Kilpatrick

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Ninth Circuit deepens circuit split in pharmaceutical industry-specific RICO proximate cause ruling

by James F. Bogan III

Takeaway: To have standing to assert a civil RICO claim, federal RICO's proximate cause requirement demands that there be a "direct relation" between the RICO violation and injury. In *Painters and Allied Trades District Council 82 Health Care Fund v. Takeda Pharmaceuticals Co.*, 943 F.3d 1243, 1259 (9th Cir. 2019), the Ninth Circuit joined the First and Third Circuits in holding that the RICO plaintiffs' alleged damages – flowing from an allegedly deceptive marketing scheme directed mostly at physicians who prescribe drugs – are "not too far removed" from a pharmaceutical company's alleged omissions and misrepresentations, and thus satisfied federal RICO's proximate cause requirement. In so doing, the Ninth Circuit deepened an existing split with the Seventh and Second Circuits.

In *Painters*, consumers and a third-party payor (TPP) filed a putative class action lawsuit against a pharmaceutical company and its parent (Takeda), alleging that Takeda had developed and marketed a drug to treat diabetes called Actos, while at the same time actively concealing that Actos increased a patient's risk of developing bladder cancer. The consumers paid out-of-pocket sums to purchase the drug and the TPP reimbursed covered individuals for the purchases. The core allegation in support of the civil RICO claims was that Takeda, through a pattern of mail and wire fraud, duped physicians, consumers, and TPPs into believing that Actos did *not* increase a consumer's risk of cancer. The plaintiffs sought damages based on the payments made to purchase Actos under the assumption that it was a safe drug.

On a motion to dismiss, the Central District of California dismissed the RICO claims with prejudice, ruling that the plaintiffs had failed adequately to allege that Takeda's acts and omissions proximately caused their alleged damages.

On appeal, the Ninth Circuit described this issue as one of first impression in the Ninth Circuit, framing the pharmaceutical-specific issue as follows: "In civil actions brought under [RICO] against pharmaceutical companies, do patients and health insurance companies who reimbursed patients adequately allege the required element of proximate cause where they allege that, but for the defendant's omitted mention of a drug's known safety risk, they would not have paid for the drug?" *Id*. at 1246.

The analysis of the proximate cause issue turned primarily on three Supreme Court decisions: *Anza v. Ideal Steel Supply Corp*., 547 U.S. 451 (2006), *Hemi Group, LLC v. City of New York,* 559 U.S. 1 (2010), and *Bridge v. Phoenix Bond & Indemnity Co*., 553 U.S. 639 (2008). The Supreme Court in *Anza and Hemi Group* found proximate cause lacking – and thus no standing on the part of the RICO plaintiffs – because the plaintiffs' alleged damages in those cases were derivative of frauds perpetrated on third parties. In *Bridge*, on the other hand, the Supreme Court ruled that the proximate cause requirement was satisfied, even though the alleged fraud was perpetrated on a county conducting a tax lien auction and not on the

RICO plaintiffs themselves (bidders who participated in that auction). The fraud in that case enabled the RICO defendants to submit multiple bids (when they were only permitted to submit one each), resulting in the defendants receiving "a disproportionately higher share of tax liens at the county auction" – a scheme that injured the plaintiff-bidders and *not* the county. *Id*. at 1250.

The Ninth Circuit ruled that the plaintiffs' injuries resembled the RICO injury endorsed in *Bridge*, as opposed to the more attenuated injuries rejected in *Anza and Hemi Group*. According to the Ninth Circuit, Takeda's omissions directly harmed the patients who were prescribed Actos (and who paid out-of-pocket costs for the prescriptions) and the TPPs (who ultimately reimbursed covered patients for their prescriptions). The prescribing doctors, the Ninth Circuit concluded, were not harmed, because they did not pay for the drugs they prescribed.

In so ruling, the Ninth Circuit elected to join similar pharmaceutical industry RICO rulings by the First and Third Circuits (*In re Neurontin Marketing & Sales Practices Litigation*, 712 F.3d 21 (1st Cir. 2013), and *In re Avandia Marketing, Sales Practices & Product Liability Litigation*, 804 F.3d 633, 634 (3rd Cir. 2015)) and depart from rulings by the Seventh and Second Circuits (*Sidney Hillman Health Center v. Abbott Laboratories*, 873 F.3d 574 (7th Cir. 2017), and *UFCW Local 1776 v. Eli Lilly & Co*., 620 F.3d 121 (2d Cir. 2010)). It remains to be seen whether the Supreme Court will undertake to resolve this industry-specific circuit split.