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 for leave to file the brief that accompanies this motion. Defendants but not Plaintiffs have consented to the filing. Accordingly, *amici* submit this motion pursuant to Federal Rule of Appellate Procedure 29.

As described in the attached brief, the American Insurance Association ("AIA"), the National Council of Self-Insurers ("National Council"), and the Chamber of Commerce of the United States of America ("Chamber") 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 the Racketeer Influenced and Corrupt Organizations Act ("RICO") for Defendants' handling of claims. The district court dismissed the Complaint for failure to state a claim. As a result, the outcome of this appeal 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 decision in this appeal 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).

Amici's brief may assist the Court in resolving this appeal 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 practical impact on the functioning of the workers' compensation system of

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 the federal RICO statute 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, this appeal presents complex questions involving the intersection of state workers' compensation law, federal RICO law, and the exclusive jurisdiction doctrine. The attached brief brings relevant authority in this circuit and others to the attention of the court. In particular, the proposed brief cites authority holding that the exclusive jurisdiction doctrine bars RICO suits that challenge conduct within the exclusive jurisdiction of a state administrative agency.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I certify that on March 24, 2011, 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-APPELLEES AND AFFIRMANCE OF THE DECISION BELOW

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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 March 24, 2011 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

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, National Council of Self Insurers
Name of Party
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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

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Name of counsel: Mark F. Horning

Pursuant to 6th Cir. R. 26.1, Chamber of Commerce of the United States of America
Name of Party

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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

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Amici curiae the American Insurance Association, National Council of Self-Insurers, and the Chamber of Commerce of the United States of America respectfully submit this brief in support of the Defendants-Appellees and urging affirmance of the district court's judgment.

INTRODUCTION

Plaintiffs are employees who seek workers' compensation benefits for alleged workplace injuries but who are dissatisfied with Michigan's administrative process for adjudicating disputes over eligibility for such awards. They attempt to circumvent that administrative process by bringing Racketeer Influenced and Corrupt Organizations Act ("RICO") claims to assert their entitlement to the very same benefits at issue in pending administrative proceedings. As the District Court recognized, this misuse of the RICO statute would undermine Michigan's regime for regulating workers' compensation awards by usurping the role of state regulators, increasing costs, and eroding the ability of employers and insurers to effectively manage disability – which is the main goal of the workers' compensation system.

Workers' compensation laws reflect an implicit bargain between employers and employees that guarantees compensation to injured workers while limiting the cost to employers. Employees obtain benefits under a "no fault" standard that relieves them of the need to prove their employer's negligence or other type of

wrongdoing. They obtain fair compensation based on statutory schedules of payments for lost wages and medical treatment but cannot recover non-economic or punitive damages. Employers obtain certainty regarding the amount for which they will be liable and relief from the possibility of mammoth jury awards. Both parties benefit from a streamlined administrative process that minimizes the transactional costs of litigation.

The workers' compensation law enforces this bargain through exclusive jurisdiction and exclusive remedy provisions that require claims to be heard in the administrative process and bar employee damages suits in other fora. This statutory regime would be compromised if compensation for workplace injuries is allowed to become the subject of RICO litigation. Claimants could make an "end run" around the administrative proceedings merely by alleging fraud and instituting costly, protracted litigation for treble damages based on federal rather than state standards of liability. This would destabilize an efficient system of compensation that has stood for decades and federalize a traditional area of state authority.

Moreover, RICO simply does not apply to Plaintiffs' claims. The alleged predicate acts in this case are violations of duties imposed by a state workers' compensation statute. Thus, they all occur as a result of state law and in the context of a detailed state scheme of administrative regulation. Because Michigan,

like other states, has held that wrongful conduct in the handling of workers' compensation claims is committed to the exclusive jurisdiction of state regulators and is subject to an exclusive remedy and an exclusive set of penalties that do not permit recovery or sanctions under other statutes, allegations of misconduct in this area are not actionable under RICO.

This Court should therefore affirm the District Court's dismissal of the Complaint based on exclusive remedy and exclusive jurisdiction. *Brown v. Cassens Transport Co.*, No. 04-CV-72316 (E.D. Mich. Sept. 27, 2010) (RE # 122).

