"PRESERVING" CIVIL RICO: HOW THE MODEL UNFAIR TRADE PRACTICES ACT AFFECTS RICO'S PRIVATE RIGHT OF ACTION UNDER THE MCCARRAN-FERGUSON ACT

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Introduction

In August 2007, a confidential report surfaced exposing widespread fraud in the insurance industry.[1] Written by the influential consulting firm McKinsey & Company,[2] the report explained how insurance companies could fraudulently increase profits by decreasing payments to customers.[3] When a policyholder filed a claim, the report said, the insurer should begin by offering them a lower settlement than their policy promised.[4] If someone refused to accept this lower offer, McKinsey recommended the company fight back against the customer, and delay making required payments as long as possible.[5] In so doing, the insurer could pressure policyholders to drop

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1 *See* David Dietz & Darrell Preston, *The Insurance Hoax*, Bloomberg Markets Mag., Sept. 2007, http://www.bloomberg.com/apps/news?pid=nw&pname=mm_0907_story1.html.

2 McKinsey & Company advises three of the five largest companies in the world and two-thirds of the *Fortune* 1000. *About Us*, McKinsey & Co., http://www.mckinsey.com/aboutus/wherewestarted/index.asp (last visited May 29, 2011).

3 *See* Dietz & Preston, *supra* note 1.

4 *See id.*

5 *See id.* According to a PowerPoint slide McKinsey & Company prepared for Allstate Insurance Company, Allstate should treat claimants who accepted the lower offers with "Good Hands" and those who did not with "Boxing Gloves." *See id.* As its customers discovered, this slide infused new meaning into Allstate's motto: "You're in good hands." Allstate, http://www.allstate.com (last visited May 29, 2011).

existing challenges, discourage others from even filing claims in the first place, or—at the very least—earn extra interest on its investments.[6] Following McKinsey's "slow-pay, low-pay, no-pay"[7] tactics, the industry earned record profits.[8]

The Racketeer Influenced and Corrupt Organizations Act (RICO)[9] might seem to grant claimants a private right of action in insurance fraud cases like these.[10] But currently, both the Sixth and Eighth Circuits refuse to allow plaintiffs access to this remedy. Relying on a broad interpretation of the McCarran-Ferguson Act,[11] these courts have held the damages available under civil RICO would impermissibly "invalidate, impair, or supersede" state insurance laws, which provide only for administrative remedies. For example, in *Riverview Health Institute LLC v. Medical Mutual of Ohio*,[12] a plaintiff filed a civil RICO suit alleging the defendant had engaged in a "slow-pay, low-pay, no-pay" scheme.[13] But because civil RICO provided a different remedy than the administrative one included in Ohio's insurance code, the court granted a motion for summary judgment on the grounds that civil RICO's use would violate the McCarran-Ferguson Act.[14] On appeal, the Sixth Circuit Court of Appeals affirmed.[15]

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6 *See* Dietz & Preston, *supra* note 1.

7 The plaintiffs in *Riverview Health Institute LLC v. Medical Mutual of Ohio* used this phrase to describe the insurance company's actions. *See* Brief of the Appellants at 3, Riverview Health Inst. LLC v. Med. Mut. of Ohio, 601 F.3d 505 (6th Cir. 2010) (No. 08-4431).

8 *See* Dietz & Preston, *supra* note 1. In 1996, insurance companies paid out sixty-four percent of the $267.6 billion they collected in premiums. *Id.* In 2006, they paid out only fifty-five percent of their $435.8 billion in premium revenue. *Id.* Not surprisingly, this decrease allowed the industry to increase its profits forty-six percent each year between 1994 and 2006, from $39.1 billion to $52.3 billion. *Id.* In one extreme example, Allstate raised its net income by 140% between 1996 and 2006 by paying less in claims to customers. *Id.* In 1996, Allstate paid out seventy-nine percent of its premium income in claims and earned $2.08 billion in profits. *Id.* In 2006, it paid out fifty-eight percent of its premium income and earned $4.99 billion in profits. *Id.*

9 18 U.S.C. §§ 1961–1968 (2006).

10 RICO makes it unlawful for "any person employed by or associated with any enterprise . . . to conduct or participate . . . in the conduct of [an] enterprise's affairs through a pattern of racketeering activity," *id.* § 1962(c), and provides a private cause of action for "[a]ny person injured in his business or property by reason of a violation of section 1962," *id.* § 1964(c).

11 15 U.S.C. §§ 1011–1015 (2006).

12 No. 3:07-cv-354, 2008 WL 4449482 (S.D. Ohio Sept. 30, 2008).

13 *See* Brief of the Appellants, *supra* note 7, at 17.

14 *See Riverview*, 2008 WL 4449482, at *5.

15 *See* Riverview Health Inst. LLC v. Med. Mut. of Ohio, 601 F.3d 505, 510 (6th Cir. 2010).

This Note examines whether the McCarran-Ferguson Act—properly interpreted—actually bars civil RICO suits against insurance companies. Part I begins by describing the background of the McCarran-Ferguson Act and the state insurance codes, which are derived from the model Unfair Trade Practices Act (UTPA).[16] Then, it details the history of this statutory framework's application to civil RICO. This history proceeds in three stages: (1) the original split in the circuits that appeared in the 1990s, (2) the Supreme Court's attempt to resolve the issue in *Humana Inc. v. Forsyth*,[17] and (3) the split in the circuits that subsequently reappeared after *Humana*. Part II argues that civil RICO does not "invalidate, impair, or supersede" the state insurance codes under the McCarran-Ferguson Act. After examining both the original meaning of the Act and the Supreme Court's holding in *Humana*, it concludes—contrary to the Sixth and Eighth Circuits—that a federal law only impairs a state law when: (1) the two directly conflict, or (2) when it hinders the successful execution of a state policy. Then, it applies this test and shows civil RICO and the state UTPA provisions can coexist. Both the UTPA's history and its remedy preservation clauses—provisions explicitly preserving a plaintiff's other legal remedies—demonstrate civil RICO neither conflicts with state law, nor hinders a state legislative policy. Finally, Part III analyzes the different post-*Humana* approaches, and explains why no persuasive justification for the current split in the circuits exists.

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16 NAIC MODEL LAWS, REGULATIONS AND GUIDELINES 880-1 (2007). This Note analyzes the UTPA because defendants claim civil RICO "invalidates, impairs, or supersedes" it more than any other state insurance code provision. Of the eleven major cases dealing with civil RICO and the McCarran-Ferguson Act, ten of them involved their state's UTPA. *See* Humana Inc. v. Forsyth, 525 U.S. 299, 311 (1999); Am. Chiropractic Ass'n, Inc. v. Trigon Healthcare, Inc., 367 F.3d 212, 232 (4th Cir. 2004); Weiss v. First Unum Life Ins. Co., 482 F.3d 254, 258 (3d Cir. 2007); Bancoklahoma Mortg. Corp. v. Capital Title Co., 194 F.3d 1089 (10th Cir. 1999); LaBarre v. Credit Acceptance Corp., 175 F.3d 640, 643 (8th Cir. 1999); Sabo v. Metro. Life Ins. Co., 137 F.3d 185, 192 (3d Cir. 1998); Doe v. Norwest Bank Minn., N.A., 107 F.3d 1297, 1306 (8th Cir. 1997); Kenty v. Bank One, Columbus, N.A., 92 F.3d 384, 391 (6th Cir. 1996); Ambrose v. Blue Cross & Blue Shield, 95 F.3d 41, 1996 WL 482689, at *1 (4th Cir. 1996) (unpublished table decision); Merchs. Home Delivery Serv., Inc. v. Frank B. Hall & Co., 50 F.3d 1486, 1489 (9th Cir. 1995).

Notwithstanding this focus on the UTPA, this Note's analysis applies to many other state insurance provisions. Because the argument rests heavily on the UTPA's preservation clauses, *see infra* notes 82–87 and accompanying text, its analysis should largely carry over to any statute affected by a similar preservation clause. For example, the other major case involving civil RICO and the McCarran-Ferguson Act involved a preservation clause. *See infra* note 282. Consequently, the proper analysis of that case differs little.

17 525 U.S. 299 (1999).

I. Background

A. The Statutory Insurance Framework

1. Adoption of the McCarran-Ferguson Act

The McCarran-Ferguson Act emerged out of a long-running dispute over government regulation of the fire insurance market.[18] Beginning in the early nineteenth century, the industry repeatedly found itself on the brink of insolvency.[19] This cycle generally proceeded as follows: In years with few fires, insurance companies earned large profits.[20] These profits, in turn, lured new firms into the marketplace, increased competition, and decreased prices.[21] Faced with the prospect of lower revenue, many insurance companies responded by cutting their reserve funds.[22] Although often successful in the short-run,[23] this strategy would collapse when a large fire eventually occurred. Then, without sufficient reserves to reimburse their customers, firms would either use legal technicalities to avoid making payments,[24] or would simply shut down altogether.[25]

Over a period of several decades, the industry clashed with state governments about the proper way to address this insolvency epidemic. The insurance companies quickly concluded that adequate

18 The early American property and casualty insurance industry consisted almost entirely of fire insurance. *See* Kenneth J. Meier, The Political Economy of Regulation 50 (1988). Because of this large market share, fire insurance companies held a "dominant economic and political position." *See id.*

19 *See* Spencer L. Kimball & Ronald N. Boyce, *The Adequacy of State Insurance Rate Regulation: The McCarran-Ferguson Act in Historical Perspective*, 56 Mich. L. Rev. 545, 547–48 (1958).

20 *See* Meier, *supra* note 18, at 51; Kimball & Boyce, *supra* note 19, at 547. Other than maintaining a capital fund, renting a small office, and hiring a few employees—who were paid mostly on commission—insurance companies at this time had few start-up expenses. *See id.* at 547. Therefore, in years with few fires, new firms could earn large profits almost immediately. *See id.*

21 *See* Meier, *supra* note 18, at 51–52; Kimball & Boyce, *supra* note 19, at 547.

22 *See* Kimball & Boyce, *supra* note 19, at 547.

23 *See id.*

24 *See* Meier, *supra* note 18, at 52.

25 *See* Kimball & Boyce, *supra* note 19, at 547–48. Many firms chose the option of shutting down. By 1877, only 1,000 insurance companies remained out of the 4,000 that had once existed. *Id.*

Other problems contributed to this instability. For example, insurance agents had no financial stake in their insurance firms, which created incentives to take bad risks. *See* Meier, *supra* note 18, at 52. Also, the rate-setting system lacked sophistication. In place of a detailed analysis, insurance companies would simply "put flat rates of perhaps $1 per $100 on brick construction, and $2 per $100 on frame." *See* Kimball & Boyce, *supra* note 19, at 547.

reserves required higher rates, and that higher rates required less competition.[26] The industry, therefore, favored collective rate-making to achieve these goals.[27] State governments, however, preferred other forms of regulation, such as reserve requirements, agent licensure, and financial disclosure.[28] At first, both sides fiercely opposed the other's approach: insurance companies responded to regulation by threatening to leave the state[29] and filing legal challenges,[30] while state governments responded to collusion with anticompact laws.[31] But eventually, dispute faded into agreement. The states began permitting collective rate-making, but controlled it by requiring state approval of rates, or by setting rates directly.[32]

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26 *See* MEIER, *supra* note 18, at 59.

27 Fire insurance companies began making informal agreements with one another as early as 1806 and formed local boards by 1819. *See* Kimball & Boyce, *supra* note 19, at 548. *Effective* restraint on competition, however, took much longer. Because these informal agreements and local boards failed, the industry created the National Board of Fire Underwriters in 1866. *See* MEIER, *supra* note 18, at 52; Kimball & Boyce, *supra* note 19, at 548. But "within five years the board became virtually moribund under pressure of relentless competitive forces." *See id.* The industry tried again with regional organizations in the 1880s. *See* MEIER, *supra* note 18, at 52; Kimball & Boyce, *supra* note 19, at 549. Although they didn't solve the problem, these regional organizations enjoyed enough success to trigger government anticollusion efforts in several states. *See id.*

28 *See* MEIER, *supra* note 18, at 53.

29 *See id.*

30 The industry challenged the regulations on the grounds that interstate insurance transactions came within the scope of the Dormant Commerce Clause. *See* Paul v. Virginia, 75 U.S. 168, 172–174 (1868). The Supreme Court rejected this argument and held that issuing an insurance policy did *not* constitute commerce. *See id.* at 183.

31 *See* 1 WARREN FREEDMAN, RICHARDS ON INSURANCE § 45, at 160 (5th ed. 1952); MEIER, *supra* note 18, at 54. These laws had little actual impact on the industry. Instead of reaching "agreements," regional boards simply began setting "advisory" rates the insurance companies could adopt. *See* MEIER, *supra* note 18; Kimball & Boyce, *supra* note 19, at 549.

32 *See* Kimball & Boyce, *supra* note 19, at 551. This movement began in 1911, when New York enacted the first law permitting collective rate-making. *See* 1 FREEDMAN, *supra* note 31, § 45, at 160; MEIER, *supra* note 18, at 60. Each side had different reasons for the compromise. The state governments began to accept the industry's arguments for collective action after the great San Francisco earthquake of 1906 caused another round of fire insurance companies to declare bankruptcy. *See* MEIER, *supra* note 18, at 59. And the industry agreed to more state government control as the only viable method of enforcing rate agreements. After years of attempted self-enforcement, the industry had realized it could not prevent new firms from entering the market and undercutting the conspiracy, or keep old firms from surreptitiously breaking their agreement. *See* MEIER, *supra* note 18, at 52.

But the Supreme Court brought an end to this arrangement in *United States v. South-Eastern Underwriters Ass'n.*[33] Previously, the states and industry's collusive compromise had survived only because of an implicit exemption from federal antitrust laws, created by the Supreme Court's repeated holding that insurance transactions did not constitute commerce.[34] Thanks to this antitrust exemption, the insur-

33 322 U.S. 533 (1944). The *South-Eastern Underwriters* case stems from a dispute over Missouri's insurance regulation. *See* MEIER, *supra* note 18, at 64. Because of the state's attempts to keep rates low, 139 insurance companies filed suit in 1922 to force increases. *See id.* In response to this suit, the court granted a temporary injunction ordering a rate increase, but required the companies deposit the money into a separate account pending the case's resolution. *See id.* Over the next several years, the industry deposited more than $10,000,000 into the account. *See id.*

After more than a decade of legal wrangling failed to resolve the dispute, the insurance companies sought help from Thomas J. Pendergast, the Kansas City mafia boss and kingmaker of local and state politics. *See id.* Together with the Missouri Superintendent of Insurance—who just happened to be part of his political machine—Pendergast quickly brokered a solution: the insurance companies and the state would split the fund eighty-twenty, the companies would pay Pendergast $750,000, and Pendergast would funnel a large bribe back to the Superintendent. *See id.* at 64–65.

After discovering this arrangement, the Missouri Attorney General, Roy McKittrick, brought state criminal charges against the insurance companies. *See id.* at 65. But after discovering the interstate nature of the insurance cartel, McKittrick notified the United States Attorney General, Nicholas Biddle, who subsequently launched a federal grand jury investigation. *See id.* Shortly thereafter, the grand jury indicted the South-Eastern Underwriters Association (SEAU) for violations of federal antitrust laws. *See id.* at 66.

The SEAU possessed two possible legal strategies: (1) it could request a dismissal after the trial's conclusion, or (2) it could file a demurrer to the indictment before the trial began. *See id.* On the one hand, the first option would allow the government to present evidence regarding the insurance cartel, including information about the boycotts, coercion, and intimidation it used to discipline member companies. But this strategy would almost certainly keep the case out of the Supreme Court. *See id.* Because the Supreme Court had repeatedly reaffirmed the proposition that insurance did not constitute interstate commerce, the district judge would likely dismiss the case, leaving the government unable to challenge the decision without running afoul of the Double Jeopardy Clause. *See id.* On the other hand, the second option would permit the industry to avoid the negative publicity, but would allow the government to appeal the case directly to the Supreme Court. *See id.*

Fearing exposure of its tactics in trial, the SEAU filed the demurrer. *See id.* The government promptly appealed the judge's ruling that insurance did not constitute commerce, and the *South-Eastern Underwriters* case was born. *See id.*

34 *See* Paul v. Virginia, 75 U.S. (8 Wall.) 168, 183 (1868) ("Issuing a policy of insurance is not a transaction of commerce."); *see also* United States v. S.-E. Underwriters Ass'n, 322 U.S. 533, 544 n.18 (1944) (listing cases that relied on the holding in *Paul*); N.Y. Life Ins. Co. v. Deer Lodge Cnty., 231 U.S. 495, 503–04 (1913) ("[C]ontracts of insurance are not commerce at all, neither state nor interstate.");

ance industry had largely remained immune from federal regulation.[35] But in light of its rapidly expanding view of interstate commerce[36] the Court used *South-Eastern Underwriters* as the occasion to overturn this long-standing precedent.[37] After distinguishing its previous decisions,[38] the Court concluded an insurance company's transactions across state lines *do* constitute interstate commerce[39] and, therefore, that federal antitrust laws applied to the industry.[40]

Predictably, the insurance industry reacted negatively.[41] Most immediately, the decision exposed insurance companies to criminal liability for conduct state law had not previously sanctioned.[42] In addition to these short-term fears, providers feared application of federal antitrust law would preempt state rate-making laws, bringing back the unfettered competition that had driven them toward insolvency.[43]

Hooper v. California, 155 U.S. 648, 655 (1895) ("The business of insurance is not commerce."). Because insurance transactions did not constitute "commerce," Congress obviously could not regulate them under the Commerce Clause. *See* U.S. CONST. art. I, § 8, cl. 3.

