On the Job. Plaintiffs' Use of RICO in Workers' Compensation Cases

By Harvey Heller and Kate Klaus

If you serve as both defense and coverage counsel, you have likely worked with a host of claims professionals and third party administrators over the years. The role you play is the person at the base of a ladder who is fact finding, analyzing, and providing a resolution strategy to assist the claims professional in evaluating a particular claim. You receive authorization and seek experts to assist in the defense. Oftentimes, like the plaintiff's bar, you use an expert more than once, depending on the matter at hand.

There are those in the plaintiff's bar who feel that insurance companies don't pay what they should and are out to get the plaintiff. Conversely, the defense bar often feels that plaintiff's experts are hired guns who, in addition to suffixes such as M.D., Esq., and AIA, also should be given the suffix "MAI" (made as instructed) after their names.

While the foregoing has been the stuff of coffee talk and finger pointing, the plaintiff's bar recently has started to gain some traction across the country with a new weapon: the Racketeer Influenced and Corrupt Organizations Act, or RICO.

The plaintiff's class-action bar has fashioned a RICO violation by alleging that self-insured employers, third party administrators (TPAs), and employer-retained experts and treaters conspire to deprive injured workers of their right to the timely and complete payment of benefits under various state workers' compensation statutes. By bringing a case under RICO, plaintiffs can seek treble damages and attorney's fees and ask for a jury trial, things that they would not be entitled to under most workers' compensation statutes.

The theory has gained some traction in federal district courts. For example, Walmart, Claims Management Inc. (Walmart's claims management unit), and Concentra Health Services paid $8 million to settle a RICO class-action case brought on behalf of Walmart employees who claimed that they were wrongfully denied appropriate medical treatment for work-related injuries.

However, on Sept. 24, 2013, the Sixth Circuit Court of Appeals sitting *en banc* decided that injured workers cannot bring suit under RICO for the wrongful denial of workers' compensation benefits. In *Jackson, et al. v. Sedgwick Claims Management Services, et al.*, the decision reversed two panel decisions that held injured workers could seek redress in federal court under RICO if they believed their workers' compensation benefits were denied or delayed. The plaintiffs' theory in *Jackson* was that the self-insured employer, TPA, and the doctor who performed an independent medical exam (IME) conspired to deprive the plaintiffs of workers' compensation

benefits. The conspiracy consisted of the claims administrator sending certain injured workers to "cut-off" doctors posing as independent medical experts. These doctors would issue predetermined opinions that the injured workers were fit to return to work. The claims administrators allegedly ignored contrary medical evidence presented by the plaintiffs' experts and denied or terminated benefits.

The *Jackson* court found that the plaintiffs had no standing to bring suit under RICO because the act restricts standing to plaintiffs seeking damages for "injury to business or property," while the plaintiffs in *Jackson* were seeking damages based on their personal injuries. Writing for the majority in the 11-5 decision, Judge Julia Smith Gibbons held that the plaintiffs' losses "are simply a shortcoming in the compensation that they believed they were entitled to receive for a personal injury." Plaintiffs must seek redress for that injury in the administrative agency created by the Michigan legislature to adjudicate disputes over workers' compensation, she ruled.

The Sixth Circuit was the first federal appellate court to rule on the issue. Similar cases are pending across the country, and the *Jackson* decision has not been followed in all of those cases. For example, York Risk Services Group is a defendant in a pending case in Arizona brought on behalf of injured firefighters who claim that York unfairly delayed the payment of workers' compensation benefits to firefighters who were suffering job-related terminal illnesses. The court in that case declined to follow *Jackson* and determined that an injured worker's "right" to workers' compensation was a property right under RICO, even if underlying injuries were personal injuries.

These cases are far-reaching and can put every claims professional at risk. The attorneys who represent employees in workers' compensation cases are, likewise, exposed under the principle of "what's good for the goose," but the alleged parity is an illusion due to collectability issues. Moreover, countersuing plaintiffs' lawyers and doctors under RICO is not an answer to the onslaught of potential workers' compensation cases being filed in federal court that must be vigorously defended. Some suggest that perhaps this new onslaught is an outgrowth of a frustration that the plaintiff's bar has with tort reform across our country.

If these cases get traction in jurisdictions outside of the Sixth Circuit, one can easily envision claims professionals and carriers being dragged into court and staying awhile due to fact questions surrounding the claims handling created by normal file-handling procedures. The nightmare of carrier or TPA hard drives being scraped in discovery for wording that creates a potential exposure will have a substantial impact on our industry. We must establish newer and/or better practices to deal with the situation before this molehill becomes a mountain. CM

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