UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

MELISSA BUCK; CHAD BUCK; and SHAMBER FLORE; ST. VINCENT CATHOLIC CHARITIES,

Plaintiffs,

v.

ROBERT GORDON, in his official capacity as the Director of the Michigan Department of Health and Human Services; HERMAN MCCALL, in his official capacity as the Executive Director of the Michigan Children's Services Agency; DANA NESSEL, in her official capacity as Michigan Attorney General; ALEX AZAR, in his official capacity as Secretary of Health and Human Services; UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES,

Defendants.

No. 1:19-cv-00286

HON. ROBERT J. JONKER

MAG. PHILLIP J. GREEN

BRIEF IN SUPPORT OF STATE DEFENDANTS' MOTION TO REQUEST CERTIFICATION TO THE MICHIGAN SUPREME COURT

EXPEDITED CONSIDERATION REQUESTED

Lori H. Windham
Attorney for Plaintiffs
The Becket Fund for Religious Liberty
1200 New Hampshire Ave. NW, Ste. 700
Washington, DC 20036
(202) 955-0095
lwindham@becketlaw.org

Christopher Alan Bates
Attorney for Defendants Alex Azar and United States Department of Health and Human Services
U.S. Department of Justice
950 Pennsylvania Ave., NW
Washington, D.C. 20530
(202) 514-3307
christopher.a.bates@usdoj.gov

Toni L. Harris (P63111)
Precious S. Boone (P81631)
Elizabeth Husa Briggs (P73907)
Attorneys for State Defendants
Michigan Department of Attorney General
Health, Education & Family Services Division
P.O. Box 30758
Lansing, MI 48909
(517) 335-7603
HarrisT19@michigan.gov

_____/

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Dana Nessel
Attorney General

Toni L. Harris (P63111)
Attorney for State Defendants
P. O. Box 30758
Lansing, Michigan 48909
(517) 335-7603
harrist19@michigan.gov

Dated: January 6, 2020

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CONCISE STATEMENT OF ISSUES PRESENTED

1. Federal courts have discretion to certify questions of state statutory interpretation to a state's highest court to promote cooperative judicial federalism and efficiencies and to avoid the potential for friction-generating error. Michigan courts have not had the occasion to interpret 2015 PA 53, codified as Michigan Compiled Laws §§ 722.124e and 722.124f (2015), and whether it authorizes state-contracted child placing agencies to refuse to provide state-supervised children with state-contracted services that conflict with an agency's sincerely held religious beliefs. Should this Court certify to the Michigan Supreme Court the question of the proper interpretation of 2015 PA 53?

INTRODUCTION

Plaintiff St. Vincent Catholic Charities ("St. Vincent") and State Defendants agree on a few things. The first is that Michigan law[1] authorizes a state-contracted child placing agency ("CPA") to reject a Michigan Department of Health and Human Services ("MDHHS" or "Department") referral of a state-supervised child needing foster care case management or adoption services for any reason, including the CPA's sincerely held religious beliefs.[2] The second is that Michigan law also authorizes a CPA to refuse to provide private and direct adoption services that conflict with the CPA's sincerely held beliefs.[3] Neither of these statutorily-based religious accommodations are in dispute.

But the parties are diametrically opposed on the legal issue of whether Michigan law authorizes a state-contracted CPA to refuse to provide state-supervised children in the agency's care with state-contracted foster care case management and adoption services that conflict with the CPA's sincerely held religious beliefs. And no state court has interpreted Mich. Comp. Laws §§ 722.124e and 722.124f.

Michigan's highest state court is the proper court to have the first opportunity to interpret this important state-law question. The proper

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[1] The Michigan law at issue is 2015 Public Act 53, codified as Michigan Compiled Laws § 722.124e and § 722.124f.

[2] Mich. Comp. Laws § 722.124f (2015).

[3] Mich. Comp. Laws § 722.124e(2) and (4) (2015).

interpretation is a matter of first impression, unique to Michigan, and significant to the State's jurisprudence.

Rather than predicting what the state court might do, this Court should certify to the Michigan Supreme Court the question of the proper interpretation of 2015 Public Act 53, codified as Mich. Comp. Laws §§ 722.124e and 722.124f (the "2015 Michigan law"). Specifically, this Court should certify:

> Whether the 2015 Michigan law authorizes a child placing agency (CPA) under contract with the state to provide foster care case management or adoption services, to refuse to provide state-supervised children with contracted services that conflict with the CPA's sincerely held religious beliefs.

Certifying this question to the Michigan Supreme Court advances cooperative judicial federalism and conserves federal judicial resources. Certification also recognizes and respects the state court's authority and interest in interpreting state law in the first instance on significant state jurisprudential issues.

The Michigan Supreme Court's interpretation of the 2015 Michigan law will assist this Court in analyzing key issues in this case and could be dispositive. Moreover, certifying this question to the Michigan Supreme Court will not unduly delay the proceedings or prejudice St. Vincent because the preliminary injunction entered by this Court would remain in effect pending the state court's decision.

ARGUMENT

I. An authoritative decision on the interpretation of the 2015 Michigan law by Michigan's highest court is necessary to determine the nature of this case going forward and could be outcome determinative.

Both federal and state courts recognize that a proper adjudication of a federal case may first require a state to authoritatively interpret its own law. *See, e.g., Cty. of Wayne v. Philip Morris, Inc.*, No. 99-76097, 2000 U.S. Dist. LEXIS 22956 (E.D. Mich. Aug. 25, 2000) (Exhibit A); *In re Certified Question (Wayne Cty. v. Philip Morris, Inc.)*, 638 N.W.2d 409 (Mich. 2002). This Court's local court rules, as well as Michigan's Court Rules, facilitate cooperation between federal and state courts by providing mechanisms to request and accept certified questions of state law. *See* W.D. Mich. LCivR 83.1; Mich. Ct. Rule 7.308(A)(2).

Certification benefits federal courts because it "save[s] time, energy, and resources and help[s] build a cooperative judicial federalism." *Arizonans for Official English v. Arizona*, 520 U.S. 43, 77 (1997) (internal citation omitted). Moreover, "[s]ubmitting uncertain questions of state law to the state's highest court by way of certification acknowledges that court's status as the final arbiter on matters of state law and avoids the potential for 'friction-generating error' which exists whenever a federal court construes a state law in the absence of any direction from the state courts." *Planned Parenthood of Cincinnati Region v. Strickland*, 531 F.3d 406, 410 (6th Cir. 2008) (quoting *Arizonans for Official English*, 520 U.S. at 79). Both principles apply here and warrant certifying the first-time question of the 2015 Michigan law's interpretation to the Michigan Supreme Court.

A. The interpretation of the 2015 Michigan law is now at the forefront of this case.

Early on, this Court recognized that the Michigan Supreme Court's insight into the 2015 Michigan law could be crucial to this case. At the Rule 16 Conference, the Court questioned whether this case would resolve if the Michigan Supreme Court interpreted the 2015 Michigan law in St. Vincent's favor. St. Vincent believed that such an interpretation would be "a great benefit" and wanted to "consider what impact [such an interpretation] would have on this case." (Doc. 51, Tr. of Rule 16 Conf., PageID.1844.) State Defendants maintained that the "state statute at issue [is] very clear that the definition of services under those statutes do[es] not include foster care case management or adoption services." (*Id*. at PageID.1844-1845.) And following the Court's prompt to consider what would happen if the Michigan Supreme Court disagreed with the State Defendants' reading of the statute (*id*. at PageID.1846-1847), the State Defendants responded that this case was based on constitutional claims, *not* on the Michigan statutes, (*id.* at PageID.1847).

This Court's ruling on the preliminary injunction, however, highlighted the importance of the interpretation of the 2015 Michigan law to Plaintiff's federal claims. And the Court seemingly interpreted the 2015 Michigan law as authorizing St. Vincent to refuse to provide state-supervised children with state-contracted

services that conflict with the agency's sincerely held religious beliefs. (Op. Granting Prelim. Inj., Doc. 69, PageID.2518.)[4]

This interpretation played an important role in determining that St. Vincent is likely to succeed on the merits of its free exercise claim.[5] For example, the Court reasoned that prohibiting St. Vincent from refusing to provide state-contracted services that conflict with its sincerely held religious beliefs would "flout the letter and stated intention of the Michigan Legislature in 2015 PA 53." (Doc. 69, PageID.2519.) Also based on its interpretation, this Court reasoned that, because the 2015 Michigan law allows CPAs to withhold state-contracted services that do not comport with their religious beliefs, MDHHS's "real goal" in enforcing state contracts "is not to promote non-discriminatory child placement, but to stamp out St Vincent's religious belief and replace it with the State's own." (Doc 69, PageID.2519.) In this way, the interpretation of the 2015 Michigan law permeated the key issues of religious animus and whether to apply strict scrutiny in the case.[6]

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[4] This Court also opined that prohibiting a CPA from refusing to provide state-contracted services based on the CPA's sincerely held beliefs, simply because it accepts a MDHHS referral of a child for case management or adoption services, "is at odds … with the 2015 law." (Doc. 69, PageID.2518.)

[5] Even though the St. Vincent raised only federal claims, references to the 2015 Michigan law appear more than 25 times throughout this Court's Opinion.

[6] This Court's interpretation of the 2015 Michigan law filtered into many aspects of the analysis. For example, although *Fulton v. City of Philadelphia*, 922 F.3d 140 (3rd Cir 2019) is similar to this case, but with a different result, this Court distinguished *Fulton*, finding that the case involves "a duly enacted public policy of the State or municipality that aimed to protect the agency's choice." (Doc. 69, PageID.2520).

Now that State Defendants have withdrawn their appeal of the preliminary injunction (Case 19-2185, Docket No 33), this case will proceed on the merits. This Court's Opinion at the preliminary injunction stage indicates that the 2015 Michigan law and its proper interpretation lie at the heart of the issues in this case and will impact the nature of the proceedings going forward. Because the 2015 Michigan law is now at the forefront of this case, certification will aid in the full and proper resolution of this case and avoid the friction-generating error that could result if the Michigan Supreme Court is not provided the opportunity to opine first on the statute's interpretation.

B. Certification of the proper interpretation of the 2015 Michigan law would clarify unsettled issues, affect the nature of this case going forward, and would not cause undue delay or prejudice.

Certification rests in the discretion of this Court. *See* W.D. Mich. LCivR 83.1; *Glover v. Nationwide Mutual Fire Ins. Co.*, 676 F. Supp. 2d 602, 622 (W.D. Mich. 2009) (citing *Lehman Brothers v. Schein,* 416 U.S. 386, 390–91 (1974)). And this Court should exercise its discretion to certify the question to the Michigan Supreme Court for three reasons.

