No. 17-55956

**IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

JOHN BLACK, et al.,
Plaintiffs-Appellants,

v.

CORVEL ENTERPRISES COMP. INC., et al.,
Defendants-Appellees.

On Appeal From The United States District Court
For The Central District Of California, Eastern Division,
CASE NO. 5:14-cv-02588-JBG-KK.

**AMICUS CURIAE BRIEF OF
CALIFORNIA WORKERS' COMPENSATION INSTITUTE
[FILED WITH CONSENT OF ALL PARTIES]
IN SUPPORT OF DEFENDANTS-APPELLEES
AND SUPPORTING AFFIRMANCE**

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I. STATEMENT OF AMICUS INTEREST AND CONSENT

Pursuant to Rule 29 of the Federal Rules of Appellate Procedure and Circuit Rule 29-3, *amicus curiae*, by and through undersigned counsel, respectfully submits this *amicus curiae* brief in support of Defendants-Appellees, and states as follows:

1. California Workers' Compensation Institute ("CWCI") is a private non-profit research, information, and educational organization dedicated to improving the California workers' compensation system. Institute members include insurers writing 82% of California's workers' compensation premium, and self-insured employers with $69.8B of annual payroll (31.5% of the state's total annual self-insured payroll).

2. The Institute publishes research that is typically based on claims data collected from member companies, offers analyses and practical expertise on issues and trends affecting California workers' compensation, spotlights problems and concerns within the system, helps build consensus for workable solutions, and is often used to evaluate the impact of various legislative and regulatory proposals.

3. CWCI further serves as a liaison for employer, labor, medical, regulatory, and legal communities within the workers' compensation system, and frequently provides written and oral input at legislative and regulatory hearings.

4. Based upon its recognized expertise in workers' compensation, CWCI has been judicially permitted to join in multiple cases as *amicus curiae* before the California Supreme Court and Courts of Appeal,[1] including the case of *Angelotti Chiropractic v. Baker* that has become an important development in the adjudication of the instant case.

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[1] CWCI has been granted amicus status in the cases of *Christian v. WCAB* (1997); *SCIF v. WCAB (Stuart)* (1998); *Avalon Bay Foods v. WCAB* (1998); *Rosales v. Depuy Ace Medical Company* (2000): *Lockheed Martin v. WCAB (McCullough)* (2002); *Wal-Mart v. WCAB (Garcia)* (2003); *Honeywell v. WCAB (Wagner)* (2005); *Green v. WCAB* (2005); *Rio Linda School District v. WCAB (Scheftner)* (2005); *Nabors v. WCAB* (2006); *Yeager Construction v. WCAB (Gatten)* (2006); *Chang v. WCAB* (2007); *Vaira v. WCAB* (2007); *Brodie v. WCAB* (2007); *Babbitt v. Ow Jing (2007); Pendergrass v. Duggan Plumbing)* (2007); *Tanimura & Antle v. WCAB (Lopez)* (2007); *Palm Medical Group v. State Compensation Insurance Fund* (2007); *Smith & Amar v. WCAB* (2007); *Facundo-Guerrero v. WCAB* (2008); *Smith & Amar v. WCAB)* (2009); *Benson v. WCAB* (2009); *Boughner v. WCAB* (2009); *Aguilar v. WCAB* (2009); *El Aguila Food Products v. WCAB (Cervantes)* (2010); *Almaraz & Guzman v. WCAB* (2011); *Baker v. WCAB (X.S.)* (2011); *Ogilvie v. WCAB (2011); Valdez v. WCAB* (2012); *Pacific Compensation v. WCAB (Nilsen)* (2013); *Southern California Edison v. WCAB (Martinez)* (2013); *Stevens v. Outspoken Enterprises* (2014); *CIGA v. WCAB (Elite Surgery Centers)* (2014); *South Coast Framing v. WCAB (Clark)* (2014); *Angelotti Chiropractic v. Baker (*2014); *Contra Costa County v. WCAB (Dahl)* (2015); *State Compensation Ins. Fund v. WCAB (Margaris)* (2016); *Ramirez v. WCAB* (2017); *Zuniga v. WCAB* (2018); *SCIF v. WCAB (Guzman)* (2018); *Co. of San Diego v. WCAB (Pike)* (2018); and *King v. CompPartners* (2018).

5. The amicus brief provides a detailed review of the exclusive remedy rule in California, and explains the importance of the public policy supporting broad interpretation of the exclusive remedy rule in workers' compensation cases.