INTEREST OF THE *AMICI*

Amicus curiae the American Insurance Association ("AIA") is a leading national trade association representing some 350 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 2009, AIA members collectively underwrote more than $97.4 billion in direct, nationwide property and casualty premiums, including nearly $178 million in Michigan workers' compensation premiums – 21.1 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 one of the principal issues presented in this case: whether the exclusive remedy and exclusive jurisdiction provisions of state workers' compensation laws protect them against treble damage actions under RICO that challenge their handling of injured workers' claims for benefits subject to a comprehensive administrative scheme of regulation and adjudication.

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 laws, 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.

DESCRIPTION OF WORKERS' COMPENSATION LAWS

The heart of state workers' compensation laws is the "compensation bargain" between employees and their employers. Employees get quick and certain compensation for on-the-job injuries under a "no fault" standard that does not require them to prove that their employer was negligent or otherwise at fault. They receive compensation for lost earnings, typically according to statutory schedules based on wages, and for the costs of medical treatment and rehabilitation. In return, "the employer . . . is relieved of the prospect of large damage verdicts." 6 Lex K. Larson, *Larson's Workers' Compensation* § 100.01[1] (2010).

Together, the presumption of liability and the statutory benefits schedules reduce the scope and stakes of litigation. That permits cheaper, more efficient handling of cases and generates large cost savings compared to traditional tort litigation. Employers and employees need not litigate every case with intensive discovery and complex theories of liability focused on the largest possible verdict. In addition, the workers' compensation system ensures that compensation is evenly

distributed among injured workers, rather than concentrated in the hands of a few lucky recipients of out-sized damage awards.

As the Michigan Supreme Court has put it:

> This concept emerged from a balancing of the sacrifices and gains of both employees and employers, in which the former relinquished whatever rights they had at common law in exchange for a sure recovery under the compensation statutes, while the employers on their part, in accepting a definite and exclusive liability, assumed an added cost of operation which in time could be actuarially measured and accurately predicted; incident to this both parties realized 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) (citations and quotation marks omitted).

The exclusive remedy and exclusive jurisdiction provisions of workers' compensation laws preserve the system's efficiencies and the balance between the interests of employees and employers. The exclusive remedy provision in Michigan's Workers' Disability Compensation Act ("WDCA") states that: "The right to the recovery of benefits as provided in this act shall be the employee's exclusive remedy against the employer for a personal injury or occupational disease." MCL § 418.131(1). With the exception of injuries intentionally inflicted by the employer, the exclusive remedy provision prevents employees from recovering damages from employers for workplace accidents under other theories, whether based on common law or statute. *See, e.g., Wells v. Firestone Tire & Rubber Co.*, 364 N.W.2d 670 (Mich. 1984) (WDCA bars product liability claims

against employers); *Adams v. Nat'l Bank of Detroit*, 508 N.W.2d 464 (Mich. 1993) (WDCA bars claims for gross negligence or recklessness). In addition, the WDCA bars claims by third parties for collateral injuries they suffered as a result of the employee's workplace injury. *See Hesse*, 642 N.W.2d at 332-35 (WDCA barred parents' claims for tortious infliction of emotional distress stemming from workplace death of their son).

The exclusive remedy is administered by a dedicated state agency, the Michigan Bureau of Workers' Compensation ("Bureau"), which has exclusive jurisdiction to adjudicate disputes regarding compensation. *See* MCL § 418.841(1) ("Any dispute or controversy concerning compensation or other benefits shall be submitted to the bureau and all questions arising under this act shall be determined by the bureau or a workers' compensation magistrate, as applicable."). The Bureau is tasked with operating a streamlined administrative process that avoids the costs and burdens of protracted judicial proceedings. Proceedings "are administrative, not judicial, – inquisitorial, not contentious, – disposed of not by litigation and ultimate judgment, but summarily." *Hebert v. Ford Motor Co*., 281 N.W. 374, 375 (Mich. 1938). That generates the cost savings that are a primary benefit of the workers' compensation regime.