First, there is no authoritative interpretation of the 2015 Michigan law on which this Court can rely, leaving it to predict how Michigan courts would decide the issue. And, the state court's interpretation of its own law is important here. Indeed, the Court has already indicated that this case could benefit from an authoritative interpretation of 2015 Michigan law. (Doc. 51, PageID.1843–1847). This Court confirmed that it does not "have jurisdiction to tell a state official to

comply with state law, that's not the federal court's role[.]" (Doc. 51, PageID.1843–1844.) An authoritative interpretation of the 2015 Michigan law from the Michigan Supreme Court could "avoid in whole or in part the necessity for federal constitutional adjudication" of St. Vincent's federal claims because the Department is required to follow state law. *Am. Booksellers Found. for Free Expression v. Strickland*, 560 F.3d 443, 446 (6th Cir. 2009) (quoting *Bellotti v. Baird*, 428 U.S. 132 (1976)). Indeed, federal courts in the Sixth Circuit, faced with unsettled questions of interpretation of state law, have recognized the value of allowing the Michigan Supreme Court to carry out its appropriate role of interpreting Michigan law. *See, e.g.*, *Cty. of Wayne v. Philip Morris, Inc.*, 2000 U.S Dist LEXIS 22956, at *7 (certifying question concerning the scope of a Michigan official's authority because there was no controlling precedent) (Exhibit A); *Thiss v. A.O. Smith Corp.*, No. 1:91-CV-239, 1993 U.S. Dist. LEXIS 11846, at *6 (W.D. Mich. June 29, 1993) (certifying question where district court had no basis to predict the course of state law on what was "essentially a policy decision between competing doctrines.") (Exhibit B).

Second, the Michigan Supreme Court's interpretation of the 2015 Michigan law could affect the outcome of this case, or at least materially change the nature of the issues. St. Vincent acknowledged during the Rule 16 Conference (Doc. 51, PageID.1844), that the Michigan Supreme Court's interpretation would be beneficial and may lead the parties to consider the impact on and propriety of further litigating this case. Even if having an authoritative interpretation does not

completely dispose of the case, it would likely significantly narrow the issues to be decided by this Court.

Third, certification will not cause undue delay or prejudice. Any risk of delay is mitigated by having a proper interpretation of the 2015 Michigan law, which will conserve this Court's "time, energy, and resources." *Lindenberg v. Jackson Nat'l Life Ins. Co.*, 912 F.3d 348, 371 (6th Cir. 2018) (quoting *Lehman Bros.* 416 U.S. at 391) (internal citation and quotation marks omitted)). Moreover, St. Vincent will suffer no negative impact pending a decision by the state court, as it obtained all the relief requested for as long as the preliminary injunction stands. (Doc. 70, PageID.2531.) And because the State has withdrawn its appeal to the Sixth Circuit, the preliminary injunction will stand throughout the time it takes for the Michigan Supreme Court to issue its decision. Therefore, any prejudice falls almost entirely on State Defendants, the party seeking the certification, and should not serve as a basis for denying the request.

C. The Michigan Supreme Court should have the opportunity to decide issues of first impression to its courts and of primary and jurisprudential significance to its citizens.

As explained above, the importance of the 2015 Michigan law's proper interpretation in this case cannot be overstated. Again, the U.S. Supreme Court and the Sixth Circuit have recognized that importance. *See, e.g.*, *Arizonans for Official English*, 520 U.S. at 77; *Bankey v. Storer Broadcasting Co.*, 882 F.2d 208, 210 (6th Cir. 1989) (Sixth Circuit unanimously certified question where the

interpretation "proffered by appellant presents a question of Michigan law that is not controlled by Michigan Supreme Court precedent.") Equally important is providing Michigan state courts the first opportunity to decide significant issues of state jurisprudence by interpreting state laws involving issues of state concern—in this case, children under the state's care and supervision and in need of foster care case management and adoption services.

Similar to federal courts' recognition of the value of certified questions, the Michigan Supreme Court also recognizes the importance of accepting a certified question. And it has accepted certified questions in cases like this, which present the "opportunity to clarify an important aspect of Michigan [] law," and provide "practical guidance and certainty" for Michigan citizens.[7] *See In re Certified Questions* (*Bankey v. Storer Broadcasting Co.*), 443 N.W.2d 112, 114, n.4 (Mich. 1989) (accepting certified question in an employment law case because it would "resolve some of the uncertainty" concerning the scope of an exception to Michigan's at-will doctrine).

Now is the appropriate time to present this certified question—with the preliminary injunction in place, before federal judicial resources and the parties'

[7] The Michigan Supreme Court accepts certified questions from both federal district courts and the federal courts of appeal. *See In re Certified Question* (*Mattison v. Social Security Comm'r)*, 825 N.W.2d 566, 567 (Mich. 2012) (certifying question from the U.S. District Court for the Western District of Michigan); *In re Certified Question* (*Philip Morris Inc., v. Jennifer Granholm, Attorney General, ex rel., State of Michigan*), 638 N.W.2d 409 (Mich. 2002) (certifying question from the U.S. District Court for the Eastern District of Michigan); *In re Certified Question* (*Deacon v. Pandora Media, Inc.*), 885 N.W.2d 628 (Mich. 2016) (certifying question from the U.S. Court of Appeals for the Ninth Circuit).

time and money is expended and prior to a final adjudication on the issues in this case. *See Heimbach v. Amazon.com Inc. (In re Amazon.com),* 942 F.3d 297, 300 (6th Cir. 2019) (time to request certification is before the district court has resolved the issue*); State Auto Property & Cas. Ins. Co. v. Hargis*, 785 F.3d 189, 194 (6th Cir. 2015) (certification disfavored when it is sought only after the district court has entered an adverse ruling on summary judgment); see also *BKB Props., LLC v. Suntrust Bank*, 453 F. App'x 582, 588 (6th Cir. 2011) (denying request for certification where movant failed to request certification in the district court, "resulting in the considerable expenditure of judicial resources by the federal courts on the issue….")

Another important consideration is that a proper interpretation of the 2015 Michigan law is of significant interest to the State. Foster care legislation presents "issues of unusual delicacy, … where professional judgments regarding desirable procedures are constantly and rapidly changing[]" and warrants federal judicial restraint. *Smith v. Org. of Foster Families for Equality and Reform,* 431 U.S. 816, 855–56 (1977). Additionally, Michigan courts recognize that "[t]he care and protection of children has long been a matter of utmost state concern," even when faced with allegations that state laws intended to facilitate care and protection of children contradict the free exercise of religion. *Fisher v. Fisher,* 324 N.W. 2d 582, 584 (Mich. Ct. App. 1982). Certifying the question of the 2015 Michigan law's interpretation will allow the Michigan Supreme Court to determine whether the

statute authorizes CPAs to refuse to provide state-supervised children with state-contracted services that conflict with their sincerely held religious beliefs.

No Michigan state court has spoken on the proper interpretation of the 2015 Michigan law. The Michigan Supreme Court should have the first opportunity to interpret this important statute, and the posture of this case presents an opportune time to do that. If the Michigan Supreme Court interprets the 2015 Michigan law as proposed by St. Vincent, then this Court may not need to reach the constitutional issues presented. If, however, the Michigan Supreme Court interprets the 2015 Michigan law as MDHHS does, then the nature of this case could significantly change. In either scenario, the clarification would resolve a crucial issue in this case, which in turn would allow the case to proceed in a much more efficient manner.

CONCLUSION AND RELIEF SOUGHT

For the reasons stated in the motion to certify and this brief in support, State Defendants respectfully requests that this Court certify to the Michigan Supreme Court the proper interpretation of 2015 PA 53, codified as Michigan Compiled Laws § 722.124e and § 722.124f.

Respectfully submitted,

Dana Nessel
Attorney General

/s/Toni L. Harris
Toni L. Harris (P63111)
Assistant Attorney General
Attorney for State Defendants
P. O. Box 30758
Lansing, Michigan 48909
(517) 335-7603
harrist19@michigan.gov

Dated: January 6, 2020

CERTIFICATE OF COMPLIANCE

This brief complies with the word limit of W.D. Mich. LCivR 7.2(b)(i) because, excluding the parts exempted by W.D. Mich. LCivR 7.2(b)(i), it contains 2,481 words. The word count was generated using Microsoft Word 2016.

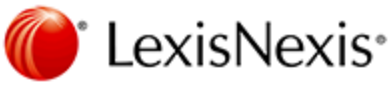
Respectfully submitted,

Dana Nessel
Attorney General

/s/Toni L. Harris
Toni L. Harris (P63111)
Assistant Attorney General
Attorney for State Defendants
P. O. Box 30758
Lansing, Michigan 48909
(517) 335-7603
harrist19@michigan.gov

Dated: January 6, 2020

EXHIBIT A



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1. *County of Wayne v. Philip Morris, Inc., 2000 U.S. Dist. LEXIS 22956*

Client/Matter: -None-
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Narrowed by:

Content Type	Narrowed by
Cases	-None-

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County of Wayne v. Philip Morris, Inc.

United States District Court for the Eastern District of Michigan, Southern Division

August 25, 2000, Decided; August 25, 2000, Filed

99-76097

Reporter
2000 U.S. Dist. LEXIS 22956 *; 2000 WL 34226614

COUNTY OF WAYNE, Plaintiff, -vs- PHILIP MORRIS INCORPORATED; R.J. REYNOLDS TOBACCO CORP.; AMERICAN TOBACCO CORP.; BROWN & WILLIAMSON TOBACCO CORP.; LIGGETT & MEYERS, INC.; LORILLARD TOBACCO CO., INC,; UNITED STATES TOBACCO CO.; B.A.T. INDUSTRIES, P.L.C.; BRITISH AMERICAN TOBACCO COMPANY; THE COUNCIL FOR TOBACCO RESEARCH - U.S.A., INC.; SMOKELESS TOBACCO COUNCIL, INC.; TOBACCO INSTITUTE, INC.; Defendants.

Subsequent History: Motion granted by *County of Wayne v. Philip Morris Inc. (In re Certified Question), 622 N.W.2d 518, 2001 Mich. LEXIS 193 (Mich., 2001)*

Certified question answered by *Wayne County v. Philip Morris, Inc. (In re Certified Question), 465 Mich. 537, 638 N.W.2d 409, 2002 Mich. LEXIS 59 (2002)*

Core Terms

Tobacco, attorney general, counties, Parties, federal court, Settling, certification, instant case, Manufacturers, provides, courts, powers, settlement, covenant, entities, products, smoking

Counsel: **[*1]** For County of Wayne, Plaintiff: Edward Ewell, Jr., LEAD ATTORNEY, Wayne County Corporation Counsel, Detroit, MI.

For Philip Morris, Incorporated, Defendant: Richard D. Bisio, LEAD ATTORNEY, Kemp, Klein, Troy, MI; Richard E. Zuckerman, LEAD ATTORNEY, Honigman, Miller, Detroit, MI.

For R.J. Reynolds Tobacco Company, Lorillard Tobacco Companies, Incorporated, Defendants: Jack O. Kalmink, Mary A. Kalmink, LEAD ATTORNEYS, Clark Hill (Detroit), Detroit, MI; Richard E. Zuckerman, LEAD ATTORNEY, Honigman, Miller, Detroit, MI.

For American Tobacco Corporation, United States Tobacco Company, B. A. T. Industries, P. L. C., British American Tobacco Company, Limited, Smokeless Tobacco Council, Incorporated, Tobacco Institute, Incorporated, Defendants: Richard E. Zuckerman, LEAD ATTORNEY, Honigman, Miller, Detroit, MI.

For Brown and Williamson Tobacco Corporation, Defendant: Kenneth T. Brooks, LEAD ATTORNEY, Honigman, Miller, Lansing, MI; Richard E. Zuckerman, LEAD ATTORNEY, Honigman, Miller, Detroit, MI; Thomas J. Byrne, LEAD ATTORNEY, Foster, Swift, Lansing, MI.