35 Humana Inc. v. Forsyth, 525 U.S. 299, 306 (1999); *see also* St. Paul Fire & Marine Ins. Co. v. Barry, 438 U.S. 531, 539 (1978) ("[T]he States enjoyed a virtually exclusive domain over the insurance industry.").

36 U.S. Dep't of Treasury v. Fave, 508 U.S. 491, 499 (1993). .

37 *See S.-E. Underwriters*, 322 U.S. at 545–47.

38 The Court distinguished these cases as addressing, not the scope of Congressional power under the Commerce Clause, but rather "the extent to which the Commerce Clause automatically deprives *states* of the power to regulate the insurance business." *Id.* at 544–45 (emphasis added).

39 *See id.* at 545–47.

40 *See id.* at 553–62.

41 *See* R.K. Powers, Note, *A Year of S.E.U.A.*, 23 CHI.-KENT L. REV. 317, 320 (1945) (discussing the insurance industry's response). The general public reacted much the same way. *See* Recent Decisions, 44 COLUM. L. REV. 752, 772 n.10 (1945).

42 *See* Raymond A. Guenter, *Rediscovering the McCarran-Ferguson Act's Commerce Clause Limitation*, 6 CONN. INS. L.J. 253, 287 (2000) ("[*South-Eastern Underwriters*] sustained criminal indictments against nearly 200 stock fire insurance companies and twenty-seven individuals. . . . [and] raised the implication that state laws that allowed collective action as part of the rate-setting process might violate the antitrust laws.").

43 *See* 1 FREEDMAN, *supra* note 31, at 169 ("[T]he entire insurance business world received a catastrophic shock precipitating an avalanche of fear and uncertainty . . . ."); Recent Decisions, *supra* note 41, at 772–77; R.K. Powers, *supra* note 41, at 320–22; *see also S.-E. Underwriters*, 322 U.S. at 561–62 (responding to the argument that "virtually all the states regulate the insurance business . . . and that if the Sherman Act be held applicable to insurance much of this state regulation will be destroyed").

These fears turned out to be exaggerated. *See* Robertson v. California, 328 U.S. 440, 447–49 (1946) (holding that states could continue to regulate the local aspects of commerce "unless or until Congress undertakes that function."). But whatever their merit, few dissenting voices existed. *See* Meier, *supra* note 18, at 72 ("The fire stock

Likewise, state governments feared federal law would preempt their regulations, and that taxes on out-of-state companies would violate the Dormant Commerce Clause.[44]

Congress wasted little time in addressing these concerns.[45] After a hastily drafted proposal supported by the fire insurance companies died in the Senate,[46] Senator Patrick McCarran and Senator Homer Ferguson jointly introduced a bill.[47] Following debate,[48] the McCarran-Ferguson Act passed both the House[49] and the Senate,[50] and became law on March 9, 1945,[51] less than one year after the Court decided *South-Eastern Underwriters*.[52]

In drafting their bill, Senator McCarran and Senator Ferguson relied heavily on a legislative proposal and explanatory memorandum the National Association of Insurance Commissioners (NAIC)[53] had

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companies' contention that free competition would be disastrous for the industry was virtually unchallenged at this time. The specter of an insolvency epidemic loomed as the constitutionality of laws in 50 states came into question.").

44 *See Fabe*, 508 U.S. at 499–500; *S.-E. Underwriters*, 322 U.S. at 590 (Jackson, J., dissenting) (predicting the "Court's decision at very least will require an extensive overhauling of state legislation relating to taxation and supervision"); MEIER, *supra* note 18, at 67; Guenter, *supra* note 42, at 287–88 & n.192.

45 *See* SEC v. Nat'l Sec., Inc., 393 U.S. 453, 458 (1969). A mere seventeen days after the Court announced the *South-Eastern Underwriters* decision, the U.S. House of Representatives passed H.R. 3270, 78th Cong. (1944), which exempted the insurance industry from federal antitrust laws. *See* Guenter, *supra* note 42, at 293 (citing 90 CONG. REC. 6565 (1944)). The Senate passed a companion measure on September 21, 1944, but immediately recalled it because of a procedural error. *See id.* (citing 90 CONG. REC. 8054 (1944)). Despite this bill's rejection, both houses continued working to address the issue. *See Nat'l Sec.*, 393 U.S. at 458. Shortly thereafter, Congress passed the McCarran-Ferguson Act. *See generally* Guenter, *supra* note 42, at 286–95 (explaining the legislative history of the Act).

46 *See* Guenter, *supra* note 42, at 292–93. Primarily, the fire insurance industry sought a complete exemption from the federal antitrust laws. *Id.* at 290.

47 *See id.* at 294 (citing 91 CONG. REC. 330 (1945)).

48 The debate focused on the degree to which the antitrust laws should apply to the industry. *See* Alan M. Anderson, *Insurance and Antitrust Law: The McCarran-Ferguson Act and Beyond*, 25 WM. & MARY L. REV. 81, 86–88 (1983). One faction sought broad exemption; the other sought greater coverage. *Id.* at 87–88. Ultimately the two sides reached a middle ground. *See* 91 CONG. REC. 1484 (statement of Senator Murdock); Anderson, *supra* note 48, at 88.

49 91 CONG. REC. 1396.

50 *Id.* at 1488–89.

51 McCarran-Ferguson Act, Pub. L. No. 79-15, 59 Stat. 33 (1945) (codified as amended at 15 U.S.C. §§ 1011–1015 (2006)).

52 *See* United States v. S.-E. Underwriters, Inc., 322 U.S. 533 (1944).

53 The NAIC is an organization of insurance regulators from all fifty states. *About the NAIC*, NAT'L ASS'N INS. COMMISSIONERS, http://www.naic.org/index_about.htm (last visited May 29, 2011). The states created the NAIC in 1871 to deal more effec-

distributed to Congress in the wake of *South-Eastern Underwriters*.[54] The NAIC firmly believed the states could regulate the insurance business more effectively than the federal government.[55] Accordingly, its proposal sought to: (1) remove any barriers the Dormant Commerce Clause might pose to state law,[56] (2) minimize potential conflict between state and federal laws under the Supremacy Clause,[57] (3) preclude application of the Federal Trade Commission Act[58] (FTCA) and the Robinson-Patman Act[59] to insurers,[60] and (4) limit the reach of the Sherman Act[61] and the Clayton Act[62] into the insurance industry.[63]

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tively with the interstate nature of the insurance industry. *Id.* It also serves as a forum for the development of model insurance codes. *Id.*

54 *Compare* 90 Cong. Rec. A4406 (1944) (NAIC), *with* S. 340, 91st Cong. (1945) (McCarran-Ferguson). Primarily, S. 340 differed from the NAIC's proposal in its treatment of the Sherman and Clayton Acts. *See* Anderson, *supra* note 48, at 86 (describing McCarran and Ferguson's removal of § 4(b) from the NAIC proposal as "a compromise between those who favored full and immediate application of the antitrust laws and those who favored an absolute exemption").

Because these documents were well circulated, other members of Congress knew the McCarran-Ferguson proposal differed only slightly from the NAIC's. For example, during the floor debates, Senator O'Mahoney stated: "It is no secret that Senate bill 12, introduced by . . . [Senator Hatch] and myself, and Senate bill 340, the bill which was reported by the committee, are modifications of a measure which was originally drafted by the legislative committee of the National Ass'n of Insurance Commissioners." 91 Cong. Rec. 483 (1945). For other acknowledgements of the NAIC's authorship, see Guenter, *supra* note 42, at 294 n.231.

55 *See* 90 Cong. Rec. A4406 ("The National Association of Insurance Commissioners sincerely believes that the States can adequately regulate the insurance business, and because of legal considerations and the close proximity of State supervisory officials to the people affected, are in a better position to regulate that business than the Federal Government.").

56 *See id.* at A4406–07 (explaining §§ 1, 2(a)).

57 *See id.* at A4407 (explaining § 2(b)).

58 15 U.S.C. §§ 41–51 (2006).

59 *Id.* §§ 13, 13a–c, 21a.

60 *See* 90 Cong. Rec. A4407 (explaining § 3).

61 15 U.S.C. §§ 1–7.

62 *Id.* §§ 12–27.

63 *See* 90 Cong. Rec. A4407 (explaining § 4). The NAIC took a mixed view of these laws. *See* Guenter, *supra* note 42, at 291 ("[The NAIC] favored the application of the Sherman and Clayton Acts to [boycotts, coercion, and intimidation]. However, the NAIC wanted to free collective rate making and related cooperative activities carried out under the aegis of state law from the constraints of the antitrust laws." (footnote omitted)).

Although Congress made several changes,[64] the final McCarran-Ferguson Act bore a strong resemblance to the NAIC's proposal.[65] Section 1 asserted that continued state regulation and taxation of the insurance industry would best serve the public interest.[66] Section 2(a) took steps to disarm the Dormant Commerce Clause by declaring that state laws regarding regulation and taxation would continue to apply.[67] Section 2(b) minimized conflict under the Supremacy Clause by precluding application of any federal law that "invalidates, impairs, or supersedes" state insurance law.[68] And, although the Act exempted the Federal Trade Commission Act and the Robinson-Patman Act from this reverse preemption clause, it allowed the states to develop their own regulatory codes that, once enacted, would take precedence over them.[69] Section 3 contained a moratorium on several federal antitrust laws[70] to allow states time to develop these codes.[71] In sum,

64 *See* Anderson, *supra* note 48, at 88 (discussing amendments to the McCarran-Ferguson Act that modified the NAIC's proposal).

65 *See* Guenter, *supra* note 42, at 295 ("The Act's overall structure, its declaration of policy, the provision describing the authority of the states to regulate the insurance business, and the preemption exception [were], with minor exceptions, identical to the NAIC Legislative Proposal."). For a detailed comparison of the Act and the NAIC proposal, see *id.* at 298–310.

66 *See* McCarran-Ferguson Act, Pub. L. No. 79-15, § 1, 59 Stat. 33, 33–34 (1945) (codified at 15 U.S.C. § 1011 (2006)) ("That the Congress hereby declares that the continued regulation and taxation by the several States of the business of insurance is in the public interest, and that silence on the part of the Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several States.").

67 *See id.* § 2(a), 59 Stat. at 34 (codified at 15 U.S.C. § 1012(a)) ("The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business.").

68 *See id.* § 2(b), 59 Stat. at 34 (codified as amended at 15 U.S.C. § 1012(b)) ("No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance . . . .").

69 *See id.* ("*Provided*, That after January 1, 1948, the Act of July 2, 1890, as amended, known as the Sherman Act, and the Act of October 15, 1914, as amended, known as the Clayton Act, and the Act of September 26, 1914, known as the Federal Trade Commission Act, as amended, shall be applicable to the business of insurance to the extent that such business is not regulated by State law.").

70 *See id.* § 3(a), 59 Stat. at 34 (codified as amended at 15 U.S.C. § 1013(a)) ("Until January 1, 1948, the Act of July 2, 1890, as amended, known as the Sherman Act, and the Act of October 15, 1914, as amended, known as the Clayton Act, and the Act of September 26, 1914, known as the Federal Trade Commission Act, as amended, and the Act of June 19, 1936, known as the Robinson-Patman Antidiscrimination Act, shall not apply to the business of insurance or to acts in the conduct thereof.").

71 *See* Anderson, *supra* note 48, at 98.

Congress followed the NAIC's lead by "removing obstructions which might be thought to flow from its own power, whether dormant or exercised, except as otherwise expressly provided in the Act itself or in future legislation."[72]

2. Adoption of the Model Unfair Trade Practices Act

After successfully shepherding its legislation through Congress, the NAIC began developing a model act the states could adopt to avoid losing their regulatory authority to the Federal Trade Commission.[73] By 1947, the NAIC had completed its work, resulting in the Unfair Trade Practices Act (UTPA).[74] States quickly adopted the UTPA.[75] By 1950, twenty-six states had enacted versions of the Model Act,[76] and by 1960, the rest had followed suit.[77]

The language of the UTPA essentially duplicated that of the existing Federal Trade Commission Act.[78] Because the McCarran-Ferguson Act limited the FTCA's regulation of state insurance "to the extent that such business is not regulated by State Law,"[79] the NAIC tried to cover the same ground, thereby achieving the exemption it had failed to acquire in the Act.[80] Using the same language ensured

72 Prudential Ins. Co. v. Benjamin, 238 U.S. 408, 429–30 (1946).

73 *See* Gerald M. Sherman & Richard R. Crowl, *The Judicial Response to Unfair Claims Practices Laws: Applying the National Experience to the Minnesota Act*, 12 WM. MITCHELL L. REV. 45, 50 (1985).

74 AN ACT RELATING TO UNFAIR METHODS OF COMPETITION AND UNFAIR AND DECEPTIVE ACTS AND PRACTICES IN THE BUSINESS OF INSURANCE, 1947-2 NAIC Proc. 392–400. The NAIC later changed this unwieldy title to "Unfair Trade Practices Act," as it later became known. 1990-4 NAIC Proc. 144, 146.

75 Not every state adopted the name "Unfair Trade Practices Act." *See, e.g.*, 40 PA. CONS. STAT. § 1171.1 (2008) (Unfair Insurance Practices Act). Nevertheless, this Note will refer to the state acts by this title for simplicity.

76 *See* 1 FREEDMAN, *supra* note 31, § 51, at 198 n.9.

77 *See* 1961-4 NAIC Proc. 309, 315. The UTPA has since undergone numerous revisions. *See* NAIC MODEL LAWS, REGULATIONS AND GUIDELINES 880-1, Legislative History (2007).

78 The UTPA gave insurance commissioners "the authority to examine and investigate, conduct hearings and issue cease and desist orders," and had substantially similar enforcement and penalty provisions. Amicus Curiae Brief of the National Association of Insurance Commissioners Suggesting Affirmance of the Decision at 10, Humana Inc. v. Forsyth, 525 U.S. 299 (1999) (No. 97-303) [hereinafter NAIC Brief]. The UTPA differed only in its enumeration of "certain defined acts or practices peculiar to the business of insurance." *Id.*

79 *See* 15 U.S.C. § 1012(b) (2006).

80 *See* 1 FREEDMAN, *supra* note 31, § 51, at 199; NAIC Brief, *supra* note 78, at 11 (citing 1959-4 NAIC Proc. 135, 145–47).

the Model Act would not inadvertently create gaps that would undermine a state's authority.[81]

When drafting the Model Act, the NAIC sought to avoid disrupting the balance of legal remedies struck by the states.[82] In other words, the NAIC designed the UTPA to complement, rather than displace, the existing state remedial structure. It did so in two ways: First, the Model Act neither created a private right of action[83] nor disturbed those that already existed.[84] In the current language of the UTPA: "No order of the commissioner under this Act or order of a court to enforce the same shall in any way release or absolve any person affected by such order from any liability under any other laws of this state."[85]

Second, it stipulated that the enforcement powers the Act granted to the insurance commissioners added to, rather than replaced, those they already possessed.[86] Again, in the current language of the UTPA: "The powers vested in the commissioner by this Act shall be additional to any other powers to enforce any penalties, fines or forfeitures authorized by law with respect to the methods, acts and practices hereby declared to be unfair or deceptive."[87] These remedy preservation clauses proved popular with the states. Twenty-three adopted versions of both preservation clauses,[88] fifteen adopted

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81 *See* NAIC Brief, *supra* note 78, at 11.

82 *See id.*

83 *See A Report of Director Robert Ratchford, Jr., of Ohio, Regarding a Private Right of Action Under Section 4(9) [or any other section] of the NAIC Model Unfair Trade Practices Act*, 1980-2 NAIC Proc. 339, 350 [hereinafter *Ratchford Report*] ("[T]he intent of the NAIC . . . was clearly not to create a new private right of action for trade practices which are prohibited by the Model Act. Any such practices which may be actionable under other law are not restricted by the Model.").

84 *See* UNFAIR TRADE PRACTICES ACT § 9(D), 1947-2 NAIC Proc. 398; *see also Ratchford Report*, *supra* note 83, at 347 ("[T]he Model Act was not designed to cut off existing rights of action under other laws. For example, misrepresentation, which is prohibited, could be actionable under common law. Such a cause of action would continue.").

85 NAIC MODEL LAWS, REGULATIONS AND GUIDELINES 880-1, § 9(D) (2007).

86 *See* UNFAIR TRADE PRACTICES ACT § 12, 1947-2 NAIC Proc. 400.

