IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PAUL BROWN, *et al.*,	)	
Plaintiffs-Appellants,	)	No. 10-2334
v.	)	
CASSENS TRANSPORT CO., *et al.*,	)	
Defendants-Appellees.	)	

MOTION OF AMERICAN INSURANCE ASSOCIATION, NATIONAL COUNCIL OF SELF-INSURERS, AND CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA FOR LEAVE TO FILE BRIEF OF *AMICI CURIAE*

Amici curiae respectfully move pursuant to Federal Rule of Appellate Procedure 29 for leave to file the brief that accompanies this motion in support of Defendants-Appellees' petitions for rehearing *en banc*.

Amicus curiae the American Insurance Association ("AIA") is a leading national trade association representing some 300 property and casualty insurance companies that write a major share of property and casualty insurance, including workers' compensation insurance, throughout the United States and in Michigan. In 2010, AIA members collectively underwrote more than $100 billion in direct, nationwide property and casualty premiums, including nearly $180 million in

Michigan workers' compensation premiums – 22.3 percent of the total workers' compensation insurance market in this State. On issues of importance to the property and casualty insurance industry and marketplace, AIA advocates sound and progressive public policies on behalf of its members in legislative and regulatory forums at the federal and state levels and files *amicus curiae* briefs in significant cases before federal and state courts. AIA members have a strong interest in the stability of the Michigan workers' compensation system and, therefore, in the principal issues presented by the panel's decision in this case: (1) whether the exclusive remedy and exclusive jurisdiction provisions of state workers' compensation laws protect them against treble damage actions under the Racketeer Influenced and Corrupt Organizations Act ("RICO") that challenge their handling of injured workers' claims for benefits; and (2) whether a claim for compensation arising out of a personal injury constitutes "property" within the meaning of RICO.

The National Council of Self-Insurers ("National Council") is a national association of employers that elect to self-insure their obligation to pay worker's compensation benefits rather than purchase insurance. Self-insurers have the same interest as insurers in the integrity of the exclusive remedy and exclusive jurisdiction provisions in state workers' compensation law, as well as in the unavailability of RICO for personal injury claims, both of which protect them

against claims for compensatory or punitive damages outside the workers' compensation system.

The Chamber of Commerce of the United States of America ("Chamber") is the world's largest business federation. It represents 300,000 direct members and indirectly represents an underlying membership of three million professional organizations of every size, in every industry sector, and from every region of the country. A central function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files amicus briefs in cases that raise issues of vital concern to the nation's business community. The Chamber's members have the same substantial interest in the outcome of this litigation as do the members of the AIA and the National Council.

AIA, the Chamber, and the National Council all represent employers or insurers who handle and pay workers' compensation claims. In return for imposing no fault liability on employers and insurers, state workers' compensation laws cap the amount of benefits paid to injured workers based on lost wages and the reasonable costs of medical treatment. The exclusive remedy and exclusive jurisdiction provisions in these laws preclude recovery of greater amounts of damages outside of the administrative system of regulation.

Plaintiffs in this case seek to circumvent these limitations by asserting treble-damages claims under RICO for defendants' handling of claims. A panel of this Circuit held that the exclusive remedy provision of Michigan's workers' compensation law does not bar RICO claims and that the alleged loss of a workers' compensation claim is property for purposes of RICO. As a result, the outcome of this petition will affect the interests of *amici curiae* in preserving the stable and efficient operation of workers' compensation schemes. In addition, members of the *amici* organizations are or may become defendants in other RICO suits alleging similar claims. The panel's decision and any decision by the full Court may have significant precedential impact not only in Michigan but in other jurisdictions as well. These interests favor the filing of a brief. *See Pinney Dock and Transport Co. v. Penn Cent. Corp.*, 838 F.2d 1445, 1454 n.11 (6th Cir. 1988).

The panel previously granted *amici's* motion for leave to file a brief on the merits. *Amici's* brief supporting the petitions for rehearing may assist the Court in resolving the petitions in several respects. First, many members of the *amici* organizations are large employers or large underwriters of workers' compensation insurance that have much experience handling workers' compensation claims. This experience enables *amici* to describe the significant practical impact on the functioning of the workers' compensation system caused by subjecting employers and insurers to RICO claims for damages far in excess of those permitted under

state law. Second, *amici's* experience enables them to explain why application of RICO would impair the effective functioning of state laws that have been in place for more than a century and federalize an area that long has been the exclusive responsibility of the States.