Disputed claims for compensation not resolved by settlement or mediation go first to a workers' compensation magistrate, *see* MCL § 418.847, whose

findings of fact are conclusive. *See* MCL § 418.861a(14). Magistrates' decisions are subject to a centralized system of review. Appeal is first to the Workers' Compensation Appellate Commission ("WCAC"), *see* MCL § 418.859a, and then to the Michigan Court of Appeals. *See* MCL § 418.861.

The Bureau's exclusive jurisdiction extends broadly – to "[a]ny dispute or controversy concerning compensation or other benefits." MCL § 418.841(1). As the Michigan Court of Appeals has explained, "the resolution of all disputes relating to workmen's compensation is vested exclusively in the Workmen's Compensation Bureau." *St. Paul Fire & Marine Ins. Co. v. Littky*, 230 N.W.2d 440, 442 (Mich. Ct. App. 1975); *see also Dixon v. Sype*, 284 N.W.2d 514, 516 (Mich. Ct. App. 1979) (Bureau's "[j]urisdiction is not limited to claims for compensation."). Thus, the Bureau is the exclusive forum in which to bring claims involving denial or termination of benefits. *See Lisecki v. Taco Bell Rests., Inc.*, 389 N.W.2d 173, 175 (Mich. Ct. App. 1986) ("allegation by the plaintiff that compensation benefits were wrongfully terminated by the defendants in order to further some ulterior motive of the defendants" was not addressable in court because "[a]n adequate remedy for the defendants' termination of benefits was available to and exercised by plaintiff Donald Lisecki, i.e., his filing of a petition for hearing with the Bureau of Worker's Disability Compensation, which resulted in an open award of benefits").

In particular, Michigan's workers' compensation regime provides a remedy for fraud in claims handling. Allegations of fraud can be presented to the magistrate, reviewed by the WCAC, and appealed to the Michigan Court of Appeals. Fraud nullifies the presumption that the Bureau's findings of fact were correct. MCL § 418.861a(14).

In addition, the administrative scheme prescribes fines and other sanctions for employers or insurers that do not comply with their statutory claims-handling obligations. The Bureau can revoke an insurer's license or an employer's privilege to self insure. *See* MCL § 418.611(5); MCL § 418.631. It can levy statutory fines for failure to pay benefits within the prescribed deadlines, and the WDCA automatically assesses interest on any delayed payment of benefits. *See* MCL § 418.801(2). A claimant can recover attorney's fees upon proof that the employer failed to provide needed medical services. *See* MCL § 418.315(1). And the WCAC may assess costs or take other disciplinary action against employers who bring frivolous appeals "for purposes of hindrance or delay." MCL § 418.861b(a).

In sum, Michigan has constructed a workers' compensation scheme that responds internally to allegations of fraudulent or otherwise improper denial of benefits. The Bureau not only has the power but also the exclusive jurisdiction to provide redress for such conduct.

ARGUMENT

I. THE BUREAU'S EXCLUSIVE JURISDICTION BARS PLAINTIFFS' RICO CLAIMS

A. Plaintiffs' Dispute with Defendants Is a Claims-Handling Controversy that Falls within the Bureau's Exclusive Jurisdiction

Whether the WDCA's exclusive remedy and jurisdiction clauses prohibit RICO claims is, in the first instance, a matter of statutory interpretation. The WDCA's exclusive remedy provision makes clear that the prohibition on other relief is complete except to the extent the statute explicitly carves out other causes of action. "The *only* exception to this exclusive remedy is an intentional tort" where "an employee is injured as a result of a deliberate act of the employer and the employer specifically intended an injury." MCL § 418.131(1) (emphasis added). Similarly, the exclusive jurisdiction clause submits "[a]ny dispute or controversy concerning compensation or other benefits" to the Bureau, without exception. MCL § 418.841(1).

