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After Fabe: Applying the Pireno Definition of “Business of Insurance” in First-Clause McCarran-Ferguson Act Cases

Peter B. Steffen†

When there is so much to be known, when there are so many fields of knowledge in which the same words are used with different meanings, when every one knows a little about a great many things, it be comes increasingly difficult for anyone to know whether he knows what he is talking about or not.

T.S. Eliot

T.S. Eliot observed that words often changed their meanings: what was once definite had become indefinite. While even the most avid lawyer would have difficulty finding poetry in insurance law, Eliot would likely sympathize with the current conundrum regarding interpretation of § 1012(b) of the McCarran-Ferguson Act. Like poetry, the provision uses the same words to mean different things.

Following the Supreme Court’s 1868 decision in Paul v Virginia, federal courts initially took the position that issuing insurance policies was not a transaction in interstate commerce, and therefore was not subject to federal regulation. To reach this conclusion, the Paul Court likened issuing an insurance policy to agreeing to a personal contract, describing both as distinctly local transactions.

The Supreme Court's understanding that the states had sole authority to regulate the insurance industry changed, however, with the Court’s expansion of the scope of federal regulation over

2 Id at 9.
3 Paul v Virginia, 75 US 168 (1868).
4 See id at 183 (“Issuing a policy of insurance is not a transaction of commerce.”).
5 Id.
interstate commerce. This expansion of federal power reached its zenith in United States v South-Eastern Underwriters Association, in which the Supreme Court held that "[n]o commercial enterprise of any kind which conducts its activities across state lines has been held to be wholly beyond the regulatory power of Congress under the Commerce Clause. We cannot make an exception of the business of insurance."

In response, Congress enacted the McCarran-Ferguson Act ("the Act") within a year of South-Eastern Underwriters. Congress sought to maintain the state insurance regulatory system existing prior to South-Eastern Underwriters by prohibiting most methods the federal government might naturally use to regulate insurance, such as incidental taxes or antitrust laws.

Section 2(b) of the Act contains two clauses, each of which employs the phrase "business of insurance." The first states:

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

The first clause addresses the reverse preemption of state law over federal law in this field. The McCarran-Ferguson Act thus enables state law to supersede and preempt federal law. The second clause of § 2(b) states:

Provided, That after June 30, 1948, . . . the Sherman Act, . . . the Clayton Act, and . . . the Federal Trade Commission Act . . . shall be applicable to the business of

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6 See United States v South-Eastern Underwriters Association, 322 US 533, 552–53 (1944) (defining the federal power to regulate commerce as a positive power with no exception for any commercial enterprise which conducts its business across state lines).
7 United States v South-Eastern Underwriters Association, 322 US 533 (1944).
8 Id at 553.
10 See Securities and Exchange Commission v National Securities, Inc, 393 US 453, 458 (1969) ("The McCarran-Ferguson Act was passed in reaction to this Court's decision in South-Eastern Underwriters.").
11 Lee R. Russ, 3 Couch on Insurance § 2:4 at 2-12 (Clark 1994) ("McCarran-Ferguson turns the traditional rule of federal preemption of state law on its head.").
12 15 USC § 1012(b) (1994) (emphasis added).
13 Russ, 3 Couch on Insurance § 2:4 at 2-12–13(cited in note 11).
insurance to the extent that such business is not regulated by State law.\textsuperscript{14}

The second clause exempts the business of insurance, \textit{not} the business of insurance companies, from federal antitrust law when state antitrust law applies.\textsuperscript{15} In other words, it exempts activities, not companies, from federal antitrust law.

Although both clauses in the Act include the same “business of insurance” language, the phrases do not always mean the same thing. Courts have molded a definition of the phrase “business of insurance” in the antitrust context of the second clause of \S\ 2(b).\textsuperscript{16} Subsequent first-clause McCarran-Ferguson Act cases have reached different interpretations in non-antitrust contexts.\textsuperscript{17} While the second-clause antitrust definition can prove helpful in some first-clause cases, the antitrust context of “business of insurance” does not provide the optimal definition for non-antitrust cases.

In Part I, this Comment discusses the \textit{South-Eastern Underwriters} decision and the origin of the McCarran-Ferguson Act. Part II examines various attempts by the courts to define “business of insurance,” beginning with \textit{SEC v National Securities},\textsuperscript{18} and concluding with the recent confusion in the federal courts after the latest Supreme Court pronouncement on the issue, \textit{United States Department of Treasury v Fabe}.\textsuperscript{19} Part III argues that the antitrust and preemption clauses are fundamentally different, even though the antitrust cases can provide direction to preemption analysis. Depending on the

\begin{footnotesize}
\textsuperscript{14} 15 USC \S\ 1012(b) (emphasis added).
\textsuperscript{15} Russ, \textit{3 Couch on Insurance} \S\ 2.4 at 2-12-14 (cited in note 11).
\textsuperscript{16} See Part II B.
\textsuperscript{17} See Part II C.
\textsuperscript{18} \textit{SEC v National Securities}, 393 US 453, 460 (1969) (holding that “[s]tatutes aimed at protecting or regulating this relationship [between the insurance company and the policy holder] . . . are the ‘business of insurance’”).
\textsuperscript{19} \textit{United States Department of the Treasury v Fabe}, 508 US 491 (1993) (noting that a statute that regulates policyholders is for the business of insurance while a statute that furthers the interests of creditors is not regulating the business of insurance). Two more recent Supreme Court cases touched on \S\ 2(b) of the McCarran-Ferguson Act, but not in ways that impact this analysis. \textit{UNUM Life Insurance Co of America}, 526 US 358 (1999), reiterated that the none of the criteria listed in \textit{Union Labor Life Insurance Co v Pireno}, 458 US 119 (1982), are determinative by themselves. \textit{UNUM}, 526 US at 373–74. See text accompanying note 93 for a further discussion of this aspect of \textit{Pireno}. \textit{Barnett Bank of Marion County, NA v Nelson}, 517 US 25 (1996), never discusses what the “business of insurance” entails. Rather, it defines what “specifically relates” means in relation to the McCarran-Ferguson Act's language that a statute must specifically relate to the business of insurance. Id at 39.
\end{footnotesize}
clauses and context of the Act, there are, therefore, two separate meanings of the phrase “business of insurance.”