87 NAIC MODEL LAWS, REGULATIONS AND GUIDELINES 880-1, § 13 (2007).

88 *See* CAL. INS. CODE § 790.08 (West 2005) (commissioner); *id.* § 790.09 (private); COLO. REV. STAT. § 10-3-1111 (2006) (commissioner); *id.* § 10-3-1114 (private); CONN. GEN. STAT. § 38a-817(d) (2010) (private); *id.* § 38a-819 (2010) (commissioner); DEL. CODE ANN. tit. 18, § 2309(e) (1999) (private); *id.* § 2313 (commissioner); FLA. STAT. § 626.9621 (2004) (commissioner); *id.* § 626.9631 (private); HAW. REV. STAT. § 431:13-202(b) (2008) (private); *id.* § 431:13-204 (commissioner); 215 ILL. COMP. STAT. 5/428(3) (1993) (private); *id.* 5/432 (commissioner); IND. CODE § 27-4-1-10 (2010) (private); *id.* § 27-4-1-13 (commissioner); KAN. STAT. ANN. § 40-2408(b) (2000) (private); *id.* § 40-2412 (commissioner); MASS. GEN. LAWS ch. 176D,

only the private remedy preservation clause,[89] and five adopted only the commissioner remedy preservation clause.[90] In total, forty-three states adopted a clause to explicitly preserve their preexisting remedies against only seven that did not.[91]

Although the NAIC designed the Unfair Trade Practices Act to exempt the insurance industry from the Federal Trade Commission Act, it sweeps more broadly. Under § 1012(b) of the McCarran-Ferguson Act, no federal law can "invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance . . . unless such Act specifically relates to the business of

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§ 8 (2005) (private); *id.* § 12 (commissioner); MINN. STAT. § 72A.29(1) (2005) (private); *id.* § 72A.29(2) (commissioner); MO. REV. STAT. § 375.944(4) (2009) (private); *id.* § 375.948(1) (commissioner); NEB. REV. STAT. § 44-1530(3) (2004) (private); *id.* § 44-1534 (commissioner); N.H. REV. STAT. ANN. § 417:5-a (2009) (private); *id.* § 417:14 (commissioner); N.J. STAT. ANN. § 17:29B-8 (West 2010) (private); *id.* § 17:29B-12 (commissioner); N.Y. INS. LAW § 2409(a) (McKinney 2006) (commissioner); *id.* § 2409(b) (private); N.C. GEN. STAT. § 58-63-35(d) (2009) (private); *id.* § 58-63-55 (commissioner); N.D. CENT. CODE § 26.1-04-18 (2010) (private); *id.* § 26.1-04-19 (commissioner); OKLA. STAT. tit. 36, § 1208(D) (1999) (commissioner); *id.* § 1212 private); OR. REV. STAT. § 731.252(2) (2009) (private); *id.* § 731.252(3) (commissioner); 1 PA. CONS. STAT. § 1929 (2008) (private); 40 PA. STAT. ANN. § 1171.13 (West 1999) (commissioner); TEX. INS. CODE ANN. § 541.451 (West 2009) (private); *id.* § 541.452 (commissioner); VA. CODE ANN. § 38.2-221 (2007) (commissioner); *id.* § 38.2-510(B) (private). Both of Oregon's provisions and Virginia's commissioner preservation clause are codified outside of their state's Unfair Trade Practices Act, because they apply to the entire insurance code. *See* OR. REV. STAT. § 731.252(2) (2009); *id.* § 731.252(3) (2009); VA. CODE ANN. § 38.2-221 (2007). Likewise, because Pennsylvania's private preservation clause applies to its entire code, it is codified elsewhere. *See* 1 PA. CONS. STAT. § 1929 (2008) (private); 40 PA. STAT. ANN. § 1171.13 (West 1999).

89 *See* ALA. CODE § 27-12-18(h) (2007); ARIZ. REV. STAT. ANN. § 20-456(C) (2010); ARK. CODE ANN. § 23-66-212(d) (2001); IOWA CODE § 507B.8 (2007); KY. REV. STAT. ANN. § 304.12-120(4) (West 2009); MD. CODE ANN., INS. § 27-103(e) (LexisNexis 2006); MICH. COMP. LAWS § 500.2050 (2002); MISS. CODE ANN. § 83-5-43(4) (1999); MONT. CODE ANN. § 33-18-1004(4) (2009); N.M. STAT. ANN. § 59A-16-27(E) (LexisNexis 2004); R.I. GEN. LAWS § 27-29-7(d) (2008); S.C. CODE ANN. § 38-2-10 (2002); S.D. CODIFIED LAWS § 58-33-44 (2004); W. VA. CODE § 33-11-6(h) (2010); WYO. STAT. ANN. § 26-13-115(d) (2006). South Carolina codified its preservation clause outside of its Unfair Trade Practices Act because it applies to the state's entire insurance code. *See* S.C. CODE ANN. § 38-2-10 (2002).

90 ALASKA STAT. § 21.36.930 (2010); GA. CODE ANN. § 33-6-14(a) (2000); ME. REV. STAT. tit. 24-A, § 12-A(5) (2010); TENN. CODE ANN. § 56-8-111 (2010); VT. STAT. ANN. tit. 8, § 4726(c) (2010). Both Alaska and Maine's preservation clauses apply to the entire insurance code and, consequently, are not codified within the state's Unfair Trade Practices Act.

91 The seven states without a preservation clause in or affecting their Unfair Trade Practices Act are Idaho, Louisiana, Ohio, Nevada, Utah, Washington, and Wisconsin.

insurance."[92] Thus, because the states enacted the UTPA for the purpose of regulating the business of insurance, they will preempt *any* federal law that invalidates, impairs, or supersedes them, unless that federal law also specifically relates to the business of insurance.

B. Application of the Framework to Civil RICO

1. Pre-*Humana* Split

In the 1990s, a split in the circuits arose regarding the proper application of the McCarran-Ferguson Act's "invalidate, impair, or supersede" test to federal laws that proscribed the same conduct as state laws, but provided materially different remedies.[93] On one side, the First, Third, Seventh, and Ninth Circuits interpreted the Act narrowly, to preempt federal law only when it directly conflicted with state law.[94] Under this test, a state's decision to provide only administrative remedies in its insurance code did not imply a legislative policy against litigants' use of other private rights of action. On the contrary, unless one law required, condoned, or authorized conduct the other prohibited, no preemption would occur.[95] On the other side, the Sixth and Eighth Circuits viewed the Act broadly, to allow for state preemption if the federal law merely upset the balance struck by the state's regulatory system.[96] These courts viewed the legislature's

92 15 U.S.C. § 1012(b) (2006).

93 *See* Humana Inc. v. Forsyth, 525 U.S. 299, 305 & n.6 (1999).

94 *See* Sabo v. Metro. Life Ins. Co., 137 F.3d 185, 194 (3d Cir. 1998) (holding RICO did not conflict with Pennsylvania insurance law because the "federal policies embodied in RICO . . . are in no way inconsistent with the stated purpose of [Pennsylvania law]"); Villafañe-Neriz v. FDIC, 75 F.3d 727, 736 (1st Cir. 1996) (holding FDIC regulations did not impair Puerto Rican insurance law because of the lack of a "direct conflict"); Merchs. Home Delivery Serv., Inc. v. Frank B. Hall & Co., 50 F.3d 1486, 1492 (9th Cir. 1995) (holding RICO did not impair California insurance law because the two regimes prohibited the same acts); NAACP v. Am. Family Mut. Ins. Co., 978 F.2d 287, 297 (7th Cir. 1992) (holding Fair Housing Act did not impair Wisconsin insurance code because the laws did not conflict). This view shares strong similarities with conflict preemption. *See infra* note 143 and accompanying text.

95 *See Am. Family*, 978 F.2d at 297 (stating the Fair Housing Act, which prohibited redlining, did not conflict with state law because the defendant could not point to any state law "requiring redlining, condoning that practice, committing to insurers all decisions about redlining, or holding that redlining with discriminatory intent (or disparate impact) does not violate state law"). Under this test, mere duplication would not establish a conflict. *See id.* at 295.

96 *See* Doe v. Norwest Bank Minn., N.A., 107 F.3d 1297, 1308 (8th Cir. 1997) ("[T]he extraordinary remedies of RICO would frustrate, and perhaps even supplant, Minnesota's carefully developed scheme of regulation."); Kenty v. Bank One, Columbus, N.A., 92 F.3d 384, 392 (6th Cir. 1996) ("The different liability under Ohio law for

choice *not* to create its own private right of action as a declared policy *against* the use of other remedies. Even if the two laws were substantively identical, a federal law could trigger the Act simply by providing plaintiffs with a different remedy than state law allowed.[97] Finally, although the Fourth Circuit decided two cases addressing this issue, it is unclear which position it adopted.[98]

This split was particularly pronounced regarding civil RICO. Adopted twenty-five years after the McCarran-Ferguson Act,[99] RICO makes it unlawful for "any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt."[100] It also provides a private right of action to "[a]ny person injured in his business or property by reason of a violation of section 1962 of this chapter."[101]

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violations, as well as different standards of proof necessary to demonstrate misrepresentations, means that RICO does impair the ability of Ohio to regulate this type of behavior."). This view shares strong similarities with field preemption. *See infra* note 144 and accompanying text.

97 *See, e.g.*, *Norwest Bank*, 107 F.3d at 1307.

98 *Compare* Mackey v. Nationwide Ins. Cos., 724 F.2d 419, 421 (4th Cir. 1984) ("The presence of a general regulatory scheme does not show that any particular state law would be invalidated, impaired or superseded by the application of the Fair Housing Act and the Civil Rights Acts."), *with* Ambrose v. Blue Cross & Blue Shield, 95 F.3d 41, 1996 WL 482689, at *2 (4th Cir. 1996) (unpublished table decision) ("[T]he dramatic disparity in the cause of action and remedies available to RICO plaintiffs . . . would effectively supplant Virginia's chosen system of redress."). In the *Humana* case, both the petitioners and respondents claimed the support of Fourth Circuit precedent. *See* Brief on the Merits of Petitioners at 9 n.6, *Humana*, 525 U.S. 299 (No. 97-303); Brief on the Merits for Respondents at 21 n.20, *Humana*, 525 U.S. 299 (No. 97-303).

99 Organized Crime Control Act of 1970, Pub. L. No. 91-452, 84 Stat. 922 (codified as amended at 18 U.S.C. §§ 1961–1968 (2006)). Congress enacted RICO primarily "to address the infiltration of legitimate businesses by organized crime." United States v. Turkette, 452 U.S. 576, 591 (1981). But the broad language of RICO "reach[es] both 'legitimate' and 'illegitimate' enterprises." Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 499 (1985). As the Supreme Court noted in *Sedima*, "The former enjoy neither an inherent incapacity for criminal activity nor immunity from its consequences. The fact that § 1964(c) is used against respected businesses allegedly engaged in a pattern of specifically identified criminal conduct is hardly a sufficient reason for assuming that the provision is being misconstrued." *Id.* *See generally* G. Robert Blakey & Brian Gettings, *Racketeer Influenced and Corrupt Organizations (RICO): Basic Concepts—Criminal and Civil Remedies*, 53 TEMP. L.Q. 1010, 1014–21 (1980) (describing RICO's legislative history).

100 18 U.S.C. § 1962(c) (2006).

101 *Id.* § 1964(c).

In such a suit, the plaintiff may obtain both treble damages and "the cost of the suit, including a reasonable attorney's fee."[102] Although RICO generally provided for a higher damage award than a plaintiff could recover under state law, circuits adopting the "direct conflict" test permitted its use because both laws prohibited the same conduct.[103] But for circuits following the "upset the balance" approach, RICO's damages award sanctioned behavior to a much greater extent than the state code and, therefore, impaired state law.[104]

2. *Humana Inc. v. Forsyth*

The Supreme Court addressed this split in *Humana Inc. v. Forsyth.*[105] In *Humana,* the plaintiffs alleged the defendant, Humana Insurance, had fraudulently entered into insurance policy agreements to pay eighty percent of the plaintiff's post-deductible hospital charges, then secretly negotiated large discounts with the hospitals.[106] As a result of this arrangement, the plaintiffs paid significantly more than their twenty percent share of the charges.[107] After discovering this backroom deal, the plaintiffs filed suit using RICO's private right of action.[108]

The conduct at issue allegedly violated both RICO and Nevada's insurance code, which, not surprisingly, strongly resembled the NAIC's model Unfair Trade Practices Act.[109] But the Nevada code differed in two important ways: First, it included a private right of action.[110] Second, it did not include a remedy preservation clause of

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102 *Id.*

103 *See* Sabo v. Metro. Life Ins. Co., 137 F.3d 185, 194 (3d Cir. 1998); Merchs. Home Delivery Serv., Inc. v. Frank B. Hall & Co., 50 F.3d 1486, 1492 (9th Cir. 1995).

104 *See* Doe v. Norwest Bank Minn., N.A., 107 F.3d 1297, 1308 (8th Cir. 1997); Kenty v. Bank One, Columbus, N.A., 92 F.3d 384, 392 (6th Cir. 1996).

105 525 U.S. 299 (1999).

106 *Id.* at 303–04.

107 *Id.* Humana Insurance concealed its actions by writing checks to the hospital for eighty percent of the billed charges, then having the hospital kick back the discounted amount through monthly intercompany transfers. *See* Forsyth v. Humana, Inc., 114 F.3d 1467, 1472 (9th Cir. 1997), *aff'd*, 525 U.S. 299.

108 *Humana*, 525 U.S. at 304.

109 *See id.* at 302. The Court described the Nevada code as "a comprehensive administrative scheme that prohibits various forms of insurance fraud and misrepresentation." *Id.* at 311–12. Additionally, the code granted the Nevada Insurance Commissioner the authority to issue cease and desist orders, and administer fines as a remedy for code violations. NEV. REV. STAT. § 686A.183 (2009).

110 *See* NEV. REV. STAT. § 686A.310(2) ("In addition to any rights or remedies available to the Commissioner, an insurer is liable to its insured for any damages sustained by the insured as a result of the commission of any act set forth in subsection 1 as an unfair practice.").

any kind.[111] Noting the extent to which RICO's private remedies differed from those provided by Nevada's UTPA,[112] the District Court concluded the McCarran-Ferguson Act barred the use of civil RICO and granted a motion for summary judgment.[113] On appeal, the Ninth Circuit Court of Appeals reversed.[114] Analyzing the case under the "direct conflict" test, the court concluded that "there [was] some symmetry between RICO's private right of action and Nevada's administrative scheme. . . . [but] [t]his symmetry . . . [did] not create a conflict between federal and state law."[115]

The Supreme Court granted certiorari.[116] The key question in deciding the case, according to the Court, was "whether RICO's application to the scheme in which the Humana defendants are alleged to have collaborated . . . would 'impair' Nevada's law."[117] In defining the word "impair," the Court rejected both the "upset the balance" and "direct conflict" approaches.[118] Instead, the majority formulated the following test: "When federal law does not directly conflict with state regulation, and when application of the federal law would not frus-

111 *See supra* note 91 and accompanying text.

112 Although both provisions contained a private right of action, they provided different types of damages. RICO provided for treble damages and attorney's fees, *see* 18 U.S.C. § 1964(c), while Nevada's UTPA permitted recovery of both compensatory and punitive damages, NEV. REV. STAT. § 42.005 (2009). The District Court, however, erroneously concluded the UTPA permitted only an administrative remedy. *Humana*, 525 U.S at 305 n.5.

113 Forsyth v. Humana, Inc., 827 F. Supp. 1498, 1521–22 (D. Nev. 1993), *aff'd in part, rev'd in part*, 114 F.3d 1467 (9th Cir. 1997), *aff'd*, 525 U.S. 299.

114 *Humana*, 114 F.3d at 1482.

115 *Id.* at 1480.

116 *Humana*, 525 U.S. at 305.

117 *Id.* at 308.

118 *See id.* at 308–09. In rejecting the "upset the balance" test, the Court stated, "If Congress had meant generally to preempt the field for the States, Congress could have said, as the Ninth Circuit noted: 'No federal statute [that does not say so explicitly] shall be construed to *apply* to the business of insurance . . . .' " *Id.* at 308–09 (first alteration in original) (quoting Merchs. Home Delivery Serv., Inc. v. Frank B. Hall & Co., 50 F.3d 1486, 1492 (9th Cir. 1995)).

The "direct conflict" test received much less discussion, consisting entirely of a reference to a modern dictionary definition. *See id.* at 309–10 ("While we reject any sort of field preemption, we also reject the polar opposite of that view, *i.e.*, that Congress intended a green light for federal regulation whenever the federal law does not collide head on with state regulation. The dictionary definition of 'impair' is '[t]o weaken, to make worse, to lessen in power, diminish, or relax, or otherwise affect in an injurious manner.' " (alteration in original) (quoting BLACK'S LAW DICTIONARY 752 (6th ed. 1990))). Thus, it is not entirely clear why the Supreme Court rejected it. *See infra* Part II.A (discussing the original meaning of the phrase "invalidate, impair, or supersede" and the Supreme Court's definition).

trate any declared state policy or interfere with a State's administrative regime, the McCarran-Ferguson Act does not preclude its application."[119]

The Court then turned to the test's application. Having already concluded the Nevada code and RICO did not conflict,[120] the Court examined whether civil RICO would frustrate or interfere with the insurance code, when looked at as a whole.[121] In concluding civil RICO complemented, rather than impaired, the Nevada insurance code[122] the majority made three main points: First, the Court noted the existence of the private right of action.[123] Second, it observed the Act was not "hermetically sealed," because it did not exclude the use of other statutory or common law remedies.[124] Third, the Court pointed out that—even though RICO authorized treble damages—the relief provided under Nevada law may actually exceed that amount.[125] Additionally, at the end of its opinion, the Court briefly noted that the State of Nevada had not filed a brief stating that application of RICO would frustrate a state policy, and that insurers in the state had also relied on RICO when they were the victims of fraud.[126] These aspects of Nevada law conclusively demonstrated the legislature had designed the insurance code to work in tandem with other causes of action. Thus, the Court concluded RICO could "be applied . . . in harmony with the State's regulation."[127]

3. Post-*Humana* Split

Despite the *Humana* Court's efforts to bring clarity to the field, confusion began to reemerge almost immediately. In the ten months following the decision, both the Eighth and Tenth Circuits reconsidered whether civil RICO impaired state insurance codes under the

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119 *Humana*, 525 U.S. at 310.

