APPENDIX A

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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

Plaintiffs-Appellants,

v.

CASSENS TRANSPORT CO., CRAWFORD & COMPANY, AND DR. SAUL MARGULES,

Defendants-Appellees.

No. 10-2334.
Argued: July 7, 2011
Decided and Filed: April 6, 2012
Rehearing and Rehearing En Banc Denied June 19, 2012.*

Before: MOORE, COLE, and GIBBONS, Circuit Judges.

MOORE, J., delivered the opinion of the court, in which COLE, J., joined. GIBBONS, J. (pp. 969–74), delivered a separate dissenting opinion.

OPINION

KAREN NELSON MOORE, Circuit Judge.

The plaintiffs, who were allegedly injured while working for Cassens Transport Company ("Cassens"), sought worker's compensation benefits under Michigan's Worker's Disability Compensation Act, Mich. Comp. Laws § 418.301 ("WDCA"). Crawford & Company, Cassens's third-party administrator, de-

* Judge Gibbons would grant rehearing for the reasons stated in her dissent.

nied each plaintiff's benefits. In response, the plaintiffs filed a complaint in the United States District Court for the Eastern District of Michigan, alleging that the denials were fraudulent and violated the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961(1)(B), 1962(c), and 1964(c) ("RICO"). The district court dismissed the lawsuit.

We hold that the Supremacy Clause prevents the Michigan legislature from preempting a RICO remedy by declaring its worker's compensation scheme to be exclusive of federal remedies. An expected entitlement to benefits under the WDCA qualifies as property, as does the claim for such benefits, and the injury to such property creates, under certain circumstances, a RICO violation. We therefore **REVERSE** the district court's judgment and **REMAND** the case for further proceedings consistent with this opinion.

I. BACKGROUND

Paul Brown, William Fanaly, Charles Thomas, Robert Orlikowski, and Scott Way were injured allegedly while performing work-related tasks for their employer, Cassens.[1] Cassens is self-insured and contracts with Crawford, a claims adjudicator, to resolve worker's compensation claims brought by Cassens's employees. Dr. Saul Margules evaluated all of the plaintiffs except Thomas. According to the complaint, Cassens and Crawford solicited fraudulent medical

[1] Gary Riggs has withdrawn his claims because he signed a release that "clearly and unequivocally covers and releases the claims he asserts in this action." *Brown* v. *Cassens Transp. Co. (Brown IV)*, 743 F. Supp. 2d 651, 653 n.1 (E.D. Mich. 2010). Riggs had originally received benefits that later were terminated. R. 1 (Compl. ¶ 48).

reports from Dr. Margules and other physicians. Dr. Margules is "not an expert in orthopedic conditions," which most injuries on the job involve. R. 1 (Compl. ¶ 37). He was also alleged to be "biased due to the amount of money defendants paid him over the years to examine Cassens workers and to testify against them." *Id.* The plaintiffs assert that Cassens and Crawford ignored other medical evidence that supported the plaintiffs' claims. The plaintiffs allege that the conspiracy was orchestrated by mail or by wire. The claims of each plaintiff except Brown were "resolved by settlement" before the Worker's Compensation Appellate Commission ("WCAC") rendered a final determination. Reply Br. at 23. Cassens denied Brown's claim, a magistrate granted Brown full benefits, and Cassens appealed. Brown's claim was decided on its merits by the WCAC. R. 1 (Compl. ¶ 39). Neither the briefs nor the complaint state how the WCAC resolved his claim.

On June 22, 2004, the plaintiffs sued Cassens, Crawford, and Dr. Margules (except that Thomas did not sue Dr. Margules), alleging violations of RICO and intentional infliction of emotional distress. Each plaintiff seeks monetary "damages measured by the amount of benefits improperly withheld …, plus interest as provided by law, all tripled in accordance with RICO, together with attorney fees and costs as provided by law." R. 1 (Compl. ¶¶ 21, 29, 46, 65, 74). The district court dismissed the case under Federal Rule of Civil Procedure 12(b)(6) for failure to allege reliance on the defendants' fraudulent misrepresentations. *Brown* v. *Cassens Transp. Co. (Brown I)*, 409 F. Supp. 2d 793 (E.D. Mich. 2005). A divided panel of this court affirmed. *Brown* v. *Cassens Transp. Co. (Brown II)*, 492 F.3d 640 (6th Cir. 2007). The Supreme Court vacated our judgment and remanded

the case in light of *Bridge* v. *Phoenix Bond & Indemnity Co.*, 553 U.S. 639, 128 S.Ct. 2131, 170 L.Ed.2d 1012 (2008), which held that civil RICO plaintiffs do not need to demonstrate reliance on defendants' fraudulent representations. *Brown* v. *Cassens Transp. Co.*, 554 U.S. 901, 128 S.Ct. 2936, 171 L.Ed.2d 862 (2008). On remand, we held that the plaintiffs had pleaded a "pattern" of unlawful activity. We also held that the McCarran–Ferguson Act, 15 U.S.C. § 1012, did not reverse preempt RICO claims because the WDCA was not enacted to regulate the business of insurance and, in any event, RICO would not "invalidate, impair, or supersede" the WDCA. *Brown* v. *Cassens Transp. Co. (Brown III)*, 546 F.3d 347, 363 (6th Cir. 2008), *cert. denied*, —— U.S. —, 130 S.Ct. 795, 175 L.Ed.2d 575 (2009).

On remand, the district court denied the plaintiffs' motion to amend their complaint and dismissed their claims under Rules 12(b)(6) and 12(c). *Brown* v. *Cassens Transp. Co. (Brown IV)*, 743 F. Supp. 2d 651 (E.D. Mich. 2010). The district court determined that the WDCA provided an exclusive state remedy via the WCAC that foreclosed federal RICO claims; that monetary losses stemming from lost benefits were personal injuries that were not injury to business or property; and that the damages were too speculative to support standing. The plaintiffs have appealed.

Meanwhile, three similar cases, all brought by one of the attorneys who represents the plaintiffs in this case, have been dismissed by various district judges. *Lewis* v. *Drouillard*, 788 F. Supp. 2d 567 (E.D. Mich. 2011), *appeal docketed*, No. 11–1325 (6th Cir. Mar. 14, 2011) (held in abeyance by 6th Cir. Apr. 15, 2011, Order pending the resolution of *Jackson* and this case); *(Jay) Brown* v. *Ajax Paving Indus.*,

Inc., 773 F. Supp. 2d 727 (E.D. Mich. 2011), *appeal docketed*, No. 11–1391 (6th Cir. Mar. 28, 2011) (held in abeyance by 6th Cir. June 6, 2011, Order pending resolution of this case); *Jackson* v. *Sedgwick Claims Mgmt. Servs., Inc.*, No. 09–11529, 2010 WL 931864 (E.D. Mich. Mar. 11, 2010), *appeal docketed*, No. 10–1453 (6th Cir. Apr. 4, 2010).

II. ANALYSIS

A. Standards Of Review

We review de novo dismissals under Rules 12(b)(6) and 12(c). *Poplar Creek Dev. Co.* v. *Chesapeake Appalachia, L.L.C.*, 636 F.3d 235, 240 (6th Cir. 2011). We construe the complaint in the light most favorable to the plaintiffs, accepting its allegations as true and drawing all reasonable inferences in the plaintiffs' favor. *Id.* To avoid dismissal, the plaintiffs must "state a claim to relief that is plausible on its face." *Bell Atl. Corp.* v. *Twombly*, 550 U.S. 544, 570, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007). Dismissal "may be granted only if the moving party is ... clearly entitled to judgment," even after taking as true the allegations of the nonmoving party. *Poplar Creek*, 636 F.3d at 240.

We also review de novo when a district court denies a motion for leave to amend a complaint on the basis that amendment would be futile. *Brown* v. *Owens Corning Inv. Review Comm.*, 622 F.3d 564, 569 (6th Cir. 2010).

B. Relationship Between RICO And The WDCA

RICO makes it a crime "for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign

commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt." 18 U.S.C. § 1962(c). RICO defines "racketeering activity" to include "any act which is indictable under any of the following provisions of title 18, United States Code: ... section 1341 [18 U.S.C. § 1341] (relating to mail fraud), section 1343 [18 U.S.C. § 1343] (relating to wire fraud)." *Id.* § 1961(1).

Brown III, 546 F.3d at 352 (alterations and omissions in original).

The WDCA provides that employees who are injured in the course of employment "shall be paid compensation." Mich. Comp. Laws § 418.301(1). An injured employee receives payments beginning fourteen days "after the employer has notice or knowledge of the disability." *Id.* § 418.801(1). The WDCA purports to make "[t]he right to the recovery of benefits" under the WDCA "the employee's exclusive remedy against the employer for a personal injury or occupational disease," with the sole exception of "intentional tort[s]." *Id.* § 418.131(1).

The parties argue at length about (a) whether the plaintiffs' RICO claims fall within the ambit of the WDCA, triggering its exclusive-remedy clause, and (b) whether RICO would impair the WDCA's regulatory scheme. We find these debates irrelevant. The plaintiffs brought a federal claim, not a WDCA claim. Although we do not hold that RICO preempts the WDCA, we do find that "the relative importance to the State of its own law is not material" when "a valid federal law" provides a cause of action based on overlapping facts. *Ridgway* v. *Ridgway*, 454 U.S. 46, 54, 102 S.Ct. 49, 70 L.Ed.2d 39 (1981) (internal quo-

tation marks and alteration marks omitted). Therefore, the district court erred in finding that the WDCA forecloses the plaintiffs' RICO claims.

1. Supremacy Clause

Although RICO's predicate of mail fraud is similar to the underlying fraud that affects a state-recognized interest, mail fraud is a distinct offense. Due to the Supremacy Clause, Michigan does not have the authority to declare a state remedy exclusive of federal remedies. *See* U.S. Const. art. VI, cl. 2; *Roberts* v. *Roadway Express, Inc.*, 149 F.3d 1098, 1105 (10th Cir. 1998) ("If Roadway means to argue that Colorado's Workers' Compensation Act provides the exclusive remedy for all work-related injuries including emotional distress caused by violations of the civil rights laws, that argument is readily disposed of by the Supremacy Clause."); *Lopez* v. *S.B. Thomas, Inc.*, 831 F.2d 1184, 1190 (2d Cir. 1987) ("New York's Workers' Compensation Law might bar plaintiff's state common-law claim ... [, but] we do not read the workers' compensation law to deny relief under a federal statute. Were state law to erect such a bar, it would clearly run afoul of the Supremacy Clause...."). State law can eliminate federal remedies only when authorized by reverse-preemption clauses, such as the one contained in the McCarran–Ferguson Act, which played a role in this panel's prior decision. *Brown III*, 546 F.3d at 357. Although the plaintiffs frame their argument in terms of preemption, the Supremacy Clause is relevant in this case only to decide whether Michigan can "foreclose[ ]" federal RICO claims, as the district court held. *Brown IV*, 743 F. Supp. 2d at 668. Regardless of whether RICO preempts the WDCA, RICO provides a distinct cause of action.

To contest this result, the defendants rely on *Connolly* v. *Maryland Casualty Co.*, 849 F.2d 525, 528 (11th Cir. 1988), *cert. denied*, 489 U.S. 1083, 109 S.Ct. 1539, 103 L.Ed.2d 843 (1989). The Eleventh Circuit held in *Connolly* that a plaintiff could not bring suit for civil rights violations under 42 U.S.C. § 1985 for injuries that stemmed from delayed payments of worker's compensation. The court reasoned that, because "[t]he civil rights claims and constitutional claims are all based on the right provided by Florida Compensation Law," "[t]he remedy for th[e] wrongful conduct cannot rise above the exclusive remedy provided by the Florida statutes." *Id.* Similarly, the entitlement to worker's compensation benefits is created by Michigan statutes. By analogy, specifying and limiting the remedy for violations of that entitlement arguably is Michigan's prerogative. More particularly, the defendants cite *Connolly* and *Prine* v. *Chailland Inc.*, 402 Fed. Appx. 469, 470–71 (11th Cir. 2010) (unpublished opinion), *cert. denied*, —— U.S. ——, 131 S.Ct. 2100, 179 L.Ed.2d 892 (2011), for the proposition that this court lacks subject-matter jurisdiction over RICO claims—that is, the allegations do not state a cognizable RICO claim—if the state court would decline to exercise jurisdiction over the plaintiffs' worker's compensation claims.

The flaw with the defendants' argument is that the predicate offense for the RICO action is mail fraud, not the denial of worker's compensation. "The gravamen of [a] RICO cause of action is not the violation of state law, but rather certain conduct, illegal under state law, which, when combined with an impact on commerce, constitutes a violation of federal law. Therefore, it is not alleged that [the defendants are] subject to 'liability under' the [state law]; their liability … stems from RICO." *Williams* v. *Stone*, 109

F.3d 890, 895 (3d Cir.), *cert. denied*, 522 U.S. 956, 118 S.Ct. 383, 139 L.Ed.2d 299 (1997). The district court here erred when it stated that this case does not "involve[ ] a separate and independent tort (theft or conversion or some similar claim)" because the plaintiffs "cannot disentangle their RICO claim from their underlying claim for benefits." 743 F. Supp. 2d at 666, 668. Admittedly, the plaintiffs are entitled to damages for the alleged fraud only if they were actually entitled to worker's compensation and were not properly compensated, which is a question of state law. But this fact shows an overlap in sanctioned conduct, not a dependency relationship between state and federal law. It is well established that "[t]he fact that a scheme may violate state laws does not exclude it from the proscriptions of the federal mail fraud statute." *Parr* v. *United States*, 363 U.S. 370, 389, 80 S.Ct. 1171, 4 L.Ed.2d 1277 (1960). It follows that mail fraud is still criminal even when the existence of fraud varies according to whether a state prohibits conduct or whether it affords entitlements.[2] *United States* v. *Blandford*, 33 F.3d 685, 702 (6th Cir. 1994) (affirming a mail-fraud conviction by distinguishing a case with identical conduct because one state proscribed the defendant's action while the other state did not), *cert. denied*, 514 U.S. 1095, 115 S.Ct. 1821, 131 L.Ed.2d 743 (1995). Thus, mail fraud is a sanctionable offense even when it resembles a state tort. For these same reasons, this court has jurisdiction over the federal civil RICO claim even if

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[2] State law is not the exclusive source for defining fraudulent activity. *Langford* v. *Rite Aid of Ala., Inc.*, 231 F.3d 1308, 1313 (11th Cir. 2000) ("[T]he fact that no duty … can be located in analogous [state] cases does not mean that no such duty can be located in federal law.").

the Michigan courts would not hear a claim for worker's compensation. A federal civil RICO claim and a state claim for worker's compensation are legally distinct, even though they share factual underpinnings.

2. Federal Administrative Schemes And The Filed–Rate Doctrine

Courts have held RICO inapplicable to claims that should have been raised before *federal* agencies that had exclusive-remedy clauses in their enabling statutes. *E.g.*, *McCulloch* v. *PNC Bank Inc.*, 298 F.3d 1217, 1226–27 (11th Cir. 2002) (Higher Education Act); *Ayres* v. *Gen. Motors Corp.*, 234 F.3d 514, 521–22 (11th Cir. 2000) (National Traffic and Motor Vehicle Safety Act); *Bodimetric Health Servs., Inc.* v. *Aetna Life & Cas.*, 903 F.2d 480, 486–87 (7th Cir. 1990) (Social Security Act). The district court extended this logic to *state* agencies. However, enabling statutes for federal agencies shed light on Congress's intent with regard to RICO because Congress passed both sets of statutes. In contrast, enabling statutes for state agencies, passed by state legislatures, say nothing about Congress's intent with regard to RICO. Michigan cannot limit the scope of a federal RICO cause of action.

Anticipating this critique, the defendants collect cases in which courts prevented plaintiffs from bringing RICO claims that would have interfered with *state* administrative agencies. The defendants fail to mention that most of these cases apply the filed-rate doctrine. The filed-rate doctrine insulates from judicial attack utility rates that have been filed with a state or federal regulatory agency, even when the plaintiffs allege that the rates are unreasonable due to "fraud upon the regulatory agency." *Wegoland Ltd.*

v. *NYNEX Corp.*, 27 F.3d 17, 20 (2d Cir. 1994); *see also Keogh* v. *Chi. & Nw. Ry. Co.*, 260 U.S. 156, 43 S.Ct. 47, 67 L.Ed. 183 (1922); *Wah Chang* v. *Duke Energy Trading & Mktg. LLC*, 507 F.3d 1222, 1225–26 n. 4 (9th Cir. 2007); *Tex. Commercial Energy* v. *TXU Energy, Inc.*, 413 F.3d 503 (5th Cir. 2005), *cert. denied*, 546 U.S. 1091, 126 S.Ct. 1033, 163 L.Ed.2d 855 (2006); *Sun City Taxpayers' Ass'n* v. *Citizens Utils. Co.*, 45 F.3d 58 (2d Cir.), *cert. denied*, 514 U.S. 1064, 115 S.Ct. 1693, 131 L.Ed.2d 557 (1995); *H.J. Inc.* v. *Nw. Bell Tel. Co.*, 954 F.2d 485 (8th Cir.), *cert. denied*, 504 U.S. 957, 112 S.Ct. 2306, 119 L.Ed.2d 228 (1992); *Taffet* v. *So. Co.*, 967 F.2d 1483 (11th Cir.) (en banc), *cert. denied*, 506 U.S. 1021, 113 S.Ct. 657, 121 L.Ed.2d 583 (1992). Asking this court to apply the doctrine to the context of worker's compensation, the defendants identify a common policy concern: "only by determining what would be a reasonable rate absent the fraud could a court determine the extent of the damages." *Wegoland Ltd.*, 27 F.3d at 21. Similarly, only by knowing whether the plaintiffs were entitled to worker's compensation could a court determine the extent of the damage produced by the defendants' fraud. Additionally, without the filed-rate doctrine, "victorious plaintiffs [in utility rate suits] would wind up paying less than non-suing ratepayers," *id.*, just as victorious plaintiffs in this case would wind up recovering more than injured workers who do not bring a RICO suit.

The filed-rate doctrine, however, has not been extended to any other context. To the contrary, some cases have criticized its continuing validity even within the field of utility rates. *Square D Co.* v. *Niagara Frontier Tariff Bureau, Inc.*, 760 F.2d 1347, 1352–55 (2d Cir. 1985) (Friendly, J.), *aff'd*, 476 U.S. 409, 106 S.Ct. 1922, 90 L.Ed.2d 413 (1986). Crucial-

ly, a key justification for the filed-rate doctrine is the need for knowledgeable regulatory agencies to police "generally monopolistic and oligopolistic industries" to ensure reasonable rates, rather than leaving a rate-reasonableness calculation in the hands of the less knowledgeable courts. *Wegoland*, 27 F.3d at 21. This concern is less present in the field of worker's compensation where courts are regularly tasked with calculating the value of such injuries. In addition, the filed-rate doctrine protects a legislative-type determination by a regulatory agency, whereas the Michigan exclusivity provision insulates an adjudicatory determination. Agency expertise, while often justifying some measure of deference, never justifies a prohibition on our review—direct, much less indirect—of agency adjudications. For these reasons, we decline to extend the filed-rate doctrine.

3. *Burford* Abstention

Had the complaint survived the motions to dismiss, the district court stated that it "would [have] stay[ed] Plaintiffs' RICO claims ... based upon the *Burford* abstention doctrine. *Brown IV*, 743 F. Supp. 2d at 676 n. 17. *Burford* abstention is a method by which federal courts may defer to the pending decision of a state agency when "the State's interests are paramount and ... [the] dispute would best be adjudicated in a state forum." *Quackenbush* v. *Allstate Ins. Co.*, 517 U.S. 706, 728, 116 S.Ct. 1712, 135 L.Ed.2d 1 (1996). When a complaint seeks only monetary damages, *Burford* abstention may justify a stay, though not a dismissal of the claims. *Id.* at 730, 116 S.Ct. 1712. The decision whether to invoke *Burford* abstention is committed to the discretion of the court. *Id.* at 724–25, 116 S.Ct. 1712. Here, none of the parties' current briefs even mention *Burford* absten-

tion.[3] We therefore decline to exercise our discretion to stay the case.