I. SOUTH-EASTERN UNDERWRITERS AND THE BIRTH OF THE MCCARRAN-FERGUSON ACT

Paul v Virginia20 established that the issuance of insurance policies was subject only to state regulation because issuance was not an interstate transaction. Thus, to regulate insurance was beyond Congress’ Commerce Clause power.21 Because Paul preceded the enactment of the Sherman and Clayton Acts, it did not resolve whether federal antitrust laws could govern anticompetitive practices in the insurance industry. The Supreme Court reached this question in South-Eastern Underwriters.22 An essential part of the Court’s inquiry was whether Congress could regulate the business of insurance as interstate commerce.23

A. United States v South-Eastern Underwriters

South-Eastern Underwriters concerned nearly two hundred insurance companies charged with conspiring to fix fire insurance policies in Georgia at noncompetitive rates in violation of the Sherman Act.24 The district court dismissed the indictment because, under Paul, the business of insurance was not interstate commerce.25 Congress therefore lacked the constitutional authority to regulate insurance companies’ activities by means of the Sherman Act.26 The Supreme Court reversed the district court, ruling that the business of insurance was interstate commerce, and thus that the Sherman Act applied to insurance companies’ alleged monopolistic behavior.27 The Supreme Court defined “business of insurance” quite broadly, to include all negotiations and

20 Paul, 75 US at 168.
21 See text accompanying notes 4–6.
23 See id at 546–50 (explaining that the Court may examine the entire transaction to determine if there is “a chain of events which becomes interstate commerce”).
24 Id at 535–36.
27 South-Eastern Underwriters, 322 US at 552–53 ("The decision now rendered repudiates this long continued and consistent construction of the commerce clause and the Sherman Act.").
transactions before and after the creation of an insurance policy.\footnote{28} Under this definition, the writing and signing of the insurance policy became a small subset of the business of insurance.\footnote{29} Although Justice Black’s majority opinion emphasized that the decision did not alter existing state authority to regulate insurance, the insurance industry feared Congress would soon attempt to use \textit{South-Eastern Underwriters} to fashion federal regulation.\footnote{30} To alleviate such concerns, Congress enacted the McCarran-Ferguson Act nine months after the \textit{South-Eastern Underwriters} decision. The Act effectively overturned the Supreme Court’s holding in that case.\footnote{31}

B. The Congressional Response: The McCarran-Ferguson Act

The McCarran-Ferguson Act did not return the law to its position prior to \textit{South-Eastern Underwriters}. Rather, the Act contained two clauses embodying a congressional effort to balance state and federal interest in regulating the “business of insurance.” The first clause enabled state law to supersede federal law; the second clause provided a federal antitrust exemption for the “business of insurance.”\footnote{32} The Act gave states some powers they did not have before, by stating in the first clause that only a federal law that “specifically relates to the business of insurance” can preempt a state law dealing with insurance.\footnote{33} Congressional legislation merely affecting insurance would not meet the first-clause test and thus would not be exempt from the general prohibition on preemption.\footnote{34} Rather, in order to apply, federal law must specifically relate to the “business of insurance.”

The second clause of the McCarran-Ferguson Act, which governs antitrust actions, confers potentially significant power on the federal government by allowing federal antitrust laws to apply to the extent that state laws do not regulate the business of

\footnote{28} Id at 541–42.  
\footnote{29} See id.  
\footnote{30} See id at 561–62 (disagreeing with the defendants’ “gloomy forebodings” and “suggestions of disaster to business”).  
\footnote{31} See notes 9–10 and accompanying text.  
\footnote{32} 15 USC § 1012(b). See also notes 9–10 and accompanying text.  
\footnote{33} See notes 11–14 and accompanying text.  
\footnote{34} Russ, 3 \textit{Couch on Insurance} § 2:4 at 2-12-14 (cited in note 11).
insurance. The second clause serves, in part, to counterbalance some of the power granted to the states in the first clause.

Within months of the enactment of the Act, the Prudential Insurance Company challenged the Act's constitutionality. Prudential argued that a South Carolina tax on foreign insurers was unduly burdensome to interstate commerce. Basing its claim on the South-Eastern Underwriters decision and the Commerce Clause, Prudential alleged that Congress could not use the McCarran-Ferguson Act to limit the Commerce Clause, thereby granting the states powers which are constitutionally reserved to the federal government. The Supreme Court rejected Prudential's arguments in Prudential Insurance Co v Benjamin, holding that the McCarran-Ferguson Act was constitutional. Specifically, the Court held that states could constitutionally regulate interstate insurance transactions as long as contradictory federal legislation did not specifically relate to the business of insurance. Justice Rutledge's majority opinion adopted a broad definition of "business of insurance" similar to that first articulated in South-Eastern Underwriters. Therefore, the business of insurance included everything from the issuance of an insurance policy to the payment of an insurance claim.

II. ATTEMPTS TO DEFINE "BUSINESS OF INSURANCE"

Few Supreme Court cases since Prudential have examined the scope of "business of insurance." It is inherently a case-by-case problem, requiring courts to consider the particular facts of each dispute. It was not until 1969 that the Supreme Court reexamined the subject in SEC v National Securities. As later
cases dealt more frequently with the antitrust context of the second clause, the Supreme Court would subtly shift its definition of the phrase.44

A. SEC v National Securities

National Securities,45 a first-clause McCarran-Ferguson case, concerned state preemption rather than antitrust. The case arose when the Arizona Director of Insurance approved the merger of two Arizona insurance companies as complying with relevant state law.46 However, the SEC sued to stop the merger, alleging that the companies violated the Securities Exchange Act47 when they distributed misleading solicitation materials to the shareholders of one of the companies.48 The district court dismissed the case on the ground that the SEC could not interfere with Arizona's merger approval process and concluded that Arizona had authority to permit the merger under the general power of the states to regulate the “business of insurance.”49 The Ninth Circuit then affirmed this decision without attempting to define “business of insurance.”50

Justice Marshall wrote the Supreme Court's opinion reversing the Ninth Circuit. The opinion offered a definition of the phrase “business of insurance.” “[W]e do not believe that a state statute aimed at protecting the interests of those who own stock in insurance companies comes within the sweep of the McCarran-Ferguson Act. Such a statute is not a state attempt to regulate 'the business of insurance.'”51 Justice Marshall also stated that McCarran-Ferguson did not “make the States supreme in regulating all the activities of insurance companies”; in fact, insurance companies could do many things subject to federal regulation, and “only when they are engaged in the 'business of insurance' does the statute apply.”52

The Supreme Court directed lower courts to look first to the purpose of the state statute in determining whether it regulated

44 See Part II B.
45 National Securities, 393 US 453.
46 Id at 455.
48 National Securities, 393 US at 455.
51 National Securities, 393 US at 457.
52 Id at 459–60.
the "business of insurance." Because the Arizona provision at issue sought to protect stockholder interests, the Supreme Court reasoned that this law had little to do with the state regulation of insurance and accordingly that the McCarran-Ferguson Act did not apply. The Arizona law obliged the state's Director of Insurance to approve a merger unless it: (1) was contrary to law; (2) was inequitable to the stockholders of the companies; or (3) would have substantially reduced the protection afforded to policyholders. Justice Marshall acknowledged that parts of the Arizona law were intended to regulate the business of insurance; however, the Court held that a state statute that has the dual purpose of protecting stockholders and the insured can be preempted under certain circumstances. In this case, the federal Securities Exchange Act only trumped state power in relation to the part of the state statute intended to protect stockholders. Therefore, the SEC could block the merger because of securities law violations involving merger activity unrelated to the business of insurance.

