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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

VIDA F. NEGRETE, as Conservator for
EVERETT E. OW, an individual and on
behalf of all other similarly situated
persons,

Plaintiff,

vs.

ALLIANZ LIFE INSURANCE
COMPANY OF NORTH AMERICA,

Defendant.

CAROLYN B. HEALEY, an individual,
and on behalf of all other similarly
situated persons,

vs.

ALLIANZ LIFE INSURANCE
COMPANY OF NORTH AMERICA,

Defendant.

Case No. CV 05-6838 CAS (MANx)
CV 05-8908 CAS (MANx)

**ORDER DENYING DEFENDANT'S
MOTION FOR JUDGMENT ON
THE PLEADINGS**

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1 **I. INTRODUCTION**

2 In these related class action cases, plaintiffs Vida F. Negrete (“Negrete”), as
3 conservator for Everett Ow (“Ow”), and Carolyn B. Healey (“Healey”) (collectively,
4 “plaintiffs”), on behalf of themselves and a nationwide class of an estimated 200,000
5 senior citizens, allege that defendant Allianz Life Insurance Company of North America,
6 Inc. (“Allianz”) conspired with a network of affiliated Field Marketing Organizations
7 (“FMOs”) to induce class members to purchase deferred annuities issued by Allianz by
8 means of misleading statements and omissions regarding the value of those annuities.

9 Negrete filed suit against Allianz on September 19, 2005, alleging the following
10 claims for relief: (1) violation of the Racketeer Influenced and Corrupt Organization Act,
11 18 U.S.C. § 1961, et seq. (“RICO”); (2) elder abuse under Cal. Welf. & Inst. Code §§
12 15610 et seq. (“§ 15610”); (3) unlawful, unfair and fraudulent business practices under
13 California’s Unfair Competition Law (“the UCL”), Cal. Bus. & Prof. Code §§ 17200, et
14 seq.; (4) false and misleading advertising under Cal. Bus. & Prof. Code §§ 17500, et seq.
15 (the “False Advertising Law” or “FAL”); (5) breach of fiduciary duty; (6) aiding and
16 abetting breach of fiduciary duty; and (7) unjust enrichment and imposition of
17 constructive trust. On December 22, 2005, Healey filed suit against Allianz, alleging
18 similar claims for relief. The Court ordered coordination of the two actions as related
19 cases (collectively, “Negrete”). On November 21, 2006, the Court granted plaintiffs’
20 motion for class certification as to their nationwide RICO claim, as well as a California-
21 only subclass asserting statutory violations, including the UCL. Negrete Dkt. No. 134
22 (“Class Order”).

23 On March 12, 2010, Allianz moved for summary judgment on the RICO claims of
24 certain Negrete class members which it contended were barred by the doctrine of claim
25 preclusion as a result of the final judgment entered in Allianz’s favor on January 29,
26 2010 in Mooney v. Allianz Life Ins. Co. of N. Am., No. 06-cv-0545 (D. Minn)
27 (“Mooney”). In an order issued August 18, 2010 (the “Claim Preclusion Order”), the
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1 Court denied Allianz’s motion for summary judgment and granted plaintiffs’ cross-
2 motion for partial summary judgment on Allianz’s affirmative defense of claim
3 preclusion. Claim Preclusion Order at 24.

4 On June 10, 2011, Allianz filed a renewed motion for summary judgment on the
5 RICO claims. On October 13, 2011, the Court denied the motion, finding that disputed
6 issues of material fact precluded summary judgment on the required elements of (1) a
7 RICO enterprise; (2) an injury “by reason of” the conduct constituting the alleged RICO
8 violation; and (3) a RICO conspiracy. Dkt. No. 805 (“MSJ Order No. 2”).

9 On May 30, 2012, Allianz filed a motion to decertify the nationwide class, a third
10 motion for summary judgment, and a motion for judgment on the pleadings. Dkt. Nos.
11 828–830. Plaintiffs filed their oppositions on August 14, 2012, Dkt. Nos. 849–851, and
12 defendant replied on October 15, 2012, Dkt. Nos. 885–887. In an order issued
13 December 27, 2012, the Court denied Allianz’s motion to decertify the class in full. Dkt.
14 No. 929. After considering the parties’ arguments, the Court finds and concludes as
15 follows.

16 **II. BACKGROUND**

17 Because application of the McCarran-Ferguson Act to plaintiffs’ RICO claim
18 depends upon the factual allegations that support it, the Court first addresses the
19 gravamen of plaintiffs’ claims. The facts of this case are well-known to the parties and
20 detailed in this Court’s prior orders; an overview of the pertinent facts is set forth below.
21 See, e.g., Dkt. 805 at 2–4 (“MSJ No. 2”); Dkt. No. 929 at 3–4 (“Class Decertification
22 Order”).

23 Plaintiffs contend that the evidence at trial will establish the following. See Def.’s
24 Ex. 4 (Plaintiff’s Contentions of Fact and Law). Allianz was the orchestrator of a
25 scheme to defraud elderly class members by misrepresenting the true value of its
26 deferred annuity products in its marketing materials. In particular, plaintiffs allege that
27 Allianz made three specific misrepresentations as part of a standardized marketing
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1 program: that Allianz’s annuities carried “no sales charges,” offered an “immediate
2 bonus,” and would pay “full value” if certain deferral requirements were met. For a
3 number of reasons, plaintiffs contend that these descriptions were false and misleading,
4 because Allianz annuities were in fact burdened by high sales charges; offered a bonus
5 that was illusory and recouped by Allianz over time; and did not provide the stated
6 “annuitization value,” as Allianz reduced the account values by an undisclosed haircut,
7 depending on when an individual annuitized. Plaintiffs aver that the three alleged
8 misrepresentations, made as part of Allianz’s scheme to defraud elderly purchasers, have
9 caused “direct and quantifiable injury” to the members of the class, because the Allianz
10 “annuities are necessarily worth less as a result of the undisclosed hidden charges” on
11 the date of purchase.

12 Allianz sold these annuity products through a network of Field Marketing
13 Organizations (“FMOs”), 19 of which are members of the alleged RICO enterprise at the
14 heart of this case. See MSJ No. 2 at 7. Allianz provided training opportunities, solicited
15 feedback regarding its products, set minimum production requirements, and offered
16 marketing advice and generous commissions to FMOs and their agents who sold Allianz
17 products in furtherance of its alleged scheme to defraud. These marketing tactics
18 included Allianz’s “Seminar Selling System,” a turnkey solution which was allegedly
19 designed to exploit the financial insecurity and fears of senior citizens with respect to
20 other financial investments, while presenting Allianz deferred annuities as the preferred
21 solution.

22 These FMOs and their sales agents were responsible for providing all prospective
23 purchasers with a sales brochure containing these three alleged misrepresentations of the
24 Allianz annuities, along with a Statement of Understanding (“SOU”). Upon signing the
25 SOU, annuity purchasers acknowledged that they had received and read the relevant
26 sales brochure and the sales agent countersigned, acknowledging that he or she had not
27 made any representations that diverged from the content of the brochure. Plaintiffs
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1 maintain that their annuities had measurably lower yields, higher surrender charges, lost
2 principal, and premium overcharges as a result of these three representations, causing
3 them financial harm.

4 **III. LEGAL STANDARD**

5 A motion for judgment on the pleadings brought pursuant to Fed. R. Civ. P. 12(c)
6 provides a means of disposing of cases when all material allegations of fact are admitted
7 in the pleadings and only questions of law remain. See McGann v. Ernst & Young, 102
8 F.3d 390, 392 (9th Cir. 1996). “A judgment on the pleadings is properly granted when,
9 taking all allegations in the pleading as true, the moving party is entitled to judgment as
10 a matter of law.” Id. In considering a Rule 12(c) motion, the district court must view
11 the facts presented in the pleadings and the inferences to be drawn from them in the light
12 most favorable to the nonmoving party. NL Indus. v. Kaplan, 792 F.2d 896, 898 (9th
13 Cir. 1986); In re Century 21-Re/Max Real Estate Adver. Claims Litig., 882 F. Supp. 915,
14 921 (C.D. Cal. 1994). For purposes of the motion, the moving party concedes the
15 accuracy of the factual allegations of the complaint, but does not admit other assertions
16 that constitute conclusions of law or matters that would not be admissible in evidence at
17 trial. 5C Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, FEDERAL
18 PRACTICE AND PROCEDURE § 1368 (3d ed. 2004).

19 Although Rule 12(c) contains no mention of leave to amend, “courts generally
20 have discretion in granting 12(c) motions with leave to amend, particularly in cases
21 where the motion is based on a pleading technicality.” In re Dynamic Random Access
22 Memory Antitrust Litig., 516 F. Supp. 2d 1072, 1084 (N.D. Cal. 2007).

23 **IV. ANALYSIS**

24 Allianz offers two grounds for granting judgment on the pleadings in its favor.
25 First, Allianz contends that the RICO claims of plaintiff Healey, and class members
26 residing in at least sixteen states, are barred by the McCarran-Ferguson Act, 15 U.S.C.
27 § 1011 et seq., which “reverse-preempts” federal claims that “impair” state statutes
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1 “regulating the business of insurance.” Second, Allianz argues that plaintiff Ow’s claim
2 of financial elder abuse under the California Elder Abuse and Dependent Adult Civil
3 Protection Act (“Elder Abuse Act”), Cal. Welf. & Instit. Code § 15600 *et seq.*, fails to
4 plead an essential element of his claim—that he has suffered physical harm or pain or
5 mental suffering as a result of the alleged abuse. Each argument is addressed in turn.