All told, Michigan cannot preempt a federal RICO claim, and the resemblance of the federal RICO claim to the claim for a state entitlement does not undermine the RICO claim.

C. Injury to Property

The district court also rejected the plaintiffs' claims because it held that they failed to allege an injury to property, as required by RICO. The district court viewed the plaintiffs' alleged injuries as "wholly derivative of their personal injuries," and as such they could not be injury to property. *Brown IV*, 743 F. Supp. 2d at 674. We fail to see support for the district court's position in the text of RICO, and we hold that the plaintiffs have alleged an injury to property because they allege the devaluation of either their expectancy of or claim for worker's compensation benefits.

1. Background

Title 18 U.S.C. § 1964(c) entitles those who have been "injured in [their] business or property by reason of" racketeering, among other actions, to treble damages, costs, and fees. Plaintiffs can recover under § 1964(c) only if they can demonstrate an injury to "business or property." Shaping our analysis of this provision is the Supreme Court's instruction that

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[3] Moreover, it appears that the parties are no longer awaiting "a final determination of Plaintiffs' entitlement to those benefits via Michigan's workers' compensation scheme." *Brown I*, 409 F. Supp. 2d at 803. All of the claims settled except Brown's, Reply Br. at 23, which was decided on its merits. Appellant Br. at 35 n.11.

"RICO is to be read broadly." *Sedima, S.P.R.L.* v. *Imrex Co.*, 473 U.S. 479, 497, 105 S.Ct. 3275, 87 L.Ed.2d 346 (1985). The Supreme Court justified that rule in two ways. First, Congress wrote the RICO statute with "self-consciously expansive language and overall approach." *Id.* at 498, 105 S.Ct. 3275 (citing *United States* v. *Turkette*, 452 U.S. 576, 586–87, 101 S.Ct. 2524, 69 L.Ed.2d 246 (1981)). Second, Congress "express[ly] admoni[shed] that RICO is to 'be liberally construed to effectuate its remedial purposes.' " *Id.* (quoting Pub. L. No. 91–452, § 904(a), 84 Stat. 947). The remedial purpose of RICO is "nowhere more evident than in the provision of a private action for those injured by racketeering activity." *Id.*

2. Prior Panel Decision And Waiver

At the district court, the plaintiffs' only argument about the nature of their injury was that *Brown III* held that they had alleged loss of property. *Brown IV*, 743 F. Supp. 2d at 671 n. 15 (quoting Plaintiffs' Response to Cassens Mot. to Dismiss). The plaintiffs are incorrect. *Brown III* stated:

> Each of the plaintiffs has also sufficiently pleaded that they were injured by the defendants' "pattern of racketeering activity" under 18 U.S.C. § 1964(c) because the defendants' fraud deprived the plaintiffs of worker's compensation benefits and caused them to incur attorney fees and medical care expenses.

Brown III, 546 F.3d at 355–56. This sentence does not specifically state that the plaintiffs alleged an injury to *property*, an issue that was not before the panel in *Brown III*.

Nevertheless, this issue "presents an appropriate circumstance for exercising our discretion to reach an issue not raised below." *Lockhart* v. *Napolitano*, 573 F.3d 251, 261 (6th Cir. 2009). "Ordinarily, an issue that is not raised in the district court is not considered on appeal unless the question is presented with sufficient clarity and completeness for us to resolve the matter without further development of the record." *United States* v. *Lucas*, 640 F.3d 168, 173 (6th Cir. 2011). This issue is presented with clarity and completeness. The district court relegated waiver to a footnote and analyzed the merits of the issue for four pages. All of the parties have briefed the issue at length, and it is "purely a question of law." *Lockhart*, 573 F.3d at 261. We therefore consider whether the plaintiffs have alleged an injury to property.

3. State Or Federal Law

Whether a person has a "property" interest is traditionally a question of state law. *Logan* v. *Zimmerman Brush Co.*, 455 U.S. 422, 430, 102 S.Ct. 1148, 71 L.Ed.2d 265 (1982) ("The hallmark of property ... is an individual entitlement grounded in state law."). For that reason, " '[i]njury to property' for RICO purposes is generally determined by state law." *Isaak* v. *Trumbull Sav. & Loan Co.*, 169 F.3d 390, 397 (6th Cir. 1999) (citing *DeMauro* v. *DeMauro*, 115 F.3d 94, 96 (1st Cir. 1997)). The Sixth Circuit has never fleshed out the circumstances in which state law is not determinative of whether someone has a property interest at stake, but *DeMauro* suggests that federal law can constrict state definitions of property, and we agree with that approach. "[O]ne might expect federal law to decide whether a given interest, recognized by state law, rises to the level of

'business or property,'" a question that "depends on federal statutory purpose." *DeMauro*, 115 F.3d at 96; *see also Evans* v. *City of Chicago*, 434 F.3d 916, 930 n. 25 (7th Cir. 2006) ("[W]e need not adopt a state law definition of 'business or property' which is so broad that it contravenes Congress' intent in enacting the RICO law."); *Price* v. *Pinnacle Brands, Inc.*, 138 F.3d 602, 607 (5th Cir. 1998) ("[E]ven though courts may look to state law to determine, for RICO purposes, whether a property interest exists, it does not follow that any injury for which a plaintiff might assert a state law claim is necessarily sufficient to establish a claim under RICO."); *cf. Town of Castle Rock* v. *Gonzales*, 545 U.S. 748, 757, 125 S.Ct. 2796, 162 L.Ed.2d 658 (2005) (invoking the same rule when deciding whether property is protected under the Due Process Clause). We therefore must ask both whether Michigan defines the interest at stake as property and whether such a definition is consistent with the concept of "property" that Congress protected in enacting RICO.

4. Devaluation Of A Statutory Expectancy As Injury To Property

The complaint identifies the plaintiffs' injuries as including the deprivation and devaluation of worker's compensation benefits. R. 1 (Compl. ¶ 17). The district court held that the fraudulent deprivation or diminution of worker's compensation benefits did not amount to an injury in property because such injury is merely another form of pecuniary loss stemming from a physical injury. *Brown IV*, 743 F. Supp. 2d at 674. Because statutory entitlements are property, the injury to which causes harm, we see no reason under RICO to distinguish between property entitlements that accrue as a result of a personal injury

from those that do not. Although none of the remaining plaintiffs in this case had started receiving their statutory benefits at the time of the fraud, Michigan's nondiscretionary worker's compensation scheme creates a property interest in the expectancy of statutory benefits following notice to the employer of injury. Finally, even if Michigan law does not create a property interest in such an expectancy, we hold that the plaintiffs' *claim* for benefits is an independent property interest, the devaluation of which also creates an injury to property within the meaning of RICO.

a. Property Interest in Worker's Compensation Benefits

As an initial matter, both Michigan law and federal law recognize that the recipient of a statutory entitlement "has a statutorily created property interest in the continued receipt of those benefits." *Am. Mfrs. Mut. Ins. Co.* v. *Sullivan*, 526 U.S. 40, 60, 119 S.Ct. 977, 143 L.Ed.2d 130 (1999) (citing *Goldberg* v. *Kelly*, 397 U.S. 254, 262 & n. 8, 90 S.Ct. 1011, 25 L.Ed.2d 287 (1970)); *Perry* v. *Sindermann*, 408 U.S. 593, 601, 92 S.Ct. 2694, 33 L.Ed.2d 570 (1972); *Logan*, 455 U.S. at 428, 102 S.Ct. 1148; *Mathews* v. *Eldridge*, 424 U.S. 319, 332, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976); *see also Williams* v. *Hofley Mfg. Co.*, 430 Mich. 603, 424 N.W.2d 278, 282, 283 n. 16 (1988) (relying on federal due process law articulated in *Logan*, 455 U.S. at 428, 102 S.Ct. 1148). A recipient of Michigan worker's compensation benefits undoubtedly has a property interest under state law in the continued receipt of those benefits. We hold today that

injury to such statutory entitlements is an injury to property within the meaning of RICO.[4]

Congress provided in 18 U.S.C. § 1964(c) that "[a]ny person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court." The statute offers no further guidance on the meaning of "business or property." When faced with interpreting similar language in the context of the Clayton Act, the Supreme Court acknowledged that the inclusion of the word "business" works to narrow the definition of "property" from its otherwise naturally broad meaning. *Reiter* v. *Sonotone Corp.*, 442 U.S. 330, 338, 99 S.Ct. 2326, 60 L.Ed.2d 931 (1979). "Congress must have intended to exclude some class of injuries by the phrase 'business or property.' " *Id.* at 339, 99 S.Ct. 2326. This construction is equally applicable to the language in RICO. For example, money is a species of property under state law, but to hold that all monetary losses are covered by RICO would render the word "business" superfluous. Therefore, whereas damage to a building is an obvious property injury, purely pecuniary losses are sometimes indicative of property injury and sometimes not, depending on whether the pecuniary loss is to a legal entitlement—i.e., property. *See id.* at 340, 99 S.Ct. 2326 ("[T]he fact that peti-

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[4] We recognize that the present case no longer involves plaintiffs who were awarded benefits that were later revoked. However, because our analysis requires examining whether RICO differentiates between benefits arising from personal injuries and those that did not, we start with the simpler question of whether a plaintiff with vested worker's compensation benefits has a property interest in those benefits, because the legal entitlement is more widely accepted.

tioner [ ] was deprived of only money, albeit a modest amount, is no reason to conclude that she did not sustain a 'property' injury.").

Against this backdrop, the Sixth Circuit has held that "[r]ecovery for physical injury or mental suffering is not allowed under civil RICO because it is not an injury to business or property." *Fleischhauer* v. *Feltner*, 879 F.2d 1290, 1300 (6th Cir. 1989), *cert. denied*, 493 U.S. 1074, 110 S.Ct. 1122, 107 L.Ed.2d 1029 (1990); *see also Drake* v. *B.F. Goodrich Co.*, 782 F.2d 638, 644 (6th Cir. 1986); *Evans* v. *City of Chicago*, 434 F.3d 916, 930–31 (7th Cir. 2006); *Grogan* v. *Platt*, 835 F.2d 844, 847 (11th Cir.), *cert. denied*, 488 U.S. 981, 109 S.Ct. 531, 102 L.Ed.2d 562 (1988). The Supreme Court similarly excluded recovery for purely personal injuries under the Clayton Act, as such injuries are not inherently injury to any entitlement we would deem property. *Reiter*, 442 U.S. at 339, 99 S.Ct. 2326. Any pecuniary losses proximately resulting from a personal injury caused by a RICO violation, e.g. attorney fees, lost wages, and medical expenses, are also not recoverable because they, too, do not implicate harm to any legal entitlement.[5]

The defendants, the district court, and the dissent all focus on language in these cases rejecting pe-

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[5] The Circuits are less consistent when the injury claimed as a result of the RICO violation includes lost wages, but this is in part because some states do recognize a legal entitlement to employment opportunities. *Compare Diaz* v. *Gates*, 420 F.3d 897, 900 (9th Cir. 2005) (en banc) (lost wages from wrongful death caused by RICO violation may be properly pleaded as a property interest given California law) with *Evans* v. *City of Chicago*, 434 F.3d 916, 930–31 (7th Cir. 2006) (lost wages from wrongful incarceration caused by RICO violation not property interest given Illinois law).

cuniary losses "flowing from" personal injuries to argue that any pecuniary losses downstream from a personal injury are categorically personal in nature and unrecoverable under RICO. *See*, *e.g.*, *Evans*, 434 F.3d at 926. In doing so, they skip over the first and most fundamental question at issue—has any legal entitlement been harmed. They are correct that "but for" the personal injury, the plaintiffs here would have had no interest in any benefits. But there is nothing in the text of RICO or the cases they point to that provides for ignoring damage to an intervening legal entitlement because it arose following a personal injury. The defendants ask us to be the first circuit to read RICO as preventing recovery for injuries to property "by reason of" a RICO violation solely because the property interest itself would not have existed but for an unrelated personal injury. We decline to take this approach for three reasons.

First, a plain reading of the text of RICO provides no support for excluding certain categories of property interests based on how the interest itself originated. Recognizing statutory entitlements as property under RICO does not render any term of the act superfluous. *See Reiter*, 442 U.S. at 338–39, 99 S.Ct. 2326. Nor does the text reject recovery for certain legal entitlements because they accrued following a personal injury wholly unrelated to the RICO offense at issue. Congress's only other express limitation is that the injury to property must be "by reason" of a § 1962 violation; the text narrows recovery based on the origin of the *injury*, not the origin of the property. Based on the plain language of § 1964, we see no reason to exclude statutory entitlements to worker's compensation benefits—which are recognized as property under state law—from the category protected by RICO.

Second, focusing on the predicate injury that gave rise to the property interest ignores the Supreme Court's instruction to interpret RICO broadly. Section 1964 places "no restrictions ... on the words 'injured in his property.' The statute does not limit standing to those 'directly injured in his property,' or 'injured only in his property.' " Comment, Patrick Wackerly, *Personal Versus Property Harm and Civil RICO Standing*, 73 U. Chi. L. Rev. 1513, 1520–21 (2006). "To the contrary, the language reads that 'any' injured party has standing to sue." *Id.* The Supreme Court has repeatedly refused to graft additional requirements onto the plain language of both this statute and the identical language in the Clayton Act when doing so would defeat Congress's intent that the statute have broad and inclusive application. *See Reiter*, 442 U.S. at 339, 99 S.Ct. 2326 (rejecting argument that Clayton Act requires injury to commercial property interests); *Sedima, S.P.R.L.*, 473 U.S. at 497, 105 S.Ct. 3275 (rejecting argument that RICO applies only to organized crime). The dissent urges a narrow reading of the word "property," but points to nothing in the text of RICO or statements of Congress to justify that approach. Because Congress intended us to interpret RICO broadly, *Sedima, S.P.R.L.*, 473 U.S. at 497, 105 S.Ct. 3275, we see no reason to preclude RICO suits that are based on injury to property, not the predicate physical injury that gave rise to the property interest in the first place.

Third, such an approach would yield inconsistent results. The defendants do not argue statutory entitlements or claims to benefits generally are not property under RICO, but they argue such interests "may be RICO 'property' only when the wrong to be vindicated by the cause of action is an injury to busi-

ness or property." Appellee Cassens Br. at 26 (capitalization omitted).[6] Such an approach would have us hold that a plaintiff could recover under RICO for the fraudulent devaluation of welfare benefits, which do not arise following a personal injury, but not for the fraudulent devaluation of worker's compensation benefits, solely because the latter do. A plaintiff could recover for the loss of a cause of action for wrongful termination, but not for the loss of a cause of action for wrongful death. Nothing in the text of RICO evinces an intent by Congress to draw such arbitrary distinctions among property interests, nor do we find any support for the exclusion of these claims from the protections of RICO. Such an approach is incompatible with RICO because it qualifies the term "property" without a basis to do so in the RICO statute. *See Reiter*, 442 U.S. at 338–39, 99 S.Ct. 2326 (rejecting interpretation of "business or property" as "business or business property"). Classifying property interests according to their origins creates untenable distinctions.

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[6] The main cases cited by the defendants for this proposition do not support their argument. The Third Circuit in *Malley–Duff & Assocs., Inc.* v. *Crown Life Ins. Co.*, 792 F.2d 341, 353–54 (3d Cir. 1986), *aff'd on other grounds by* 483 U.S. 143, 107 S.Ct. 2759, 97 L.Ed.2d 121 (1987), recognized that causes of action were a species of property and harm to one could also be an injury to business when the action arose out of the termination of a business. Subsequent Third Circuit cases have held some causes of action are not property if the state itself would not treat the cause of action as a property interest. *See Magnum* v. *Archdiocese of Philadelphia*, 253 Fed. Appx. 224, 226–27 (3d Cir. 2007) (unpublished opinion). Here, the parties do not dispute that Michigan treats a cause of action over worker's compensation benefits as property. *Williams* v. *Hofley Mfg. Co.*, 430 Mich. 603, 424 N.W.2d 278, 282, 283 & n. 16 (1988).

The dissent makes the same mistake that the district court did by misconstruing the meaning of language from our sister circuits that "pecuniary losses *flowing from* [personal] injuries" are insufficient to establish injury to property. *Evans*, 434 F.3d at 930 (emphasis added); *see also Grogan* v. *Platt*, 835 F.2d 844, 847 (11th Cir.), *cert. denied*, 488 U.S. 981, 109 S.Ct. 531, 102 L.Ed.2d 562 (1988). Neither of these cases involved an injury to an intervening legal entitlement. Both addressed whether various damages that were the proximate result of a personal injury caused by a RICO violation, albeit some more indirectly than others, could be deemed property interests *on their own*. *Evans*, 434 F.3d at 930 (lost wages from wrongful incarceration caused by alleged RICO violation not property); *Grogan*, 835 F.2d at 846–47 (economic losses from wrongful death caused by alleged RICO violation not property). We take no issue with their holdings that they could not. *Evans* even left open the possibility that a plaintiff might be able to "recover under RICO for loss of an employment opportunity" if "an employee is able to establish that he has been unlawfully deprived of a property right in promised or contracted[-]for wages." 434 F.3d at 928. The *Evans* court did not say it would permit recovery for such a property deprivation "*only if the promise of wages did not arise following a physical injury at work*."[7] Such a scenario involving harm to an intervening legal entitlement, separating the physical injury from the downstream pecuniary losses, would be more factually analogous

[7] The *Evans* court also distinguished *Diaz* v. *Gates*, 420 F.3d 897 (9th Cir. 2005) (en banc), in part because under Illinois law, prospective employment was not a cognizable property right, whereas under California law it was. 434 F.3d at 930 n. 26.

to this case than the actual facts of *Evans* are. Focusing on whether pecuniary losses "flowed" in some way from a personal injury does not make sense in cases involving the devaluation of an actual legal entitlement as the result of an independent RICO fraud.

b. Property Interest in Expectation of Worker's Compensation Benefits

Having determined that the devaluation or loss of a statutory entitlement is an injury to property, we must next decide whether the plaintiffs in this case had accrued such a legal entitlement. None of the remaining plaintiffs in this case had started receiving any worker's compensation benefits under Michigan law at the time of filing their RICO action. The issue is, therefore, whether an injured employee obtains a property interest in his *expectancy* of worker's compensation benefits. Again, we look first to Michigan law.

Michigan has not directly addressed at what point an injured employee has a property interest in the benefits provided by the WDCA. In construing other statutes, Michigan courts have held that "a unilateral expectation of [a statutory] benefit" before the benefit is awarded is not property because the claimant must "have a legitimate claim of entitlement to the funds." *City of St. Louis* v. *Mich. Underground Storage Tank Fin. Assurance Policy Bd.*, 215 Mich. App. 69, 544 N.W.2d 705, 708–09 (1996) (citing *Williams*, 424 N.W.2d 278). However, that principle originates in federal due process law.[8] *Town of Castle*

[8] Michigan often looks to federal due process law in analyzing whether property interests are at stake. *Williams* v. *Hofley Mfg. Co.*, 430 Mich. 603, 424 N.W.2d 278, 282, 283 n. 16 (1988) (rely-

Rock v. *Gonzales*, 545 U.S. 748, 756, 125 S.Ct. 2796, 162 L.Ed.2d 658 (2005) (quoting *Bd. of Regents of State Colls.* v. *Roth*, 408 U.S. 564, 577, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972)). And when interpreting federal due process law, "[e]very regional circuit to address the question," including the Sixth Circuit, "has concluded that applicants for benefits, no less than benefits recipients, may possess a property interest in the receipt of public welfare entitlements," *Cushman* v. *Shinseki*, 576 F.3d 1290, 1297 (Fed.Cir.2009), so long as "a statute mandates the payment of benefits to eligible applicants based on objective, particularized criteria," *Mallette* v. *Arlington Cnty. Emps.' Supplemental Ret. Sys. II*, 91 F.3d 630, 639–40 (4th Cir. 1996); *see also Hamby* v. *Neel*, 368 F.3d 549, 559 (6th Cir. 2004); *Flatford* v. *Chater*, 93 F.3d 1296, 1305 (6th Cir. 1996).[9]

Federal due process law therefore recognizes a property interest in benefits that have not yet been awarded if the party asserting the property entitlement can "point to some policy, law, or mutually ex-

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ing on federal due process law articulated in *Logan*, 455 U.S. at 428, 102 S.Ct. 1148).

