

15-604

No.

Supreme Court, U.S.
FILED

NOV 4 2015

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IN THE
Supreme Court of the United States

DANIEL BRINK, ET AL., Petitioners

v.

CONTINENTAL INSURANCE COMPANY, ET AL.

*PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT*

PETITION FOR WRIT OF CERTIORARI

Joshua T. Gillelan II
Longshore Claimants'
National Law Center
Georgetown Place,
Suite 500
1101 30th Street, N.W.
Washington, DC 20007
(202) 625-8331

William J. Skepnek
The Skepnek Law Firm
1 Westwood Road
Lawrence, KS 66044
(785) 856-3100

Scott J. Bloch
Counsel of Record
Law Offices Scott J.
Bloch, PA
1050 17th St., N.W.
Suite 600
Washington, DC 20036
Scott@scottblochlaw.com
(202) 496-1290

QUESTIONS PRESENTED

The Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §§ 901-50 ("Longshore Act") provides an exclusive remedy for all injuries that are *within the act*, specifically a process for determining compensation for disability and medical expenses arising out of injuries suffered in the course of employment that is covered by the act. But Section 5(a) of the Longshore Act does not create a claim, or provide coverage for injuries, financial, physical and emotional, that are not the result of an "injury" that is within the Act – "accidental injury . . . arising out of and in the course of employment," § 2(2), 33 U.S.C. § 902 (2). The statute does not create, and therefore cannot limit, claims that are caused by subsequent intentional conduct of employers or insurance carriers that causes harm to persons who are no longer, or even never were, employees within the coverage of the Act, and for whom the Act never provided any remedy at all. Nothing in the act can be construed to destroy, or take away common law rights of affected persons without a sufficient *quid pro quo*.

The Racketeer Influence Corrupt Organization (RICO) Act, 18 U.S.C. §1961 et seq., applies to any enterprise created by a company covered by the Longshore Act, through which that company acting together with another, such as a third party administrator, acts to commit a pattern of illegal or fraudulent acts (as defined by RICO) that proximately causes an independent harm to individuals and their property. Nothing in the Longshore Act, or in RICO, exempts companies covered by the act from the remedial reach of RICO.

The questions presented are simple and straightforward:

1. Whether the Longshore Act's exclusive remedy provision excludes not only accidental injuries directly related to the "work" of covered workers—but also injuries that are secondary and new—that were not caused by the "work" itself, but are independent, caused by the new, supervening, intentional, and malicious conduct of Insurance Companies—inducing new and independent injuries wholly unrelated to the original covered "work" itself.
2. Whether the Longshore Act's exclusive remedy provision can be construed to reach beyond regulation of compensation for injuries suffered while doing the "work" covered by the act to define what is and is not actionable outside the Act, or whether there is some further comprehensive scheme that preempts tort actions, excluding actions against Insurance Companies and/or Contracting Companies for new injuries inflicted in the United States, unrelated to the covered work itself, not in the course of the covered employment, not on account of the original injury suffered while working, affecting entirely new injuries and harms caused by independent and supervening intentional acts?

3. Whether RICO can apply to an "enterprise" created by contracting Companies, their insurance carriers, and third party administrators who utilize the enterprise to commit fraudulent acts that proximately caused independent harm to covered workers and their families, and thousands similarly situated persons.

PARTIES TO THE PROCEEDING

Petitioners Daniel Brink; Ronald Bell; Merlin Clark; Marcie Clark; C.J. Mercadante; Johann Steenberg; Steven Thompsen; Jack Jones; Fred Busse; Mark Griffin; Wallace Byars; Antonio Ambrose; Cody McAnally; Patrick J. Brewer; Coenrad Theunissen; Malik Hadi; Robert Biddle; Margaretha Bezuidenhout; Harbee Kreesha; Mohsen Alsaleh;; Mbusi Cele; Marlene Gericke; Nicky Pool; Mark McLean; Allen Porch, III; Catharina Louw; Surita Swart; Christo Engelbrecht; Desire Tablai, as guardian and natural parent of Diante Tablai, a minor, and Migual Tablai, a minor; and Christine Holguin-Luge were Plaintiffs and Appellants below.

Respondents Continental Insurance Company; ACE American Insurance Company; Zurich Insurance; Tacticor International; DynCorp International, LLC; Northrop Grumman Corporation; Halliburton Corporation; Ronco Consulting; Wackenhut Services International; Global Linguist Solutions, LLC; Siegler, Inc.; US Investigations Services, LLC; Combat Support Associates; AECOM Government Services, Inc.; Erinys Ltd.; Khudairi Group; Exelis Systems Corporation; USIS International, Inc.; L-3 Services, Inc.; Kellogg Brown & Root Services, Inc.; Academi, LLC; American International Group, Inc. were Defendants and Appellees below.

Parsons Group ITT Corp.; Titan Corporation; XE Holdings, LLC; AIG Insurance Company; CNA Global Insurance; and Kellogg Brown & Root, LLC appeared before the District Court, but are not parties in this Petition.

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PETITION FOR WRIT OF CERTIORARI

The above-named Petitioners respectfully petition for a writ of certiorari to review the judgement of the United States Court of Appeals for the District of Columbia Circuit in this matter.

OPINIONS BELOW

The opinion of the court of appeals affirming in part and reversing in part, reported at 787 F.3d 1120, is reprinted in the Appendix (App.) at 1a-18a. The order denying rehearing en banc, reported at 2015 U.S. App. LEXIS 13842 (D.C. Cir. Aug. 6, 2015), is reprinted at App. 57a. The underlying opinion of the district court, reported at 787 F.3d 1120 (D.C. Cir. 2015), is reprinted at App. 22a-55a.

JURISDICTION

The Circuit Court of Appeals for the District of Columbia entered its judgment on June 2, 2015 and denied a petition of rehearing and rehearing en banc on August 6, 2015 App. 56a-57a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1).

STATUTORY PROVISIONS INVOLVED

Title 33, United States Code, Section 905(a) is reproduced in the Appendix at 58a.

STATEMENT OF THE CASE

The decision below calls into question fifty years of well-known precedent by construing the exclusive remedy provision of the Longshore Act in a way that allows employers and insurance carriers to deliberately injure workers who have suffered an initial injury on the job.

The question of what conduct by insurance companies relating to their handling of Longshore Act and Defense Base Act claims must be shielded from liability by the exclusive remedy provision of the Longshore Act has been inconsistently addressed by the several circuits. Decisions across the circuits do not provide meaningful guidance to litigants or to trial courts, leading to uncertainty, and more litigation.