Drawing in part on South-Eastern Underwriters, Justice Marshall concluded that the focus of the "business of insurance" was on "the relationship between the insurance company and the policyholder." Therefore, statutes that regulate this relationship are laws "regulating the 'business of insurance.'" Simply stated, under National Securities, a state law regulating the "business of insurance" is one that aims to protect or regulate the insurer-insured relationship. This was a narrowing of the existing definition of "business of insurance."

53 Id at 457 ("The first question posed by this case is whether the relevant Arizona statute is a 'law enacted . . . for the purpose of regulating the business of insurance' within the meaning of the McCarran-Ferguson Act.").
54 Id at 460. One commentator has pointed out that the Supreme Court ignored the fact that the Arizona law was meant to protect both stockholders and policyholders. See Davis J. Howard, Uncle Sam Versus the Insurance Commissioners: A Multi-Level Approach to Defining the 'Business of Insurance' Under the McCarran-Ferguson Act, 25 Willamette L Rev 1, 39-40 (1989) ("This conclusion was based on a false premise, because the Arizona statute was aimed at protecting both stockholders and policyholders and the statute did not suggest that it sought to provide more protection for one group than the other.").
55 National Securities, 252 F Supp at 625.
56 See National Securities, 393 US at 462-63 ("Moreover, Arizona has approved the merger not only under its laws relating to insurance securities but also in its capacity as licensor of insurers within the State.").
57 Id at 460.
58 Id.
59 National Securities, 393 US at 460.
B. “Business of Insurance” in the Antitrust Context

The National Securities decision left future courts with a sketchily phrased and easily manipulated definition. In Group Life & Health Insurance Co v Royal Drug Co and Union Labor Life Insurance Co v Pireno, the Supreme Court had two opportunities to define “business of insurance” in the antitrust context. These rulings on the antitrust exemption to the McCarran-Ferguson Act refined the National Securities definition of “business of insurance.”

1. Group Life & Health Insurance Co v Royal Drug Co.

In Royal Drug, Blue Shield marketed a prescription drug insurance policy in compliance with Texas state law that provided greater benefits and lower prices to policyholders who purchased their medicine from a “participating pharmacy” than to those who patronized “non-participating pharmacies.” A non-participating pharmacy sued, alleging that defendants violated the Sherman Act by conspiring to fix the price of drugs and create a group boycott.

The district court used the National Securities definition of “business of insurance,” despite the fact that National Securities was a first-clause McCarran-Ferguson case and the instant case was an antitrust case governed by the second clause. Dismissing the suit, the district court ruled that state law forestalled application of the Sherman Act because Blue Shield’s arrangements with participating pharmacies were so closely related to the insurance policy itself that the agreement with the pharmacies affected the insured. Therefore, the agreement was within the realm of the “business of insurance.”

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62 Royal Drug, 440 US at 209. Participating pharmacies had entered into contracts with Blue Shield guaranteeing the insured a maximum cost of $2.00 for filling a prescription.
63 See id at 207.
66 Id.
The Fifth Circuit reversed this decision after also reviewing the National Securities precedent. The Fifth Circuit reasoned that any cost reduction benefits of the insurer-pharmacy agreements at best benefitted the insured only slightly. Accordingly, there was an insufficient connection between those agreements and the insured to justify characterizing the arrangement as part of the “business of insurance.” The court determined that any other conclusion would logically expand the application of the McCarran-Ferguson Act to transactions not particular to the insurance industry.

However, the Fifth Circuit’s logic ignored the Supreme Court language of National Securities that established a clear distinction between the business of insurance and the business of insurance companies. The opinion also overlooked the fact that, by virtue of the terms and conditions of the insurance policy, the insured would have to pay more to purchase a prescription at a non-participating pharmacy. Part of the marketing appeal of such a policy is the option for the insured to save money by buying prescriptions from a participating pharmacy.

The fact that the Fifth Circuit was defining “business of insurance” in the antitrust context made a difference in its analysis. This context brought into play “the general principle that statutory exceptions to the antitrust laws ‘are to be strictly construed.’” Therefore, in the antitrust context, the Fifth Circuit defined “business of insurance” narrowly so as to leave pharmacy agreements outside the boundaries of the phrase.

In affirming the Fifth Circuit, the Supreme Court explained the distinction between the two clauses of § 2(b) of the McCarran-Ferguson Act. Congress intended the first clause of § 2(b) to further a primary purpose: preserving state regulation of

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68 Royal Drug, 556 F2d at 1386.
69 See id.
70 See id (“Thus, Blue Shield’s attempts to control costs in the pharmaceutical industry might just as easily be undertaken by a noninsurance firm.”).
71 See National Securities, 393 US at 459–60 (“Insurance companies may do many things which are subject to paramount federal regulation; only when they are engaged in the ‘business of insurance’ does the statute apply.”).
72 See Royal Drug, 440 US at 209.
73 See Howard, 25 Willamette L Rev at 50–51 (cited in note 54).
74 Royal Drug, 556 F2d at 1380.
75 Id.
insurance companies. The second clause addressed Congress’ “secondary” goal: granting insurance companies a limited exemption from antitrust laws.

In *Royal Drug*, the Supreme Court agreed that the pharmacy agreements were not part of the “business of insurance,” and thus, were not exempt from federal antitrust laws. Because these agreements did not concern the underwriting or spreading of risk and did not directly involve the insured, they were “legally indistinguishable” from a normal business arrangement between any two parties. Therefore, antitrust laws applied to the insurer’s conduct. Justice Stewart’s opinion stated that, along with the insurance policies themselves, only contracts among members of the insurance industry fell within the boundaries of the “business of insurance” standard.

