

***RICO Report: Navigating Civil Standing Requirements for Defense Success*****Host: Cal Stein****Recorded: 8/13/24****Cal Stein:**

Hello, and thank you for joining me on this installment of the *RICO Report*. My name is Cal Stein and I am a partner in the white Collar and Litigation practice groups at Troutman Pepper. I represent clients in white collar criminal and government investigation matters, as well as in complex civil lawsuits and in RICO litigation.

I come to you today to talk about a RICO topic that is near and dear to my heart because it served me quite well this past year or so, during which time I've been able to win several motions to dismiss RICO claims on this basis. I'm talking about RICO's standing requirement, which may not be the most exciting sounding RICO topic, but it is one that has proven time and time again to be quite effective in both narrowing RICO cases and even eliminating RICO claims at the motion to dismiss stage. And in the end, really, what is more exciting than being able to tell your client that you were successful in kicking a RICO claim and with it the possibility of trouble damages and attorney's fees and costs before the lawsuit really even begins?

So today, we're going to talk about RICO's civil standing requirement and explore how it can be used by the defense bar to defend RICO cases, particularly at the motion to dismiss stage.

Let's begin by understanding what RICO's standing requirement is and loyal *RICO Report* listeners won't be surprised to learn that to find the RICO standing requirement, we're going to start where we always do, which is at the words of the RICO statute. But actually before we do that, why don't we start by defining what standing is generally just to make sure we're all on the same page?

Any plaintiff or other litigant who wants to bring a claim in a lawsuit must have standing, and what that means is that he or she must have the capacity to bring the lawsuit.

Generally speaking, this means that the person satisfies certain basic requirements, primarily that he or she can demonstrate a sufficient connection to and harm from the actions of the defendant that are being challenged. Often we hear standing referred to as quote, "Article III standing," which refers to standing in federal courts.

Article III standing requires that a plaintiff bringing a claim assert an actual or threatened injury that can be traced to the conduct of the defendant. So that's another formulation of the general standing requirement.

Although RICO is, of course, a federal statute and therefore RICO claims are most often brought in federal court, it actually has its own independent standing requirement that courts have repeatedly acknowledged and observed is different than traditional Article III standing. And not everyone realizes this. Not even all attorneys realize this, which is perhaps why a crafty and experienced RICO practitioner can have success challenging standing at the motion to dismiss stage.

Okay, so now we're going to get into the good stuff. The RICO standing requirements, starting with the words of the statute. RICO's civil standing requirement is found in 18 U.S.C., Section 1964, which is of course the section of the RICO statute titled Civil Remedies.

Specifically it's found in 1964 subsection C, and the standing requirement is found in the very first sentence of that subsection. It says, and I quote, "Any person injured in his business or property by reason of a violation of Section 1962 of this chapter may sue therefore in any appropriate United States District Court."

RICO standing therefore has two components. First, the RICO plaintiff must be injured in his business or property. And second, the RICO plaintiff's injury must be by reason of the racketeering activity that is alleged. This second component is really a causation component, and today we're going to address each of these two components of RICO standing separately.

Let's start with the first component, an injury to quote, "business or property," end quote. This sounds super easy, super straightforward, but as is often the case with RICO, the devil is in the details and so are the good motion to dismiss arguments based on this standing component. As a general rule, the business or property standard is construed to refer only to pecuniary injury to property itself or a property interest. Put another way, most federal courts construe this component strictly to mean that a plaintiff must have suffered a concrete financial loss to tangible property.

This, of course, raises the question of whether and in what circumstances an injury involving intangible assets can satisfy the business or property requirement. And this is really where courts can diverge at times. So it's important to know what the courts in your jurisdiction say.

For example, several circuit courts like the 9th, the 2nd, the 5th, have held that loss of intangible assets like customers or lost business relationships can in some circumstances constitute an injury to your business or property to satisfy RICO standing.

Similarly, a circuit like the 8th Circuit has found that reputational harm can sometimes constitute injury to one's business or property under RICO, but these rules do not apply across the board. With respect to whether personal injuries can constitute injury to one's business or property for RICO standing purposes, this is a topic I actually covered in great detail in its own *RICO Report* episode where we discussed an upcoming Supreme Court decision that will resolve a long-standing circuit split about that issue. So since we covered that in detail on its own, I'm not going to delve into it here, especially since the Supreme Court is going to weigh in relatively soon.