6 **A. Reverse-Preemption and the McCarran-Ferguson Act**

7 In pursuit of the notion that “continued regulation and taxation by the several
8 States of the business of insurance is in the public interest,” Congress enacted the
9 McCarran-Ferguson Act in 1945 to ensure that “silence on the part of the Congress shall
10 not be construed to impose any barrier to the regulation or taxation of such business by
11 the several States.” 15 U.S.C. § 1011; Humana Inc. v. Forsyth, 525 U.S. 299, 306
12 (1999). A primary motivating concern for both representatives of the insurance industry
13 and Congress in enacting the MFA “was that cooperative ratemaking efforts be exempt
14 from the antitrust laws.” Union Labor Life Ins. Co. v. Pireno, 458 U.S. 119, 129 (1982)
15 (quoting Group Life & Health Ins. Co. v. Royal Drug Co., 440 U.S. 205, 221 (1979)).

16 At issue here is section 2(b) of the Act, which provides in relevant part that:

17 No Act of Congress shall be construed to invalidate, impair, or supersede any law
18 enacted by any State for the purpose of regulating the business of insurance, or
19 which imposes a fee or tax upon such business, unless such Act specifically
20 relates to the business of insurance. . . .

21 15 U.S.C. § 1102(b). Under this section, state law preempts a federal statute if (1) “the
22 federal law does not specifically relate to insurance”; (2) the purpose of the state
23 enactment is to regulate the business of insurance; and (3) “the application of federal law
24 to the case might invalidate, impair, or supersede the state law.” Ojo v. Farmers Group,
25 Inc., 600 F.3d 1201, 1203 (9th Cir. 2010) (per curiam) (en banc).¹ As a general rule,

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27 ¹ Other than the Ojo per curiam, en banc decision, which addressed whether the
28 continue...

1 “[w]hen federal law is applied in aid or enhancement of state regulation, and does not
2 frustrate any declared state policy or disturb the State’s administrative regime, the
3 McCarran-Ferguson Act does not bar the federal action.” Humana, 525 U.S. at 303.²

4 Neither party disputes that RICO does not specifically relate to the business of
5 insurance. See Humana, 525 U.S. at 307. The question is thus whether a given state has
6 enacted a law “for the purpose of regulating” the business of insurance that would be
7 invalidated, impaired or superseded by allowing plaintiffs to pursue their RICO claims.
8 As both parties focus on the impairment prong of section two, Humana supplies the
9 controlling test: “When federal law does not directly conflict with state regulation, and
10 when application of the federal law would not frustrate any declared state policy or
11 interfere with a State’s administrative regime, the McCarran-Ferguson Act does not
12 preclude its application.” Id. at 310. In adopting this test, “the Court rejected an implicit
13 presumption against the application of federal law in insurance contexts, stating instead
14 that federal law is to be applied in an insurance context where it can be applied in
15 harmony with state law.” Dehoyos v. Allstate Corp., 345 F.3d 290, 294 (5th Cir. 2003).

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18 ¹...continue

19 federal Fair Housing Act, 42 U.S.C. §§ 3601–3619, is reverse-preempted by the Texas
20 Insurance Code, the Ninth Circuit has not addressed the import of the Supreme Court’s
21 Humana decision on the application McCarran-Ferguson Act. Prior to Humana, the Ninth
22 Circuit applied a four-factor test for preemption. See Merchants Home Delivery Serv. v.
23 Frank B. Hall & Co., 50 F.3d 1486, 1489 (9th Cir. 1995). In addition to the foregoing, this
24 test asked whether a defendant’s alleged conduct constitutes “the business of insurance.”
Id. Neither party argues that Allianz’s alleged conduct is unrelated to the business of
insurance, and therefore the remaining provisions of the McCarran-Ferguson Act must be
considered here.

25 ² The Court notes that “whether McCarran-Ferguson precludes a RICO claim is a
26 question of federal law,” In re Nat’l Western Life Ins. Deferred Annuities Litig., 467 F.
27 Supp. 2d 1071, 1079 (S.D. Cal. 2006), although resolution of this question depends on an
28 interpretation of state laws regulating the insurance industry. See also Weiss v. First Unum
Life Ins. Co., 482 F.3d 254, 263 n. 6 (3d Cir. 2007).

1 In Humana, health insurance policyholders brought claims under RICO against
2 defendant Humana, alleging that the defendant had engaged in a scheme to defraud its
3 beneficiaries. Pursuant to their contract with Humana, the policyholders bore
4 responsibility for paying only 20% of the hospital charges over a designated deductible,
5 and Humana the remaining 80%. However, because of a concealed discount Humana
6 allegedly obtained from the hospital in question, Humana paid “significantly less” than
7 its contractual share and the beneficiaries paid significantly more. Id. at 304. A state
8 investigation of the alleged scheme led to a consent decree and a civil penalty.

9 Applying the impairment test noted above, a unanimous Supreme Court held that
10 the Nevada Unfair Insurance Practices Act (“NUIPA”) would not be “impaired” by
11 allowing the policyholders to bring suit under RICO. Id. at 312. In reaching this
12 conclusion, the Court noted the various statutory and common law remedies that Nevada
13 had adopted to prohibit insurance fraud and misrepresentations. In particular, not only
14 was the Nevada Insurance Commissioner given authority to bring charges for violations
15 of the NUIPA, the NUIPA also authorizes a private right of action for violations of a
16 number of unfair insurance practices, including misrepresentations about insurance
17 policy provisions relating to coverage. Id. Nevada also permits private rights of action
18 to be brought based upon breaches of common law duties, including the covenant of
19 good faith and fair dealing, and allows punitive damages that may exceed the treble
20 damages provided for under RICO. Id. at 313. Finally, the Court noted that Nevada
21 never urged during the course of the lawsuit that application of RICO “would frustrate
22 any state policy, or interfere with the State’s administrative regime.” Id. at 313–14.
23 Accordingly, the Court held that the McCarran-Ferguson Act did not preclude the
24 plaintiffs’ suit, because RICO “advance[d] the State’s interest in combating insurance
25 fraud, and [did] not frustrate any articulated Nevada policy.” Id. at 314.³

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27 ³ Following Humana, a number of federal courts have adopted a “non-exclusive” list
28 continue...

1 F.3d 1089, 1099 (10th Cir. 1999) (holding that a RICO claim is not reverse-preempted
2 by the Missouri Unfair Trade Practice Act, despite the lack of a private right of action
3 under state law).⁴

4 The Court concludes that the better view is that articulated by the Third, Fourth,
5 and Tenth Circuits—the absence of a private right of action under state insurance law is
6 not dispositive as to whether there is reverse-preemption under the McCarran-Ferguson
7 Act. See In re Nat'l Western Life Ins. Deferred Annuities Litig., 467 F. Supp. 2d 1071,
8 1078 (S.D. Cal. 2006) (finding the same); Axiom Ins. Managers Agency, LLC v. Indem.
9 Ins. Corp., No. 11-cv-2051, 2011 WL 3876947, at *9 (N.D. Ill. Sept. 1, 2011)
10 (concluding that “unless a state’s insurance regime establishes an exclusively
11 administrative remedy, the fact that a state insurance statute does not permit a private
12 cause of action does not preclude a plaintiff from bringing an action under a federal law
13 of general applicability”). This conclusion best aligns with the Supreme Court’s holding
14 in Humana, because federal law may provide for a claim “in aid or enhancement of state
15 regulation” even in those situations where a state does not provide for a private right of
16 action. 525 U.S. at 303.⁵

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18 ⁴ See also Highmark, Inc. v. UPMC Health Plan, Inc., 276 F.3d 160, 169 (3d Cir.
19 2001) (finding no reverse-preemption of Lanham Act claims brought against an insurer
20 under Pennsylvania law); Sabo v. Metropolitan Life Ins. Co., 137 F.3d 185 (3d Cir. 1998)
21 (holding that RICO does not impair a state insurance law where private rights of action are
22 permitted under other state laws); Am. Chiropractic Ass’n v. Trigon Healthcare, Inc., 367
23 F.3d 212, 232 (4th Cir. 2004) (holding that “RICO furthers Virginia’s interest in policing
24 insurance fraud and misconduct and does not frustrate any declared state policy,” even in
25 the absence of a private right of action).

26 ⁵ This conclusion is buttressed by the fact that the Supreme Court granted certiorari
27 in Humana to consider whether “a federal law, which proscribes the same conduct as state
28 law, but provides materially different remedies, ‘impair[s]’ state law under the
McCarran-Ferguson Act.” Humana, 525 U.S. at 305. As noted, the Court answered this
question in the negative. Moreover, as discussed by the Tenth Circuit, Humana rejected

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1 Moreover, as numerous courts have noted, it is not enough simply to find that all
2 “RICO claims” are reverse-preempted by the insurance laws of a particular
3 state—Humana’s “fact-intensive interpretation of the word ‘impair’” requires a court to
4 focus on “the precise federal claims asserted.” Saunders v. Farmers Ins. Exch., 537 F.3d
5 961, 967 (8th Cir. 2008). A broadly-drafted federal statute, such as RICO, may impair
6 state insurance laws in some circumstances but not in others, depending on the “theory
7 of liability asserted and the relief sought by [the] plaintiffs.” Id.; see also AmSouth
8 Bank v. Dale, 386 F.3d 763, 781 (6th Cir. 2004) (“when assessing whether a general
9 federal statute that creates a cause of action ‘impairs’ the operation of a state law, the
10 proper inquiry is whether the particular suit being brought would impair state law”).
11 With these principles in mind, the Court turns to the individual state insurance laws at
12 issue on this motion.