Although the Supreme Court cited *National Securities* in making this analysis, it nonetheless effectively revived the rationale of *Paul v Virginia* and the narrow view of what constitutes “business of insurance.” If only agreements concerning the transfer of risk qualified as the business of insurance, then many other facets of the relationship between the insurer and insured would not qualify. Actions with respect to current policyholders, such as payments on claims, would not meet this standard. In a dissent joined by three other Justices, Justice Brennan applied *National Securities*. He reasoned that the pharmacy agreements counted as part of the “business of insurance” because they were essential to the workings of the

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76 *Royal Drug*, 440 US at 218–19 n 18 (“There is no question that the primary purpose of the McCarran-Ferguson Act was to preserve state regulation of the activities of insurance companies.”).

77 Id (“The question in the present case, however, is one under the quite different secondary purpose of the McCarran-Ferguson Act—to give insurance companies only a limited exemption from the antitrust laws.”).

78 Id at 232–33.

79 Id at 214–15.

80 See *Royal Drug*, 440 US at 219–20 (explaining that Congress did not extend the antitrust exemption to the business of insurance companies).

81 Id at 231 (“Application of this principle [that antitrust exemptions are narrowly construed] is particularly appropriate in this case because the Pharmacy Agreements involve parties wholly outside the insurance industry.”).

82 *Paul*, 75 US 168.

83 See notes 4–6 and accompanying text for a discussion of *Paul*. The *Royal Drug* majority may have chosen to break new ground in the evolving definition of “business of insurance” because it was deciding a second-clause antitrust case, and its only prior opinion on the meaning of “business of insurance,” *National Securities* was a first-clause, preemption case.

84 See *Royal Drug*, 440 US at 247.
insurance policies. Accordingly, Justice Brennan believed that such arrangements should have been exempt under the McCarran-Ferguson Act from federal antitrust regulation.\textsuperscript{85}

Instead, the Royal Drug majority considerably narrowed the definition of "business of insurance" under both clauses of the McCarran-Ferguson Act. Applicable precedent would have permitted the Court either to use a distinct definition of "business of insurance" in second-clause cases or to apply the first-clause definition using a new analytical framework. However, the Court applied the first-clause definition to a second-clause case and narrowed it in the process. This move greatly influenced subsequent McCarran-Ferguson cases.

2. Union Labor Life Insurance Co v Pireno.

The Supreme Court's next addressed "business of insurance" three years later in Pireno, and it was again in the antitrust context. In that case, on the advice of a peer review committee of the New York State Chiropractic Association (the "NYSCA"), an insurance company declined to reimburse policyholders treated by Pireno, in part because the NYSCA felt he engaged in unnecessary treatments and charged excessive prices.\textsuperscript{86} Pireno sued, alleging that the insurer and the association conspired to fix his prices in violation of the Sherman Act.\textsuperscript{87} The district court dismissed the action on the ground that the McCarran-Ferguson Act's antitrust exemption barred relief.\textsuperscript{88}

The Second Circuit, recognizing that Royal Drug and National Securities established different tests,\textsuperscript{89} followed Royal Drug and concluded that the NYSCA's peer review process neither transferred nor spread any risk.\textsuperscript{90} Accordingly, the activities of the peer review committee did not qualify as part of the insurance industry.\textsuperscript{91} Because the peer review process did not

\textsuperscript{85} See id at 252–53 (Brennan dissenting). Brennan did state, however, that "not all provider agreements come within the McCarran-Ferguson Act proviso." Id at 253.

\textsuperscript{86} Union Labor Life Insurance Co v Pireno, 458 US 119, 123 (1982).

\textsuperscript{87} See id at 124.

\textsuperscript{88} Pireno v New York State Chiropractic Association, 1979-2 Trade Cases (CCH) 62,758 at 78,377–79 (S D NY 1979), revd, 650 F2d 387 (2d Cir 1981) (ruling that the peer review committee's role was sufficiently important to the settlement of claims to qualify as the business of insurance).

\textsuperscript{89} Pireno v New York State Chiropractic Association, 650 F2d 387, 394 (2d Cir 1981) ("Royal Drug sets forth a substantially narrower scope for the 'business of insurance' exemption than its approving citation of National Securities might suggest.").

\textsuperscript{90} See id at 393.

\textsuperscript{91} See id at 394–95.
fall under Royal Drug's narrow interpretation of "business of insurance," the court permitted Pireno to sue under the federal antitrust laws. The Second Circuit did not determine whether its interpretation only applied in the antitrust context.

The Supreme Court affirmed the Second Circuit's decision. Noting that exemptions from federal antitrust laws should be narrowly construed, the Supreme Court developed three criteria for determining whether McCarran-Ferguson exempts a given practice from federal antitrust laws: "[F]irst, whether the practice has the effect of transferring or spreading a policyholder's risk; second, whether the practice is an integral part of the policy relationship between the insurer and the insured; and third, whether the practice is limited to entities within the insurance industry." Importantly, no single factor is determinative. Rather, courts should examine the practice in relation to all criteria. The Pireno test for "business of insurance," when put in practice, excluded claims adjustments performed by a third party (such as a peer review committee) because such practices did not satisfy any of the three criteria.

C. "Business of Insurance" in the Preemption Context

Pireno left unanswered the question of whether the definition of "business of insurance" that emerged in cases under the second clause of § 2(b) of the McCarran-Ferguson Act would apply in first-clause cases as well. After Pireno, courts interpreting the Act's first clause were left to decide whether to follow National Securities or the Royal Drug–Pireno line of cases. Moreover, courts also struggled to determine whether both clauses would use the same definition of "business of insurance."

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92 See id at 395.
94 Id at 126 ("Our precedents consistently hold that exemptions from the antitrust laws must be construed narrowly.").
95 Id at 129.
96 See id. This exemplifies the case-by-case nature of "business of insurance" decisions. See text accompanying note 43.
97 See Pireno, 458 US at 130–33.
1. The period between *Pireno* and *Fabe*.

An early example of this struggle is *Gordon v United States Department of Treasury*. In that case, the federal government claimed it had priority among all the creditors of an insolvent insurer, although Maryland law stipulated otherwise. The district court noted that *Royal Drug* and *Pireno* "effectively define and limit the antitrust exemption set out in the McCarran-Ferguson Act." Despite those statements, the district court did not hesitate to apply *Pireno* to *Gordon*, a first-clause preemption case. The court ruled in favor of the federal government and held that the state law did not involve the "business of insurance." Thus, federal law could preempt state law. The Fourth Circuit concluded that the district court correctly applied the law and that the *Pireno* definition was not limited to the antitrust context.

