The Sixth Circuit's 2013 En Banc Opinions

By John A. Ferroli

Under the Federal Rules of Appellate Procedure, en banc hearings are "not favored" and will ordinarily not be ordered unless review is "necessary to secure or maintain uniformity of the court's decisions" or "the proceeding involves a question of exceptional importance."[1] Perhaps acting consistently with this narrow purpose, the Sixth Circuit Court of Appeals issued only four en banc opinions in 2013. Three of these merit attention.

Jackson v Sedgwick Claims Management Services, Incorporated[2]

In *Jackson*, the en banc court held that the Racketeer Influenced and Corrupt Organizations Act[3] (RICO) did not extend to the plaintiffs' claims for benefits under the Michigan Workers' Disability Compensation Act.[4] The plaintiffs were injured during the course of their work at Coca-Cola Enterprises. Sedgwick, Coca-Cola's third-party benefit claims administrator, denied the plaintiffs' claims for workers' compensation benefits. The plaintiffs then filed suit in federal court under the civil-remedy provision of RICO,[5] alleging that Coca-Cola and Sedgwick engaged in a fraudulent scheme involving the mail to avoid paying benefits to injured employees, in violation of Section 1962(c) of RICO. The plaintiffs also sued Dr. Paul Drouillard, alleging he colluded with Coca-Cola and Sedgwick to cut off benefits.

After the district court granted the defendants' motion to dismiss, a Sixth Circuit panel reversed[6] in reliance on *Brown v Cassens Transport Company*.[7] The Sixth Circuit then decided to rehear the appeal en banc. The en banc court affirmed the district court's dismissal of the plaintiffs' claims and overruled *Brown*. In reaching its decision, the *Jackson* court emphasized that although RICO is broad by design, it is "not boundless," and its limits have been derived from antitrust laws, which are similar to RICO's provisions.[8] One limit is that in order to bring a civil action under RICO, a plaintiff must be "injured in his business or property," which bars RICO claims for personal injuries.[9] The court held that the plaintiffs' claims were nothing more than claims for personal injuries:

> In this case, the plaintiffs claim that they were legally entitled to receive certain benefits mandated by statute as a consequence of their personal injuries, and that they received less than they were entitled to under that system because of the defendants' racketeering conduct. But the losses they allege are simply a shortcoming in the compensation they believed they were entitled to receive for a personal injury. They are not different from the losses the plaintiffs would experience if they had to bring a civil action to redress their personal injuries and did not obtain the compensation from that action they expected to receive. Michigan's decision to create a workers' compensation system does not transform a disappointing outcome in personal injury litigation into damages that can support a RICO civil action, even if Michigan law characterizes the benefits awarded under this system as a legal entitlement. Accordingly, 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.[10]

The *Jackson* court added that its decision was supported by the federalism principle that without a clear statement that it intends to do so, Congress should not be understood to change the distribution of power between federal and state governments.[11] The court found that although RICO is a remedial statute, there was no clear statement by Congress of an "intent to intervene in Michigan's administrative system for handling workers' compensation claims."[12] The court held that RICO claims like the plaintiffs' would undermine state workers' compensation schemes, which have "always been within the domain of the states' police powers." If Congress truly intended that RICO serve to provide "federal collateral review" of claims under state benefits schemes, it would have explicitly said so.[13]

United States v Blewett[14]

In *Blewett*, the en banc court held that the Fair Sentencing Act of 2010,[15] in increasing the amount of crack cocaine needed to trigger the mandatory minimum sentences

