No. 98-3097

IN THE
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

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ANN M. LABARRE, individually and on behalf of all persons similarly situated,

Appellants,

vs.

CREDIT ACCEPTANCE CORPORATION, a Michigan corporation; BANKERS AND SHIPPERS INSURANCE COMPANY, a foreign corporation; and FIRST LENDERS INSURANCE SERVICES, INC., a foreign corporation,

Appellees.

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

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# AMICUS CURIAE BRIEF OF UNITED POLICYHOLDERS IN SUPPORT OF PETITION FOR REHEARING

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## INTEREST OF AMICUS CURIAE

United Policyholders is incorporated as a not-for-profit educational organization and was granted tax exempt status under §501(c)(3) of the Internal Revenue Code. United Policyholders' mission is to educate the public on insurance issues and consumer rights thereto, and to assist policyholders to secure prompt, fair, insurance settlements.

United Policyholders also files amicus curiae briefs in insurance coverage cases of public importance. United Policyholders' recently filed an amicus curiae brief in case of Humana, Inc. v. Forsyth, 119 S. Ct. 710, 719 (1999) (citing to pp. 19-23 of Brief for United Policyholders as Amicus Curiae). United Policyholders is vitally interested in combatting fraudulent and deceptive practices towards policyholders. United Policyholders is interested in the LaBarre ruling as it impermissively deprives Minnesota policyholders from recourse to the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. § 1961 et seq.

## SUMMARY OF ARGUMENT

The LaBarre Panel ruled RICO civil remedies impaired Minnesota insurance law because RICO provides materially greater remedies than that provided for under Minnesota law. The LaBarre panel's decision is contrary to recent United States Supreme Court precedent and creates a conflict with the Third Circuit Court of Appeals. Moreover, the Court's decision presents a question of exceptional

importance that was recently considered by this nation's highest court. Accordingly, rehearing *en banc* is warranted under Federal Rule of Appellate Procedure 35.

## LEGAL ARGUMENT

### I. THE PANEL'S DECISION IS CONTRARY TO HUMANA, INC. v. FORSYTH, IN WHICH THE SUPREME COURT REJECTED THE IDEA THAT FEDERAL LAW IMPAIRS STATE LAW MERELY BY PROVIDING GREATER REMEDIES THAN STATE LAW.

The LaBarre Panel's decision is directly contradictory to the United States Supreme Court's decision in Humana, Inc. v. Forsyth, 119 S. Ct. 710, 715 (1999). The Supreme Court ruled that, under the McCarran-Ferguson Act, 15 U.S.C. § 1011 et seq., the Racketeer Influenced Corrupt Organization Act ("RICO") does not impair state law merely by providing greater remedies for conduct that also violates state insurance law. See, 119 S. Ct. at 715. In direct contradiction to Humana, the LaBarre Panel ruled that RICO impaired Minnesota insurance law by providing greater remedies for the same wrong. Accordingly, the LaBarre Panel's decision conflicts with a decision of the United States Supreme Court, necessitating rehearing *en banc*. See Fed. R. App. P. 35(b)(1)(A) (authorizing rehearing *en banc* when panel decision conflicts with a decision of U.S. Supreme Court).

The LaBarre Panel ruled that the scheme to defraud alleged in the complaint as a violation of RICO is "governed by Minnesota's insurance law." Op. at 3-4. The Court ruled that Minnesota's insurance law provides only an administrative remedy, not a private right of action, for insurance company fraudulent conduct. Op. at 4. The Panel then applied its precedent in Doe stating that "the extraordinary remedies of RICO would frustrate, and perhaps even

supplant, Minnesota's carefully developed scheme of regulation." Op. at 4. Thus, the Court held that application of the RICO statute against First Lenders and Bankers would impair Minnesota insurance law.