The Ninth Circuit reached a different outcome in a similar case. In *Soward v United States*, the court overturned a district court's ruling that a California statute regarding the priority of creditors of an insolvent insurer pertained to the "business of insurance." The Ninth Circuit stated, "Although ostensibly appearing to speak to the precise issue raised here, neither *Royal Drug* nor *Pireno* are necessary to decide this case. Both cases are refinements ... of *National Securities* tailored to address activities of insurance companies that would implicate the antitrust laws." The court ruled that since the insolvent companies no longer sold insurance, the state liquidation statute was "wholly unrelated to the relationship between insurer and insured." Because not even the broad definition of "business of insurance" found in *National Securities* had been met, the court

99 See *Gordon*, 668 F Supp at 486.
100 Id at 487.
101 Id at 489.
102 Id at 491.
103 See *Gordon*, 846 F2d at 273.
104 *Soward v United States*, 858 F2d 445 (9th Cir 1988).
105 *Soward v United States*, 662 F Supp 60, 63 (D Idaho 1987).
106 *Soward*, 858 F2d at 453.
107 Id at 452.
declined to engage in the *Pireno* analysis.\(^{108}\) In refusing to apply *Royal Drug* or *Pireno* to a first-clause case, the Ninth Circuit drew a clear distinction between the antitrust and non-antitrust contexts.

2. *United States Department of the Treasury v Fabe.*

The Supreme Court attempted to resolve the problem of how to apply *Pireno* in first-clause McCarran-Ferguson Act cases in *United States Department of the Treasury v Fabe.*\(^{109}\) The *Fabe* Court considered whether a federal statute could legitimately preempt an Ohio law designating the priority of creditors' claims in insurance-liquidation proceedings.\(^{110}\) To resolve the case, the Court had to decide whether Ohio had enacted its law for the purpose of regulating the business of insurance.\(^{111}\)

Ohio argued that application of "business of insurance," but not the definition of the phrase, should differ in antitrust and preemption cases.\(^{112}\) To bolster the state's argument for a broad application in a first-clause case, Ohio's brief cited Justice Brennan's conclusion that courts should construe antitrust exemptions narrowly.\(^{113}\)

The federal government argued that the Ohio statute was not shielded from preemption by the McCarran-Ferguson Act because the statute addressed only the relationship between policyholders and other creditors of the insurance company, and therefore met none of the three *Pireno* criteria.\(^{114}\) The Supreme Court rejected this argument and found that the first clause of § 2(b) of the McCarran-Ferguson Act covered the Ohio law and that Ohio had intended its law to protect the interests of the insured. Unlike the pharmacy agreements in *Royal Drug* or the committee reviews in *Pireno*, payments from an insolvent insurer related to the

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\(^{108}\) See id at 453 ("Although ostensibly appearing to speak to the precise issue raised here, neither *Royal Drug* nor *Pireno* are [sic] necessary to decide this case.").

\(^{109}\) *Fabe*, 508 US at 502–03.

\(^{110}\) Id at 493.

\(^{111}\) Id.

\(^{112}\) See *Fabe*, 508 US 491, Respondent's Brief, 1992 WL 511969, *16 n 18 ("Respondent believes that it is the application of the definition of the phrase 'business of insurance,' not the definition itself, which may differ in an anti-trust exemption case under McCarran-Ferguson.").

\(^{113}\) See id ("The definition must be applied narrowly in the anti-trust exemption case"). Implicitly, the state argued that a broad definition would then be acceptable in the non-antitrust context. Id.

\(^{114}\) See *Fabe*, 508 US 491, Petitioner's Brief, 1992 WL 511967, *7 (explaining why the Ohio statute does not regulate the business of insurance).
performance of the original insurance contract. Accordingly, the federal government could not preempt such legislation.

Writing for the majority, Justice Blackmun conceded that the Supreme Court had construed the first clause of the McCarran-Ferguson Act only once, in National Securities. He declined to equate laws "enacted ... for the purpose of regulating the business of insurance" with the business of insurance itself.

Although the dissenting opinion charged that this reading "runs counter to the basic rule of statutory construction that identical words used in different parts of the same Act are intended to have the same meaning," Blackmun responded that the dissent overlooks a different standard of statutory construction, namely, "that a court should give effect, if possible, to every clause and word of a statute."

Noting that both Royal Drug and Pireno involved antitrust immunity, Justice Blackmun wrote that the first clause of § 2(b) was not as narrowly circumscribed as the second clause. Because laws enacted for the purpose of regulating the business of insurance necessarily deal with matters involving the management of the insurance industry, such laws encompass more than what courts in earlier cases defined as the business of insurance.

Accordingly, the Fabe Court looked at whether the application of the federal statute would "invalidate, impair, or supersede" the Ohio law. The federal statute could not do so if the purpose of the Ohio law were to regulate the business of insurance. Instead of applying the narrow definition from Royal

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115 See id.
116 See Fabe, 508 US at 504 (finding Ohio's law integrally related to the performance of contracts after bankruptcy: "the Ohio priority statute is designed to carry out the enforcement of insurance contracts by ensuring the payment of policyholders' claims despite the insurance company's intervening bankruptcy"). Therefore, Ohio's law was one "enacted by any State for the purpose of regulating the business of insurance." Id, quoting 15 USC § 1012(b).
117 See Fabe, 508 US at 501 ("This Court has had occasion to construe this phrase only once.").
118 Id at 504, quoting 15 USC § 1012(b).
119 Id at 515 (Kennedy dissenting).
121 Fabe, 508 US at 504 ("We deal here with the first clause, which is not so narrowly circumscribed [as the second clause].").
122 Id at 505 (stating that the first clause "necessarily encompasses more than just the 'business of insurance'").
123 15 USC § 1012(b).
124 See Fabe, 508 US at 500–01, citing similar language in 15 USC § 1012(b).
Drug and Pireno, the Fabe Court wrote that "[t]he broad category of laws enacted 'for the purpose of regulating the business of insurance' consists of laws that possess the 'end, intention, or aim' of adjusting, managing, or controlling the business of insurance."126

Thus Fabe created a new standard, not directly based on Pireno, for laws governed by the first clause of § 2(b).126 The Court referred to the three-part Pireno test,127 derived from Royal Drug, but significantly adapted it for non-antitrust analysis. Despite the Supreme Court's efforts, Fabe did not put an end to confusion over the definition of "business of insurance."

D. How Lower Courts Have Reacted to Pireno and Fabe

After Fabe's analysis, the federal courts continue to struggle with "business of insurance" cases. The question troubling lower courts in the wake of Fabe is whether they should completely disregard the Pireno test in first-clause cases. Those lower courts that apply Pireno in first-clause cases must also decide whether a broader application of "business of insurance" is necessary outside of the antitrust context. Various federal courts reached dissimilar answers to these questions.