Michigan courts therefore have rejected claims for compensation for workplace injuries that are not based on the WDCA – however they are styled. *See Slayton v. Michigan Host, Inc*., 332 N.W.2d 498, 500 (Mich. Ct. App. 1983) ("the applicability of the exclusive remedy provision of the act turns not upon the characterization of the asserted cause of action but upon whether the employee has a right to recover benefits under the act"); *Hesse*, 642 N.W.2d at 333-35; *Harris v. Vernier*, 617 N.W.2d 764 (Mich. Ct. App. 2000); *Moran v. Nafi Corp*., 122

N.W.2d 800, 804 (Mich. 1963) ("we believe any broadening of the base of recovery against the employer as a result of an industrial injury to include an action at law by any other person must, if it is to be authorized, be authorized by legislative action").

The exclusive remedy and the Bureau's exclusive jurisdiction extend to Plaintiffs' claims. As the District Court noted in dismissing their suit, "[t]he gravamen of Plaintiffs' Complaint is that Defendants failed to abide by their statutory duty under the WCA to provide benefits for claimed work place injuries. . . . These are the very damages for which compensation is provided for under the WDCA." Slip op. at 15 (RE # 122).

Plaintiffs' principal allegation is that Defendants retained physicians to provide fraudulent medical "opinion[s,] which [D]efendants could use to deny benefits to [P]laintiffs" because Defendants "knew . . . doctors they employed . . . [would] stat[e] plaintiffs were able to work[] or, if disabled, [that] their injury was not work related." *See* RE # 1, Complaint ¶ 6 (p.3);[1] *see also id*. at 11-16 (pp. 3, 6-7); RE # 117-2, Pls.' Proposed 1st Am. Compl. ("FAC") ¶¶ 11, 20-28 (pp. 3-4, 6-

[1] It appears that Dr. Margules is in fact a treating rather than an examining physician. *See* Brief of Defendant-Appellee Dr. Saul Margules at 11-13. As explained in his brief, conduct of a treating physician plainly falls within the WDCA for the same reasons as does conduct of other physicians involved in workers' compensation. *See id*.

14).[2] Thus, this suit is plainly a "dispute or controversy concerning compensation or other benefits." MCL § 418.841(1).

The WDCA depends on medical opinions to determine a worker's entitlement to compensation and, if so, the amount. Claimants are eligible for compensation only if the injury they suffered occurred in the workplace. *See* MCL § 418.301. The amount and duration of compensation depends on the extent to which the injury prevents the worker from performing his or her normal workplace duties. *See* MCL § 418.371; MCL § 418.301(5). Workers compensation magistrates rely on expert medical evidence and opinion to decide these questions, and the WDCA extensively regulates this medical evidence and the doctors who provide it. *See, e.g.*, MCL §§ 418.385, 418.851. In other words, Plaintiffs' central allegations – regarding the validity of medical opinions – involve precisely the kind of determinations committed to the exclusive jurisdiction and expertise of the Bureau's magistrates.

Plaintiffs also allege that defendants failed to make reasonable investigation of their claims, relied on unqualified doctors, and denied the claims without medical evidence or for falsified reasons. *See, e.g.*, RE # 117-2, FAC ¶¶ 19, 20-22, 27, 40 (pp. 5-13, 18). The exclusive jurisdiction of the Bureau's magistrates also

[2] The District Court denied Plaintiffs' motion for leave to amend because the proposed First Amended Complaint suffered the same deficiencies as the original.

extends to allegations of this kind and, indeed, more broadly to ***any*** allegation of improper claims handling by the employer or insurer. *See* discussion above at 8-9; below at 19-21.

B. Federal Case Law Supports Application of the Exclusive Jurisdiction Doctrine Here

Federal courts have refused to permit the use of RICO to litigate disputes that are entrusted to the exclusive jurisdiction of a regulatory agency. For example, the Ninth Circuit has held that plaintiffs may not use "artful pleading" to bring a RICO claim for fraudulent denial of disability benefits afforded by the Railway Labor Act, which has an exclusive remedy clause similar to those in state workers' compensation laws. *Hubbard v. United Airlines, Inc.*, 927 F.2d 1094, 1098 (9th Cir. 1991); *see also Fry v. Airline Pilots Ass'n, Int'l*, 88 F.3d 831, 835-39 (10th Cir. 1996). Other Courts of Appeals similarly have refused to countenance RICO suits that would interfere with exclusive remedy provisions. *See, e.g., Danielsen v. Burnside-Ott Aviation Training Ctr., Inc.*, 941 F. 2d 1220, 1226-29 (D.C. Cir. 1991) (no RICO action could be maintained where conduct was wrongful under the Service Contract Act, which includes an exclusive statutory scheme for relief); *Adkins v. Mireles*, 526 F.3d 531, 542 (9th Cir. 2008) (RICO not available to challenge misconduct within the exclusive jurisdiction of the NLRB); *Tamburello v. Comm-Tract Corp.*, 67 F.3d 973, 976-79 (1st Cir. 1995) (same);