13 **1. Florida**

14 Allianz argues that permitting plaintiff Healey and other members of the class
15 residing in Florida to assert RICO claims against it will impair Florida’s “comprehensive
16 scheme” for regulating the insurance industry, in addition to “displacing” Florida’s
17 administration of its laws. See Fla. Stat. § 624.602(1).⁶ Allianz reasons that the
18 combination of state insurance laws that “closely regulate” the conduct that forms the
19 basis of plaintiffs’ claims, in conjunction with the absence of a private right of action
20 under this state scheme, counsels in favor of a finding of reverse-preemption. See, e.g.,

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22 ⁵...continue

23 the “upset the balance approach” of the Fourth, Sixth and Eighth Circuits, under which the
24 provision of an additional or supplemental federal remedy could be said to “impair” the
25 operation of the state’s insurance scheme. See BancOklahoma, 194 F.3d at 1098–99
26 (discussing the circuit split prior to Humana).

27 ⁶ “Annuity contracts” are considered a form of life insurance under the Florida
28 legislative scheme, and are therefore subject to regulation under the FUITPA. See Fla.
Stat. § 624.602(1).

1 In re Managed Care Litig., 185 F. Supp. 2d 1310, 1322 (S.D. Fla. 2002). This includes
2 the remedies provided for under RICO, which Allianz argues far exceed those available
3 under any provision of FUITPA, including treble damages and costs and attorney’s fees
4 to prevailing parties. Moreover, Allianz contends, permitting the Florida members of the
5 class to bring their RICO claims would impermissibly “displace” the administration of
6 Florida’s insurance laws, which further “impairs” Florida’s administration of its laws
7 and regulations. See Doe v. Mut. of Omaha Ins. Co., 179 F.3d 557, 564 (7th Cir. 1999).
8 This includes the procedural limitations on private rights of action under Florida
9 insurance law, such as the notice requirement and safe harbor provision under section
10 624.155. Allianz also argues that Florida courts categorically forbid class certification
11 of common law fraud claims based upon individual contracts or misleading advertising.
12 See Lance v. Wade, 457 So.2d 1008, 1011 (Fla. 1984); Rollins, Inc. v. Butland, 951
13 So.2d 860, 877–78 (Fla. Dist. Ct. App. 2006).

14 Having considered the pertinent aspects of Florida law, however, the Court
15 concludes that the claims of the class members residing in Florida are not reverse-
16 preempted under the McCarran-Ferguson Act. The Florida Unfair Insurance Trade
17 Practices Act (“FUITPA”), Fla. Stat. §§ 626.951 et seq., provides a legislative scheme
18 for regulating the insurance industry. The Act prohibits a variety of “unfair methods of
19 competition and unfair or deceptive acts,” including misrepresenting or falsely
20 advertising “the benefits, advantages, conditions, or terms of any insurance policy.” Id.
21 § 626.9541(1)(a)(1). In addition, the Florida Office of Insurance Regulation (“OIR”)
22 has promulgated a number of regulations pursuant to its authority under the FUITPA.

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1 See Fla. Admin. Code r. 69B-150.101 et seq.⁷ The stated purpose of these regulations is
2 to:

3 to provide prospective purchasers with clear and unambiguous statements in the
4 advertisement of Life Insurance and Annuity Contracts, and to assure the clear,
5 truthful and adequate disclosure of the benefits, limitations and exclusions of
6 policies sold as Life Insurance and Annuity Contracts.

7 Id. r. 69B-150.101.⁸ The OIR rules prescribe particular methods for the disclosure of
8 required information, Fla. Admin. Code r. 69B-150.104, and the form and content for
9 advertisements of annuity products, mandating that any advertisement “shall be
10 sufficiently complete and clear to avoid deception or the capacity or tendency to mislead
11 or deceive,” Fla. Admin. Code r. 69B-150.105(1); see also id. (“Advertisements shall be
12 truthful and not misleading in fact or in implication”). Other regulations prohibit
13 advertisements that (by omission or misrepresentation) have a “tendency or effect of
14 misleading or deceiving. . . purchasers as to the nature or extent of any policy or contract
15 benefit payable,” or make any representation regarding the interest rate that is to be
16 earned, “unless all limitations and conditions which affect the ultimate rate of return
17 earned by the policyholder/insured/beneficiary are disclosed prominently and
18 conspicuously.” Fla. Admin. Code r. 69B-150.107(1)(a), (j). In addition to the
19 foregoing, specific provisions apply to the advertisement of “indeterminate value”
20

21 ⁷ The parties do not address the issue of whether the Court should consider a state’s
22 administrative regulations, in addition to its statutory framework, in determining whether
23 the RICO claim is reverse-preempted. However, the Court need not reach this question,
24 as the Court finds that the state’s regulations are at a minimum evidence of the state’s
policy, which is relevant to the reverse-preemption analysis under Humana.

25 ⁸ “Advertisements” for purposes of these regulations includes a “notice, circular,
26 pamphlet, letter, or poster” that is disseminated to the public, Fla. Stat. § 626.9541(1)(b),
27 but does not include “[m]aterial to be used solely for the training and education of an
28 insurer’s employees, agents, or brokers” or other internal communications not directed at
the buying public. See Fla. Admin. Code r. 69B-150.103.

1 annuity contracts.” These advertisements may not contain “rates of return or any other
2 designation of earnings performance” unless “all limitations and conditions which affect
3 the rate of return ultimately realized by the . . . annuitant are disclosed prominently [and]
4 with equal emphasis.” Fla. Admin. Code r. 69B-150.106(1); see id. (noting that
5 disclosures must include, where applicable “premium expense charges,” “administrative
6 charges,” “surrender charge[s],” and “any other provisions which affect the rate of return
7 ultimately realized”). Moreover, no agent may effectuate any insurance coverage before
8 providing “a full explanation of the coverage offered” to the purchaser. Fla. Admin.
9 Code r. 69B-150.105(6).

10 Although plaintiffs’ RICO claims are not based upon a violation of the FUITPA,
11 the Court notes that plaintiffs challenge an alleged course of conduct that is prohibited
12 by multiple provisions of FUITPA and its implementing regulations. In particular,
13 section 626.9541(1)(a)(1) of the Florida Code prohibits the very sort of
14 misrepresentation of “the benefits. . . conditions, or terms” in the advertising and
15 promotion of annuity contracts that plaintiffs challenge by way of this lawsuit. And the
16 various Florida regulations governing the sale of annuities prohibit the omission or
17 misrepresentation of material information in any advertising that has a “tendency or
18 effect” to mislead or deceive potential purchasers. See Fla. Admin. Code r. 69B-150.101
19 et seq. Therefore, as was the case in Humana, RICO complements or supplements the
20 state’s legislative scheme, and the imposition of liability under RICO would not
21 necessarily subject Allianz to conflicting standards of conduct in its sale of insurance
22 products. See Humana, 525 U.S. at 313; see also Axiom, 2011 WL 3876947, at *9
23 (finding no reverse-preemption where, *inter alia*, the defendant’s alleged actions “in
24 misrepresenting its capitalization to regulators and committing fraud to insurance rating
25 agencies would, if true, violate the Illinois statute.”); N.A.A.C.P. v. Am. Family Mut.
26 Ins. Co., 978 F.2d 287, 297 (7th Cir. 1992) (noting that “state and federal rules that are
27 substantively identical but differ in penalty do not conflict with or displace each other”).
28

1 In this fundamental sense, plaintiffs’ RICO claims do not conflict with or impair any
2 state enactment or substantive policy, but instead advance Florida’s interest in
3 combating fraud and deception in the annuities market. Cf. In re Managed Care, 150 F.
4 Supp. 2d 1330, 1339 (S.D. Fla. 2001) (noting that some of the states at issue in that
5 litigation had statutes that appeared to permit the very practices that plaintiffs challenged
6 by way of their RICO claims).

7 Moreover, the absence of a private right of action is but one factor in the Humana
8 “impairment” analysis. See, e.g., Weiss, 482 F.3d at 264 (holding that the absence of a
9 private right of action is an “obstacle” to a plaintiff’s claim, “but by no means an
10 insurmountable one”). It is true that FUITPA provides private rights of action for
11 certain violations but not others, and that none of the provisions for which a private right
12 of action are provided address the use of misleading or fraudulent advertising and sales
13 materials in the insurance industry. See Buell v. Direct Gen. Ins. Agency, Inc., 267 F.
14 App’x 907, 909 (11th Cir. 2008); Fla. Stat. § 624.155 (setting forth the specific
15 provisions of the insurance code for which a civil action may be brought against an
16 insurer); see also Fla Stat. § 626.9641 (setting forth a policyholder bill of rights,
17 including “the right to insurance advertising and other selling approaches that provide
18 accurate and balanced information on the benefits and limitations of a policy,” but
19 further stating that this section does not create a civil cause of action against an insurer).