The Plaintiffs brought a class action suit against the Defendants – DBA contractor-employers and their insurers – in federal district court for the District of Columbia alleging damages caused by conduct that is independent of the work covered by the act, and is outside the compensation system established by the act. The alleged wrongful conduct includes, *inter alia*, that Defendants threatened individuals once they made a claim of on the job injury, threatened their families when benefits were demanded, and in many cases, after accepting claims as covered and legally valid, failed or refused to provide medical benefits owed to Plaintiffs under the DBA while fraudulently asserting in reports to the Department of Labor that they had paid such benefits; cut off medical benefits owed under the DBA and fraudulently claiming their system caused it or they lost the checks; stopped payment on checks

for compensation or otherwise caused grave harm to persons in wheelchairs or caused bank investigations against individuals for checks that had been fraudulently mishandled by Defendants; delayed provision of medical benefits or compensation owed under the DBA, made false statements and misrepresentations regarding payment of DBA benefits while reducing, denying or ignoring Plaintiffs' medical needs; failed to comply with DOL orders to pay DBA benefits; discouraged workers from making DBA claims on pain of termination, or falsely imprisoned employees; directed incurring debts by spouses and family members only to withdraw payment once the bills came in, and threatened workers at their homes with institutionalization of their spouses and parents or financial ruin, through their agents and employees.¹

Of the 30 plus individuals identified in the Complaint, the Court recognized only three as having claims not barred by the DBA exclusivity provisions, Bell, Holguin-Luge, and Pool, but neglected to apply the same reasoning to others with similar claims: Marcie Clark (a former employee's spouse, never an employee, whose claims include outrage and fraud and RICO damages to her personal and family life, who never had any right to claim benefits under the

¹ The U.S. District Court for the District of Columbia had jurisdiction based on 28 U.S.C. § 1331 in that several federal questions were raised including violations of the Racketeer Influenced and Corrupt Organizations Act (18 U.S.C. §§ 1961-68 and the Americans with Disabilities Act of 1990 (42 U.S.C. §§ 12101 et seq.) and based on the Class Action Fairness Act (28 U.S.C. § 1332 (d)).

Act);² Fred Busse for damages caused by insurance company's manipulation of his bank account; Daniel Brink and his business agreements with CNA and DynCorp related to his trip to the U.S. and his refitting of his home in reliance on fraudulent promises of DynCorp; Chris Mercadante who was harassed and threatened and ultimately falsely imprisoned by Blackwater for claiming he was injured and needed treatment, to name a few.

This case presents a question of exceptional importance to the operation of the sole federal private-sector workers'-compensation program, the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §§ 901-50, and its extensions, including the Defense Base Act, 42 U.S.C. §§ 1651-54 ("DBA"): whether either the Act's "exclusive-remedy" provision, 33 U.S.C. § 905 (a), or its provisions for augmentation of periodic compensation payable in the event of untimely payment under certain circumstances, 33 U.S.C. § 914 (e), (f), or its dormant provision of criminal penalties for willfully making false statements in opposition to claims for benefits, 33 U.S.C. § 931 (c), forecloses state or federal common-law or statutory tort remedies for bad-faith insurance claims practices with respect to benefits under the Act.

The circuit court's June 2, 2015 opinion (App. 1a-18a) answered that question in the affirmative, in large part based on the authority of *Hall v. C&P Telephone Co.*, 809 F.2d 924 (D.C. Cir. 1987) (per curiam) (*Hall II*). App. 9a. Petitioners seek review by

² Three others had ADA claims which were improperly dismissed due to faulty pleading without any allowance to replead.

this Court as the foreclosure of such remedies is based on a misreading of the terms and the intent of the exclusive-remedy clause and a misunderstanding of the very limited applicability of the augmentation-for-delay provisions, which had no bearing on any of Plaintiffs' cases.

The Second Amended Complaint ("SAC") lists alleged tortious acts that give rise to causes of action based on deliberate, knowing and intentional efforts to cause foreseeable harm to Plaintiffs and their families, their credit, their finances and personal property, including loss of necessary medical treatment, and increased or new physical and psychological injuries. According to the Department of Labor ("DOL"), over 100,000 persons reported injuries and deaths since the beginning of the Iraq and Afghanistan campaigns.³ Longshore cases result in payouts of nearly \$500,000,000 per annum.⁴

The pattern of conduct alleged includes, *inter alia*: promising to provide benefits with detrimental reliance and then withholding the promised benefits (including Brink, Mercadante, Biddle, Bezuidenhout, Steenberg, Theunissen, Jones, Byars, Clark, among others) (SAC ¶ 136); refusing to provide benefits after being instructed to do so by the DOL and after accepting the benefits as due including medical

³ See U.S. Dep't of Labor, *Defense Base Act Case Summary Reports*, (last visited Oct. 30, 2015); U.S. Dep't of Labor, *Defense Base Act Case Summary by Employer*, <http://www.dol.gov/owcp/dlhwc/dbaallemmployer.htm> (last visited Oct. 30, 2015); SAC ¶¶ 552-63.

⁴ See Office of Workers' Compensation Programs, U.S. Dep't of Labor, *OWCP Annual Report to Congress—Fiscal Year 2012*, Feb. 26, 2014.

procedures (Mercadante, Clark, Busse, Bell, and many others) (SAC ¶ 82); issuing checks to pay for medical treatment but then stopping payment (Brink, Busse) (SAC ¶ 353); telling injured victims they will be treated but then hiring doctors that have agreed to falsify and misrepresent the facts to avoid payment (Brink, Busse, Mercadante, Clark, and many others) (SAC ¶¶ 188 – 192); making false statements to doctors and to the DOL concerning payment of medical expenses, reimbursements (Brink, Mercadante, Clark, Steenberg, among others), and incorrectly paying disability benefits (Steenberg, Clark, Busse, and many others).

The actions of Defendants were deliberate and designed to inflict injury, or done knowingly and foreseeing serious injury to Plaintiffs. Daniel Brink who was involved in an IED explosion in Iraq while on the job, had his legs and parts of his hands torn off, suffered a brain injury, had multiple surgeries, PTSD, and complications for years. Defendants DynCorp and CNA Insurance accepted his claim, but over a period of years injured him by taking actions that caused secondary injuries, e.g., because they failed to pay for his wheelchair it was repossessed, and another wheelchair was not delivered because Defendants stopped payment on a check. CNA caused a secondary injury to Mr. Brink by authorizing \$150,000 in payments for medical expenses but then delaying payment for 3 years, causing him to lose his house and furniture, while being forced into homelessness. While CNA engaged in a pattern of misrepresentation to Mr. Brink and DOL that it had paid the medical bills, Doctors and nurses who had not been paid refused to provide him with needed care, causing new and additional mental

and physical injuries. But Mr. Brink's claim has been dismissed based upon the exclusive remedy bar.