[9] "The Supreme Court has repeatedly reserved decision on the question of whether *applicants* for benefits (in contradistinction to *current recipients* of benefits) possess a property interest protected by the Due Process Clause." *Kapps* v. *Wing*, 404 F.3d 105, 115 (2d Cir. 2005). Nevertheless, "the Supreme Court's procedural due process jurisprudence focuses on whether statutory provisions create a right, not whether benefits have been received in the past." *Mallette* v. *Arlington Cnty. Emps.' Supplemental Ret. Sys. II*, 91 F.3d 630, 640 (4th Cir. 1996) (citing *Bd. of Regents of State Colls.* v. *Roth*, 408 U.S. 564, 577, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972)). "[T]he potential consequences of denying ... benefits are no less potentially dire than those of revoking them." *Id.*

plicit understanding that both confers the benefits and limits the discretion of the [other party] to rescind the benefit." *R.S.W.W., Inc.* v. *City of Keego Harbor*, 397 F.3d 427, 435 (6th Cir. 2005) (internal quotation marks omitted); *see also Castle Rock*, 545 U.S. at 756, 125 S.Ct. 2796 ("[A] benefit is not a protected entitlement if government officials may grant or deny it in their discretion."). Michigan law is consistent with this approach. For example, the Michigan Supreme Court has held that a bar owner with a liquor license has a property interest in his expectancy of receiving a renewal license, independent of his interest in his existing license, despite having had no property interest in his expectancy of an initial license in the first place. *Bundo* v. *City of Walled Lake*, 395 Mich. 679, 238 N.W.2d 154, 160 (1976). The Michigan Supreme Court focused entirely on the differences in the statutory procedures for obtaining a renewal license as compared to an initial license. An initial applicant for a liquor license must obtain approval from the local legislative body *before* the license may be granted; the initial applicant therefore has nothing more than a unilateral expectation or hope that he may receive the license. An existing licensee need not obtain such approval; unless an objection by the local body is filed prior to thirty days before his license expires, renewal "take[s] place as a matter of course." *Id.* at 157, 161.

Applying this principle to the present context, we look to the statutory procedures for obtaining worker's compensation in Michigan and conclude that applicants for worker's compensation benefits have a property interest in those benefits at the time that their employer becomes aware of the injury. The WDCA's mandatory language deprives the WCAC of discretion about whether to award benefits. The sta-

tute says that employees injured in the course of employment "*shall* be paid compensation," which is calculated according to a rigid schedule. Mich. Comp. Laws § 418.301(1) (emphasis added). In the context of the WDCA, there is no "well established tradition" of government officials having "discretion" despite "apparently mandatory ... statutes." *Castle Rock*, 545 U.S. at 760, 125 S.Ct. 2796. In fact, no adjudication is required: an employee receives worker's compensation benefits fourteen days "after the employer has notice or knowledge of the disability." Mich. Comp. Laws § 418.801(1). Applicants therefore acquire a property interest in worker's compensation when employers learn of their employees' physical injuries. The property interest has an "ascertainable monetary value" and the identity of the entitlement is neither indeterminate nor vague. *Castle Rock*, 545 U.S. at 763, 125 S.Ct. 2796. These features demarcate a property interest guaranteed by the mandatory language of the WDCA.

The dissent argues that the employer's statutory ability to dispute the payment of benefits negates any claim of legal entitlement to benefits prior to a decision to award them.[10] As an initial matter, both

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[10] The defendants make a similar argument, pointing to Michigan cases with language suggesting the employee's "entitlement" to benefits does not begin until after the employee meets his burden of proof under the WDCA. *See*, *e.g.*, *Stokes* v. *Chrysler L.L.C.*, 481 Mich. 266, 750 N.W.2d 129, 143–44 (2008) ("There is no way of knowing whether claimant is entitled to benefits until the correct legal standards have been applied, and these standards cannot be applied until the claimant has introduced evidence concerning his wage-earning capacity."); *Rake-straw* v. *Gen. Dynamics Land Sys., Inc.*, 469 Mich. 220, 666 N.W.2d 199, 205 (2003) ("[A]n employee must establish the existence of a work-related injury by a preponderance of the

the dissent and the district court misread Michigan Compiled Laws § 418.801(2) as permitting the non-payment of otherwise mandatory weekly compensation in the event of an ongoing dispute. It does not. Subsection (2) relieves an employer of an otherwise automatic *penalty* for the non-payment of the benefits owed under the statute in the event of an ongoing dispute.[11] But even if it did relieve the employer of its obligation, the existence of a limited mechanism to dispute the receipt of benefits otherwise awarded as a matter of course does not make the expectation cease to be a property interest.[12] In *Bundo*,

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evidence in order to establish entitlement to benefits."). These cases are cited out of context on issues regarding respective burdens when benefits are disputed under the WDCA, Mich. Comp. Laws § 418.851, and not whether a plaintiff has a property interest in his expectancy of benefits. We therefore do not find their use of the word "entitlement" persuasive on this distinct issue.

[11] The cases cited by the district court also address only the nonpayment of the penalty set forth in subsection (2) in the event of an ongoing dispute. *See Warner* v. *Collavino Bros.*, 133 Mich. App. 230, 347 N.W.2d 787 (1984); *Richardson* v. *Gen. Motors Corp.*, 139 Mich. App. 727, 363 N.W.2d 22 (1984); *Couture* v. *Gen. Motors Corp.*, 125 Mich. App. 174, 335 N.W.2d 668 (1983). The WDCA does not spell out what impact a dispute has on subsection (1)'s requirement that the employee "shall" be compensated. However, given that an employer suffers no penalty from refusing to pay disputed claims, as was the case here, it seems the practical effect of the statute is that employers who dispute claims do not pay them until ordered to do so.

[12] Otherwise a party could *never* be denied benefits, even for proper grounds, which is clearly not the case. The ability of an employer to dispute an otherwise nondiscretionary claim of benefits, and such employer's potential success, impacts only the value of the employee's claim to benefits, not the determination that such an expectancy of benefits is the employee's property in the first place.

238 N.W.2d at 160–61, for example, the Michigan Supreme Court deemed it of no consequence that the local legislative body retained a statutory right to object to renewal of a liquor license.

The absence of a specific statutory provision authorizing an employer not to pay compensation during a dispute also distinguishes this case from *American Manufacturers Mutual Insurance Co.* v. *Sullivan*, 526 U.S. 40, 58–61, 119 S.Ct. 977, 143 L.Ed.2d 130 (1999). In *American Manufacturers*, the Supreme Court held that claimants of worker's compensation benefits in Pennsylvania did not have a property interest in the payment of benefits prior to an adjudication that the medical treatments for which they sought compensation were "reasonable and necessary." *Id.* at 61, 119 S.Ct. 977. In 1993, Pennsylvania had amended its worker's compensation laws to insert a procedure by which an employer could require a review of the necessity of an employee's treatments "before a medical bill must be paid." *Id.* at 45, 119 S.Ct. 977. The Supreme Court held that under the new regime, it was no longer enough that the plaintiffs demonstrated their "initial *eligibility* for medical treatment" because they had not overcome the second statutory hurdle of showing "that the particular medical treatment they received was reasonable and necessary." *Id.* at 61, 119 S.Ct. 977. The injured employees therefore could not yet claim a property interest in their expectation of benefits. *Id.*

Here, the underlying Michigan state law does not require injured employees to make such an initial showing *before* they receive benefits, as Pennsylvania's law did. In contrast, Michigan law resembles the old Pennsylvania regime, stating simply that

"[a]n employee[ ] who receives a personal injury arising out of and in the course of employment by an employer ... *shall be paid compensation* as provided in this act." Mich. Comp. Laws § 418.301(1) (emphasis added); *see* 77 Pa. Stat. Ann. § 531(5) (Purdon Supp. 1978) ("The employer shall provide payment for reasonable ... services rendered ... as and when needed."). Although an employee bears the burden of showing his personal injury arose during the course of his employment in the event of a dispute, Mich. Comp. Laws § 418.851, no Michigan statutory provision permits the employer to withhold compensation until such a showing has been made.

Where, as here, the receipt of the benefit is nondiscretionary and statutorily occurs as a matter of course, we firmly believe that the Michigan courts would recognize a property interest in an injured employee's expectancy of worker's compensation. And, as already discussed, because a property interest in the form of entitlement to benefits is consistent with "property" as defined by RICO, the plaintiffs have properly stated a claim alleging injury to property when they alleged harm to their expectancy of statutory benefits under the WDCA.

c. Property Interest in Claim for Worker's Compensation Benefits

Independently of our analysis thus far, we also hold that the plaintiffs in this case have a property interest in their claim for benefits. Therefore, even if Michigan courts would *not* recognize an expectancy of benefits under the WDCA as property, the plaintiffs in this case may proceed by alleging injury to property in that their *claim* to benefits under the worker's compensation scheme was damaged by the defendants' actions. *American Manufacturers* specifi-

cally reserved judgment on whether an applicant has "a property interest in ... *claims* for payment, as distinct from the payments themselves." *Am. Mfrs.*, 526 U.S. at 61 n. 13, 119 S.Ct. 977 (emphasis added). The holding was limited to the expectation of *payment* of worker's compensation (i.e., mailing a particular check), not the *claim* for payment (i.e., entitlement to present a claim). Had the defendants in *American Manufacturers* barred the plaintiffs from following the statutory procedures for presenting a claim at all, the result would very likely have been different.

Michigan law describes a cause of action for worker's compensation as a "species of property"—for both the plaintiff and the defendant. *Williams* v. *Hofley Mfg. Co.*, 430 Mich. 603, 424 N.W.2d 278, 282, 283 & n. 16 (1988) (citing *Logan*, 455 U.S. at 428, 102 S.Ct. 1148). Although the dissent is correct that the plaintiff in *Williams* had already been awarded worker's compensation, unlike here, the relevant interest at issue was not the employee's expectancy in benefits but whether an employer had a property interest in a worker's compensation cause of action such that a failure to afford the employer adequate process in such a proceeding injured his property. The court held that it was property. Here, the plaintiffs' claim is not necessarily about particular payments themselves, but also about the defendants' deception before the WDCA that deprived the plaintiffs of the ability to assert their claim for benefits under the statute in a fair forum.[13] We hold that Michigan would recognize *a claim* for worker's compensation

[13] The plaintiffs' complaint is ambiguous as to which property interest they believe was harmed—their expectancy or their claim. This should be considered on remand as part of the plaintiffs' motion to amend their complaint.

benefits as a species of property independently of whether the employee had obtained an interest yet in the underlying benefits themselves. And as discussed throughout, we see no reason to exclude injuries to causes of action, which are indisputably injuries to property, from the category identified by Congress as "property" in RICO.

Finally, the defendants are correct that worker's compensation is "a substitute for the tort system." *Brown III*, 546 F.3d at 359. That does not mean, however, that claims for worker's compensation sound in tort. When a plaintiff's personal injury is filtered through the WDCA, it is converted into a property right.

d. Effect of Settlement and Unfavorable Adjudication

Attacking the plaintiffs from another angle, the defendants claim that the plaintiffs "were not deprived of their causes of action" because the plaintiffs pursued the claims to resolution, be it by settlement or by final adjudication. Appellee Cassens Br. at 28. This argument mischaracterizes the plaintiffs' property interest. The plaintiffs did not lose the ability to litigate their claims entirely, but the value of their claims was allegedly diminished because of the fraud.

Of course, the plaintiffs' RICO action can succeed only by proving that the plaintiffs suffered an ascertainable injury from the defendants' fraud. To do that, they must show that their claims to benefits had value, i.e., the claims had some likelihood of success had they been able to present them in a fair proceeding. This is similar to legal malpractice cases, where the plaintiffs also allege injury to an underly-

ing claim, and Michigan requires plaintiffs to prove a "suit within a suit"—in other words, that they could have prevailed or obtained a better outcome in the original lawsuit. *Coleman* v. *Gurwin*, 443 Mich. 59, 503 N.W.2d 435, 437 (1993) (internal quotation marks omitted). This requirement "insure[s] that the damages claimed to result from the attorney's negligence are more than mere speculation." *Id.* Losing or settling the original lawsuit does not, on its own, render the injury speculative. To the contrary, damages are generally quantified counterfactually. *See*, *e.g.*, *Chronister Oil Co.* v. *Unocal Ref. & Mktg. (Union Oil Co. of Cal.)*, 34 F.3d 462, 464 (7th Cir. 1994) (Posner, J.) ("The point of an award of damages, whether it is for a breach of contract or for a tort, is, so far as possible, to put the victim where he *would have been* had the breach or tort not taken place." (emphasis added)).

The same logic is true here; losing or settling a case due to fraudulent medical reports does not extinguish the plaintiffs' property interest in bringing a claim free of fraud. It would be nonsensical to allow a plaintiff to sue her attorney for malpractice only if she had won the suit in which the malpractice occurred, even though she must still put on evidence that she would have won absent her attorney's malpractice. Likewise, here, plaintiffs should be allowed to proceed on their RICO claim and put on evidence that they would have received a better result in the underlying state agency proceedings had the defendants not submitted fraudulent medical reports. The fact that the plaintiffs lost or settled in tainted proceedings is not evidence that the plaintiffs would have lost or settled if the proceedings had been fair.

Raising an argument that goes to the merits of the adjudication, the defendants dispute whether the plaintiffs were injured on the job. *Cf.* Mich. Comp. Laws § 418.841(1) ("Any dispute or controversy concerning compensation ... shall be submitted to the [WCAC]… "). This argument relates only to damages, however, and not whether plaintiffs had a property interest in a fraud-free adjudication of their claims. Even if a person cannot ultimately satisfy the criteria to receive the statutory entitlement, she still has a property interest in her statutory right to raise the claims and be subject to a fair proceeding on the merits of her claims.

We hold that the plaintiffs have a property interest in their claims for worker's compensation benefits, and the favorable or unfavorable adjudication or settlement of those claims in a proceeding tainted by fraud does not extinguish their property interest in those benefits. The plaintiffs, then, have alleged an injury to property.

5. Damages

Under 18 U.S.C. § 1964(c), prevailing plaintiffs are entitled to treble damages and costs of the RICO suit, including reasonable attorney fees. Because of the trebling of damages, courts do not permit RICO claims to proceed unless the measure of damages is "not based upon mere speculation and surmise." *Fleischhauer* v. *Feltner*, 879 F.2d 1290, 1299–1300 (6th Cir. 1989). The district court here held that the damages in this case would be too speculative to give the plaintiffs standing to pursue a RICO claim. Although many of the arguments with respect to this issue have already been addressed, we will discuss briefly why damages here are appropriately quantifiable.

In the context of the Clayton Act, "a consumer ... is injured in 'property' when the price of those goods or services is artificially inflated by reason of the anticompetitive conduct complained of." *Reiter*, 442 U.S. at 339, 99 S.Ct. 2326. By analogy, a person is injured in "property" under RICO when the value of the statutory benefits that she receives is artificially decreased by reason of the fraud complained of. "[T]he compensable injury necessarily is the harm caused by predicate acts sufficiently related to constitute a pattern." *Sedima, S.P.R.L.*, 473 U.S. at 497, 105 S.Ct. 3275. Calculating such differences is rarely an exact science, but the plaintiffs should be able to put on proof of how much compensation they would have received under the WDCA's rigid schedule of compensation but for the defendants' allegedly fraudulent medical testimony. The difference between that amount and the amount they received in settlement is neither speculative nor too difficult to surmise.

The WDCA calculates a compensatory award using detailed instructions and tables set forth in Michigan Compiled Laws §§ 418.301 *et seq*., plus, after payments are 30 days late, $50 per day (capped at $1,500) for each subsequent day on which the employer fails to pay in the absence of an ongoing dispute. *Brown III*, 546 F.3d at 362 (quoting Mich. Comp. Laws § 418.801(2)). The damages alleged in this case are (1) either the denied benefits, or the amount by which the settlement reduced the award to which the plaintiff would have been entitled but for the inducement to settle, R. 117–2 (Amended Compl. ¶ 46) ("damages measured by the amount of benefits improperly withheld"); (2) costs incurred due to the "time delay in receipt of those benefits," *id.*; (3) attorney fees and litigation costs of litigating the

claim in the state system, *id.*; and (4) expenses from "mileage to and from medical care," *id.* The plaintiffs also request interest pertaining to each item. *Id.*

Because the plaintiffs have alleged a specific, ascertainable injury to property within the meaning of RICO, they are entitled to pursue these damages.

D. Adequacy of the Pleadings

The plaintiffs have plausibly alleged an "enterprise" and Dr. Margules's role in its "operation or management." For purposes of RICO, "an enterprise includes any union or group of individuals associated in fact," elsewhere described as "a group of persons associated together for a common purpose of engaging in a course of conduct." *Boyle* v. *United States*, 556 U.S. 938, 944, 129 S.Ct. 2237, 2243, 173 L.Ed.2d 1265 (2009) (internal quotation marks omitted). Such an association must have "a purpose, relationships among those associated with the enterprise, and longevity sufficient to permit these associates to pursue the enterprise's purpose." *Id.* at 2244. The requirements are interpreted flexibly. For example, members do not need to hold fixed roles, and a chain of command is not required. *Id.* at 2245.

1. Allegations Of "Enterprise"

"[A] corporation cannot be both the 'enterprise' and the 'person' conducting or participating in the affairs of that enterprise.... [A] corporation may not be liable under section 1962(c) for participating in the affairs of an enterprise that consists only of its own subdivisions, agents, or members."[14] *Begala* v. *PNC*

[14] Contrary to the defendants' argument, there is no requirement that the plaintiffs explicitly allege that "Cassens is a person." The complaint clearly alleges that Cassens violated §

Bank, Ohio, N.A., 214 F.3d 776, 781 (6th Cir. 2000), *cert. denied*, 531 U.S. 1145, 121 S.Ct. 1082, 148 L.Ed.2d 958 (2001). This principle is known as the "non-identity" or "distinctness" requirement. *Id.* Also, a plaintiff may plead in the alternative and "the pleading is sufficient if any one of [the theories that the plaintiff pleads] is sufficient." Fed. R. Civ. P. 8(d)(2).

The alleged enterprise consists of Cassens and Crawford, or Cassens, Crawford, and Dr. Margules. R. 1 (Compl. ¶ 20). Crawford and Cassens can comprise an enterprise on their own because Crawford "act[ed] as an agent for, *or in concert with*, Cassens." R. 1 (Compl. ¶ 18) (emphasis added). Moreover, the plaintiffs' allegations suggest that Dr. Margules is a distinct actor with whom the other defendants have "a long-standing business relationship." *Id.* ¶ 11; *see also* Appellee Margules Br. at 29 ("[The complaint] establishes that Dr. Margules was in practice for himself."). Therefore, the allegations satisfy the distinctness requirement.

Moreover, the complaint meets *Twombly*'s plausibility standard. The complaint alleges that the "Defendants expressly or implied[ly] communicated to Dr. Margules that [they] wanted him to write reports stating plaintiff was not disabled due to work-related injuries, regardless of the true circumstances." R. 1 (Compl. ¶ 12). Thus, the plaintiffs have plausibly pleaded the existence of an "enterprise."

1962(c), implying that Cassens is a "person" capable of violating that section.

2. Dr. Margules's Role

The plaintiffs have adequately alleged Dr. Magules's involvement in the operation or management of the enterprise. *Reves* v. *Ernst & Young* held that, although liability is not limited to "upper management," a person can be liable under RICO only if he or she is part of the "operation or management" of the enterprise. 507 U.S. 170, 185, 113 S.Ct. 1163, 122 L.Ed.2d 525 (1993). The defendants in *Reves* were not part of the operation of the enterprise because they simply prepared standard financial statements "based on information from management's accounting system." *Id.* at 186, 113 S.Ct. 1163. Dr. Margules, on the other hand, allegedly did more than participate in his "*own* affairs" of evaluating medical conditions. *Id.* at 184–85, 113 S.Ct. 1163. According to the complaint, Dr. Margules's evaluations were not objective medical reports. Dr. Margules was a " 'cut off' doctor ... upon whom Crawford and Cassens could rely for opinions which they could cite as grounds for cutting off or denying benefits." R. 1 (Compl. ¶ 6B). He allegedly fraudulently slanted his medical evaluations to serve the purposes of the enterprise, with "the express or implied promise of future payment of money." *Id.* Therefore, the complaint adequately alleges that Dr. Margules was part of the operation or management of the enterprise.