20 Even in the absence of a statutory cause of action, however, plaintiffs would have
21 a number of potential common law claims available to them, including claims for fraud,
22 bad faith, and negligent misrepresentation.⁹ See Riverview, 601 F.3d at 517 (finding
23

24 ⁹ Allianz notes the unavailability of claims under the “Florida RICO Act,” for which
25 FUITPA violations are not listed as a predicate act, see Fla. Stat. § 895.02(1)(a), and the
26 Florida Deceptive and Unfair Trade Practices Act, which by its terms does not apply to the
27 insurance industry, see Fla. Stat. § 501.212(4); Zarrella v. Pac. Life Ins. Co., 755 F. Supp.
28 2d 1218, 1226 (S.D. Fla. 2010). In addition, it appears that parallel common law claims

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1 reverse-preemption where the “[p]laintiffs have no common law remedies available,
2 which renders Ohio’s Prompt Pay Act [p]laintiffs’ exclusive source of remedies”). The
3 FUITPA expressly preserves a plaintiff’s right to assert these parallel common law
4 causes of action against an insurer. See Fla. Stat. § 626.9631 (stating that the provisions
5 of FUITPA “are cumulative to rights under the general civil and common law, and no
6 action of the department, commission, or office shall abrogate such rights to damages or
7 other relief in any court”).¹⁰ A number of other courts, including the Supreme Court,
8 have noted the importance of these “preservation clauses” in their analysis of whether a
9 particular claim is reverse-preempted by the state’s insurance laws. See Humana, 525
10 U.S. at 312 (noting that the Nevada insurance practices act “is not hermetically sealed; it
11 does not preclude the application of other state laws, statutory or decisional”); see also
12 Weiss, 482 F.3d at 264; Am. Chiropractic, 367 F.3d at 218; BancOklahoma, 194 F.3d at
13 1099. There is no question that insureds in Florida have availed themselves of these
14 common law rights in suits against their insurers. See, e.g., Zarrella v. Pac. Life Ins. Co.,
15 755 F. Supp. 2d 1218, 1226 (S.D. Fla. 2010) (fraud claim).

16 In addition, as in Humana, plaintiffs would have the right to seek punitive
17 damages under Florida law. See Fla. Stat. § 768.72; Hialeah Automotive, LLC v.

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19 ⁹...continue

20 may not be based on an underlying violation of FUITPA, although Allianz cites scant case
21 law in support of this proposition. See Keehn v. Carolina Cas. Ins. Co., 758 F.2d 1522,
22 1524 (11th Cir. 1985) (affirming district court opinion without discussion). However, the
23 fact that remedies are not available under parallel statutory claims does not diminish the
24 fact that plaintiffs challenge alleged conduct that appears to be directly prohibited by
25 Florida law.

26 ¹⁰ Allianz notes that Florida courts have interpreted this provision to only “preserve
27 those causes of action that a party had available to him prior to the enactment of the Act.”
28 Cycle Dealers Ins., Inc. v. Bankers Ins. Co., 394 So.2d 1123, 1125 (Fla. Dist. Ct. App.
1981). However, the fact that plaintiffs may bring common law claims for the conduct at
issue in this action, regardless of the availability of the savings clause, is what supports
plaintiffs’ ability to bring their RICO claims here.

1 Basulto, 22 So.3d 586, 590 (Fla. Dist. Ct. App. 2009) (“punitive damages are available
2 in judicial proceedings where there is a fraud claim”). This mirrors the treble damages
3 that are available to prevailing plaintiffs under RICO. Thus, RICO’s treble damages
4 provision appears to complement, rather than impair, the Florida regulatory scheme for
5 insurance fraud and deceptive practices. See Humana, 525 U.S. at 313.¹¹ Allianz is also
6 unable to point to any pronouncement by the state of Florida at any stage of this
7 litigation (or other litigation) against the application of RICO to allegations such as
8 plaintiffs’ allegations here. This factor also weighs against a finding of reverse-
9 preemption.

10 Allianz relies on In re Managed Care Litig. for the proposition that the RICO
11 claims brought by Florida citizens are reverse-preempted by Florida law. In that case,
12 the district court found that the RICO claims of plaintiffs from California, New Jersey,
13 Virginia, and Florida were reverse-preempted by the McCarran-Ferguson Act.
14 However, the Court finds that this case is distinguishable on numerous grounds. First,
15 Managed Care involved an alleged scheme to defraud subscribers to managed care
16 organization (“MCO”) plan, where the plaintiffs alleged that the MCO defendants used
17 various monetary incentives to influence their doctors, misapplying the term “medical
18 necessity,” and including “gag clauses” that prohibited doctors from communicating
19 with their patients about certain proprietary information regarding the MCO operating

21 ¹¹ Allianz’s reliance on the Florida state court decisions in Lance and Rollins is
22 misplaced. Even assuming that a plaintiff’s ability to bring class actions under state
23 common law is relevant, Lance and the cases that follow it stand for the proposition that
24 “claims for fraud based on individual contracts cannot be the basis for a class action” under
25 Florida procedural law. Rollins, 951 So.2d at 877 (citing Lance, 457 So.2d at 1011).
26 Rollins distinguished cases such as Klay v. Humana, Inc., 382 F.3d 1241 (11th Cir. 2004),
27 where “because of the nature of the misrepresentations at issue in that case, circumstantial
28 evidence could be used to show that reliance was common to the whole class.” 951 So.2d
at 879. As the Court has already found, plaintiffs here could demonstrate reliance through
circumstantial evidence that is common to the class, as in Klay. As such, Lance is
distinguishable from the instant case.

1 structure. Id. at 1316–17. Unlike Allianz’s alleged conduct here, much of the
2 defendants’ alleged conduct in Managed Care may have been permissible under the
3 insurance schemes of the states at issue. See In re Managed Care, 150 F. Supp. 2d at
4 1339 (noting that “[d]efendants identify statutes from California, Florida, Oklahoma and
5 Texas which permit certain cost-containment processes by insurance companies”). This
6 apparent conflict between the requirements of the state insurance regulatory scheme and
7 the plaintiffs’ claims in Managed Care supports a much stronger inference of impairment
8 than the instant case, where plaintiffs seek to impose duties on Allianz that are analogous
9 to those contemplated by the relevant state law.

10 Second, Managed Care’s reasoning and its conclusions have been called into
11 doubt by a number of more recent cases, most prominently by decisions of the Third and
12 Fourth Circuit, which found that a plaintiff’s RICO claims were not reverse-preempted
13 by the insurance laws of New Jersey or Virginia, respectively. See Weiss, 482 F.3d at
14 269 (“we are left with the firm conviction that RICO does not and will not impair New
15 Jersey’s state insurance scheme”); Am. Chiropractic Ass’n v. Trigon Healthcare, Inc.,
16 367 F.3d 212, 232 (4th Cir. 2004) (“RICO furthers Virginia’s interest in policing
17 insurance fraud and misconduct and does not frustrate an declared state policy”); see
18 also In re Nat’l Western, 467 F. Supp. 2d at 1079 (finding no reverse-preemption under
19 California law). More fundamentally, Managed Care relied heavily on decisions such as
20 Am. Chiropractic Ass’n v. Trigon Healthcare, Inc., 151 F. Supp. 2d 723, 735 (W.D. Va.
21 2001), a decision that was vacated on appeal in relevant part by the Fourth Circuit, for
22 the proposition that the absence of a private right of action under a state insurance
23 scheme is dispositive under the McCarran-Ferguson analysis. Indeed, the Managed Care
24 court evidently placed significant weight on this factor. But because this interpretation
25 of Humana has since been rejected by nearly every court to consider the issue, the Court
26 finds that Managed Care is not persuasive here, particularly in the absence of any
27 conflict between the commands of state and federal law.

1 The unpublished decisions in Weinstein v. Zurich Kemper Life, No. 01-cv-6140,
2 2002 WL 32828648 (S.D. Fla. Mar. 15, 2002) and Braunstein v. Gen. Life Ins. Co., No.
3 01-cv-6040, 2002 WL 31777635 (S.D. Fla. Nov. 19, 2002) are also distinguishable.
4 Both of these cases involved apparently identical schemes to defraud, as the plaintiffs
5 alleged that the defendants were engaged in a “scheme of collecting life insurance
6 premium payments for periods of time during which the [d]efendants were not providing
7 insurance.” Weinstein, 2002 WL 32828648, at *1; Braunstein, 2002 WL 31777635, at
8 *1. Both courts found that this alleged conduct appears to be forbidden by the FUTPA.
9 See Fla. Stat. § 626.9541(o)(1) (prohibiting an insurer from “[k]nowingly collecting any
10 sum as a premium or charge for insurance, which is not then provided”). Unlike the
11 instant case, Florida law does provide a private right of action for violations of this
12 subsection, see Fla. Stat. § 624.155(1)(a)(1), albeit a right of action that has certain
13 accompanying procedural limitations, including a pre-suit notice requirement and a
14 prohibition on class actions, see Fla. Stat. § 624.155(3), (6). As such, both courts
15 concluded that “[t]hese limitations are the declared state policy in Florida on suing
16 insurance companies for unfair or deceptive trade practices, *of the type alleged in this*
17 *case*, pursuant to Fla. Stat. § 626.9541(1)(o).” Braunstein, 2002 WL 31777635 at *4
18 (emphasis added). However, there is no private right of action under Florida law for
19 violations of Fla. Stat. § 624.9541(1)(a) and its accompanying regulations, which
20 prohibit misrepresentations and false advertising of insurance policies, the type of unfair
21 and deceptive trade practices alleged in this case. As such, there is no “declared state
22 policy” as to the proper procedural limitations for the types of claims alleged in this
23 case, unlike the RICO claims at issue in Braunstein and Weinstein. These cases are
24 further distinguished from the instant one because these courts ignored possible common
25 law claims that a plaintiff could bring challenging the same alleged conduct, and the
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1 plaintiffs' claims in those cases sounded in breach of contract, not fraud.¹² Because even
2 the absence of a private right of action is not dispositive under Humana, the Court finds
3 that procedural limitations on any private rights of action do not necessarily counsel in
4 favor of reverse-preemption of a RICO claim, where plaintiffs' claims are premised
5 upon a materially different sort of allegedly unfair and deceptive insurance practices.¹³
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7 For all of the foregoing reasons, the Court concludes that the prosecution of RICO
8 claims on behalf of Florida class members would not impair Florida's scheme for
9 regulating insurance. The Court is of the view that the Ninth Circuit would most likely
10 follow the Third Circuit's approach in Weiss, which best conforms with the principles
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14 ¹² These courts did consider the import of the former Fla. Stat. § 624.155(7), now set
15 forth in section 624.155(8), which provides that:

16 The civil remedy specified in this section does not preempt any other remedy or
17 cause of action provided for pursuant to any other statute or pursuant to the common
18 law of this state. Any person may obtain a judgment under either the common-law
19 remedy of bad faith or this statutory remedy, but shall not be entitled to a judgment
20 under both remedies. This section shall not be construed to create a common-law
cause of action.