For Liggett and Myers, Incorporated, Defendant: Aaron H. Marks, LEAD ATTORNEY, Kasowitz, Benson, New York, NY; James G. Derian - INACTIVE, **[*2]** LEAD ATTORNEY, Butzel Long, Bloomfield Hills, MI; Richard E. Zuckerman, LEAD ATTORNEY, Honigman, Miller, Detroit, MI.

For Council for Tobacco Research-U.S.A., Incorporated, Defendant: Bruce G. Merritt, LEAD ATTORNEY, Debevoise & Plimpton, New York, NY; Bruce T. Wallace, William J. Stapleton, LEAD ATTORNEYS, Hooper, Hathaway, Ann Arbor, MI; Harry Zirlin, LEAD ATTORNEY, Debevoise & Plimpton, New York, NY; Richard E. Zuckerman, LEAD ATTORNEY, Honigman, Miller, Detroit, MI.

Judges: PAUL D. BORMAN, UNITED STATES DISTRICT COURT JUDGE.

Opinion by: PAUL D. BORMAN

Opinion

OPINION AND ORDER (1) CERTIFYING QUESTION TO THE MICHIGAN SUPREME COURT, AND (2) STAYING PROCEEDINGS IN THIS CASE

Before the Court is a motion for judgment on the pleadings filed by certain defendants (Docket Entry # 23), The Court heard oral argument on this motion on June 21, 2000. Upon consideration of the motion, the submissions of the parties, and the applicable law the Court will stay the proceedings in this case pending resolution of the question the Court has hereinafter certified to the Michigan Supreme Court. This Court concludes both that the certified issue has "truly been left unsettled by the state courts," [1] and that the issue is one of paramount **[*3]** importance involving the structure, balance of power, separation of power, and functioning of Michigan governmental entities. That basic issue, elaborated upon, *infra,* is whether the Michigan Attorney General's settlement of a similar case against the instant defendants, which states that counties are bound by the settlement, prevents plaintiff Wayne County from bringing this lawsuit. More specifically, the issue is whether the Michigan Attorney General, in settling a lawsuit, has the power to bind Michigan counties, who have been given the power to sue and be sued by the Michigan Legislative. *MICH. COMP. LAWS ANN. § 45.3*.

This Court further concludes that the instant case presents sufficiently exceptional circumstances to justify the time and expense inherent in the certification procedure.

I. THE CASE

Plaintiff, County of Wayne, Michigan, ("Plaintiff," or "the County") filed the instant action against numerous enterprises in the tobacco industry. The defendants are American Tobacco Company, Inc.; [2] Liggett & Myers, Inc.; Lorillard Tobacco Company, Inc.; Philip Morris Inc.; R.J. Reynolds Tobacco Company; **[*4]** Brown & Williamson Tobacco Corporation; United States Tobacco Company; B.A.T. Industries, P.L.C.; British American Tobacco Company, Ltd.; The Council for Tobacco Research - U.S.A., Inc.; Smokeless Tobacco Council, Inc., and Tobacco Institute, Inc.

In its Complaint, Plaintiff alleges, in great detail, a nearly fifty year old conspiracy among Defendants to suppress the truth about the health effects of tobacco, to misrepresent the health effects of smoking, to conceal their knowledge that nicotine is addictive, to manipulate the level of nicotine in their products, to make an illegal agreement not to compete, to market false "health reassurance" products such as "light" and "ultra-light" cigarettes, to target minors for addiction to tobacco products, and to impose the medical costs of smoking on other sectors of the economy.

Based on these allegations, Plaintiff asserts five state law claims for relief: (1) Unreasonable Restraint of Trade, in violation of *MICH. COMP. LAWS ANN. § 445.772*; (2) Public Nuisance; (3) Negligent Entrustment; **[*5]** (4) Undertaking of and Willful Failure to Perform a Special Duty; and (5) Conspiracy. For these claims, Plaintiff seeks relief comprising, *inter alia:* (1) that the Court enjoin Defendants from engaging in such conduct detailed in the Complaint; (2) that the Court order Defendants to publicly disclose all research previously conducted that relates to the issue of smoking and health; (3) that the Court order Defendants to fund a corrective public education campaign relating to the issue of smoking and health, administered by an independent third party; (4) that the Court order Defendants to fund clinical smoking cessation programs in Wayne County; and (5) that the Court order Defendants to pay restitution which would restore Plaintiff to the financial position it would be in, absent Defendants' conduct.

On December 7, 1999, Plaintiff filed this action in Wayne County Circuit Court. On December 22, 1999,

[1] See *L. Cohen & Co. v. Dun & Bradstreet, 629 F. Supp. 1419, 1423 (D. Conn. 1986)*.

[2] In 1994, Defendant American Tobacco was sold to Defendant British American Tobacco Co., parent of Defendant Brown & Williamson Tobacco Corporation. (Compl. P 17.)

Defendants timely removed the case to this Court based on diversity of citizenship jurisdiction, 28 U.S.C. § 1332, Currently before the Court is a motion for judgment on the pleadings filed by Defendants Philip Morris Inc., R.J. Reynolds Tobacco Co., Brown & Williamson Tobacco Corp. (individually **[*6]** and as successor by merger to The American Tobacco Company), Lorillard Tobacco Co., Liggett & Myers, Inc., and The Council for Tobacco Research-U.S.A., Inc. (hereinafter "Moving Defendants").

II. STANDARD OF REVIEW

The standard of review for motions for judgment on the pleadings under FED. R. Civ. P. 12(c) is the same standard applicable to motions to dismiss under Rule 12(b)(6). *See* Grindstaff v. Green, 133 F.3d 416, 421 (6th Cir. 1998). In evaluating such a motion, the Court construes the complaint in the light most favorable to the plaintiff, accepts all factual allegations in the complaint as true, and determines whether the plaintiff undoubtedly can prove no set of facts in support of the claims that would entitle relief. *See* Bloch Ribar, 156 F.3d 673, 677 (6th Cir. 1998); *see also* Morgan v. Church's Fried Chicken, 829 F.2d 10, 11 (6th Cir. 1987).

Because jurisdiction in this case is based on diversity of citizenship, this Court is required to apply the law of the forum state; *i.e.,* Michigan law. *See* Erie R.R. Co. v. Tompkins, 304 U.S. 64, 58 S. Ct. 817, 82 L. Ed. 1188 (1938). Under *Erie* and its progeny, if the state's highest court has not addressed the issue, the federal court must ascertain how that court would **[*7]** rule if it were faced with the issue. *See* Meridian Mut. Ins. Co. v. Kellman, 197 F.3d 1178, 1181 (6th Cir. 1999). In making this determination, the Court may use the decisional law of the state's lower courts, other federal courts construing state law, restatements of law, law review commentaries, and other jurisdictions on the "majority" rule. *See id.* (*citing Grantham & Mann v. American Safety Prods.,* 831 F.2d, 596, 608 (6th Cir. 1987)). A federal court should not disregard the decisions of intermediate appellate state courts unless it is convinced by other persuasive data that the highest court of the state would decide otherwise. *See id.* (citing Commissioner v. Estate of Bosch, 387 U.S. 456, 465, 87 S. Ct. 1776, 18 L. Ed. 2d 886 (1967)).

On the other hand, where there is no recent Michigan decision on the issue, and no clear precedent, and the issue is one of fundamental importance to the state, the federal court can certify the issue to the state supreme court for a determination of the issue.

III. RELEVANT BACKGROUND RELATING TO THE DESIGNATED RELEASE OF THE COUNTY'S CLAIMS

On or about August 21, 1996, the State of Michigan, through its Attorney General, filed an action against entities in the tobacco industry, including **[*8]** all of the defendants in the case at bar. *Kelley ex rel. State of Michigan v. Philip Morris Inc., et al.,* No. 96-84281-CZ (Ingham Co. Cir. Ct.) ("the *Michigan AG* case"). That action alleged, in essence, the same conspiracy by the defendants as the County alleges in the instant case. In that case, the State asserted five claims for relief: (1) violations of the Michigan Consumer Protection Act, [3] (2) violation of the Michigan Antitrust Reform Act, [4] (3) restitution based upon unjust enrichment, (4) indemnity, and (5) breach of duty voluntarily undertaken. (*Michigan AG* case Compl.; Def. Ex. A.) The Attorney General filed the *Michigan AG* case on behalf of the State of Michigan and certain agencies, including the Department of Community Health. (*Michigan AG* case Compl. P 17; Def. Ex. A.)

The *Michigan AG* case was settled in November 1998; defendants entered into a "Master Settlement Agreement" ("MSA") with-the State of Michigan and 45 other states. (Def. Ex. B.) [5] Under the MSA, the defendants agreed to pay Michigan approximately $ 8.9 billion over a period of 25 years. The defendants also agreed to the entry **[*9]** of a consent decree with broad injunctive provisions.

On December 7, 1998, following a fairness hearing, the Ingham County Circuit Court approved the *Michigan AG* case consent decree (the MSA), finding it to be "in the best interests of the State of Michigan," and ordered that the complaint be "dismissed with prejudice." (*Michigan AG* case Consent Decree and Final Judgment at 12; Def. Ex. C.) Wayne County did not seek to intervene in

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[3] MICH. COMP. LAWS ANN. § 445.901, et seq.

[4] MICH. COMP. LAWS ANN. § 445.771, et seq.

[5] Signatories to the MSA included the following defendants: Phillip Morris, Inc., R.J. Reynolds Tobacco Co., Brown & Williamson Tobacco Corp., and Lorillard Tobacco Co. As discussed *infra,* the MSA also covers other defendants as "related" entities. Consequently, all Moving Defendants are covered by the *Michigan AG* case settlement.

the *Michigan AG* case. (*Id.*) Moving Defendants argue, *inter alia,* that the County's instant claims are barred by the release and covenant not to sue contained in the MSA. Resolution of this argument would conclusively determine this case.

The parties do not dispute that under the MSA, the State explicitly released and covenanted not to sue Moving Defendants for a broad range of claims, including every claim the County asserts in the **[*10]** case at bar. Specifically, the MSA provides:

> (a) Release
>
> (1) Upon the occurrence of State-Specific Finality in a Settling State, such Settling State shall absolutely and unconditionally release and forever discharge all Released Parties from all Released Claims that the Releasing Parties directly, indirectly, derivatively or in any other capacity ever had, now have, or hereafter can, shall or may have.
>
> * * * *
>
> (3) Each Settling State (for itself and for the Releasing Parties) further covenants and agrees that it (and the Releasing Parties) shall not after the occurrence of State-Specific Finality sue or seek to establish civil liability against any Released Party based, in whole or in part, upon any of the Released Claims, and further agrees that such covenant and agreement shall be a complete defense to any such civil action or proceeding.

(MSA § XII(a)(1) and (3), pp. 110-11; Def. Ex. B) (emphasis added).

As to this release, there is no dispute that:

1. Michigan is a "Settling State;" [6]
2. "State-Specific Finality has occurred in Michigan; [7]
3. The Moving Defendants are "Released Parties;" [8] and
4. The claims in the case at bar are "Released Claims" as defined by the MSA, since the instant **[*11]** claims are essentially the same as those asserted in the *Michigan AG* case. [9]

This case revolves around the issue of whether Wayne County is a "Releasing Party," The MSA provides:

> "Releasing Parties" means each Settling State and any of its past, present, and future agents, officials acting in their official capacities, legal representatives, agencies, departments, commissions and divisions; and also means, to the full extent of the power of the signatories hereto release past, present and future claims, the following: (1) any Settling State's subdivisions (political or otherwise, including, but not limited to municipalities, counties, parishes, villages, unincorporated districts and hospital districts), public entities, public instrumentalities and public educational institutions….