E. Leave to File an Amended Complaint

Courts should "freely give leave [to amend a complaint] when justice so requires." Fed. R. Civ. P. 15(a). When a complaint, as amended, could not survive a motion to dismiss, a district court does not err in denying the motion to amend. *Owens Corning*, 622 F.3d at 574. Because we conclude that the amended complaint could survive the motion to dismiss, denial

of the motion to amend for reason of futility was in error. We leave to the district court the question whether justice requires letting the plaintiffs amend their complaint.

III. CONCLUSION

We **REVERSE** the district court's judgment and **REMAND** the case for further proceedings consistent with this opinion.

JULIA SMITH GIBBONS, Circuit Judge, dissenting.

Because I disagree with the majority's analysis and conclusions in section II.C. of the opinion and because this issue is dispositive, I respectfully dissent. The district court recognized several grounds on which the plaintiffs' case could be dismissed, and in order to affirm the decision of the district court, our panel need only have agreed with one of them. The plaintiffs failed to state a claim for RICO relief because they neglected to plead an injury to business or property, and, thus, the district court's dismissal of plaintiffs' case should be affirmed.[15]

Plaintiffs' alleged RICO damages are that they were deprived of workers' compensation benefits and incurred attorneys' fees, medical-care expenses, and transportation expenses driving to and from medical care. The district court held that plaintiffs lack standing to sue under RICO because their claims for medical expenses and related pecuniary loss sustained as a result of their workplace injuries do not constitute injury to business or property under RI-

[15] I agree with the majority opinion's determination that *Brown III* did not deal with this issue and that we should decide it here.

CO. *Brown* v. *Cassens Transp. Co. ("Brown IV")*, 743 F. Supp. 2d 651, 658 (E.D. Mich. 2010). Because plaintiffs' damages "unquestionably were incurred as a direct result of Plaintiffs' on-the-job injuries," the district court concluded that "their medical expenses, workers' compensation benefits, medical mileage and attorneys fees are damages which are indisputably wholly derivative of their personal injuries and as such are not injuries to 'business or property' under RICO." *Id.* at 674. I agree.

As recognized by the majority, RICO provides recovery for "[a]ny person injured in his *business* or *property* by reason of a violation of section 1962 of this chapter...." 18 U.S.C. § 1964(c) (emphases added). Thus, without an allegation of damages to business or property by reason of a violation of § 1962, plaintiffs will not have standing to pursue their RICO claims. Although the Supreme Court has stated "RICO is to be read broadly" in determining what injuries were actually caused by conduct that RICO was designed to deter (*i.e.*, racketeering injuries), *Sedima, S.P.R.L.* v. *Imrex Co.*, 473 U.S. 479, 497, 105 S.Ct. 3275, 87 L.Ed.2d 346 (1985), (Maj. Op. at 956), this does not eliminate the requirement to plead an injury to business or property. " 'The phrase business or property ... retains restrictive significance. It would, for example, *exclude personal injuries suffered*.' " *Drake* v. *B.F. Goodrich Co.*, 782 F.2d 638, 644 (6th Cir. 1986) (internal quotation marks omitted) (quoting *Reiter* v. *Sonotone Corp.*, 442 U.S. 330, 339, 99 S.Ct. 2326, 60 L.Ed.2d 931 (1979)) (affirming district court's denial of a motion to amend a complaint). Furthermore, this restrictive significance has been clarified to exclude both personal injuries *and* pecuniary losses flowing from those personal injuries. *Evans* v. *City of Chicago*, 434 F.3d 916, 926 (7th

Cir. 2006); *see also Doe* v. *Roe*, 958 F.2d 763, 767 (7th Cir. 1992) ("The terms 'business or property' are, of course, words of limitation which preclude recovery for personal injuries and the pecuniary losses incurred therefrom."); *Grogan* v. *Platt*, 835 F.2d 844, 847 (11th Cir. 1988) ("[T]he pecuniary and non-pecuniary aspects of personal injury claims are not so separated ...; rather, loss of earnings, loss of consortium, loss of guidance, mental anguish, and pain and suffering are often to be found, intertwined, in the same claim for relief.").

At the outset, it is necessary to examine what law determines whether an injury constitutes a personal injury or an injury to business or property. "While federal law governs most issues under RICO, whether a particular interest amounts to property is quintessentially a question of state law." *Doe*, 958 F.2d at 768 (citing *Logan* v. *Zimmerman Brush Co.*, 455 U.S. 422, 430, 102 S.Ct. 1148, 71 L.Ed.2d 265 (1982)). But our court is "not required to adopt a state interpretation of 'business or property' if it would contravene Congress' intent in enacting RICO." *Id.* (citing *Reconstruction Fin. Corp.* v. *Beaver Cnty.*, 328 U.S. 204, 66 S.Ct. 992, 90 L.Ed. 1172 (1946)). "Some role does exist for state law. There is no general federal law of property transfers...." *DeMauro* v. *DeMauro*, 115 F.3d 94, 96 (1st Cir. 1997). Nonetheless, "[w]here to set the 'business or property' threshold depends on federal statutory purpose, and that purpose is likely to support a definition that is uniform throughout the country." *Id.* at 96–97. The task of the court is "to determine whether Congress intended the damages that plaintiffs seek in this case to be recoverable under civil RICO." *Grogan*, 835 F.2d at 846.

The majority indeed recognizes this legal framework. It then, however, concludes that Michigan's definition of property is consistent with Congress's intent, while engaging in little discussion of that Congressional intent, and relies on Michigan procedural due process jurisprudence to determine whether plaintiffs' allegations state a claim under RICO. Overlooking or minimizing the federal cases does not merely reject the helpful analogies they offer; it also results in an interpretation of RICO's standing requirement that departs from both Congressional language and intent.

Plaintiffs alleged that, after they were each injured at work, Cassens and Crawford formed an enterprise and fraudulently denied plaintiffs' claims for benefits under the WDCA through Notices of Dispute (in which Crawford challenged the validity of the claims as being unsupported by medical evidence or not job-related), opinion letters sent by Dr. Margules (opining that the alleged injury was not job-related or not sufficiently disabling), and additional communications in furtherance of the scheme. *Brown IV*, 743 F. Supp. 2d at 656. Based on this activity, plaintiffs' alleged damages were that they were deprived of workers' compensation benefits and incurred attorneys' fees, medical care expenses, and mileage to and from medical care providers. *Id.* at 658.

The majority discusses extensively whether an expectation of workers' compensation benefits constitutes a property interest. This approach ignores the determinative fact that the damages sought in worker's compensation cases derive from personal injuries. Under RICO, both personal injuries *and* pecuniary losses flowing from those personal injuries are insufficient to confer standing under § 1964(c). *See*

Evans, 434 F.3d at 926; *see also Grogan*, 835 F.2d at 846–47. The injury to plaintiffs is not the loss of an opportunity to assert a claim, in which there might or might not be a property interest, but the personal injury for which success on the claim would compensate.[16]

The majority opinion also departs from precedents of our sister circuits. These precedents provide useful examples of damages that compensate for personal injury and those that compensate for injury to property or business interests under RICO. *See Evans*, 434 F.3d at 926–27 (finding that malicious prosecution and false imprisonment resulting in loss of potential income and attorneys' fees were personal injuries because, under Illinois law, these claims are traditional tort claims resulting in personal injuries and pecuniary consequences of those personal injuries); *Doe*, 958 F.2d at 770 (finding that loss of earnings, purchase of a new security system, and employment of a new attorney were derivative of emotional distress resulting from defendant's sexual encounters with plaintiff and therefore reflected personal injuries that were not compensable under RICO); *Grogan*, 835 F.2d at 848 (holding that plaintiffs could not recover under RICO "for those pecuniary losses that are most properly understood as part of a personal injury claim," in this instance, personal injuries inflicted by predicate physical injury or death and the lost employment opportunities that

[16] The majority opinion asserts that focusing on the origin of the injury may yield inconsistent results. But the statutory language delineates the inquiry, which requires an examination of the origins of an injury. Thus, I would characterize the inconsistency the majority describes as the natural result of the Congressional definition of injuries within the statute's reach.

result); *Drake*, 782 F.2d at 644 (finding that a wrongful death action—based in an employer's concealment of hazards associated with working in an environment containing vinyl chloride—constituted a personal injury action rather than an injury to business or property). *But* see *Diaz* v. *Gates*, 420 F.3d 897, 898, 900–01 (9th Cir. 2005) (en banc) (*per curiam*) (concluding that plaintiff had alleged an injury to business or property resulting from false imprisonment by alleging "lost employment, employment opportunities, and the wages and other compensation associated with said business, employment and opportunities, in that [he] was unable to pursue gainful employment while defending himself against unjust charges and while unjustly incarcerated"); *Evans*, 434 F.3d at 928 ("Where an employee is able to establish that he has been unlawfully deprived of a property right in promised or contracted for wages, the courts have been amenable to classifying the loss of those wages as injury to 'business or property.' "). Thus, the cases from other circuits support the defendants' arguments that pecuniary damages flowing from plaintiffs' work-related injuries constitute personal injuries, not damages to property or business.

Many of these circuit cases also explain that Congress intended RICO's standing requirement—which again allows plaintiffs to sue for injuries only to business or property losses—to have real teeth. *See Evans*, 434 F.3d at 928 ("[A]lthough the economic aspects of Evans' alleged loss of employment income injury could conceivably be regarded as affecting 'business or property,' Congress specifically foreclosed this possibility by adopting the civil RICO standing requirement and its 'restrictive significance' from the Clayton Act."); *id.* at n. 23 ("[I]t would be contrary to the intent of Congress for this court to

construe the statute *so broadly* that we completely read the 'restrictive significance,' of the 'business or property' standing requirement out of [the statute].") (internal citation omitted); *Grogan*, 835 F.2d at 845 ("The words 'business or property' are, in part, words of limitation; if Congress had intended for the victims of predicate acts to recover for all types of injuries suffered, it would have drafted the statute [differently]."). Congress's clear desire to limit standing to those who suffer business- or property-related losses makes sense, given that "Congress enacted civil RICO primarily to prevent organized crime from obtaining a foothold in legitimate business." *Doe*, 958 F.2d at 768; *see also Grogan*, 835 F.2d at 845. What does not make sense, however, is to believe that Congress intended to thwart such criminal activity by recognizing a civil action to recover medical expenses and related losses due to a denial of worker's compensation benefits.

In addition, federal district courts have persuasively determined that the sort of damages sought here are for personal injury, not for injury to business or property. *See Bradley* v. *Phillips Petroleum Co.*, 527 F. Supp. 2d 625, 645–47 (S.D.Tex.2007), *summarily aff'd*, 337 Fed. Appx. 397 (5th Cir. 2009); *Brown* v. *Ajax Paving Indus.*, 773 F. Supp. 2d 727, 734 (E.D. Mich. 2011); *Lewis* v. *Drouillard*, 788 F. Supp. 2d 567, 570–71 (E.D. Mich. 2011). In the Southern District of Texas, the federal district court evaluated a "claim that Defendants 'conspired to defraud [the plaintiffs] of their common law right to file intentional tort claims against their employer for the injuries they suffered' in [an explosion]." *Bradley*, 527 F. Supp. 2d at 645. "Defendants allegedly 'paid large monetary settlement awards to certain union officials ... for intentional tort claims outside of

[plaintiff's] alleged workers' compensation plan'...." *Id.* The court found that the plaintiffs' "RICO claim in no way implicates their 'business or property' " because "[t]he claim solely seeks to redress for personal injuries suffered in the [explosion]." *Id.* at 647. The "viable personal injury causes of action" failed to "constitute an injury cognizable under RICO." *Id.* The court recognized that "the economic consequences of personal injuries do not qualify as 'injury to business or property'" and "at least one court has expressly held that 'a lost opportunity to bring state law personal injury claims ... is not cognizable as an injury to business or property in a civil RICO action.'" *Id.* at 646 (internal quotation marks omitted) (citing *Magnum* v. *Archdiocese of Phila.*, 253 Fed. Appx. 224, 226 (3d Cir. 2007)). The court then emphasized that this "position is entirely consistent with the legislative purpose of the RICO statute." *Id.* (internal quotation marks omitted).

Furthermore, two district courts have recently come to the same conclusion with respect to workers' compensation claims under the WDCA in the state of Michigan. These decisions have been stayed on appeal pending our decision in this case. As one court concluded,

> there is no question that the damages identified in Plaintiff's complaint—diminished worker's compensation benefits, losses resulting from the delayed payment of benefits, medical expenses, and costs and attorney fees incurred in an effort to secure the benefits to which Plaintiff allegedly was entitled—all stem from an underlying personal injury that led Plaintiff to pursue an award of worker's compensation benefits.

Ajax, 773 F. Supp. 2d at 734 (internal citation omitted). That underlying injury involved an injury to plaintiff while on the job; plaintiff was then examined by a board-certified orthopedic surgeon who opined that plaintiff's injury was work-related; plaintiff's employer denied plaintiff's claim for workers' compensation benefits; plaintiff sought review of this denial; and plaintiff alleged that his employer attempted to bribe witnesses to testify falsely that plaintiff's injury occurred outside of work. *Id.* at 730. The court in *Ajax* agreed with the district court in the case at bar and found that this allegation was insufficient for a RICO action. Furthermore, the court reasoned that the " 'lost cause of action' theory of civil RICO damages" was sufficient only when "the 'lost' suit is itself an injury to 'business or property.' " *Id.* at 736. Additionally, in *Lewis*, the court noted, "While it is true that employers or their insurance carriers are required by law to pay workers' compensation benefits when warranted, the injuries suffered by workers while on the job have never lost their characteristic as personal injuries." 788 F. Supp. 2d at 570 (citing *Mathis* v. *Interstate Motor Freight Sys.*, 408 Mich. 164, 289 N.W.2d 708 (1980); *Specht* v. *Citizens Ins. Co. of Am.*, 234 Mich. App. 292, 593 N.W.2d 670 (1999)). The court found that "Plaintiffs' alleged damages [were] intimately related to their personal injuries," and they did "not have standing under RICO." *Id.*

Finally, our panel previously referred to the WDCA as a "public regulation of the employment relationship that is a substitute for the *tort* system rather than any contractual relationship between employees and employers." *Brown* v. *Cassens Transp. Co. ("Brown III")*, 546 F.3d 347, 359 (6th Cir. 2008) (emphasis added). The workers' compensation

scheme "creates a legislative remedy regarding the tort-liability relationship...." *Id.* at 360. Our statement is consistent with case law analyzing the intentions of RICO. Given the strong body of case law supporting the notion that plaintiffs' damages allege only personal injuries, I would conclude the plaintiffs have not pled an injury to business or property, as required under RICO.

The majority chooses to ignore most of the case law supporting the result reached by the district court. Instead, citing *Williams* v. *Hofley Manufacturing Co.*, 430 Mich. 603, 424 N.W.2d 278 (1988), the majority concludes that Michigan law establishes that a claim for workers' compensation benefits constitutes a property interest. In *Williams*, the court concluded that a money judgment rendered in litigation would deprive the defendant employer of its property, and "the United States Supreme Court has held that a cause of action is, in itself, a species of property protected by the Fourteenth Amendment's Due Process Clause." *Id.* at 282 (citing *Logan*, 455 U.S. at 428, 102 S.Ct. 1148). "Thus, to the extent that the procedure involved would affect the ability of the defendant to present a legitimate defense, the defendant's property rights are also impaired." *Id.* at 282–83. *Williams*, however, is inapt because it involves an already-decided, legitimate claim of entitlement. That is not the case here. Indeed, it appears that, after the initial denial of benefits, all the plaintiffs but Brown have entered into settlements disposing of their workers' compensation claims. Resolved claims hardly represent legitimate claims of future entitlement.

The majority also argues that because the workers' compensation scheme provided for under the

WDCA deprives the WCAC of discretion over whether to award benefits, those benefits are essentially guaranteed and constitute legitimate claims of entitlement. Indeed, the WDCA provides for the automatic payment of weekly compensation installments to a person with a disability claim after the employer has notice or knowledge of the disability. Mich. Comp. Laws § 418.801(1). However, weekly compensation is no longer due and payable when there is an "ongoing dispute." *See* Mich. Comp. Laws § 418.801(2). An employer can place a claim in dispute by filing a "Notice of Dispute." Michigan state courts have held that no distinction is to be made among good faith disputes, bad faith disputes, and unreasonable disputes. *See Warner* v. *Collavino Bros.*, 133 Mich. App. 230, 347 N.W.2d 787, 790 (1984) ("On its face M.C.L. § 418.801(2) ... merely requires an 'ongoing dispute' and does not distinguish good faith disputes from bad faith or unreasonable disputes."); *Couture* v. *Gen. Motors Corp.*, 125 Mich. App. 174, 335 N.W.2d 668, 670 (1983) ("We cannot read the term 'dispute' in either statute to mean only a meritorious or nonfrivolous dispute."). Thus, although the payment of benefits remains nondiscretionary, payment is not inevitable under the WDCA. In the case at hand, plaintiffs attempted to receive workers' compensation benefits under the WDCA. Due to allegedly false medical reports and other wrongdoing, those benefits were denied. In order to regain a legitimate claim of entitlement, the WDCA provides an appellate process by which to challenge the dispute over benefits. *See* Mich. Comp. Laws §§ 418.841(1), 418.847(1), 418.859a(1), 418.861. Although wrongdoing had been alleged in conjunction with that denial, the denial of benefits still exists, and the denial of benefits in no way approximates an "al-

ready-decided, legitimate claim of entitlement." Thus, *Williams* provides little help to plaintiffs' position.

For the foregoing reasons, I respectfully dissent. I would affirm the decision of the district court.

APPENDIX B

OPINION OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN

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

Plaintiffs,

v.

CASSENS TRANSPORT COMPANY, CRAWFORD & COMPANY, FOREIGN CORPORATIONS, AND DR. SAUL MARGULES,

Defendants.

Case No. 04–cv–72316.
Sept. 27, 2010.

OPINION AND ORDER
(1) GRANTING DEFENDANT CASSENS TRANSPORT COMPANY'S MOTION TO DISMISS PURSUANT TO FED. R. CIV. P. 12(c) AND FOR PARTIAL SUMMARY JUDGMENT (DKT. NO. 83);
(2) GRANTING DEFENDANT CASSENS TRANSPORT COMPANY'S SUPPLEMENTAL MOTION TO DISMISS; (DKT. NO. 95);
(3) GRANTING DEFENDANT DR. SAUL MARGULES' MOTION TO DISMISS (DKT. NO. 106);
(4) DENYING AS MOOT DEFENDANT CASSENS TRANSPORT COMPANY'S RENEWED MOTION FOR SUMMARY JUDGMENT (DKT. NO. 82);
(5) DENYING PLAINTIFFS' MOTION FOR LEAVE TO AMEND (DKT. NO. 117); AND
(6) DISMISSING THIS CASE WITH PREJUDICE

PAUL D. BORMAN, District Judge.

This matter comes before the Court on Defendant Cassens Transport Company's ("Cassens") Motions to Dismiss and for Partial Summary Judgment[1] and Supplemental Motion to Dismiss (Dkt. Nos. 83 and 95) and on Defendant Dr. Saul Margules' ("Margules") Motion to Dismiss (Dkt. No. 106.)[2] Also before

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[1] Cassens' motion for partial summary judgment seeks to dismiss the claims of Plaintiff Gary Riggs based upon a release that Riggs executed in connection with his redemption of his workers compensation claims. Cassens filed a motion for leave to file a supplemental reply in support of its motion for partial summary judgment as to Riggs (Dkt. No. 105) attaching a transcript of Plaintiff Rigg's redemption hearing in which Riggs admits to releasing his RICO claim in this case. At the hearing on this matter on September 15, 2010, Plaintiffs' counsel informed the Court that Plaintiff Riggs is withdrawing his claims in this case. Because the Plaintiffs have indicated that they are withdrawing Riggs' claims in this case and because the Court in any event finds that Riggs' release clearly and unequivocally covers and releases the claims he asserts in this action, *see Cole* v. *Ladbroke Racing Michigan, Inc.*, 241 Mich. App. 1, 13, 614 N.W.2d 169 (2000) (a clear and unambiguous release must be given its plain and ordinary meaning), the Court need not consider Cassens' additional motion for leave to supplement its reply (Dkt. No. 105) and denies that motion as moot.

