 92 F.3d at 392 (implicitly applying “direct conflict” test and finding that Act barred RICO claims against insurance company defendant); *compare also Sabo*, 137 F.3d at 195 (applying “balance” analysis and finding Act did not bar RICO claims) *with Doe*, 107 F.3d at 1307-08 (applying “balance” analysis and finding Act barred RICO claims).

23. *Sabo*, 137 F.3d at 192-95; *Merchants*, 50 F.3d at 1491-92; *Forsyth v. Humana, Inc.*, 114 F.3d 1467, 1480 (9th Cir. 1997).

24. *Ambrose*, 95 F.3d 41 (full text available at 1996 WL 482689); *Kenty*, 92 F.3d at 392; *Doe*, 107 F.3d at 1307-08.

25. *Peoples v. American Fidelity Life Ins. Co.*, 176 F.R.D. 637, 639 (S.D. Fla. 1998) (referring to unpublished order of June 2, 1997); *Dornberger*, 961 F. Supp. at 517-21; *Corporacion Insular de Seguros v. Munoz*, 896 F. Supp. 233, 237 (D.P.R. 1995); *Moore v. Fidelity Fin. Servs., Inc.*, 884 F. Supp. 288, 292-93 (N.D. Ill. 1995); *Liner v. DiCresce*, 905 F. Supp. 280, 284 (M.D.N.C. 1994); *Thacker v. New York Life Ins. Co.*, 796 F. Supp. 1338, 1342-43 (E.D. Cal. 1992); *Elliott v. State Farm Mut. Auto. Ins. Co.*, 786 F. Supp. 487, 494 (E.D. Pa. 1992); *Elliott v. ITT Corp.*, 764 F. Supp. 102, 104-05 (N.D. Ill. 1991); *Chamberlain v. State Farm Mut. Auto. Ins. Co. & Worldwide Auditing Servs.*, 1991 WL 108688, at *4 (E.D. Pa. June 13, 1991); *Brownell v. State Farm Mut. Ins. Co.*, 757 F. Supp. 526, 536-37 (E.D. Pa. 1991); *Becks v. Emery-Richardson, Inc.*, 1990 WL 303548, at *2 (S.D. Fla. Dec. 21, 1990).

26. *Bristol Hotel Management Corp. v. Aetna Cas. & Sur. Co.*, 20 F. Supp. 2d 1345, 1349-51 (S.D. Fla. 1998); *Espinoza v. Union Security Life Ins. Co.*, 1996 WL 380702, at *3-5 (N.D. Ga. Jan. 24, 1996); *Doe*, 909 F. Supp. at 672-73; *Ambrose*, 891 F. Supp. at 1164-68; *Sabo*, 1995 WL 928256 (W.D. Pa. Jan. 4, 1995); *Everson v. Blue Cross and Blue Shield of Ohio*, 898 F. Supp. 532, 542-45 (N.D. Ohio 1994); *Forsyth*, 827 F. Supp. at 1521-22; *Wexco*, 820 F. Supp. at 202-03; *LeDuc v. Kentucky Cent. Life Ins. Co.*, 814 F. Supp. 820, 826-27 (N.D. Cal. 1992); *Gordon v. Ford Motor Credit Co.*, 868 F. Supp. 1191, 1196-97 (N.D. Cal. 1992); *Senich v. Transamerica Premier Ins. Co.*, 766 F. Supp. 339 (W.D. Pa. 1990); *Richhart v. Metropolitan Life Ins. Co.*, 1990 WL 39268 (E.D. Pa. Mar. 30, 1990). In addition, the Southern District of Ohio and the Central District of California had found, in unreported decisions, that the Act barred RICO claims before those decisions were appealed to their respective appellate courts. See *Kenty*, 92 F.3d at 388; *Merchants*, 50 F.3d at 1488. See also *American Int'l Group, Inc. v. Superior Ct.*, 234 Cal. App. 3d 749, 764-68 (1991), *cert. denied sub nom. Brutoco Eng'g & Constr., Inc. v. American Int'l Group, Inc.*, 504 U.S. 911 (1992); *Leckey v. Aetna Cas. and Sur. Co.*, 590 A.2d 1255, 1260 (Penn. 1991).
27. See 119 S. Ct. at 714 n.1.
28. See Amicus Brief of United States, available at 1998 WL 644651; Amicus Brief of the National Association of Insurance Commissioners, available at 1998 WL 644642.
29. 119 S. Ct. at 714.
30. 493 U.S. 455 (1990).
31. According to Justice O'Connor's opinion for the Court in *Tafflin*, the "precise" question was "whether state courts have been divested of jurisdiction to hear civil RICO claims 'by an explicit statutory directive, by unmistakable implication from legislative history, or by a clear incompatibility between state-court jurisdiction and federal interests.'" *Id.* at 460 (quoting *Gulf Offshore Co. v. Mobil Oil Corp.*, 453 U.S. 473, 478 (1981)).
32. 493 U.S. at 460-63.
33. *Id.* at 464-66.
34. *Id.* at 466-67.
35. *Humana*, 119 S. Ct. at 716.
36. *Id.* at 716-19.
37. *Id.* at 717-18 (discussing *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85 (1983)).
38. *Id.* at 717.
39. See *supra* note 5.
40. 119 S. Ct. at 717.
41. *Id.*
42. See *Group Life & Health Ins.*, 440 U.S. at 211, 218 n.18 (citing *SEC v. National Secs.*, 393 U.S. at 459-60).
43. *Fabe*, 508 U.S. at 497-98, 502 (quoting *Pireno*, 458 U.S. 119, 129 (1982)).