Mr. Mercadante, who was severely injured while working for Blackwater, was told that medical treatment had been approved, but when he attended appointments payment was denied. The delays and refusal to pay healthcare providers interfered with subsequent treatment, causing him to suffer new injuries. His life-threatening injuries became worse, exacerbating his psychological issues. These claims are corroborated by Dr. Afield, one of Mr. Mercadante's doctors, who wrote:

"I must say in 49 years of practice that I have had in medicine, this is really rather outrageous and I can see why the man is so upset...I feel I am obligated to inform somebody that what they are doing is killing him. This is just not the way you treat your people and it is certainly not the way you treat people coming back from Iraq."⁵

Mr. Mercadante's claims have been dismissed under the exclusive remedy doctrine.

Merlin Clark, whose claims have also been dismissed, suffered massive injuries from an ordnance explosion. After his DBA claim was initially accepted, and he was repeatedly told that benefits been paid, then his claim was rejected, and payments were refused, which interfered with medical treatment.⁶ As a result, Mr. Clark lost

⁵ SAC ¶¶ 130-66.

⁶ *Id.* ¶¶ 100-10.

appropriate medical treatment, financial stability, psychological stability and treatment, medications, and medical devices needed for recovery. His wife was forced to give up her career to care for Mr. Clark.⁷

Plaintiff Holguin-Luge, whose claim was originally dismissed, was sexually assaulted by a KTTC employee who threatened to kill her if she told anyone, which the circuit court reversed and remanded.⁸ But, the similar claim of Plaintiff Biddle, who was willfully injured by Blackwater, has been dismissed.⁹ The claim of Plaintiff Thompson who was refused PTSD treatment after KBR and AIG directed his doctor to rewrite his report to say he was exaggerating his symptoms has also been dismissed.¹⁰ Plaintiff Busse, whose claim has been dismissed, was awarded benefits, yet payment was delayed three years while Defendants SEII and AIG fraudulently sought opinions from multiple additional doctors when the initial opinion did not meet their expectations, causing Mr. Busse to suffer new injuries. His claim has been dismissed in this action, though AIG actually engaged in sending a forged check.¹¹ Plaintiff Pool's claim has survived though she was blackballed by most medical providers in South Africa after CNA refused to pay her medical bills. The decision below allows her

⁷ *Id.* ¶¶111-116; Declaration of Marcie Hascall Clark attached to Memorandum in Opposition to WSI/RONCO's Motion to Dismiss

⁸ SAC ¶ 322, 325, 328.

⁹ *See id.* ¶ 283.

¹⁰ *See id.* ¶ 187.

¹¹ *See id.* ¶ 260-65.

claim to proceed but not the strikingly similar claim of Mr. Brink.¹² And Plaintiff Mercadante who was intentionally threatened and falsely imprisoned has been dismissed.

The injuries suffered by each of the described Plaintiffs was secondary to the underlying covered claim, and was the direct result of Defendants' supervening wrongful and deliberate conduct.¹³ Yet some claims have survived dismissal, while others have been dismissed, with often semantic distinctions providing the only explanation.

REASONS FOR GRANTING THE PETITION

This case presents a straightforward question of statutory construction of the exclusive remedy provision of the Longshore Act, which affects several hundred thousand contractors who have been badly injured, or killed, and who have been abused by ongoing intentional acts of the contacting companies and insurance companies who are paid billions of dollars to assist the United States in its missions in Iraq and Afghanistan and Kuwait and elsewhere on U.S. Bases. This also affects tens of thousands of Longshore cases brought in the courts.¹⁴

¹² See *id.* ¶ 412.

¹³ SAC ¶¶ 39 – 71, and with specificity as to each named representative Plaintiff ¶¶ 72 – 560.

¹⁴ This court is no stranger to resolving splits among circuits recently as to differences about scope of Longshore Act provisions or meaning of particular provisions. See, e.g., *Roberts v. Sea-Land Services, Inc.*, __U.S.__, 132 S. Ct. 1350, 182 L. Ed. 2d 341 (2012); *Pacific Operators Offshore, LLP v. Valladolid*, __U.S. __, 132 S.Ct. 680, 181 L. Ed. 2d 675 (2012).

Numerous courts have recognized that the exclusive remedy of the workers compensation scheme of the Longshore Act and Defense Base Act together – do not foreclose claims for intentional torts such as outrage, fraud, or other independent torts that are not “on account of an injury” suffered while performing the actual work for which they sought and received workers compensation benefits. No court, other than this one below, has held that the Longshore Act preempts intentional torts by these companies even if they are caused by deliberate acts against individuals who are not even the worker who suffered a compensable injury. Other courts have found that there is an intentional tort exception, and yet still other courts have said there likely would be. Thus this case presents a morality tale of the harm wrought by the absence of predictable and measurable standards. Though Petitioners hope they are not overly cynical, we do not believe we will be the first to suggest that business practices can be expected to fall to the lowest accepted legal standard. If Longshore employers and their insurers believe the law will protect them from the consequences of conduct designed to drive down the costs of claims, regardless of the secondary harm it may cause, they can be expected to conform their business practices to legal expectations, however diminished. If the exclusive remedy doctrine is determined by courts to apply to conduct outside of the workplace, and even into claims behavior, and to protect corporations from the secondary impact of their practice upon workers, they should be expected to take full advantage.

The decision below while explicitly recognizing that claims of assault and battery are not foreclosed,

nevertheless utilized a decision, now several decades old, decided under the District of Columbia Workers Compensation Act, to foreclose claims based on other intentional acts. That case, and the District of Columbia Workers Compensation Act, easily distinguishable, characterized claims of external "bad faith" as being within the exclusive remedy, and denied the Plaintiffs any remedy for other deliberate acts, though the basis for making the distinction cannot be understood on any other than a semantic basis.

Consider Daniel Brink: the carrier deliberately authorized his nurse manager to incur \$150,000 in medical expenses, including a mechanized wheelchair, but after all expenses were incurred, refused any payments, including stopping payment on a check issued for the wheelchair. The carrier then admitted responsibility for payment but falsely informed the DOL that payment had been made. This caused the loss not only of the wheelchair, but the worker's home and furniture. How could such acts be less egregious than simple assault or battery and not actionable in tort? One suspects Mr. Brink would have happily taken a simple beating rather than suffer through years of economic and consequential emotional and physical agony ending in homelessness. Yet under the current rubric, depending on which circuit you are in, the beating is actionable while the years of suffering intentional economic privation caused by malicious conduct is not.

**I. THE “EXCLUSIVE REMEDY”
PROVISION OF THE LONGSHORE
ACT PERMITS ACTIONS AGAINST
EMPLOYERS AND INSURANCE
CARRIERS FOR DELIBERATE,
INTENTIONAL TORTS BASED ON
ACTIONS WELL AFTER THE
INJURY OF THE INJURED
WORKER.**

The Longshore Act “creates a comprehensive federal scheme to compensate” workers who are injured in the course of covered employment. While the Act requires that compensation for such an injury be paid promptly “without an award” unless the employer files a notice “controvert[ing]” liability (§ 14(a), (d)-(e), 33 U.S.C. § 914 (a), (d)-(e)), it provides administrative procedures both for prompt issuance of awards in undisputed claims (subject to “modification” if and when a dispute develops thereafter) and for formal-hearing proceedings to resolve disputed claims (Act § 19(b)-(e), 33 U.S.C. § 919 (b)-(e)).