[2] Both Defendant Crawford & Company (Dkt. No. 88) and Defendant Margules (Dkt. No. 87) joined and concurred in Cassens' motion to dismiss (Dkt. No. 83). Both Defendant Crawford (Dkt. No. 100) and Defendant Margules (Dkt. No. 101) also joined in Cassens' Supplemental Motion to Dismiss Pursuant to Fed. R. Civ. P. 12(c) (Dkt. No. 95) (bringing to the Court's attention the decision of District Court Judge Nancy G. Edmunds in *Jackson* v. *Sedgwick Claims Mgt.*, No. 09–11529, 2010 WL 931864 (E.D. Mich. March 11, 2010)). Defendant Margules also filed his separate Motion to Dismiss (Dkt. No. 106). Defendant Crawford has not filed a separate motion to dismiss and relies on the arguments made in Cassens's motions in seeking dismissal of Plaintiffs' Complaint. Cassens also filed a Motion for Summary Judgment Based on Preemption by § 301 of the Labor Management Relations Act addressing only the issue of

the Court is Plaintiffs' Motion for Leave to File First Amended Complaint. (Dkt. No. 117.) The Court held a hearing on these matters on September 15, 2010. For the reasons that follow, the Court GRANTS Defendants' motions to dismiss and DENIES Plaintiffs motion for leave to amend.

INTRODUCTION

Plaintiffs allege that they were deprived of benefits due to them under the provisions of the Michigan Workers' Disability Compensation Act ("WDCA"), Mich. Comp. Laws § 418.101 *et seq*. They allege that through various acts of mail and wire fraud, and in violation of the Racketeer Influenced and Corrupt Organizations Act, ("RICO"), 18 U.S.C. § 1964(c), Defendants perpetrated a scheme to deny them workers' compensation benefits. The essence of the alleged scheme is that Cassens Transport Company ("Cassens") (Plaintiffs' employer which was self-insured) and Crawford & Company ("Crawford") (which served under contract as the claims adjuster for Cassens's workers' compensation claims) deliberately selected unqualified doctors, including Defendant Dr. Saul Margules ("Margules"), to give erroneous medical opinions that would support fraudulent denials of workers' compensation benefits. Four of the six Plaintiffs allege claims against all Defendants (Fanaly, Brown, Orlikowski and Way, all of whom were seen by Defendant Margules) and two of the six allege claims only against Defendants Cassens and

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preemption under the LMRA (Dkt. No. 82) in which Crawford (Dkt. No. 88) and Margules (Dkt. No. 87) joined and concurred. Because the Court dismisses Plaintiffs' claims on other grounds, it will not address the merits of Cassens' arguments regarding preemption under the LMRA and will deny the motion as moot.

Crawford (Thomas and Riggs, neither of whom was seen by Defendant Margules). Plaintiffs each claim monetary damages as a result of the wrongful denial of their statutory workers' compensation benefits, "measured by the amount of benefits improperly withheld from him, plus interest as provided by law, all tripled in accordance with RICO, together with attorney fees and costs provided by law."[3]

Defendants respond that Plaintiffs are impermissibly attempting to bypass the exclusive administrative scheme for recovery of benefits embodied in the WDCA and that, even assuming a claim outside that statutory scheme is viable, Plaintiffs cannot establish several essential elements of a RICO claim including (1) an injury which is compensable under RICO, and/or (2) the existence of a RICO enterprise. Additionally, Defendant Cassens argues that the claims against it are preempted by the Labor Relations Management Act ("LMRA") and Defendant Margules argues that Plaintiffs cannot establish that he "conducted the affairs" of the alleged RICO enterprise.

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[3] Plaintiffs Complaint also makes a veiled allegation that Defendants committed the predicate act of witness tampering under 18 U.S.C. § 1512. As this Court noted in its December 19, 2007, 2007 WL 4548225, Opinion and Order Adopting in Part and Rejecting in Part the Magistrate Judge's Report and Recommendation in Favor of Awarding Nine Hours of Attorney Fees and Denying Plaintiffs' Cross–Motion for Sanctions (Dkt. No. 66), Plaintiffs' counsel is well aware that any such claim lacks legal merit, that the Complaint does not and cannot allege an "official proceeding," and that the claim is frivolous. To the extent, if at all, that Plaintiffs continue to press this claim, the Court dismisses Plaintiffs' RICO claims to the extent that they purport to rely on violations of the federal witness tampering statute as predicate acts.

The Court concludes that Plaintiffs' exclusive remedy for their claim that they were fraudulently denied benefits under the WDCA lies within the exclusive administrative scheme set forth in the WDCA, which forecloses their RICO claim. The Court further concludes that even assuming such a claim could be raised outside of the WDCA's exclusive administrative framework, Plaintiffs have failed to allege an "injury to business or property" as that term is defined under RICO and their claims thus fail for this separate and independent reason. Finally, the Court concludes that, even assuming that Plaintiffs' Complaint stated a cognizable claim under RICO, the Court would abstain from deciding Plaintiffs' claims and would stay proceedings pending a final WDCA administrative determination of Plaintiffs' entitlements to workers compensation benefits.[4]

I. BACKGROUND

A. Procedural History

On July 15, 2005, this Court entered an Opinion and Order Granting Defendants' Motions to Dismiss Plaintiffs' Complaint Under Rule 12(b)(6). (Dkt. No. 39) This Court ruled that Plaintiffs' RICO claims failed to allege the "key requirement" of reliance and therefore, failed to state a claim for which relief could be granted. *Brown* v. *Cassens Transport Co.*, 409 F. Supp. 2d 793, 808 (E.D. Mich. 2005) (" *Brown I* "). Plaintiffs appealed this ruling which was af-

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[4] Because the Court is dismissing Plaintiffs' RICO claims on the grounds addressed in this Opinion and Order, it need not reach the merits of Defendants' arguments that Plaintiffs (1) have failed to plead and prove the existence of a RICO enterprise, and (2) have failed to adequately plead Dr. Margules' participation in the conduct of the affairs of the enterprise.

firmed, based upon established Sixth Circuit precedent requiring proof of detrimental reliance, in *Brown* v. *Cassens Transport Co*., 492 F.3d 640, 646 (6th Cir. 2007) ("*Brown II*"). In *Brown I*, this Court also dismissed Plaintiffs' RICO claims on the alternate ground that they were reverse preempted by the McCarran–Ferguson Act, 15 U.S.C. § 1012(b). *Id*. at 811. In *Brown II*, the Sixth Circuit did not address this alternative ground for dismissal, invoking its authority to "affirm the district court on any ground supported by the record." *Brown II*, 492 F.3d at 646 n. 5.

The United States Supreme Court granted Plaintiffs' petition for a writ of certiorari, vacated the judgment of the Sixth Circuit in *Brown II*, and remanded the case to the Sixth Circuit for reconsideration in light of *Bridge* v. *Phoenix Bond & Indemnity Co*., 553 U.S. 639, 128 S.Ct. 2131, 170 L.Ed.2d 1012 (2008), which established that a civil-RICO plaintiff need not show detrimental reliance on the defendant's alleged misrepresentations. On remand, the Sixth Circuit reversed this Court's dismissal of Plaintiffs' claims in Brown I, and remanded for further proceedings, holding: (1) that the WDCA does not preempt Plaintiffs' RICO claims and (2) that Plaintiffs had "sufficiently pleaded a pattern of racketeering activity under RICO given that reliance is not an element of a civil RICO fraud claim." *Brown* v. *Cassens Transport Co*., 546 F.3d 347, 351 (6th Cir. 2008) (" *Brown III* ").[5] Defendants now file the in-

[5] Plaintiffs also alleged in their Complaint a claim against Cassens and Crawford for Intentional Infliction of Emotional Distress ("IIED"). This Court previously dismissed Plaintiffs' IIED claim for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6). *Brown I*, 409 F. Supp. 2d at 815. The Sixth

stant motions to dismiss and for partial summary judgment.

B. Plaintiffs' Claims

Plaintiffs claim that Defendant Cassens, who employed each of the Plaintiffs, and Defendant Crawford, who adjusted workers' compensation claims on behalf of Cassens, formed an enterprise for purposes of RICO and fraudulently denied Plaintiffs' claims for benefits under the WDCA, in part through violations of the mail and wire fraud statutes, 18 U.S.C. §§ 1341, 1343, which allegedly form the predicate acts for Plaintiffs' RICO claim. (Compl. ¶¶ 4–6A.) Four of the six Plaintiffs, Fanaly, Brown, Orlikowski and Way, claim in addition that Defendant Margules, described by Plaintiffs as a "cut-off" doctor, was part of the enterprise in that he provided false and fraudulent medical opinions to Defendant Cassens and/or Crawford, which were then used to deny Plaintiffs' claims for workers' compensation benefits. (Compl. ¶ 6B.) Plaintiffs allege that in these fraudulent communications, "defendant and the IME 'cut-off' doctors whose reports defendants relied upon in terminating or denying plaintiffs' benefits ... discussed means of cutting off plaintiffs' benefits or forcing them to take settlements at less than true value, even though defendants possessed medical reports from treating doctors and doctors chosen by defendants stating plaintiffs did have work-related disabilities." (Compl. ¶ 6D.) Plaintiff Brown appealed

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Circuit affirmed dismissal of this claim in its two subsequent opinions, *Brown II*, 492 F.3d at 647 and *Brown III*, 546 F.3d at 364. Thus, Plaintiffs only remaining claims for damages in this lawsuit are for workers' compensation benefits that they allege were due them under the WDCA, plus interest, all trebled under RICO, plus attorney's fees.

his denial of benefits and was awarded benefits by the Workers Disability Compensation Board ("WDCB"). The remaining Plaintiffs do not allege that they appealed their denial of benefits.

The alleged predicate acts which are specifically referenced in the Complaint are either Notices of Dispute sent from Crawford to Plaintiffs, in which Crawford challenged the validity of the claim as being unsupported by medical evidence or not job related, or opinion letters sent from Margules to Plaintiff and/or Cassens and/or Crawford, opining that his examination revealed that the alleged injury was not job related or not sufficiently disabling. Plaintiffs also make several nonspecific allegations regarding additional "communications" in furtherance of the scheme, without expressly identifying the means of communication, the speaker/author or recipient, or the specific date of the alleged communication.

1. Plaintiff Fanaly

Plaintiff Fanaly alleges that on December 14, 2001, he injured his right foot while walking to his Cassens car-hauling truck.[6] He reported the injury to "defendants" and his claim was denied by Crawford's claim adjuster, Tina Litwiller, on December 19, 2001 as being not job related. (Compl. ¶ 8.) Fanaly alleges that this denial was fraudulent because "the corporate defendants knew that an injury which happens to an employee while he is leaving his motel during the course and scope of his employment is an injury which is compensable under the Act." (Compl. ¶ 9.)

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[6] Cassens is in the business of hauling automobiles for new car manufacturing facilities.

On February 17, 2002, Fanaly alleges that he dislocated his left shoulder while loading his Cassens car-hauling truck and filed a claim for benefits under the WDCA. Fanaly further alleges that "Defendants" sent him to Dr. Margules for an examination. Fanaly alleges that "defendants expressly or impliedly communicated to Dr. Margules that it wanted him to write reports stating plaintiff was not disabled due to work-related injuries, regardless of the true circumstances." (Compl. ¶¶ 10–12.) Fanaly alleges that sometime "in February or March, 2002, Margules opined to defendants that plaintiff had no job-related disability relating to his shoulder." On February 21, 2001, Tina Litwiller sent Fanaly a Notice of Dispute which stated that the "condition is chronic-per Dr. Marglious [sic]." (Compl. ¶¶ 13–14.) Fanaly alleges that this statement was fraudulent because "chronicity of a condition is not a legal basis for denial of benefits ... and because plaintiff's treating surgeons opined, based on what they saw in exams and during surgery, that plaintiff's pathology was work-related." (Compl. ¶ 16.) Fanaly claims that he "relied on the fraudulent communications to the extent he suffered the financial loss of having to pay attorney fees, medical care and medical mileage" and was injured because he was "deprived of workers compensation benefits" and "caused him the expense of paying attorney fees, medical care and mileage to and from medical care." (Compl. ¶ 17.)

2. Plaintiff Thomas

Plaintiff Thomas claims that on April 16, 2001, he tore his rotator cuff while working for Cassens and filed a workers compensation claim with Crawford and Cassens. Thomas alleges that despite having possession of a physician's statement dated De-

cember 13, 2001 regarding the incident, Tina Litwiller filed a Notice of Dispute of the claim on or about January 21, 2002, stating "no medical establishing causation." (Compl. ¶¶ 22–23.) Thomas claims that this statement was fraudulent because Litwiller possessed a medical statement establishing causation. Thomas claims that he "relied on the fraudulent communications to the extent he suffered the financial loss of having to pay attorney fees, medical care and medical mileage" and was injured because he was "deprived of workers compensation benefits" and "caused him the expense of paying attorney fees, medical care and mileage to and from medical care." (Compl. ¶ 25.)

3. Plaintiff Brown

Plaintiff Brown claims that on April 12, 2000, he injured his left knee while climbing off of a Cassens' car hauler. Plaintiff Brown further claims that on February 15, 2002, he injured his shoulders pulling down on a tie-bar and later that day injured his knee. He filed a claim for workers compensation benefits and was sent to Dr. Margules for an examination. (Compl. ¶¶ 30–32.) Brown alleges that "defendants expressly or impliedly communicated to Dr. Mar-gules that it wanted him to write reports stating plaintiff was not disabled due to work-related injuries, regardless of the true circumstances." (Compl. ¶ 32.) Brown alleges that his treating orthopedic surgeons, Drs. Pinto and Page, operated on Brown's knees and shoulders and wrote reports stating that Brown had job-related disabilities due to the condition of his knees and shoulders. (Compl. ¶ 33.) Brown alleges that "Margules opined to the other defendants that plaintiff had no job-related disability" and that Tina Litwiller mailed a Notice of Dispute on

March 19, 2002 stating that the "medical condition was not job related." Brown alleges that this statement was fraudulent. (Compl. ¶¶ 34–35.) Brown claims that he "relied on the fraudulent communications to the extent he suffered the financial loss of having to pay attorney fees, medical care and medical mileage" and was injured because he was "deprived of workers compensation benefits" and "caused him the expense of paying attorney fees, medical care and mileage to and from medical care." (Compl. ¶ 38.)

Brown appealed the denial of benefits and on March 30, 2003, the magistrate awarded benefits to Brown. Defendants appealed the magistrate's ruling but were required to pay Brown benefits while the appeal was pending. Brown alleges that Defendants ultimately paid the benefits but only after Brown filed a motion to have the benefits paid during the appeal. (Compl. ¶¶ 39–41.) Brown alleges that this additional fraudulent refusal to pay full benefits during the appeal "caused him the expense of paying attorney fees, medical care and mileage to and from medical care." (Compl. ¶ 42.)

4. Plaintiff Orlikowski

Plaintiff Orlikowski injured his left knee on or about November 6, 2000 while employed as a car-hauler by Cassens. Orlikowski alleges that the injury was caused by trauma suffered that day and/or by aggravation caused by years of car-hauling work for Cassens, and from *degenerative arthritis* from a 1980 injury to his left knee that did not occur while working for Cassens. (Compl. ¶ 55.) Orlikowski filed a claim and was sent for an examination to Dr. Margules who opined that Orlikowski could return to work without restriction. On or about November 8,

2000, Margules allegedly reported to Cassens and Crawford that Orlikowski's injuries were not work related. Orlikowski claims that this statement was fraudulent. (Compl. ¶¶ 56, 57.) On November 21, 2000, Tina Litwiller sent Orlikowski a Notice of Dispute denying benefits on the ground that the injury was not work related "based on opinion of authorized physician [sic]." Orlikowski claims that this statement was fraudulent because Cassens and Crawford knew Orlikowski's injury was compensable. (Compl. ¶ 58.) Orlikowski claims that he provided Cassens and Crawford with further medical evidence of his condition but they "continued in their scheme to deny benefits." (Compl. ¶¶ 59–60.) Orlikowski claims that he "relied on the fraudulent communications to the extent he suffered the financial loss of having to pay attorney fees, medical care and medical mileage" and was injured because he was "deprived of workers compensation benefits" and "caused him the expense of paying attorney fees, medical care and mileage to and from medical care." (Compl. ¶ 61.)

5. Plaintiff Way

Plaintiff Way alleges that on March 12, 2002, he hurt his lower back at work when he fell off a truck and that increased stiffness in his back caused him to stop work on June 11, 2002. He filed a claim and was sent on June 12, 2002 to Dr. Margules for an examination. (Compl. ¶¶ 66–68.) On June 19, 2002, Dr. Margules sent a report to Tina Litwiller concluding that Way's disc herniation was not related to the work-related incidents. Way claims that this report was fraudulent because Margules knew that the disc herniation may have been aggravated by the work-related incidents and therefore compensable. (Compl. ¶ 68.) On July 29, 2002, Tina Litwiller mailed to Way

a Notice of Dispute denying benefits "[b]ased on Dr. Margules' 6/19/02 report and opinion ..." Way claims that this statement was fraudulent because Litwiller knew Way's injury qualified him for workers compensation benefits. (Compl. ¶ 69.) Way claims that he "relied on the fraudulent communications to the extent he suffered the financial loss of having to pay attorney fees, medical care and medical mileage" and was injured because he was "deprived of workers compensation benefits" and "caused him the expense of paying attorney fees, medical care and mileage to and from medical care." (Compl. ¶ 70.)

C. Plaintiffs' Damages

Plaintiffs claim that they were injured by Defendants' alleged RICO violations in that they were deprived of workers' compensation benefits, and incurred attorneys' fees, medical care expenses and mileage to and from medical care. (Compl. ¶¶ 17, 25, 38, 42, 61, 70.) As to each Plaintiff's RICO claim, the *ad damnum* clauses is identical: "[P]laintiff demands judgment against defendants [or against Cassens and Crawford only in the case of Plaintiffs Thomas and Riggs, who were not examined by Margules] for damages measured by the amount of benefits improperly withheld from him, plus interest as provided by law, all tripled in accordance with RICO, together with attorney fees and costs as provided by law." (Compl. pp. 8, 10–11, 16, 18–19, 22–23, 26.)

II. STANDARDS OF REVIEW

A. Federal Rule Of Civil Procedure 12(B)(6) And 12(C)

The standards for reviewing motions for judgment on the pleadings pursuant to Federal Rule of Civil Procedure 12(c) are the same as those applied

in considering motions to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6). *Sensations, Inc.* v. *City of Grand Rapids*, 526 F.3d 291, 295 (6th Cir. 2008). Fed. R. Civ. P. 12(b)(6) provides for the dismissal of a case where the complaint fails to state a claim upon which relief can be granted. When reviewing a motion to dismiss under Rule 12(b)(6), a court must "construe the complaint in the light most favorable to the plaintiff, accept its allegations as true, and draw all reasonable inferences in favor of the plaintiff." *Directv, Inc.* v. *Treesh*, 487 F.3d 471, 476 (6th Cir. 2007). But the court "need not accept as true legal conclusions or unwarranted factual inferences." *Id.* (quoting *Gregory* v. *Shelby County*, 220 F.3d 433, 446 (6th Cir. 2000)). "[L]egal conclusions masquerading as factual allegations will not suffice." *Eidson* v. *State of Tenn. Dep't of Children's Servs.*, 510 F.3d 631, 634 (6th Cir. 2007).