MSA § II(pp) pp. 14-15 (emphasis added).

The **[*15]** Michigan Attorney General signed the MSA on behalf of the people of the State of Michigan under

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[6] The MSA defines "Settling State" (with certain exceptions not relevant to the instant case) as "any State that signs this Agreement on or before the MSA Execution Date." MSA § II(qq), p. 15. Michigan signed the MSA on the MSA Execution Date of November 23, 1998. *See* MSA § II(aa), p. 9, and the Michigan signature page.

[7] "State-Specific Finality" required (a) approval by the *Michigan AG* case court of the MSA and consent decree and dismissal of the *Michigan AG* case suit, all of which occurred on December 7, 1998; and (b) expiration of the period for any appeal therefrom (with no appeal having been filed), which occurred in January 1999. *See* MSA § II(ss), pp. 15-16.

[8] The MSA defines "Released Parties," in relevant part, as follows:

> "Released Parties" means all Participating Manufacturers, their past, present and future Affiliates, and the respective divisions, officers, directors, employees, representatives, insurers, lenders, underwriters, Tobacco-Related Organizations, trade associations, suppliers, agents, auditors, advertising agencies, public relations entities, attorneys, retailers and distributors of any Participating **[*12]** Manufacturers or of any such affiliate (and the predecessors, heirs, executors, administrators, successors and assigns of each of the foregoing).

MSA § II(oo), p. 14 (emphasis added). All Moving Defendants are covered by this provision. Philip Morris Inc., R.J. Reynolds Tobacco Co., Brown & Williamson Tobacco Corp. (individually and as successor by merger to The American Tobacco Co.), Lorillard Tobacco Co., and Leggett & Myers are "Participating Manufacturers." *See* MSA § II(jj), pp. 11-12. The Council for Tobacco Research-U.S.A., Inc. is a "Tobacco-Related Organization." *See* MSA § II(ww), p. 17.

[9] The MSA defines "Released Claims" as follows:

> "Released Claims" means:

both his [10] statutory and common law authority. (*Michigan AG* case Compl. P 17.) The Court must determine whether the Attorney General had the power to release Wayne County's claims against the tobacco industry in the instant case.

> (1) for past conduct, acts or omissions (including any damages incurred in the future arising from such past conduct, acts or omissions), those Claims directly or indirectly based on, arising out of or in any way related, in whole or in part, to (A) the use, sale, distribution, manufacture, development, advertising, marketing or health effects of, (B) the exposure to, or (C) research, statements, or warnings regarding, Tobacco Products (including, but not limited to, the Claims asserted in the actions identified in Exhibit **[*13]** D, or any comparable Claims that were, could be or could have been asserted now or in the future in those actions or in any comparable action in federal, state or local court brought by a Settling State or a Releasing Party (whether or not such Settling State or Releasing Party has brought such action)), except for claims not asserted in the actions identified in Exhibit D for outstanding liability under existing licensing (or familiar) fee laws or existing tax laws (but not excepting claims for any tax liability of the Tobacco-Related Organizations or of any Released Party with respect to such Tobacco-Related Organizations, which claims are covered by the release and covenants set forth in this Agreement);
>
> (2) for future conduct, acts or omissions, only those monetary Claims directly or indirectly based on, arising out of or in any way related to, in whole or in part, the use of or exposure to Tobacco Products manufactured in the ordinary course of business, including without limitation any future Claims for reimbursement of health care costs allegedly associated with the use of or exposure to Tobacco Products.

MSA §.II(nn), pp. 13-14. The MSA defines "Claims" as:

> any and all manner **[*14]** of civil (*i.e.,* non-criminal): claims demands, actions, suits, causes of action, damages (whenever incurred), liabilities of any nature including civil penalties and punitive damages, as well as costs, expenses and attorneys' fees (except as to the Original Participating Manufacturers' obligations under section XVII), known or unknown, suspected or unsuspected, accrued or unaccrued, whether legal, equitable, or statutory.

MSA § II(n), p. 7.

[10] Although Michigan's current Attorney General is the Honorable Jennifer Mulhern Granholm, the Honorable Frank J. Kelley held that office when the MSA was signed. Accordingly, this Opinion will use the masculine pronoun to refer to the Attorney General in the context of the MSA.

The Michigan Constitution of 1963 provides for the creation of counties and endows the legislature with the authority to establish their powers and immunities. *MICH. CONST. art. 7 § 1* ("Each organized county shall be a body corporate with powers and immunities provided by law"). Michigan counties have no inherent powers, and only possess those limited powers which have been granted to them by the State Legislature. *See Alan v. Wayne County, 388 Mich. 210, 245, 200 N.W.2d 628 (1972)*; *County of Saginaw v. John Sexton Corp., 232 Mich. App. 202, 220, 591 N.W.2d 52 (1998)*; *see also Hanselman v. Killeen, 419 Mich. 168, 187, 351 N.W.2d 544 (1984)*. **[*16]** The Michigan Legislature has delegated to each county the capacity to sue and be sued. *MICH. COMP. LAWS ANN. § 45.3*.

Michigan's Attorney General has broad authority to prosecute actions that are in the interest of the State. *See State of Michigan ex rel. Kelley v. C.R. Equip. Sales, Inc., 898 F. Supp. 509, 513 (W.D. Mich. 1995)*. Michigan statutory authority provides:

> The attorney general shall prosecute and defend all actions in the supreme court, in which the state shall he interested, or a party … and may, when in his own judgment the interests of the state require it, intervene in and appear for the people of this state in any other court or tribunal, in any cause or matter, civil or criminal, in which the people of this state may be a party or interested.

MICH. COMP. LAWS ANN. § 14.28 (West 1994). Although the statute states that the Attorney General may intervene in an action on behalf of the State, courts have interpreted it as allowing the Attorney General to initiate actions as well. *See Assoc. Builders and Contractors, Saginaw Valley Area Chapter v. Perry, 115 F.3d 386, 390 (6th Cir. 1997)*. In addition, "the attorney general has a wide range of powers at common law." *Mundy v. McDonald, 216 Mich. 444, 450, 185 N.W. 877 (1921)*. **[*17]** Thus, the Attorney General "has statutory and common law authority to act on behalf of the people of the State of Michigan in any cause or matter, such authority being liberally construed." *Michigan State Chiropractic Ass'n v. Kelley, 79 Mich. App. 789, 791, 262 N.W.2d 676 (1977)* (citation omitted). Moreover, "[s]uch liberally construed authority and discretion should only be interfered with where his actions are clearly inimical to the people's interest." *Id.*

The State of Michigan, through its Attorney General, has the power to institute actions on behalf of political subdivisions of the State. For example, in *C.R. Equip. Sales, supra*, the Attorney General filed an action "on

behalf of over five hundred public school districts in Michigan's Lower Peninsula" asserting antitrust claims against six corporate and six individual defendants who, the State alleged, "conspired and agreed not to compete on contracts for the sale of school buses, school bus bodies, and school bus parts." *C.R. Equip. Sales, 898 F. Supp. at 511-12*. The court found that the State of Michigan had standing in that case because it was not an action on behalf of a single unit of local government, and that every Michigan taxpayer had **[*18]** an interest in the case. *Id. at 514*.

However, a nineteenth century Michigan Supreme Court opinion held that the authority of the State to institute such actions is not boundless. In *Attorney General ex rel. Lockwood v. Moliter, 26 Mich. 444 (1873)*, the Attorney General brought an action to recover money illegally paid out of a county's treasury and to enjoin further payment. The Michigan Supreme Court noted that the claim was a "mere money demand, belonging to the county," and that "[t]he title to the claim, both legal and equitable, is exclusively in the county. If collected, the money must be instantaneously paid to the county treasury, and no state agency or official can touch or control it." *Id. at 447*. Accordingly, the court held that the State, through the Attorney General, had no right to sue for the funds, explaining that the case "is not, it its civil aspect, a matter of state concern, but is rather a local corporate interest or right of action, subject to be sued for by the county." *Id.*

The State of Michigan's complaint in the *Michigan AG,* case did not state that it brought that case on behalf of political subdivisons, or counties. The Attorney General filed the action "on **[*19]** behalf of the State itself and on behalf of certain of its agencies, including the Michigan Department of Community Health." (*Michigan AG* case Compl. P 17; *see also, id.* PP 2, 4, 15, 16, 43, 193, 194, 197, 216, 218-220, 222-224, 227.) However, in signing the MSA, the Michigan Attorney General released both the claims of the State of Michigan and, "to the full extent of [his] power" to do so, released the claims of Michigan's political subdivisions, including counties.

Whether the Attorney General had the power to release claims of Michigan counties is a fundamental issue concerning the separation of governmental powers and the balance of power between the various levels of government. In other words, the Court must determine the validity of the executive's attempt the (vis-a-vis Attorney General) to release claims of a county, in the face of a statute granting counties the capacity to file lawsuits. *MICH. COMP. LAWS ANN. § 45.3*. There is no appropriate Michigan Supreme Court precedent for this Court to utilize in resolving this significant state issue.

Recognizing the significance of both the State's interest in resolving this issue, as well as the relationship between the federal and **[*20]** state sovereigns, the Court will certify this issue to the Michigan Supreme Court. This Court finds support for its decision in recent decisions of both the Michigan Supreme Court and United States Supreme Court.

The Michigan Supreme Court recently set forth a clarion call for federal courts to, in essence, "let Michigan be Michigan". The Michigan Supreme Court criticized a federal district court order [11] granting hail to a defendant convicted in a state criminal case pending before state appellate courts:

> In our judgment, the district court erred in its exercise of authority in the instant case, impinging upon the traditional criminal jurisdiction of this state. . . . .

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[11] *Puertas v. Michigan Department of Corrections, 88 F. Supp. 2d 775 (E.D. Mich. 2000)* Gadola, J.). In *Puertas* Petitioner had been convicted of a state narcotics offense. After the trial court denied Petitioner's request for bail pending appeal, the Michigan Court of Appeals granted his request. The Michigan Supreme Court vacated the Court of Appeals order for failing to provide a reason for its holding. The Michigan Court of Appeals, on remand, provided a reason for its decision to grant bail pending appeal. The Michigan Supreme Court vacated the Michigan Court of Appeals opinion granting bail, but despite its having ordered the Michigan Court of Appeals to explain its decision, did not provide any rationale for the High Court's order.

Petitioner then sought a writ of habeas corpus in the Federal District Court for the Eastern District of Michigan, asserting a lack of due process in the Michigan Supreme Court order. U.S. District Judge Paul V. Gadola, granted petitioner's motion for **[*22]** a preliminary injunction preventing state corrections officials from taking him into custody to serve his state sentence. Judge Gadola set forth the issue before him, as follows:

> The issue before the Court is whether the order of the Michigan Supreme Court that vacated, without a statement of reasons, the Michigan Court of Appeals decision that granted Petitioner bond pending appeal, was a denial of Petitioner's federal constitutional right to due process.

Id. at 778, Judge Gadola concluded that the Michigan Supreme Court had deprived the petitioner of his federal constitutional right to due process.