120 *See id.* at 303 ("The federal law at issue, RICO, does not proscribe conduct that the State's laws governing insurance permit.").

121 *See id.* at 311–14.

122 *See id.* at 313.

123 *See id.* at 312.

124 *See id.*

125 *See id.* at 313. As punitive damages under the Nevada code, a plaintiff could receive (a) "three times the amount of compensatory damages if they are more than $100,000" or (b) "$300,000 if compensatories are less than $100,000." *Id.* (citing NEV. REV. STAT. § 42.005(1)(a)–(b) (2009)). The Court also noted that if an insurer "acts in bad faith regarding its obligations to provide insurance coverage," these limits did not apply. *Id.* (citing NEV. REV. STAT. § 42.005(2)(b)).

126 *See id.* at 313–14. Neither of these rationales received more than a sentence of analysis. *See id.*

127 *See Humana*, 525 U.S. at 303.

McCarran-Ferguson Act.[128] Again, the circuits split.[129] Over the next decade the split widened, as three more circuits—the Third, Fourth, and Sixth—addressed the same question but reached different results.[130]

Interestingly, the post-*Humana* split bears a striking resemblance to the one it replaced. Instead of the two-to-two split prior to *Humana*,[131] a three-to-two split now exists.[132] Furthermore, three out of the four circuits that addressed this problem both before and after *Humana* reached the same conclusion each time,[133] while the fourth merely clarified an internal split within its precedent.[134] And finally, the analysis in some of the cases is virtually indistinguishable from that which came before the Supreme Court weighed in.[135] In other words,

128 *See* Bancoklahoma Mortg. Corp. v. Capital Title Co., 194 F.3d 1089 (10th Cir. 1999); LaBarre v. Credit Acceptance Corp., 175 F.3d 640 (8th Cir. 1999).

129 *See Bancoklahoma*, 194 F.3d at 1099 ("The Supreme Court's decision in *Forsyth* compels us to hold that BOMC's RICO claims are not barred by the McCarran-Ferguson Act."); *LaBarre*, 175 F.3d at 643 ("As we stated in *Doe,* Minnesota law permits only administrative recourse for violations of § 72A.20 and, unlike RICO, does not provide a private cause of action for violations of this provision. . . . Thus, guided by our decision in *Doe*, the district court correctly concluded that the McCarran-Ferguson Act barred LaBarre's RICO claims against First Lenders and Bankers.").

130 *See* Riverview Health Inst. LLC v. Med. Mut. of Ohio, 601 F.3d 505, 519 (6th Cir. 2010) ("We conclude that application of federal RICO in this case would impair Ohio's insurance regulatory scheme."); Weiss v. First Unum Life Ins. Co., 482 F.3d 254, 269 (3d Cir. 2007) ("After canvassing the *Humana* factors, we are left with the firm conviction that RICO does not and will not impair New Jersey's state insurance scheme."); Am. Chiropractic Ass'n, Inc. v. Trigon Healthcare, Inc., 367 F.3d 212, 232 (4th Cir. 2004) ("We agree with the Tenth Circuit that in such a situation, *Humana* compels a conclusion that American Chiropractic's RICO claim was not barred by the McCarran-Ferguson Act.").

131 *See supra* notes 103–104 and accompanying text.

132 Three circuits—the Third, Fourth, and Tenth—permit civil RICO causes of action in insurance-related matters, while two circuits—the Sixth and Eighth—do not. *See supra* notes 129–130. As this Note later explores, no viable reason for distinguishing these cases exists. *See infra* Part III.B.

133 *See Riverview*, 601 F.3d 505 (reaching the same conclusion as *Kenty*); *Weiss*, 482 F.3d 254 (reaching the same conclusion as *Sabo*); *LaBarre*, 175 F.3d 640 (reaching the same conclusion as *Norwest Bank*). For more information on these cases, see *supra* notes 94–97 and accompanying text.

134 *See Am. Chiropractic Ass'n*, 367 F.3d 212 (resolving the split between *Mackey* and *Ambrose*). For more information on these cases, see *supra* note 98.

135 *See, e.g.*, *Labarre*, 175 F.3d at 643. In deciding *Labarre*, the Eighth Circuit relied almost exclusively on its *Norwest Bank* precedent. In the entire opinion, the court made only one substantive reference to *Humana*, summarily claiming that "[t]he Supreme Court applied similar analysis in *Humana* and stated the McCarran-Ferguson Act precludes the application of RICO when RICO directly conflicts with a state's insurance statutes, frustrates any declared state policy, or interfere's [sic] with a state's

the *Humana* decision appears to have had little effect—if any—in resolving this circuit split.

II. Analyzing the "Invalidate, Impair, or Supersede" Provision

A. *The Meaning of "Invalidate, Impair, or Supersede"*

Section 1012(b) of the McCarran-Ferguson Act states that "[n]o 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 . . . unless such Act specifically relates to the business of insurance."[136] Thus, when both a federal law and a state statute regulate the insurance industry, this clause will bar the federal law's applications if: (1) the federal statute does not specifically relate to the business of insurance, (2) the state statute has been enacted for the purpose of regulating the business of insurance, and (3) application of the federal statute would invalidate, impair, or supersede the state statute.[137]

The first two prongs of this test are generally not at issue. Courts on both sides of the split agree civil RICO does not specifically relate to the business of insurance.[138] And usually, little debate exists about whether the state enacted its statute for the purpose of regulating the business of insurance.[139] Disagreement, then, stems almost entirely

administrative regime." *See id.* The court then concluded that "guided by our decision in *Doe,* the district court correctly concluded that the McCarran-Ferguson Act barred LaBarre's RICO claims against First Lenders and Bankers." *Id.* For an in-depth analysis of the similarities between the pre- and post-*Humana* analysis, see *infra* Part III.A.3.

136 15 U.S.C. § 1012(b) (2006). Congress intended this provision to provide courts with a rule of construction for federal statutes either "not identified in the Act or not yet enacted." *See* Humana Inc. v. Forsyth, 525 U.S. 299, 306 (1999).

137 *See Humana*, 525 U.S. at 307; *Fabe*, 508 U.S. at 501.

138 *See, e.g.*, *Humana*, 525 U.S. at 307; Riverview Health Inst. LLC v. Med. Mut. of Ohio, 601 F.3d 505, 516 (6th Cir. 2010); Weiss v. First Unum Life Ins. Co., 482 F.3d 254, 259 (3d Cir. 2007).

139 *See generally* Anderson, *supra* note 48, at 89–97 (exploring the "business of insurance" requirement). Arguments may arise about the meaning of this clause because the McCarran-Ferguson Act does not even attempt to define it. *See id.* at 89. Nevertheless, the Supreme Court has identified three criteria to help determine whether a particular practice constitutes part of the business of insurance: "*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." Union Labor Life Ins. Co. v. Pireno, 458 U.S. 119, 129 (1982) (citing *Royal Drug*, 440 U.S. at 211–24). Although useful, "[n]one of these criteria is necessarily determinative in itself." *Id.*

from application of the third prong: the "invalidate, impair, or supersede" requirement.[140]

Proponents of all three approaches—the "direct conflict" test, the "upset the balance" test, and the *Humana* test—agree § 1012(b) institutes a form of inverse preemption, reversing the general rules for federal preemption of state law under the Supremacy Clause.[141] But they differ on which of the three recognized types of preemption should apply: (1) express preemption, in which Congress explicitly defines a law's preemptive scope, (2) field preemption, in which Congress has so pervasively regulated a given issue that all state laws infringing on the field are preempted, and (3) conflict preemption, in which state law is preempted only to the extent it conflicts with federal law.[142] The "direct conflict" test draws on the principles of conflict preemption, arguing that federal laws should apply to the bus-

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For example, the first prong of this test was at issue in *Riverview*. In that case, the plaintiff claimed the defendant insurance company "systematically discourage[d] the utilization of out-of-network health-care services, delay[ed], diminishe[d] and denie[d] claims submitted by out-of-network, health-care providers, unlawfully and inaccurately calculate[d] UCR payments, inappropriately bundle[d] providers services and procedures and reward[ed] its employees for unlawfully discriminating against out-of-network providers." Brief of the Appellants at 8, *Riverview*, 601 F.3d 505 (No. 08-4431). Because this conduct involved only arrangements between health-care insurers and health-care providers, the plaintiffs claimed they did not transfer or spread a policyholder's risk and thus did not fall within the business of insurance. *See id.* at 19.

In *American Chiropractic Ass'n*, the second prong was at issue. In that case, the plaintiffs alleged the defendant insurance company "engaged in an anticompetitive conspiracy with medical doctors and medical associations whose purpose was to harm chiropractors." Am. Chiropractic Ass'n, Inc. v. Trigon Healthcare, Inc., 367 F.3d 212, 217 (4th Cir. 2004). Because these alleged acts "do not affect the relationship between the insurer and insured," the plaintiffs argued they were not a part of the business of insurance. *See* Brief of Appellants at 61, *Am. Chiropractic Ass'n*, 367 F.3d 212 (No. 03-1675).

Neither of these arguments succeeded. *See Riverview*, 601 F.3d at 514–15; *Am. Chiropractic Ass'n*, 367 F.3d at 231. Exploring the merits of these arguments goes beyond the scope of this Note.

140 *See supra* Part I.B.

141 *See, e.g.*, *Humana*, 525 U.S. at 308–10; *Riverview*, 601 F.3d at 513 ("upset the balance" test); NAACP v. Am. Family Mut. Ins. Co., 978 F.2d 287, 296 (7th Cir. 1992) ("direct conflict" test).

142 *See* Mich. Canners & Freezers Ass'n v. Agric. Mktg. & Bargaining Bd., 467 U.S. 461, 469 (1984). State law conflicts with federal law when (1) "compliance with both federal and state regulations is a physical impossibility," Fla. Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142–43 (1963), and (2) when state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," Hines v. Davidowitz, 312 U.S. 52, 67 (1941).

iness of insurance, unless they directly conflict with state laws.[143] The "upset the balance" approach mirrors field preemption doctrine, arguing the McCarran-Ferguson Act reflects Congress's intent to withdraw completely from the field of insurance, absent an express statement to the contrary.[144] Finally, the *Humana* approach charted a middle course between these two positions, holding that state law would preempt not only directly conflicting federal laws, but also those that frustrated a declared state policy or interfered with the state's administrative regime.[145]

This subpart examines the original meaning of the "invalidate, impair, or supersede" and concludes the "direct conflict" test provides the best interpretation. It then analyzes the *Humana* decision, describes the difficulties with the Supreme Court's interpretation, and explains how this opinion should be understood going forward.

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143 *See Am. Family Mut. Ins.*, 978 F.2d at 295 ("Federal laws that do not conflict with or supersede state rules always apply; federal laws inconsistent with state laws apply when Congress says so directly."). The "direct conflict" test differs slightly, however, from conflict preemption because it includes an exception for when Congress expressly states it is regulating the business of insurance.

In fashioning the "direct conflict" test, the Seventh Circuit relied on the Supreme Court's decision in *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238 (1984), in concluding that "state and federal rules that are substantively identical but differ in penalty do not conflict with or displace each other." *See Am. Family Mut. Ins.*, 978 F.2d at 297. In *Silkwood*, a nuclear facility faced liability for both civil penalties under federal law and punitive damages under state law. *Silkwood*, 464 U.S. at 257. Applying a traditional conflict preemption approach, the Supreme Court held the two laws did not conflict because "[p]aying both federal fines and state-imposed punitive damages for the same incident would not appear to be physically impossible," and because "exposure to punitive damages [does not] frustrate any purpose of the federal remedial scheme." *Id.* Thus, in *American Family Mutual Insurance*, the Seventh Circuit reversed the process. Even though the Fair Housing Act—the federal law at issue—differed in penalty, the court concluded it did not conflict with the state law because the defendant could comply with both state and federal law, and because the federal remedy did not frustrate any state policy. *Am. Family Mut. Ins.*, 978 F.2d at 297.

144 *See* Brief on the Merits of Petitioners, *supra* note 98, at 10 ("The language and history of the statute bespeak a broad preclusionary intent, not limited to 'direct conflicts,' but intended to withdraw Congress from the field absent an express congressional statement to the contrary."). This position differs from traditional field preemption in two ways. First, it does not appear to require pervasive regulation of the field by the states. *See* Merchs. Home Delivery Serv., Inc. v. Frank B. Hall & Co., 50 F.3d 1486, 1491 (9th Cir. 1995) (describing the "upset the balance" approach as applying "a very broad proscription against applying federal law where a state has regulated, *or chosen not to regulate*, in the insurance industry"). Second, and similar to the "direct conflict test," it provides for an exception from traditional field preemption rules whenever Congress expressly states otherwise.

145 *See* Humana Inc. v. Forsyth, 525 U.S. 299, 310 (1999). For a discussion of the precise meaning of this test, see *infra* Part II.A.2.b.

1. The Original Meaning

Of these three positions, the text and history[146] of the McCarran-Ferguson Act demonstrate that the "direct conflict" test best captures the original meaning of the phrase "invalidate, impair, or supersede." At the time of the Act's passage, the word "invalidate" meant to "render of no force or effect,"[147] and the Supreme Court regularly used the word to describe preemption.[148] Used individually, the word "impair" meant "to diminish in quantity, value, excellence, or strength."[149] But when used as part of the phrase "impair a law," it meant "the displacement of some portion of a statute or its preclusion in certain contexts."[150] The Court regularly used the word to describe partial preemption.[151] Finally, the word "supersede" meant to "displace, or set aside, and put another in place of; to supplant."[152] The Court regularly used the word to describe preemption where federal law not only barred application of state law, but provided a federal rule to take its place.[153] The dissenters in *South-Eastern Underwriters,* in fact, used these words in precisely this way.[154]

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146 These two elements—text and context—are essential to understanding the original meaning of any statute. *See* REED DICKERSON, THE INTERPRETATION AND APPLICATION OF STATUTES 103 (1975) ("In the communication of meaning there are two main elements: (1) the vehicle of communication specially created and controlled by its author, and (2) the context within which that vehicle operates. No communication is complete without both."); *see also* Regions Hosp. v. Shalala, 522 U.S. 448, 460 n.5 (1998) ("In expounding a statute, we must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy." (quoting U.S. Nat'l Bank of Or. v. Indep. Ins. Agents of Am., Inc., 508 U.S. 439, 455 (1993))). Of course, construction of a statute must begin with its text. *See* U.S. Dep't of Treasury v. Fabe, 508 U.S. 491, 500 (1993) ("[T]he starting point in a case involving construction of the McCarran-Ferguson Act, like the starting point in any case involving the meaning of a statute, is the language of the statute itself." (alteration in original) (quoting Group Life & Health Ins. Co. v. Royal Drug Co., 440 U.S. 205, 210 (1979))).

147 *See* Brief for the United States as Amicus Curiae Supporting Respondents at 13, Humana Inc. v. Forsyth, 525 U.S. 299 (1999) (No. 97-303) [hereinafter United States Brief] (citing WEBSTER'S NEW INTERNATIONAL DICTIONARY 1135 (1917)).

148 *See id.* at 13–14 (collecting cases).

149 *See id.* at 14 (quoting WEBSTER'S NEW INTERNATIONAL DICTIONARY, *supra* note 147, at 1077)).

150 *See id.*

151 *See id.* at 14–15 (collecting cases).

152 *See id.* at 16 (quoting WEBSTER'S NEW INTERNATIONAL DICTIONARY, *supra* note 147, at 2082).

153 *See id.* (collecting cases).

154 For example, Chief Justice Stone argued the *South-Eastern Underwriters* decision would invalidate state law:

When used together, these three words addressed preemption of state law where federal law did *not* provide a substitute rule ("invalidate"), preemption of state law where federal law *did* provide a substitute rule ("supersede"), and partial preemption of state law ("impair").[155] In other words, the "invalidate, impair, and supersede" clause bore the combined meaning of conflict preemption.[156] The use of these three words—rather than the single word "preemption"—strengthens rather than weakens this analysis. Because people would not begin using it to mean "conflict" preemption until the mid-1950s,[157] the word "preemption" would not have conveyed Congress's chosen meaning. But the word had acquired the meaning of "field preemption" by the early 1940s.[158] Congress's avoidance of this word, therefore, strongly cuts against the "upset the balance" test. Additionally, had Congress wanted to withdraw completely from the insurance

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> The Government admits that statutes of at least five states will be invalidated by the decision as in conflict with the Sherman Act, and the argument in this Court reveals serious doubt whether many others may not also be inconsistent with that Act. The extent to which still other state statutes will now be invalidated as in conflict with the commerce clause has not been explored in any detail in the briefs and argument or in the Court's opinion.

United States v. S.-E. Underwriters Ass'n, 322 U.S. 533, 581 (1944) (Stone, C.J., dissenting). For usage of the words impair and supersede, see *id.* at 587 (Jackson, J., dissenting), which states, "When this power is exercised by Congress, it impairs state regulation only in so far as it actually conflicts with the federal regulation," and *id.* at 586, stating, "I have little doubt that if the present trend continues federal regulation eventually will supersede that of the states."

155 *See id.* at 16 n.6.