6. Consent to Amicus Brief: Pursuant to Rule 29(a)(2), Circuit Rule 29-3, and the Circuit Advisory Committee Note to Rule 29-3, the timely filing of an *amicus curiae* brief is permitted without leave of the Court if all parties consent to the filing of the brief; obtaining such consent relieves the Court of the need to consider a motion. Amicus CWCI has obtained consent to file this *amicus curiae* brief from all counsel (both Appellants and Appellees).

Respectfully submitted,

June 18, 2018

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II. STATEMENT OF COMPLIANCE [FRAP 29(a)(4)(E)]

No party or party's counsel authored this brief in whole or in part. No party or party's counsel contributed money to fund the preparation or submission of this brief. No other person other than the California Workers' Compensation Institute and its members contributed money to fund the preparation or submission of this brief.

III. CORPORATE DISCLOSURE STATEMENT [CIR. RULE 26.1]

The California Workers' Compensation Institute is a nonprofit organization incorporated in the State of California. There is no parent corporation, nor is there any publicly held corporation that owns 10% or more of its stock.

IV. CERTIFICATE OF COMPLIANCE [FRAP 29(a)(4)(A)]

I certify that this brief complies with the length limits permitted by FRAP 29(a)(5) and Ninth Circuit Rule 32-1. The attached amicus curiae brief contains 4,797 words, excluding the portions exempted by FRAP 32(f). The brief's type size and type face comply with FRAP 32(a)(5) and (6).

Respectfully submitted,

June 18, 2018

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VII. INTRODUCTION

Appellants cannot show a vested property right in their non-final claims for workers' compensation benefits sufficient to support their allegations of RICO violations. In the absence of a protectable property right under RICO, Appellants' allegations are reduced to ordinary mishandling of claims.

Public policy supports the broad application of the exclusive remedy rule to complaints (such as in this case) that amount to nothing more than allegations of bad faith claims handling.

This brief proposes that application of the exclusive remedy provisions is warranted in all instances where the gravamen of the alleged misconduct is the delay or refusal to pay workers' compensation benefits.

VIII. LEGAL ARGUMENT

A. APPELLANTS' WORKERS' COMPENSATION CLAIMS DO NOT QUALIFY AS A RECOGNIZABLE PROPERTY RIGHT SUFFICIENT TO SUPPORT A RICO VIOLATION.

The period of delay alleged by Appellants occurred between the time that plaintiffs filed their initial claims of injury and the time that the claims were ultimately accepted.[2] Their contingent entitlements to benefits during this time do not qualify as a "business or property" right sufficient to support a RICO violation.

1. THE DISTRICT COURT CORRECTLY APPLIED THE *ANGELOTTI* DECISION TO THE FACTS OF THIS CASE.

In the proceedings below, the District Court determined that plaintiffs could not show a vested property right in their non-final claims. Citing *Angelotti Chiropractic v. Baker*,[3] the District Court ruled that the Appellants' rights to benefits did not vest until a final judgment.

In their opening brief, appellants go to great lengths to try to distinguish the facts of the instant case from *Angelotti*. Appellants argue that *Angelotti* involved a different type of property right and a different constitutional deprivation. However, appellants have failed to explain why their non-vested, non-final expectation of entitlement to a property right should be given more protection than the lien claimants were provided in *Angelotti*.

[2] This brief is intended to address the primary contentions supporting Appellants' claims under RICO. *Amicus curiae* acknowledges a subset of allegations by two appellants, both of whom have alleged post-award delays. However, as set forth by the District Court below, acts that are isolated do not demonstrate a pattern of criminal activity sufficient to state a claim under RICO. *Durning v. Citibank Intl.*, 990 F.2d 1133 (9th Cir. 1993).

[3] *Angelotti Chiropractic v. Baker*, 791 F.3d 1075 (9th Cir. 2015).

In fact, the un-adjudicated workers' compensation claims at issue here are of the same type of property right as the non-vested lien claims in *Angelotti*. Nascent claims of industrial injury are not vested property interests until they are "reduced to a final judgment."[4] By definition, the non-adjudicated claims of industrial injury at issue here are contingent and are of purely speculative value; they do not constitute a right to payment.

2. APPELLANTS' WORKERS' COMPENSATION CLAIMS ARE NOT PROTECTED PROPERTY INTERESTS.

A careful review of at least one case relied upon by appellants in their effort to distinguish *Angelotti* actually disproves their argument.

Appellants contend that the District Court's reliance on *Angelotti* is misplaced, because *Angelotti* dealt only with vested property rights, whereas appellants herein claim something they have nicknamed an "expectation of entitlement to a statutory benefit." In making this argument, appellants rely upon *Bowers v. Whitman*[5] for the proposition that a property right can be constitutionally protected even when not vested.[6]

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[4] *Graczyk v. WCAB,* 184 Cal. App. 3d 997, 1006 (1986).