It has absolutely no remedy for the claims in this case, and does not pretend to exclude deliberate harm and intentional torts such as are claimed in this case. This case was wrongly decided as being a mere “bad faith” refusal to pay benefits case that falls squarely within the ambit of *Hall v. C&P Telephone Co.*, 793 F.2d 1354, 1356 (D.C. Cir. 1986) (*Hall I*), and that case on rehearing, *Hall v. C&P Tel. Co.*, 809 F.2d 924 (1987) (per curiam) (*Hall II*). It is not that kind of case. Instead, it involves cases solely of those whose claims have been accepted, who are supposed to be paying or providing benefits, but

the employers and carriers have tried to illegally and intentionally go around the law to threaten, stop payment, employ fraud and artifice to pretend to be complying with the law but instead trying to harm plaintiffs and their families, through intimidation, lying to doctors, lying to the Department of Labor, creating wedges with doctors, pretending to lose checks or electronic payment information, lying about when things were sent to doctors, and threatening spouses. They have, under the law of the well-pleaded complaint, intentionally inflicted mental and emotional distress on plaintiffs, their families, and have wreaked financial havoc.

There is no remedy for any of these abuses under the Longshore or DBA Acts. The Longshore Act has no provisions at all providing a remedy for the acts described in the SAC, with the sole exception of a provision added in 1984 to criminalize "knowingly and willfully making a false statement or representation for the purpose of reducing, denying, or terminating benefits," § 31(c), 33 U.S.C. § 931 (c) – a provision that has lain fallow for 30 years despite ample occasions for its invocation. Premium rates for LHWCA insurance are regulated solely by the states in which the insured employment is conducted; those for DBA insurance are entirely *unregulated*.

The authorities on the scope of § 5 (a) have generally recognized that its foreclosure of tort liability is inapplicable to cases of *intentional* injury by the employer, even as to events that *are* "in the course of [the worker's] employment." *A fortiori*, there is no basis for denying recovery for intentional torts that are *not* in the course of the worker's employment.

Hall II may not apply to most if not all of the conduct as other circuit's law should be applied under choice of law principles, as many of the actions took place in other circuits that caused the wrong harm, such as New York 2d Circuit (AIG and CNA), Illinois 7th Circuit (CNA headquarter offices for DBA decisions where Brink and Pool traveled), Texas, 5th Cir (DynCorp, KBR, Bell lives there and events occurred there), Missouri (Busse), 11th Cir. Florida (Clarks and Mercadante) and so on. Many were wronged in South Africa such as Steenberg and Bezuidenhout. Which law should apply beyond *Hall II* is not for the 12(b)(6) setting to determine. *Hall II* involved a case in the District of Columbia. No District of Columbia plaintiffs exist in this case.¹⁵

The Court's order also conflicts with other courts around the country in rejecting intentional torts that do not occur on the job. For example, *Ross v. DynCorp*, 362 F.Supp.2d 344, 364-65 (D.D.C. 2005), ruled that plaintiffs could sue for intentional infliction of mental and emotional distress due to the inhumane handling of a dead body. Yet Plaintiffs have alleged just that in the mistreatment of persons in wheelchairs (Brink), burn victims left to die (Tablai), and other extreme and uncivilized behavior that society cannot tolerate (Bezuidenhout, mishandling of body parts and accusing deceased of taking drugs and dying of alcohol intake), claims of family members who have no ability to claim under

¹⁵ See, e.g., *Harper v. LG Elec. USA*, 595 F. Supp. 2d 486, 490-91 (D.N.J. 2009) (observing that choice-of-law determinations require a full factual record and refusing to rule on choice-of-law at the 12(b)(6) stage); *Sioux Biochemical, Inc. v. Cargill, Inc.*, 410 F. Supp. 2d 785, 800 (N.D. Iowa 2005).

the Act (Marcie Clark), claims of worsening PTSD and inflicting it on family members as in Clark, Mercadante, and others. Family members of living workers have no remedies in the Act when companies or insurance companies (or both in conspiracy) seek to deliberately inflict damage or distress on family members by threatening them (Mercadante, Clark, Theunissen, Steenberg), claims of fraud in banking and stop payments (Busse and Brink). Similarly, in *Kuhlman v. Crawford and Co.*, 2002 U.S. Dist. LEXIS 28223, No. 01-6036-CIV (S.D. Fla. Jan. 23, 2002), the court permitted a claim to proceed for intentional infliction of emotional distress, alleging the carrier knowingly prepared a false labor market survey report, intent on denying or reducing his disability benefits. Because these *actions took place after the injury*, the court found that they gave rise to a separate cause of action from the exclusivity provision of the LHWCA. This, even though the labor market survey itself was commissioned in response to the claim. See *Houston v. Bechtel Assoc. Prof. Corp.*, 522 F. Supp. 1094, 1096 (D.D.C. 1981).

In *Fisher v. Halliburton*, 667 F.3d 602 (5th Cir. 2012), the court concluded that the exclusive remedy bar only applied in the lack of certain factors:

We are not confronting a situation in which...employer personally assaulted an employee. Nor are we confronting a situation in which an employer has conspired with a third party to inflict an assault on the employee.

Id. at 620. The 5th Circuit specifically chose not to address the issue of intentional tort by employers

and carriers against claimants, because it was not properly before them. However, the court did take the opportunity to point out that a number of states have found such injuries actionable in civil court:

Importantly, the cases take a very narrow view of the types of intentional injury that lie outside of the LHWCA—the cases consistently require that the employer have had a specific intent or desire that the injury occur.

Id. at 618.

The 5th Circuit not only relied upon multiple state court decisions on this point, but also Professor Arthur Larson's treatise, *Larson's Workers' Compensation Law* § 103.01 (2011), at 103-3, that intentional acts by employers are not covered under the Longshore Act. *Fisher*, 667 F.3d at 618 n.59 (citing 6 Arthur Larson & Lex K. Larson, *Larson's Workers' Compensation Law* § 103.01, at 103-3 (2011)). The court further looked to the *Bechtel* decision, where specific intent is required on the part of the employer for an employee to bring a tort action outside of the LHWCA, *Houston v. Bechtel*, 522 F. Supp. at 1096.

The 5th Circuit noted the decision in *Talik v. Fed. Marine Terminals*, 117 Ohio St.3d 496 (2008), which held:

Although [LHWCA] covers an intentional tort by third parties against an employee, the definition does not include an intentional tort by an employer.

