

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 98-1260, 98-1302, 98-1541, 98-1716 & 98-1860

UNITED STATES OF AMERICA,
Appellee/Cross-Appellant,

v.

ALLEN W. STEWART,
Appellant/Cross-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA
Crim. No. 96-583

**BRIEF OF THE NATIONAL ASSOCIATION
OF INSURANCE COMMISSIONERS
AS AMICUS CURIAE
IN SUPPORT OF APPELLEE/CROSS APPELLANT**

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STATEMENT OF JURISDICTION

Amicus Curiae adopts the Statement of Jurisdiction for this matter as presented by the Appellee/Cross-Appellant.

STATEMENT OF ISSUES

Amicus Curiae adopts the Statement of Issues for this matter as presented by the Appellee/Cross-Appellant.

STATEMENT OF FACTS

Amicus Curiae adopts the Statement of Facts for this matter as presented by the Appellee/Cross-Appellant.

STANDARD OF REVIEW

Amicus Curiae adopts the Standard of Review for this matter as presented by the Appellee/Cross-Appellant.

INTEREST OF THE NAIC

The National Association of Insurance Commissioners (NAIC) is a non-profit, unincorporated association established in 1871, whose membership consists of the principal insurance regulatory officials of the 50 States, the District of Columbia, the territories and insular possessions of the United States.

In submitting this brief, the NAIC seeks to demonstrate its interest in this proceeding and to fulfill the mission of the NAIC, as set out in its Constitution, to:

...assist state insurance regulators, individually and collectively, in serving the public interest in achieving the following fundamental insurance regulatory goals in a responsive, efficient and cost-effective manner, consistent with the wishes of its members:

1. Protect the public interest, promote competitive markets and facilitate the fair and equitable treatment of insurance consumers;
2. Promote the reliability, solvency, and financial solidity of insurance institutions; and
3. Support and improve State regulation of insurance.

The interest of the NAIC in this matter arises out of the regulatory responsibility vested in each insurance regulator (commissioner) to see that all laws respecting insurance companies and the types of policies offered for sale in his or her State are executed faithfully. The commissioners of the various States are charged with the responsibility of regulating the business of insurance within their jurisdictions pursuant to the McCarran-Ferguson Act, 15 U.S.C. § 1011, *et seq.*, and State insurance laws. The executive committee of the NAIC, at the

request of the Pennsylvania Insurance Commissioner, voted unanimously to submit this *amicus* brief.

The NAIC, on behalf of its members, sponsors activities to prevent and uncover fraud in the insurance business. It established an active Antifraud Task Force, supplies regulators with technical assistance and works with the F.B.I., U.S. Department of Labor and other federal agencies in their anti-fraud activities. In 1995, the Insurance Fraud Prevention Model Act (Fraud Act) was drafted and approved by the NAIC's members. NAIC, *Model Laws, Regulations and Guidelines*, Vol. IV, p. 680 (1995). The Fraud Act, when enacted by a jurisdiction, creates an insurance fraud unit within the jurisdiction's insurance department. Approximately 34 states have so far established such units. The NAIC and its members are very active in the prevention, detection and prosecution of insurance crimes.

The NAIC asks that this Honorable Court of Appeals affirm the decision of the District Court holding that the McCarran-Ferguson Act does not bar the federal criminal prosecution of the defendant. *United States v. Allen W. Stewart*, 955 F.Supp. 385 (E.D. Pa. 1997). The members of the NAIC believe this would be consistent with statutory and common law and is in the best interest of insurance consumers.

SUMMARY OF ARGUMENT

The members of the National Association of Insurance Commissioners believe it is vital that those who commit federal crimes not seek refuge under the McCarran-Ferguson Act simply because their victims are insurers or insureds. The members believe that the McCarran-Ferguson Act does not preempt federal criminal law and that the application of federal criminal law to insurance related crimes protects the public interest, promotes the reliability, solvency and financial solidity of insurance institutions and aids, complements and enhances the state regulation of insurance.

ARGUMENT

I. THE MCCARRAN-FERGUSON ACT DOES NOT BAR THIS PROSECUTION BECAUSE IT DOES NOT DIRECTLY CONFLICT WITH STATE REGULATION OF INSURANCE, IT DOES NOT FRUSTRATE ANY DECLARED STATE POLICY AND IT DOES NOT INTERFERE WITH ANY STATE ADMINISTRATIVE SCHEME.