> Apparently, the concurrence would limit the interaction between the federal and state judiciaries to a one-way street in which the federal judiciary is entitled to opine to whatever extent it chooses about constitutional matters impacting upon this relationship, while the state judiciary is forever denied the opportunity to respond. This is a prescription for the continual enhancement of the federal judiciary at the expense of the state judiciary.
> . . . .
>
> The district court's decision to intervene and assume effective jurisdiction **[*21]** over this state matter prevented enforcement of this Court's interpretation of Michigan law.

*People v. Puertas,; No, 116333, 462 Mich. 885, 613 N.W.2d 297, 2000 Mich. LEXIS 1194, *2, *3, *9(Mich. 2000)*. [12]

The instant case provides a signature opportunity, for the Michigan Supreme Court to exercise its appropriate role on a state law issue of overwhelming importance.

Further, the instant issue certified to the Michigan Supreme Court is sufficiently precise as to avoid the usual arguments against certification: abstractness and difficulty formulating the question. *See* **[*23]** M. Bryan Schneider, *"But Answer Came There None": The Michigan Supreme Court and the Certified Question of State Law, 41 WAYNE L. REV. 273, 294-98 (1994)*. As to other possible concerns such as delay, and docket concerns, this Court assumes that the Michigan Supreme Court will both respond promptly to this request, and thereafter deal with this significant issue with dispatch.

This Court recognizes the significance of this issue to the State of Michigan, and assumes that the Michigan Supreme Court will concur in this assessment. Further, this Court's invitation to the Michigan Supreme Court is encouraged by that court's expressed concern that federal courts should neither infringe upon the traditional jurisdiction of the State of Michigan nor enhance themselves at the expense of the state judiciary. *See Puertas, supra.*

[12] Subsequently, the Michigan trial court (Hon. Colleen O'Brien, Oakland County Circuit Judge) granted the Defendant's Motion for New Trial on the grounds that the prosecution had failed to turn over evidence critical to the defense.

IV. CONCLUSION

The instant certification request provides the Michigan Supreme Court with an opportunity to engage in cooperative judicial federalism, so that the State of Michigan does not have Michigan law interpreted by and imposed upon it by the federal courts. [13]

As the United State Court of Appeals for the Sixth Circuit noted in *Geib v. Amoco Oil Co., 29 F.3d 1050, 1060-61 (6'h Cir. 1994)*:

> [T]his matter can most authoritatively be resolved by the Supreme Court of Michigan which bears ultimate responsibility for reconnecting that state's competing policy interests.
>
> . . . .
>
> We believe that judicious resort to the technique of certification in situations such as this, where an important question of state law has risen solely in federal court, "prevent[s] federal invasion of the state law-making function and [avoids] needless federal-state friction." (quoting Note, *Inter-Jurisdictional Certification: Beyond Abstention Toward Cooperative Individual Federalism,* 111 U. PA. L. REV. 344, 350 (1963)).

The United States Supreme Court has, this term, reserved judgment in a case, and certified a matter to the Pennsylvania Supreme Court for determination, *Fiore v. White, 528 U.S. 23, 120 S. Ct. 469, 145 L. Ed. 2d 353 (1999)*. Thus, the instant order of this Federal Court requesting Michigan Supreme **[*25]** Court determination has recent supporting precedent.

Because the issue certified to the Michigan Supreme Court will greatly affect the case at bar, because it raises an issue uniquely directed to that court's decision-making jurisdiction, and because the certification will not cause undue delay or prejudice to the parties, IT IS ORDERED that all proceedings in the above-entitled case shall be stayed until further order of

[13] *See* Philip B. Kurland, *Toward a Cooperative Judicial Federalism: The Federal Court Abstention Doctrine, 24 F.R.D. 481, 489-90 (1960)*, **[*24]** *Lehman Bros v. Stein, 416 U.S. 386, 391, 94 S. Ct. 1741, 40 L. Ed. 2d 215 (1974)*: ("[certification] does, of course, in the lone run save time, energy and resources and helps build a cooperative judicial federalism")

this Court.

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V. QUESTION CERTIFIED

The case at bar presents an issue, for which there is no controlling precedent, concerning the scope of the Michigan Attorney General's authority. Accordingly, pursuant to *Michigan Court Rule 7.305(B)*, this Court hereby certifies the following question of law for consideration by the Michigan Supreme Court:

> **Does the Michigan Attorney General have the authority to bind/release claims of a Michigan county as part of a settlement agreement in an action that the Attorney General brought on behalf of the State of Michigan?**
> As disclaimed by other courts,
>
> [t]he particular phrasing used in the certified question is not to restrict the Supreme Court's consideration of the problems involved and the issues as the Supreme Court perceives them to be **[*26]** in its analysis of the record certified in this case. This latitude extends to the Supreme Court's restatement of the issue or issues and the manner in which the answers are to be given, whether as a comprehensive whole or in subordinate or even contingent parts.

Dorse v. Armstrong World Industries Inc., 798 F.2d 1372, 1377 (11th Cir. 1986) (quoting *Martinez v. Rodriquez, 394 F.2d 156, 159 n. 6 (5th Cir. 1968)*).

VI. DIRECTIONS TO THE CLERK

The Court directs the Clerk of the United States District Court for the Eastern District of Michigan to forward to the Clerk of the Supreme Court of Michigan a certified copy of this Opinion and Order, and eight copies of the same.

SO ORDERED.

/s/ Paul Borman

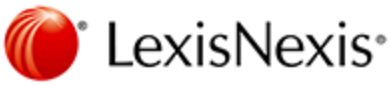
PAUL D. BORMAN

UNITED STATES DISTRICT COURT JUDGE

Dated: Aug 25 2000

Detroit, Michigan

EXHIBIT B



User Name: Elizabeth Briggs
Date and Time: Monday, January 6, 2020 9:34:00 AM EST
Job Number: 106607249

Document (1)

1. *Thiss v. A.O. Smith Corp., 1993 U.S. Dist. LEXIS 11846*
   Client/Matter: -None-
   Search Terms: 1993 WL 771013
   Search Type: Natural Language
   Narrowed by:

Content Type	Narrowed by
Cases	-None-

Thiss v. A.O. Smith Corp.

United States District Court for the Western District of Michigan

June 29, 1993, Decided ; June 29, 1993, Filed

File No. 1:91:CV:239

Reporter
1993 U.S. Dist. LEXIS 11846 *; 1993 WL 771013

ARTHUR THISS and MOLLY THISS, Plaintiffs, v. A.O. SMITH CORPORATION, Jointly and Severally, A.O. SMITH HARVESTORE PRODUCTS, INCORPORATED, Jointly and Severally, Defendants,

Core Terms

plaintiffs', enterprise, Defendants', Sickle, feed, entities, silos, herd, conspiracy, counts, association-in-fact, products, accrued, statute of limitations, summary judgment motion, summary judgment, oxygen, pattern of racketeering activity, matter of law, subsidiary, commit, farm, reasonable person, predicate crime, racketeering, time-barred, discovery, certify, storage, commit fraud

Case Summary

Procedural Posture

Defendants, corporation and subsidiary, filed motions for summary judgment in plaintiff dairy farmers' claim that alleged fraud, conspiracy to commit fraud, and violations of the Racketeer Influenced and Corrupt Organizations statute (RICO), *18 U.S.C.S. §§ 1962(c)* and *1962(a)*. The dairy farmers purchased a feed storage unit from the subsidiary that allowed the feed to be contaminated and poisoned the farmers' herd.

Overview

After their dairy herd became ill and died from eating contaminated feed, the farmers filed suit against the corporation that made the unit and the subsidiary that sold the unit. The corporation and the subsidiary both filed motions for summary judgment. The court denied in part and granted in part the motions. The court found that the relevant causal connection was between the problems on the dairy farm and the unit, and the farmers need not have known exactly why or how the units harmed the feed. The farmers should have discovered the pattern the same date they should have discovered the source of their injury. A jury must have decided when the farmers should have discovered the source of their injury. The court certified a question to the Michigan Supreme Court by separate order: "Under Michigan law, is it possible for a corporation to commit civil conspiracy with its wholly owned subsidiary?" The corporation's and subsidiary's motions for summary judgment as to one count under the Racketeer Influenced and Corrupt Organizations Act, *18 U.S.C.S. § 1962(a)*, was granted.

Outcome

The court denied in part and granted in part the corporation's and subsidiary's motions for summary judgment in the farmers' fraud, conspiracy to commit fraud, and violations of the Racketeer Influenced and Corrupt Organizations Act claims. The court also certified a question to the state supreme court.

LexisNexis® Headnotes

Civil Procedure > ... > Summary Judgment > Burdens of Proof > Movant Persuasion & Proof

Governments > Legislation > Statute of Limitations > Pleadings & Proof

Civil Procedure > ... > Summary Judgment > Burdens of Proof > General Overview

Civil Procedure > Judgments > Summary Judgment > Partial Summary Judgment

Civil Procedure > ... > Summary Judgment > Motions for Summary Judgment > Timing of Motions & Responses

Governments > Legislation > Statute of Limitations > General Overview

Governments > Legislation > Statute of Limitations > Time Limitations

HN1[] Burdens of Proof, Movant Persuasion & Proof

All evidence in a motion for summary judgment must be considered in the light most favorable to the non-moving party, under Michigan law, the plaintiff has the burden to establish an exception to the statute of limitations.

Governments > Legislation > Statute of Limitations > Time Limitations

Torts > ... > Statute of Limitations > Tolling > Discovery Rule

Governments > Legislation > Statute of Limitations > General Overview

Torts > Business Torts > Fraud & Misrepresentation > General Overview

Torts > Procedural Matters > Statute of Limitations > General Overview

HN2[] Statute of Limitations, Time Limitations

The statute of limitations for a conspiracy to commit fraud claim is six years. *Mich. Comp. Laws. § 600.5813*.

Business & Corporate Law > Distributorships & Franchises > Causes of Action > Fraud & Misrepresentation

Criminal Law & Procedure > ... > Racketeering > Racketeer Influenced & Corrupt Organizations Act > General Overview

Governments > Legislation > Statute of Limitations > Time Limitations

Governments > Legislation > Statute of Limitations > General Overview

HN3[] Causes of Action, Fraud & Misrepresentation

The statute of limitations for Racketeer Influenced and Corrupt Organizations, *18 U.S.C.S. § 1962*, claims is four years.

Criminal Law & Procedure > Appeals > Appellate Jurisdiction > Certified Questions

Governments > Courts > Judicial Precedent

HN4[] Appellate Jurisdiction, Certified Questions

Mich. Ct. R. 7.305(B) states that when a federal court considers a question that Michigan law may resolve and that is not controlled by Michigan Supreme Court precedent, the court may on its own initiative certify the question to the Michigan Supreme Court. A certificated may be prepared by stipulation or at the certifying court's direction, and must contain (a) the case title; (b) a factual statement; and (c) the question to be answered. The presiding judge must sign it, and the clerk must certify it under seal. With the certificate, the parties shall submit (a) briefs conforming with Mich. Ct. R. 7.306 and 7.309; (b) a joint appendix conforming with Mich. Ct. R. 7.307, 7.308 and 7.309; and (c) request for oral argument, if oral argument is desired. If the Supreme Court responds to the question certified, the clerk shall send a copy to the certifying court under seal. The Supreme Court shall divide costs equally among the parties, subject to redistribution by the certifying court.