[5] *Bowers v. Whitman,* 664 F.3d 1321 (9th Cir. 2012).

[6] Appellants' Opening Brief, p. 9, quoting *Bowers*: "[T]he Supreme Court

That is not what *Bowers* actually held; to the contrary, the court in *Bowers* held that a potential property interest did not effect a constitutional "taking" because that interest had not vested absent a final judgment.[7] The *Bowers* court emphasized that the relevant inquiry is the certainty of the expectation in the property interest at issue.[8] Here, Appellants' claimed expectation of entitlement to a property right is quite different from an actual entitlement to a property right.

Furthermore, *Bowers* cited with approval definitions of "property interests" as state laws securing certain benefits, and "vested right" as a right that so completely and definitively belongs to a person that it cannot be impaired or taken away without that person's consent.[9] That is a far cry from the type of interest that Appellants can assert in pending workers' compensation claims.

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has recognized property rights that were constitutionally protected, such that they were safeguarded by due process, but still not vested."

[7] *Bowers*, *supra*, 664 F.3d at 1329.

[8] *Ibid*. Notably, the *Bowers* court emphasized that the plaintiffs had failed to articulate any clear characterization of the exact property interest to which they were entitled. *Bowers, supra*, 664 F.3d at 1330. Likewise, appellants herein have failed (over the course of four amended complaints) to adequately state a valid legal basis for a cognizable property interest in the workers' compensation benefits at issue. *See, e.g.*, Order Granting Motion to Dismiss, dated August 25, 2016, p. 10.

[9] *Bowers*, *supra*, 664 F.3d at 1328-1329.

Appellants contend that they maintain a property right in their "expectation of benefits" because California law includes "mandatory" language requiring that benefits be paid.[10] Of course, if that were true, appellants would not have a mere "expectation" but rather an absolute entitlement. But as appellants concede,[11] the California Labor Code includes multiple prerequisites to compensation, all of which must be satisfied before benefits are deemed payable.[12]

Contrary to Appellants' arguments, it is well-settled in California that an employee's rights to workers' compensation benefits are wholly statutory, and remain incipient in nature until and unless there has been a final judgment.[13] The Ninth Circuit has agreed: "We have squarely held that although a cause of action is a species of property, a party's property

[10] Appellants' Opening Brief, p. 10.

[11] *Ibid*.

[12] For example, the employee has the burden of proof that his injury arises out of and occurred in the course of his employment, and that the injury is proximately caused by employment activities. Lab. C. §3600(a).

[13] *Graczyk*, *supra*, 184 Cal. App. 3d at 1007 (because employee's inchoate right to benefits under workers' compensation law was not reduced to final judgment before Legislature's enactment of new laws regarding employee status of athletes, he did not have a vested right and his constitutional objections were not supported).

right in any cause of action does not vest until a final unreviewable judgment is obtained."[14]

Because Appellants' expectations about their workers' compensation claims are not protected property interests, those contingent expectations cannot support a RICO claim.

3. CASES REFERENCED IN *BOWERS* AS WELL AS OTHER SUPREME COURT PRECEDENT DO NOT SUPPORT APPELLANTS' CLAIMS TO A CONSTITUTIONALLY PROTECTED PROPERTY INTEREST.

A review of the two cases cited in *Bowers* for the proposition that the Supreme Court has recognized some constitutional protections for non-vested property rights further belies Appellants' position:

- *Perry v. Sindermann*: The court actually held that a mere subjective "expectancy" is not an interest in property protected by procedural due process.[15]
- *Goldberg v. Kelly*: The court held that where individual's entitlement to benefits had previously been established, a pre-deprivation notice and a hearing were required before

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[14] *Ileto v. Glock, Inc.*, 565 F.3d 1126 (9th Cir. 2009) (*quoting Lyon v. Agusta S.P.A.*, 252 F.3d 1078, 1086 (9th Cir. 2001) (internal quotation marks omitted); *see also Austin v. City of Bisbee*, 855 F.2d 1429, 1435 (9th Cir. 1988) (explaining that, although a cause of action is a species of property, "it is inchoate and affords no definite or enforceable property right until reduced to final judgment" (internal quotation marks omitted)).

[15] *Perry v. Sindermann*, 408 U.S. 593 (1972).