In *Bell Atlantic Corp.* v. *Twombly*, 550 U.S. 544, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007), the Supreme Court explained that "a plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do. Factual allegations must be enough to raise a right to relief above the speculative level...." *Id.* at 555, 127 S.Ct. 1955 (internal citations omitted). Dismissal is only appropriate if the plaintiff has failed to offer sufficient factual allegations that make the asserted claim plausible on its face. *Id.* at 570, 127 S.Ct. 1955. The Supreme Court clarified the concept of "plausibility" in *Ashcroft* v. *Iqbal*, —— U.S. ——, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009):

> To survive a motion to dismiss, a complaint must contain sufficient factual matter, ac-

> cepted as true, to "state a claim to relief that is plausible on its face." [*Bell Atlantic Corp.* v. *Twombly*, 550 U.S. 544, 556, 570, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007)]. A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. *Id.* at 556, 127 S.Ct. 1955. The plausibility standard is not akin to a "probability requirement," but it asks for more than a sheer possibility that a defendant has acted unlawfully. *Ibid.* Where a complaint pleads facts that are "merely consistent with" a defendant's liability, it "stops short of the line between possibility and plausibility of 'entitlement to relief.' " *Id.*, at 557, 127 S.Ct. 1955 (brackets omitted).

Id. at 1948–50. A plaintiff's factual allegations, while "assumed to be true, must do more than create speculation or suspicion of a legally cognizable cause of action; they must show *entitlement* to relief." *LULAC* v. *Bredesen*, 500 F.3d 523, 527 (6th Cir. 2007) (citing *Twombly*, 127 S.Ct. at 1965). Thus, "[t]o state a valid claim, a complaint must contain either direct or inferential allegations respecting all the material elements to sustain recovery under some viable legal theory." *Bredesen*, 500 F.3d at 527 (citing *Twombly*, 127 S.Ct. at 1969).

In addition to the allegations and exhibits of the complaint, a court may consider "public records, items appearing in the record of the case and exhibits attached to defendant's motion to dismiss so long as they are referred to in the [c]omplaint and are central to the claims contained therein." *Bassett*

v. *NCAA*, 528 F.3d 426, 430 (6th Cir. 2008) (citing *Amini* v. *Oberlin Coll.*, 259 F.3d 493, 502 (6th Cir. 2001)); *Pension Benefit Guar. Corp.* v. *White Consol. Indus., Inc.*, 998 F.2d 1192, 1196 (3d Cir. 1993) ("[A] court may consider an undisputedly authentic document that a defendant attaches as an exhibit to a motion to dismiss if the plaintiff's claims are based on the document.") (citations omitted).

B. Federal Rule Of Civil Procedure 56

Pursuant to Federal Rule of Civil Procedure 56, a party against whom a claim, counterclaim, or cross-claim is asserted may "at any time, move with or without supporting affidavits, for a summary judgment in the party's favor as to all or any part thereof." Fed. R. Civ. P. 56(b). Summary judgment is appropriate where the moving party demonstrates that there is no genuine issue of material fact as to the existence of an essential element of the nonmoving party's case on which the nonmoving party would bear the burden of proof at trial. *Celotex Corp.* v. *Catrett*, 477 U.S. 317, 322, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). "Of course, [the moving party] always bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any,' which it believes demonstrate the absence of a genuine issue of material fact." *Id.* at 323, 106 S.Ct. 2548; *See also Gutierrez* v. *Lynch*, 826 F.2d 1534, 1536 (6th Cir. 1987).

A fact is "material" for purposes of a motion for summary judgment where proof of that fact "would have [the] effect of establishing or refuting one of the essential elements of a cause of action or defense asserted by the parties." *Kendall* v. *Hoover Co.*, 751

F.2d 171, 174 (6th Cir. 1984) (quoting Black's Law Dictionary 881 (6th ed. 1979)) (citations omitted). A dispute over a material fact is genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson* v. *Liberty Lobby, Inc.*, 477 U.S. 242, 247–48, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). Conversely, where a reasonable jury could not find for the nonmoving party, there is no genuine issue of material fact for trial. *Feliciano* v. *City of Cleveland*, 988 F.2d 649, 654 (6th Cir. 1993). In making this evaluation, the court must examine the evidence and draw all reasonable inferences in favor of the non-moving party. *Bender* v. *Southland Corp.*, 749 F.2d 1205, 1210–11 (6th Cir. 1984).

If this burden is met by the moving party, the non-moving party's failure to make a showing that is "sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial," will mandate the entry of summary judgment. *Celotex*, 477 U.S. at 322–23, 106 S.Ct. 2548. The non-moving party may not rest upon the mere allegations or denials of his pleadings, but the response, by affidavits or as otherwise provided in Rule 56, must set forth specific facts which demonstrate that there is a genuine issue for trial. Fed. R. Civ. P. 56(e). The rule requires the non-moving party to introduce "evidence of evidentiary quality" demonstrating the existence of a material fact. *Bailey* v. *Floyd County Bd. of Educ.*, 106 F.3d 135, 145 (6th Cir. 1997); see *Anderson*, 477 U.S. at 252, 106 S.Ct. 2505 (holding that the non-moving party must produce more than a scintilla of evidence to survive summary judgment).

III. ANALYSIS

A. The WDCA Sets Forth The Exclusive Administrative Scheme For The Resolution Of Plaintiffs' Claims For Wrongful Denial Of Their Workers Compensation Benefits, Foreclosing Plaintiffs' RICO Claims[7]

The gravamen of Plaintiffs' Complaint is that Defendants failed to abide by their statutory duty under the WDCA to provide benefits for claimed work place injuries. Plaintiffs seek "damages measured by the amount of benefits wrongfully withheld" described as "the expense of paying attorney fees, medical care and mileage to and from medical care." These are the very damages for which compensation is provided under the WDCA. Regardless of how Plaintiffs frame their claim, a conclusive finding that Plaintiffs were wrongly denied workers compensation benefits is essential to their theory and resolution of such workers compensation benefits claims has been firmly vested in the comprehensive admin-

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[7] In its opinion in *Brown III*, the Sixth Circuit concluded that Plaintiffs had stated a sufficient number of predicate acts, and a sufficient relatedness and continuity among those acts, to satisfy those aspects of the "pattern" requirement under RICO. 546 F.3d at 353–355. Defendants do not challenge these elements of Plaintiffs' RICO claims in the motions *sub judice*. The Sixth Circuit also concluded, in dicta, that Plaintiffs had sufficiently alleged that they were injured "by reason of" the alleged pattern because they suffered loss of benefits in addition to costs related to medical care expenses and attorney fees. *Id*. at 355–356. *Cf*. Compl. ¶ 61. While the Sixth Circuit thus opined on the issue of proximate cause, it did not specifically address the issue, discussed *infra*, of whether the nature of the injury, i.e. monetary compensation for physical injuries, constitutes a compensable injury under RICO.

istrative enforcement scheme embodied in the WDCA.[8]

1. The WDCA Establishes A Comprehensive And Exclusive Administrative Scheme, Addressing Every Aspect Of The Recovery Of Workers' Compensation Benefits, Including A Detailed Set Of Procedures For Determining Disputed Claims For Benefits, Even Those Alleged To Have Been Denied In Bad Faith, And Does Not Allow For A Private Right Of Action.[9]

An injured employee seeking workers' compensation benefits must utilize the WDCA's comprehensive

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[8] In *Jackson* v. *Sedgwick*, No. 09–cv–11529, 2010 WL 931864 (E.D. Mich. March 11, 2010), Judge Edmunds, on indistinguishable facts, reached this same conclusion and dismissed Plaintiffs' RICO claims, holding that plaintiffs "may not avoid the WDCA's comprehensive procedures and exclusive remedies simply by characterizing a denial of benefits as 'fraudulent.' " 2010 WL 931864 at *18.

[9] With respect to Dr. Margules' statement that he is a treating physician covered by the WDCA (*see* Margules' Mot. to Dismiss, Dkt. No. 106, pp. 9–11), the Court need not decide this issue in light of the Court's alternative holding that Plaintiffs have failed to allege an injury compensable under RICO. However, the Court notes that Plaintiffs appear to concede this issue by acknowledging that Dr. Margules conducted his examinations pursuant to Mich. Comp. Laws § 418.385 (*see* Pls.' Resp. to Margules' Mot. to Dismiss, Dkt. No. 112, p. 15), which by its terms subjects Dr. Margules at the very least to potential cross examination under oath: "Any physician who makes or is present at any such examination may be required to testify under oath as to the results thereof." Mich. Comp. Laws § 418.385. Further, Mich. Comp. Laws § 418.315(6), which Dr. Margules asserts governs his conduct, provides both civil and criminal penalties for the submission of false or misleading records to the carrier or the workers' compensation agency.

administrative process and has no private right of action for such benefits: "The right to 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. The only exception to this exclusive remedy is an intentional tort." Mich. Comp. Laws § 418.131. When Michigan adopted the WDCA it essentially created a "no-fault" system under which a worker no longer has to establish negligence on the part of the employer but the employer is liable for certain expenses related to an injury suffered on the job without regard to fault. As this Court has previously noted, "the purpose of the WDCA is to provide ... not only for employees a remedy which is both expeditious and independent of proof of fault, but also for employers a liability which is limited and determinate." *Brown I*, 409 F. Supp. 2d at 811 (internal quotation marks and citations omitted). The exclusive remedy provision is an essential part of this important balance struck by the Legislature in adopting the WDCA; the provisions of the WDCA cover every aspect of Plaintiffs' claims for wrongful denial of their benefits.

The WDCA provides that: "Compensation shall be paid promptly and directly to the person entitled thereto and shall become due and payable on the fourteenth day after the employer has notice or knowledge of the disability or death, on which date all compensation then accrued shall be paid. Thereafter compensation shall be paid in weekly installments." Mich. Comp. Laws § 418.801(1). The WDCA further provides that weekly benefits, in the absence of a dispute over a claim, must be paid within thirty days of when the claim becomes due and owing and employers must pay a penalty of $50 per day, with a

maximum penalty of $1,500, for failure to timely pay such benefits. Mich. Comp. Laws § 418.801(2).

An insurer can delay the payment of benefits by filing a timely Notice of Dispute. *Richardson* v. *GMC*, 139 Mich. App. 727, 363 N.W.2d 22 (1984). Michigan law is clear that a timely filed notice of dispute will relieve the employer's obligation to pay benefits without regard to whether the claim is disputed in bad faith or for legitimate reasons. *Warner* v. *Collavino Bros.*, 133 Mich. App. 230, 236–237, 347 N.W.2d 787 (1984) (affirming an administrative decision refusing to assess a penalty and holding that section 418.801(2) "merely requires an 'ongoing dispute' and does not distinguish good faith disputes from bad faith or unreasonable disputes"); *Couture* v. *General Motors Corp.*, 125 Mich. App. 174, 178–179, 335 N.W.2d 668 (1983) (reversing a penalty award above the statutory limit, finding that the Legislature intended to limit liability for failures to pay benefits, even those failures to pay that are motivated by bad faith).

A disputed claim for benefits is first reviewed by a mediator, or at a hearing before a workers compensation magistrate. Mich. Comp. Laws § 418.847. The statute provides that the parties may seek review of the magistrate's decision by the Workers Compensation Appellate Commission. Mich. Comp. Laws § 418.859(a). Finally, the decision of the WCAC is subject to judicial review. Mich. Comp. Laws § 418.861(a). If the magistrate's decision awards benefits to the worker, the worker is entitled to begin receiving benefits immediately, even though the employer may chose to appeal the magistrate's decision. In fact, this process was followed successfully by Plaintiff Brown, who appealed his denial and was

awarded benefits by the magistrate and paid those benefits during the appeal process.

The WDCA contains its own procedures for policing abuses of the obligations imposed to timely pay benefits. First, under Mich. Comp. Laws 418.631(2), a self-insurer, like Cassens, can lose its privilege to self-insure if it "repeatedly or unreasonably fails to pay promptly claims for compensation for which it shall become liable." Also, under section 418.861b, the WCAC may dismiss a claim submitted for review, and assess costs and take other disciplinary action if it determines that the claim is proceeding vexatiously or was taken without a reasonable basis for believing that the claim had merit. Further, "[t]he bureau may appoint a duly qualified impartial physician to examine the injured employee and to report." Mich. Comp. Laws § 418.865. Thus, the WDCA does address the "fraudulent" denial of benefits and Michigan Courts have routinely held that such claims belong exclusively before the WDCB and the WCAC, with the ultimate availability of judicial review.

Plaintiffs argue that reliance on these procedures is misplaced because "there is no provision for proving or punishing fraud which occurs at the claims stage (before a proceeding is filed with the Agency), or during the pendency of proceeding." (Pls.' Resp. to Supp. Mot., Dkt. No. 102 at 7.) However, Michigan courts have expressly rejected this argument, in refusing to assess penalties against employers for bad faith denials of benefits:

> M.C.L. § 418.801(2); M.S.A. § 17.237(801)(2) does not, by its own terms, grant the WCAB the power to make a qualitative determination of the merits of a defense for the purpose of assessing a penalty. The statute simply

> provides that there must be no ongoing "dispute." ... We cannot read the term "dispute" ... to mean only a meritorious or nonfrivolous dispute.... We note the possible salutary effect of a penalty provision in deterring the bad faith failure to pay meritorious claims. The Legislature had expressly put such provision into no-fault insurance law. See M.C.L. § 500.2006(4); M.S.A. § 24.12006(4). However, in the absence of such an express provision in the workers' compensation law, we must hold that the penalty provision M.C.L. § 418.801(2); M.S.A. § 17.237(801)(2), is limited in its application to 30 days following the 14 days after the injury if no dispute is made to the compensation bureau.

Couture, 125 Mich. App. at 178–179, 335 N.W.2d 668. *See also Warner*, 133 Mich. App. at 236–237, 347 N.W.2d 787 ("From our reading of similar statutes, we infer that the Legislature was aware that prompt payment of compensation benefits could be encouraged by imposing a penalty for the bad faith denial of payments." Holding that the Legislature's failure to so provide precluded the assessment of a penalty for bad faith denials.).

Similarly, as the Sixth Circuit noted in both *Brown II* and *Brown III*, Michigan courts have routinely denied claims based upon allegedly tortious denial of workers' compensation benefits. *See Brown II*, 492 F.3d at 647 and *Brown III*, 546 F.3d at 364, citing *Lisecki* v. *Taco Bell Restaurants, Inc.*, 150 Mich. App. 749, 755, 389 N.W.2d 173 (1986) (holding that bad faith denials of claims for benefits under the WDCA, even those based upon some ulterior motive of the employer, while calling into serious question

the employer's business practices, cannot support an independent claim for tortious denial of benefits, concluding that: "An adequate remedy for the defendants' termination of benefits was available to and exercised by Plaintiff 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.") *See also Wright* v. *DaimlerChrysler Corp.*, 220 F. Supp. 2d 832, 845 (E.D. Mich. 2002) ("[W]rongful, even *bad faith* refusal to offer benefits to which Plaintiff is entitled is not tortious.") (emphasis in original).[10] "At most, the dilatory handling of plaintiffs' claim constitutes 'bad faith' justifying imposition of the statutory penalties set forth above, but for which this Court has held no separate cause of action can lie." *Lisecki*, 150 Mich. App. at 754, 389 N.W.2d 173 (quoting *Roberts* v. *Auto–Owners Ins.* Co., 422 Mich. 594, 607–608, 374 N.W.2d 905 (1985) (discussing bad faith handling of claims in the context of the denial of no-fault benefits)).

This same reasoning has been employed by courts interpreting the provisions of the Longshore and Harbor Workers' Compensation Act ("LHWCA") which, though a federal statute, contains similar exclusivity and penalty provisions to those in the WDCA. In *Atkinson* v. *Gates, McDonald & Co.*, 838

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[10] As the court noted in *Wright*, claims for tortious denial of benefits seeking to recover as damages the workers compensation benefits denied, the claims Plaintiffs make in the instant case, are to be distinguished from claims for recovery of damages for intentional infliction of emotional distress, which Michigan courts have allowed to proceed only in extreme cases. *Wright*, 220 F. Supp. 2d at 845 n. 9. The Sixth Circuit has twice affirmed this Court's prior holding that Plaintiffs cannot state such a claim on the facts of this case. *Brown II*, 492 F.3d at 647; *Brown III*, 546 F.3d at 364.

F.2d 808 (5th Cir. 1988), the court examined plaintiff's claims, essentially sounding in intentional infliction of emotional distress, that her employer's insurance carrier had wrongfully and fraudulently terminated her disability compensation benefits without notice or explanation. *Id.* at 809. Plaintiff filed a claim to have her benefits reinstated, following the procedures of the LHWCA and ultimately was awarded benefits. Her employer, who had not timely disputed the claim before terminating benefits, was assessed a penalty. Plaintiff then filed suit, claiming that the termination of benefits had been wilful and in bad faith and claimed damages for mental and emotional distress. Affirming the district court's dismissal of plaintiff's claims based upon the exclusivity provision of the LHWCA, the court observed:

> Under the scheme established in [the LHWCA], the employer has the unfettered right to controvert a claim for compensation and, if the employer does so, no compensation is due until an award is made. There can be no *wrongful* failure to pay compensation when no compensation is due. If as in this case, there has been no timely controversion, then the penalty for pre-award failure to pay compensation is that fixed by section 14(e), and no other penalty is provided for, except that if an award is entered attorneys' fees may also be ordered under section 28. As the district court aptly observed:
>
> > Since the Act itself provides not only for payment of benefits, but also for redress in the event of nonpayment of benefits, and further does not distinguish between good

> faith and bad faith nonpayment of benefits, the apparent intent of the Act is that the penalty provisions provide the exclusive remedy for late payment or nonpayment of benefits.

838 F.2d at 812 (internal quotation marks and citation omitted) (emphasis in original). The court affirmed the district court's ruling that plaintiffs' sole avenue of relief was the exclusive administrative process set forth in the LHWCA. Rejecting the notion that the LHWCA penalty provisions did not fully compensate Plaintiff, the court observed: " '[A]lthough the penalties may in some instances be inadequate, this does not, within the overall nature of the compensation concept, make them invalid. At most, it may be cause to apply to the legislature for a more suitable penalty level.' " 838 F.2d at 814 (quoting 2A Larson, *Workmen's Compensation Law* § 68.34(c) (1987) at 13–145–146 *now at* 6–104 Larson's Workers' Compensation Law § 104.05[3] (2010)).

Some courts have allowed departures from exclusive workers' compensation schemes in rare instances where the defendant's behavior has been found to be particularly heinous and where plaintiffs sought damages not for their lost benefits and related expenses but for emotional and mental distress separate and apart from the underlying claim for benefits.[11] Reserving departure from the exclusive

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[11] Michigan courts have recognized a claim for intentional infliction of emotional distress in connection with an insurer's outrageous wrongful termination or denial of workers' compensation benefits. In *Broaddus* v. *Ferndale Fastner Division*, 84 Mich. App. 593, 269 N.W.2d 689 (1978), the court construed plaintiff's claim, which sought damages only for emotional and

administrative scheme only in such extreme cases comports with the most fundamental precepts of the workers' compensation scheme, as recognized by Professor Larson in his classic treatise on workmen's compensation law:

> It seems clear that a compensation claimant cannot transform a simple delay in payments into an actionable tort by merely invoking the magic words "fraudulent, deceitful and intentional" or "intentional infliction of emotional distress" or "outrageous" conduct in his complaint. The temptation to shatter the exclusiveness principle by reaching for the tort weapon whenever there is a delay in payments or a termination of treatment is all too obvious, and awareness of this possibility has undoubtedly been one reason for the reluctance of courts to recognize this tort except in cases of egregious cruelty or venality.

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mental injury and not compensation for the benefits denied, and *Atkinson* v. Farley, 171 Mich. App. 784, 431 N.W.2d 95 (1988), the courts found that defendants' conduct was the type of "extreme and outrageous" behavior necessary to state a claim of intentional infliction. In *Wright*, the court distinguished both *Broaddus* and *Atkinson* on this very basis and concluded that these decisions did not justify a departure from the exclusive administrative scheme in a case of bad faith claim denial that did not meet this high threshold of offensive conduct. These cases involved facts simply not alleged in the instant case, such as an employer's acute awareness of a particular employee's precarious financial situation and termination of benefits knowing and intending that cutting off or denying benefits would cause the employee severe emotional distress. The Sixth Circuit has twice affirmed this Court's holding that Plaintiffs' in the instant case have not stated a claim for intentional infliction of emotional distress. *See Brown II*, 492 F.3d at 647 and *Brown III*, 546 F.3d at 364.