Business & Corporate Law > Distributorships & Franchises > Causes of Action > Fraud & Misrepresentation

Criminal Law & Procedure > ... > Racketeering > Racketeer Influenced & Corrupt Organizations Act > General Overview

HN5 **Causes of Action, Fraud & Misrepresentation**

A "reinvestment" theory, without allegations of distinct harm from that reinvestment, will not support a 18 U.S.C.S. § 1962(a) count.

Business & Corporate Law > ... > Management Duties & Liabilities > Rights of Partners > General Overview

Criminal Law & Procedure > ... > Racketeering > Racketeer Influenced & Corrupt Organizations Act > General Overview

HN6 **Management Duties & Liabilities, Rights of Partners**

18 U.S.C.S. § 1962(c) prohibits any person associated with any enterprise from conducting or participating in the conduct of such enterprise's affairs through a pattern of racketeering activity. 18 U.S.C.S. § 1961(3) defines "person" as any individual or entity capable of holding an interest in property. § 1961(4) defines "enterprise" as any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact, although not a legal entity.

Criminal Law & Procedure > ... > Racketeering > Racketeer Influenced & Corrupt Organizations Act > General Overview

HN7 **Racketeering, Racketeer Influenced & Corrupt Organizations Act**

18 U.S.C.S. § 1962(c) prohibits "persons" from doing certain acts, and therefore, the alleged persons in a Racketeer Influenced and Corrupt Organizations Act (RICO), claim will be the defendants. "Persons" are liable under this statute, not "enterprises," for the RICO 'person' is the active wrongdoer, while the RICO "enterprise" is the passive instrumentality through which the person performs the predicate acts.

Business & Corporate Law > Distributorships & Franchises > Causes of Action > Fraud & Misrepresentation

Criminal Law & Procedure > ... > Racketeering > Racketeer Influenced & Corrupt Organizations Act > General Overview

HN8 **Causes of Action, Fraud & Misrepresentation**

The three requirements of a Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C.S. § 1962(c), enterprise defendants propose is: (1) there must be a shared purpose among the enterprise's members or participants; (2) the enterprise must be an ongoing organization with some sort of structure; (3) there must be an ascertainable structure distinct from that inherent in the pattern of racketeering activity.

Criminal Law & Procedure > ... > Racketeering > Racketeer Influenced & Corrupt Organizations Act > General Overview

HN9 **Racketeering, Racketeer Influenced & Corrupt Organizations Act**

The Racketeer Influenced and Corrupt Organizations Act is targeted at the element which makes the commission of some predicate crimes more dangerous than others, and that is the use of otherwise legitimate enterprises as a tool to commit predicate crimes. Use of such passive instruments makes those crimes harder to detect, and often enhances the scope and profitability of racketeering operations.

Criminal Law & Procedure > ... > Racketeering > Racketeer Influenced & Corrupt Organizations Act > General Overview

HN10[] **Racketeering, Racketeer Influenced & Corrupt Organizations Act**

It is not necessary to show that the enterprise has some function wholly unrelated to the racketeering activity, but rather that it has an existence beyond that which is necessary merely to commit each of the acts charged as predicate racketeering offenses.

Judges: [*1] ENSLEN

Opinion by: RICHARD A. ENSLEN

Opinion

HON. RICHARD A. ENSLEN

OPINION

Presently before the Court are two summary judgment motions; one submitted by each defendant. Because the issues raised by each apply to both defendants, I will consider both motions in this Opinion. The standard for summary judgment pursuant to *Fed. R. Civ. P. 56* is well-known, and I will not repeat it here.

Facts

Plaintiffs are Michigan dairy farmers. Defendant A.O. Smith Harvestore Products, Inc. ("Harvestore") is a wholly owned subsidiary of defendant A.O. Smith Corp. ("the Smith Corporation"). Both entities are in the business of designing, manufacturing, marketing and selling farm machinery and equipment.

In July of 1977, plaintiffs brought their first "Harvestore system," a feed storage structure designed to hold high moisture corn, and they began using it that fall. The system's highlighted feature was its alleged ability to prevent oxygen from coming into contact with the feed. This capacity is referred to as its "oxygen-limiting" feature, and it was purported to increase the nutritional value of feed. On or about October of 1980, plaintiffs bought their second Harvestore system. This one was designed **[*2]** for the storage of haylage. Haylage is the principle staple in dairy cows' ration; corn is used to a lesser extent. The sales representative who promoted and sold the products to plaintiffs is named Earl Smalligan. He was associated with a company named Michigan Glass Lined Storage, which is not a party to this action.

At some point after the installation of the second Harvestore system, plaintiffs' dairy herd began to suffer health problems. These problems affected production and, therefore, profits. Plaintiffs allege that when they recognized these problems they set about identifying their source. In 1990, they stopped using the Harvestore systems for a trial period, and the health of the herd improved. Plaintiffs allege that this is because defendants' storage silos are not oxygen-limiting. Instead, they allow oxygen to mix with the feed, causing spoilage which is not detectable by visual inspection, but significantly reduces the nutritional value of the feed. Plaintiffs' farm went bankrupt in 1990.

Plaintiffs' diversity claim contains five counts, and is governed by Michigan law. Count One alleges that through its promotional materials and its authorized sales representative, **[*3]** Harvestore fraudulently represented that the Harvestore system was oxyen-limiting. As a result, this Count asserts, the health and productivity of plaintiffs' herd, and plaintiffs' profits, suffered. Count Two makes the same fraud allegations against the Smith Corporation. Count Three alleges a conspiracy between the two defendants to commit fraud. Count Four alleges a violation of the Racketeer Influenced and Corrupt Organizations statute ("RICO"), *18 U.S.C. § 1962(c)*, and Count Five alleges violation of RICO *section 1962(a)*.

Defendants' Statute or Limitations Claim

Defendants first argue that they are entitled to summary judgment on all counts because the statute of limitations has run on plaintiffs' claims. I will consider defendants' argument on plaintiffs' fraud, conspiracy to commit fraud, and RICO claims separately.

Counts I and II: Common Law Fraud

The statute of limitations for plaintiffs' fraud claims is six years. *M.C.L. § 600.5813*. The present complaint was filed on March 8, 1991. Therefore, if plaintiffs' claim accrued earlier than March 8, 1985, their claim is time-barred. Although *HN1*[] all evidence in a motion for

summary **[*4]** judgment must be considered in the light most favorable to the non-moving party, under Michigan law, the plaintiff has the burden to establish an exception to the statute of limitations. *McLaughlin v. Aetna Life Insurance Co., 221 Mich. 479, 483, 191 N.W. 224 (1922)*; *1500 North Woodward Building v. U.S. Mineral Products Co.,* Slip Op., Case No. 91-CV-72491-DT, at 16 (E.D. Mich. Feb. 24, 1992) (Defendants' Ex. G).

In *Agristor v. Van Sickle, 967 F.2d 233 (6th Cir. 1992)*, a case involving the same attorneys and the instant defendants, the court held that the "discovery accrual standard" applies to this type of fraud action in Michigan. The *Van Sickle* court first describes this standard as dictating that plaintiffs' cause of action accrued when they knew or should have known of their injury. *Id. at 238*. However, in its case-specific analysis, it describes the point at which plaintiffs "should have known" as the time when "a reasonable person might [] have connected the problems on the dairy farm to the Harvestore silos, and therefore a reasonable person might [] have known of the alleged fraud . . .." **[*5]** *Id. at 240*.

This language clarifies two points. The first is that defendants are mistaken when they imply that they must only show when plaintiffs knew that their herd was suffering. The causal connection between the feed storage system and the problems is critical. However, I believe that plaintiffs also are mistaken when they assert that the relevant moment is when they identified the connection between the herd's health problems and the failure of the silos to limit oxygen intake. The relevant causal connection is between the "problems on the dairy farm [and] the Harvestore silos," *id.;* the plaintiffs need not know exactly why or how the silos harmed the feed.

The *Van Sickle* court went on to determine that a reasonable trier of fact could find that plaintiffs discovered or should have discovered the connection between their problems and the Harvestore system within the statute of limitations period. Therefore, the trial court's grant of summary judgment in favor of defendants on the statute of limitations issue was inappropriate. *See also, Agristor Leasing v. Saylor, 803 F.2d 1401, 1405-06 (6th Cir. 1986)*, **[*6]** *cert. denied, 493 U.S. 919 (1989)*; (remanding case for retrial; trial court should have submitted statute of limitations question to jury in form of interrogatories due to conflicting evidence on date of plaintiffs' actual discovery that Harvestore system caused herd's problems); *Hines v. A.O. Smith Harvestore Products, Inc., 880 F.2d 995 (8th Cir. 1989)* (reversing trial court's grant of summary judgment; evidentiary conflicts rendered when plaintiffs knew or should have known of defects a jury question); *Mohr v. A.O. Smith Corp.,* Slip Op., Case. No. 88-cv-10043-BC (E.D. Mich. March 25, 1993) (adopting magistrate's recommendation that statute of limitations issue should be left to the jury).

According to the uncontroverted affidavit of Arthur Thiss, he did not have actual knowledge of the connection between the injury to his herd and the Harvestore system until 1989 or 1990, well within the limitations period. Therefore, the only disputed issue is when plaintiffs should have learned of the connection.

Van Sickle dictates that the "should have learned" point is measured by a reasonable person standard. The appellate **[*7]** panel in *Van Sickle* affirmed the trial court's finding that the plaintiffs should have learned of the connection between their problems and the Harvestore system within two years of its installation. "Although [the *Van sickle* plaintiffs] experienced serious problems for many years, it was not until mid-1982 that the dairy herd experienced dramatic calf losses . . .." *967 F.2d at 240*. The panel held "as a matter of law, that a reasonable person should have determined that the calf losses of mid-1982 were caused by the 'poisoned' grain and hay." [1] *967 F.2d at 241*.

Therefore, the question posed by defendants' motion **[*8]** is whether a reasonable person, considering the circumstance on the Thisses' farm, should have determined the link between the herd's poor health and productivity and the first Harvestore system (corn), within seven and one-half years of its installation, and the second system (haylage), within four and one-half years of installation.

There is significant evidence that shortly after installation of the Harvestore systems, plaintiffs became aware of production problems. In their amended complaint plaintiffs allege that in the months after commencing use of the second Harvestore system plaintiffs' herd began to experience a number of problems. These included lower milk production,

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[1] However, because a reasonable trier of fact could also find the reverse, the court noted that defendants remained free to present evidence to the jury at trial to prove that plaintiffs knew or should have known of the alleged misrepresentations earlier, and that their claim was therefore time-barred. *Id. at 240*.

breeding problems, general unthrifty physical condition, and higher than normal cull rates based on production and health. Am. Comp. para. 26. In a deposition, Mr. Thiss asserted that the 1980 silo caused the four maladies listed above in the early 1980s. Defendants' Ex. 4 at 21.

However, according to the affidavit of Arthur Thiss, the productivity of a dairy farm ebbs and flows in response to numerous factors, including the herd's natural lactation cycles. He avers that although he was aware of specific production **[*9]** problems, the farm's overall "downward trend was not apparent until the late 1980's." Thiss Affidavit, Ex. 22, para. 7, para. 10. The Thisses looked for explanations for the downturn in production in several places. This investigation included consultation with their Harvestore sales representative. Ex. 22, para. 11. Unfortunately, the date of this consultation is not clear. [2]

Neither Mr. Thiss nor farmhand John Van Oordt noticed anything wrong with the feed; it looked and smelled fine, and the cows generally ate it. Plaintiffs' Ex. 22, para. 10; J. Van Oordt dep., Ex. 24, **[*10]** pp. 27-28. These observations are in accord with those of defendants. A 1967 internal memorandum of defendants states although oxygen could have detrimental effects on feed value, "it would be very difficult to establish any relation between amount of oxygen admitted and such additional loss in feed value." Ex. 29, p. 3.