The legal question presented to the Court in LaBarre was whether RICO, which proscribes the same conduct as state law, but which provides materially different remedies, impairs state law under the McCarran-Ferguson Act. This was the precise question considered by the United States Supreme Court In Humana, Inc. v. Forsyth. The Supreme Court addressed the question of whether "a federal law, which proscribes the same conduct as state law, but provides materially different remedies, 'impair' state law under the McCarren Ferguson Act?" 119 S. Ct. 710, 715 (1999). The Supreme Court was resolving a conflict between the Eighth and Ninth Circuits. Id., n.6. The Eighth Circuit in Doe had answered the question in the affirmative, finding impairment, while the Ninth Circuit had answered the question in the negative, finding no impairment. Compare Merchants Home Delivery Serv., Inc. v. Frank B. Hall & Co., 50 F.3d 1486, 1492 (9th Cir. 1995) with Doe v. Norwest Bank Minnesota, N.A., 107 F.3d 1297, 1307 (8th Cir. 1997). The United States Supreme Court resolved this conflict by ruling that a federal law, like RICO, does not impair state law under the McCarran-Ferguson Act merely by providing remedies different from or greater than the administrative remedies provided under state law. The Supreme Court reasoned that the language of the McCarran-Ferguson Act "belies any 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. As the LaBarre panel's entire reasoning in dismissing

LaBarre's RICO claims against First Lenders and Bankers was that RICO imposed civil liability that was additional to the administrative remedies found in §72A.20 of the Minnesota Insurance Code, it is contrary to the Supreme Court's decision in Humana.

## II. THE PANEL'S REASONING CONTAINS INCORRECT PREMISES ABOUT MINNESOTA LAW --THAT MINNESOTA LAW ALLOWS ONLY ADMINISTRATIVE PENALTIES FOR INSURANCE COMPANY FRAUD-- WHICH LED THE PANEL TO REACH TO AN ERRONEOUS DISPOSITION OF LABARRE'S RICO CLAIM.

The Panel's opinion is based upon an incorrect premise concerning Minnesota law, the same incorrect premise that underlies Doe. The Panel held "that Minnesota law permits only administrative penalties for violations of § 72A.20...." See, Op. at 5 (citing Doe, 107 F.3d at 1303-04) (emphasis added). Based upon this incorrect premise, the Panel held that the "McCarren-Ferguson Act barred LaBarre's claims against First Lenders and Bankers." Op. at 6. "Because RICO advances the State's interest in combatting insurance fraud, and does not frustrate any articulate [State] policy,...the McCarran-Ferguson Act does not block the respondent policy beneficiaries recourse to RICO...." Hamana, 1195 S. ct. at 719.

### A. Section 72A.29 of the Minnesota Insurance Code Preserves the Rights of Parties Injured by Insurance Company Fraud to Seek All Other Available Statutory or Common Law Relief for Conduct that Violates the Unfair Trade Practices Act.

Section 72A.20 simply does not provide that the only liability that can be imposed for insurance company fraudulent conduct is administrative penalties. Like the Nevada Unfair Trade Practices Act, which the Supreme Court held was not impaired by RICO, the Minnesota Act "is not hermetically sealed; it does not exclude application of other state laws, statutory or decisional." 119 S. Ct. at 718.

In a section entitled "Concurrent Remedies," the Act specifically leaves insurance companies subject to the full range of private and judicial remedies:

> Liability under other laws. No order of the commissioner, or order or decree of the 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 laws of this state.

Minn. Stat.72A.29, subd. 8. This section makes it abundantly clear that policyholder's private rights of action under other statutory or common law[1] are not affected or in conflict with the commissioner's administrative powers to address violations of §72.A20. The insurance commissioner's administrative remedies are simply not exclusive. Allowing policyholders to file actions against insurance companies under RICO is wholly consistent with the intent of Minn. Stat. § 72A.20 and § 72A.29.

**B. Minnesota Public Policy Encourages, Not Discourages, Private Legal Action to Combat Fraud, Including Insurance Fraud.**

Under Minnesota law, defrauded policyholders may bring actions based on insurance company fraud under the Consumer Fraud Act, Minn. Stat. § 325F.68-69 (1998), the Deceptive Trade Practices Act, Minn. Stat. § 325D.44-48 (1998), and

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1. Indeed, insurance company conduct that is proscribed by §72A.20 is most often resolved by private litigation and not by insurance commissioner administrative action. In holding that § 72A.20 does not itself provide for a private right of action, the Minnesota Supreme Court underscored that policyholders could file private actions against insurance companies. Morris v. Amer. Mut. Ins. Co., 386 N.W.2d 233, 237 (Minn. 1986) ("If an insurer fails to settle in good faith with a third-party claimant, the insured can bring a bad faith action against the insurer...."). Additionally, if the insurance company's wrongful actions give rise to independent tort liability, punitive damages can be awarded. Id. (citing Minnesota-Iowa Television Co. v. Watonawan T.V. Improvement Assn., 294 N.W.2d 297, 309 (Minn. 1980)).