A question I often get when discussing the RICO standing business or property requirement is whether it's necessary for a pecuniary injury, a monetary concrete financial injury to reach a certain threshold. Or put another way, will minor pecuniary injuries still satisfy RICO's standing requirement of an injury to one's business or property, especially if there are other injuries that don't satisfy that standard that may be more significant?

The short answer is that even minor pecuniary injuries, as long as their concrete financial losses can still satisfy the business or property requirement of civil RICO standing. Though I note this is an area of RICO law that's not particularly well-developed.

The primary case on this topic comes out of the 3rd Circuit, which affirmed a RICO judgment where the pecuniary interest was just under \$900. So that is a little bit of a frame of reference for what is and isn't required.

Let's shift now to the second RICO standing requirement, the causation requirement that mandates that the plaintiff's injury be quote, "by reason of, end quote, the racketeering activity. For RICO, this by reason of requirement implicates both of the primary types of causation that we often think about. That is, but for causation as well as proximate causation.

This is actually a fairly developed area of RICO law, including the Supreme Court having its say a couple of times. Back in 1992 in the somewhat famous, at least famous in RICO circles, *Holmes* case, the Supreme Court held that proximate cause for RICO requires a direct relation between the injury asserted and the injurious conduct alleged. And this directness requirement announced by the Supreme Court in *Holmes* has become the hallmark of RICO jurisprudence on causation.

Now, in announcing this directness rule, the Supreme Court offered up a number of policy reasons that it reasoned justified this type of directness requirement. And I mentioned these here because comparing your case to them can be very, very effective at the motion to dismiss stage when you are arguing about whether a plaintiff's complaint satisfies RICO causation.

The policy reasons the Supreme Court offered were as follows: first, it found that the less direct the injury, the more difficult it would be to ascertain the amount of damages flowing from the violation.

Second, the Supreme Court found that allowing a plaintiff to recover for indirect damages may force cause to try and apportion damages to avoid multiple recoveries, which should be avoided.

And third, the Supreme Court said, "Look, those who are directly injured who satisfy this directness requirement, there are enough of those people out there to use RICO to deter bad conduct. So we don't need to extend RICO's reach to those who have suffered indirect injuries."

Now again, in my experience, these are very, very helpful principles to raise with any federal court when moving to dismiss a RICO claim on standing causation grounds. This is what the Supreme Court, the highest court in the land has said, and federal district courts tend to listen. So as I noted a moment ago, this area of RICO law is very well-developed in part because of the *Holmes* case we just talked about, but also because the Supreme Court has addressed it multiple other times.

Several years after *Holmes*, in 2006, it addressed it again in the also somewhat famous in RICO circles, *Anza* case, and then it did it again in 2010 in the *Hemi* case. Again, both of these issues and these cases focused on proximate cause.

Let's focus on *Anza* first. In that case, the Supreme Court focused again on the directness requirement of the injury to the racketeering conduct that was alleged. And what the court said is the quote, "central question." In this analysis is quote, "whether the alleged violation led directly to the plaintiff's injuries."

So here we are in 2006 and the court is again addressing causation requirement under RICO and ostensibly it just doubles down on its original ruling in the *Holmes* case from 1992. Then four years later, we get another decision by the Supreme Court in the *Hemi* case, and again, it reaffirms what it said in *Anza*.

The facts of the *Hemi* case, I think, are actually really interesting and help illustrate the point that the Supreme Court was making on directness. The plaintiff in the *Hemi* case was New York City, and what it alleged was that an online seller of cigarettes committed a pattern of mail and wire fraud by failing to file required information with the state of New York concerning the customers who purchased these cigarettes online and who lived in New York City. Those customers were supposed to pay the city taxes on the cigarettes. And the city claimed because the company failed to file the paperwork, it deprived the city of its ability to collect what it called tens of millions of dollars in cigarette tax revenue.

And the Supreme Court actually rejected the RICO claim on causation grounds. It found that the conduct that was actually directly, again, there's that directness requirement, the conduct that was directly responsible for New York City's losses was not the company's failure to file the paperwork, but rather the direct cause was the customer's failure to pay the taxes. This the Supreme Court held was insufficiently direct to satisfy RICO's by reason of standing requirement. Really interesting case and a really illustrative point.

One interesting outcome from these well-developed RICO causation rules that has emerged is the impact on RICO claims by businesses who try to sue their competitors for what they allege is a pattern of racketeering activity. Now, the typical competitor RICO scenario is where the plaintiff is a business that believes it is being disadvantaged in the market because one of its competitors is committing a pattern of illegal conduct. In short, these types of cases happen all the time. We see it all the time with businesses trying to bring RICO claims against competitors and they can satisfy RICO standing, but only in very specific circumstances, which circumstances are not often present, which makes this a very, very fertile ground to pursue in a motion to dismiss when you're representing a business facing a RICO suit from a competitor.