> the individual's interest in continued payment of benefits could be terminated.[16]

In sum, *Bowers* and the cases cited therein provide solid precedent that Appellants' so-called "expectation of entitlement to a statutory benefit" is *not* entitled to constitutional protection.[17]

4. SUPREME COURT PRECEDENT REQUIRES MORE THAN AN EXPECTATION OF A PROPERTY INTEREST FOR PURPOSES OF RICO.

Finally, both the U.S. Supreme Court and the California Supreme Court have soundly rejected Appellants' claims to a so-called "expectation of entitlement to a statutory benefit" as a constitutionally protected property interest:

> To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. **He must have more than a unilateral expectation of it.** He must, instead, have a legitimate claim of entitlement to it.[18]

[16] *Goldberg* v. *Kelly*, 397 U.S. 254, 261-263 (1970); *see American Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40 (1999).

[17] Other Circuits have confirmed this reasoning. *See, e.g., Gucwa v. Lawley*, 2018 U.S. App. LEXIS 9428 (6th Cir. 2018), *quoting Jackson v. Sedgwick Claims Mgmt. Servs., Inc.*, 731 F.3d 556, 566 (6th Cir. 2013) (en banc) ("racketeering activity leading to a loss or diminution of benefits the plaintiff expects to receive under a workers' compensation scheme does not constitute an injury to 'business or property' under RICO").

[18] *Skelly v. State Personnel Bd.*,15 Cal. 3d 194, 206-207 (1975), *quoting Board of Regents v. Roth*, 408 U.S. 564, 577 (1972) (emphasis added).

Because Appellants' property interests in their workers' compensation claims have not been reduced to final judgment and remain mere expectancies, they do not constitute property rights that are constitutionally protected. As stated in *Bowers*, "if the property interest is 'contingent and uncertain' or the receipt of the interest is 'speculative' or 'discretionary,' then the government's modification or removal of the interest will not constitute a . . . taking."[19]

Expectations, contingencies, opportunities -- none of these constitutes a valid "injury to business or property" for purposes of RICO. "It does not suffice… that the object of the fraud may become property in the recipient's hands; for purposes of the [RICO] mail fraud statute, the thing obtained must be property in the hands of the victim."[20] Appellants' contingent interests here do not qualify as a recognizable property right sufficient to support a RICO violation.

B. APPELLANTS' ASSERTION OF §1983 CLAIMS OF UNCONSTITUTIONAL DELAYS MUST ALSO FAIL

Because Appellants' claims pursuant to 42 U.S.C. §1983 also relate to deprivation of property rights, these claims must also fail for the

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[19] *Bowers v. Whitman*, 671 F.3d 905, 912–14 (9th Cir. 2012), *citing Engquist v. Or. Dep't of Agric.*, 478 F.3d 985, 1002–04 (9th Cir. 2007).

[20] *Cleveland v. United States*, 531 U.S. 12, 15 (2000).

same reasons that Appellants are unable to demonstrate an injury to property for purposes of RICO.

In the absence of a deprivation of a constitutionally protected property right, Appellants cannot demonstrate an unconstitutional delay of benefits.

C. WHERE THERE IS NO PROTECTABLE PROPERTY INTEREST UNDER RICO OR §1983, THE EXCLUSIVE REMEDY RULE APPLIES TO ALLEGATIONS OF MISCONDUCT RELATED TO THE UNDERLYING CLAIMS PROCESS.

1. THE COMPENSATION BARGAIN SERVES AS THE FOUNDATION FOR THE WORKERS' COMPENSATION ACT, AND THE EXCLUSIVE REMEDY RULE IS THE NECESSARY COROLLARY THAT IS CENTRAL TO THE PROPER FUNCTIONING OF THE COMPENSATION SYSTEM.

The basis for workers' compensation in California is the "compensation bargain." Under this important public policy, the employer assumes liability for industrial personal injury or death, without regard to fault, in exchange for limitations on the amount of that liability; the employee is afforded relatively swift and certain payment of benefits to cure or relieve the effects of industrial injury without having to prove fault and, in exchange, gives up the wider range of damages potentially available in tort.[21] This central design, supported by Article XIV of the California Constitution,[22] constitutes the very foundation of the Workers' Compensation Act in California, which in turn reflects a complex set of bargains between employers and employees.

The California Supreme Court has identified the public policies supporting this compensation bargain:

1. to ensure that the cost of industrial injuries will be part of the cost of goods rather than a burden on society;
2. to guarantee prompt, limited compensation for an employee's work injuries, regardless of fault, as an inevitable cost of production;
3. to spur increased industrial safety; and, in return,
4. to insulate the employer from tort liability for employee injuries.[23]

A primary mechanism of protection for the compensation bargain and the important public policies it facilitates is the rule of exclusive

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[21] *Shoemaker v. Myers*, 52 Cal. 3d 1, 16 (1990).