Third, the panel's decision presents issues of extraordinary public importance involving the intersection of state workers' compensation law, federal RICO law, and the exclusive jurisdiction doctrine. The attached brief demonstrates the importance of those issues and the conflict between the panel's decision and other decisions of this Court and sister circuits.

Respectfully Submitted,

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I certify that on April 30, 2012, I served the Motion of American Insurance Association, National Council of Self-Insurers, and Chamber of Commerce of the United States of America for Leave to File Brief of *Amici Curiae* by electronic case filing on the following:

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NO. 10-2334

United States Court of Appeals

for the Sixth Circuit

PAUL BROWN, WILLIAM FANALY, CHARLES THOMAS, GARY RIGGS, ROBERT ORLIKOWSKI and SCOTT WAY,

Plaintiffs-Appellants,

- vs. -

CASSENS TRANSPORT CO., CRAWFORD & COMPANY and SAUL MARGULES,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN

BRIEF OF *AMICI CURIAE* THE AMERICAN INSURANCE ASSOCIATION, NATIONAL COUNCIL OF SELF-INSURERS, AND CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF DEFENDANTS' PETITIONS FOR REHEARING *EN BANC*

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UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Disclosure of Corporate Affiliations and Financial Interest

Sixth Circuit
Case Number: 10-2334 Case Name: Brown v. Cassens Transport Co.

Name of counsel: Mark F. Horning

Pursuant to 6th Cir. R. 26.1, American Insurance Association
Name of Party
makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? If Yes, list below the identity of the parent corporation or affiliate and the relationship between it and the named party:

No

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? If yes, list the identity of such corporation and the nature of the financial interest:

No

CERTIFICATE OF SERVICE

I certify that on April 30, 2012 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by placing a true and correct copy in the United States mail, postage prepaid, to their address of record.

s/ Mark F. Horning

This statement is filed twice: when the appeal is initially opened and later, in the principal briefs, immediately preceding the table of contents. See 6th Cir. R. 26.1 on page 2 of this form.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Disclosure of Corporate Affiliations and Financial Interest

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Name of counsel: Mark F. Horning

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES

INTRODUCTION

The panel decision in this case ("*Brown III*" or "Op.") should be reviewed *en banc* because it raises two issues of extraordinary public importance regarding the interaction of state workers' compensation laws and the Racketeer Influenced and Corrupt Organizations Act ("RICO"). The decision, which conflicts with other circuit-level authority, would make RICO an avenue to evade the workers' compensation systems that the States have successfully run for generations and make workplace injuries a subject of federal litigation.

This is one of four cases in this Circuit in which plaintiffs have brought RICO suits predicated on alleged fraudulent mishandling of their workers' compensation claims. Any such mishandling arises under Michigan's workers' compensation law – the Workers' Disability Compensation Act ("WDCA") – and is committed to the exclusive jurisdiction of an expert administrative agency – the Michigan Bureau of Workers' Compensation ("Bureau"). The law is unequivocal that it provides not only the sole remedy for workplace injuries but also makes a dedicated agency the exclusive forum for "[a]ny dispute or controversy concerning compensation or other benefits" – including those over the handling of workers' compensation claims at issue here. MCL § 418.841(1).

Because that exclusivity is essential to the cost efficient operation of a system that provides no-fault benefits to injured employees, allowing plaintiffs to

evade the exclusive remedy and exclusive jurisdiction provisions of the WDCA and seek treble damages under RICO will undermine the system by driving up the costs of workers' compensation – just what Michigan and other states attempt to avoid.

The panel also held that, while a workplace accident is a quintessential personal injury, a claim for compensation for such an accident is a "property" interest and therefore satisfies RICO's "injury to business or property" requirement. That ruling vastly expands RICO's scope and creates an alternative treble damages remedy for compensation for workplace accidents that RICO's authors never intended.