The key case that explains when these types of competitor RICO suits can satisfy standing is the Supreme Court ruling in the *Bridge* case. And the *Bridge* case is one I have mentioned on this podcast before, and it presents such a unique set of circumstances that have to be present in order for a competitor to have RICO standing that I think it's worth discussing in some detail here. Now, the facts are a little bit complicated, but I'm going to do my best to explain them.

The *Bridge* case involved a situation where there were what's called municipal auctions where companies would show up and place bids to purchase county tax liens. Now, frequently two or more competing bidders would make the same bid resulting in a tie, and when that happened, the county had a system where it would award the lien to the tied bidders on a rotating basis. This was the fairest way the county figured it could do this. For example, if bidder A and bidder B tied on four straight auctions, bidder A would get the first bidder, B would get the second, bidder A would get the third, and bidder B would get the fourth. Both would end up with two.

When this system of rotating awards was announced, some bidders began to try to game the system, and what they would do is they would send their agents or proxies to make additional bids. So in this example, you might have three bidders: bidder A, bidder B, and bidder C, but bidder C is just an agent for bidder A. and let's say they all tied and if they tied four times in a

row, bidder A would get the first, bidder B would get the second, bidder C would get the third, and then bidder A would get the fourth. But because bidder C is actually bidder A's agent, bidder A would end up with three of the four auctions, an unfair share. To combat this, the county changed the rules of the auction to prohibit proxy or agent bidders.

Now, the plaintiff in *Bridge* alleged that despite this new rule, one of its competitors was still using agents, still using proxies, and falsely certifying to the county that it wasn't. That was the pattern of racketeering activity through mail and wire fraud. Now, this case gets all the way up to the Supreme Court with the key issue being whether the allegations satisfy RICO's directness requirement. The defendant argued, "Look, the fraud here was not on the plaintiff but the fraud was on the county itself." So it's one step removed. We don't have a direct causation requirement met, but the Supreme Court disagreed and it ruled in plaintiff's favor.

Now, the Supreme Court offered five factors as to why it ruled the directness requirement was met here, despite there being this intervening issue with the county. The key factor though was the total absence of what the Supreme Court called independent factors that could have accounted for the plaintiff's injury.

Now, within the context of this case, this is what the Supreme Court was referring to. It was talking about the rotational system that the county used to break the ties. The system allowed the court to draw a direct line from the fraud on the county to an ascertainable injury to the business or property of the plaintiff because without the fraud, the plaintiff would've been guaranteed to win more options because ties were broken on a pure rotation. And this is the truly unique situation and circumstance that existed in this case.

Consider for a moment if the county used a different system to break ties. Instead of just awarding them on a rotating basis to be fair, consider if the county said, "Look, when there's a tie, we're going to evaluate a series of factors and determine which tied bidder is actually more deserving." In that situation, I think the Supreme Court would've come out the opposite way because in this hypothetical, the plaintiff's injuries would be attributable to the independent factor. Again, there's that key phrase, the independent factor of the county's analysis, but that wasn't the case here. There was no analysis, there was no independent factor. The county would have just awarded them on a rotating basis.

In my experience, many RICO plaintiffs think that they can rely on this *Bridge* decision to satisfy causation. I see it all the time. This case gets cited all the time in oppositions to motions to dismiss I file for lack of standing, but the circumstances of *Bridge* are unique. And the jurisprudence from the Supreme Court about the directness requirement of RICO standing is so well-settled that where these circumstances aren't present, and you can distinguish your case from the really unique circumstances of *Bridge*, you can really, really succeed on motions to dismiss.

It is hard, in my view, for a plaintiff to plead a case that replicates the experience of the plaintiff in the *Bridge* case. And oftentimes when the plaintiff tries to rely on that case to support facts that are not same, it can actually highlight the reason why a defendant is entitled to dismissal.

And with that, I think we're out of time here today discussing civil RICO's standing requirements, so I want to bring this discussion to a conclusion. I want to thank everyone for listening.

If you have any thoughts or any comments about this series or about today's episode on RICO standing, I invite you to contact me directly at [callan.stein@troutman.com](mailto:callan.stein@troutman.com). You can subscribe and listen to other Troutman Pepper podcasts wherever you listen to podcasts, including on Apple, Google, and Spotify. Thank you for listening and stay safe.

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