Brennan v. Chestnut, 973 F.2d 644, 647 (8th Cir. 1992) (same); *see also* cases cited below, slip. op. at 28-30 (RE # 122).

The exclusive jurisdiction doctrine applies notwithstanding that the WDCA is a state statute and the Bureau is a state agency. At least five federal circuit courts have held that RICO cannot be used to litigate matters within the exclusive jurisdiction of state regulatory agencies. *See 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*); *Wegoland Ltd. v. NYNEX Corp.*, 27 F.3d 17, 18-22 (2d Cir. 1994); *Sun City Taxpayers' Ass'n v. Citizens Utils. Co.*, 45 F.3d 58, 62 (2d Cir. 1995); *Wah Chang v. Duke Energy Trading & Mktg., LLC*, 507 F.3d 1222, 1226 n.4 (9th Cir. 2007); *see also Texas Commercial Energy v. TXU Energy, Inc.*, 413 F.3d 503 (5th Cir. 2005).

More specifically, courts have recognized that the exclusive jurisdiction of state workers' compensation agencies bars resort to federal causes of action that would circumvent the exclusive remedy. For example, the Eleventh Circuit has held that a district court could not consider civil rights claims under 42 U.S.C. § 1985 that depended on entitlement to benefits under Florida's workers' compensation law. *See Connolly v. Maryland Cas. Co.*, 849 F.2d 525, 525, 528 (11th Cir. 1988). As the court explained, "[t]he civil rights claims and constitutional claims are all based on the right provided by Florida Compensation

Law. Were it not for the alleged conduct required of defendant by Florida law, there would be no ground for asserting civil rights or constitutional claims because of wrongful conduct. The remedy for that wrongful conduct cannot rise above the exclusive remedy provided by the Florida statutes." *Id*. at 528.

The same is true of RICO claims for improper denial of benefits. Plaintiffs base their RICO claims on Defendants' alleged breach of compensation and claims handling obligations duties created by the WDCA. *See* RE # 117-2, FAC ¶¶ 18, 27-29 (pp. 5, 12-14). However, the state law that creates those duties provides that violations are cognizable only within the exclusive jurisdiction of the Bureau.

C. Allowing RICO to Override the Bureau's Exclusive Jurisdiction Would Undermine Michigan's System for Workers' Compensation

The Bureau's exclusive jurisdiction over any dispute relating to workers' compensation is an "essential part of [the] important balance struck by the Legislature in adopting the WDCA." *Brown*, slip op. at 16 (RE # 122). As the Michigan Supreme Court explained long ago and recently reaffirmed, "[t]he history of the development of statutes, such as this, creating a compensable right independent of the employer's negligence and notwithstanding an employee's contributory negligence, recalls that the keystone was the exclusiveness of the remedy." *Balcer v. Leonard Refineries, Inc*., 122 N.W.2d 805, 807 (Mich. 1963), *quoted in Hesse*, 642 N.W.2d at 334 (italics omitted).

By compromising the exclusivity provisions of Michigan's scheme, RICO suits such as Plaintiffs' would disrupt the administrative regime as a whole. Application of RICO would permit claims for workers' compensation to evade scrutiny by the agency with expertise on medical questions and substitute the less tutored views of a federal judge or jury. Further, RICO suits would allow intensive discovery not permitted under the WDCA. The end result would be a duplicative system of federal review of medical findings rife with the potential for inconsistent decisions.