[22] CALIF. CONST. ART. XIV, SEC. 4: The Legislature is hereby expressly vested with plenary power, unlimited by any provision of this Constitution, to create, and enforce a complete system of workers' compensation…. A complete system of workers' compensation includes … full provision for vesting power, authority and jurisdiction in an administrative body with all the requisite governmental functions to determine **any dispute or matter arising** under such legislation, to the end that the administration of such legislation shall accomplish substantial justice in all cases expeditiously, inexpensively, and without incumbrance of any character; **all of which matters are expressly declared to be the social public policy of this State….** [emphasis added].

[23] *S. G. Borello & Sons v. DIR*, 48 Cal. 3d 341, 354 (1989.); *South Coast Framing v. WCAB*, 61 Cal. 4th 291, 298 (2015).

jurisdiction of the Workers' Compensation Appeals Board.[24] The purpose of the exclusive remedy rule is to protect the employer from unlimited liability to its employees – *i.e.*, to protect the employer side of the compensation bargain.[25] The exclusive remedy rule is a necessary corollary to the compensation bargain,[26] without which the bargain would be negated and the out-of-balance system "significantly disturbed."[27]

2. EGREGIOUS CONDUCT FALLING OUTSIDE OF THE COMPENSATION BARGAIN IS PROPERLY WITHOUT EXCLUSIVE REMEDY PROTECTIONS.

Not all employer conduct is protected by the exclusive remedy rule. Violent and coercive criminal actions are properly without exclusive remedy protection.[28] Extreme situations exist where the employer steps out of its proper role or engages in conduct of

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[24] Lab. C. §3602.

[25] *Shoemaker, supra*, 52 Cal. 3d at 16.

[26] "The function of the exclusive remedy provisions is to give efficacy to the theoretical 'compensation bargain.'" *Shoemaker, supra*, 52 Cal. 3d at 16.

[27] *Johns-Manville Prods. Corp. v. Superior Court*, 27 Cal. 3d 465, 474 (1980) (the balance of the compensation bargain "would be would be significantly disturbed if we were to hold… that any misconduct of an employer which may be characterized as intentional warrants an action at law for damages.").

[28] *Fermino v. Fedco, Inc.*, 7 Cal. 4th 701, 723 fn. 7 (1994) (intentional employer crimes against employee's person by means of violence and coercion violate employee's reasonable expectations and transgress the limits of compensation bargain).

questionable relationship to the employment; in those cases, courts have held that an employee may pursue a civil claim against the employer.

In *Fermino v. Fedco*, the employee was accused of theft, taken to a windowless room under threat of arrest, made to suffer a litany of profanities, told that witnesses were ready to testify against her, and prevented from leaving for more than an hour. The California Supreme Court considered whether her action against her employer was barred by exclusive remedy. In concluding that the false imprisonment claim was not barred, the court stated the proper focus was "whether the conduct itself, concretely, is of the kind that is within the compensation bargain."[29] Finding that false imprisonment is, by definition, an unreasonable and illegal confinement, the court held that it is always outside of the scope of the compensation bargain.[30] "When an employer forcibly and criminally deprives an employee of her liberty, even as a means to otherwise legitimate ends, it steps outside its 'proper role,'

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[29] *Id*. at 718.

[30] *Ibid*.; *see also Iversen v. Atlas Pacific Engineering*, 143 Cal. App. 3d 219 (1983); *Meyer v. Graphic Arts International Union Local*, 88 Cal. App. 3d 176 (1979); *Moffatt v. Buffums', Inc.*, 21 Cal. App. 2d 371 (1937); *Parrott v. Bank of America*, 97 Cal. App. 2d 14 (1950).

whether it uses assault and battery to enforce that false imprisonment or employ some other coercive stratagem."[31]

Like the forcible deprivation of liberty in *Fermino*, the rare cases that permit an employee to seek civil damages outside of workers' compensation are based on an employer's misconduct far exceeding the normal risks of an employment relationship. For example, a plaintiff was permitted to pursue a civil claim against his employer based on alleged ratification of acts by a co-worker, who made sexual remarks and gestures toward the plaintiff, grabbed the plaintiff's genitals, grabbed the plaintiff around the waist, tried to mount him, and pinched his buttocks.[32] In sum, courts have allowed civil claims against their employers for acts such as assault, false imprisonment, and rape.[33]

3. Insurer Activity Intrinsic to the Workers' Compensation Claims Process Is a Risk Contemplated by the Compensation Bargain.

The examples of employer misconduct set forth in the preceding section are patently outside of the normal employment relationship. But that level of egregiousness is simply absent from this case. Appellants

[31] *Fermino, supra*, 7 Cal. 3d at 721-722.