156 *See id.* Although the words had a technically distinct meaning, common usage also overlapped to a good extent. For example, during the congressional debates, senators often used one of the three words as a shorthand reference to all three. *See, e.g.*, 91 CONG. REC. 485 (1945) ("However, in section 2(b) it is implied that even in 1948 the Sherman Act shall not invalidate any State regulatory law."); *id.* at 486 ("Then it is applicable, it does apply, does it not, to the Sherman Act, and also to the Clayton Act, presently, because neither one of those acts specifically repeals or impairs or invalidates any State law?").

The statute's use of multiple words with roughly the same meaning should not surprise. *See* Moskal v. United States, 498 U.S. 103, 120 (1990) (Scalia, J., dissenting) (discussing the practice of "obvious instances of iteration to which lawyers, alas, are particularly addicted"). This habit of paired legal phrases traces all the way back to the Norman Conquest. *See* ERNEST WEEKLEY, CRUELTY TO WORDS 43 (1931). Afterwards, the language of the law was a form of French, and thus unintelligible to the conquered English. *See id.* Thus, lawmakers began the practice of coupling words, one French and the other native. *See id.*

157 *See* United States Brief, *supra* note 147, at 17 n.7.

158 *See id.*

field, it could have simply stated that, "No federal statute shall be construed to *apply* to the business of insurance."[159]

Likewise, the statute's purpose supports a "direct conflict" approach. As recognized by the Supreme Court, Congress passed the McCarran-Ferguson Act in response to the "avalanche of fear and uncertainty,"[160] precipitated by its decision in *South-Eastern Underwriters*.[161] More precisely, however, Congress passed the Act, not because of fear the decision might lead to federal *supplementation* of state law, but because it might *preempt* state taxation and regulation altogether. Both insurance providers and state governments believed *South-Eastern Underwriters* would gut state law, bringing back the cyclical pattern of insolvency that threatened the industry.[162]

Section 1011 of the McCarran-Ferguson Act, which explains the statute's purpose, makes exactly this point. Had Congress feared mere supplementation, § 1011 would state an intention to "avoid interference with state regulation and taxation." But it does not. Instead, the text states "that the continued regulation and taxation by the several States of the business of insurance is in the public interest."[163] This fear of preemption, rather than supplementation, is also reflected in the opinions of *South-Eastern Underwriters* itself,[164] the public reaction immediately following the decision,[165] the petitions for

159 Merchs. Home Delivery Serv., Inc. v. Frank B. Hall & Co., 50 F.3d 1486, 1492 (9th Cir. 1995).

160 1 FREEDMAN, *supra* note 31, § 48, at 169.

161 *See* U.S. Dep't of Treasury v. Fabe, 508 U.S. 491, 499 (1993); SEC v. Nat'l Sec., Inc., 393 U.S. 453, 458 (1969).

162 *See supra* Part I.A.1.

163 15 U.S.C. § 1011 (2006).

164 For the dissenting opinions, see *supra* note 154. The majority acknowledged the argument that "the Sherman Act necessarily invalidates many state laws regulating insurance," although they described it as "exaggerated." United States v. S.-E. Underwriters Ass'n, 322 U.S. 533, 562 (1944).

165 *See, e.g.*, Recent Decisions, *supra* note 41, at 773 n.10 ("Public opinion, as reflected in the press, was, in general, violently opposed to the decision, mainly because of the alleged uncertainty and confusion it would bring to this field and because of the fear that it would invalidate many of the existing schemes of state regulation.").

rehearing,[166] the NAIC's explanatory memorandum of its legislative proposal,[167] and contemporaneous commentaries.[168]

The "direct conflict" test, with its reliance on conflict preemption principles, addresses these exact concerns. By elevating state law above federal law only in the case of a conflict, this rule would permit simultaneous federal and state regulation of the insurance industry, while preserving the states' ability to tax and regulate as they had prior to the *South-Eastern Underwriters* decision.[169] Conversely, the "upset the balance" test extends too broadly. Because this approach does not require a direct conflict, it would displace federal laws even though they posed no risk of preemption. This test, therefore, is better suited to address a concern about federal supplementation of state law, which is notably absent from the Act's history. Thus, both the text and the historical context of the McCarran-Ferguson Act strongly point toward conflict preemption as the original meaning of the "invalidate, impair, or supersede" requirement.

166 *See* Petition for Rehearing at 7, *S.-E. Underwriters*, 322 U.S. 533 (No. 354) (filed Sept. 20, 1944) ("[T]he effect of the decision is not only to call into question state statutes which are inconsistent with the Sherman Act, but also to place all existing state regulation of insurance in jeopardy."); Petition for Rehearing at 4, *S.-E. Underwriters*, 322 U.S. 533 (No. 354) (filed Sept. 1, 1944) ("This clearly overlooks the effect of holding that the business of insurance is interstate commerce and subject to the Sherman Act, which automatically brings about a basic and fundamental conflict with state regulation. . . . [T]he effect is to strike down the existing system of regulation without offering a substitute therefor until Congress enacts appropriate legislation."); Petition of the State of New York in Support of Motion for Rehearing at 1, *S.-E. Underwriters*, 322 U.S. 533 (No. 354) ("This Court's decision that insurance is commerce creates problems without foreseeable limit concerning the effect of Federal statutes and concerning the extent to which State regulations are now permissible.").

167 Section 2(b) of the NAIC's memorandum described the purpose of the "invalidate, impair, or supersede" requirement as "eliminat[ing] or at least minimiz[ing] conflict between State laws and existing or future acts of Congress." 90 CONG. REC. A4407 (1944).

168 *See, e.g.*, 1 FREEDMAN, *supra* note 31, § 48, at 177 (describing the *South-Eastern Underwriters* decision as making several federal laws that directly conflicted with state laws immediately applicable to the insurance business).

169 Although not weighing in on the meaning of the "invalidate, impair, or supersede" phrase, the Supreme Court concluded shortly after the McCarran-Ferguson Act passed that Congress's purpose was "to give support to the existing and future state systems for regulating and taxing the business of insurance. . . . by removing obstructions which might be thought to flow from its own power." Prudential Ins. Co. v. Benjamin, 328 U.S. 408, 429 (1946).

2. The Supreme Court's Interpretation: *Humana Inc. v. Forsyth*

a. Flaws in *Humana*

Despite the unanimous nature of the decision in *Humana*, the Supreme Court's opinion suffers from three serious flaws regarding its interpretation of the "invalidate, impair, or supersede" requirement. First, the Court failed to adopt the original meaning of the Act. The Court began by erroneously defining each word independently, rather than by examining the combined meaning of the words within the phrase.[170] Then, although the Court adopted the historical definitions of the words "invalidate" and "supersede,"[171] it inexplicably ignored the original meaning of "impair," instead relying on the 1990 edition of *Black's Law Dictionary*.[172] The Court made no attempt to explain why the available historical evidence sufficed to define the first two words, but did not for the third. Nor did the Court explain how a definition written forty-five years after the passage of the Act illuminated the word's original meaning more than records of its use at the time. Instead, the Court simply bypassed these issues.

Second, the standard the Court distilled from these definitions provides no more clarity than the language of the statute itself. At first, the majority appears to hold that the McCarran-Ferguson Act will preclude the application of federal law when it: (1) "directly con-

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170 *See* Humana Inc. v. Forsyth, 525 U.S. 299, 307–08 (1999). Generally, courts adopting the "direct conflict" test looked at the meaning of the phrase as a whole, while courts adopting the "upset the balance" approach looked at the meaning of each word individually. *Compare* Sabo v. Metro. Life Ins. Co., 137 F.3d 185, 193 (3d Cir. 1998) ("[T]he legal question before us is whether allowing plaintiff's suit under RICO would 'invalidate, impair, or supersede' Pennsylvania law as that phrase is understood under the Act."), *and* NAACP v. Am. Family Mut. Ins. Co., 978 F.2d 287, 295 (7th Cir. 1992) ("[The Fair Housing Act] therefore does not 'invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance.'"), *with* Doe v. Norwest Bank Minn., N.A., 107 F.3d 1297, 1307 (8th Cir. 1997) ("The issue presented here, therefore, is whether a federal statute that is essentially parallel in substance to a state statute may impair the state statute because of a difference in the availability and the magnitude of the remedies they provide.").

171 The Court defined "invalidate" as "to render ineffective, generally without providing a replacement rule or law." *Humana*, 525 U.S. at 307 (quoting United States Brief, *supra* note 147, at 16 n.6). It defined "supersede" as "to displace (and thus render ineffective) while providing a substitute rule." *Id.* (quoting United States Brief, *supra* note 147, at 17 n.6). Both of these definitions were based on the historical information provided in the United States Brief. The Court quickly ruled out the possibility that civil RICO invalidated or superseded Nevada law. *See id.* at 307–08.

172 The Court defined "impair" as "[t]o weaken, to make worse, to lessen in power, diminish, or relax, or otherwise affect in an injurious manner." *Id.* at 309–10 (alteration in original) (quoting BLACK'S LAW DICTIONARY 752 (6th ed. 1990)).

flict[s] with state regulation," (2) "frustrate[s] any declared state policy," or (3) "interfere[s] with a State's administrative regime."[173] The meaning of the first prohibition is relatively straightforward—it simply adopts the "direct conflict" test. But the second two merely seem to replace one disputed word (impair) with two more disputed words (frustrate and interfere) that are largely synonymous.[174] This approach may even seem to endorse the "upset the balance" test—which takes the mere existence of a state administrative remedy to constitute a declared state policy of exclusivity[175]—although the Court had already explicitly rejected it.

Third, after establishing this test, the Court applied it in an equally vague fashion. Instead of analyzing each one of the prongs in a systematic way—asking first whether the federal and state laws conflicted, second whether the federal law frustrated a declared state policy, and third whether the federal law interfered with the state's administrative regime—the Court briefly discussed several different factors that weighed in favor of the plaintiff.[176] But this analysis explains little. It does not reveal how these factors relate to the three-part definition of "impair," their relative importance to the decision, how the Court selected them, why other factors were not included, whether the Court considered them exclusive, or how cases with a different balance of factors should be decided.[177] Despite the lack of an answer to any of these questions, several courts have actually found these factors the easiest part of the Court's opinion to construct into a workable test.[178]

173 *See Humana*, 525 U.S. at 310.

174 *Black's Law Dictionary* defines "frustration" as "hindering," BLACK'S LAW DICTIONARY 694 (9th ed. 2009), and "interference" as "hindrance," *id.* at 831.

175 *See, e.g.*, Riverview Health Inst. LLC v. Med. Mut. of Ohio, No. 3:07-cv-354, 2008 WL 4449482, at *5 (S.D. Ohio Sept. 30, 2008). The District Court in *Riverview* first described the Supreme Court's holding in *Humana*, then held a RICO action would "frustrate the administrative regime of the state of Ohio" because "Ohio ha[d] created an administrative regime to oversee the insurance industry and demands exhaustion of this regime's remedies before allowing one to pursue a private action." *See id.*

176 *See supra* notes 123–26 and accompanying text.

177 These problems are shared, to a great extent, by all opinions relying on a discretionary "totality of the circumstances" approach. *See* Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1179 (1989) (arguing, inter alia, that a rule-based mode of analysis will promote the fairness and predictability of cases more than a discretionary standards-based approach).

178 *See infra* Part III.A.2.

b. Understanding *Humana*

In light of these difficulties, the *Humana* decision is best understood as establishing a two-prong impairment test. First, a federal law will impair a state law when the two directly conflict. Second, a federal law will impair a state law when it hinders the successful execution of a state legislative policy.[179] This dual definition of impairment stems from the language of the Court's standard and holding, its attempt to craft an approach between the "direct conflict" and "upset the balance" tests, and the focus of its multifactor examination.

Although the Court's standard for impairment appears to include three separate prohibitions—confliction, frustration, and interference[180]—a closer look at the language of the opinion indicates the words "frustration" and "interference" prohibit the same thing: hindrance of a state policy. The Court's definition includes both an independent clause[181]—"the McCarran-Ferguson Act does not preclude [federal law's] application"—and two dependent clauses[182]: (1) "[w]hen federal law does not directly conflict with state regulation," and (2) "when application of the federal law would not frustrate any

179 This policy may be declared either expressly in a statute or implicitly in the balance struck by the state's regulatory system. Either way, the legislature must have *intended* to adopt the policy. In other words, this test requires a deeper examination into the state legislature's intent in passing the UTPA. If the state legislature intended to exclude the use of other remedies when it passed the UTPA, then state law will preempt federal law. But if the state legislature merely intended to supplement the use of other remedies, then no preemption occurs.

One could understand this prong as a mere rewording of obstacle preemption, thus transforming the *Humana* test into a restatement of conflict preemption. *See* Dehoyos v. Allstate Corp., 345 F.3d 290, 294 (5th Cir. 2003) ("[T]he Court emphasized that [McCarran-Ferguson Act] preemption is to be examined within a 'conflict preemption' rubric . . . ."). Although attractive, this interpretation also suffers from a glaring difficulty: the Supreme Court had already rejected the "direct conflict" test, which incorporated these conflict preemption principles. *See supra* note 143 and accompanying text. The most likely explanation is that the Court incorrectly interpreted the "direct conflict" test to include only the first type of conflict preemption—when "compliance with both federal and state regulations is a physical impossibility." *See supra* note 142. This problem aside, application of the *Humana* test appears to differ little from conflict preemption.

180 *See supra* note 173 and accompanying text.

181 An independent clause is a group of words, containing a subject and verb, which expresses a completed thought and by itself could be a sentence. PENELOPE CHOY & DOROTHY GOLDBART CLARK, BASIC GRAMMAR AND USAGE 82 (7th ed. 2006).

182 A subordinate clause is a group of words, containing a subject and verb, that does not express a complete thought and by itself could not be a sentence. *Id.* at 93. Subordinate clauses must be attached to a main clause by a conjunction, known as a subordinating conjunction. *Id.* at 94.

declared state policy or interfere with a State's administrative regime."[183] The existence of only two dependent clauses suggests only two general circumstances exist in which the Act will preclude federal law.[184] And the grouping of "frustrate" and "interfere" into the same clause, which is bracketed off by commas, suggests these two verbs function together to constitute a single circumstance.

Furthermore, the Court used the word "frustrate" several times as a short-hand reference to the pair, also suggesting the existence of a single concept. For example, after completing its multifactor examination, the Court concluded, "In sum, we see *no frustration of state policy* in the RICO litigation at issue here. RICO's private right of action and treble damages provision appears to complement Nevada's statutory and common-law claims for relief."[185] Then, in formulating its holding, the Court stated, "Because RICO advances the State's interest in combating insurance fraud, and *does not frustrate any articulated Nevada policy*, we hold that the McCarran-Ferguson Act does not block the respondent policy beneficiaries' recourse to RICO in this case."[186]

In addition to capturing the Court's language, this two-prong "impairment" test reflects the opinion's attempt to chart a path between the "direct conflict" and "upset the balance" approaches. The Court clearly wished to provide more protection for state insurance regulation than the "direct conflict" test, but just as clearly wished to avoid instituting the full-fledged field preemption of the "upset the balance" test.[187] This test strikes precisely that balance by providing for preemption of federal law when it conflicts with state law or hinders the successful execution of a state legislative policy. On

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183 *See* Humana Inc. v. Forsyth, 525 U.S. 299, 310. (1999) The existence of only two subordinating conjunctions in the sentence—the word "when" both times—confirms the presence of only two subordinate, adverb clauses.

184 Had the Court wanted to hold the Act functioned in *three* types of circumstances, it could have stated: "The McCarran-Ferguson Act does not preclude federal law's application when it does not directly conflict with state regulation, when it does not frustrate any declared state policy, and when it does not interfere with a State's administrative regime." The use of three separate subordinating conjunctions would have made this meaning clear. The Court could have achieved the same effect by using one subordinating conjunction, and then breaking up the sentence with commas: "When federal law does not directly conflict with state regulation, frustrate any declared state policy, or interfere with a State's administrative regime, the McCarran-Ferguson Act does not preclude its application."

185 *Humana*, 525 U.S. at 313 (emphasis added).

186 *Id.* at 314 (emphasis added).

187 *See id.* at 309 ("While we reject any sort of field preemption, we also reject the polar opposite of that view, *i.e.*, that Congress intended a green light for federal regulation whenever the federal law does not collide head on with state regulation.").

the one hand, it provides more protection than the "direct conflict" test because it allows a state law to preempt a federal law, even though it is possible to comply with both. On the other hand, it stops short of instituting the "upset the balance" test because it does not assume the state legislature intended the UTPA remedies to be exclusive without further evidence. Thus, it satisfies both criteria.

Finally, the flow of the Court's analysis in *Humana* reveals use of this two-prong test. In determining whether civil RICO would impair the state's Unfair Trade Practices Act, the Court searched first for a direct conflict between the two.[188] Finding none, the Court then looked at the insurance code as a whole, trying to decipher whether the provision of an administrative remedy in the state's UTPA reflected a state policy against the use of other remedies for insurance fraud.[189] Almost every single one of the factors the Court examined—the existence of a private cause of action, other statutory and common law remedies provided by state law, the availability of state law damages comparable to those provided by RICO, and the absence of a state brief asserting a state policy—shed light on this question.[190]

This multifactor analysis also suggests a refinement of the test for cases involving civil RICO. In these cases, defendants generally assert the legislature's inclusion of an administrative remedy in its Unfair Trade Practices Act constitutes a policy *against* the use of other remedies for insurance fraud.[191] Use of these other, materially different remedies—the argument goes—impairs the state's ability to regulate. Thus, although any hindrance of a state policy would suffice, in RICO cases the second prong will primarily focus on whether the state legislature intended to adopt a policy against the use of non-UTPA remedies.

