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Notes from RICO Class Action Wars Against Pharmaceutical Companies

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Takeaway: There are two ways to beat a class action – defeat class certification or defeat the class claims on the merits. Individual RICO actions tend to be complex and expensive to defend, and they increase a defendant's exposure, given that RICO's civil remedies include treble damages and fee-shifting. RICO class actions only add to the complexity, expense, and exposure. Accordingly, defendants in RICO class actions usually seek the dismissal of civil RICO claims at the earliest opportunity. Recent decisions in RICO class actions against pharmaceutical companies demonstrate how this strategy plays out.

In re: Testosterone Replacement Therapy Products Liability Litigation

In a prior post [*RICO class actions: To win certification, the RICO claims must be driven by defendant-specific and not class-member specific evidence; otherwise, individualized issues predominate*], we reported on the denial of class certification of a putative RICO class action in the case *In re: Testosterone Replacement Therapy Products Liability Litigation*, MDL No. 2545, Case Nos. 14 C 1748, 14 C 8857, 2018 WL 3586182 (N.D. Ill., July 26, 2018) ("MMO III"). In that MDL proceeding, which was consolidated in federal court in the Northern District of Illinois, thousands of individuals asserted personal injury claims against a number of defendants, consisting of manufacturers, promoters, and sellers of testosterone replacement therapy (TRT) drugs. The individual plaintiffs claimed that use of TRT drugs caused serious personal injuries, such as "cardiovascular and venous thromboembolic injuries." *Id*. at *1. One of the plaintiffs in the MDL, however, was Medical Mutual of Ohio (MMO), an insurer and third-party payor (TPP) seeking to represent a nationwide class of TPPs. MMO claimed that the TPPs suffered financial harm as the result of the defendants' fraudulent marketing schemes, by reimbursing medically unnecessary or even harmful TRT prescriptions.

MMO's original complaint was 434 pages long and alleged a number of nationwide schemes to defraud. It identified 23 defendants and sorted them into 7 different groups. As for the civil RICO claims, the complaint alleged a claim under 18 U.S.C. § 1962(c), as well as a claim for RICO conspiracy under 18 U.S.C. § 1962(d).

The defendants moved to dismiss, including for lack of standing and for failure to state a claim. The district court largely denied this motion, ruling that MMO had Article III standing to bring the RICO claims, that MMO had sufficiently alleged RICO proximate cause, and that MMO had sufficiently alleged a RICO conspiracy. But the district court agreed that the fraud-based predicate acts (mail and wire fraud) had not been alleged with sufficient particularity and gave MMO the opportunity to submit an amended complaint. Ultimately, some of MMO's RICO claims were allowed to proceed, and the case moved into the class certification discovery phase. See *In re Testosterone Replacement Therapy Prods.*

Liab. Litig., 159 F. Supp. 3d 898 (N.D. Ill. 2016) ("MMO I"), and *In re Testosterone Replacement Therapy Prods. Liab. Litig.*, Nos. 14 C 1748, 14 C 8857, MDL No. 2545, 2016 WL 4091620 (N.D. Ill. Aug. 2, 2016) ("MMO II").

After class discovery, MMO moved for class certification. But the district court denied MMO's motion for class certification, concluding that individualized issues predominated, because the evidence going to the key issues of exposure to and reliance on the alleged fraud – the evidence critical to a showing of RICO proximate cause – required class-member by class-member proof. *MMO III*, 2018 WL 3586182.

In a later ruling granting defendants' motion for summary judgment on MMO's individual RICO claims, the district court dismissed the claims on the merits, ruling on the basis of detailed summary judgment evidence that no reasonable jury could find that MMO relied on the defendants' alleged misrepresentations and, therefore, no reasonable jury could find that defendants' alleged fraud proximately caused MMO's alleged RICO injury – the reimbursement of TRT prescriptions. *In re: Testosterone Replacement Therapy Products Liability Litigation,* MDL No. 2545, Case Nos. 14 C 1748, 14 C 8857, 2019 WL 652217 (N.D. Ill., Feb. 14, 2019) ("*MMO IV*").

In re: Insulin Pricing Litigation

In another RICO case against pharmaceutical companies, *In re: Insulin Pricing Litigation*, Case No. 3:17-cv-0699-BRM-LHG, 2019 WL 643709 (D.N.J. Feb. 15, 2019), plaintiffs accused the defendants of engaging in a scheme to inflate the price of insulin products. The first case was filed in the District of New Jersey and was later consolidated with 5 other class actions. Ultimately, a First Amended Complaint was filed on behalf of 67 individuals seeking to represent a nationwide class of insulin consumers.

The pharmaceutical companies moved to dismiss the First Amended Complaint. The district court denied the motion in substantial part, ruling that plaintiffs adequately alleged RICO predicate acts, a RICO enterprise, proximate causation, and a RICO conspiracy. But the RICO claim fell short in one key respect – the indirect purchaser rule. The plaintiffs did not buy insulin products directly from the pharmaceutical companies. Indeed, "Plaintiffs [were] multiple purchasers down the distribution chain from Defendants and [were] quintessential indirect purchasers for the purposes of the indirect purchaser rule." 2019 WL 643709, at *9. Because plaintiffs did not and could not allege that they purchased the insulin products directly from the defendants, their claims were subject to dismissal without prejudice for lack of standing, as per the indirect purchaser rule established by the U.S. Supreme Court in the antitrust cases *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977) and *Kansas v. UtiliCorp United Inc.*, 497 U.S. 199 (1998).

These putative RICO class actions advanced creative and complicated RICO allegations against pharmaceutical companies. The defendants, however, were ultimately able to expose the soft underbellies of the RICO liability theories advanced in those cases. Attorneys defending RICO defendants – especially in RICO class actions – must always be looking for ways to win the dismissal of RICO claims. But, as especially demonstrated in *In re: Testosterone Replacement Therapy Products Liability Litigation*, the path to dismissal can be a long and difficult process.