21 Id. Both courts determined that this section allows for other remedies under Florida
22 statutory and common law, but not under Federal law. See Braunstein, 2002 WL
23 32828648, at *5–7. Neither of these decisions discusses Fla. Stat. § 626.9631, the
preservation clause discussed previously, nor potential common law fraud claims.

24 ¹³ Moreover, Bristol Hotel Mgmt. Corp. v. Aetna Cas. & Sur. Co., 20 F. Supp. 2d
25 1345 (S.D. Fla. 1998), predates Humana and is factually distinguishable. There, the
26 plaintiffs' allegations implicated not only Florida's unfair insurance practices regulatory
27 scheme, but also its "comprehensive" workers' compensation framework. See id. at 1351.
28 As such, the court concluded that the plaintiffs' claims would impair these dual regulatory
regimes.

1 articulated by the Supreme Court in Humana.¹⁴ Nothing in the Florida regulatory
2 scheme compels the conclusion that the application of RICO here would interfere with
3 the state’s administrative regime or frustrate any declared state policy. Although
4 Florida’s regulation of the insurance industry is extensive, plaintiffs’ RICO claims
5 complement, rather than impair, the parallel regulatory scheme under Florida law, which
6 prohibits the same sort of alleged misrepresentations and omissions allegedly at issue
7 here.

8 The Court further notes that RICO “embodies federal policies of an expansive
9 nature. . .[and] [t]he need for this type of regulation was not contemplated when
10 McCarran-Ferguson was enacted.” Weiss, 482 F.3d at 268; see Sedima, S.P.R.L. v.
11 Imrex Co., Inc., 473 U.S. 479, 498 (1985) (describing RICO as “an aggressive initiative
12 to supplement old remedies”). Plaintiffs claim to have suffered injury as a result of an
13 alleged nationwide scheme to defraud seniors, carried out through a pattern or practice
14 of racketeering activity by a “Senior Annuity Enterprise” consisting of Allianz and its
15 affiliated or subsidiary Field Marketing Offices. These allegations, if proven, amount to
16 more than a mere violation of the Florida insurance statutes and regulations at issue, but
17 define an organized syndicate formed for the common purpose of defrauding seniors
18 nationwide. In this sense, RICO advances—not impairs—Florida’s interest in
19 combating insurance fraud, by providing federal remedies for a particular sort of alleged
20 conduct by an enterprise. Cf. Agency Holding Corp. v. Malley-Duff & Assoc., Inc., 483

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¹⁴ In Ojo, the Ninth Circuit certified the question of whether Texas insurance law prohibited the use of credit-score factors to the Texas Supreme Court, noting that “if Texas law prohibits the use of credit-score factors that could violate the [Fair Housing Act] on the basis of a disparate-impact theory, then the FHA would complement—rather than displace and impair—Texas law, and Ojo’s FHA disparate-impact suit would not be reverse-preempted by the MFA.” Ojo v. Farmers Group, Inc., 600 F.3d 1201, 1204 (9th Cir. 2010) (per curiam) (en banc). This reasoning supports plaintiffs’ argument that application of RICO here will complement, rather than impair, the Florida scheme for regulating insurance carriers.

1 U.S. 143, 153–154 (1987) (noting the “sui generis” nature of a RICO claim, which
2 requires a nexus to interstate commerce and “the allegation of a *pattern of*
3 racketeering”). As such, courts “should be wary of underestimating the significance of
4 these federal policies and should not go out of [their] way to find impairment of a state
5 scheme when such impairment is not clear.” Weiss, 482 F.3d at 268.

6 In sum, the important federal policies supporting the imposition of RICO liability
7 must be balanced against those supporting state autonomy in the regulation of the
8 insurance industry contemplated by the McCarran-Ferguson Act. Weighing that balance
9 here, the Court concludes that the particular RICO claims that plaintiffs seek to bring
10 here—based on fraud allegations in the sale of annuity products—will not impair
11 Florida’s legislative and administrative regulatory scheme. The McCarran-Ferguson Act
12 is not designed to “preclude federal regulation merely because the regulation imposes
13 liability additional to, or greater than, state law.” Humana, 525 U.S. at 309.

14 2. Other States

15 The Court turns next to the states of Alabama, Alaska, Arkansas, Kansas,
16 Michigan, Mississippi, New Hampshire, Oklahoma, Oregon, South Carolina, Vermont,
17 and Wisconsin. Similar to its arguments with respect to the state of Florida, Allianz
18 offers a number of reasons why RICO claims are reverse-preempted in each of the
19 foregoing states. First, Allianz argues that all of these states regulate unfair and
20 deceptive practices in the insurance industry, but none of these states provides a private
21 right of action to challenge deceptive practices. Second, Allianz contends that some of
22 these states have an administrative hearing process or vest certain enforcement powers in
23 the state’s insurance commissioner, and these administrative schemes would be impaired
24 by plaintiffs’ claims.¹⁵ Third, Allianz notes that plaintiffs in these states would be
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26 ¹⁵ This includes the states of Alaska, Kansas, New Hampshire, and Ohio. New
27 Hampshire does provide for a private right of action under its Unfair Insurance Trade
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continue...

1 unable to assert any state law statutory claims, whether under a given state’s racketeering
2 and corrupt practices statute, if a state has one, or under a general consumer protection
3 statute.

4 Having reviewed the relevant laws in these states, the Court concludes that none
5 of the RICO claims brought by residents of these states is barred by the McCarran-
6 Ferguson Act, for substantially the same reasons as those articulated with respect to the
7 state of Florida above. Like Florida, all of these states have laws and regulations that
8 prohibit unfair and deceptive practices in the insurance industry, the same conduct that
9 forms the basis of plaintiffs’ allegations in this case. See, e.g., Ala. Admin. Code r. 482-
10 1-132-.06(2) (prohibiting “misleading or deceiving. . . prospective purchasers as to the
11 nature or extent of any policy benefit payable, loss covered, [or] premium payable”);
12 Alaska Admin. Code tit. 3 § 26.755(a), (g)(3)–(4) (requiring various disclosures at the
13 time of sale, including an explanation of potential fees and any applicable bonus rate);¹⁶
14 Ark. Admin. Code 054.00.99-5 & -6 (“Advertisements shall be truthful and not
15 misleading in fact or by implication”); Kan. Stat. § 40-2404 (prohibiting the use of any
16 advertising that is misleading as to “the benefits, advantages, conditions or terms of any
17 insurance policy”); Mich. Comp. Laws § 500.2005 (prohibiting misrepresenting “the
18 terms, benefits, advantages, or conditions of an insurance policy”); Miss. Code § 83-5-
19 35 (prohibiting misrepresentations and false advertising of insurance policy contracts);
20 N.H. Rev. Stat. Ann. § 417:4 (prohibiting false or misleading representations in the

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22 ¹⁵...continue
23 Practices Law, N.H. Rev. Stat. § 417:1 et seq., but only where the Insurance Commissioner
24 finds that an insurer has violated the trade practices law. Ohio’s administrative scheme is
discussed *infra*.

25 ¹⁶ As of 2009, Alaska’s regulations also ban the use of “senior-specific certification
26 or professional designation in a manner that could mislead a purchase or prospective
27 purchaser to believe that the insurance producer has special certification or training in
28 advising or servicing seniors in the connection with the solicitation . . . or purchase of a life
insurance or annuity product. . . .” Alaska Admin Code tit. 3, § 26.825(a).

1 business of insurance); Okla. Admin. Code § 365:10-3-33 (prohibiting the omission of
2 material information or the use of “words, phrases, statements, references or illustrations
3 if such omission or such use has the capacity, tendency or effect of misleading or
4 deceiving purchasers or prospective purchasers as to the nature or extent of any policy
5 benefit payable”); Or. Rev. Stat. § 746.075 (prohibiting misrepresenting the terms of a
6 policy in the sale of insurance); S.C. Code Ann. § 38-57-40 (prohibiting
7 misrepresentations or false advertisements in the sale of insurance policies); Vt. Stat.
8 Ann. tit. 8, § 4724 (prohibiting any statement that “misrepresents or fails to adequately
9 disclose the benefits, advantages, conditions, exclusions, limitations, or terms of any
10 insurance policy”); Wisc. Stat. Ann. § 628.347 (setting forth various “suitability”
11 requirements in annuity transactions, including a requirement that a potential consumer
12 be “reasonably informed” about various policy provisions); Wisc. Admin. Code Ins.
13 § 2.16 (setting forth extensive requirements for the form and content of advertisements
14 and deceptive practices in life insurance and annuities). Accordingly, as with Florida, it
15 appears that plaintiffs’ RICO claims would not conflict with or impair any state
16 enactment or substantive policy, but instead advance these states’ respective interests in
17 combating fraud and deception in the annuities market.¹⁷ This weighs strongly against a
18 finding of reverse-preemption of plaintiffs’ RICO claims.