Therefore, a court applying the *Humana* test should ask whether application of civil RICO will: (1) directly conflict with the state's insurance code, or (2) hinder a state policy against the use of non-UTPA remedies for insurance fraud. In determining whether the laws directly conflict, courts should look to see whether one law requires, condones, or authorizes something the other prohibits.[192] If so, the state law will preempt the federal law. Regarding an asserted hin-

188 *See id.* at 303.

189 *See id.* at 311–14.

190 *See id.* The only exception was the Court's notice that state insurers also relied on the civil RICO provision, a factor which occupied only a single sentence of the Court's opinion. *See id.* at 314.

191 *See* cases cited *supra* notes 103–04, 129–30.

192 *See Humana*, 525 U.S. at 311 (discussing SEC v. Nat'l Sec., Inc., 393 U.S. 453 (1969)). A mere difference in remedies does not suffice to establish a direct conflict.

drance, courts should look first for express statutory language adopting or disavowing this type of exclusive remedy policy. If the state has not expressly adopted a policy, courts should then undergo a multifactored examination into the state legislature's intent like the Supreme Court did in *Humana*.[193] This examination should encompass all factors that might shed light on the legislature's intention, including the original meaning and structure of the state UTPA, any authoritative state court constructions, and the factors considered in *Humana*.

B. *Applying the "Invalidate, Impair, or Supersede" Test to Civil RICO*[194]

In applying the *Humana* test, courts should conclude civil RICO does not impair state insurance codes for two reasons: First, the two statutes do not directly conflict because RICO only penalizes conduct the insurance codes also prohibit. Second, RICO does not hinder a state policy against the use of non-UTPA remedies because no such policy exists. Instead of a policy of remedial exclusivity, the National Association of Insurance Commissioners specifically designed the Unfair Trade Practices Act to work in tandem with other remedies.

Regarding the first prong of the *Humana* test,[195] civil RICO and the state UTPAs do not directly conflict because insurers can fully comply with both.[196] The state UTPAs prohibit "all such practices . . . that constitute unfair methods of competition or unfair or deceptive

See id. at 303, 308 (concluding RICO and Nevada's UTPA did not conflict, even though they provided for different remedies).

193 The Court in *Humana* completed the multifactor examination only because Nevada was one of the seven states that failed to adopt at least one of the model UTPA's preservation clauses. *See supra* note 91. Thus, in the absence of an express state policy, the Court tried to discern an implicit one, using the factors as a proxy for the legislature's intention. The Court's opinion does not, therefore, require a multifactored analysis when the state legislature has spoken expressly.

194 Unless otherwise noted, the arguments in Part II.B rely primarily on the NAIC Model Act's language, because forty-five states have adopted it "in a uniform and substantially similar manner," which requires "states to adopt the model in its entirety but does allow for minor variations in style and format." NAIC MODEL LAWS, REGULATIONS AND GUIDELINES 880-35 to -39 (2007) (State Adoption). Differences may occur, therefore, in the remaining five states, all of which have adopted at least a portion of the Model Act. *See id.* (describing "related activity").

195 Under this prong, civil RICO can impair the state UTPAs only if the two directly conflict (i.e., one law requires, condones, or authorizes something the other prohibits). *See supra* note 192 and accompanying text.

196 *See, e.g.*, *Humana*, 525 U.S. at 308 ("[I]nsurers can comply with both RICO and Nevada's laws governing insurance. These laws do not directly conflict. The acts the policy beneficiaries identify as unlawful under RICO are also unlawful under Nevada law.").

acts or practices."[197] Although civil RICO reaches only a portion of this conduct,[198] anything that violated its provisions would seem to be an unfair method of competition, almost by definition.[199] Certainly, it does not compel anything the state UTPA would prohibit or vice versa.[200] Rather than conflict, the two statutes complement one another.

Regarding the second prong of the *Humana* test,[201] the use of civil RICO does not hinder a state policy against the use of non-UTPA remedies. As a logical matter, the use of civil RICO can only hinder a state policy against the use of non-UTPA remedies if the legislature actually adopted such a policy. But, as reflected in both the text of the Model Act and the history of its passage, the NAIC designed the UTPA to work *together* with the preexisting remedial structure.[202] Thus, far from "upsetting the balance" of remedies struck by the state insurance codes, the use of civil RICO actually reflects that balance.

The text of the Unfair Trade Practices Act—rather than expressing a concern that its remedies would *not* be considered exclusive—reveals a worry that they *would*.[203] Consequently, the NAIC included two different types of remedy preservation clauses to make sure the UTPA would not disrupt preexisting remedies. The first clause preserved the remedies available to private citizens by declaring that none of the UTPA's administrative remedies "shall in any way release or absolve any person affected by such order from any liability under any other laws of this state."[204] States have generally adopted two versions of this clause. One tracks this language, expressly preserving pri-

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197 NAIC MODEL LAWS, REGULATIONS AND GUIDELINES 880-1, § 1 (2007).

198 Civil RICO would reach only insurance fraud involving an "enterprise" and a "pattern of racketeering activity." *See* 18 U.S.C. § 1962 (2006).

199 *See* Highmark, Inc. v. UPMC Health Plan, Inc., 276 F.3d 160, 168 (3d Cir. 2001) ("By its very nature, a company that violates the RICO statute has participated in an unfair method of competition. [The defendant's] assertion [that a RICO violation may not constitute an unfair method of competition] is akin to a claim that a conviction of murder is not necessarily a finding that such a person is guilty of a violent crime."); *see also* 18 U.S.C. § 1961 (listing conduct RICO prohibits).

200 Although states need not adopt the NAIC Model Act verbatim, it seems quite unlikely that a state UTPA would compel an insurance company to engage in a pattern of racketeering activity, or that civil RICO would compel a company to engage in unfair trade practices. Accordingly, courts rarely even need to address an argument to the contrary. *See* cases cited *supra* notes 103–04, 129–30.

201 Under this prong, civil RICO can impair a state law only if it hinders the successful execution of a state legislative policy. *See supra* note 179 and accompanying text.

202 See *supra* notes 82–87 and accompanying text.

203 *See supra* notes 82–87 and accompanying text.

204 NAIC MODEL LAWS, REGULATIONS AND GUIDELINES 880-15, § 9(D) (2007).

vate rights of action "under any other laws of this state."[205] The other, which is even broader than the first, simply states that the remedies provided in the UTPA "are in addition to any other penalty provided by law."[206] Despite this slight difference, both variations demonstrate the UTPA's remedies were meant to be complementary, not exclusive.

The second clause preserved the remedies state law provided to the state's insurance commissioner, stating that "[t]he powers vested in the commissioner by this Act shall be additional to any other powers."[207] These commissioner remedy preservation clauses are important for two reasons: First, they demonstrate that the framers of the Model Act did not intend to alter the state's preexisting remedial scheme. Second, the clause shows the remedies provided for in the UTPA do not exclude the use of others.[208] Thus, although these

205 Twenty-five out of the forty states that have adopted private preservation clauses have used this language. *See* ARK. CODE ANN. § 23-66-212(d) (2001); CAL. INS. CODE § 790.09 (West 2005); COLO. REV. STAT. § 10-3-1114 (2006); CONN. GEN. STAT. § 38a-817(d) (2010); DEL. CODE ANN. tit. 18, § 2309(e) (1999); GA. CODE ANN. § 33-39-20(d) (2000); 215 ILL. COMP. STAT. 5/428(3) (1993); IND. CODE § 27-4-1-10 (2010); IOWA CODE § 507B.8 (2007); KAN. STAT. ANN. § 40-2408(b) (2000); MASS. GEN. LAWS ch. 176D, § 8 (2005); MICH. COMP. LAWS § 500.2050 (2002); MINN. STAT. §72A.29(1) (2005); MISS. CODE ANN. § 83-5-43(4) (1999); MO. REV. STAT. § 375.944(4) (2009); NEB. REV. STAT. § 44-1530(3) (2004); N.H. REV. STAT. ANN. § 417:5-a (2009); N.J. STAT. ANN. § 17:29B-8 (West 2010); N.C. GEN. STAT. § 58-63-35(d) (2009); N.D. CENT. CODE § 26.1-04-18 (2010); OKLA. STAT. tit. 36, § 1208(D) (1999); OR. REV. STAT. § 731.252(2) (2009); R.I. GEN. LAWS § 27-29-7(d) (2008); TEX. INS. CODE ANN. § 541.451 (West 2009); VA. CODE ANN. § 38.2-221 (2007).

206 Fourteen states have adopted this type of provision. *See* ALA. CODE § 27-12-18(h) (2007); ARIZ. REV. STAT. ANN. § 20-456(C) (2010); FLA. STAT. § 626.9631 (2004); HAW. REV. STAT. § 431:13-202(b) (2008); KY. REV. STAT. ANN. 304.12-120(4) (West 2009); MD. CODE ANN., INS. § 27-103(e) (LexisNexis 2006); MONT. CODE ANN. § 33-18-1004(4) (2009); N.M. STAT. ANN. § 59A-16-27(E) (LexisNexis 2004); N.Y. INS. LAW § 2409(b) (McKinney 2006); 1 PA. CONS. STAT. § 1929 (2008); S.C. CODE ANN. § 38-2-10 (2002); S.D. CODIFIED LAWS §58-33-44 (2004); W. VA. § 33-11-6(h) (2010); WYO. STAT. ANN. § 26-13-115(d) (2006).

207 NAIC MODEL LAWS, REGULATIONS AND GUIDELINES 880-16, § 13 (2007). Twenty-eight states have adopted this type of provision. *See supra* notes 88, 90 and accompanying text.

208 *See* Weiss v. First Unum Life Ins. Co., 482 F.3d 254, 264 (3d Cir. 2007) (relying on New Jersey's commissioner preservation clause to conclude that "the New Jersey system is best seen as limited, regulating without setting forth private remedies yet not explicitly or implicitly excluding other remedies"). Although the Third Circuit did not mention it, New Jersey's UTPA also included a private preservation clause. *See* N.J. STAT. ANN. § 17:29B-8. Several other states that do not have a private preservation clause have still held their state's commissioner preservation clause to be evidence that the UTPA's remedies are not exclusive. *See, e.g.*, State Farm Fire & Cas. Co. v. Nicholson, 777 P.2d 1152, 1157–58 (Alaska 1989) ("Given the limited scope and civil penalties provided by the Alaska Insurance Code, we conclude that the legis-

clauses do not expressly preserve private rights of action, they further reveal that the NAIC designed these insurance codes to complement the state's existing regulatory scheme. Altogether, forty-four states have adopted at least one type of preservation clause, thus declaring a state policy in favor of permitting the use of remedies outside the UTPA.[209]

In the face of these preservation clauses, proponents of the "upset the balance" test still maintain the administrative remedies provided for by the insurance code represent a state policy against the use of non-UTPA remedies.[210] But if the UTPA actually represented a reasoned state policy of remedial exclusivity then these statutes read exactly backwards. Instead, the private remedy preservation clause should state that the UTPA's administrative remedies "*shall* release and absolve any person affected under any other laws of this state," and the commissioner remedy preservation clause should say "the powers vested in the commissioner by this Act shall be *exclusive* of any other powers." Given how the statutes actually read, advocates of the "upset the balance" test are left in an uncomfortable position. They must argue the use of non-UTPA remedies violates a declared state policy, even though state law expressly preserves the use of non-UTPA remedies. In other words, they must contradict the plain text of the state insurance codes to reach their desired result.[211]

In the five states that adopted only a commissioner remedy preservation clause,[212] proponents of the "upset the balance" test may

lature did not intend to alter a private party's right to seek punitive damages."); Myint v. Allstate Ins. Co., 970 S.W.2d 920, 926 (Tenn. 1998) ("[T]he mere existence of comprehensive insurance regulations does not prevent the Consumer Protection Act from also applying to the acts or practices of an insurance company. . . . We consider the Insurance Trade Practices Act, the bad faith statute, and the Consumer Protection Act as *complementary* legislation that accomplishes different purposes, and we conclude, accordingly, that the acts and practices of insurance companies are generally subject to the application of all three.").

209 *See supra* notes 88–90 and accompanying text.

210 *See, e.g.*, Brief and Supplement Appendix of Defendants-Appellees at 25, *Weiss*, 482 F.3d 254 (No. 05-5428) [hereinafter Brief of Defendants]. The defendants in that case argued that civil RICO—in the absence of a private right of action in New Jersey's UTPA—"would frustrate the declared policy of that State to limit the remedies available to aggrieved policy holders and beneficiaries." *Id.* They made this claim, despite the fact that New Jersey had adopted *both* a private and a commissioner preservation clause. *See* N.J. STAT. ANN. § 17:29B-8 (private); *id.* § 17:29B-12 (commissioner).

211 Actually, the preferred method of "upset the balance" advocates appears to involve simply ignoring the preservation clauses altogether. *See infra* notes 286–91 and accompanying text.

212 *See supra* note 90.

attempt to infer a state policy against the use of private remedies. Likewise, in the twenty-five states that adopted a private clause preserving only state remedies,[213] these advocates may attempt to infer a policy against the use of federal remedies. Such inferences are unsound. All three types[214] of preservation clauses provide strong evidence that the state legislature did not intend the UTPA's remedies to be exclusive. Although adoption of both a private and a commissioner preservation clause would increase the clarity of the state's policy, a state need only speak clearly in order to effectuate its policy, not as clearly as possible.[215]

Even the nonadoption of a remedy preservation clause cannot be taken as conclusive evidence of exclusivity. A state's failure to expressly state that a code was not exclusive does not automatically imply the opposite. Although such an omission could show a state's preference for exclusivity, it could just as easily reflect something else, such as a predisposition against redundancy.[216] For example, when faced with Nevada's UTPA in *Humana*, which did not contain a remedy preservation clause, the Supreme Court unanimously decided that the code allowed the use of other remedies.[217] In other words, the Court did not view the lack of a preservation clause as very strong evidence of exclusivity. Likewise, courts in states that have neither a preservation clause, nor a private cause of action, have reached the same conclusion.[218] Therefore, in the face of nonadoption, all a court may conclude is that further investigation into the state's code is needed.

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213 *See supra* note 205.

214 The three types of preservation clauses include: (1) the private preservation clause expressly preserving state remedies, (2) the private preservation clause expressly preserving all remedies, state or federal, and (3) the commissioner preservation clause.

215 *Cf.* United States v. Locke, 471 U.S. 84, 95 (1985) ("[T]he fact that Congress might have acted with greater clarity or foresight does not give courts a *carte blanche* to redraft statutes in an effort to achieve that which Congress is perceived to have failed to do."). Interestingly, litigants have not made these arguments in any of the circuits involved in the split. Perhaps advocates of the "upset the balance" approach are uncomfortable using statutes that *preserve* the use of non-UTPA remedies as their best evidence *against* the use of non-UTPA remedies.

216 Preservation clauses may be considered redundant because, after all, they state only what the Model Act does not accomplish. And generally, what a statute does not do may be inferred from what it does.

217 *See* Humana Inc. v. Forsyth, 525 U.S. 299, 313 (1999).

218 *See, e.g.*, Dental Care Plus, Inc. v. Sunderland, 735 N.E.2d 19, 22 (Ohio Ct. App. 1999) (holding that the Ohio UTPA did "not deprive persons affected by [deceptive] acts or practices of their right to an action for damages for defamation or interference with their business activities").

The history behind the UTPA's adoption also reveals the NAIC intended to complement the existing regulatory structure, with only one exception: the Federal Trade Commission Act (FTCA). Faced with application of the FTCA in the wake of *South-Eastern Underwriters*, the NAIC began to worry about the continued viability of state insurance law.[219] Specifically, it feared the broad language of the FTCA would so thoroughly regulate the field that it would completely preempt the states' authority.[220] Initially, to thwart this potential preemption, the NAIC tried to obtain a complete exemption from the FTCA.[221] But Congress refused to grant one. Instead, Congress placed a partial exemption into the McCarran-Ferguson Act, stipulating the FTCA would apply to the insurance industry, but only "to the extent that such business is not regulated by State law."[222] To take advantage of this rule, the NAIC developed the Model Act, using substantially similar language as the FTCA in order to invoke this exemption's reverse preemptive effects.[223] Notably, the NAIC did not intend the Model Act to preempt any other statute.

Furthermore, civil RICO does not possess either of the FTCA's features that provoked the NAIC's response. First, civil RICO poses no similar risk of preemption to state insurance codes.[224] Unlike the FTCA, which granted substantial regulatory authority to the federal government and threatened the survival of state regulation, civil RICO merely provides plaintiffs with a private cause of action. This additional tool for recovery will not keep the state UTPAs from functioning as intended—insurance commissioners will still be able to regulate what constitutes an unfair method of competition, and penalize those companies that engage in them. Confirming this lack of preemptive

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219 *See supra* note 55 and accompanying text.

220 The NAIC's explanatory memorandum submitted to Congress makes this exact argument. *See* 90 CONG. REC. A4407 ("It seems quite obvious that if the regulation of the insurance business is to continue in the several States, that any possible application of the Federal Trade Commission Act to that business should be excluded . . . . [T]he Federal Trade Commission might well preempt this field to the exclusion of the States.").