Courts that opt for the Pireno test choose a narrow definition of what constitutes "business of insurance." This definition focuses on whether the activity spreads a policyholder's risk, whether the activity is an integral part of the relationship between the insurer and the insured, and whether the activity is limited to within the insurance industry.128

1. Decisions finding Pireno inapplicable to first-clause jurisprudence.

Courts that reject the Pireno test in first-clause cases effectively choose a more inclusive approach. In defining laws enacted for the purpose of regulating the business of insurance, the National Securities Court simply looked at whether the statute aimed at protecting or regulating the relationship between the insurer and the insured.129 By focusing on the

125 Fabe, 508 US at 505.
126 Id.
127 See text accompanying note 95.
128 See Fabe, 508 US at 498 (listing the factors in the Pireno test).
129 National Securities, 393 US at 460. See also text accompanying notes 43–60.
spreading of the policyholder's risk, *Pireno* limits what can be defined as "business of insurance" and, in the first-clause context, protects fewer state laws from federal preemption.\(^\text{130}\)

An example of this approach is *Colonial Life & Accident Insurance Co v American Family Life Assurance Co*,\(^\text{131}\) where a federal district court applied the broader *National Securities* analysis. The court ruled that a state law regulating insurance advertising fell within the boundaries of "business of insurance" for purposes of the first clause of the McCarran-Ferguson Act because the law affected the insurer-insured relationship.\(^\text{132}\) The court held that *Pireno* only controls in second-clause antitrust cases and that the first clause "encompasses more types of activities than does the second clause."\(^\text{133}\) The district court's opinion stated that the *Pireno* criteria "are not determinative with respect to the first clause of Section 2(b)."\(^\text{134}\) Had the *Colonial Life* court applied the *Pireno* test, the court probably would not have reached the same conclusion. Insurance advertising neither affects the transfer of the policyholder's risk nor forms an integral part of the policy relationship between the insurer and the insured.\(^\text{135}\)

Two circuit courts have adopted the position that *Pireno* should not control in first-clause cases. In *Doe v Norwest Bank Minnesota*,\(^\text{136}\) the Eighth Circuit construed *Fabe* as recognizing that *Pireno* is "relevant only in cases involving a conflict between state law and federal antitrust law."\(^\text{137}\) In *Norwest Bank*, a borrower had brought a RICO claim against the defendant bank. The Eighth Circuit ruled "that the intrusion of RICO's substantial damage provisions into a state's insurance regulatory program may so impair the state law as to bar application of RICO."\(^\text{138}\) Therefore, the McCarran-Ferguson Act barred the RICO claim.\(^\text{139}\)

\(^{130}\) See *Colonial Life & Accident Insurance Co v American Family Life Assurance Co of Columbus*, 846 F Supp 454, 459–60 (D SC 1994) (discussing results of the different treatment courts afford *Pireno*).


\(^{132}\) See id at 460.

\(^{133}\) Id at 459.

\(^{134}\) Id.

\(^{135}\) *Pireno*, 458 US at 129. See also text accompanying note 95.

\(^{136}\) *Doe v Norwest Bank Minnesota*, 107 F3d 1297 (8th Cir 1997).

\(^{137}\) Id at 1305–06 n 8.

\(^{138}\) Id at 1307.

\(^{139}\) See id at 1308.
In *Autry v Northwest Premium Services, Inc*, the Seventh Circuit reached a similar conclusion that *Pireno* applies only to antitrust cases. While confessing “uncertainty” as to whether *Pireno* applied in the first-clause context, the court nonetheless declared that it did not “understand *Fabe* to require the *Pireno* analysis in this situation.” Indeed, the court considered the *Pireno* factors’ focus on the particular activity to be too narrow for a first-clause analysis. The court wrote that *Pireno* would not “capture all of the statutes that were ‘enacted . . . for the purpose of regulating the business of insurance.’”

Declining to apply *Pireno*, the *Autry* court used the broader analysis of *National Securities* to examine the purpose of the state statute, rather than the activity regulated by the statute. The Seventh Circuit panel held that a state statute regulating premium financing for the purchase of automobile insurance only served to protect the interests of the borrower. That the borrower also happened to be the insured did not protect the statute from federal preemption by the Truth in Lending Act.

2. Applying *Pireno* to first-clause cases: a middle ground?

Other courts have reached different conclusions. In *Merchants Home Delivery Service, Inc v Frank B. Hall & Co, Inc*, the Ninth Circuit read *Fabe* in another way and held that *Fabe* was an application of the *Pireno* tripartite test. The *Merchants Home* court determined that the antitrust test merely applies more broadly in first-clause cases and that the distinction “is a matter of degree, however, rather than a wholesale change

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140 *Autry v Northwest Premium Services, Inc*, 144 F3d 1037 (7th Cir 1998).
141 Id at 1044 n 5.
142 See id.
143 Id at 1041–42.
144 *Autry*, 144 F3d at 1041.
145 *National Securities*, 393 US at 457. “The first question posed by this case is whether the [state law] is a ‘law enacted . . . for the purpose of regulating the business of insurance.’” Id, quoting 15 USC § 1012(b).
146 See *Autry*, 144 F3d at 1044 (“[T]he critical point is that the state is attempting to protect the interests of the borrower *qua* borrower.”).
147 See id (“The statute may serve to protect someone who happens to be an ‘insured,’ but it does not protect that person in his capacity as a party to a contract of insurance. The fact that the money borrowed ultimately pays insurance premiums is incidental.”).
148 *Merchants Home Delivery Serv, Inc v Frank B. Hall & Co, Inc*, 50 F3d 1486 (9th Cir 1995).
149 Id at 1490 n 2 (“In *Fabe*, the Supreme Court actually applied the [*Pireno* factors], emphasizing that the acts involved there affected the transfer or spreading of risk.”).
in the inquiry.” A second court read Fabe similarly—as directly applying the Pireno test to first-clause cases—albeit with the distinction that “the interpretation of ‘the business of insurance’ is broader in a situation which does not involve the antitrust exemption.”