The significant difference of opinion on these issues, including a dissent, contrary rulings by several district judges in this circuit, and contrary decisions of other circuits also supports review by the full Court.

INTEREST OF THE *AMICI* AND AUTHORTHIP STATEMENT

As described more fully in the accompanying motion for leave, *amici curiae* are leading national trade associations that represent employers and insurers who have a stake in the stable and efficient functioning of the workers' compensation system. No party or its counsel authored or contributed money that was intended to fund this brief, which was wholly paid for by *amici curiae* and their members.

REASONS TO GRANT THE PETITION

I. THE PANEL'S UNWARRANTED EXPANSION OF RICO WILL UNDERMINE STATE WORKERS' COMPENSATION REGIMES

Like all fifty states, Michigan long ago enacted a workers' compensation system that guarantees injured workers no-fault compensation for lost wages and medical treatment while relieving them of the delays and vicissitudes of litigation. The system keeps costs reasonable by limiting recovery of non-economic and punitive damages, by relieving employers from the possibility of mammoth jury awards, and by directing the parties to a streamlined administrative process that minimizes the transactional costs of litigation.

The essential features of this regime are that the compensation law provides the exclusive remedy for workplace injuries and that disputes over claims handling are subject to the exclusive jurisdiction of a state agency. *See* MCL §§ 418.131(1); 418.841(1). The presumption of employer liability and standardized benefit schedules reduce the scope and stakes of the dispute, thereby avoiding intensive discovery and complex theories of liability focused on the largest possible verdict. They also ensure that compensation is distributed evenly among injured workers, rather than concentrated in the hands of a few especially successful litigants.

The "keystone" is thus the "exclusiveness of the remedy." *Balcer v. Leonard Refineries, Inc.*, 122 N.W.2d 805, 807 (Mich. 1963). Allowing workers to sue in tort would dramatically expand the system's cost, with much of the

additional money going to lawyers as workers and employers engage in aggressive litigation governed by the possibility of an out-sized jury award. This would undermine the compensation law's careful "balanc[e]" between "employees and employers, in which the former relinquish[] [their] rights . . . at common law in exchange for a sure recovery . . . , while employers . . . accept[] a definite and exclusive liability [as] an added cost of operation . . . [that can] be actuarially measured . . . [and] both parties realize[] a saving in the form of reduced hazards and costs of litigation." *Hesse v. Ashland Oil, Inc.*, 642 N.W.2d 330, 334 (Mich. 2002).

The panel's decision eliminates this exclusiveness and gives rise to the very alternative remedy that state legislatures had sought to bar. If it stands, the panel's decision will allow RICO suits to challenge claims handling decisions that are now within the Bureau's exclusive jurisdiction. Any injured worker will be able to make an end-run around the WDCA by alleging wire or mail fraud in claims handling. That will require federal judges to second-guess the Bureau's decisions while applying federal rather than state law standards, with the ultimate result the federalization of a traditional area of state authority.

Indeed, the panel's far-reaching decision holds that the Supremacy Clause automatically overrides ***any*** state law creating exclusive remedies or giving a state agency exclusive jurisdiction. The panel's decision thus would allow injured

workers to evade workers' compensation laws by suing under a bevy of federal statutes, not just RICO.

The decision, moreover, extends RICO to include misconduct that arises solely by operation of state law, even though the state law at issue makes the misconduct subject to the exclusive jurisdiction of a state agency. Notwithstanding that federal mail fraud is "a distinct offense" from state-law fraud, Op. at 6, the actual misconduct at issue here – alleged violations of workers' compensation claim handling duties – arises only because of state law responsibilities and only in the context of state law administrative proceedings. The panel's interpretation of federal RICO law would thus transform a carefully calibrated state law scheme so that it creates legal liabilities never intended by the state legislators. Laws that were intended to avoid tort and similar lawsuits based on employer misconduct will now become the basis for a vast new field of federal litigation.