the False Statement in Advertising Act, Minn. Stat. § 325F.67 (1998) (collectively "the Minnesota Fraud Acts").[2]

The Legislature gave the Attorney General power to enforce the Minnesota Fraud Acts. See, Minn. Stat. § 8.31. Subd. 1. In order to supplement the Attorney General's efforts to combat fraud or deceptive practices, policyholders and other consumers were given the right to bring actions under the Minnesota Fraud Acts by virtue of the private attorney general provision contained in Minn. Stat. § 8.31. Subd. 3a. (1998). This provision provides that "any person injured by a violation of any of the laws referred to in subdivision 1 may bring a civil actions and recover damages, together with costs and disbursements, including costs of investigation and reasonable attorney's fees...." See, also, Force, 4 F. Supp. 2d at 956-60; Parkhill, 995 F. Supp. at 996, 998 (same).

The Minnesota Legislature's purpose in passing the Minnesota Fraud Acts was to encourage private actions to combat fraud to supplement the State's limited resources. Church of the Nativity of Our Lord v. Watpro, Inc., 491 N.W.2d 1, 10 (Minn. 1992) (Simonett, J., concurring in part and dissenting in part) ("Because the attorney general's office does not have the resources to pursue all deceptive practices, and because an aggrieved consumer may lack the resources to sue, particularly when the claim is small and suit expense is high, the legislature has

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2. See, Force v. ITT Hartford Life and Annuity Ins. Co., 4 F. Supp. 2d 843, 856-860 (D. Minn. 1998). In Force, the court held that the Insurance Trade Practices Act does not bar claims under the Consumer Fraud, Deceptive Trade Practices, or False Statement in Advertisement Acts and that these Acts can be applied against insurance company fraudulent or deceptive practices. Id.; see, also, Parkhill v. Minnesota Mut. Life Ins. Co., 995 F. Supp. 983, (D. Minn. 1998) (same).

authorized an award of attorney fees to give the disadvantaged consumer access to the court and an incentive to assist in the curtailing of consumer fraud practices.").

Minnesota public policy both allows and encourages injured policyholders to file suits to combat insurance company fraudulent or deceptive practices. Section 72A.20 is merely a single part of an extensive statutory and common law system that addresses the problem of insurance company fraud and unfair trade practices. This system is marked by a variety of non-exclusive remedies that are available to the insurance commissioner, the attorney general, and private citizens to address the same wrong - - insurance company fraud. As the Supreme Court held in Humana with respect to the Nevada Act, there is "no frustration of state policy," where "RICO's private right of action and treble damages provision appears to complement [the State's] statutory and common-law claims for relief." See, 119 S. Ct. at 765.

Common law remedies are also available to remedy insurance company misconduct. Thus, "[i]f an insurer fails to settle in good faith with a third-party claimant, the insured can bring a bad faith action against the insurer...." Morris v. Amer. Mut. Ins. Co., 386 N.W.2d at 237. If the insurance company's wrongful actions give rise to independent tort liability, punitive damages can be awarded. Id. (citing Minnesota-Iowa Television Co. v. Watonawan T.V. Improvement Assn., 294 N.W.2d 297, 309 (Minn. 1980)).

As was the case in Humana with respect to the Nevada Act, there is "no frustration of state policy," where "RICO's private right of action and treble

## C. The Drafting History Of The Unfair Trade Practices Model Act, Upon Which The Minnesota Insurance Trade Practices Act Is Patterned, Shows That Judicial Remedies Were Contemplated.

The Minnesota Insurance Trade Practices Act is derived from the Unfair Trade Practices Model Act (the "Model Act") developed by the National Association of Insurance Commissioners ("NAIC"). Morris, 386 N.W.2d at 234-35. The history of the Model Act reveals that its drafters explicitly contemplated and relied upon the existence of other remedies for policyholders in creating and sustaining limited remedies under the Model Act. Therefore, the insurance law of Minnesota, and the insurance law of every other state that has been based on the Model Act, relies on private lawsuits, including actions under RICO, to vindicate state policies against insurance company fraud and unfair practices.