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for possessing crack cocaine with intent to distribute, did not retroactively undo the Blewett cousins' final sentences that were based on the triggering amounts in effect before the act became effective. The court cited to the general saving statute, 1 USC 109, which provides that a law reducing statutory penalties for an offense is presumed not to alter penalties incurred before the new law took effect.[16] In examining the Fair Sentencing Act, the court determined the act did not state that it covers offenders sentenced before the effective date of the act. The court observed that its decision was consistent with recent United States Supreme Court precedent[17] and the decisions of every other U.S. Court of Appeals. The court rejected arguments that its decision was inconsistent with either section 3582(c)(2) of the Sentencing Reform Act of 1984[18] or the equal protection and cruel-and-unusual-punishment provisions of the U.S. Constitution. In so ruling, the *Blewett* court made a point of expressing its view that Congress should consider making the Fair Sentencing Act changes retroactive:

> In holding that the courts lack authority to give the Blewetts a sentence reduction, we do not mean to discount the policy arguments for granting that reduction. Although the various opinions in this case draw different conclusions about the law, they all agree that Congress should think seriously about making the new minimums retroactive.[19]

United States v Gabrion[20]

In *Gabrion*, the en banc court rejected arguments that under the Eighth Amendment and Federal Death Penalty Act, the defendant's death sentence should be vacated because the fact that the murder for which he was found guilty and sentenced to death occurred in Michigan was not considered a mitigating factor in the penalty phase of his trial—even though Michigan law does not permit imposing the death penalty. The court held the fact that Michigan lacks a death penalty had nothing to do with the defendant's background or character, the reasons why he chose to kill the victim, the "utter depravity of the manner in which he killed her," or his culpability for the offense.[21] The court found equally unpersuasive the defendant's arguments about the geographic circumstances of the offense or how a single juror might weigh them:

> That Gabrion would not have been subject to the death penalty if only he had rowed his boat 228 feet to the north, beyond the boundary of the Manistee National Forest, before throwing Rachel Timmerman overboard, is not mitigating—for the same reasons that Michigan's lack of a death penalty is not mitigating.... Nor does the boundary's proximity become mitigating based on Gabrion's speculation about what a single juror might have thought about it. Mitigation evidence, as shown above, is not an empty concept to be filled by whatever a lawyer or court thinks might persuade a single juror in a particular case.... Otherwise, for example, the Eighth Amendment would compel admission of evidence regarding the positions of the planets and moons at the time of the defendant's offense—so long as he can show that at least one juror is a firm believer in astrology.[22]

Mitigation evidence, the court found, includes only that evidence the sentencing court could *reasonably* find warrants a sentence less than death, and the evidence must be relevant to a "reasoned moral response to the defendant's background, character, and crime."[23] The fact that Michigan law does not include the death penalty is not mitigation evidence, the court found, and does not fall within any of the mitigating factors in the Federal Death Penalty Act. ■

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ENDNOTES

1. FR App P 35(a).
2. *Jackson v Sedgwick Claims Mgt Servs, Inc*, 731 F3d 556 (CA 6, 2013).
3. 18 USC 1961 *et seq.*
4. MCL 418.101 *et seq.*
5. 18 USC 1964(c).
6. *Jackson v Sedgwick Claims Mgt Servs, Inc*, 699 F3d 466 (CA 6, 2012).
7. *Brown v Cassens Transport Co*, 675 F3d 946 (CA 6, 2012).
8. 731 F3d at 563.
9. *Id.* at 563–564.
10. *Id.* at 566.
11. *Id.* at 567.
12. *Id.* at 568.
13. *Id.*
14. *US v Blewett*, ___ F3d ___ (CA 6, 2013).
15. PL 111-220, 124 Stat 2372 *et seq.*
16. *Blewett*, n 14 *supra* at *2.
17. *Dorsey v US*, 567 US ___; 132 S Ct 2321; 183 L Ed 2d 250 (2012).
18. 18 USC 3582(c)(2).
19. *Blewett*, n 14 *supra* at *13.
20. *US v Gabrion*, 719 F3d 511 (CA 6, 2013).
21. *Id.* at 522.
22. *Id.*
23. *Id.*, quoting *Penry v Lynaugh*, 492 US 302, 319; 109 S Ct 2934; 106 L Ed 2d 256 (1989).