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21 ¹⁷ Moreover, the fact that the insurance commissioner in some of these states is
22 granted various enforcement powers to enforce these laws and regulations does not
23 demonstrate the existence of a state policy or administrative regime that would be impaired
24 by plaintiffs’ RICO claims here. Many of these laws are modeled after the Unfair Trade
25 Practices Act, crafted by the National Association of Insurance Commissioners and
26 discussed by the Supreme Court in Humana. See 525 U.S. at 311–12 (citing 4 National
27 Association of Insurance Commissioners, Model Laws, Regulations and Guidelines 880-1
28 (1995)). In this model law, section nine provides that any penalties imposed by the
insurance commissioner shall not “in any way relieve or absolve any person affected by
such order from any liability under any other laws.” This lends further support to
plaintiffs’ position that states that adopted the model law, including this or similar
provisions, did not intend to eliminate other potential claims against insurers.

1 In addition, like members of the class who purchased their annuities in Florida,
2 plaintiffs would have various common law claims available to them in all of these states,
3 including claims for fraud, bad faith, and negligent misrepresentation. And a plaintiff
4 pursuing one of these common law claims could potentially obtain punitive damages.
5 Although a plaintiff in one of these states may be unable to base a common law claim on
6 a violation of one of these states' unfair and deceptive insurance practices act, there is an
7 independent common law duty in all of these states not to commit fraudulent acts.
8 Accordingly, as discussed above with respect to Florida, the existence of these parallel
9 common law claims weighs against a finding of reverse-preemption for all of these
10 states.

11 And as with Florida, almost all of these states have a preservation provision in
12 their insurance code, which expressly preserves the rights of policyholders and insurance
13 commissioners to pursue other remedies under statutory or common law. See Ala. Code
14 § 27-12-18(h) (providing that any order of the insurance commissioner does not
15 “absolve any person affected by such order from any other liability, penalty, or forfeiture
16 under law”); Alaska Stat. § 21.36.930 (“The powers vested in the director by this chapter
17 are in addition to any other powers to enforce penalties, fines, or other forfeitures
18 authorized by law with respect to acts and practices declared in this chapter to be unfair
19 or deceptive.”); Ark. Code Ann. § 23-66-212(d) (providing that no one shall be absolved
20 of any other “liability under any laws of this state”); Kan. Stat. Ann. § 40-2408(b)
21 (same); Mich. Comp. Laws § 500.2050 (providing that the provisions of the trade
22 practices act are “in all respects cumulative of and supplemental to the insurance code
23 and all other applicable Michigan statutes or common law”); Miss. Code Ann. § 83-5-
24 43(4) (“No order of the commissioner. . . shall in any way relieve or absolve any person
25 affected by such order from any liability under any other laws of this state.”); N.H. Rev.
26 Stat. Ann. § 417:5-a (providing that the provisions of the act are “in all respects
27 cumulative of and supplemental to the insurance code and all other applicable New
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1 Hampshire statutes and common law”); Or. Rev. Stat. § 731.252 (“[n]o order of the
2 Commissioner. . . shall in any way relieve or absolve any person affected by such order
3 from liability under any other laws of this state”); S.C. Code Ann. § 38-2-10 (noting that
4 penalties for violating the insurance laws of the state are additional to, and do not
5 preclude, other proceedings); Vt. Stat. Ann. tit. 8, § 4726(c) (“powers vested in the
6 commissioner . . . shall be in addition to any other powers to enforce any penalties, fines,
7 or forfeitures authorized by law”).¹⁸

8 While some of these provisions appear to be addressed to the powers of insurance
9 commissioners to bring other enforcement proceedings, this does not end the inquiry.
10 Regardless of the precise language of a state’s preservation provision, neither party
11 contends that any of these states has created an exclusive administrative regime for the
12 regulation of unfair or deceptive practices in the insurance industry. Instead, it appears
13 that “although [a particular state] may limit certain statutory remedies for certain claims
14 under its insurance code, [each of these states] still provides for a robust policy in favor
15 of vindicating the rights of private plaintiffs damaged by an insurer’s unlawful conduct.”
16 In re Nat’l Western, 467 F. Supp. 2d at 1079. As such, the Court finds that the absence
17 of a preservation clause for Wisconsin is not dispositive of the reverse-preemption
18 question. Allianz has identified no “declared” Wisconsin policy that would be
19 frustrated, nor how the Wisconsin administrative regime would be unduly “interfere[d]”
20 with by a plaintiff’s claim under RICO. See Humana, 525 U.S. at 310; Weiss, 482 F.3d
21 at 269. Rather, as with the other states discussed thus far, the particular RICO claims
22 that plaintiffs seek to bring here would not impair any declared Wisconsin policy,
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25 ¹⁸ Allianz’s argument that the phrase “laws of this state” refers only to other state
26 laws, not federal ones, is beside the point. As noted by the Tenth Circuit in
27 BancOklahoma, the proper inquiry is whether a plaintiff may bring other causes of action
28 under state law, not whether a state expressly carves out a plaintiff’s ability to bring federal
claims. 194 F.3d at 1099.

1 because plaintiffs' claims would advance the state's interest in combating alleged
2 insurance fraud.¹⁹

3 The three remaining states at issue on this motion are Minnesota, Nebraska, and
4 Ohio. As to the states of Minnesota and Nebraska, Allianz contends that the Eighth
5 Circuit's decision in LaBarre controls this case. In LaBarre, the plaintiff alleged that she
6 purchased a used car pursuant to a retail installment contract, where the purchase was
7 assigned to one defendant, CAC. "[T]he contract specifically required the purchaser to
8 maintain insurance on the vehicle against property damage until the loan was repaid in
9 full." LaBarre v. Credit Acceptance Corp., 11 F. Supp. 2d 1071, 1073 (D. Minn.
10 1998).²⁰ To fulfill this requirement, a purchaser could either obtain this insurance on her
11 own, or instead from CAC as part of the financing package. Id. The plaintiff opted to
12 purchase the required limited physical damage (LPD) insurance through CAC, which in
13 turn had contracted with two insurers, Bankers and First Lenders, for a vendor single
14 interest (VSI) insurance policy covering losses in any of CAC's financed vehicles.
15 Rather than separately obtaining LPD insurance, therefore, CAC "simply billed [the

17 ¹⁹ Allianz's citation to Pearson v. Provident Life and Acc. Ins. Co., 834 F. Supp. 2d
18 1199 (D. Or. 2004), is unpersuasive. The plaintiff in Pearson brought a number of claims
19 for relief, including RICO, based on a denial of his disability claim by the defendant
20 insurer. Id. at 1201–02. Unlike plaintiffs here, the district court found that the plaintiff's
21 allegations essentially amounted to a breach of contract claim related to the denial of
22 benefits under the terms of his policy. The court concluded that plaintiff had no common
23 law claims for fraud or bad faith against his insurer, and found that allowing him to pursue
24 his RICO claim would impair the state's legislative scheme for regulating insurance, as the
25 plaintiff's claims may have conflicted substantively with the relevant provisions of Oregon
26 law. Id. at 1204–05. These factual allegations are markedly different from plaintiffs'
27 allegations here, as discussed throughout this order. Accordingly, the Court finds that
28 Pearson does not resolve whether the particular RICO claims plaintiffs seek to bring here
are reverse-preempted by Oregon law.

²⁰ As this case was decided at the motion to dismiss stage, the Court adopts in part
the summary of plaintiff's allegations contained in the district court's order that was
affirmed in relevant part on appeal.

1 plaintiff] for its VSI insurance coverage on [her] car.” LaBarre, 175 F.3d at 642. The
2 installment contract expressly advised consumers that “LPD Insurance . . . is primarily
3 designed to fulfill the insurance requirement in your contract and to protect CAC.” 11 F.
4 Supp. 2d at 1074. In support of her RICO claim, the plaintiff alleged that the defendants
5 engaged in a scheme to defraud by unlawfully requiring consumers “to secure limited
6 property damage insurance.” Id. The plaintiff further alleged that the defendants
7 defrauded purchasers by obtaining VSI insurance for CAC, rather than the LPD
8 insurance that purchasers had contracted for. 175 F.3d at 642. Notably, the plaintiff did
9 not bring any claims sounding in fraud other than her RICO claim, asserting only claims
10 for interference with contract by all the defendants; breach of contract by CAC;
11 violations of the Minnesota Motor Vehicle Retail Installment Sales Act (“MVRISA”) by
12 CAC; and breach of fiduciary duty by CAC. 11 F. Supp. 2d at 1074.