44. *Id.* at 504.
45. *Id.* at 505 (citation omitted).
46. *See Ambrose*, 891 F. Supp. at 1160; *see also Sabo*, 137 F.3d at 191 n.3; *Doe*, 107 F.3d at 1305 n.8.
47. *Merchants*, 50 F.3d at 1490 n.2; *see also Sabo*, 137 F.3d at 191 & n.3.
48. *Merchants*, 50 F.3d at 1489, 1490-91.
49. *Dana Corp. v. Blue Cross & Blue Shield Mut. of Northern Ohio*, 900 F.2d 882, 888 (6th Cir. 1990).
50. *See Kenty*, 92 F.3d at 393 (bank-defendant’s unauthorized purchase of force-placed insurance for plaintiffs who had financed automobile purchases); *Moore*, 884 F. Supp. at 291-92 (same); *Bermudez v. First of America Bank Champion, N.A.*, 860 F. Supp. 580, 589-91 (N.D. Ill. 1994) (same), *withdrawn pursuant to settlement*, 886 F. Supp. 643 (N.D. Ill. 1995); *Corporacion Insular de Seguros*, 896 F. Supp. at 236 (defrauding of insurer by insiders and outsiders); *Elliott v. ITT*, 764 F. Supp. at 105 (lenders’ practice of “packing” insurance by representing to borrowers that credit would be extended only if certain insurance were purchased). Some courts had concluded that “fraud” is not the “business of insurance.” *See Thacker*, 796 F. Supp. at 1342; *First Nat. Bank of Penn. v. Sedgwick James of Minn., Inc.*, 792 F. Supp. 409, 418-19 (W.D. Pa. 1992); *Washburn v. Brown*, 1986 WL 7062 (N.D. Ill. June 17, 1986). These latter cases should no longer be considered good law since recognizing this type of exception would read the McCarran-Ferguson Act out of existence. *See Sabo*, 137 F.3d at 191-92; *Merchants*, 50 F.3d at 1489-90.
51. For example, in *Sabo*, the Third Circuit found that a RICO claim by a terminated insurance salesman was related to the business of insurance. *See* 137 F.3d at 191.
52. *See* 119 S. Ct. at 714 (“We hold that RICO can be applied *in this case* in harmony with the State’s regulation.”); *id.* at 719 (“In sum, we see no frustration of state policy in the RICO litigation *at issue here*.”); *id.* (“we hold that the McCarran-Ferguson Act does not block the respondent policy beneficiaries’ recourse to RICO *in this case*.”) (emphases supplied).
53. *Id.* at 719.
54. *Id.* at 719 n.12.
55. *Id.* at 718.
56. *See* Pub. L. 91-452, § 904(b), 84 Stat. 947.
57. *See* Amicus Brief of the National Association of Insurance Commissioners, available at 1998 WL 644642, at *7.
58. *Id.* at *4, 6.
59. 119 S. Ct. at 719.
60. *See* 1998 WL 644642, at *14-16.
61. *See* 1998 WL 644651, at *28-29.
62. The United States argued in support of the “direct conflict” test and against the “upset the

balance” analysis. *Id.* at *15 n.5, 22, 27.

63. 119 S. Ct. at 719 (citing *Aetna Cas. Sur. Co. v. P&B Autobody*, 43 F.3d 1546, 1551 (1st Cir. 1994)).