221 *See id.* at A4406. The NAIC's proposal read as follows: "Nothing contained in the Federal Trade Commission Act, as amended, or the act of June 19, 1936, known as the Robinson-Patman Antidiscrimination Act, shall apply to the business of insurance or to acts in the conduct of that business." *Id.*

222 *See* 15 U.S.C. § 1012(b) (2006).

223 *See supra* notes 78–81 and accompanying text.

224 For an explanation of why the NAIC feared application of the FTCA to the states, see 90 CONG. REC. A4407 (section 3).

potential, Congress specifically designed RICO to work in tandem with other remedies, not to supplant them.[225]

Second, civil RICO does not reduce the state's authority to adjust the balance of remedies available to plaintiffs. The NAIC only needed to address the FTCA because § 1012(b) of the McCarran-Ferguson Act exempted that law from the general "invalidate, impair, or supersede" clause.[226] Thus, without comprehensive regulation, a state would have no ability to alter the balance struck by the FTCA. Even had the state passed a law in direct conflict with the FTCA, the federal law would still have had priority. Not so with civil RICO. Because civil RICO remains subject to the "invalidate, impair, or supersede" provision, the states retain the ability to displace it simply by passing conflicting legislation. In other words, if a state believes the goals of their insurance code could be better implemented without the use of civil RICO, it can simply pass legislation stating the UTPA's remedies are exclusive. And because the use of civil RICO would then directly conflict with such a law, § 1012(b) of the McCarran-Ferguson Act would prohibit RICO's application.

Therefore, in light of this text and history, civil RICO does not impair the state insurance codes. Application of RICO's private right of action provision would only impair a state UTPA if it: (1) directly conflicts with that state's law, or (2) hinders that state's policy against the use of non-UTPA remedies for insurance fraud. But civil RICO does neither. Because RICO only sanctions conduct already prohibited by the UTPA, the two statutes do not directly conflict. And civil RICO cannot hinder a state policy against the use of non-UTPA remedies, because no such policy exists. The NAIC designed the UTPA to complement the existing remedial structure, and the states—through the adoption of remedy preservation clauses—have strengthened that design.

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225 RICO expressly states that it shall not "supersede any provision of Federal, State, or other law . . . affording civil remedies in addition to those provided for in this title." Organized Crime Control Act of 1970, Pub. L. No. 91-452, § 904(b), 84 Stat. 922, 947; *see also* United States v. Turkette, 452 U.S. 576, 586 n.9 (1981) (concluding that, in the criminal context, this provision meant the states were "free to exercise their police powers to the fullest constitutional extent"); Neibel v. Trans World Assurance Co., 108 F.3d 1123, 1130–31 (9th Cir. 1997) (applying *Turkette* conclusion to RICO's civil provision).

226 *See* 15 U.S.C. § 1012(b) (stating the FTCA "specifically relates to the business of insurance").

III. Examining the Post-*Humana* Split in the Circuits

A. *Post-*Humana *Approaches*

Despite this evidence, the circuits remain split on proper application of the McCarran-Ferguson Act to federal laws that proscribe the same conduct, but provide materially different remedies than state laws. The Third, Fourth, and Tenth Circuits hold a mere difference in remedy does not trigger preemption under the McCarran-Ferguson Act; the Sixth and Eighth Circuits claim it does.[227] In reaching these conclusions, the five post-*Humana* decisions adopt three main methods of analysis: (1) a two-prong *Humana* approach similar to the one described in Part II of this Note, (2) a seven-factor *Humana* approach, and (3) a modified "upset the balance" approach.

1. Two-Prong *Humana* Approach

In concluding civil RICO does not "invalidate, impair, or supersede" state law, both the Tenth and the Fourth Circuits implicitly tracked this Note's analysis. In *Bancoklahoma Mortgage Corp. v. Capital Title Co.*,[228] the plaintiff, Bancoklahoma (BOMC), agreed to purchase residential mortgage loans from Lenders Mortgage Services, Inc. (LMS).[229] After discovering LMS had violated its contractual obligation to provide title insurance by delegating the task to third parties, BOMC filed a civil RICO suit.[230] The district court, however, promptly granted summary judgment.[231] On appeal, the Tenth Circuit closely analyzed both *Humana*[232] and Missouri's UTPA,[233] the state law civil RICO allegedly impaired.[234] Although the UTPA did not include a private cause of action, the court relied on the existence of a private remedy preservation clause[235] in holding civil RICO: (1) advanced, rather than undermined, Missouri's insurance code, and (2) did not frustrate a state policy.[236]

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227 *See supra* note 132.

228 194 F.3d 1089 (10th Cir. 1999).

229 *See id.* at 1095.

230 *See id.* at 1095–97. The agreement at issue "prohibited LMS from delegating any of its duties without BOMC's prior written consent." *Id.* at 1095.

231 *See id.* at 1097.

232 *See id.* at 1098–99.

233 Mo. Rev. Stat. §§ 375.930–.948 (2009).

234 *See Bancoklahoma*, 194 F.3d. at 1099.

235 *See id.* ("Although Missouri does not provide a private cause of action under its Unfair Trade Practice Act, it does allow causes of action under other state law." (citing Mo. Rev. Stat. § 375.944(4) (1991)).

236 *See id.*

Likewise, in *American Chiropractic Ass'n, Inc. v. Trigon Healthcare, Inc.*,[237] the Fourth Circuit concluded civil RICO complemented Virginia's UTPA,[238] rather than impaired it.[239] In that case, the plaintiff, American Chiropractic, brought a civil RICO suit against the defendant, Trigon Healthcare, alleging Trigon had engaged in an anticompetitive conspiracy to funnel money away from chiropractors and toward medical doctors.[240] The district court, relying on prior Fourth Circuit precedent, granted Trigon's motion to dismiss.[241] But on appeal, the Fourth Circuit disregarded that precedent, recognizing *Humana* had superseded it.[242] Noting the UTPA's lack of a private right of action, the Fourth Circuit nevertheless sided with *Bancoklahoma* over the district court.[243] Because Virginia's insurance laws expressly preserved other legal remedies, the court held that (1) civil RICO furthered the state's interest in combating insurance fraud, and (2) did not frustrate any declared state policy.[244]

These decisions line up closely with this Note's proposed two-prong understanding of *Humana*. Both courts began by stating civil RICO "advanced" or "furthered" state law, rather than conflicted with it. Both courts then noted civil RICO did not "frustrate" a state policy. And given the existence of a remedy preservation clause, both courts concluded their analysis without undergoing a multifactor examination of the state code. Because the state UTPA expressly preserved other legal remedies, neither the Fourth nor the Tenth Circuit felt the need to search for the legislature's intent. Although not directly adopting this Note's test, both of these opinions implicitly endorse it.

2. Seven-Factor *Humana* Approach

In *Weiss v. First Unum Life Insurance Co.*,[245] the Third Circuit adopted a seven-factor understanding of *Humana*. In that case, the plaintiff, Weiss, applied for and received long-term disability benefits

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237 367 F.3d 212 (4th Cir. 2004).

238 VA. CODE ANN. §§ 38.2-500 to -516 (2007).

239 *See Am. Chiropractic*, 367 F.3d. at 232.

240 *See id.* at 218.

241 *See id.* at 231–32.

242 *See id.* at 231 n.21 ("Because *Ambrose* was decided before the Supreme Court's decision in *Humana, Inc. v. Forsyth*, and because the district court in *Ambrose* applied different definitions for the statutory terms than did the *Humana* Court, that decision is not helpful to our decision today." (citation omitted)).

243 *See id.*

244 *See id.* (citing VA. CODE ANN. § 38.2-221).

245 482 F.3d 254 (3d Cir. 2007).

under his employer's group insurance policy with First Unum.[246] But when First Unum discontinued Weiss's benefits after only three months,[247] Weiss brought a civil RICO suit against First Unum, alleging the discontinuance resulted from First Unum's illegal scheme to reduce expensive payouts.[248]

After concluding civil RICO claims would impair New Jersey's UTPA,[249] the district court dismissed the case.[250] On review, the Third Circuit began by examining its pre-*Humana* precedent and *Humana* itself. From this examination the court derived a nonexclusive, seven-factor balancing test including the following factors:

> (1) the availability of a private right of action under state statute; (2) the availability of a common law right of action; (3) the possibility that other state laws provided grounds for suit; (4) the availability of punitive damages; (5) the fact that the damages available (in the case of Nevada, punitive damages) could exceed the amount recoverable under RICO, even taking into account RICO's treble damages provision; (6) the absence of a position by the State as to any interest in any state policy or their administrative regime; and (7) the fact that insurers have relied on RICO to eradicate insurance fraud.[251]

After announcing this test, the court described New Jersey's UTPA, specifically noting the existence of a commissioner preservation clause.[252] Consequently, the court concluded "the New Jersey system is best seen as limited, regulating without setting forth private remedies yet not explicitly or implicitly excluding other remedies."[253]

Next, the court analyzed each of the seven factors. As a part of this analysis, the court pointed out that (1) New Jersey's UTPA did not include a private cause of action,[254] (2) its courts permitted a common law right of action for wrongly withheld benefits, (3) other state statutes authorized treble damages, and (4) punitive damages were

246 *See id.* at 256. Weiss applied for the long-term disability benefits after suffering a major heart attack. *See id.*

247 *See id.*

248 *See id.*

249 N.J. Stat. Ann. §§ 17:29B-1 to -14 (West 2010). New Jersey named its version of the UTPA, the Insurance Trade Practices Act (ITPA). *See id.* at 258 & n.4 (describing the confusion surrounding the ITPA's name). For the sake of consistency, this Note will refer to this portion of the code as New Jersey's UTPA.

250 *See id.* at 258.

251 *Id.* at 261 (footnote omitted).

252 *See id.* at 263–264.

253 *Id.*

254 The court viewed this absence "as an obstacle to Weiss's claim, but by no means an insurmountable one." *Id.*

arguably available.[255] Furthermore, the court acknowledged the State of New Jersey had not taken a position in the case, and that insurers undoubtedly relied on RICO to defend against insurance fraud.[256]

Finally the court concluded civil RICO would not impair New Jersey's UTPA under the McCarran-Ferguson Act.[257] Although the factors pointed in both directions, the court stated that nothing in the insurance code indicated its remedies were exclusive.[258] In fact, returning to the commissioner remedy preservation clause, the court held the UTPA expressly permitted additional remedies.[259]

This analytical method shares much in common with the two-prong *Humana* approach. For example, both methods give great weight to the existence of preservation clauses and avoid the field preemption methodology of the "upset the balance" proponents. Nevertheless, it differs in two key ways: First, the decision to engage in a multifactor analysis *after* concluding the UTPA expressly preserved other remedies indicates the Third Circuit does not understand its purpose. In *Humana*, the Supreme Court used the multiple factors as a method of discovering the legislature's intent *in the absence* of an express statement.[260] Consequently, when a state *has* directly stated its policy in the form of a preservation clause, the multifactor test becomes unnecessary. Second, the court's list of factors ignores several crucial indicators of intent, such as the history behind the UTPA provisions.[261] Because of these significant flaws, other courts should follow a different approach.

3. Modified "Upset the Balance" Approach

Both the Eighth and Sixth Circuits adopted a modified version of the "upset the balance" approach. In *LaBarre v. Credit Acceptance Corp.*,[262] the plaintiff, LaBarre, obtained financing for her used car purchase from the defendant, Credit Acceptance (CAC).[263] Because the installment contract permitted her to obtain insurance through

255 *See id.* at 264–67.

256 *See id.* at 267–68.

257 *See id.* at 268.

258 *See id.*

259 *See id.* Interestingly, the Third Circuit seemed to place decisive weight on the existence of the commissioner preservation clause, but failed to mention New Jersey's private preservation clause. *See* N.J. STAT. ANN. § 17:29B-8 (West 2010). This clause would seem to provide even a stronger basis for the court's conclusion.

260 *See supra* note 193.

261 *See supra* Part I.A.2.

262 175 F.3d 640 (8th Cir. 1999).

263 *See id.* at 642.

CAC, LaBarre requested they purchase limited physical damage insurance on her behalf.[264] But instead of carrying out her request, CAC simply charged LaBarre for the insurance it had already purchased to cover its losses on vehicle financing.[265] After discovering the scheme, LaBarre brought a civil RICO suit against CAC. The district court subsequently granted a motion to dismiss after concluding the McCarran-Ferguson Act barred her claims.[266]

In contrast to the Third, Fourth, and Tenth Circuits, the Eighth Circuit engaged in only cursory analysis before affirming the district court. After framing the issue, the court stated that Minnesota's UTPA[267] covered the defendant's alleged activities, and that the insurance code did not include a private cause of action.[268] Next, the court cited to its pre-*Humana* precedent, noting it had "held in *Doe* that the McCarran-Ferguson Act barred the application of RICO to an insurer which allegedly violated [Minnesota's UTPA] because 'the extraordinary remedies of RICO would frustrate, and perhaps even supplant, Minnesota's carefully developed scheme of regulation.'"[269] Then the Eighth Circuit made a passing reference to *Humana*, baldly asserting that "[t]he Supreme Court applied similar analysis in *Humana* and stated the McCarran-Ferguson Act precludes the application of RICO when RICO directly conflicts with a state's insurance statutes, frustrates any declared state policy, or interfere's [sic] with a state's administrative regime."[270] Finally, the court concluded that—guided by *Doe*—the district court correctly decided the McCarran-Ferguson Act reverse preempts civil RICO.[271] At no point in the opinion did the court mention Minnesota's private remedy preservation clause or its commissioner remedy preservation clause.[272]

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264 *See id.*

265 *See id.*

266 *See id.*

267 MINN. STAT. §§ 72A.17–.32 (2005).

268 *See LaBarre*, 175 F.3d at 643.

269 *Id.* (citing Doe v. Norwest Bank Minn., N.A., 107 F.3d 1297, 1308 (8th Cir. 1997)).

270 *Id.* (citing Humana Inc. v. Forsyth, 525 U.S. 299, 310 (1999)).

271 *See id.*

272 For Minnesota's private remedy preservation clause, see MINN. STAT. § 72A.29(1) (2005), which states, "No order of the commissioner, or order or decree of any district court, under sections 72A.17 to 72A.32 shall in any way relieve or absolve any person affected by such order or decree from any liability under any other laws of this state." For its commissioner remedy preservation clause, see MINN. STAT. § 72A.29(2) (2005), which states, "The powers vested in the commissioner by sections 72A.17 to 72A.32 shall be additional to any other powers to enforce any penalties,

In *Riverview Health Institute LLC v. Medical Mutual of Ohio*,[273] Riverview, an out-of-network health care provider, filed a civil RICO suit arguing that Medical Mutual, a health insurance company, continually "delayed, underpaid and/or denied claims submitted to it" by the plaintiffs, but nonetheless continued to do business with them.[274] The district court, however, concluded civil RICO would impair Ohio's Prompt Pay Act,[275] which also covered the defendant's alleged actions.[276]

On appeal, the Sixth Circuit began by reviewing Ohio's comprehensive insurance code in detail.[277] After briefly discussing its pre-*Humana* precedent,[278] the court then purported to apply the Third Circuit's seven-factor *Humana* test.[279] First, the court noted Ohio's Prompt Pay Act did not include a private right of action.[280] Second, in response to the argument that the Act's administrative remedies did not expressly exclude the use of others, the court asserted that the plaintiffs had no other state common law or statutory remedies available, leaving the Prompt Pay Act as the sole source of remedies.[281] In so doing, the court failed to mention the Act's private remedy preservation clause.[282] Third, the court pointed out that RICO's damages greatly exceeded Ohio's administrative remedies.[283] Fourth, the court observed the State of Ohio had filed an amicus curiae brief, arguing that RICO impaired its insurance laws.[284] In light of these factors, the

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fines, or forfeitures authorized by law with respect to the methods, acts, and practices hereby declared to be unfair or deceptive."

273 601 F.3d 505 (6th Cir. 2010).

274 *See id.* (quoting Brief of the Appellants at 7, Riverview Health Inst. LLC v. Med. Mut. of Ohio, 601 F.3d 505 (6th Cir. 2010) (No. 08-4431), 2009 WL 495873 at *10).

275 OHIO REV. CODE ANN. §§ 3901.38–.3814 (LexisNexis 2010).

276 *See Riverview*, 601 F.3d at 511–12.

277 *See id.* at 515–16.

278 *See id.* at 516–17 ("[A]pplying RICO to insurance companies would subject them to a different standard of behavior than the one envisioned by Ohio. By holding insurance companies liable under a federal law, such as RICO, when Ohio law provides for no liability, RICO would impair the regulatory framework within which Ohio expects its insurance companies to do business.").

279 *See id.* at 517.

280 *See id.*

281 *See id.*

282 *See* OHIO REV. CODE ANN. § 3901.3812(c) (LexisNexis 2010) ("The remedies imposed by the superintendent under this section are in addition to, and not in lieu of, such other remedies as providers and beneficiaries may otherwise have by law.").

283 *See id.* at 518.

284 *See id.*

Sixth Circuit held the McCarran-Ferguson Act barred the plaintiff's use of civil RICO.[285]

Essentially, both of these opinions adopted a modified version of the "upset the balance" approach. Although phrased in the language of *Humana*, both the Sixth and Eighth Circuits made two crucial changes that transformed the test back into field preemption: First, despite professing concern about the balance of remedies struck by the legislature, these courts ignored the very statutes that strike that balance: the preservation clauses. In particular, the silence in *Riverview* spoke volumes. There, the plaintiffs argued the determinative nature of Ohio's private remedy preservation clause in their opening brief[286] and at oral argument.[287] Nevertheless, the defendants,[288] the Ohio Attorney General's office,[289] and the Sixth Circuit itself,[290] all chose to avoid discussing the statute.[291]

Second, instead of applying a multifactor analysis, these courts adopted a single-factor analysis, asking only whether the state insurance code contains a private cause of action. In *LaBarre*, for example, the Eighth Circuit looked only to see whether Minnesota's UTPA pro-

285 *See id.* at 519.