In 1979, the NAIC considered an amendment to the Model Act that would have allowed insurance commissioners to award policyholders damages for insurance company unfair trade practices, including fraud. Proposed Section 8(a)(C) provided that the insurance commissioner could, at his or her discretion, order "[s]uch other relief as is reasonable and appropriate."[3]

The insurance industry was well aware that the administrative remedies were not exclusive. In arguing that Section 8(a)(C) should not be adopted, the Insurance Advisory Committee, which was comprised of members of the insurance

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3. See, Report of the Industry Advisory Committee to the NAIC B-6 Subcommittee to Review the Model Unfair Trade Practices Act, Nov. 29, 1971, 1972-1 NAIC Proceedings 490, 198. The NAIC proceedings referenced herein can be found in the "NAIC" file of the "INSURE" library on the LEXIS system. The insurance industry also successfully opposed similar claims-handling amendments to the Minnesota Act. Morris, 386 N.W. 2d at 234, n.6.

industry, stressed that persons injured by unfair trade practices "have an adequate remedy at law." 1972-1 NAIC Proceedings at 509.[4] In advancing this argument, the Industry Advisory Committee specifically pointed to Section 9(d) of the Model Act as "mak[ing] this very clear." Id. Section 9(d) provides, in its entirety, that:

> (d) No order of the (Commissioner) under this Act or order of a court to enforce the same shall relieve or absolve any person affected by such Order from any liability under any other laws of the State.

Id. at 509.[5] Thus, the NAIC relied on other remedies provided at law in limiting the remedies provided by the Model Act. Section 9(d) of the Model Act has been adopted as part of the Minnesota Insurance Trade Practices Act. See Minn. Stat. §

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4. The insurance industry explained that policyholders already could use other remedies at law to combat unfair trade practices, like insurance company fraud, and that to allow the commissioner to also award such damages would sanction a double recovery:

> In the more serious cases, the public has the very real and effective capability of using remedies at law that now exist. This clause makes prosecutor, judge and jury out of the Commissioner and still would subject the insurer and agent to the public's statutory and common law remedies.

Statement by Robert S. Sieler, Chairman, Industry Advisory Committee, Unfair Trade Practices (B-6), Subcommittee to the NAIC Laws, Legislation and Regulation (B) Committee, 1972-1 NAIC Proceedings 443, 446 (emphasis added). Thus.

5. Like the Model Act, RICO was not intended to displace remedies under other laws:

> 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.

Pub. L. No. 91-452, § 904(b), 84 Stat. 941, 947 (1970). See also, Neibel v. Trans World Assurance Co., 108 F.3d 1123, 1130-31 (9th Cir. 1997) ("plaintiff may receive both treble damages under RICO and state law punitive damages for the same course of conduct").

72A.29. Indeed, this language, or substantially similar language, appears in virtually every state insurance code section that deals with insurance unfair trade practices.[6]

The NAIC considered another provision that would have given state insurance commissioners the power to bring class actions on behalf of consumers for violations of the Model Act. The Industry Advisory Committee strongly recommended against the inclusion of "any provision for consumer class action suits for damages resulting from violation of the Act. . . ." First Report of the Advisory Committee to the NAIC B-5 Subcommittee to Review the Model Unfair Trade Practices Act, June 16, 1971, 1971-2 NAIC Proceedings 341, 350. Among other things, the Industry Advisory Committee told the NAIC that "the common law in all states recognizes the principal of representative actions, so the consumer is not without remedy in this area...." Id.

The NAIC also considered adding a non-discrimination provision to the Model Act which would affect the underwriting practices of insurance companies. The non-discrimination provision "would have restricted the right of insurers to reject persons

