Legal Opinion Letter

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# A *BRIDGE* TOO FAR?: HIGH COURT'S *HEMI* RULING REINS IN RICO LITIGATION

by
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RICO (the "Racketeering Influenced Corrupt Organizations" statute) is a square peg that plaintiffs' lawyers try to force into the round hole of drug and device litigation. So why has there been an increase in RICO cases? It could be the treble damages and lucrative attorneys' fees that make a RICO claim attractive, or perhaps the highly profitable class actions under the law. *See* http://druganddevicelaw.blogspot.com/2008/11/if-not-reliance-then-remoteness.html. Because it evokes images of gangsters, plaintiffs' lawyers love to bandy about ominous words like "racketeering" and "wire fraud." RICO, after all, was originally enacted to go after mobsters – but in today's world of hungry and creative plaintiffs' lawyers, RICO has gotten out of hand and is becoming a run-of-the-mill claim seen in many mass tort settings.

Targeted businesses should thus be encouraged by the U.S. Supreme Court's recent RICO decision, *Hemi Group, LLC v. City of New York*, 130 S. Ct. 983 (2010). In *Hemi Group*, a plurality-in-part opinion by Chief Justice Roberts reaffirmed that RICO has a proximate cause requirement, and that requirement has teeth. More to the point, he also rejected the argument often heard in drug and device RICO cases – that proximate causation is satisfied by a mere showing of "foreseeability." Typically, the plaintiffs' RICO causation argument proceeds along these lines: manufacturer lied in its marketing [i.e. wire fraud] to physicians, and it was reasonably foreseeable that its lies would cause the physicians to prescribe [insert offending product] to me [if it is a consumer case] or the patient [if it is a third-party payor case], causing me [the consumer/third-party payor] to be injured "by reason of" fraud.

After the Court's decision in *Bridge v. Phoenix Bond & Indemnity Co.*, 128 S. Ct. 2131 (2008), plaintiffs' lawyers were feeling emboldened to bring this sort of "fraud on a third party" RICO claim. In *Bridge*, the Court found a sufficiently direct link between the alleged wrongful conduct and the plaintiff's injury where the fraud was alleged to be directed not at the plaintiff, but at a governmental body (which gave the defendant a business advantage over the plaintiff). But the Chief Justice's opinion slammed that "third-party fraud" door shut in the *Hemi* case. It made clear that plaintiffs were misreading *Bridge* if they thought it stood for the proposition that a RICO case survives whenever the alleged fraud is directed at a third party and the resulting reliance by a third party caused the plaintiff to suffer harm, simply because that reliance was "foreseeable."

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*Hemi* involved a claim by New York City that Hemi LLC, a New Mexico company, violated RICO by selling cigarettes online (without NYC's sales tax) and thus preventing the city from collecting tax it was due on the sale of cigarettes to NYC residents. The City's causation theory went like this: The Jenkins Act requires Hemi to file a report with New York State tax administrators listing the name, address, and quantity of cigarettes purchased by state residents. Hemi did not file this report, which meant the state did not have the information to pass on to the city, which in turn meant that the city could not pursue cigarette tax payments from city residents. So in other words, by failing to provide information on its customers to the state, Hemi was allegedly liable to the city for the taxes Hemi's customers should have paid.

The Court found RICO requires a proximate cause showing – that the RICO injury occurred "by reason of" the RICO fraud – and that proximate cause showing in turn requires a "direct relation between the injury asserted and the injurious conduct alleged." *Hemi Group*, 130 S. Ct. at 985 (quoting *Holmes v. Securities Investor Protection Corp.*, 503 U.S. 258, 268 (1992) – a major RICO causation case). The Court was (rightly) troubled by the "attenuated" causal chain alleged by the city because there were so many steps the Court had to take to trace causation from Hemi's action to the alleged harm. In fact, "[b]ecause the City's theory of causation requires us to move well beyond the first step, that theory cannot meet RICO's direct relationship requirement." *Id*. The city's causal theory was further complicated by the fact that liability "rests not just on separate actions, but separate actions carried out by separate parties." *Id*. at 990 (emphasis in original). Sound familiar for those facing drug/device RICO cases? Think "prescribing physician."

And importantly, the Court concluded that the foreseeability test of proximate causation – advocated by the dissent – has been specifically considered and rejected by the Court (in *Anza v. Ideal Steel Supply Corp.*, 547 U.S. 451 (2006) – another major RICO causation case). In other words, the Supreme Court has rejected plaintiffs' favorite argument – that RICO causation is established where the prescribing physicians' reliance and decision to prescribe was a "foreseeable" and "intended" result of the fraud – not once, but twice.

But what about *Bridge*? The Court gave *Bridge* the proverbial backhand in a manner that should be discouraging to drug and device plaintiffs. In a nutshell:

> The City's theory in this case is anything but straightforward: Multiple steps, as we have detailed, separate the alleged fraud from the asserted injury. And in contrast to *Bridge*, where there were 'no independent factors that account[e]d for [the plaintiff's] injury,' here there certainly were: The City's theory of liability rests on the independent actions of third and even fourth parties.

*Id*. at 992 (emphasis added). A consumer cannot recover under RICO because of the independent actions of that pesky learned intermediary (and sometimes the insurer), and a third-party payor's alleged harm is also remote because it depends on the independent actions of the prescriber and the consumer.

*Hemi* hopefully signals the beginning of the end for RICO claims in drug and device cases. And before the plaintiffs' bar gets incensed about poor plaintiffs left without a remedy, remember – RICO really is, and always has been, a square peg in this context, and there are still plenty of other (traditional) avenues for plaintiffs to seek recovery.



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