6–104 Larson's Workers' Compensation Law § 104.05[3] (2010). Quoting this passage from Professor Larson's treatise in *Sample* v. *Johnson*, 771 F.2d 1335 (9th Cir. 1985), another case interpreting the parallel provisions of the LHWCA, the court distinguished intentional infliction claims, which are "conspicuously contemptible," from all other denials or terminations of benefits:

> The bulk of authority in cases involving ordinary refusals to pay is *contra*. One reason is that most worker's compensation statutes, like the LHWCA, have penalty provisions for wrongful failure to pay.... While it may be that the penalty provisions are inadequate to fully compensate a worker who has been harmed by an employer's refusal to pay when due, the problem requires a political solution.

771 F.2d at 1347. As this Court previously held, and as the Sixth Circuit twice confirmed, this case simply does not present allegations of such "cruel" or "venal" conduct.

Moreover, claims for intentional infliction of emotional distress are based upon separate tortious conduct of the defendant which in no way involves a determination of the plaintiff's underlying entitlement to benefits. In *Broaddus*, where the court permitted plaintiffs' claim for intentional infliction of emotional distress to stand, the court recognized this "subtle yet crucial distinction:"

> While it is true that plaintiffs must prevail on a showing that the physical injuries were compensable prior to showing that defendants acted in collusion to deny those benefits, a subtle yet crucial distinction must be

> made clear. Plaintiffs are not seeking as damages in this lawsuit the compensation benefits they alleged were required to be paid from July 2, 1973, to December 17, 1973. They are seeking, in part, separate damages for emotional distress caused by the alleged intentional and wrongful denial of these compensation benefits. It is the emotional and mental injuries which are the subject of the lawsuit, and which are claimed by plaintiffs to be not compensable under the Act and thus actionable in a common-law tort suit.

84 Mich. App. at 599, 269 N.W.2d 689. Plaintiff in *Broaddus* was already receiving workers' compensation benefits pursuant to a settlement, and was seeking damages for a separate and independent tort, intentional infliction of emotional distress, that did not in any way involve a determination of her entitlement to benefits.[12]

The court in *Gates* commented on this same "subtle" distinction. Rejecting plaintiffs' argument that the exclusivity rationale inevitably would bar even the most egregious behaviors of an insurer or employer, the court distinguished scenarios which in-

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[12] It appears, based upon the allegations of Plaintiffs' Complaint, that Plaintiff Brown was awarded benefits through the appeal process but it is not clear (1) whether that claim has been finally determined or (2) if it has been finally determined, and Plaintiff is in fact receiving benefits, the nature of Plaintiffs' damages, which are stated in the Complaint to be the same as those of the other Plaintiffs who never appealed their denials and are not receiving benefits. Regardless of the finality of Plaintiff Brown's claim for benefits, his claim fails, along with all other Plaintiffs, for the separate and independent reason that he failed to allege an injury to business or property as discussed in section IIIB, *infra*.

volved separate tortious conduct (for example where an insurer gained illegal entry into a claimant's home in the course of an investigation), the proof of which was independent of the underlying claim for benefits:

> But the obvious difference between the examples posed by Atkinson and Larson (see note 7, supra) in this connection, and the case of bad faith refusal to pay compensation benefits, is that in the former class of case plaintiff's entitlement to recover in the tort action is in no way dependent on his having been entitled to compensation benefits or to the defendant's having violated the compensation statute. By contrast, in order to recover for bad faith or malicious failure to pay compensation benefits there must have been an entitlement to such benefits or a violation of the compensation statute in the failure to pay them.

838 F.2d at 814–815.

At the hearing on this matter, in response to Defendants' argument regarding the underlying nature of the injury Plaintiffs are claiming in the instant case which is addressed more fully *infra* in section III.B, Plaintiffs' counsel posed the following hypothetical to the Court: what if the RICO scheme involved the theft of Plaintiffs' benefit checks before Plaintiffs received them, would the injury still be derivative of Plaintiffs' personal injuries and thus not compensable under RICO? This hypothetical is inapt and crystallizes the fundamental flaw in Plaintiffs' claim—this scenario involves a separate and independent tort (theft or conversion or some similar claim) which is in no way dependent upon proof of

Plaintiffs' underlying entitlement to their workers' compensation benefits. Plaintiffs in the instant case have made clear that they are not seeking damages for emotional distress (likely because such damages are clearly not recoverable under RICO), and that they are seeking to recover the workers' compensation benefits that they allege they were wrongly denied, along with medical expenses and attorneys fees which are wholly derivative of their claim that they are entitled to benefits.

Regardless of how they package their RICO claim, Plaintiffs are asking this Court to decide whether they were entitled to receive workers' compensation benefits and, secondarily, if they were so entitled, whether Defendants' initial denial of those benefits was fraudulent. They seek to impugn the character and credibility of Dr. Margules and to show that the injuries they sustained were in fact work related or sufficiently disabling to entitle them to workers' compensation benefits. The gravamen of their claims is that the physician chosen by their employer was unfairly influenced by their employer's interests and conducted an unfair, even fraudulent, medical exam which they claim resulted in the denial of their benefits. Plaintiffs' Complaint is replete with allegations of conflicting medical opinions as to each Plaintiff's injury, asserting that one doctor's pedigree and opinion trumps that of Dr. Margules or another doctor. This is precisely the fact finding process that the Michigan legislature placed squarely and exclusively within the special competence of the WCDB and the WCAC, with the possibility of limited judicial review following an administrative determination. As the court observed in *Feld* v. *Robert & Charles Beauty Salon*, 435 Mich. 352, 459 N.W.2d 279 (1990), the unfairness of which these Plaintiffs'

complain is best addressed through the WDCA procedures:

> [T]he plaintiff argues that medical examinations conducted pursuant to § 385 are inherently unfair because "[t]he physicians selected by the carriers for the employers are often the same physicians time after time and are well versed with the Workers' Compensation laws and procedures." However, given the current scheme of the WDCA, we suggest that the appropriate remedy for this concern would be to impeach the credibility of the physician selected by the carrier through cross-examination. Additionally, an attorney would have "ample opportunity to challenge the use made of the information obtained by the examination when the findings are presented as evidence in court." Barbet, Compulsory medical examinations under the federal rules, 41 Valor 1059, 1074 (1955).

435 Mich. at 365–366, 459 N.W.2d 279. This perceived unfairness is inherent the scheme and is part of the delicate balance struck by the legislature in deciding to impose what is in essence a no-fault system on employers for workplace injuries sustained by their employees.

As recognized by the courts in *Feld*, *Warner* and *Couture*, and by the courts in *Sample* and *Gates* interpreting the parallel provisions of the LHWCA, the procedures and remedies set forth in these workers' compensation schemes are Plaintiffs' exclusive avenue for redressing their claims of even allegedly bad faith denials of workers compensation benefits. To allow actions for allegedly bad faith claim denials to

proceed in tandem, or in lieu of, this system would subvert the clear intent of the legislature to vest these factual determinations in the workers compensation boards created to decide them and would create an intolerable potential for inconsistent results. As the court noted in *Gates*, discussing the provisions of the LHWCA:

> [W]here entitlement to the compensation benefits would be a necessary element of plaintiff's right to recover in a tort suit, to allow the separate tort action opens the possibility of inconsistent results between the resolution of the compensation claim itself and the resolution of the separate tort claim, as the two claims would be adjudicated by different bodies. This consideration is clearly applicable in the LHWCA context where the compensation rulings are made in a federal administrative framework, with provision for appeal to an administrative review board and then to a regional federal court of appeals, while the tort action would likely be determined by a jury in a state or federal trial court. In the second place, the LHWCA, in common with many other compensation statutes, expressly addresses the matter of when payments thereunder are to be made and provides penalties for failing to timely make the required payments. By contrast, neither the LHWCA nor the typical compensation statute addresses in any analogous manner the methods which the employer or insurance carrier may or may not utilize in investigating the claim.
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> *Gates*, 838 F.2d at 815.

Regardless of how Plaintiffs' characterize the alleged "fraud" in this case, they cannot disentangle their RICO claim from their underlying claim for benefits, the resolution of which lies within the exclusive jurisdiction of the WDCA. As noted by the courts in so many of the cases discussed above, if Plaintiffs' feel that the penalty provisions of the statute fail their essential purpose, this is an issue best addressed by the legislature.

2. The Existence Of This Exclusive, Comprehensive Administrative Scheme Forecloses Plaintiffs' RICO Claims.

Plaintiffs' attempt to convert their dispute over entitlement to workers compensation benefits into a RICO claim is foreclosed by the extensive administrative scheme which has been specifically enacted as an exclusive remedy to address the wrongful denial of those benefits. Several courts have addressed this issue in other contexts and have held that where there exists a comprehensive statutory scheme, that does not provide for a private right of action, a plaintiff cannot create a RICO claim out of a matter that would otherwise be exclusively addressed by that administrative scheme. In *Jackson*, Judge Edmunds conducted this inquiry specifically with respect to the WDCA, on facts materially indistinguishable from the present case, and concluded that Plaintiffs' sole remedies were those set forth under the WDCA and rejected Plaintiffs' attempt to avoid those procedures and exclusive remedies "simply by characterizing a denial of benefits as 'fraudulent.' " 2010 WL 931864 at *18.

As noted by the court in *Jackson*, several cases compel this conclusion. For example, in *Danielsen* v. *Burnside–Ott Aviation Training Center, Inc.*, 941

F.2d 1220 (D.C. Cir. 1991), employees of various Navy aircraft maintenance contractors brought a RICO claim against their employers alleging that the employers had misclassified the workers as "technicians" when they should have been classified as "aircraft workers." Classifying the workers as "aircraft workers" would have entitled them to earn a higher wage. *Id.* at 1225–26. The employees claimed that the predicate acts were mail and wire fraud which consisted of entering into the contracts and using the mails and wires in furtherance of the contracts. *Id.* at 1226. The court found that the employee's claims were cognizable under the Service Contract Act, 41 U.S.C. § 351 (the "SCA") which specifically addressed wage and other issues under federal or federally assisted contracts. *Id.* at 1223. The statutory scheme involved multiple levels of administrative review of claims and numerous regulations relating to the methodology by which wage classification determinations were to be made. *Id.* The court concluded that the SCA did not give to a private right of action and went on to hold that the exclusive remedy embodied in the SCA scheme also did not allow for a civil action under RICO:

> [W]hat plaintiff will pursue his administrative remedies under the Act where more direct and expeditious relief is available in a private suit? How much more the case where plaintiffs couch their complaint in terms of RICO to give them, not a remedy equal to that provided under the SCA, but three times that remedy? How much more still where their attorneys would be extracting their fees not from their clients but from the other side? Thus, the ingenious pleading of the action in RICO terms rather than in straight

> SCA language cuts against the implication of the right of action rather than in its favor.

941 F.2d at 1228 (citing *Miscellaneous Service Workers, etc.* v. *Philco–Ford Corp.*, 661 F.2d 776 (9th Cir. 1981)).

In *McCulloch* v. *PNC Bank Inc.*, 298 F.3d 1217 (11th Cir. 2002) the court came to the same conclusion analyzing claims cognizable under the Higher Education Act ("HEA"). Parents of college-bound students brought claims under HEA and RICO against lenders and marketers of student loans who allegedly failed to disclose that there were alternative lending arrangements available to students whose parents did not qualify for federal parent loans. The court held that there was no private right of action under HEA and concluded that plaintiffs' RICO claims were similarly foreclosed:

> Plaintiffs' mail and wire fraud claims are nothing more than purported HEA violations pled in RICO terms. Thus, since Congress did not intend for Plaintiffs to have a private right of action against lenders for the failure to disclose Stafford Loan information, and instead provided administrative remedies, it follows that Congress could not have intended for that same failure to disclose to constitute a violation of the mail and wire fraud statute.

298 F.3d at 1226–27. The court relied in part on the Eleventh Circuit opinion in *Ayres* v. *General Motors Corp.*, 234 F.3d 514 (11th Cir. 2000), where the court found that violations of the National Traffic and Motor Vehicle Safety Act could not serve as the basis for the predicate acts for a RICO claim. Citing

the court's decision in *Danielsen*, the *McCulloch* court held: "[I]n light of the HEA's enforcement scheme, granting the Secretary of Education exclusive authority to remedy violations of the HEA, and the fact that the HEA does not confer a private right of action, the Court finds that the failure to disclose Stafford Loan information, even if in violation of the HEA, cannot form the basis for a civil RICO claim seeking treble damages and injunctive relief." 298 F.3d at 1227. *See also Bodimetric Health Servs., Inc.* v. *Aetna Life & Casualty*, 903 F.2d 480, 486–487 (7th Cir. 1990) (holding that RICO claims were foreclosed by the exclusive benefits determination process of the Social Security Act); *Norman* v. *Niagara Mohawk Power Corp.*, 873 F.2d 634, 637 (2d Cir. 1989) (relying on *Danielsen* to hold that the Energy Reorganization Act provides the exclusive remedy for violations of its proscriptions and dismissing plaintiffs' RICO claim, cautioning that "artful invocation of controversial civil RICO, particularly when inadequately pleaded, cannot conceal the reality that the gravamen of the complaint herein is section 210 harassment."); *Bridges* v. *Blue Cross and Blue Shield Assoc.*, 935 F. Supp. 37, 41–43 (D.D.C.1996) (holding that the comprehensive administrative remedy scheme embodied in the Federal Employee Health Benefits Act ("FEHBA") left no room for a remedy under RICO: "the broad enforcement and oversight powers of the OPM established in the statute indicate that the exclusive remedy for an action cognizable under the FEHBA lies under the FEHBA, not under another federal statute."); *Livingston* v. *Shore Slurry Seal, Inc.*, 98 F. Supp. 2d 594, 600–601 (D.N.J. 2000) (relying on the reasoning of *Danielsen*, finding that the Davis–Bacon Act contained a detailed administrative scheme which was the exclu-

sive remedy for alleged underpayment of wages claims for work performed on federal construction projects, and dismissing plaintiffs' RICO claims based on alleged violations of the statute).[13]

Plaintiffs claim that they were injured by Defendants' alleged RICO violations in that they were deprived of workers' compensation benefits, and incurred attorneys' fees, medical care expenses and mileage to and from medical care. (Compl. ¶¶ 17, 25, 38, 42, 61, 70.) As to each Plaintiff's RICO claim, the *ad damnum* clauses is identical: "[P]laintiff demands judgment against defendants [or against Cassens and Crawford only in the case of Plaintiffs Thomas and Riggs, who were not examined by Margules] for damages measured by the amount of benefits improperly withheld from him, plus interest as provided by law, all tripled in accordance with RICO, together with attorney fees and costs as provided by law." (Compl. pp. 8, 10–11, 16, 18–19, 22–23, 26.) Plaintiffs' characterization of the denial of benefits as "fraudulent" does not change the essence of the claim, which is for deprivation of benefits to which Plaintiffs claim they are entitled under the WDCA. *See*, *e.g. Butchers' Union, Local No. 498* v. *SDC Inv., Inc.*, 631 F. Supp. 1001, 1011 (E.D. Cal. 1986) ("Bluntly put, no matter how you cut the complaint, the only conceivable 'fraud' is the deprivation of plaintiffs' rights under the labor law. Since defendants' liability, under the mail and wire fraud statutes, if any, is wholly dependent on the labor laws,

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[13] In this Court's prior Opinion in *Gifford* v. *Meda*, No. 09–cv–13486, 2010 WL 1875096 (E.D. Mich. May 10, 2010), the Court discussed these same cases and this same theory of exclusive administrative regulatory jurisdiction in a different context and borrows here from its discussion in that Opinion.

judgment of the defendants' conduct ... lies exclusively with the [NLRB]."). *See also Danielsen*, 941 F.2d at 1229 ("To frame the action for [an award of statutory benefits] in terms of RICO fraud adds nothing.")[14]

This Court agrees with Judge Edmunds conclusion in *Jackson* that:

> RICO was never intended to create a path into courts for litigants who would otherwise be limited to exclusive administrative remedies and procedures, and subject to strict damages limitations. The Court finds that Plaintiffs may not use their RICO claims to reform Michigan's workers' compensation law—allowing them to do so would be an unwarranted intrusion into Michigan state law and procedure. Because Plaintiffs' sole remedies are those set forth under the WDCA, Plaintiffs' RICO claims are dismissed.

Jackson, 2010 WL 931864 at *18.

Plaintiffs argue that this result is foreclosed by the Sixth Circuit's opinion in *Brown III*, where, in dicta in its analysis of the issue of preemption under *McCarran–Ferguson*, that court stated that "the WDCA provision regarding sanctions for failure to pay benefits does not appear to contemplate the *fraudulent* denial of worker's compensation benefits." 546 F.3d at 363 (emphasis in original). The Sixth Circuit stated that this Court's finding, again made in the context of analyzing reverse preemption under

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[14] As discussed extensively above, Plaintiffs' claims in the instant case are wholly dependent upon a determination of the WDCA that they are entitled to the benefits which their employer disputes.

McCarran–Ferguson, that a RICO suit would impair the Michigan legislature's goal of limited liability for employers, "relie[d] on the faulty premise that the state has a policy of limited liability for employers even when they *fraudulently* deny worker's compensation benefits." *Id*. (emphasis in original). The Sixth Circuit stated that "no authority supports this proposition," but did not discuss the holdings of the Michigan Court of Appeals in *Couture*, *Warner* and *Lisecki* where such a policy is expressed. *See Jackson*, 2010 WL 931864 at *17 (rejecting plaintiffs' argument that *Brown III* foreclosed this result, noting that "there is no indication that the Sixth Circuit considered [*Couture* and *Warner*] which held that the WDCA strictly limits an employer's liability for disputing a workers' compensation claim—even those made in bad faith.") Nor did the Sixth Circuit specifically address the host of cases holding that exclusive statutory administrative schemes cannot be avoided by pleading as RICO violations claims which fall expressly under those procedures.

This Court concludes that Plaintiffs' remedy for recovery of their workers compensation benefits lies exclusively within the administrative scheme contained in the WDCA which forecloses any claim under RICO and for that reason their RICO claims are dismissed.

B. Plaintiffs' Lack Standing To Sue Under RICO Because Their Claims For Medical Expenses And Related Pecuniary Loss Sustained As Result Of Their Workplace Injuries Do Not Constitute Injury To Business Or Property Under RICO And Are Too Speculative To Confer Standing Under RICO[15]

1. Plaintiffs' Damages Derive From Their Workplace Injuries And Do Not Constitute Injury To Business Or Property Under RICO.

The RICO statute does not permit recovery of damages for personal injuries. *See* 18 U.S.C. § 1964(c). By its express terms, RICO provides for recovery only for "any person injured in his business or property." 18 U.S.C. § 1964(c). *See Drake* v. *B.F. Goodrich Co*., 782 F.2d 638, 644 (6th Cir. 1986) (holding that the phrase "business or property" excludes personal injuries suffered, rejecting plaintiffs' RICO claims, based on personal injury and wrongful death, alleging pecuniary loss as a result of exposure to toxic chemicals) (citing *Reiter* v. *Sonotone Corp*., 442 U.S. 330, 339, 99 S.Ct. 2326, 60 L.Ed.2d 931 (1979)). *See also Genty* v. *Resolution Trust Corp*., 937 F.2d 899, 918–19 (3d Cir. 1991) ("RICO plaintiffs

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[15] The Court notes that Plaintiffs' only response to Defendants' legal argument regarding the requisite "injury to business or property" necessary for standing to assert a claim under RICO is the statement that the Sixth Circuit in *Brown III* "specifically held plaintiffs plead damages." (PLS.' Resp. to Cassens Mot. to Dismiss, Dkt. No. 92, p. 3.) The Court agrees with Defendants that the Sixth Circuit did not address Plaintiffs' standing to assert a RICO claim and did not analyze or decide whether Plaintiffs have alleged a cognizable RICO "injury to business or property."

may recover damages for harm to business and property only, not physical and emotional injuries due to harmful exposure to toxic waste.").