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6. See Ariz. Rev. Stat. § 20-456.C (1997); Ark. Code Ann. § 23-66-212(d) (1997); Cal. [Ins.] Code § 790.09 (Deering 1997); Conn. Gen. Stat. § 38a-817(d)(1997); Del. Code Ann. tit. 18, § 2308(g) (1997); Del. Code Ann. tit. 18, § 2309(e) (1997); Haw. Rev. Stat. § 431:13-202(b) (1997); Idaho Code § 41-1319(8) (1997); 215 Ill. Comp. Stat. 5/428 (3) (1998); Ind. Code Ann. § 27-4-1-10 (1998); Iowa Code § 507B.8 (1997); Ky. Rev. Stat. Ann. § 304, 12-120(4) (Michie 1996); Mich. Comp. Laws § 500.2049 (1997); Mich. Stat. Ann. § 24.12049 (1997); Minn. Stat. § 72A.29 Subd. 1 (1997); Miss. Code Ann. § 83-5-43(4) (1997); Mont. Code Ann. § 33-18-1004(4) (1997); Neb. Rev. Stat. § 44-1530 (1997); N.J. Stat. Ann. § 17B:30-17 (1998); N.J. Stat. Ann. § 17:29B-8 (1998); N.M. Stat. Ann. § 59A-16-27.E (1998); N.C. Gen. Stat. § 58-63-35(d) (1997); N.Y. Ins. Law § 2409(b) (Consol. 1997); Okla. Stat. tit. 36, § 1208.D. (1997); Or. Rev. Stat. § 731.252(2) (1997); R.I. Gen. Laws § 27-29-7(d) (1997); Tenn. Code Ann. § 56-8-110(d) (1997); W. Va. Code § 33-11-6(c) (1998); and Wyo. Stat. Ann. § 26-13-115(d).

as risks solely because of race, color, creed, marital status, sex, national origin, residence, age, lawful occupation, failure to place collateral insurance, or previous refusal by another insurer." Remarks of Co-Chairman Durkin, Laws, Legislation & Regulation (B) Committee; Unfair Trade Practices (b)6) Subcommittee, 1972-1 NAIC Proceedings 490, 491. Among other reasons, the NAIC "decided not to incorporate such provisions because: (1) Some of these matters are presently covered in civil rights laws...." Once again, the NAIC rejected an expansion of the Model Act's protection for policyholders because other remedies were deemed sufficient to protect policyholders.

At every turn in the course of the Model Act proceedings, the insurance industry argued that comprehensive administrative remedies were unnecessary because private remedies were available under non-insurance statutory and common law. The text of the Model Act, which explicitly preserves policyholders' other remedies, supported these arguments. Accord, Minn. Stat. § 72A.29 (1998) (injured parties may pursue all other non-Insurance Code remedies). Accordingly, policyholders remain free to utilize statutory law and common law, including federal law (e.g., the federal civil rights statutes and RICO).

### D. Because Policyholders Do Not Initiate An Insurance Department Administrative Proceeding Any More Than A Victim Of Crime Initiates A Criminal Proceeding, The Concerns Identified in Doe and LaBarre Are Misplaced.

The decisions in Doe and LaBarre rest upon the idea that a policyholder will be so enticed by the remedies of RICO that he or she will forgo the administrative process and proceed to court, thus impairing the state regulatory scheme. In another opinion, this Court ruled that a prosecution pursuant to the

criminal provisions of RICO would not run this risk because policyholders do not initiate criminal action. United States v. Blumeyer, 114 F.3d 758, 768 (8th Cir. 1997) ("our particular concern in Doe - - that wronged policyholders would turn to RICO suits instead of pursuing administrative channels of relief, see id. at 1306-07-- is simply inapplicable here, for private parties are not empowered to bring criminal charges").

It is the State -- not the policyholder -- that initiates an administrative hearing under the Minnesota Insurance Trade Practices Act.[7] Because policyholders do not initiate the administrative process, policyholders do not impair the statutory scheme by litigating a RICO claim. Compare, Blumeyer, 114 F.3d. at 768 Indeed, as is shown above, the statutory scheme contemplates that policyholders will pursue their remedies privately, rather than wait to see if the insurance commissioner will initiate an administrative proceeding.

### E. RICO Actually Assists State Insurance Departments To Combat Insurance Company Fraud.

Contrary to the assumptions of the LaBarre panel, RICO actually assists, and does not impair, the states in their battles against insurance company fraud. In a brief filed with the Supreme Court in 1995, the NAIC flatly contradicted the idea that RICO impairs the enforcement of state insurance law:

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7. See Minn. Stat. § 72A.22 (whenever commissioner has reason to believe that a person is engaged in an unfair or deceptive act or practice, the commissioner issues a statement of charges and a notice of hearing); see also, Minn. Stat. § 72A.21 (commissioner has power to investigate deceptive acts and practices). In fact, violations of the Minnesota Insurance Trade Practices Act can result in criminal-type penalties. See Minn. Stat. § 72A.09 (violations of insurance law constitute misdemeanors or gross misdemeanors).