The recent U.S. Supreme Court decision in *Humana v. Forsyth* has made it clear that there is no field preemption of federal civil or criminal jurisprudence in the business of insurance. *Humana v. Forsyth*, 119 S.Ct. 710, 717 (1999). The Supreme Court held that federal law is not preempted unless there is a direct conflict with a state law or regulation, or a declared state policy is frustrated or impaired. *Humana*, 119 S.Ct. at 714.

There is no evidence that the federal criminal laws challenged by Defendant make illegal practices that are permissible or encouraged by virtue of Pennsylvania law, regulation or policy. The various insurance commissioners throughout the country find it impossible to conclude that the use of the federal criminal laws challenged in this prosecution stand as any sort of obstacle to the accomplishment of the full purposes and objectives of the Commonwealth of Pennsylvania in the regulation of the insurance business. As, a result, this prosecution should not be barred by the McCarran-Ferguson Act. *Cf. Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 108, 77 L.Ed.2d 490, 508, 103 S.Ct. 2890 (1983). The Supreme Court has stated:

We hold that RICO can be applied in this case in harmony with the State's regulation. When federal law is applied in aid or enhancement of state regulation, and does not frustrate any declared state policy or disturb the State's administrative regime, the McCarran-Ferguson Act does not bar the federal action.

Humana, 119 S.Ct. at 714.

This type of preemption analysis (with the state and federal roles reversed) was also used in *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 78 L.Ed. 2d 443, 104 S.Ct. 615 (1984). In that case the Supreme Court held that:

[S]tate law can be pre-empted in either of two general ways. If Congress evidences an intent to occupy a given field, any state law falling within that field is preempted....If Congress has not entirely displaced state regulation over the matter in question, state law is still pre-empted to the extent it actually conflicts with federal law . . . or where the state laws stands as an obstacle to the accomplishment of the full purposes and objectives of Congress....

Silkwood, 464 U.S. at 248, 78 L.Ed.2d at 452.

The Federal criminal RICO (Racketeer Influenced and Corrupt Organizations Act) statutes do not upset the regulatory scheme in Pennsylvania because Pennsylvania has its own state version of criminal RICO. 18 Pa. C.S.A. § 911 (1972). As noted in *Humana*, there is no frustration of state policy when the federal law complements state law. The Commonwealth of Pennsylvania is making use of the federal civil RICO law in its federal civil action against the Defendant. *Taylor v. Stewart*, Civ. No. 96-6643 (E.D. Pa.). The Pennsylvania Insurance Commissioner asked the NAIC to file its brief as *amicus curiae* in this cause. Such

facts are at war with Defendant's position that this prosecution is incompatible with Pennsylvania law and policy.

The Commonwealth of Pennsylvania has never intended that its laws, its regulatory scheme, or any declared or undeclared policy preempt federal criminal jurisprudence. Pennsylvania has no state insurance law or regulation that expressly states that it shall supersede any and all federal laws insofar as they may now or hereafter relate to the business of insurance. This evidences an intent to not occupy the field of insurance as Congress intended to do with the Employee Retirement Income Security Act of 1974 (ERISA). *See Shaw*, 463 U.S. at 95-96, 77 L.Ed.2d at 500-501 (noting the effect of the preemptive language used in 29 U.S.C. 1144(a)). The federal criminal laws have existed for scores of years and Pennsylvania could have easily expressed its intent to limit their effect in the insurance field if it wished to attempt to do so.

It borders on the inconceivable that Congress intended to stop the federal criminal prosecution of insurance crimes when it passed the McCarran-Ferguson Act. *Accord, Humana*, 119 S.Ct. at 717. Furthermore, the Supreme Court has held that federal law which imposes greater liability than that imposed by state law is fully permissible since there was no "congressional intent to preclude federal regulation merely because the regulation imposes liability additional to, or greater than, state law." *Humana*, 119 S.Ct. at 717.

With regard to RICO the Supreme Court has stated:

RICO imposes no restrictions upon the criminal justice systems of the States. See 84 Stat 947 ('Nothing in this title shall supersede any provision of Federal, State, or other law imposing criminal penalties or affording civil remedies in addition to those provided for in this title'). Thus, under RICO, the States remain free to exercise their police powers to the fullest constitutional extent in defining and prosecuting crimes within their respective jurisdictions. That some of those crimes may also constitute predicate acts of racketeering under RICO, is no restriction on the separate administration of criminal justice by the States.

United States v. Turkette, 452 U.S. 576, 586, 69 L.Ed.2d 246, 256, 101 S.Ct. 2524 (1981) (footnote 9, quoting Pub. L. No. 91-452, § 904(a), 84 Stat. 947 (1970)).