Not only do personal injuries themselves not provide standing in civil RICO cases, "but also [ ] pecuniary losses flowing from those personal injuries are insufficient to confer standing under § 1964(c)." *Evans* v. *City of Chicago*, 434 F.3d 916, 926 (7th Cir. 2006). Recognizing that most personal injuries produce some sort of financial loss, courts have rejected the notion that such injuries confer standing under civil RICO:

> In our view, the ordinary meaning of the phrase "injured in his business or property" excludes personal injuries, including the pecuniary losses therefrom.... [T]he pecuniary and non-pecuniary aspects of personal injury claims are not so separated as the appellants would have us accept; rather, loss of earnings, loss of consortium, loss of guidance, mental anguish, and pain and suffering are to be found, intertwined, in the same claim for relief. We agree that "[h]ad Congress intended to create a federal treble damages remedy for cases involving bodily injury, injury to reputation, mental or emotional anguish, or the like, *all of which will cause some financial loss*, it could have enacted a statute referring to injury generally, without any restrictive language."

Grogan v. *Platt*, 835 F.2d 844, 847 (11th Cir. 1988) (quoting *Morrison* v. *Syntex Laboratories*, 101 F.R.D. 743, 744 (D.D.C. 1984)) (emphasis in original). *See also Doe* v. *Roe*, 958 F.2d 763, 770 (7th Cir. 1992) (holding that miscellaneous expenses, includ-

ing attorneys' fees and loss of earnings, which were totally derivative of plaintiff's alleged personal injuries, were not recoverable under RICO).

A court reached a similar conclusion in *Fisher* v. *Halliburton*, No. 06–1168, 2009 WL 5170280 (S.D. Tex. Dec. 17, 2009) which involved an attack by Iraqi insurgents on a group of civilian contractors driving fuel convoys in Iraq. *Id.* at *1. Plaintiff contractors, who suffered physical injuries in the attack, alleged that Haliburton fraudulently failed to disclose the true risks of working in Iraq and sought in part, under RICO, damages in the amount of continued compensation they allegedly lost due to the injuries they sustained in Iraq as well as the difference in pay they would have received had the true risks of the work been disclosed. *Id.* at *4. Rejecting plaintiffs' argument that their loss of compensation was caused not by personal injuries but by Haliburton's alleged predicate acts of mail and wire fraud in failing to inform them of the danger of the job, the court found that plaintiffs' alleged pecuniary injuries were a direct result of their personal injuries suffered in Iraq. *Id.* "The injuries that plaintiffs suffered in Iraq caused their alleged loss of compensation, and that loss is intimately related to plaintiffs' personal injuries. Consequently, because personal injuries and their resulting pecuniary consequences are not an "injury to business or property" under section 1964(c), plaintiffs' "continued compensation" injury does not confer standing to bring a RICO claim." *Id.* at *5. *See also Allman* v. *Philip Morris, Inc.*, 865 F. Supp. 665, 668–669 (S.D. Cal. 1994) (finding that "federal courts that have addressed [the] question have all held that Congress intended the 'business or property' language to exclude civil RICO actions seeking recovery of expenses resulting from personal

injury," and holding that medical expenses incurred as a result of personal injury (the expense of medical treatment and nicotine patches incurred by smokers who had become addicted to tobacco, allegedly through defendant's fraudulent acts) were the economic consequence of the underlying personal injury and not compensable under RICO); *Morrison* v. *Syntex Laboratories, Inc.*, 101 F.R.D. 743, 746 (D.D.C.1984) ("Thus, injury in one's property under the RICO provision would not include damages for the money lost as a result of the costs of medical attention and treatment incurred from the injuries allegedly sustained ... from consumption of the alleged chloride deficient.")

In *Vavro* v. *Albers*, No. 05–cv–321, 2006 WL 2547350 (W.D. Pa. Aug. 31, 2006), a case involving the alleged fraudulent deprivation of workers' compensation benefits, parallels to the instant case are apparent and the court's reasoning instructive. Plaintiff suffered a workplace injury and filed a claim for workers' compensation benefits. His claim for benefits was denied and plaintiff brought suit under RICO, along with several other claims, to recover damages for various "personal and financial injuries" seeking damages "treble the equivalent amount of [Workers Compensation Benefits] and disability benefits he was entitled to receive, plus the costs of continuing health care over his lifetime." *Id.* at *3–4. Plaintiff claimed that, in addition to wrongfully denying plaintiff workmen's compensation and disability benefits, defendants conducted fraudulent defensive medical exams ("DMEs") and used plaintiff's personal medical information ("PMI") derived from those exams to justify similar claim denials. The court noted at the outset: "It appears that the present lawsuit is nothing more than an attempt by

plaintiff to relitigate his failed claims for WCOD and disability benefits, albeit under the guise of state common law tort and civil RICO claims." *Id*. at *5. Rejecting plaintiff's claims on numerous other grounds, the court concluded that plaintiff's claim was barred "for a more primal reason in that he lacks standing under Section 1962(c) to bring a civil RICO claim." Citing many of the cases discussed above, the court thoroughly summarized:

> [A]ll of the injuries Plaintiff claims to have suffered constitute either personal injuries (intentionally inflicted distress, physical pain and mental distress, a diminished capacity to enjoy life, intentional infliction of emotional distress, denial of medical treatment and care), or financial injuries that derive from the alleged personal injuries (i.e., incurred medical bills for treatment and care, loss of income, diminished earning capacity, and other substantial economic losses), none of which are deemed compensable under RICO. As the Court of Appeals noted in *Genty* v. *Resolution Trust Corp*., "[i]n ordinary usage, 'injury to business or property' does not denote physical or emotional harm to a person. Indeed, the Supreme Court has declared that Congress's limitation of recovery to business or property injury 'retains restrictive significance. It would for example exclude personal injuries suffered.' " 937 F.2d at 918 (quoting *Reiter* v. *Sonotone Corp.*, 442 U.S. 330, 339, 99 S.Ct. 2326, 60 L.Ed.2d 931 (1979)); see also *Zimmerman* [v. *HBO Affiliate Group*], 834 F.2d [1163] at 1169 [(3d Cir. 1987)] (alleged injury of mental distress did not constitute an injury in business or prop-

> erty for RICO standing); *Fried* [v. *Sungard Recovery Serv., Inc.*], 900 F. Supp. [758] at 762–63 [(E.D. Pa. 1995)] (declining to find plaintiff's claim for hazard pay constituted an "injury" for RICO standing where hazard pay would have allegedly been paid to induce workers to work in an environment contaminated by dangerous asbestos fibers; in reality hazard pay constituted compensation for fear of catching a disease which is a type of emotional distress not covered by RICO). Moreover, to the extent a RICO plaintiff attempts to claim financial losses that derive from the personal injuries, the courts have refused to find a cognizable injury to property for RICO standing purposes. See *Thomas*, 2005 U.S. App. LEXIS 7888, at *7–8 (affirming district court's rejection of civil RICO claim where alleged injury from RICO violations consisted of lost earning capacity due to depression which was found to be a non-cognizable injury under RICO); *Fried*, 900 F. Supp. at 762 (*quoting Grogan* v. *Platt*, 835 F.2d 844, 847 (11th Cir. 1988)) (recognizing that although " 'recovery for personal injury has pecuniary aspects' ... it is important to distinguish between the pecuniary harm that arises from personal injuries and the pecuniary harm that arises from injury to business or property.")

2006 WL 2547350 at *21. The court held that plaintiffs' claims for "out-of-pocket medical expenses, lost income, diminished earning capacity, although capable of valuation, all derive from his [underlying medical condition] and the denial of his workers' compensation claim ... Therefore, Plaintiff's alleged

injuries are not the type of "injury" that creates RICO standing."

In the instant case, Plaintiffs claim that they were deprived of workers' compensation benefits, and incurred attorneys' fees, medical care expenses and mileage to and from medical care and claim damages "measured by the amount of benefits improperly withheld from [them], plus interest as provided by law, all tripled in accordance with RICO, together with attorney fees and costs as provided by law." These damages unquestionably were incurred as a direct result of Plaintiffs' on-the-job injuries. But for their workplace injuries, Plaintiffs would have no claim at all. The fact that the WDCA allows these Plaintiffs to bypass the legal proofs of negligence and causation normally associated with a personal injury claim does not change the nature of their claims—they seek to recover for injuries they allege that they suffered while working for Cassens and they seek medical benefits and related expenses. Regardless of how Plaintiffs characterize the wrong, their medical expenses, workers' compensation benefits, medical mileage and attorneys fees are damages which are indisputably wholly derivative of their personal injuries and as such are not injuries to "business or property" under RICO. Plaintiffs' seek damages in the amount of benefits they were denied and related medical expenses, i.e. they seek reimbursement for the pecuniary loss they suffered as a result of their workplace injuries, damages not recoverable under RICO, and therefore lack standing to bring their RICO claims.

2. Plaintiffs' Damages, Which Are Based Upon A Presumption Of A Legal Entitlement To Workers' Compensation Benefits, Are Too Speculative To Confer Standing To Bring Their RICO Claims.

Speculative damages are not recoverable under RICO. "The effective means of punishing a defendant in the civil RICO context is to apply the treble multiplier to damages established by competent proof, not based upon mere speculation and surmise." *Fleischhauer* v. *Feltner*, 879 F.2d 1290, 1299 (6th Cir. 1989). " 'Injury to mere expectancy interests or to an 'intangible property interest' is not sufficient to confer RICO standing.' " *Halliburton*, 2009 WL 5170280 at *5 (quoting *Price* v. *Pinnacle Brands, Inc.*, 138 F.3d 602, 607 (5th Cir. 1998)). In *Halliburton*, the court discussed this requirement in analyzing plaintiffs' claims for damages measured by the amount they would have received in compensation had they been fully informed of the risks of working in Iraq (i.e. had defendants not committed the alleged predicate acts of failing to inform them of the risks of working in Iraq). The court concluded:

> Whether plaintiffs would have been able to secure additional payment for their service in Iraq if any alleged undisclosed risks had been fully disclosed is speculative and does not confer standing under section 1964(c). See *Price*, 138 F.3d at 607; *In re Taxable Mun. Bond Secs. Litig.*, 51 F.3d [518] at 523 [(5th Cir. 1995)]; *Oscar* [v. *University Students Co-op. Ass'n*], 965 F.2d [783] at 785 [(9th Cir. 1992)]. The alleged compensation loss claimed by the plaintiffs is not a "concrete financial loss," but rather is a theoretical claim

> that is more in line with an "injury to a[n] ... intangible property interest." *Oscar*, 965 F.2d at 783 ("[A] showing of 'injury' requires proof of concrete financial loss, and not mere injury to a valuable intangible property interest."). Thus, according to controlling precedent, the theoretical compensation loss claimed by plaintiffs is too speculative to confer standing for a civil RICO cause of action under section 1964(c).
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> 2009 WL 5170280 at *5.

Thus, standing to bring a RICO claim must derive from something more than a speculative, intangible property interest. "While federal law governs most issues under RICO, whether a particular interest amounts to property is quintessentially a question of state law. *See Logan* v. *Zimmerman Brush Co.*, 455 U.S. 422, 430, 102 S.Ct. 1148, 1154, 71 L.Ed.2d 265 (1982) ("The hallmark of property ... is an individual entitlement grounded in state law...."); *Board of Regents* v. *Roth*, 408 U.S. 564, 577, 92 S.Ct. 2701, 2709, 33 L.Ed.2d 548 (1972) (property interests "are created and their dimensions are defined by" sources "such as state law.")." *Doe*, 958 F.2d at 768. As discussed at length above, "plaintiffs must prevail on a showing that their physical injuries were compensable prior to showing that defendants acted in collusion to deny those benefits ...." *Broaddus*, 84 Mich. App. at 599, 269 N.W.2d 689. Until Plaintiffs can establish a legal entitlement to the benefits they claim to have been wrongfully denied, they cannot

demonstrate a present property interest that would support of their claimed RICO injury.[16]

At the hearing on this matter, Plaintiffs' counsel argued to the Court that Plaintiffs are not seeking damages for their physical injuries but rather seek damages flowing from Defendants' "thwarting" the system, which is the conduct Plaintiffs claim caused their injuries. In other words, they argue, they are not seeking to recover the expenses incurred as a result of their physical injuries (although admittedly their damages are measured by those expenses) but rather for their employer's wrongful failure to pay those expenses. This "spin" on Plaintiffs' claim, which appears to be a semantic distinction without a difference, presumes that Plaintiffs' have an entitlement, a protected property interest, in the claimed benefits. Plaintiffs' claim to reimbursement for medical payments and other expenses incurred as a result of their denial of workers' compensation benefits is based on pure speculation as to their entitlement to those benefits. They have not established a present property right in those benefits and cannot establish such a right, as discussed above, other than by a final determination of entitlement to benefits through the exclusive administrative procedures set forth in the WDCA. Accordingly, Plaintiffs' speculative alleged injuries, based upon the expectancy of a legal

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[16] In *Jackson*, Judge Edmunds came to a similar conclusion based on the legal principle of ripeness: "[T]he injury Plaintiffs may suffer in the denial of workers' compensation benefits—that have not been established—cannot yet be determined. Only when Plaintiffs are able to establish an injury (i.e., after their eligibility for benefits has been determined) will their claims be ripe for suit. Thus, Plaintiffs' RICO claims are dismissed." 2010 WL 931864 at *21–22.

entitlement, do not confer standing to bring a claim under RICO and Plaintiffs claims are dismissed for this separate and independent reason.

To establish standing to sue under 18 U.S.C. § 1964(c), Plaintiffs must establish "injury to their business or property." *Drake*, 782 F.2d at 644. The phrase "business or property" excludes damages for personal injuries and the pecuniary losses flowing therefrom and excludes damages which are speculative and based upon mere expectancy interests. The damages which Plaintiffs claim to have suffered are both too intimately tied to their personal injury claims and too speculative to constitute "injury to business or property" under RICO. As a result, Plaintiffs lack standing to bring those claims and their RICO claims are dismissed.[17]

C. Plaintiffs' Motion For Leave To Amend

On September 9, 2010, one week before the hearing on this matter and more than two months after the last responsive pleading was filed on the instant motions, Plaintiffs filed a motion for leave to amend their Complaint, adding three new plaintiffs, a new defendant and additional factual allegations as to ex-

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[17] As this Court discussed at length in *Brown I*, even if Plaintiffs' claims survived the instant motions, the Court would stay Plaintiffs' RICO claims, which allege entitlement to workers' compensation benefits, based upon the *Burford* abstention doctrine. *Brown I*, 409 F. Supp. 2d at 801–803. *In accord Jackson*, 2010 WL 931864 at *14 (finding this Court's reasoning and analysis persuasive and holding that if plaintiffs' claims survived the pending motions to dismiss, the court would stay the RICO claims pending final determinations of eligibility for workers compensation benefits under the WDCA). This Court agrees with Judge Edmunds that the Sixth Circuit did not address the *Burford* abstention issue in *Brown III*.

isting claims. This is Plaintiffs' third proposed amended complaint. Plaintiffs previously filed a motion to amend to their Complaint, on January 14, 2005. (Dkt. No. 32). Similar to the timing of the filing of the present third proposed amended Complaint, this first proposed amendment was filed shortly after the Defendants filed their original motions to dismiss. Without explanation, Plaintiffs' withdrew their first motion to amend on February 7, 2005. (Dkt. No. 36.) On July 15, 2005, after the Court held a hearing on the Defendants' original motions to dismiss, and just days before the Court issued its Opinion and Order dismissing Plaintiffs' Complaint, Plaintiffs filed their second motion for leave to amend their Complaint. (Dkt. No. 41.) The Court denied Plaintiffs' second motion for leave to amend in its Opinion and Order dated entered July 22, 2005. (Dkt. No. 42.) The Court notes that this "practice of 'testing' the strength of their claims in the face of Defendants' motions to dismiss" appears to be a technique which Plaintiffs' counsel also employed in the *Jackson* case. *Jackson*, 2010 WL 931864 at *6, *9 n. 17 ("The Court does recognize, however, the merit in Defendants' argument that Plaintiffs appear to be using Defendants' motions to dismiss as an opportunity to test the strength of their claims at Defendants' expense—suggesting that the motions to amend are made in bad faith.")

The Court has reviewed the instant proposed amended complaint and rejects Plaintiffs' third attempt to hone their claims in response to the flaws in their pleadings made manifest by Defendants' motions to dismiss. This third proposed amended complaint purports to add three new plaintiffs whose claims, like those of the Plaintiffs presently before the Court, seek damages measured by the amount of

workmen's compensation benefits they claim to have been wrongly denied. There is nothing new or different in the claims of the proposed new plaintiffs, or in the added factual content with regard to Dr. Margules, which changes the nature of the claims or the damages sought. A review of the proposed amendments, which are replete with detailed allegations regarding the employees' injuries and the conflicting medical opinions assessing those injuries, strengthens this Court's resolve in concluding that Plaintiffs' claims must be determined in the first instance by the administrative scheme embodied in the WDCA.

The third proposed amended complaint purports to add a damage component, in addition to "the amount of benefits improperly withheld," measured by "the time delay in receipt of hose benefits." (*See e.g.* Proposed Amended Complaint, Dkt. No. 117, 33.) It is not clear whether this proposed amendment to the *ad damnum* clause is a claim for monetary or emotional damages but in either case, as discussed above, such damages flow directly from the injuries suffered by these workers and are of a type not compensable under RICO's requirement that a plaintiff plead injury to business or property. Additionally, such damages are based upon a presumption of a legal entitlement and are therefore too speculative to confer standing under RICO.

The Court concludes that resolution of the claims set forth in the third proposed amended complaint, which ask this Court to decide whether these workers were entitled to the workers compensation benefits that they claim they were fraudulently denied, has been committed by statute to a determination by the WCDB and the WCAC under the exclusive ad-

ministrative scheme embodied in the WDCA. Additionally, the damages sought in the proposed amended complaint, which seek recovery of benefits for workplace injuries, do not constitute injury to business or property under RICO and are based upon a presumption of a legal entitlement and are therefore too speculative to confer standing under RICO. The Court concludes upon careful review that Plaintiffs' proposed amendments would not defeat the instant motions to dismiss. Therefore, Plaintiffs' motion for leave to file the proposed amended complaint is denied on the grounds of futility. *See Rose* v. *Hartford Underwriters Ins. Co*., 203 F.3d 417, 420 (6th Cir. 2000) ("A proposed amendment is futile if the amendment could not withstand a Rule 12(b)(6) motion to dismiss.").

IV. CONCLUSION[18]

For the foregoing reasons, the Court:

(1) **GRANTS** Defendant Cassens' motion to dismiss and for partial summary judgment and supplemental motion to dismiss, in which Defendant Crawford joins (Dkt. Nos. 83 and 95);

(2) **GRANTS** Defendant Margules' motion to dismiss (Dkt. No. 106);

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[18] Because the Court is dismissing Plaintiffs' RICO claims on the grounds addressed in this Opinion and Order, it need not reach the merits of Defendants' arguments that (1) that Plaintiffs' claims are preempted by the LMRA; (2) that Plaintiffs have failed to plead and prove the existence of a RICO enterprise; and (3) that Plaintiffs have failed to adequately plead Dr. Margules' participation in the conduct of the affairs of the enterprise.

(3) **DENIES** as moot Defendant Cassens' renewed motion for summary judgment (Dkt. No. 82); and

(4) **DENIES** Plaintiffs' motion for leave to amend (Dkt. No. 117).

IT IS SO ORDERED.

APPENDIX C

ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT DENYING REHEARING

No. 10-2334
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PAUL BROWN, ET AL.,
Plaintiffs-Appellants,
v.
CASSENS TRANSPORT COMPANY, ET AL.,
Defendants-Appellees.

BEFORE: MOORE, COLE, and GIBBONS, Circuit Judges.

Filed June 19, 2012

The court having received three petitions for rehearing en banc, and the petitions having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petitions for rehearing have been referred to the original panel.

The panel has further reviewed the petitions for rehearing and concludes that the issues raised in the petitions were fully considered upon the original submission and decision of the case. Accordingly, the petitions are denied. Judge Gibbons would grant rehearing for the reasons stated in her dissent.

ENTERED BY ORDER OF THE COURT

/s/
Leonard Green, Clerk