There is a conflict between the parties' experts as to when plaintiffs could have learned about the oxygen damage to their feed through testing. Plaintiffs have submitted the affidavit of Lawrence Scott, an animal nutritionist and feed chemist. He avers that

> "the changes in protein content and complexing of the carbohydrate fraction of the feedstuffs with protein residues was not disclosed by the normal testing methodologies employed during the late 1970s and early 1980s. Thus the feedstuffs as analyzed might reflect an adequate or acceptable level of protein and energy. However, what the normal analytical tests would not disclose are that the changes that had taken place in the protein and carbohydrate composition of the feedstuffs made them in whole or in part unavailable for assimilation or utilization by the animals consuming the feed."

Ex. 23, para. 3-4. **[*11]** However, defendants respond with the affidavit of Robert Davis, a doctor of veterinary medicine. He states that a commonly used indicator of the excessive exposure of ensiled forage to oxygen is the amount of "acid detergent insoluble nitrogen" ("ADIN") in the feed. Dr. Davis further states that four laboratory feed analyses of feed stored on the Thiss farm between 1980 and 1985 include data reflective of the amount of ADIN or other indicators of oxygen damage. Defendants' Reply Brief, Ex. D.

Consideration of the evidence described above leads me to conclude that there are disputed material facts which preclude summary judgment on this issue. My conclusion that I cannot, as a matter of law, identify the date a reasonable person on the Thisses farm should have recognized the alleged fraud, differs from the conclusion of the trial court in *Van Sickle.* [3] This is because the facts which led the *Van Sickle* trial court to conclude that plaintiffs reasonably should have known about their silos' defects stand in contrast to the facts recited above.

[*12] Like the Thisses, the *Van Sickle* plaintiffs noticed a decline in milk and butterfat and reproductive problems. However, unlike the Thisses, the *Van Sickle* plaintiffs noticed a moldy smell emanating from a silo as early as 1974, and had visual confirmation that they were feeding their herd moldy feed. This was the first symptom that directly linked the herd's health and productivity problems with the Harvestore systems. The second link, also missing in the present case, is the *Van sickle* plaintiff's observation that cows fed from the Harvestore silos tended to produce stillborn calves. Though the two cases share many facts, the trial court's conclusion that the Van Sickle's should have known about the alleged fraud within two years of the purchase of their second silo relied heavily on these links. Ex. 27, *West Marion Dairy Farms v. A.O. Smith Corp.,* Slip Op. Case No. 86-CV-75448-DT (E.D. Mich. Sept. 10, 1990).

In the present matter, although there is a significant

[2] Mr. Thiss' affidavit does not give a date for this consultation. Defendants assert that Mr. Smalligan retired in 1981, and therefore it had to be before that time. There is one reference to consultation with Mr. Smalligan in a deposition of Mr. Thiss. It occurred shortly after the Thisses bought their first silo, and it "as prompted by plaintiffs' recognition that their butterfat content had not increased as promised. Defendants' Ex. 2, p. 69.

[3] On appeal, the plaintiff is identified as Van sickle. At trial, the plaintiff was identified as West Marion Farms, which is the corporation the Van Sickle family runs. For clarity's sake, when referring to either the trial or appellate level, I will identify it as *Van Sickle.*

amount of evidence concerning the plaintiffs' notice that something was wrong, there is not sufficient evidence linking those problems with the Harvestore systems for me to rule as a matter of law that they **[*13]** should have realized the connection on a particular date. Therefore, resolution of the issue of when a reasonable person would have known of the alleged fraud in the circumstances described above will be left to the jury. Defendants' motion for summary judgment on this point will be denied.

Count III: Conspiracy to Commit Fraud

This Count of plaintiffs' complaint alleges that defendants knew that the Harvestore system was not oxygen-limiting, as advertised, and that they conspired to conceal this information and continued to make representations to customers which they knew were false.

HN2[⬆] The statute of limitations for this claim is six years. *M.C.L. § 600.5813*. Defendants assert that the conspiracy cause of action accrues at the same time as the underlying tort. [4] If defendants are correct, this issue should be resolved by the jury. Plaintiffs assert that Michigan adheres to an "actual discovery" rule to measure accrual of a cause of action for conspiracy. If plaintiffs are correct, the accrual date is clearly within the limitations period.

[*14] Review of Michigan law has convinced me that Michigan courts would apply the same tolling standard to a conspiracy count as they would to the underlying overt act. *Gilbert v. Grand Trunk, 95 Mich. App. 308, 290 N.W.2d 426 (1980)*; *Roche v. Blair, 305 Mich. 608, 9 N.W.2d 861 (1943)*. Therefore, while I do not believe that plaintiffs' assertion of an "actual discovery" rule is correct, I also believe that defendants' assertion that the causes of action accrue at the same time is overbroad. They accrue in the same manner.

That means that plaintiffs' conspiracy to commit fraud count accrued when plaintiffs knew or should have known of the alleged conspiracy to commit fraud. There is virtually no evidence before me on this point. Therefore, at this stage of the proceedings, defendants' motion for summary judgment on Count III must be denied.

Counts IV and V: RICO

HN3[⬆] The statute of limitations for RICO claims is four years. *Agency Holding Corp. v. Malley-Duff & Assoc., Inc., 483 U.S. 143, 97 L. Ed. 2d 121, 107 S. Ct. 2759 (1987)*. The present complaint was filed on March 8, 1991. Therefore, if plaintiffs' RICO claims accrued earlier than March 8, 1987, **[*15]** their claim is time-barred.

In *Van Sickle,* the Sixth Circuit panel reviewed the Circuit split on when RICO causes of action accrue. The panel rejected one method, the last-predicate act rule. However, it determined that it did not need to decide between the two remaining methods, because the plaintiffs' RICO claim was time-barred by each. The first of the two is the discovery rule, which focuses on when plaintiffs knew or should have known of defendants' fraudulent scheme. The second is a "compromise rule," also referred to as the *Bivens* rule, which holds that a civil RICO action accrues as soon as the plaintiff discovers, or reasonably should have discovered, both the existence and source of the injury, and that the injury is part of a pattern. *Van Sickle, 967 F.2d at 241*, citing *Bivens Gardens Office Bldg., Inc., v. Barnett Bank of Florida, Inc., 906 F.2d 1546, 1554-55 (11th Cir. 1990)*, *cert. denied, 111 S. Ct. 1695 (1991)*.

The *Van Sickle* court found that it did not have to choose between the latter two standards. Instead, it held that in the factual circumstance at bar, plaintiffs **[*16]** should have discovered the pattern of fraud at the same time they discovered the fraud. 957 F.2d at 242. However, it reached this conclusion by analyzing the more "liberal" standard, the *Bivens* rule, first. Because plaintiffs' claim was time-barred by that standard, it would also have been barred by the discovery rule. Given the similarity of the facts and the claims in these cases, and the lack of guidance on the appropriate accrual rule, I will follow the Sixth Circuit's approach in *Van Sickle,* and apply the *Bivens* rule for determining when plaintiffs' RICO claims accrued.

Similarly, I will apply the approach of the Sixth Circuit in my analysis of the facts. The *Van Sickle* panel held that the same facts that did or should have alerted the plaintiffs to the alleged injury and its source also should have alerted them that the alleged misrepresentations

[4] Although defendants asserted that their statute of limitations basis for summary judgment applied to all counts, they did not analyze the conspiracy count in their motion. Plaintiffs addressed it briefly, and then defendants made the contention above in their reply. As a result, I note for the record that this issue has not been argued very thoroughly.

were part of a pattern. It held that "as a matter of law, [plaintiff] should have determined that the representations were part of pattern at the same time it should have discovered that the silos caused the alleged problems on the dairy farm." *967 F.2d at 242*.

As **[*17]** a result, I hold that plaintiffs should have discovered the pattern the same date they should have discovered the source of their injury. As I ruled in regard to the fraud counts, the jury must decide when plaintiffs should have discovered the source of their injury. If this date is before March 8, 1987, then plaintiffs' RICO counts are time-barred. If it is not, these counts are viable.

Defendants' Substantive Attack on Count III, Conspiracy to Defraud

Defendants argue that they are entitled to summary judgment on plaintiffs' conspiracy count because defendants assert, Smith Corp. cannot conspire with its subsidiary as a matter of law. Plaintiffs argue that it can, but, as both parties concede, there is no Michigan law to instruct the Court on whether Michigan courts would allow plaintiffs to proceed on this theory. Therefore, the arguments on each side are based on law from other jurisdictions.

Defendants' motion forces me to consider a state law count with no governing law. A federal judge sitting in diversity can attempt to predict the course of state law, but there is no basis for me to predict what Michigan courts would do in this situation. I refuse both parties' **[*18]** invitation to make what is essentially a policy decision between competing doctrines.

Instead, I must turn to the Michigan Supreme Court for guidance. Pursuant to Michigan Rule of Court 7.305(B), [5] I will certify the following question to the Michigan Supreme Court by separate order; "Under Michigan law, is it possible for a corporation to commit civil conspiracy with its wholly owned subsidiary?"

[*19] My proposed certification order is attached to this opinion. I will delay sending it for ten days after the issuance of this opinion. If either party has an objection to the phrasing or content of the certification order, it should lodge it with the Court within that ten-day period.

As a result of the foregoing, defendants' motion on Count III will be denied without prejudice. If the Supreme Court accepts the certified question for review, I will reconsider the motion in light of the answer it returns. If the Supreme Court declines to answer the question, I will reconsider the motion on the briefs already submitted, and make an *"Erie* guess," *Erie R.R. Co. v. Tompkins, 304 U.S. 64, 82 L. Ed. 1188, 58 S. Ct. 817 (1938)*, as to how the state's highest court would decide the issue.

Defendants' Substantive Attacks on Counts IV & V, the RICO Counts

Defendants offer three grounds in support of their motion for summary judgment on plaintiffs' RICO counts. First, they argue that the Thisses cannot establish the requisite "investment injury" under *§ 1962(a)*. Secondly, they argue that the Thisses' *§ 1962(c)* claim is deficient because the Thisses' alleged association-in-fact enterprise **[*20]** is not distinct from the alleged persons. Thirdly, they argue that the Thisses' alleged association-in-fact enterprise is not

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[5] *HN4*[↑] Rule 7.305(B) states:

Rule 7.305 Certified Questions

(B) From Other Courts

(1) When a federal court . . . considers a question that Michigan law may resolve and that is not controlled by Michigan Supreme Court precedent, the court may on its own initiative . . . certify the question to the Michigan Supreme Court.

(2) A certificated may be prepared by stipulation or at the certifying court's direction, and must contain

(a) the case title;

(b) a factual statement; and

(c) the question to be answered.

The presiding judge must sign it, and the clerk must certify it under seal.

(3) With the certificate, the parties shall submit

(a) briefs conforming with MCR 7.306 and 7.309;

(b) a joint appendix conforming with MCR 7.307, 7.308 and 7.309; and

(c) request for oral argument, if oral argument is desired.