Thus, courts have held that because Congress did not explicitly include an employer intentional tort in the exclusive-remedy provision of Section 905(a), an employee may pursue an intentional tort action against the employer. We therefore cannot say that Congress has expressly preempted the intentional tort standard that Ohio uses.

Id. at 503 [citations omitted].

See also *Bowen v. Aetna Life*, 512 So.2d 248 (Fla. App. 1987) (permitting intentional infliction of emotional distress, as a result of the carrier's intentional and malicious refusal to pay benefits, which the court held did not fall under the exclusivity provision of the Act); *Linn v. United Plant Guard Workers of America, Local 114*, 383 U.S. 53, 86 S. Ct. 657, 15 L.Ed.2d 582 (1966) (“[t]o the extent...that Congress has not prescribed procedure for dealing with the consequences of tortious conduct already committed, there is no ground for concluding that existing criminal penalties or liabilities for tortious conduct have been eliminated....”); *Hoffman v. Lyons*, No. 08-5248, 2009 U.S. Dist. LEXIS 84458 (D. N.J. Sept. 15, 2009) (recognizing intentional tort exception to exclusive remedy of Longshore if plaintiff alleges employer's specific intent to injure); *Taylor v. Transocean Terminal Operators, Inc.*, 785 So.2d 860, 863-64 (La. Ct. App. 2001), *cert. denied sub nom. Transocean Terminal Operators, Inc. v. Taylor*, 534 U.S. 1020 (2001) (examining case law, finding no cases saying there is no intentional tort exception to exclusive remedy, and recognizing intentional tort exception under Longshore because “the workers compensation ‘bargain’ typically does

not include an employer's intentional tort."); *Holmes v. Pacarini USA, Inc.*, 88 So. 3d 671, 673 (La.App. 4 Cir. 2012) (approving *Taylor*, finding that intentional tort is exception to Longshore exclusive remedy and remanding as discovery needed to show whether the torts were truly intentional); *Talik*, 117 Ohio St. at 503 (court recognizes exception to exclusive remedy preemption under Longshore for state intentional tort with intent plus harm that is "substantially certain" to occur, which is a fact issue).

The Circuit split and muddying of the intentional tort exception comes prior to *Fisher* in *Atkinson v. Gates, McDonald & Co.*, 838 F.2d 808 (5th Cir. 1988). There the Fifth Circuit held that the exclusivity provision of Section 5(a) precludes a claimant from bringing a suit against an agent of his employer, the administrator of a fund established by the self-insured employer for payment of claims under the Act, for alleged bad faith in terminating compensation payments, even though the Act does not contain any language explicitly precluding such a lawsuit. The court indicated in a footnote that its holding may be inconsistent with the First Circuit decision in *Martin v. Travelers Ins. Co.*, 497 F.2d 329 (1st Cir. 1974), but elected to follow *Sample v. Johnson*, 771 F.2d 1335 (9th Cir. 1985), *cert. denied*, 475 U.S. 1019 (1986), and *Hall*, 809 F.2d 924. *Atkinson*, 838 F.2d at 814, n. 6.

But even *Sample* recognized a true intentional tort exception to the exclusive remedy of the Longshore Act.¹⁶ It found the exclusive remedy provision

¹⁶ The District Court erred by finding a stricter exclusive remedy in the Defense Base Act, but the Circuit Court declined to follow this clear error of statutory interpretation. The DBA's
(Footnote continued . . .)

“not applicable to claims concerning such [intentional] injuries. However, the term ‘intentional’ is construed very strictly....” *Sample*, 771 F.2d at 1346 (quoting Professor Larson on workers compensation non applicability to intentional injuries). Just prior to the ruling in this case, but well after it was fully briefed, another federal district court found that there is an intentional tort exception, but that it requires deliberate intent to harm, not just knowledge that the harm occur and allowing it to occur. *Birkenbach v. Nat’l Gypsum Co.*, 2014 U.S. Dist. LEXIS 88483, 13-15 (E.D. Mich. June 30, 2014) . The court went through a series of cases that make the proper distinctions of recognizing the intentional tort exception in Longshore cases but not anything falling short of true intentional and deliberate intent to injure, and found:

The conduct Birkenbach complains of does not fall within the intentional tort exception of the LHWCA because willful and wanton conduct, short of a deliberate intent to injure, is within the exclusive reach of the Act.

*Id.*¹⁷

Since the ruling in the case at bar, commentators who represent companies and insurance carriers in Longshore and DBA cases have been touting the *Brink* case as substantially

extra exclusive remedy provision found at 42 U.S.C. only applies to also excluding state workers compensation proceedings, which Longshore does not. 42 U.S.C. § 1651 (c).

¹⁷ Numerous other cases also recognize exceptions to exclusive remedy bar in Longshore cases. See fn. 23 and accompanying text.

clarifying the scope of the exclusive remedy bar, and extending it beyond what was known to exist previously. See, e.g., Alan Brackett, *D.C. Circuit Rules No Intentional Tort Exception Under Defense Base Act*, Navigable Waters: A Maritime, Longshore, and Defense Base Act Blog (June 15, 2015), <http://navwaters.com/2015/06/04/d-c-circuit-rules-no-intentional-tort-exception-under-defense-base-act/>.

The lower court decision has sown further confusion, inspiring courts to find that the doctrines of exclusive remedy and exhaustion of administrative remedies prevent an employee from suing for their wrongful termination and loss of wages under a contract theory as well. See *Sickle v. Torres Advanced Enterprise Solutions, LLC*, 17 F.Supp.3d 10, 48 BRBS 37(CRT) (D.C.D.C. 2013) (appeal held in abeyance pending outcome of the instant case).¹⁸

The evidence on the 209-page SAC establishes intentional torts viewing the evidence in a light most favorable to Plaintiffs. But no discovery was permitted on the intentional tort issues. Thus this case has far-reaching meaning not only for the hundred thousand contractors injured in Iraq and Afghanistan and still being injured there, but also for the millions who are subject to the Longshore Act internationally. This decision should be heard by this Court to resolve the confusion such a decision has engendered and to permit cases to move forward that fit within the true intentional tort exception.

¹⁸ The Circuit Court's allowance of the claims of Nicki Pool in the instant case under a contract theory to proceed would seem to indicate that the Circuit Court will reverse when it hears the *Sickle* appeal.