13 The Eighth Circuit, agreeing with the Minnesota district court below, held that the
14 plaintiff’s RICO claim against the two insurers was reverse-preempted by the McCarran-
15 Ferguson Act. The court, relying largely on its decision in Doe that predated the
16 Supreme Court’s decision in Humana, concluded that the alleged “activities of [the
17 insurers] in scheming to sell [the plaintiff] higher-priced VSI insurance rather than LPD
18 insurance are governed by Minnesota’s insurance law.” Id. at 643 (citing Minn. Stat.
19 § 72A.20, the Minnesota Unfair Trade Practices Act (“MUTPA”). Because Minnesota
20 law “permits only administrative recourse for violations of § 72A.20,” the court found
21 that the application of RICO against the insurer-defendants would impair Minnesota’s
22 scheme for regulating insurance. Id. (citing Doe v. Norwest Bank Minnesota, N.A., 107
23 F.3d 1297, 1303–04 (8th Cir. 1997)). The court did not address whether the plaintiff
24 would have any common law claims available to her against the insurers, or any claims
25 under the Minnesota Prevention of Consumer Fraud Act (“MPCFA”), Minn. Stat.
26 §§ 325F.68–.70, which provides for private rights of action to enforce its provisions.
27 See Mooney v. Allianz Life Ins. Co. of North America, No. 06-cv-545, 2007 WL
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1 128841 (D. Minn. Jan. 12, 2007) (asserting claims against Allianz under Minnesota law,
2 including the MPCFA, on behalf of a class of annuities purchasers).²¹ Both the Eighth
3 Circuit and the district court appeared to conclude that plaintiff would have no claim
4 available to her under any Minnesota law against the insurers, statutory or otherwise.
5 See 11 F. Supp. 2d at 1075 (stating that if plaintiff has such a claim, “it is covered by
6 Minnesota’s comprehensive insurance regulatory scheme set forth in the [MUTPA]).²²
7 The district court thus dismissed all of the plaintiff’s other claims against the insurers for
8 failure to state a claim, and the Eighth Circuit affirmed this dismissal on appeal. 175
9 F.3d at 644.²³

10 Notwithstanding LaBarre, this Court is of the view that its analysis set forth above
11 for the other states at issue applies equally to the question of reverse-preemption under
12 Minnesota and Nebraska law, and accordingly, the Court concludes that the RICO
13 claims of plaintiffs who purchased their annuities in these states are not reverse-
14 preempted. Unlike the plaintiff’s RICO claims in LaBarre, for which there was
15 apparently no cause of action available under Minnesota law, plaintiffs here would
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17 ²¹ In particular, Minnesota Statute section 8.31, subdivision 3a, provides that “any
18 person injured by a violation of any of the laws referred to in subdivision 1 may bring a
19 civil action and recover damages, together with costs and disbursements.” One of the laws
20 referenced in “subdivision 1” is “the Prevention of Consumer Fraud Act (sections 325F.68
21 to 325F.70).” Section 325F.69, in turn, prohibits “the act, use or employment by any
22 person of any fraud, false pretense, false promise, misrepresentation, misleading statement
or deceptive practice, with the intent that others rely thereon in connection with the sale of
any merchandise”

23 ²² See also id. at 1073 (expressing the court’s view that “[t]he plaintiff has decided
24 that the defendants have violated various laws”).

25 ²³ The Eighth Circuit did find, however, that the plaintiff’s RICO claim against CAC,
26 a financial services company, could proceed, holding that “CAC’s alleged activities are
27 not governed by Minnesota’s insurance statutes and do not involve the business of
28 insurance within the meaning of the McCarran-Ferguson Act.” 175 F.3d at 643 (citations
omitted).

1 potentially have a private right of action under the MPCFA, as shown by the plaintiffs’
2 claims in the Mooney litigation. Moreover, as with the other states at issue, plaintiffs
3 could bring common law fraud claims against Allianz centered around the same
4 allegations that comprise their RICO claims. Cf. Saunders v. Farmers Ins. Exch., 537
5 F.3d 961, 968 (8th Cir. 2008) (finding reverse-preemption where the “right not to pay
6 ‘unfairly discriminatory’ insurance rates is solely a creature of the insurance statutes”).
7 Thus the fact that there is no private right of action for violations of Minn. Stat.
8 § 72A.20 is not dispositive here, where plaintiffs would have numerous other private
9 rights of action available to them under Minnesota law. For these reasons, plaintiffs’
10 RICO claims—unlike those asserted in LaBarre—would not “impair” the Minnesota
11 scheme for regulating insurance.

12 Similarly, Nebraska has adopted the Nebraska Consumer Protection Act
13 (“NCPA”), which provides in relevant part that “[u]nfair methods of competition and
14 unfair or deceptive acts or practices in the conduct of any trade or commerce” are
15 unlawful. Neb. Rev. Stat. Ann. § 59-1602. A private right of action for violations of the
16 NCPA is provided in section 59-1609. Therefore, although the Nebraska Unfair
17 Insurance Trade Practices Act, Neb. Rev. Stat. Ann. §§ 44-1521 to 44-1535, does not
18 contain a private right of action, plaintiffs here presumably have a parallel statutory right
19 of action available to them under the NCPA, in addition to common law claims for
20 fraud.²⁴ Accordingly, the Court finds that as with the other states addressed in this
21 motion, the claims of class members who purchased their annuities in Nebraska and
22 Minnesota are not barred by the McCarran-Ferguson Act.

25 ²⁴ Allianz’s citation to Wineinger v. United Healthcare Ins. Co., No. 99-cv-141, 2000
26 WL 1277629, at *7 (D. Neb. Feb. 16, 2000), is unpersuasive. Wineinger relied on LaBarre
27 for the proposition that “lack of a private cause of action” under the insurance laws in
28 particular was dispositive under the McCarran-Ferguson analysis. As the Court finds this
reading of LaBarre unpersuasive, the Court declines to follow Wineinger.

1 In addition, the Court finds that the RICO claims of class members who purchased
2 their policies in Ohio are not reverse-preempted by the McCarran-Ferguson Act. The
3 Sixth Circuit’s decision in Riverview dealt with a different section of the Ohio insurance
4 code that is part of Ohio’s Prompt Pay Act, “which regulates the timely processing and
5 payment of insureds’ healthcare claims.” 601 F.3d at 516 (citing Ohio R.C.
6 §§ 3901.38–3901.3814). There is no private right of action to enforce the terms of this
7 statute, but an aggrieved party may avail themselves of an administrative hearing
8 process. See Ohio R.C. § 3901.3812 (providing for administrative hearings before the
9 insurance commissioner). Addressing the same factors as the Third Circuit in Weiss, the
10 court concluded that the lack of a private right of action, coupled with the “exclusive”
11 nature of Ohio’s administrative hearing procedure under the Prompt Pay Act, weighed in
12 favor of reverse-preemption. Crucially, the court also noted the inability of the plaintiffs
13 to bring a common law claim premised upon the same allegations, as the wrongs the
14 plaintiffs complained of arose from duties that were created only by Ohio statute.²⁵ In
15 addition, the State of Ohio filed an amicus brief arguing that plaintiffs’ RICO claim was
16 barred by Ohio law, reasoning that the administrative process governing the Prompt Pay
17 Act should not be circumvented through the use of RICO. Because of the absence of a
18 private right of action or any other cause of action under state law, the court reasoned
19 that permitting plaintiffs’ to bring their RICO claim would allow an end-run around the
20 fundamental requirement of administrative exhaustion.

21 Plaintiffs’ allegations here concern conduct that is governed by Ohio Revenue
22 Code § 3901.21, which defines unfair and deceptive practices under Ohio law in a
23 similar manner to those regulatory schemes already considered in this order. The Ohio
24 Insurance Department has also promulgated regulations that address a number of
25 specific practices in the sale of annuity products. See, e.g., Ohio Admin. Code

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27 ²⁵ As such, the plaintiffs in Riverview were also unable to obtain any punitive
28 damages.

1 § 3901-6-13 (“Suitability in annuity transactions”). As with the Prompt Pay Act, the
2 section covering unfair and deceptive practices in the insurance industry also contains an
3 administrative hearing mechanism, whereby the commissioner may determine that a
4 particular insurance practice is prohibited under Ohio law. See Ohio R.C. § 3901.22
5 (setting forth administrative procedure for violations of the unfair practices provision).
6 Notably, however, the Ohio unfair practices law does not purport to set forth an
7 exclusive administrative remedy; and unlike claims encompassed by the Prompt Pay
8 Act, an Ohio plaintiff would still have traditional common law remedies available to him
9 or her, including the potential for punitive damages. As with the regulatory schemes of
10 the other states considered in this motion, plaintiffs’ RICO claims are based upon
11 allegations that, if true, could constitute violations of the relevant Ohio statutes and
12 regulations. Moreover, the state’s concern with preserving the integrity of its
13 administrative process, as articulated as an amicus in Riverview with respect to the
14 Prompt Pay Act, would not be implicated here to the same degree. And there is no
15 dispute that parallel common law claims remain available to plaintiffs in Ohio, without
16 regard to whether a plaintiff has exhausted all available administrative remedies.²⁶
17 Because this key factor distinguishes the instant case from Riverview, the Court
18 concludes that Riverview does not dictate the outcome of the class members’ claims who
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22 ²⁶ Triggering the administrative hearing process under the Prompt Pay Act also
23 requires a greater showing than under the unfair and deceptive practices section of the Ohio
24 Code, further demonstrating the Ohio legislature’s intent to limit remedies under this Act.
25 Section 3901.3812 is only triggered “after completion of an examination involving
26 information collected from a six-month period, [where] the superintendent finds that a
27 third-party payer has committed a series of violations that, taken together, constitutes a
28 consistent pattern or practice” of violating the Prompt Pay Act. By contrast, section
3901.22 does not have this requirement of a pattern or practice of unfair and deceptive
practice violations over a six-month period to trigger potential administrative review.

1 purchased their annuities in Ohio.²⁷ Accordingly, for all of the reasons discussed herein,
2 the Court finds that Ohio insurance law does not reverse-preempt the claims of any class
3 member.