The panel's decision should also be reviewed because it conflicts with other circuit decisions that refuse to allow federal claims whose factual predicate is alleged misconduct in the handling of workers' compensation claims or where the misconduct at issue is within the exclusive jurisdiction of a state regulatory agency. The Eleventh Circuit has held that a district court cannot consider civil rights claims under 42 U.S.C. § 1985 that arise from the alleged mishandling of a workers' compensation claim. *See Conolly v. Maryland Cas. Co.*, 849 F.2d 525,

525, 528 (11th Cir. 1988). A violation of the civil rights laws is, like RICO mail fraud, a federal offense separate and independent from any claims handling requirement contained in state workers' compensation laws. Nevertheless, the Eleventh Circuit barred federal recovery because the wrongful conduct was purely a product of the state workers' compensation scheme and "the remedy for that wrongful conduct [could] not rise above the exclusive remedy provided by the Florida statues." *Id*. at 528; *see also Prine v. Chailland Inc*., 402 F. App'x 469, 471-72 (11th Cir. 2010).

Similarly, Courts of Appeals consistently have held in the context of the filed rate doctrine that conduct subject to the exclusive jurisdiction of a state regulatory agency cannot be used as a RICO predicate, notwithstanding that similar misconduct in other contexts would be actionable under RICO. *See Wah Chang v. Duke Energy Trading & Mktg., LLC*, 507 F.3d 1222, 1226 n.4 (9th Cir. 2007); *Sun City Taxpayers' Ass'n v. Citizens Utils. Co.*, 45 F.3d 58, 62 (2d Cir. 1995); *Wegoland Ltd. v. NYNEX Corp.*, 27 F.3d 17, 18-22 (2d Cir. 1994); *H.J., Inc. v. Nw. Bell Tel. Co.*, 954 F.2d 485, 494 (8th Cir. 1992); *Taffet v. Southern Co.*, 967 F.2d 1483, 1490-95 (11th Cir. 1992) (*en banc*); *see also Texas Commercial Energy v. TXU Energy, Inc.*, 413 F.3d 503 (5th Cir. 2005).

The panel's decision not only disregards these precedents but is in tension with this Court's prior holding in a previous appeal in this case. That decision held

that there is no McCarran-Ferguson Act "reverse preemption" of RICO as applied to workers' compensation because RICO would not "invalidate, impair, or supersede" Michigan's compensation law. *See Brown v. Cassens Transport Co.*, 546 F.3d 347, 361-63 (6th Cir. 2008) (*Brown II*). Yet, *Brown III* rests on the entirely contradictory holding that the Supremacy Clause supersedes the compensation law's exclusive remedy provision, notwithstanding the absence of any conflicting federal statute. Op. at 6.

II. THE PANEL'S DECISION THAT PLAINTIFFS HAVE SUFFERED AN INJURY TO PROPERTY WOULD VASTLY EXPAND RICO'S SCOPE

This case presents a second issue of extraordinary public significance regarding RICO's requirement that the plaintiff suffer an "injury to business or property." 18 U.S.C. § 1964(c). As the dissent notes, it is well-established in this Circuit that personal injuries do not fall within those bounds. *See Flieschhauer v. Feltner*, 879 F.2d 1290, 1300 (6th Cir. 1989); *Drake v. B.F. Goodrich Co.*, 782 F.2d 638, 644 (6th Cir. 1986) (quotation marks and citation omitted). And there is no dispute that plaintiffs' workplace injuries are personal injuries.

Nonetheless, the panel held that the expectation of a future award of workers' compensation benefits for those personal injuries is property for RICO purposes, notwithstanding that the injured worker is not entitled to an award unless

and until the state agency determines that the standards for compensation are satisfied. That is at odds with decisions of other Courts of Appeals. *See* Op. at 33.

By treating the loss of a claim for uncertain future recovery for a personal injury as something distinct from the injury itself, and by characterizing the former as an injury to property, the decision would obviate as a practical matter RICO's distinction between personal injuries and injuries to property, at least in the context of an administrative scheme for awarding compensation. Indeed, the decision goes well beyond workers' compensation law and threatens to transform many compensation claims for accidents or other physical injury into a RICO property interest, thereby transforming RICO into a quasi-tort law.

CONCLUSION

The petition for rehearing *en banc* should be granted for the above reasons.

Respectfully submitted,

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This brief complies with the length limitation of Fed. R. App. P. 29 & 35 because this brief contains 7.5 pages, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in Times New Roman 14 point.

/s/
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