II. WHETHER THE “EXCLUSIVE REMEDY” PROVISION OF THE LONGSHORE ACT PERMITS AN ACTION FOR DAMAGES THAT ARE NOT “ON ACCOUNT OF THE” WORKERS COMPENSATION INJURY IS AN EXCEPTIONALLY IMPORTANT FEDERAL QUESTION THAT WARRANTS THIS COURT’S REVIEW

The decision of the Circuit Court errs for another reason: it extends the exclusive remedy provision beyond the injury on the job and seeks to sweep into its bar any subsequent injury committed by the employer or carrier off the job. To the extent the Court sees *Hall* as controlling even those situations like this one where there is an intentional harm that the carrier or the contracting company desires to commit to harm a person or persons – then that is directly at odds with other precedent of the District of Columbia and with the vast majority of other courts that state the Longshore and Defense Base Act is only an exclusive remedy for negligence or other non-intentional torts for injuries suffered *on the job*. The Court then adopts a preemption doctrine that goes beyond exclusive remedy analysis. The Longshore and DBA act only to foreclose a tort suit, whether negligence based or a genuine intentional tort for those things that could be remedied exclusively by the Act: viz., benefits for on the job injuries, and penalties for failing to comply

with the Act regarding payment for benefits. Nothing more.¹⁹

Indeed, the decision (*Garret v. Washington*) on which the Circuit Court deferred and later agreed with in *Hall II*, 809 F. 2d, accurately stated that under § 5(a), “an employee is barred from bringing a common law tort action against his employer for injuries which have been or could be compensated under the Act.” *Garrett v. Washington Air Compressor Co.*, 466 A.2d 462, 463 (D.C. 1983). Without remarking explicitly that the action of the insurer which was allegedly tortious – bad-faith opposition to his claim for a previous back injury – was not such an “injury,” the court reasoned that the plaintiff’s argument “ignores the fact that the Act provides a specific remedy for the wrong of which he complains,” describing the operation of LHWCA § 14(b), (d), (e), 33 U.S.C. § 914, and concluding that “appellant’s remedy for the alleged tardiness of [the employer and its insurer] in making payments under the Act was to seek an administrative fine pursuant to 33 U.S.C. § 914 (e).” *Garrett*, 466 A.2d at 464. On

¹⁹ This misnomer of preemption is most vexing considering (1) that the court allowed several causes of action to proceed on remand including an intentional tort of assault against Bell by KBR once Bell filed his PTSD claim, the ADA claims, the claim of Nicki Pool for her services as a nurse and consequential damages for CNA not paying under their agreement, and the sexual assault on the KBR employee; and (2) numerous types of claims are permitted against contractors under federal law such as ADA, Title VII, and ADEA, as well as contract actions for breach of agreements to pay wages. True field preemption may be found in the battlefield preemption discussed in *Fisher v. Halliburton* or in *Saleh v. Titan Corp.*, 580 F.3d 1, 9 (D.C. Cir. 2009) .

rehearing in *Hall*, the Court, agreeing with *Garrett*, reasoned that the LHWCA

. . . provides a comprehensive scheme for compensating employees who are injured or killed in the course of employment. In return for the guarantee of a practical and expeditious statutory remedy, employees relinquish their common-law tort remedies against employers for work-related injuries.

Hall, 809 F.2d at 926. Describing the claimant's action against the employer as based on his being "[u]nsatisfied with the statutory *quid pro quo*," the Court repeated the *Garrett* court's reasoning:

Not only does the Act provide general immunity to employers from employee tort suits, [citing § 5(a)], but it also provides a specific remedy for an employer's late payment of claims. *Id.* § 914(e), (f).

*Id.*²⁰ The other courts that have reached similar conclusions under the LHWCA and its extensions have relied upon the same reasoning, but have often stated the matter as one of *preemption* of otherwise available state-law remedies by the "comprehensiveness" of the statutory "scheme."

²⁰ The Court appears to have overlooked the fact that the plaintiff's dissatisfaction there was not with "the statutory *quid pro quo*," but with the fact that he had been *denied* the benefit of the workers'-compensation bargain: the supposed "guarantee of a practical and expeditious statutory remedy" had proved worthless.

But the Act provides no remedy or authority for the Department of Labor to regulate insurers' claims practices. Section 14(e), the sole provision relied upon in *Garrett*, augments the compensation payable by ten percent if it is not paid promptly without the need for a claim or a "compensation order" making the award, *only if the employer or insurer fails to file a one-page form* "controverting" the claimant's rights.²¹ If the denial of liability has not been brought to the administrator's attention, even if as a result of a *good-faith* belief that the Act does not apply, the amount due is augmented under § 14(e); conversely, if the form has been filed, even if it states no colorable ground for the denial or asserts such a ground without any basis and in bad faith, the augmentation provision does *not* apply, *Hitt v. Newport News S. & D.D. Co.*, 38 Ben. Rev. Bd. Serv. (MB) 47 (2004), and the Act provides no remedy at all for the harm resulting from what is often several years of delay before an award can be obtained. In short, the augmentation provisions have nothing to do with good or bad faith. Further, contrary to the Court's apparent casual assumption in *Hall*, it applies only to untimely "installment[s] of compensation," a phrase that does not encompass the *medical* benefits the employer in that case had allegedly withheld in bad faith.

²¹ Indeed, notwithstanding the explicit statutory reference to the prescribed form, the Benefits Review Board and some courts have held that the augmentation is avoided so long as the relevant Labor Department agency "knew of the facts a proper notice would have revealed." *E.g.*, *National Steel & Shipbuilding Co. v. Bonner*, 600 F.2d 1288, 1295 (9th Cir. 1979).

Hall II moved well beyond what the DBA was designed to do -- to create a simplified, uniform compensation system for civilian contractors and their employers engaged in work outside of the United States at military bases and in Zones of Special Danger.

In order to be a comprehensive statutory scheme, the statute in question must provide administrative remedies, but none are provided in either the law for the deliberate damages inflicted upon these Plaintiffs by the Defendants. The injured Plaintiffs received benefits through the Department of Labor; through intentional acts of fraud, bad faith, misrepresentation, intentional infliction of emotional distress, etc., the Defendants went outside the scope of the DBA and gave rise to the claims contained in the SAC. It is unreasonable to find, for example, that intentionally stopping payments on a wheelchair for a Plaintiff who lost a leg, leading to the repossession of that wheelchair and fraud on the DOL about what happened, was anything other than an act of malicious intent on the well-pleaded complaint.

Marcie Clark, herself and similarly situated spouses, are not claimants or possible takers under the Act (as are widows) and could have no claims before the Department of Labor. Johann Steenberg and others in the Complaint were threatened on their property by agents for the carrier. Daniel Brink had agreements with DynCorp and CNA that were breached--including agreements to reimburse him for the expense of flying from South Africa to the United States and for retrofitting his home to accommodate his disabilities. These agreements have nothing to do with the exclusive remedy provision but have been dismissed.