The Seventh Circuit said the same thing over forty years ago when, in reviewing an insurance mail fraud conviction, it stated "the district court . . . did not interfere with regulation of the insurance company by the state" *United States v. Sylvanus*, 192 F.2d 96, 100 (7th Cir. 1951). This Honorable Court used the same preemption analysis in *Sabo v. Metropolitan Life Ins. Co.* when it held that the federal civil RICO provisions do not conflict with state insurance regulation. *Sabo v. Metropolitan Life Ins. Co.*, 137 F.3d 185, 194-95 (3rd Cir. 1998). Other circuits have held that federal criminal prosecutions are not barred. *E.g.*, *United States v. Cavin*, 39 F.3d 1299, 1305 (5th Cir. 1994) ("its interest in the fraud prosecution is completely compatible with the state's regulatory interests."); *United States v. Blumeyer*, 114 F.3d 758, 768 (8th Cir. 1997) ("a criminal

prosecution of an insurance company officer for fraud does not ‘invalidate, impair or supersede any law’ enacted by the state ... the prosecution ... will not disturb the MDI’s regulatory processes at all...”).

Amicus Curiae thus asserts that the case law allowing the federal prosecution of insurance fraud is uniform and overwhelming.

II. FEDERAL CRIMINAL LAW AIDS, COMPLEMENTS AND ENHANCES STATE REGULATION OF THE BUSINESS OF INSURANCE AND IS RELIED UPON BY COMMISSIONERS TO DETER CRIMINAL ACTIVITY IN THE FIELD OF INSURANCE.

The NAIC's members believe that the use of criminal RICO, mail and wire fraud statutes and the money laundering statutes by federal prosecutors in fighting insurance fraud furthers and enhances the missions and goals of the NAIC members. As stated earlier, the NAIC itself sponsors activities to prevent and uncover fraud in the insurance business. It established an active Antifraud Task Force, supplies regulators with technical assistance and works with the F.B.I., U.S. Department of Labor and other federal agencies in their anti-fraud activities. In 1995, the Insurance Fraud Prevention Model Act (Fraud Act) was drafted and approved by the NAIC. NAIC, *Model Laws, Regulations and Guidelines*, Vol. IV, p. 680 (1995). The Fraud Act, when enacted by a jurisdiction, creates an insurance fraud unit within the jurisdiction's insurance department. Approximately 34 states have so far established such units. Yet, no state has ever attempted, or even contemplated, occupying the entire field of criminal law against insurance crimes. All of this country's various insurance commissioners rely on federal statutes and federal agencies to supplement the states' insurance crime fighting duties. The inherent limited jurisdiction of any individual state and the interstate and

international nature of many criminal insurance schemes make federal prosecution appropriate in a number of cases.

RICO has historically been used to prosecute insurance fraud and has been a valuable tool in this ongoing battle. *See, e.g., Russello v. United States*, 464 U.S. 16, 78 L.Ed.2d 17, 104 S.Ct. 296 (1984), *United States v. Turkette*, 452 U.S. 576, 69 L.Ed.2d 246, 101 S.Ct. 2524 (1981). The same is true for the mail and wire fraud statutes. *See, e.g., United States v. Christopher*, 142 F.3d 46 (1st Cir. 1998); *United States v. Needle*, 72 F.3d 1104 (3rd Cir. 1995); *United States v. Cooper*, 132 F.3d 1400 (11th Cir. 1998); *United States v. Sokolow*, 91 F.3d 396 (3rd Cir. 1996); *United States v. Cavin*, 39 F.3d 1299 (5th Cir. 1994); *United States v. Cosentino*, 869 F.2d 301 (7th Cir. 1989); *United States v. Bailey*, 859 F.2d 1265 (7th Cir. 1988); *United States v. Sylvanus*, 192 F.2d 96 (7th Cir. 1951). If Defendant is successful in his argument then the resultant absence of federal criminal jurisprudence will turn the business of insurance into a magnet for criminal activity of all types imaginable.

The members of the National Association of Insurance Commissioners believe that federal criminal jurisprudence enhances and complements the state regulation of insurance and promotes every state and territorial regulatory scheme throughout the country. A former president of the NAIC and current Insurance Commissioner of North Carolina has stated:

Along with banking and securities, insurance is one of the most cash-intensive industries. Thus, it is a natural attraction for criminal fraud. Indeed, insurance is especially attractive for attempts at illicit fraudulent activity, because the premium is paid up front for a performance that may or may not occur. The nature of insurance transactions – involving agents, brokers, insurance carriers, reinsurers, and insureds – creates an environment where criminal activity that tends to involve many people working on a common plan of criminal activity or conspiracy can arise. This is the very type of crime that RICO was envisioned to combat – “white collar” crime.