[32] *Hart v. National Mortgage & Land Co*., 189 Cal App. 3d 1420 (1987).

[33] *See Iversen*, *supra*, 143 Cal. App. 3d 219; *Meyer*, *supra*, 88 Cal. App. 3d 176.

here have alleged only that the claims administrators collaborated to delay or deny benefits.

In assessing whether an exception to the exclusive remedy rule exists, courts first determine whether the alleged acts are of the kind reasonably contemplated by the compensation bargain. Only where the tortious act is not closely connected to a normal employer or insurer action have the exclusive remedy protections been waived. **"The critical issue is whether the alleged acts, *bereft of their motivation*, can ever be viewed as a normal aspect of the employer relationship or claims process."**[34]

A claims administrator's decision to delay, deny, or provide workers' compensation benefits is, virtually by definition, an inherent part of the administration of workers' compensation claims, and can be expected to occur with obvious frequency in the administration of those claims.[35] As such, the conduct necessarily arises out of and occurs during

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[34] *Charles J. Vacanti, M.D., Inc. v. State Comp. Ins. Fund*, 24 Cal. 4th 800 (2001) (emphasis added).

[35] *Mitchell v. Scott Wetzel Services, Inc*., 227 Cal. App. 3d 1474 (1991); *Cervantes v. Great American Insurance Company*, 140 Cal. App. 3d 763 (1983); *Caplan v. Fireman's Fund Ins. Co.,* 175 Cal. App. 3d 146 (1985); *Soto v. Royal Globe Insurance Co*., 184 Cal. App. 3d 420 (1986); *Fremont Indemnity Co. v. Superior Court of Los Angeles Co. (Hendricks)*, 133 Cal. App. 3d 879 (1982); *Everfield v.*

the course of employment and must be covered by the exclusivity provisions.[36] Exclusive remedy protections bar claims related to the claims process because they are tethered to the compensable injury itself.[37] Thus, an employee may not pursue a civil remedy for unreasonable delay in paying workers' compensation benefits,[38] for failing to pay benefits awarded by the WCAB,[39] or for failing to pay medical treatment for an industrial injury.[40] Because denying or objecting to claims for benefits is a normal part of the claims process, misconduct stemming from the delay or denial of payments is properly addressed by the WCAB.[41]

SCIF, 115 Cal. App. 3d 15 (1981); *Schlick v. Comco Mgmt., Inc.*, 196 Cal. App. 3d 974 (1987).

[36] *See, e.g., Shoemaker, supra*, 52 Cal. 3d 1; *Miklosy v. Regents of University of California*, 44 Cal. 4th 876 (2008); *Yau v. Allen* (2014) 229 Cal. App. 4th 144.

[37] *Vacanti, supra*, 24 Cal. 4th at 815.

[38] *Mitchell, supra*, 227 Cal. App. 3d 1474; *Cervantes, supra*, 140 Cal. App. 3d 763; *Caplan, supra*, 175 Cal. App. 3d 146; *Soto, supra*,184 Cal. App. 3d 420; *Hendricks, supra*, 133 Cal. App. 3d 879; *Everfield, supra*, 115 Cal. App. 3d 15; *Schlick, supra*, 196 Cal. App. 3d 974 .

[39] *Marsh & McLennan v. Orange County Superior Court (Silvestri)*, 49 Cal. 3d 1 (1989); *Droz v. Pacific National Ins. Co.*, 138 Cal. App. 3d 181 (1982); *Depew v. Hartford Acc. and Indem. Co.*, 135 Cal. App. 3d 574 (1982); *Santiago v. Employee Benefit Services* (1985) 168 Cal. App. 3d 898 (1985).

[40] *Ricard v. Pacific Indemnity Co.*, 132 Cal. App. 3d 886 (1982).

[41] *Marsh, supra*, 49 Cal. 3d at 11; *see also Phillips v. Crawford & Co.*, 202 Cal. App. 3d 383 (1988) (civil action for refusal to pay benefits barred by exclusivity rule).