The Circuit Court says that *Martin v. Travelers Ins. Co.*, 497 F.2d 329, 330-31 (1st Cir. 1974), has been strictly limited to its facts, and was rejected by *Hall II*,²² but in the case of Brink, those exact facts caused Brink to lose his home and car, and have no medical providers for a time including no psychiatrist or psychologist even though he has severe PTSD and brain injury from the explosion; harmed Busse when the insurance company deliberately committed fraud regarding a check it sent to Plaintiff and then caused him to be accused of bank fraud. This harm and numerous similar harms in the SAC are not within the Act. This argues for accepting this case to bring clarity and uniformity to define when a claim fits within a harm that is specifically "on account of the injury" and when it is extreme and outrageous misconduct and attendant harm that is outside that exclusivity language. The very thing that *Hall II* and *Atkinson* sought to prevent is not present in the instant case – viz., trying to convert untimely payment of benefits that has potential remedies in the Act into an intentional

²² *Hall II* was grounded in the fact that there was a remedy for late compensation payments. *Hall II* did not, as the lower courts said, specifically reject *Martin*. The opinion implies that a contrary result could be found if one fell within *Martin* when it said at the very end of the opinion:

In our view, the Garrett court was clearly correct in concluding that the sort of tort claims advanced here fall within the Act's exclusivity provisions. See also *Texas Employers Insurance Association v. Jackson*, 618 F. Supp. 1316, 1319-22 (E.D. Tex. 1985). But see *Martin v. Travelers Insurance Co.*, 497 F.2d 329 (1st Cir. 1974).

tort by calling it fraudulent or mere bad faith non-payment. Here the defendants engaged in extraordinary actions to directly harm Plaintiffs by threatening them, stopping payment on checks that upset their financial welfare, using fraud and deceit to appear to be compliant with the law, and to cause Plaintiffs to lose health providers of any kind due to intentional financial fraud *where they assert they do owe the money to the health care providers*. These are all harms that would be actionable even if there were no workers compensation claims. The depredations on Americans from two theaters of war mandate a more nuanced rule of law than the Circuit Court's procrustean rule allowed.

All of the law points to the existence of a cause of action for all of the above – and lip service was paid by the District Court here to that rule, as it was in *Hall I and II*. "[W]hen an employer intentionally committed the act," the injury is not "accidental" and does not fall under the exclusive-remedy provision of the workers' compensation act. 6 *Larson* § 103.01, at 103-3. See also *Jones v. Halliburton Co.*, 625 F. Supp. 2d 339, 356 (S.D. Tex. 2008), *aff'd*, 583 F.3d 228 (5th Cir. 2009) (sexual assault and outrage claims actionable despite having a DBA claim). The Court (and many courts) are afraid of "bad faith" creating a floodgate of litigation. This is not bad faith, in the sense the courts use it, to mean denying and delaying payments for bad faith reasons. The cases before the Court here are those that the Defendants have admitted they owe the money, have claimed they paid the money, but they have lied repeatedly and caused massive harm deliberately in carrying out their "gaslighting" campaign to drive the plaintiffs and their families to financial and

emotional ruin. These companies should not and cannot get away with this deplorable state of affairs engendered by over a decade of two wars.

Numerous courts recognize that the Longshore Act and DBA do not foreclose all state tort actions for discrimination, intentional infliction and other deliberate harms apart from the workers compensation injury itself. See, e.g., *Hernandez v. General Adjustment Bureau*, 199 Cal App3d 999, 245 Cal Rptr 288 (1988) (plaintiff's cause of action not barred where defendant knew of plaintiff's susceptibility to profound mental distress and repeated suicide attempts and still intentionally delayed payment of workers' compensation disability benefits); *Correa v. Pennsylvania Manufacturers Association Insurance Co.*, 618 F. Supp 915 (D. Del. 1985) (recognizing right of employee to maintain suit to redress intentional bad faith conduct in delay or termination of workers' compensation benefit payments); *Continental Casualty Insurance Co v. McDonald*, 567 So2d 1208 (Ala. 1990) (accord); *Boudoin v. Bradley*, 549 So2d 1265 (La. App. 1989) (accord); *Moss v. Dixie Mach. Welding & Metal Works, Inc.*, 617 So.2d 959, 961 (La.Ct.App. 4th Cir.) (state wrongful discharge may coexist with a Longshore discrimination remedy; no Longshore preemption); *LaCour v. Lankford Co., Inc.*, 287 S.W.3d 105, 110-11 (Tex. App. 2009) (exclusive remedy provisions did not bar wrongful discharge); *Reddy v. Cascade General, Inc*, 227 Or. App. 559, 571-72 (2009) (Longshore Act fell "far short of [the] threshold of 'adequacy'...and, particularly and most importantly, [did] not provide for compensation for

any injury or loss other than equitable recoupment of back pay.”).²³

When a plaintiff demonstrates that an injury or death – *even if* in the course of employment – is the result of a “specific intent” to cause harm, immunity under LHWCA §5(a) is inapplicable, see *Houston v. Bechtel*, 522 F. Supp. at 1096. See also *Rustin v. District of Columbia*, 491 A.2d 496, 501 (D.C. 1985) (the exclusivity provision “does not reach

²³ *Ladner v. Secretary of H.E.W.*, 304 F.Supp. 474 (S.D. Miss. 1969) (plaintiffs may pursue benefits under social security SSI and SSD for the same injury and disability in addition to a DBA/LHWCA claim); *Palermo v. Letourneau Tech., Inc.*, 542 F.Supp.2d 499 (S.D. Miss. 2008) (the LHWCA does not occupy the field of wrongful discharge and employment so as to preempt a state law claim for wrongful discharge for pursuit of workers compensation benefits); *Machado v. National Steel & Shipbuilding Co.*, 9 BRBS 803 (1978) (an administrative judge lacks power to make findings on breach of contract even if plaintiffs could proceed under Section 948(a) of the DBA); *Hais v. Smith*, 547 A.2d 986, 987 (D.C. 1988) (implied covenant of good faith and fair dealing means that “neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract.”); *Paul v. Howard Univ.*, 754 A.2d 297 (D.C. 2000) (“all contracts contain an implied duty of good faith and fair dealing as enumerated in *Hais v. Smith*...”); *Lawrence v. U.S.*, 631 F. Supp. 631 (E.D. Pa. 1982) (Federal Employees Compensation Act [5 U.S.C.A. § 8116(c)] did not provide the exclusive remedy for mental suffering, humiliation, embarrassment or loss of employment alleged by the employee, where such claim did not involve compensatory damages and was not premised upon injuries otherwise covered by FECA remedies); *Jones v. Halliburton Co.*, 791 F.Supp.2d 567, 588 (S.D. Tex. 2011) (since “[employee]’s injuries did not arise out of or in the course of her employment agreement, the exclusivity provisions of the LHWCA and the DBA [did] not apply to any of her common law claims, including the intentional tort claims.”).

actions where the employer specifically intended to injure the employee"). The Act does not address claims, as exist with plaintiffs in this case, of spouses or children for emotional harm due to injuries of the spouse or father. See *Lee v. Bath Iron Works*, 2005 LHC 01 625 (October 28, 2009) (LHWCA only recognizes injuries with causal connection to employment, but does not recognize or provide for any claims for spouse or child for emotional harm by the illness or death of an employee).²⁴

Professor Larson writes of this as a general principle:

Several legal theories have been advanced to support [the employer intentional tort] exception to exclusivity. The best is that the employer will not be heard to allege that the injury was 'accidental,' and therefore was under the exclusive provision of the workers' compensation act, when the employer intentionally committed the act.

