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CLASS ACTION

ALERT

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THE THIRD CIRCUIT GIVES THE GREEN LIGHT TO RICO PLAINTIFFS SEEKING TO RECOVER PAYMENTS FOR PRESCRIPTION DRUGS

By Theresa E. Loscalzo and Rachel A.H. Horton

This week, the Third Circuit altered the legal landscape for civil Racketeer Influenced and Corrupt Organizations Act (RICO) claims against pharmaceutical companies. The ruling in *In re Avandia Marketing, Sales Practices & Product Liability Litigation* allows the plaintiffs' RICO claims to proceed; in their suit, the plaintiffs allege that GlaxoSmithKline LLC (GSK) engaged in a marketing campaign to minimize the side effects of Avandia, a drug prescribed to treat Type II diabetes, and thereby increase sales at a higher price than it otherwise would have been sold.

The plaintiffs alleged claims under § 1964(c) of RICO. According to the plaintiffs, GSK violated RICO by committing predicate acts of wire fraud, mail fraud, tampering with witnesses, and use of interstate facilities to conduct unlawful activity. Plaintiffs allege that GSK engaged in these predicate acts through a marketing campaign designed to boost confidence in Avandia's safety.

The plaintiffs, union welfare funds that pay for prescription coverage for their enrollees, argue that they lost money due to GSK's misrepresentations and brought the suit as a class action. As third-party payors (TPPs), the plaintiffs pay for all or some of the cost of drugs that the TPP has listed on its formulary. The formulary is comprised of drugs that have been evaluated for safety, efficacy, and cost effectiveness.

After a trial court denied GSK's motion to dismiss, the Third Circuit's ruling came as part of an interlocutory appeal on the issues of whether the plaintiffs have standing and whether the complaint adequately alleged proximate causation. The Third Circuit found in favor of the plaintiffs on both questions.

On appeal, GSK contended that the plaintiffs did not have standing because they lacked a concrete injury to business or property within the meaning of RICO. Specifically, GSK relied on the Third Circuit's decision in *Maio v. AETNA, Inc.* to argue that the plaintiffs' allegations were too dependent on future events, such as Avandia being unsafe or ineffective. In *Maio*, the Third Circuit concluded that health insurance beneficiaries could not maintain a RICO claim for economic injury against their insurer based on alleged misrepresentations regarding the services included in their HMO plans. Rejecting the plaintiffs' argument that they had paid high premiums for inferior health insurance, the Third Circuit found that the plaintiffs suffered no cognizable injury because their theory of injury was premised solely on the possibility that they might receive inadequate healthcare in the future.

Unpersuaded by GSK's analogy to *Maio*, the court here held that *Maio* was distinguishable in one crucial respect—the plaintiffs' injury was not contingent on future events. The Third Circuit held that this case was more closely analogous to *In re Warfarin Sodium Antitrust Litigation*, in which TPPs alleged that the defendant violated antitrust law by spreading false information about a competitor drug, causing the TPPs to pay for the defendant's more expensive drug. In *Warfarin*, the Third Circuit held that TPPs do suffer a direct economic harm when, as a result of the pharmaceutical company's misrepresentation, they pay supracompetitive prices for brand name drugs. The Third Circuit extended the *Warfarin* court's reasoning to claims brought under RICO, finding that the TPPs adequately alleged that they had suffered direct economic harm as a result of GSK's alleged misrepresentations.

The court was unpersuaded by GSK's contention that no concrete injury existed because TPPs can anticipate fraud and, thus avoid harm by passing on that cost to their enrollees by way of higher premiums. The court noted that, at the motion to dismiss stage, no evidence supported GSK's argument and, further, the argument had no limiting principle. For example, if adopted, such a theory could be used to bar stores from recovering for shoplifting based on the presumption that their pricing model accounted for theft.

GSK also argued that the plaintiffs had not adequately alleged proximate causation because the presence of intermediaries—physicians and patients—in the causal chain rendered any harm too indirect. The court surveyed precedent on RICO causation, beginning with *Holmes v. Securities Investor Protection Corp*. In *Holmes*, the U.S. Supreme Court addressed the overbreadth concerns inherent in the language of § 1964(c) by setting out the three factors courts should assess in evaluating causation under RICO: (1) the directness of the injury; (2) the risk of multiple recoveries; and (3) the likelihood of vindication by others.

Considering these factors, the *Holmes* Court determined that a plaintiff-subrogee had failed to satisfy RICO's proximate cause requirement. In that case, the plaintiff alleged that the defendant manipulated a stock, which led two broker-dealers to insolvency and later required the plaintiff to reimburse the broker-dealers' customers' losses. The Court refused to find an adequate causal connection because "the link [was] too remote between the stock manipulation alleged and the customers' harm, being purely contingent on the harm suffered by the broker-dealers."

In contrast to *Holmes*, proximate cause will be found if a sufficiently direct relationship exists between a defendant's wrongful conduct and a plaintiff's injury. This is true even if a RICO plaintiff did not directly rely on the defendant's misrepresentation. The Third Circuit determined that proximate causation can be found where the conduct that allegedly caused the plaintiff's injuries is identical to the acts that form the basis of the RICO scheme. Further, the injury alleged by the TPPs is an economic injury independent of any physical injury suffered by Avandia users. Joining the First Circuit, the court found that doctors do not break the chain of causation because it was not the doctors' decision to prescribe Avandia that caused the plaintiffs' injuries.

Without opining on the likelihood of success of the plaintiffs' claims, the court concluded that the TPPs had adequately alleged standing and proximate causation. The court's decision adds clarity to the requirements for successfully pleading under § 1964(c) of RICO, and it may clear the way for similar litigation against pharmaceutical companies. ◆

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