Moreover, litigating compensation disputes under RICO would expand the available damages beyond those permitted by the WDCA. RICO damages are not limited to the compensation specified in the WDCA's schedules; they may include consequential damages exceeding lost wages and the cost of medical treatment. RICO also permits trebling of damages – essentially, a form of punitive damages. That is at odds with the WDCA, which does not provide punitive damages for workplace injuries. *See* MCL §§ 418.301 *et seq*. The objective of workers' compensation systems is not punishment or deterrence but compensation of injured workers for lost wages and provision of the reasonable and necessary medical treatment required for their recovery and return to work.

Between them, tort-style litigation and damages would create great uncertainty for employers and insurers, which it is a major purpose of the WDCA

to avoid. No longer would employers be subject to "a definite and exclusive liability" that is an "actuarially measure[able] and accurately predict[able]" "cost of operation" that allows them to "realize[] a saving" on the "costs of litigation." *Hesse*, 642 N.W.2d at 334 (quoting *Balcer*, 122 N.W.2d at 805).

That uncertainty would affect every stage of the claims handling process, particularly because RICO extends liability to those who have no financial responsibility under state law. The threat of liability will undermine the independence and objectivity of physicians and deter claims handlers from refusing compensation for fraudulent claims.

More generally, RICO suits will make every claims management decision the potential subject of treble damages litigation. A major goal of the workers' compensation system is to encourage workers to return to work, but the threat of RICO damages will infect every decision regarding management of disability – whether to determine the existence and extent of permanent or temporary impairment, the nature and intensity of medical treatment, the amount and duration of compensation, qualification for vocational rehabilitation, or the ability to return to work. The possibility of recovering treble damages may even deter workers from returning to work. And the threat of treble damages will cause employers and insurers to consult counsel at every stage of the claims-handling process out of fear of liability for any decision the claimant or his counsel deem improper. That will

shift the focus of claims handling from managing disability to obtaining legal protection, impairing the system's rehabilitative goals while increasing its costs.

In addition, allowing injured workers to invoke RICO would subject disputes over compensation to a set of federal legal standards inconsistent with those in the WDCA. There is nothing analogous to the concept of an "enterprise" or a "pattern of racketeering activity" in the Michigan law. And the federal standards for proving "wire fraud" or "mail fraud" as "predicate acts" are quite different than the standards in the WDCA for proving fraud or other misconduct in the handling of claims. Conversely, RICO does not incorporate any of the standards for determining compensation under the WDCA, such as "workplace injury," the distinction between "permanent" and "temporary" disability, and the difference between "total" and "partial" disabilities. MCL §§ 418.301, 418.351, 418.361. Therefore, using RICO to litigate workers' compensation claims would create a double legal standard and destroy the uniformity of Michigan's system.

RICO suits such as this one undermine the WDCA by usurping the Bureau's administrative and enforcement functions. Here, for example, Plaintiffs seek injunctive relief against Defendants that presumably would control their use of physicians and otherwise order them to act in good faith when handling claims under the WDCA. RE # 117-2, FAC ¶ 154 (p. 49). Under Michigan law, however, enforcement of the WDCA is exclusively the function of the Bureau,

subject to state court review. *See, e.g.*, MCL § 418.801(1) (requiring keeping of certain records and the furnishing of reports "to the bureau as the director may reasonably require"); MCL § 418.631(1) (allowing the Bureau to recommend revocation of a workers' compensation insurer's license if it "fails to pay promptly claims for compensation for which it shall become liable or if it repeatedly fails to make reports to the director as provided in this act"). RICO litigation would transform federal district courts into co-administrators of the WDCA. That would be an unprecedented federal intrusion into a traditional area of state regulation.

D. Plaintiffs Fail to Demonstrate Why the Exclusive Remedy Clause Does Not Apply

Plaintiffs argue that the Bureau does not have exclusive jurisdiction because: (1) the WDCA does not address claims handling fraud – or if it does, any penalties for fraud are too weak; and (2) the alleged fraud occurred long after the workplace injuries. *See* Brief of Plaintiffs-Appellants ("Br. Appellants") at 13-19. These arguments are not availing.