6 Arthur Larson & Lex K. Larson, *Larson's Workers' Compensation Law* § 103.01, at 103-3 (2011). By their very nature, neither the DBA nor the LHWCA were intended to cover every possible subject of litigation that might arise involving an injured worker. The Act does not speak to intentional or even *negligent* acts that cause injury

²⁴ This case also was before U.S. District Court of Maine on August 6, 2009, which can be found at http://www.gpo.gov/fdsys/pkg/USCOURTS-med-1_06-cv-00057/pdf/USCOURTS-med-1_06-cv-00057-0.pdf

off the job, or to any actionable conduct by anyone other than the employer occurring subsequent to the injury.

The Circuit Court got it wrong, and there are far-reaching effects beyond this class action for the thousands who are suffering deliberate harms at the hands of the companies being sued here.

Additionally, the SAC specifically pleads on behalf of a class of third country nationals, the wholesale failure to provide DBA insurance to thousands of individuals by setting up a rival method for dealing with claims. This is a specific exception of application of the exclusive remedy doctrine in section 905(a) ("except that if an employer fails to secure payment of compensation as required by this Act, an injured employee, or his legal representative in case death results from the injury, may elect to claim compensation under the Act, or to maintain an action at law or in admiralty for damages on account of such injury or death."). See ¶¶ 535-560 of SAC. The Circuit Court and District Court failed to allow these claims to proceed as a class.

III. WHETHER PROPERTY INTERESTS OF FORMER MILITARY CONTRACTORS IN THEIR HOMES, CREDIT HISTORY OR PERSONAL PROPERTY LOST BY PREDICATE ACTS OF FRAUD BY INSURANCE COMPANIES FALL UNDER RICO

Because the only exclusivity of the Longshore/DBA Acts lies in bringing claims on account of the injury, RICO would only be preempted

from any claim that has a remedy before the Department of Labor. The SAC lists with great specificity the times and places where misrepresentations were made to the degree possible in a class action law suit with a multiplicity of Defendants.

The LHWCA and DBA are comprehensive only with respect to work-related *accidental injuries* (and occupational diseases), not for intentional torts by and upon employees and non-employees. RICO is meant to be read broadly and to be liberally construed to effectuate the purposes of the Act, *Sedima, S. P. R. L. v. Imrex Co.*, 473 U.S. 479, 497 (1985). RICO is not preempted even though a more specific and comprehensive statutory scheme exists that utilizes the same fraud. See *United States v. Computer Sciences Corporation*, 689 F.2d 1181, 1186-88 (4th Cir. 1982) (False Claims Act does not preempt RICO); *United States v. Boffa*, 688 F.2d 919, 931-33 (3d Cir. 1982) (despite overlap of mail fraud predicate of RICO and labor statutes, not preempted). The plaintiffs' property rights in their credit rating, bank accounts, and homes and cars that were destroyed by Defendants' deliberate acts are within the ambit of RICO. See *McNally v. United States*, 483 U.S. 350 (1987) (RICO directed at schemes to defraud Plaintiff of tangible and intangible property rights).

Plaintiffs will be able to more properly plead the elements of and facts to support a common purpose among the participants, an organization, and continuity. The 209 page complaint contains all of those facts showing the attempt by contractors working in tandem with the carriers to intimidate individuals who bring claims and make it so

unpleasant as to discourage others from bringing claims or additional claims at all.

Under Fed. R. Civ. P. 15 (a)(2), Plaintiffs should have been given leave to cure any defects in their SAC through amendment. Plaintiffs were never put on notice from the Court in what respects the RICO claims or lack of particularity needed to be cured. See *Carribean Broadcasting System, Ltd. v. Cable & Wireless, PLC*, 148 F.3d 1080, 1084-85 (D.C. Cir. 1998)(reversing district court's refusal to permit amendment on motion to dismiss for failing to recite particulars as to depriving use of a facility in a monopolization claim because not within spirit of Rule 15).

RICO addresses the creation of criminal enterprises intent on fraud, which is clearly not a part of the coverage intended by either the DBA or LHWCA. The Plaintiffs herein clearly have standing under 18 U.S.C. §1964(c), because they can show how their property or business was harmed as a result of the Defendants' actions. In the case at bar, although the Plaintiffs filed timely claims for DBA benefits to which they were entitled, and the Defendants agreed that they were entitled to receive, nevertheless the Defendants have willfully and intentionally conspired to deprive the Plaintiffs of those benefits, which are properly the property of the Plaintiffs and not the Defendants.

Defendants rely primarily on *Danielsen v. Burnside-Ott Aviation Training Center, Inc.*, 941 F.2d 1220 (D.C. Cir. 1991), involving whether the Service Contract Act, 41 U.S.C. § 351-358 was a comprehensive statutory scheme. They further rely upon *Bridges v. BCBC Ass'n*, 935 F. Supp. 37 (D.D.C. 1996), on whether the Federal Employee Health

Benefits Act, 5 U.S.C. § 8901-8914, is a comprehensive statutory scheme. Neither has anything to do with either the DBA or the LHWCA.

Defendants argued and the court accepted the notion that Plaintiffs lacked a property interest in their workers' compensation claims such that RICO did not apply here. But the property interests were not in the workers compensation payments but in their credit, their homes, their furniture and cars, which many of the plaintiffs like Brink, Byars, and others lost in whole or part due to the inhumane scheme of these companies and the insurance carriers to deliberately harm the plaintiffs.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Scott J. Bloch, Esq.
DC Cir Bar No. 56052
LAW OFFICES SCOTT J. BLOCH, PA
1050 17th St., N.W. Suite 600
Washington, DC 20036
Tel. (202) 496-1290
Fax. (202) 478-0479
Scott@scottblochlaw.com

Joshua T. Gillelan II
Longshore Claimants' National Law Center
Georgetown Place, Suite 500
1101 30th Street, N.W.
Washington, DC 20007
(202) 625-8331
Fax (202) 787-1920

William J. Skepnek, Esq.
THE SKEPNEK LAW FIRM
1 Westwood Road
Lawrence, KS 66044
Telephone: (785) 856-3100
Fax: (785) 856-3099
bskepnek@skepneklaw.com

Attorneys for Petitioners