Courts have searched for some middle ground in the application of Pireno to first-clause cases. In Ambrose v Blue Cross & Blue Shield, a district court noted that the uncertainty stemmed from Fabe’s distinction of Royal Drug and Pireno on the basis that they involved the second clause of § 2(b) as opposed to the first. At the same time, however, “the [Fabel Court concluded that ‘the actual performance of an insurance contract falls within the “business of insurance,” as we understood that phrase in Pireno and Royal Drug.’ The Ambrose court reviewed the split between Colonial Life and Merchants Home Delivery and determined that “[a]lthough the Pireno analysis was developed in cases addressing the second clause of Section 2(b), it is relevant to the first clause for the limited purpose of defining the business of insurance.” A state law controls under the first clause, the Ambrose court held, “so long as its purpose, that is, its ‘end, intention, or aim,’ is ‘adjusting, managing, or controlling the business of insurance.’”

Under the second clause, according to the Ambrose court, a state-regulated practice is “exempt from the antitrust laws to the extent that the practice regulated is itself the business of insurance.” Ambrose concluded that the Pireno analysis is irrelevant to the broader inquiry into statutory purpose that the first clause of § 2(b) requires. By the Ambrose court’s reasoning,

150 Id (“[T]he [Fabe] Court held the business of insurance was to be defined more broadly outside the antitrust area.”).
151 Kachanis v United States, 844 F Supp 877, 881–82 (D RI 1994) (ruling that the Federal Employees’ Compensation Act (FECA) was preempted by a state insolvency statute, and therefore, that the United States could not collect from the insolvency fund on behalf of a federal employee). FECA was ruled to not specifically relate to the business of insurance. Id.
152 Ambrose v Blue Cross & Blue Shield, 891 F Supp 1153 (E D Va 1995) (holding that application of RICO was precluded by the McCarran-Ferguson Act).
153 Id at 1160.
154 Id, quoting Fabe, 508 US at 503.
155 Ambrose, 891 F Supp at 1160 (emphasis added).
156 Id, quoting Fabe, 508 US at 505.
157 Ambrose, 891 F Supp at 1160.
158 Id at 1160–61 (“Thus, to the extent that Pireno and Royal Drug consider whether the practice being regulated is itself the business of insurance, their analysis is inapplicable in a case controlled by the broader first clause of Section 2(b).”.

[122x228]150 Id (“[T]he [Fabe] Court held the business of insurance was to be defined more broadly outside the antitrust area.”).
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152 Ambrose v Blue Cross & Blue Shield, 891 F Supp 1153 (E D Va 1995) (holding that application of RICO was precluded by the McCarran-Ferguson Act).
153 Id at 1160.
154 Id, quoting Fabe, 508 US at 503.
155 Ambrose, 891 F Supp at 1160 (emphasis added).
156 Id, quoting Fabe, 508 US at 505.
157 Ambrose, 891 F Supp at 1160.
158 Id at 1160–61 (“Thus, to the extent that Pireno and Royal Drug consider whether the practice being regulated is itself the business of insurance, their analysis is inapplicable in a case controlled by the broader first clause of Section 2(b).”).
Fabe requires a court to examine of the purpose of a state statute under the first clause of § 2(b), while Pireno urges courts to look directly at the business practice being regulated under the second clause of § 2(b). According to Ambrose, both clauses employ the phrase “business of insurance,” but because of the plain language of the statute, each clause requires a separate examination. The key difference between the clauses for the Ambrose court was the use of the word “purpose” in the first clause.

Accordingly, Ambrose ruled that the first clause of § 2(b), as determined by Fabe, affords the states broad leeway to regulate the business of insurance without federal interference. Under the second clause, as read by Pireno, the antitrust exemption is more narrow than the exemption articulated in the first clause.

Reaching a similar conclusion to that of the Ambrose court, the Third Circuit recently noted that “federal courts have seemingly disagreed as to the proper analytic inquiry into McCarran-Ferguson Act preclusion.” That court found the Pireno test helpful in a first-clause case, but only that it “may . . . provide guidance in a more generalized analysis.” Finding fault with the anti-Pireno cases, like Norwest Bank, the opinion noted that even Fabe cited Royal Drug as a starting point in its “business of insurance” analysis.

In 1999, the Eleventh Circuit used Pireno in its first-clause analysis in Blackfeet National Bank v Nelson. The court claimed to have a coherent view of the Fabe distinction between the clauses, but the court nonetheless still found Pireno appropriate in the first-clause context on the theory that courts should interpret “business of insurance” uniformly in both clauses. The Blackfeet National Bank court considered whether

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159 See id.
160 See id.
161 See Ambrose, 891 F Supp at 1157–58.
162 See text accompanying note 154.
163 Sabo v Metropolitan Life Insurance Co, 137 F3d 185, 189 n 2 (3d Cir 1998) (holding that RICO was not precluded by McCarran-Ferguson where, unlike Ambrose, there was no state enforcement law excluding private causes of action and treble damages; therefore, RICO did not invalidate, impair or supersede state law).
164 Id at 191 (finding the sale and marketing of Metropolitan Life’s policies so clearly constituting the “business of insurance” that “We need not delve into a sophisticated three part analysis under Royal Drug or Pireno to reach this conclusion”). The court stated that Pireno’s guidance based on first-clause cases was not necessary. Id.
165 Id at 191 n 3, citing Fabe, 508 US at 503–05 (1993). Royal Drug was the precursor to Pireno. See text accompanying notes 86–97.
167 See id at 1246 n 13.
Florida could regulate a bank's marketing of a specific retirement certificate of deposit. Ruling that the product involved the business of insurance, the court used the Pireno factors to bolster its decision, despite the fact that the case did not involve antitrust. “We merely need to determine whether offering ... [the product] constitutes the ‘business of insurance.’ We cannot imagine that ‘business of insurance’ could have two different meanings in the same statutory subsection.” Because the court was analyzing the practice itself rather than the purpose of the statute, it found Pireno applicable to a first-clause case.

III. HOW TO APPLY PIRENO TO FIRST-CLAUSE CASES

The use of the phrase “business of insurance” in consecutive sentences in the McCarran-Ferguson Act has evidently caused much confusion in the courts. An oft-applied rule of statutory construction is that “identical words used in different parts of the same act are intended to have the same meaning.” The difference between the antitrust and preemption contexts and the unfortunate wording of the Act itself has frustrated an easy application of this rule of statutory construction. The Blackfeet National Bank decision is the latest manifestation of this dilemma, as that court applied Pireno in a first-clause analysis—which some other courts have counseled against.

The legislative history of the McCarran-Ferguson Act provides some clues as to whether the phrase “business of insurance” has separate definitions in the antitrust and preemption contexts. Prior to South-Eastern Underwriters, legislators introduced bills in Congress to grant the insurance industry an exemption from antitrust laws. After the upheaval caused by the Supreme Court’s groundbreaking decision, the purpose of the legislation changed markedly to give state insurance regulation primacy over federal regulation.

