Ganan & Shapiro, P.C.

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EXTRA EDITION

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Extra Edition

Special Update on Federal RICO Cases

At Ganan and Shapiro we have been monitoring the cases of *Brown v. Cassens Transport Co.* and *Jackson* v. *Sedgwick Claims Management Services, Inc.* as they have worked their way up and down the Federal Court system, and we have been reporting to our friends in the industry the status of these litigated claims. The potential for opening a whole new area of liability for the employer community would arise if the Federal Courts allows claims of this nature to move forward.

As you know we work closely with the National Council of Self-Insurers (NCSI) in monitoring the status of litigation and legislation that will affect the workers' compensation aspect of claims against employers. We have found NCSI to be on the cutting edge of these issues, and we supported their position to become involved in the Amicus Briefs that were filed in both the *Cassens* and *Jackson* cases in Michigan. Their investment of both the time and money required to prepare and file the Amicus Briefs surely helped the Court focus in on the issues involved. We would urge you to consider joining NCSI as a member so that they can continue to fight these battles. Though we are seeing a favorable decision in *Cassens*, the battle is not over yet. You can go to the NCSI website for further information at www.natcouncil.com.

I hope you find the following article helpful in understanding these cases. We felt the decision to be of such great importance that we have issued this special edition of our quarterly newsletter. The decision itself is lengthy, consisting of over 50 pages. If you would like to see the full decision send me an e-mail at cliff.ganan@ganan-shapiro.com, and I will forward you a full copy of the decision.

Cliff Ganan
Editor-in-Chief

Good News from the Michigan Federal Court

This case centers around six employees of Cassens Transport who brought Federal RICO charges against their employer, the claims administrator, and an IME doctor after they were denied workers' compensation benefits by Cassens' third-party claims administrator. In July of 2005, the case was dismissed under Federal Rule of Civil Procedure 12(b)(6); failure to state a claim for which relief can be granted. The claim was also dismissed under the McCarran-Ferguson Act; however, this ground for dismissal was not addressed by the appellate court. In dismissing the complaint, the Court noted the Plaintiffs failed to allege reliance on the Defendant's actions. After being affirmed by the Appellate Court, the United States Supreme Court granted certiorari and remanded the decision for consideration of *Bridge v. Phoenix Bond & Indemnity Co.*, 128 S.Ct. 2131 (2008) which held a civil RICO claim does not require reliance by a plaintiff. On remand, the Appellate Court reversed and remanded the case for further proceedings holding that: 1) the WDCA did not preempt the RICO claims; and, 2) Plaintiffs had pleaded sufficiently since reliance is not an element of a civil RICO fraud claim.

On September 27, 2010, the Court issued an opinion and order dismissing the Plaintiff's complaint. Specifically the Court granted Cassen's motion for dismissal under Federal Rule of Civil Procedure 12(c) and partial summary judgment, as well as Cassen's supplemental motion to dismiss and Dr. Margules' motion to dismiss. The Court denied Plaintiffs motion for leave to file an amended complaint and also denied Cassen's renewed motion for summary judgment as moot.

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Good News from the Michigan Federal Court

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Plaintiff's complaint contended Defendants failed to abide by their duties under the Michigan Workers' Disability Compensation Act ("WDCA") in filing their RICO claim.

The WDCA allows injured workers to file their case before a mediator who makes a determination of benefits. The mediator's decision can be appealed to workers' compensation appellate division and is ultimately subject to judicial review. The WDCA provides for penalties and costs in the event an employer's denial of benefits is merely to provide the vexatious delay in payment of benefits owed. Nothing in the WDCA asks whether the denial of benefits was made in good faith, and numerous Courts have held the same. *See, Warner v. Collavino Bros.*, 122 Mich. App. 230, 236-37 (1984); *Couture v. General Motors Corp*., 125 Mich. App. 174, 178-79 (1983).

In reaching its decision, the Court first found the WDCA is the exclusive remedy for work-related injury claims. Citing the WDCA as an exclusive and comprehensive scheme, the Court explained the legislature enacted the WDCA as a tradeoff between employees and employers, as it allows for prompt claims of benefits for employees and predictable results for employers. The Court was clear in explaining that the WDCA covered all workers' compensation claims, including those denials made in bad faith. The only exception to the WDCA as an exclusive remedy is an intentional tort claim, something not alleged by Plaintiffs.

The Plaintiffs argued their treating doctors' opinions entitled them to benefits under the WDCA. In rejecting their argument, the Court explained the WDCA created its scheme for that exact reason and to allow a mediator and the workers' compensation appellate division to be the finders of fact when a treating doctor's opinion is refuted by an IME doctor. The Court explained cross-examination is the best way to test an IME doctor's opinion and expose any unfairness. *See*, *Feld v. Robert & Charles Beauty Salon*, 435 Mich. 352 (1990).

The Court went on to explain that because this exclusive system exists for workers' compensation claims, the Plaintiffs' RICO claims were foreclosed. The Court noted where there is a statutory scheme in place, and no private right of action is provided, a plaintiff is barred from bringing a RICO claim if the claim would otherwise be addressed by the statutory scheme. The Court cited *Jackson v. Sedgwick Claims Management Services, Inc.*, 2010 WL 931864 at 18, another District Court case, with basically the same facts as *Brown v. Cassens*, in reaching the conclusion that the RICO claim was barred. *See also, Danielsen v. Burnside-Ott Aviation Training Center, Inc.*, 941 F.2d 1220 (D.C. Cir. 1991); *McCulloch v. PNC Bank Inc.*, 298 F.3d 1217 (11th Cir. 2002).

Plaintiffs argued the Sixth Circuit Court of Appeals' decision prohibited the District Court from finding the RICO claim was barred. In rejecting the Plaintiffs' argument, the Court explained the Sixth Circuit was discussing the McCarran-Ferguson Act in dicta, and never addressed *Couture* or that line of cases in reaching its decision. The Court pointed to *Jackson*, which specifically stated the Sixth Circuit failed to consider *Couture or Warner* in its decision. The Court also pointed out the Sixth Circuit made no mention of any of the cases which prohibiting the subversion of statutory schemes by pleading RICO violation claims.

The Court next addressed alternative grounds for dismissing the Plaintiffs' standing to bring a RICO violation claim and whether their damages were too speculative.

The RICO statute allows for the recovery of damages to "any person damaged 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). The Court explained any pecuniary interest lost by the Plaintiffs was the result of personal injuries and therefore not allowed under the RICO statute. *See Evans v. City of Chicago*, 434 F.3d 916, 926 (7th Cir. 2006).

The Court also found the Plaintiffs damages were too speculative under RICO to give Plaintiffs standing. The Court cited *Fleischauer v. Fetiner*, 879 F.2d 1290, 1299 (6th Cir. 1989), in explaining the need for damages to be established by proof, not speculation. The Court explained the Plaintiffs' damages were speculative because they failed to have a determination made under the WDCA what amount of compensation they were entitled to. The Plaintiffs were operating on an assumption that they were entitled to benefits. Because the Plaintiffs damages were based on pecuniary interests from their personal injuries, and too speculative of an amount of damages, the Court found Plaintiffs lacked standing under RICO.

Jackson v. Sedgwick Claims Management Services, Inc. is currently pending before the Sixth Circuit Court of Appeals. This case is RICO violation claim similar to that made in *Brown v. Cassens Transport*. Now that *Brown* has been decided in the District Court, it is likely the case will be appealed to the Sixth Circuit again. Because both *Jackson* and *Brown* involve the same claims by employees against their employers, the cases will likely be consolidated to allow the cases to be decided by one panel, rather than two separate Appellate panels.

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