4 **B. Elder Abuse Act Claim**

5 The California Elder Abuse Act makes additional damages available to a
6 prevailing plaintiff who proves abuse of an elder, or a person age 65 years or older. The
7 Act defines various acts as “abuse of an elder,” including “[p]hysical abuse, neglect,
8 financial abuse, abandonment, isolation, abduction, or other treatment with resulting
9 physical harm or pain or mental suffering.” Cal. Welf. & Instit. Code § 15610.07(a).
10 Each of these types of elder abuse is further defined elsewhere in the Act.

11 At issue here is alleged “financial abuse,” which occurs when a person or entity
12 “takes, secretes, appropriates, obtains, or retains real or personal property of an elder or
13 dependent adult for a wrongful use or with intent to defraud, or both.” Id.
14 § 15610.30(a)(1). The taking or retaining of property for “wrongful use” is further
15 defined as a taking of property where the person or entity “knew or should have known
16 that this conduct is likely to be harmful to the elder.” Id. § 15610.30(b). And “taking” is
17 defined as depriving an elder of any real or personal property by a number of means,
18 including “by means of an agreement.” Id. § 15610.30(c). The Act also makes it illegal
19 for a person or entity to “assist” in any of the foregoing acts of abuse. Id. A plaintiff
20 who proves “by a preponderance of the evidence that a defendant is liable for financial
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22 ²⁷ Allianz’s citation to Shields v. Unumprovident Corp. is similarly unpersuasive.
23 No. 05-cv-744, 2008 WL 8713740, at *2 (S.D. Ohio Jan. 17, 2008). As with the Pearson
24 case discussed previously, the plaintiffs’ claims in Shields arose out of the denial of their
25 claims for workers’ compensation benefits, a field that is regulated by both ERISA, the
26 Ohio workers’ compensation system, and Ohio law concerning the setting of insurance
27 rates. See id. at *5, *7 (discussing ERISA and Ohio R.C. § 3937.04). The court did not
28 discuss whether any common law claims were potentially available to the plaintiffs. As
such, the court’s conclusion that RICO is reverse-preempted by Ohio law does not aid the
Court in its determination here.

1 abuse, as defined in Section 15610.30,” may obtain reasonable attorney’s fees and costs.
2 Cal. Welf. & Instit. Code § 15657.5(a) (emphasis added).²⁸

3 Allianz contends that it is entitled to judgment in its favor on plaintiff Ow’s claim
4 for violation of the Elder Abuse Act, made on behalf of the California class, because
5 plaintiff has failed to allege that Allianz’s purported financial abuse caused Ow or his
6 fellow class members to suffer physical harm or mental suffering. The better view,
7 Allianz argues, is that the entitlement to enhanced remedies under section 15657.5(a)
8 depends on the definitions contained in *both* sections 15610.07(a), the general definition
9 of “elder abuse,” and 15610.30(a)(1), the specific definition of “financial abuse.” Once
10 one assumes that both sections are at issue, Allianz contends that the term “financial
11 abuse” must be read in conjunction with the phrase “with resulting physical harm or pain
12 or mental suffering.”

13 Thus, citing to a federal district court decision from this district, Allianz argues
14 that “[p]laintiffs are also required to allege physical harm or pain or mental suffering
15 to support a claim for financial elder abuse.” Derry v. Jackson Nat’l Life Ins. Co., No.
16 11-cv-0343, 2011 WL 7110571, at *7 (C.D. Cal. Oct. 5, 2011); see also Siemonsma v.
17 Mut. Diversified Emps. Fed. Credit Union, No. 10-cv-1093, 2011 WL 1485979 (C.D.
18 Cal. Apr. 19, 2011). In addition, Allianz cites a number of unpublished California
19 Appellate decisions for the same principle, although these courts find as much without
20 discussion. See In re Estate of Hazewinkel, D058282, 2011 WL 6396324 (Cal. Ct.
21 App. Dec. 9, 2011) (“financial abuse” of an elder, with resultant physical harm or pain
22 or mental suffering, is defined and forbidden. (§ 15610.07; remedies are provided in §
23 15657 et seq.)”); Raicevic v. Lopez, D055002, 2010 WL 3248335 (Cal. Ct. App. Aug.
24 18, 2010) (“Under the Act, ‘financial abuse’ of an elder, with resultant physical harm
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26 ²⁸ Where a plaintiff proves that a defendant has committed financial abuse in a
27 reckless, oppressive, fraudulent, or malevolent manner, the Act also eliminates the damages
28 limitation set forth in section 377.34 of the Code of Civil Procedure.

1 or pain or mental suffering, is defined and forbidden. (Welf. & Inst. Code, § 15610.07;
2 remedies are provided in § 15657 et seq.) Under Welfare and Institutions Code section
3 15610.30, subdivision (a)(2), “financial abuse” may include assistance in another’s
4 wrongful taking of property of an elder, for a wrongful use or with intent to
5 defraud.”). Allianz also notes that at least one court has found that the term “neglect”
6 to require a showing of resulting “physical harm, pain or mental suffering,” relying on
7 section 15610.07(a), analogous to Allianz’s argument regarding “financial abuse.”
8 See Carter v. Prime Healthcare Paradise Valley LLC, 198 Cal. App. 4th 396, 408
9 (2011).

10 The Court concludes that the better view is that articulated by the only
11 published California Court of Appeal decision addressing this issue: section 15610.07
12 does not apply to a plaintiff’s claim that is premised upon a violation of section
13 15610.30. As the court held:

14 To the extent respondents continue to assert that the financial elder abuse claim
15 requires a finding that the [plaintiffs] suffered mental suffering, they are
16 mistaken. The statute does not require a finding of mental suffering. Rather,
17 the statute requires a finding that the defendant took the property for ‘a
18 wrongful use or with intent to defraud or both.’ (Welf. & Inst. Code,
19 § 15610.30, subd. (a)(1).) While cases may be brought under the elder abuse
20 statute alleging mental suffering (see id., § 15610.07), the [plaintiffs] did not do
21 so, nor did they allege emotional distress or seek damages for pain and
22 suffering.

23 Bonfigli v. Strachan, 192 Cal. App. 4th 1302, 1316 (2011). Other published decisions
24 from California lend further support to the notion that the requirement of “resulting
25 physical harm or pain or mental suffering” from section 15610.07 should not be read
26 in to 15610.30. See Wood v. Jamison, 167 Cal. App. 4th 156, 164 (2008) (upholding
27 award of costs and attorneys’ fees under section 15657.5 without any discussion of
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1 section 15610.07); see also Das v. Bank of Am., N.A., 186 Cal. App. 4th 727, 744
2 (2010) (no mention of section 15610.07 in discussion of pleading requirements under
3 15610.30); Stebley v. Litton Loan Servicing, LLP, 202 Cal. App. 4th 522, 528 (2011)
4 (same).²⁹

5 In light of these published decisions, the Court finds Allianz’s citations to
6 unpublished opinions of the California Court of Appeal unpersuasive. See California
7 Rules of Court, Rule 8.1115 (“[A]n opinion of a California Court of Appeal or
8 superior court appellate division that is not certified for publication or ordered
9 published must not be cited or relied on by a court or a party in any other action.”).
10 Moreover, the Court declines to address Allianz’s arguments regarding the various
11 canons of interpretation for determining the meaning of section 15610.07(a).

12 According to the plain mandate of Bonfigli and the other decisions cited herein, the
13 meaning of this section is not at issue when a plaintiff seeks the enhanced remedies for
14 financial abuse available under section 15657.5. Finally, the Court declines Allianz’s
15 invitation to ignore the clear holding of Bonfigli—and the other decisions which
16 Allianz does not discuss—in favor of unpublished decisions of the California Court of
17 Appeals and a federal district court. See Ryman v. Sears, Roebuck, & Co., 505 F.3d
18 993, 994 (9th Cir. 2007) (holding that when “there is relevant precedent from the
19 state’s intermediate appellate court, the federal court must follow the state
20 intermediate appellate court decision unless the federal court finds convincing
21 evidence that the state’s supreme court likely would not follow it”). Because the
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24 ²⁹ Plaintiffs appear to assume without discussion that section 15610.07 applies to
25 section 15610.30, and therefore their argument is that the phrase “with resultant physical
26 harm or pain or mental suffering” is only meant to modify “other treatment,” and not the
27 other types of abuse in section 15610.07. However, plaintiffs cite no authority in support
28 of this reading of 15610.07, as Bonfigli did not interpret the language in section 15610.07
at all, but simply found that it does not apply when a plaintiff seeks the enhanced remedies
available under section 15657.5 for financial abuse.

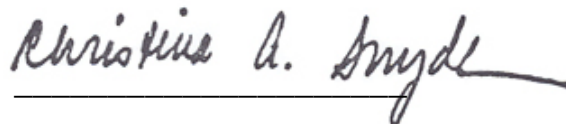
1 Court does not find that there is “convincing evidence” that the California Supreme
2 Court would not follow Bonfigli’s interpretation of the Elder Abuse Act, Allianz’s
3 contention is without merit. Accordingly, the Court denies Allianz’s motion for
4 judgment on the pleadings on plaintiffs’ Elder Abuse Act claim, as plaintiffs are not
5 required to allege physical harm or pain or mental suffering.

6 **V. CONCLUSION**

7 In accordance with the foregoing, the Court DENIES Allianz’s motion for
8 judgment on the pleadings.

9 IT IS SO ORDERED.

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11 Dated: March 4, 2013

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14 CHRISTINA A. SNYDER
15 United States District Judge
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