168 Id at 1239.
169 Id at 1246 n 13.
170 Blackfeet Natl Bank, 171 F3d at 1246 n 13.
171 See Part II D.
173 See text accompanying notes 166–70.
After South-Eastern Underwriters, lawmakers added the preemption clause to the antitrust exemption to ensure that states retained authority to regulate the insurance industry.\(^{175}\) The preemption clause was necessary to restore the federalist holding of Paul that insurance regulation was a state, and not a federal, power. The Senate passed an amendment that returned antitrust authority to the federal government, but the House deleted this amendment without explanation.\(^{176}\) The conference committee adopted substantially the House version of the bill.\(^{177}\)

When the Senate debated the final bill, Senator Ferguson defended the return of the antitrust exemption, stating that open competition in insurance rates would cause “chaos.”\(^{178}\) This rebirth of the antitrust exemption had nothing to do with federalist impulses, but rather reflected a fear that open competition in insurance rates would bankrupt many insurance companies. Congress enacted the first clause of § 2(b) because of federalist concerns, while it inserted the antitrust clause because “it was not sound policy to apply the antitrust laws in the insurance market.”\(^{179}\) The legislative history indicates that Congress had two separate purposes for enacting the McCarran-Ferguson Act.

The Fabe Court recognized the dual purpose of McCarran-Ferguson, noting that the first clause “was intended to further Congress’ primary objective of granting the States broad regulatory authority . . . . The second clause accomplishes Congress’ secondary goal, which was to carve out only a narrow exemption for ‘the business of insurance’ from the federal antitrust laws.”\(^{180}\) Thus, “business of insurance” can have two separate definitions reflecting Congress’ distinct goals in passing

\(^{175}\) See Senate Committee on the Judiciary, Expressing the Intent of the Congress with Reference to the Regulation of the Business of Insurance, S Rep No 20, 79th Cong, 1st Sess 1–3 (1945).


\(^{178}\) See 91 Cong Rec 1481 (Jan 25, 1945). Ferguson stated, “[T]he insurance companies have convinced many members of the legislature that we cannot have open competition in fixing rates on insurance. If we do, we shall have chaos. There will be failures, and failures always follow losses.” Id.


\(^{180}\) Fabe, 508 US at 505. See also Royal Drug, 440 US at 219 n 18, for further discussion of the McCarran-Ferguson Act’s dual purpose.
the Act. With this legislative history as background, Royal Drug should not affect the law outside the antitrust context.\textsuperscript{161} Because Pireno descended from Royal Drug, the dual-purpose theory contradicts the application of Pireno to first-clause cases by the Blackfeet National Bank and Merchants Home Delivery courts.\textsuperscript{162}

Even if one accepts the dual-purpose theory of the McCarran-Ferguson Act, it does not mean that the phrase "business of insurance" must have two different definitions.\textsuperscript{183} Prior to Fabe, one commentator reached this conclusion, however, and counseled that courts should ignore Royal Drug and Pireno in first-clause cases.\textsuperscript{184} The commentator argued that in order to resolve the conflicting Supreme Court decisions and to fulfill congressional intent, only National Securities should govern in preemption cases because Royal Drug and Pireno are antitrust cases.\textsuperscript{185} After Fabe, however, all first-clause "definition of insurance" cases must be examined in light of Fabe's use, however minimal, of Royal Drug and Pireno.\textsuperscript{186} The dual-purpose theory remains relevant in considering the scope of each clause and the appropriate use of Pireno in first-clause cases.

Fabe has failed to alleviate the confusion among lower courts.\textsuperscript{187} Courts have even doubted whether Fabe applies Pireno.\textsuperscript{188} To clarify this controversy, courts should acknowledge that Fabe created its own analysis for determining whether a state law deserves protection from federal preemption under the first clause of the McCarran-Ferguson Act.\textsuperscript{189} "The broad category of laws enacted 'for the purpose of regulating the business of insurance' consists of laws that possess the 'end, intention, or aim' of adjusting, managing, or controlling the business of insurance."\textsuperscript{190} This analysis is different from the Pireno test,
which determines what the “business of insurance” encompasses instead of looking at the purpose of the law at hand.191

When investigating whether the Ohio law in Fabe regulated the business of insurance, the Fabe Court did indeed look to the understanding developed in Pireno and Royal Drug of what constituted the business of insurance.192 The Court qualified this analysis, however, by acknowledging that Congress intended a narrower antitrust exemption than the relative breadth of the first clause.193 Also, as a first-clause analysis, the Fabe approach could not stop with the Pireno test, but also had to examine the purpose of the statute.

A middle approach, perhaps best articulated in Blackfeet National Bank, is an appropriate solution.194 Blackfeet National Bank used the Pireno test to analyze the specific activity in the case—the marketing of retirement certificates of deposit—but not the purpose of the statute. Courts should recognize that Pireno can be helpful in first-clause non-antitrust cases, but that it is only a starting point.195 Courts should apply the second clause more narrowly than the first. This is not because the phrase “business of insurance” has separate meanings. Rather, the first clause uses slightly different language, that is, “any law enacted by any State for the purpose of regulating the business of insurance.”196 The use of the word “purpose” signals the broader and more inclusive application of the first clause. The broad category of statutes with the purpose of regulating the business of insurance “necessarily encompasses more than just the ‘business of insurance.’”197 This approach would also mark a return of the rarely cited, but broad, definition of “business of insurance” found in United States v South-Eastern Underwriters.198 The Pireno test should not be definitive in first-clause cases.

191 See text accompanying note 95.
192 Fabe, 508 US at 503–05. “[T]he actual performance of an insurance contract falls within the ‘business of insurance,’ as we understood that phrase in Pireno and Royal Drug.” Id at 503.
193 Id at 505 (stating that the first clause grants states “broad regulatory authority,” while the second clause “carve[s] out only a narrow exemption . . . from the federal antitrust laws”).
194 See text accompanying notes 166–70.
195 See text accompanying note 164.
196 15 USC § 1012(b).
197 Fabe, 508 US at 505.
CONCLUSION

“Business of insurance” cases have caused sufficient grief in McCarran-Ferguson Act jurisprudence. The correct approach takes the best of each extreme of the argument: recognizing that the preemption and antitrust clauses are fundamentally different, while noting that the antitrust cases can provide direction to preemption analysis. There are not two separate meanings of the phrase “business of insurance,” but two separate applications depending on the clauses and context of the McCarran-Ferguson Act.