Plaintiffs are simply wrong to claim that the WDCA is inapplicable to fraud. As described above, the WDCA imposes multiple penalties for fraud in claims handling. *See* above at 9. In fact, the WDCA provides for enhanced judicial review of administrative decisions that may have been tainted by fraud by relaxing the rule that a magistrate's findings of fact are conclusive on appeal. *See* MCL

§ 418.861a(14). The Michigan Court of Appeals can overturn the Bureau's decision to deny compensation if there is proof of fraud. *See, e.g., Fuchs v. General Motors Corp.*, 325 N.W. 2d 489, 491 (Mich. Ct. App. 1982) ("We are charged with the responsibilities of reviewing questions of law [and] determining whether there is any fraud . . . ."). Thus, the lower court correctly held that "the WDCA does address the 'fraudulent' denial of benefits and Michigan Courts have routinely held that such claims belong exclusively before the [Bureau] and the WCAC, with the ultimate availability of judicial review." Slip op. at 18 (RE # 122).

Nor does it matter that a denial of benefits occurs after a workplace injury. The WDCA's exclusive jurisdiction clause extends the Bureau's jurisdiction to "***[a]ny*** dispute or controversy ***concerning*** compensation or other benefits." MCL § 418.841(1) (emphasis added). Indeed, because a claim for compensation can be made only if the worker has suffered a workplace injury, compensation for the injury and the handling of the resulting claim cannot be de-linked. As a result, resolution of a dispute over the handling of a claim not only "concerns" compensation but lies at the heart of the Bureau's exclusive jurisdiction to resolve disputes over eligibility. A dispute over post-injury denial of benefits is just the type of controversy that falls within the sole purview of the Bureau and, on appeal, the WCAC and the Michigan Court of Appeals. *See Warner v. Collavino Bros.*,

347 N.W.2d 787, 789 (Mich. Ct. App. 1984) (claim that benefits were denied in bad faith heard first by magistrate within Bureau, then by WCAC, and then by the Court of Appeals); *Couture v. General Motors Corp.*, 335 N.W.2d 668, 669-70 (Mich. Ct. App. 1983) (same).

Essentially, the plaintiffs in this case are attempting to create a "bad faith" exception to the Bureau's exclusive jurisdiction over compensation disputes. They contend that alleged fraud by an employer or insurer gives them a cause of action outside the WDCA. The Michigan courts, however, have rejected this notion because nothing in the statute supports such an exception to the exclusive jurisdiction clause and because the WDCA itself contains remedies for bad faith claims handling and defines the type of conduct for which those penalties are appropriate. *See Warner*, 347 N.W.2d 789-90 (improper to impose a penalty for disputing a claim in bad faith beyond those authorized by the WDCA); *Couture*, 335 N.W.2d at 670 (WDCA defines the sort of bad faith conduct for which penalties are appropriate).

Although Plaintiffs may be dissatisfied with the severity of the penalties the WDCA imposes on fraudulent conduct, that does not justify invocation of RICO to override the Bureau's exclusive jurisdiction. The penalty for fraud within Michigan's workers' compensation system is a public policy question that should be addressed to the Michigan legislature and not to the federal courts.

Finally, Plaintiffs' heavy reliance on *Brown v. Cassens Transport Co*., 546 F.3d 347 (6th Cir. 2008), is misplaced. That decision does not bear on the application of the exclusive jurisdiction doctrine to RICO. The panel considered the application of the "reverse preemption" provisions of the McCarran-Ferguson Act, not the exclusive jurisdiction doctrine, which arises from an independent body of federal and state jurisprudence. Nor did the panel consider the effect of the WDCA's exclusive remedy and exclusive jurisdiction provisions and their significance within the statutory scheme. Finally, the panel did not consider the substantial body of Michigan law holding that allegations of fraudulent denial of benefits are just as subject to the Bureau's exclusive jurisdiction as allegations based on inadvertence or mistake. The District Court thus correctly held that this Court's prior decision does not control application of the exclusive jurisdiction doctrine. *See* slip op. at 31 (RE # 122).

CONCLUSION

The District Court's judgment should be affirmed for the foregoing reasons.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH RULE 32(A)

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 4,941 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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CERTIFICATE OF SERVICE

I certify that on March 24, 2011, I served the 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-Appellees by electronic case filing on the following:

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