This case is hardly the first time that injured workers have sought civil redress for alleged delays and denials of rightful benefits. In *Hablian v. WCAB*,[42] a group of injured workers sought class action status to pursue allegations that a group of insurance carriers and self-insured employers had (similarly to the allegations in this case) "systematically and intentionally failed" to pay workers' compensation benefits in violation of Unfair Competition laws.[43] The WCAB held that it had no jurisdiction to entertain an Unfair Competition action notwithstanding the fact that the plaintiffs would also be barred from bringing the action in civil court due to exclusive remedy. In sum, the workers were necessarily confined to the remedies available at the WCAB -- which, the WCAB noted, were not insignificant:

> There is no doubt that we have authority, when an application has been properly filed, to order named defendants to pay workers' compensation **benefits** found due and unpaid as may be revealed by audits conducted by the Division of Workers' Compensation. We may also determine whether the imposition of **penalties** is justified for any unreasonable delay in paying benefits under Labor Code section 5814, and allow **attorney fees** as a lien against the compensation awarded. We also have authority to **allow costs** between the parties. Indeed, the WCAB has **exclusive jurisdiction over all claims for compensation** provided by

[42] *Hablian v. WCAB*, 68 Cal. Comp. Cases 1867, 2003 Cal. Wrk. Comp. LEXIS 590 (2003) (writ denied).

[43] *Hablian, supra*, 68 Cal. Comp. Cases at 1869.

> Division 4 of the Labor Code against an employer or insurance carrier for an injury arising out of and in the course employment.[44]

The same considerations should apply in this case. The Appellants here have the full breadth and scope of the Workers' Compensation Act (including penalties, fees, and costs) to seek redress for any perceived wrongs suffered during the claims process. Simply put, if an employee believes that an employer has taken a meritless position about his entitlement to benefits, the workers' compensation system established in California provides ample mechanisms by which the employee can contest these actions.

4. ALLEGATIONS OF OUTRAGEOUS CONDUCT ALONE ARE NOT A SUFFICIENT BASIS TO ALLOW ESCAPE FROM THE EXCLUSIVE REMEDY MANDATE.

The California Supreme Court has ruled that even "intentional or egregious misconduct is not necessarily outside the scope of the workers' compensation scheme."[45] And in another case, the California Supreme Court pointed out:

> If characterization of conduct normally occurring in the workplace as unfair or outrageous were sufficient to avoid the exclusive remedy provisions of the Labor Code, the exception would permit the employee to

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[44] *Hablian*, *supra*, 68 Cal. Comp. Cases at 1870 (citations omitted, emphasis added).
[45] *Livitsanos v. Superior Court*, 2 Cal. 4th 744, 752 (1992).

> allege a cause of action in every case … merely by alleging an ulterior purpose of causing injury. Such an exception would be contrary to the compensation bargain and unfair to the employer.[46]

Where the alleged misconduct is, at its core, a normal part of the claims process, it is covered by the exclusivity provisions – even if such conduct is "characterized as intentional, unfair, or outrageous."[47]

That conduct may be characterized in civil court pleadings as intentional or even deceitful cannot be a deciding factor in the question of whether the exclusivity bar applies: "[I]f an action at law were allowed as a remedy, many cases cognizable under workers' compensation would also be prosecuted outside that system…. Such result would undermine the underlying premise upon which the workers' compensation system is based."[48]

Appellants here have attempted to "dress up" ordinary claims of delayed benefits as violations of federal law, purely in hopes of disguising the allegations in order to avoid the barrier of exclusive

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[46] *Cole v. Fair Oaks Fire Protection District*, 43 Cal. 3d 148, 160 (1987).

[47] *Shoemaker, supra*, 52 Cal. 3d at 25; *see also Cole, supra*, 43 Cal. 3d at 160 ("[A]n employee … may not avoid the exclusive remedy provisions of the Labor Code by characterizing the employer's decisions as manifestly unfair, outrageous, harassment, or intended to cause emotional disturbance resulting in disability.").

[48] *Johns-Manville, supra*, 27 Cal. 3d at 474.

remedy. As explained by the Supreme Court cases quoted above, the law does not permit this type of subterfuge.

Delays or refusal to pay, even if done intentionally with the full knowledge of the hardship to the worker, are covered by workers' compensation. In *Mitchell v. Scott Wetzel Services*,[49] the plaintiff alleged that the claims administrator wrongfully delayed and denied benefits. Despite finding the conduct to be "reprehensible,"[50] the Court of Appeal concluded that the plaintiff's claims of delay, denial, or threatened termination of benefits did nothing to remove the case from the exclusive jurisdiction of the WCAB. In summary, the allegations of intentional misconduct by the claims administrator, while serious, were all related to the enforcement of workers' compensation benefits and thus subject to the exclusivity rule. [51]

Indeed, the courts have invariably barred civil claims alleging that an insurer unreasonably avoided or delayed payment of benefits -- *even*

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[49] *Mitchell v. Scott Wetzel Services, Inc*., 227 Cal. App. 3d 1474 (1991).

[50] *Id*., 227 Cal. App. 3d at 1482.