286 *See* Brief of the Appellants, *supra* note 274, at 25, 2009 WL 495873, at *17.

287 *See* Petition for a Writ of Certiorari at 24, *Riverview*, 601 F.3d 505 (No. 09-091575).

288 *See Riverview*, 601 F.3d 505; Brief of Appellees, *Riverview*, 601 F.3d 505 (No. 08-4431).

289 *See* Brief of Amicus Curiae State of Ohio in Support of Appellees, *Riverview*, 601 F.3d 505 (No. 08-4431).

290 *See Riverview*, 601 F.3d 505.

291 The defendant in *Weiss* took much the same strategy. In that case, the defendant attempted to distinguish *Bancoklahoma* and *American Chiropractic*, both of which held civil RICO did not impair the state's insurance code. *See* Brief of Defendants, *supra* note 210, at 33–35. Those cases, the defendant argued, were "easily distinguished based on the nature of the remedies available to claimants under the applicable state law." *Id.* at 33. The brief then pointed to the preservation clauses in both Missouri and Virginia—the states involved in *Bancoklahoma* and *American Chiropractic*, respectively—as the statutes that compelled those different results. *Id.* at 35. Astonishingly, the defendant failed to even *mention*, much less explain, the fact that New Jersey's UTPA contained essentially the *same* provision. *Compare* MO. REV. STAT. § 375.944(4) (2010) ("No order of the director under section 375.942 or order of a court to enforce the same shall in any way relieve or absolve any person affected by such order from any liability under any other laws of this state."), *and* VA. CODE ANN. § 38.2-221 (2007) ("The power and authority conferred upon the Commission by this section shall be in addition to and not in substitution for the power and authority conferred upon the courts by general law to impose civil penalties for violations of the laws of this Commonwealth."), *with* N.J. STAT. ANN. § 17:29B-8 (West 2010) ("No order of the commissioner under this act shall in any way relieve or absolve any person affected by such order from any liability under any other law of this State.").

vided a private right of action.[292] After concluding it did not, the court reapplied its pre-*Humana* precedent, which had adopted a field preemption–like "upset the balance" test.[293] And because civil RICO provided a materially different remedy than the Minnesota insurance code, the court held the McCarran-Ferguson Act barred the plaintiff's claims.[294] In reaching this conclusion, the court did not look at any of the other *Humana* factors, such as the existence of other common law or state remedies. In fact, other than dismissively stating that *Humana* applied "similar analysis," the Eighth Circuit made no substantive mention of *Humana* at all.

Likewise, despite its ostensible adoption of the seven-factor *Humana* test, the Sixth Circuit looked only for the existence of a private right of action. After concluding one did not exist, the court resorted to simply sidestepping factors that pointed in the plaintiffs' favor. For example, the plaintiffs repeatedly demonstrated the existence of nonadministrative remedies for victims of insurance fraud, such as common law fraud, the tort of bad faith, and Ohio's RICO statute.[295] Rather than rebut this evidence, the court simply claimed the plaintiff did not possess a viable claim under these remedies.[296] But, even if true,[297] this fact suggests nothing about whether the legislature intended the *administrative remedies* to exclude the use of others. Rather—as *Humana* demonstrated—the court should have focused on whether litigants *generally* have access to nonadministrative remedies.[298] As long as one plaintiff could theoretically recover under a

292 *See* LaBarre v. Credit Acceptance Corp., 175 F.3d 640, 643 (8th Cir. 1999).

293 *See supra* note 96 and accompanying text.

294 *See LaBarre*, 175 F.3d at 643.

295 *See* Brief of the Appellants, *supra* note 274, at 27–28, 2009 WL 495873, at *18.

296 *See* Riverview Health Inst. LLC v. Med. Mut. of Ohio, 601 F.3d 505, 517 (6th Cir. 2010) ("Although Plaintiffs cite claims for the tort of bad faith on the part of an insurance company and common law fraud, *Plaintiffs* have no such viable claims." (emphasis added)); *id.* at 518 ("Thus, although Plaintiffs correctly assert that Ohio's RICO statute does not preclude recovery based on other claims of relief, such an argument is misplaced because Ohio's RICO statute would not apply to *the instant case.* (emphasis added) (citation omitted)).

297 Although detailed analysis of the plaintiff's claims are beyond the scope of this Note, the Sixth Circuit's arguments on this score do not convince. For example, the court held the plaintiff could not recovery under Ohio's RICO statute because an "alleged violation of the Prompt Pay Act does not constitute 'corrupt activity' for purposes of Ohio's RICO statute." *Id.* at 518. But the plaintiff never argued otherwise. Instead, the plaintiff claimed the defendants had committed "theft by deception," which did come within the Ohio RICO provision. *See* Petition for a Writ of Certiorari at 25, *supra* note 287. The Sixth Circuit did not address this argument.

298 *See* Humana Inc. v. Forsyth, 525 U.S. 299, 312 (1999) ("*Victims of insurance fraud* may also pursue private actions under Nevada law. . . . Moreover, the Act is not her-

different remedy, the UTPA cannot be exclusive. Thus, the Sixth Circuit's acknowledgement that other remedies could have applied—if only the plaintiff had a better case—demonstrates that Ohio's administrative remedies do *not* exclude the use of others. The court repeated this identical error with respect to damages.[299]

These two changes—ignoring remedy preservation clauses and focusing only on the absence of a private right of action—make this approach virtually identical to the "upset the balance" test. According to these courts, a state declares a policy against the use of nonadministrative remedies simply by enacting an insurance code that includes them, unless the state also expressly adopts a private right of action. Consequently, unless Congress expressly states otherwise, state insurance law will preempt *any* federal law that provides a materially different remedy. In other words, state insurance codes preempt the field against the use of any other remedies; the exact same position taken by the pre-*Humana* opinions *Kenty* and *Norwest Bank*.[300]

Two main problems exist with this view: First, the Supreme Court flatly rejected it in *Humana*. Had the Court believed the private right of action to be dispositive, it would not have continued its analysis in *Humana* after discovering Nevada's UTPA provided one. Instead, the Court clearly treated the private right of action as merely a single piece of evidence.[301] The Court similarly rejected the claim that the McCarran-Ferguson Act implemented a field preemption regime.[302] Second, given the many overlapping schemes of regulation in existence today, it seems very unlikely a legislature would actually intend for its administrative code to affect other statutes in this way.[303]

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metically sealed; it does not exclude application of other state laws, statutory or decisional." (emphasis added)).

299 *See Riverview*, 601 F.3d at 518 (concluding that the plaintiffs could not recover treble damages under state law, because it could not state claims for either state common law fraud or the tort of bad faith).

300 *See supra* notes 96–97 and accompanying text.

301 *See Humana*, 525 U.S. at 311–13.

302 *See id.* at 308 ("We reject any suggestion that Congress intended to cede the field of insurance regulation to the States, saving only instances in which Congress expressly orders otherwise.").

303 *See* Lemelledo v. Beneficial Mgmt. Corp. of Am., 696 A. 2d 546 (1997) ("In the modern administrative state, regulation is frequently complementary, overlapping, and comprehensive. Absent a nearly irreconcilable conflict, to allow one remedial statute to preempt another or to co-op a broad field of regulatory concern, simply because the two statutes regulate the same activity, would defeat the purpose giving rise to the need for regulation.").

B. *Potential Explanations for the Split*

The foregoing analysis of these post-*Humana* views also reveals that no persuasive reason for this split in the circuits exists. Most commonly, proponents of the modified "upset the balance" test claim that differences in underlying state law account for the split. Because the McCarran-Ferguson Act only applies if a federal law "invalidates, impairs, or supersedes" *state* law, the argument goes, its application will necessarily vary from state-to-state.[304] Thus, variations in state law account for any differences in the post-*Humana* split.

Although plausible, this argument quickly breaks down under examination. First, four of the five cases in the circuit split deal with their state's version of the Unfair Trade Practices Act,[305] all of which came from a common source.[306] And although not derived from the UTPA, the fifth case, *Riverview*, involved a similar provision.[307] Thus, one cannot safely presume large differences between the state laws exist.

Second, "upset the balance" advocates point to the absence of a private right of action in both *Labarre* and *Riverview* as a viable reason for distinguishing these cases from *Humana*.[308] But, as noted above, the existence of a private right of action constitutes only one piece of evidence in the Court's multifactor inquiry.[309] Consequently, this fact alone cannot justify the split. More importantly, the three circuits currently permitting the use of civil RICO in the post-*Humana* split all faced the exact same absence of a private right of action.[310] There-

304 *See, e.g.*, Respondent's Brief in Opposition to Petition for a Writ of Certiorari at 2, *Riverview*, 601 F.3d 505 (No. 09-1575) ("The circuits . . . have applied the *Humana* test to varying fact patterns under several different state law insurance regimes. . . . To the extent the ultimate outcomes differ, any such discrepancies can be traced to substantive differences in the laws of the respective States . . . ."); Brief of Defendants, *supra* note 210, at 33–34 ("The *Humana* Court did not hold that the McCarran-Ferguson Act did not preclude a RICO cause of action in all cases. . . . The Court's analysis . . . is dependent on an analysis of the underlying State law.").

305 *See* Weiss v. First Unum Life Ins. Co., 482 F.3d 254, 263 (3d Cir. 2007) (New Jersey); Am. Chiropractic Ass'n, Inc. v. Trigon Healthcare, Inc., 367 F.3d 212, 231 (4th Cir. 2004) (Virginia); Bancoklahoma Mortg. Corp. v. Capital Title Co., 194 F.3d 1089, 1099 (10th Cir. 1999) (Missouri); *LaBarre*, 175 F.3d at 643 (Missouri).

306 *See supra* notes 88–89 and accompanying text (including four states within list of those that adopted one or both of the UTPA's suggested preservation clauses).

307 *See supra* note 282.

308 *See, e.g.*, Brief of Appellees at 48, *Am. Chiropractic Ass'n*, 367 F.3d 212 (No. 03-1675).

309 *See supra* note 301 and accompanying text.

310 *See Weiss*, 482 F.3d at 262; *Am. Chiropractic Ass'n*, 367 F.3d at 232; *Bancoklahoma*, 194 F.3d at 1099.

fore, even if the absence of a private right supported distinguishing the *Humana* decision, it certainly cannot distinguish the Sixth and Eighth Circuits from the others. Advocates of the "upset the balance" test can certainly argue these cases were decided incorrectly, but they cannot deny a split exists on these grounds.

Third, the court in *Riverview* argued that civil RICO subjected people to a different standard of liability than the state administrative code.[311] But this explanation, as a reason to distinguish between the two sides of this split, simply begs the question. Under the *Humana* test, a mere difference between the federal and state statutes will not trigger application of the McCarran-Ferguson Act. Rather, that difference must either directly conflict with the state law, or hinder the successful execution of a state policy. Because RICO and the state insurance codes do not directly conflict,[312] the court must address whether the differing standards of liability will hinder a state policy. And one cannot answer this question merely by pointing back to the differing standards of liability that triggered the question in the first place.

The Ohio Attorney General's brief in *Riverview*, which claimed the state had a "declared" state policy against the use of non-UTPA remedies, suggests another possible rationale.[313] But this, too, cannot carry enough weight to trigger a different outcome. The existence of a state brief, as one of the factors analyzed by the Supreme Court in *Humana*, is relevant only when the court must engage in the multifactor approach. And in *Riverview*, the presence of an express state policy preserving private remedies made such an approach unnecessary.[314] Furthermore, the Ohio Attorney General cannot unilaterally "declare" a state policy; that power rests solely with the legislature. The Ohio Attorney General can *interpret* a preexisting state policy, but that interpretation cannot bind the court. And when the Attorney General fails to even *mention* the relevant remedy preservation clause—the legislature's *actual* declared policy—it loses much of its persuasiveness.

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311 *See* Riverview Health Inst. LLC v. Med. Mut. of Ohio, 601 F.3d 505, 516–17 (6th Cir. 2010) ("By holding insurance companies liable under a federal law, such as RICO, when Ohio law provides for no liability, RICO would impair the regulatory framework within which Ohio expects its insurance companies to do business.").

312 *See Humana,* 525 U.S. at 310.

313 *See* Brief of Amicus Curiae State of Ohio in Support of Appellees, *supra* note 289, at 5–6.

314 *See* OHIO REV. CODE ANN. § 3901.3812(C) (LexisNexis 2010).

Finally, the judicial community's well-established distaste for civil RICO suggests another possible explanation.[315] In part, this dislike may reflect a fear that adding civil RICO to other available private rights of action will cause too many lawsuits, thus driving up the cost of insurance.[316] But this argument reflects a policy judgment better reserved for the legislature. And when the legislature has expressly adopted the *opposite* policy, the courts should not come in and "correct" their judgment. Rather, the judiciary must enforce the law, even if it does not like the outcome.[317]

Conclusion

Unless corrected, the Sixth and Eighth Circuits' refusal to apply civil RICO to the insurance industry will continue to cause harm. First, policyholders will lose access to a valuable tool in the fight against insurance fraud. Although the UTPA's administrative remedies still exist, even the NAIC believes "[i]t would not be realistic to expect insurance commissioners to settle every [private] dispute.[318] Second, insurance companies will lose *their* ability to rely on civil

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315 *See* H.J. Inc. v. Nw. Bell Tel. Co., 492 U.S. 229, 251–55 (1989) (Scalia, J., concurring) (stating civil RICO is pervasively vague); Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 504 (1985) (Marshall, J., dissenting) (arguing civil RICO federalizes large portions of the state common law); David B. Sentelle, *Civil RICO: The Judges' Perspective, and Some Notes on Practice for North Carolina Lawyers*, 12 Campbell L. Rev. 145, 147 (1990) (describing judicial feelings about civil RICO as "widely, if not unanimously held, disdain"); William H. Rehnquist, *Get RICO Cases out of My Courtroom*, Wall St. J., May 19, 1989, at A14 (calling for reform of civil RICO).

316 *See, e.g.*, Brief of Defendants, *supra* note 210, at 26 ("Furthermore, sound public policy concerns justify limiting the remedies available to plaintiffs in such cases. Limiting the nature of private recoveries against insurance companies helps minimize the cost of insurance products.").

317 *See* Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723 (1975) ("We quite agree that if Congress had legislated the elements of a private cause of action for damages, the duty of the Judicial Branch would be to administer the law which Congress enacted; the Judiciary may not circumscribe a right which Congress has conferred because of any disagreement it might have with Congress about the wisdom of creating so expansive a liability."). As Justice Cardozo has said: "[A court's] duty is done when . . . [it] enforce[s] the law as it is written." Tech v. Hughes, 128 N.E. 185, 186 (N.Y. 1920).

318 *See* NAIC Brief, *supra* note 78, at 15 (noting the UTPA's drafters and state legislators who adopted it "have carefully avoided placing the commissioner in the role of protector and pursuer of the private rights of action" because of the commissioner's "heavy responsibilities); *see also* Agency Holding Corp. v. Malley-Duff & Assocs., Inc., 483 U.S. 143, 151 (1987) ("[RICO] bring[s] to bear the pressure of 'private attorneys general' on a serious national problem for which public prosecutorial resources are deemed inadequate . . . .").

RICO, which they often do.[319] Unsurprisingly, insurance fraud runs both ways and the industry may need to rely on it as well. Third—and potentially most seriously—the refusal to apply civil RICO could actually displace criminal RICO. Because the McCarran-Ferguson Act does not distinguish between civil and criminal laws, its preemption in the civil context should lead to preemption of the same laws in the criminal context.[320] Thus, neither civil nor criminal RICO will exist to deter insurance fraud.[321]

Properly understood, the McCarran-Ferguson Act triggers none of these problems. Enacted in response to the Supreme Court's decision in *South-Eastern Underwriters*, the Act represents a limited restriction on federal law, not the broad field preemption regime proponents of the "upset the balance" test continue to claim. Only when federal law directly conflicts with state law, or hinders a state legislative policy does it actually "invalidate, impair, or supersede" state law. And because the UTPA reflects a deliberate attempt to preserve plaintiffs' preexisting legal remedies, civil RICO's private right of action does no such thing.

319 *See* Humana Inc. v. Forsyth, 525 U.S. 299, 311 (1999) (noting that insurers often rely on civil RICO); NAIC Brief, *supra* note 78, at 16 (describing situations in which insurance commissioners used RICO on behalf of "insolvent insurance companies that were defrauded by those who operated them").

320 *See, e.g.*, English v. Gen. Electric Co., 496 U.S. 72, 83 (1990) (stating that acceptance of the argument that the federal government had preempted the field of nuclear safety "would require [the Court] to conclude that Congress has displaced not only state tort law . . . but also *criminal* law").

321 Currently, the U.S. Department of Justice appears unaware of this danger. *See* CRIMINAL RICO, U.S. DEP'T OF JUSTICE (5th ed. 2009) (discussing preemption and briefly stating that "RICO was designed to augment existing civil and criminal remedies, and therefore . . . is not pre-empted by other, even more specific statutes").