> The National Association of Insurance Commissioners ("NAIC"), whose members are the principal state insurance regulators, strenuously disagrees with the notion that RICO impairs any state's insurance laws. The NAIC urges, to the contrary, that RICO enhances the effective enforcement of those laws.

Brief of Amicus Curiae National Association of Insurance Commissioners Supporting Respondent, Prometheus Funding Corp. v. Merchants Home Delivery Serv., Inc., No. 95-409.

Indeed, insurance commissioners routinely use RICO. See, Kempe v. Monitor Intermediaries, Inc., 785 F.2d 1443 (9th Cir. 1986); Schnact v. Brown, 711 F.2d 1343 (7th Cir.), cert. denied, 464 U.S. 1002 (1983); Kaiser v. Stewart, Civil Action No. 96-6643, 1997 U.S. Dist. LEXIS 12788 (E.D. Pa. Aug. 19, 1997); Clark v. Millam, 847 F. Supp. 409 (S.D. W.Va. 1994); State of North Carolina v. Alexander & Alexander Servs., Inc., 680 F. Supp. 746 (E.D. N.C. 1988).

A recent case from the Eastern District of Pennsylvania is illustrative. See Kaiser v. Stewart, Civil Action No. 96-6643, 1997 U.S. Dist. LEXIS 12788 (E.D. Pa. Aug. 19, 1997). The Insurance Commissioner of Pennsylvania brought a civil RICO action on behalf of an insolvent insurance company. The Commissioner alleged that the defendants had taken control of the insurance company, had siphoned off assets of the company, rendering it insolvent, and then had disguised that insolvency through a pattern of fraud. The defendants argued that the McCarran-Ferguson Act barred the RICO claims. Kaiser, 1997 U.S. Dist. LEXIS 12788, at * 37. The district court rejected that argument, finding RICO to be consistent with the Pennsylvania insurance laws, regardless of the difference in remedies. Id., at * 42-44. The court came to a similar conclusion in a parallel

criminal RICO action, finding that the federal interest in protecting the public from racketeering is perfectly compatible with Pennsylvania's interest in protecting policyholders. United States v. Stewart, 955 F. Supp. 385 (E.D. Pa. 1997).

In sum, the Minnesota Act was based upon the Model Act which left policyholders free to pursue all other non-insurance Common law and statutory remedies. The Minnesota Act contains a specific provision that allows policyholders to pursue all other non-insurance remedies. Minn. Stat. § 72A.29 has acted to encourage policyholders to file such actions by passage of the Minnesota Fraud Acts and the private attorney general provision. Thus, RICO does not conflict with Minnesota's regulatory system. On the contrary, RICO complements and supports it.

## III. THE LABARRE PANEL'S DECISION CREATES A CONFLICT WITH THE THIRD CIRCUIT.

The Third Circuit has ruled, under the McCarran-Ferguson Act, that RICO does not impair Pennsylvania's insurance regulatory system, even though there is no private right of action under Pennsylvania's Unfair Insurance Practices Act ("UIPA"). See Sabo v. Metropolitan Life Ins. Co., 137 F.3d 185, 192-95 (3d Cir. 1998). The Third Circuit noted that, even though the insurance commissioner alone was empowered to enforce the UIPA, Pennsylvania courts had not barred common law suits for fraud and deceit arising out of insurance practices and had sanctioned policyholders' use of Pennsylvania's consumer protection statute to recover for insurance company fraud. Id. at 192. The Third Circuit found "no indication . . . that Pennsylvania's non-recognition of a private remedy under the UIPA represents a reasoned state policy of exclusive administrative enforcement or that the vindication

of UIPA norms should be limited or rare." Id. at 195. Allowing the RICO action, the court ruled, would not "invalidate, impair or supersede" Pennsylvania's scheme of insurance regulation. Id.

Because Pennsylvania law does not differ from Minnesota law in any material respect, the LaBarre panel's decision is directly contradictory to the Third Circuit's decision in Sabo.

## CONCLUSION

Rehearing *en banc* should be granted because the LaBarre panel's decision is contrary to a Supreme Court decision, Fed. R. App. P. 35(b)(1)(A), and creates a direct conflict with a decision of the Third Circuit, Fed. R. App. P. 35(b)(1)(B). Moreover, the LaBarre panel's decision makes several incorrect yet dispositive assumptions regarding Minnesota law in a case of exceptional importance.

Dated: June 11, 1999

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