[51] *See also Stoddard v. Western Employers Ins. Co.*, 200 Cal. App. 3d 165, 168-169 (1988) (WCAB exclusive jurisdiction barred civil claim, even though claims administrator's egregious misconduct caused claimant to lose his mobile home, boat, truck, car, furniture, furnishings and savings, drove him to abuse alcohol to address incessant pain, and forced him to live with his mother-in-law).

though the insurer committed fraud and other misdeeds in the course of doing so.[52] Payment of benefits that are untimely or less than the amount ordered by the WCAB are nonetheless covered by the exclusive remedy rule, *even if the employee alleges that the insurance carrier acted intentionally, fraudulently, deceitfully, and in bad faith.*[53]

Simply put, and contrary to Appellants' position, the mere existence of a pattern or practice of bad faith delays or denials of payment is not enough to insulate a cause of action from preemption where each wrongful act is closely connected to a normal insurer activity.[54]

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[52] *Vacanti, supra*, 24 Cal. 4th at 821, *citing Marsh, supra*, 49 Cal. 3d at 7, 9-10; *Mitchell, supra*, 227 Cal. App. 3d at 1480-1481; *Phillips, supra*, 202 Cal. App. 3d at 389; *Stoddard, supra*, 200 Cal. App. 3d at 173; *Mottola v. R.L. Kautz & Co.*, 199 Cal. App. 3d 98, 103, 109 (1988); *Schlick, supra*, 196 Cal. App. 3d at 981-982; *Soto, supra*, 184 Cal. App. 3d at 429-430; *Caplan, supra*, 175 Cal. App. 3d at 147-148; *Teague v. Home Ins. Co.*, 168 Cal. App. 3d 1148, 1151-1152 (1985); *Santiago, supra*, 168 Cal. App. 3d at 905-907; *Cervantes, supra*, 140 Cal. App. 3d at 774; *Denning v. Esis Corp.*, 139 Cal. App. 3d 946, 948-949 (1983); *Droz supra*, 138 Cal. App. 3d at 187; *Depew, supra*, 135 Cal. App. 3d at 578-579; *Hendricks, supra*, 133 Cal. App. 3d at 881-882; *Ricard, supra*, 132 Cal. App. 3d at 894-895; *Everfield, supra*, 115 Cal. App. 3d at 20-21.

[53] *Mitchell, supra*, 227 Cal. App. 3d 1474; *Hendricks, supra*, 133 Cal. App. 3d 879.

[54] *Vacanti, supra*, 24 Cal. 4th at 828; *see also Everfield, supra*, 115 Cal. App. 3d at 21 (irrespective of suspected evil motives, plaintiff cannot allege cause of action based upon delay in payment of benefits, as WCAB maintains exclusive jurisdiction over such matters).

D. APPELLANTS' STATUS AS PUBLIC EMPLOYEES HAS NO BEARING ON THE CHARACTERIZATION OF THEIR PROPERTY RIGHTS TO WORKERS' COMPENSATION BENEFITS.

On appeal, Appellants now contend that their status as "public employees" has somehow conferred upon them an entitlement to certainty of benefits.

Casting themselves as "first responders" and "public employees," Appellants now seek to play upon this Court's humanistic sympathies and biases in favor of safety employees, instead of simply representing the ordinary workers' compensation claims that they actually represent.

In fact, Labor Code section 3600 does not distinguish between public employees and private employees. Instead, this section describes conditions for compensation that must exist before <u>any</u> employee becomes eligible for workers' compensation benefits. Far from automatically conferring benefits in a mandatory process, as Appellants have suggested, each of the conditions of compensation have generated a myriad of litigation and judicial interpretation.

IX. CONCLUSION

Whether the exclusive remedy applies to intentional torts, including fraud, is a "complicated" question.[55]

Nevertheless, public policy requires that the exclusive remedy rule be broadly applied to all allegations of misconduct stemming from the workers' compensation claims process. Appellants' allegations here, devoid as they are of any protectable property interest and thus outside RICO, are ordinary claims of delay and denial that are unalterably connected to the claims process and thus subject to the exclusivity bar.

The dismissals of Appellant's claims should be upheld by this Court.

Respectfully submitted,

June 18, 2018

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[55] *Fermino*, *supra*, 7 Cal. 4th at 709.

X. CERTIFICATE OF SERVICE

When All Case Participants Are Registered
for the Appellate CM/EMF System

I certify that, on June 18, 2018, I electronically filed the foregoing A**MICUS CURIAE BRIEF OF CALIFORNIA WORKERS' COMPENSATION INSTITUTE IN SUPPORT OF DEFENDANTS-APPELLEES** with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

June 18, 2018

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