Long and Wright, *Rico: Law, Practice and Issues in the Context of Insurer Insolvency*, 9 J. Ins. Reg. 344, 346 (1991).

A “direct conflict” exists between state and federal law where “it is impossible for a private party to comply with both state and federal requirements.” *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-143 (1963). It was not impossible for Defendant to comply with both state and federal criminal law, it was expected.¹ A conflict also exists where a law “stands as an obstacle to the accomplishment and execution of the full purpose and objectives of” a legislative body. *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941). This federal prosecution is not an obstacle to the regulation of insurance. The federal criminal laws at issue in this appeal improve, aid, complement and enhance state regulation of the business of insurance. Furthermore, the presence of a general regulatory

¹ Defendant in his McCarran-Ferguson preemption argument has specifically and intentionally chosen in his opening brief to make no reference to any particular Pennsylvania law or regulation which has been allegedly impaired or negated by this prosecution. Appellant’s Opening Brief, p. 82.

scheme addressing insurance “does not show that any particular state law would be invalidated, impaired, or superseded.” *Mackey v. Nationwide Ins. Co.*, 724 F.2d 419, 421 (4th Cir. 1984).

Every state prohibits fraud committed by or against insurance companies. Every state also has legislatively prescribed criminal penalties for such frauds.² There is no legal precedent for holding that a federal statute that provides criminal sanctions for misconduct in the business of insurance is preempted simply because state statutes also provide for criminal penalties for the same conduct. *Humana’s* holdings are to the contrary. *Humana*, 119 S.Ct. at 717. And indeed, with regard to RICO, Congress has stated “Nothing in this title shall supercede any provision of Federal, State or other law imposing criminal penalties or affording civil remedies in addition to those provided for in this title.” Pub. L. No. 91-452, § 904(a), 84 Stat. 947 (1970).

In *Humana*, the Supreme Court gave significant weight to the fact that the State of Nevada did not oppose the use of civil RICO, did not intervene in that action and filed no brief. *Humana*, 119 S.Ct. at 719. Likewise, in this case the Commonwealth of Pennsylvania does not oppose this prosecution in any way. The Pennsylvania Insurance Commissioner and her office have provided intensive

² *E.g.*, 215 Ill. Comp. Stat. 5/134; R.I. Gen. Laws § 27-94-1; W.Va. Code § 33-4-8 (1998); § 374.210(3), R.S.Mo. (1998); 40 PA. STAT. § 3-910 (1921).

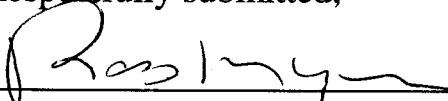
technical assistance to the United States and testified on behalf of the United States during the trial and the sentencing hearing. This is additional evidence that this prosecution does not frustrate or impair Pennsylvania's insurance regulatory scheme or policy.

Therefore, *Amicus Curiae* asserts that Defendant's argument that his entire prosecution is barred by the McCarran-Ferguson Act is wrong as a matter of federal law and state law.

CONCLUSION

In construing the preemptive effect and overall purposes of the McCarran-Ferguson Act, the members of the National Association of Insurance Commissioners, the nation's oldest association of state government officials, firmly believe that Congress never intended to bar the federal prosecution of those who commit insurance related crimes and that this intent should guide this Honorable Court. So long as there is no conflict with state insurance law and so long as no declared state policy is frustrated, federal laws of general applicability are not preempted. Such an analysis would avoid an absurd result and would be in the best interests of insurance consumers, whom the members of the NAIC are charged by both State and Federal law to protect.

Respectfully submitted,



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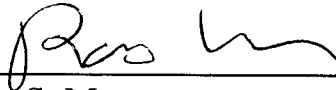
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CERTIFICATE OF COMPLIANCE WITH RULES

The undersigned hereby certifies that by separate correspondence to the Court he has filed an application for admission to the Court in accordance with 3rd Cir. LAR 46.1 (1997). The undersigned further certifies that, in accordance with FRAP 32, the attached brief uses proportionately spaced Times New Roman 14 point type and has a total word count of 4725.



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CERTIFICATE OF SERVICE


I, the undersigned, Ross S. Myers, certify that two copies of the *Brief of the National Association of Insurance Commissioners as Amicus Curiae in Support of Defendant-Appellant* were served by first-class U.S. mail, postage prepaid, to each of the following on this 10th day of February, 1999:

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