(4) If the Supreme Court responds to the question certified, the clerk shall send a copy to the certifying court under seal.

(5) The Supreme Court shall divide costs equally among the parties, subject to redistribution by the certifying court.

distinct from the alleged pattern of racketeering activity. I will address each argument in turn.

Investment Injury Under § 1962(a)

Count V of plaintiffs' complaint alleges that defendants participated in a pattern of racketeering activity and invested the monies generated to fund the continuing marketing and sale of Harvestore systems to farmers across the country between 1973 and 1986.

In *Craighead v. E.F. Hutton & Co., Inc., 899 F.2d 485 (6th Cir. 1990)*, the court stated,

> If plaintiffs had alleged the necessary predicate acts, their *section 1962(a)* claim would still fail because they have not alleged injuries stemming directly from the defendants' alleged use or investment of their illegally obtained income. Unlike *section 1962(c)*, subsection (a) requires such a separate and traceable injury, and plaintiffs have alleged only injuries traceable to the alleged predicate acts.

Id. at 494. Although plaintiffs are correct to point out that this passage is dicta, it is the best guidance **[*21]** the appellate court has given to date.

The harm plaintiffs claim cannot be fairly characterized as a "separate and traceable injury" which "stems directly" from defendants' alleged use or investment of illegally obtained income. The harm they claim flowed from the allegedly fraudulent representations which led them to buy the Harvestore, and the subsequent damage it allegedly caused. ***HN5***[⬆] A "reinvestment" theory, without allegations of distinct harm from that reinvestment, will not support a *§ 1962(a)* count. *Berent v. Kemper Corp., 780 F. Supp. 431, 446 (E.D. Mich. 1991)*, *aff'd on other grounds, 973 F.2d 1291 (6th Cir. 1992)*; *Brittingham v. Mobil Corp., 943 F.2d 297, 305 (3d Cir. 1991)*. As a result, defendants' motion for summary judgment as to Count V will he granted.

The Distinction Between the Alleged Association-in-Fact and Alleged Persons Under § 1962(c)

In relevant part, ***HN6***[⬆] *18 U.S.C. § 1962(c)* prohibits any "person . . . associated with any enterprise" from conducting or participating in the conduct of "such enterprise's affairs through a pattern **[*22]** of racketeering activity." *§ 1961(3)* defines "person" as any individual or entity capable of holding an interest in property. *§ 1961(4)* defines "enterprise" as any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact, although not a legal entity.

Plaintiffs allege that Smith Corp. (the parent corporation) and Harvestore (its subsidiary) are the RICO persons, and they allege that Smith Corp., Harvestore, and Michigan Glass comprise an association-in-fact "enterprise." ***HN7***[⬆] *§ 1962(c)* prohibits "persons" from doing certain acts, and therefore, the alleged persons in a RICO claim will be the defendants. "Persons" are liable under this statute, not "enterprises," for "the RICO 'person' is the active wrongdoer, while the RICO 'enterprise' is the passive instrumentality through which the person performs the predicate acts." *Salvador v. Mazzocone, 686 F. Supp. 528, 530 (E.D. Pa. 1987)*.

Defendants argue that the RICO persons and the RICO enterprise alleged by plaintiffs are not sufficiently separate to sustain a *§ 1962(c)* claim. Defendants' position is that the alleged enterprise is nothing **[*23]** more than a combination of entities affiliated with the same corporation. Any actions taken by Harvestore, as a subsidiary of Smith Corp., and Michigan Glass, as an agent of Smith Corp., would have been on behalf of Smith Corp. Therefore, defendants assert, the "passive" association-in-fact comprised by this parent corporation, its subsidiary and its agent, is not sufficiently distinct from the "active" RICO persons.

The best guidance the Sixth Circuit has offered on the requisite degree of distinction between a RICO person and a RICO enterprise is found in *Fleischhauer v. Feltner, 879 F.2d 1290 (6th Cir. 1989)*, *cert. denied, 493 U.S. 1074, 107 L. Ed. 2d 1029, 110 S. Ct. 1122 (1990)*. In *Fleischhauer,* defendants challenged a jury verdict in favor of plaintiffs. The Sixth Circuit panel rejected defendants' attack on plaintiffs' *§ 1962(c)* claim, and held that the RICO persons were sufficiently distinct from the RICO enterprises.

> We believe the pleadings adequately state that each of the five defendants was a "person" and together they formed a racketeering "enterprise." . . . Appellant contends that the "enterprise" alleged and proven was not sufficiently **[*24]** distinct from the "person" -- in other words, because Feltner owned 100% of the corporations, they were the equivalent of his "right arm" with whom he could not "conspire." [citation's omitted] Such argument has no merit; the fact that Feltner owned 100% of the

corporations' shares does not vitiate the fact that these corporations were separate legal entities.

879 F.2d at 1297.

A case from within the district, *In* Re Tucker Freight Lines Inc., 789 F. Supp. 884, 893 (W.D. Mich. 1991), also provides some guidance. In that case, one of plaintiffs' § 1962(c) arguments was that a company named Tucker conducted the affairs of an association of itself, its owner Central, and Central's parent company, Centra. *Id. at 892*. The Court rejected this alignment. It found that Tucker did not violate subsection (c) by conducting the affairs of an association of itself and its controlling agents, because the affairs conducted were not distinct from Tucker's. In support of this proposition, the court quoted *Yellow Bus Lines v. Drivers Chauffeurs & Helpers Local Union 639, 280 U.S. App. D.C. 60, 883 F.2d 132, 141 (D.C. Cir. 1989)* **[*25]** for the proposition that "'an organization cannot join with its own meters to do that which it normally does and thereby form an enterprise separate and apart from itself.'" *Id. at 892*.

The difference between *Tucker* and the present case is that the enterprise alleged by plaintiffs' includes an entity distinct from the parent and subsidiary corporation. That is Glass Lined, which plaintiffs do not allege was aware that the representations that Harvestore and Smith Corp. instructed it to make were fraudulent. Plaintiffs allege that "Defendants are the perpetrators of the racketeering activity, using Michigan Glass Lined Storage and the enterprise itself as the conduit, or "passive instrument" of this activity." Smith Corp.'s Ex. 3, Plaintiffs' RICO Case Statement, Response to Question 6(f).

This distinction leads me to conclude that the law of this Circuit does not entitle defendants to summary judgment on plaintiffs'§ 1962(c) claim. *Fleischhauer* approved the use of the same entities as both persons and participants in an enterprise. I also believe it stands for the proposition that close ties don't prevent separate legal entities from forming an enterprise. However, even **[*26]** if that were the case, it appears that plaintiffs could sustain a § 1963(c) claim by alleging that Smith Corp. and Harvestore are persons associated with Glass Lined, who participated in the affairs of Glass Lined in a pattern of racketeering activity. Though plaintiffs' pleadings are fairly opaque, I believe that this assertion is clearly made in the section of their RICO Case Statement cited above.

As a result, I find that the entities plaintiffs' allege as persons and as an enterprise in fact are sufficiently distinct, and defendants ore not entitled to judgment as a matter of law on this basis.

The Distinction Between an Association-in-Fact Enterprise and the Alleged Pattern of Racketeering Activity

Defendants' last argument first asks the Court to adopt a three part test to define whether the RICO enterprise and the alleged pattern of racketeering are sufficiently separate. The Circuits which have adopted variations of this test have done so in response to the Supreme Court's statement that a RICO enterprise must be "separate and apart from the pattern of activity in which it engages." *United states* v. *Turkette, 452 U.S. 576, 583, 69 L. Ed. 2d 246, 101 S. Ct. 2524 (1981)*. **[*27]** The Sixth Circuit has not addressed the issue. Secondly, defendants invite the Court to find that plaintiffs fail the third prong of the proposed test, and therefore their RICO claims must be dismissed.

HN8[⬆] The three requirements of a RICO enterprise defendants propose is: (1) there must be a shared purpose among the enterprise's members or participants; (2) the enterprise must be an ongoing organization with some sort of structure; (3) there must be an ascertainable structure distinct from that inherent in the pattern of racketeering activity. I decline to either adopt or reject this test in this Opinion. However, were the Court to adopt this test, I would find that plaintiffs have satisfied the all three prongs.

Defendants only allege that plaintiffs fail the third prong, so I will not address the first two. The purpose of the third prong is to prevent the bootstrapping which occurs when persons who come together to commit predicate crimes are charged with an additional RICO violation solely on the basis of that affiliation. ***HN9***[⬆] RICO is targeted at the element which makes the commission of some predicate crimes more dangerous than others, and that is the use of otherwise legitimate enterprises **[*28]** as a tool to commit predicate crimes. Use of such passive instruments makes those crimes harder to detect, and often enhances the scope and profitability of racketeering operations. As a result, Congress saw fit to penalize those who commit predicate crimes through use of an enterprise more heavily than those who simply commit predicate acts.

Therefore, in order to satisfy the third prong of the proposed test, the entity alleged as the enterprise or association-in-fact must do something other than commit predicate crimes. Put another way, I believe the

question is whether the members of the association-in-fact came together solely for the purpose of committing the predicate crimes, or if their affiliation has substantial additional purposes. The Third Circuit has explained its understanding of the requirement that the entity is separate from the pattern of racketeering activity as follows:

> HN10[] It is not necessary to show that the enterprise has some function wholly unrelated to the racketeering activity, but rather that it has an existence beyond that which is necessary merely to commit each of the acts charged as predicate racketeering offenses.

United States v. Riccobene, 709 F.2d 214 **[*29]** (3rd cir.), *cert. denied, 464 U.S. 849 (1983)*. As applied to this case, I believe the question is whether the alleged association-in-fact of Smith Corp., Harvestore and Glass Lined came together solely for the purpose of committing the alleged wire and mail fraud.

The answer is no. In addition to marketing the Harvestore System through allegedly fraudulent representations, these entities also manufacture the product. Additionally, the line may be drawn between products. The members of the association-in-fact also joined to manufacture and market other products. I am unpersuaded by the affidavit of Donald Dunaway, which asserts that all of Harvestore's products are sold as one "system." It might be reasonable to accept this argument as applied to the products which enhance and facilitate the use of the featured feed silos. However, even if this characterization were accepted with the feed containment units, I do not believe that it can be extended to the Slurrystore, which, along with all of its associated products, is used to convert manure into useable fertilizer.

In summary, were the Court to adopt the test defendants propose to insure separateness **[*30]** of the alleged RICO enterprise and the alleged pattern of racketeering, I believe plaintiffs would satisfy it. Therefore, defendants are not entitled to a judgment as a matter of law on this point.

Dated in Kalamazoo, MI:

June 29, 1993

RICHARD A. ENSLEN

United States District Judge

ORDER

In accordance with the Opinion entered on this date;

IT IS HEREBY ORDERED that defendant A.O. Smith Harvestore Products Inc.'s motion for summary judgment on statute of limitations grounds (dkt. #188), filed February 16, 1993, is **DENIED.**

IT IS FURTHER ORDERED that defendant A.O. Smith Corporation's motion for summary judgment (dkt. #186), filed February 16, 1993, is **GRANTED in part, DENIED with prejudice in part, and denied without prejudice in part.**

IT IS FURTHER ORDERED that Count V of plaintiffs' complaint is **DISMISSED.**

Dated in Kalamazoo, MI:

June 29, 1993

RICHARD A. ENSLEN

United States District Judge

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