

## ***RICO Report* — One Year After Horn: How Lower Courts Are Applying RICO's Expanded Damages**

**Host: Cal Stein**

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**Cal Stein (00:04):**

Hello, and thank you for joining me on this installment of the *RICO Report*. My name is Cal Stein and I'm a partner in the White Collar and Litigation practice groups at Troutman Pepper Locke. 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 on nearly the one-year anniversary of one of the most significant RICO decisions by the U.S. Supreme Court in some time. That is, of course, the *Medical Marijuana Inc. v. Horn* decision, which came to the Supreme Court on appeal from the Second Circuit and decided a circuit split concerning whether civil RICO could reach personal injury claims, either directly or indirectly under any circumstances. Now, as discussed in detail in our RICO Report episode dedicated entirely to that case, the Supreme Court resolved that circuit split by holding that, yes, in some cases, economic injuries that flow from a personal injury can in fact satisfy RICO's standing requirement.

(01:15):

In that episode, we also discussed the likely fallout from that decision, including most importantly, the many questions it raised that lower federal courts would be left to grapple with, as we anticipated plaintiffs and the plaintiff's bar would bring new civil RICO cases asserting theories that were in line with the Supreme Court's expansion of civil RICO damages. Now, nearly one year out from that decision, it feels like as good a time as any to check in and see how federal courts are doing, applying the *Medical Marijuana* decision. That is exactly what we're going to do here today. Let's start with a little recap of the *Medical Marijuana, Inc. v. Horn* case and its holding. As I mentioned, it was decided almost one year ago in April of 2025. The plaintiff in that case was a commercial truck driver who was injured in an accident.

(02:13):

For pain relief, he purchased and took a CBD product manufactured by the defendant, Medical Marijuana, Inc. Now, Medical Marijuana, Inc. had advertised this product as containing 0% THC, which was very important to Mr. Horn because he was subject to routine drug screening by his employer. Lo and behold, after he purchased and took the product, he tested positive for THC despite Medical Marijuana, Inc.'s representations and advertisements to the contrary, and Mr. Horn was subsequently fired. He then brought a civil RICO claim alleging fraud by Medical Marijuana, Inc., concerning the misrepresentations of the contents of its product. The Supreme Court considered whether the civil RICO statute permitted him to recover for the property losses he asserted were derived from his personal injuries, namely those he sustained in the accident that prompted him to purchase the product in question. Put another way, the Supreme Court in

this case answered the question of whether economic injuries that flow from personal injuries constitute damage to one's business or property as is required by the RICO statute for standing.

(03:37):

This was subject to a circuit split, so the Supreme Court decided, and it did decide in a very, very narrow decision. The Supreme Court made clear it was not deciding whether Horn actually suffered a personal injury. It was not deciding whether the Second Circuit was correct – that business, i.e. injury to business or property, encompassed employment. It was not deciding what it means for a RICO plaintiff to be injured in his property. The only thing the Supreme Court was deciding was whether civil RICO bars recovery for all business or property harms that derive from personal injury. The answer that the Supreme Court gave was no. No, civil RICO does not always bar business or property harms that derive from a personal injury. That was an expansion of RICO law. Now, at the time, we predicted that this decision would cause quite a bit of confusion, with plaintiffs rushing to try to use that holding to expand civil RICO, and in some cases to get reconsideration or overturn lower court rulings, dismissing RICO claims on those grounds.

(04:54):

To some degree, they have. There has been some confusion, and to some degree, plaintiffs have sought to expand civil RICO claims, and we expect that to continue. But what have courts done? What have lower federal courts done with the *Medical Marijuana v. Horn* decision from the Supreme Court? There are not a ton of reported decisions yet, but there are some, and there are going to be many more. It's just the life cycle of these cases take some time and only a year out, we only have the first few that have started to trickle in. But what lessons can we learn from those first few? I think there are many, and I think those are important cases because those are going to be the ones that other defendants and plaintiffs cite in the litigation to come over how to apply the Supreme Court's decision in *Medical Marijuana, Inc. v. Horn*.

(05:51):

Let's start with what lessons we can glean from those cases. First and foremost, it appears that courts have at least so far not been all that confused by the Supreme Court decision. By that, I mean, so far at least, the courts that have considered these issues have not overall taken the bait and opened wide the door for all personal injuries to be recoverable under RICO. There was some concern that the Supreme Court decision would open the floodgates to an increase in civil RICO litigation. That was a concern shared by many of the justices on the Supreme Court as they decided the case. Justice Kavanaugh, in fact, addressed this exact issue and this exact concern in his dissent, which prompted Justice Barrett, who penned the majority opinion, to quell that concern by writing, and I quote, "Not every monetary harm, be it lost wages, medical expenses, or otherwise necessarily implicates RICO." But still, concerns remained.

(06:59):

Would lower courts allow plaintiff's wide latitude, especially at the Rule 12 motion to dismiss stage, to pursue RICO claims based on all types of monetary harm? The early returns suggest courts are not, as I noted, taking the bait on this. Courts are scrutinizing civil RICO damages

and not letting plaintiffs just pursue whatever they want, despite the expansion in the *Medical Marijuana v. Horn* case. Now, there's a good example of this coming out of the Eastern District of New York. It's a case called *Alexander v. Cuomo*, and it was a motion to dismiss decision. I'm going to read from the case a few quotes because I think it illustrates well this point. One of the things that the court said in this case was, the plaintiff's complaint contains a single bald reference to injury "in business and property", but this assertion is conclusory and unsupported by even a single specific factual allegation.

(08:04):

The complaint states that plaintiff and his decedent were injured in their business and property by reason of the RICO defendant's violation. Following the sentence, the complaint merely lists the personal injuries already discussed, such as wrongful death and loss of consortium. Again, you can see the court is not necessarily taking the bait. This is the type of case and the type of damages that the Supreme Court and Justice Kavanaugh were worried about, but here you can see the court already examining and scrutinizing this. So, what did they say next? They talked directly about the *Medical Marijuana v. Horn* case. The court states, "Nothing in the Supreme Court's recent opinion in *Medical Marijuana v. Horn* changes this analysis." The court was not saying that personal injury can suffice for a RICO claim in lieu of an injury to business or property. Rather, the court held that if damage to business or property occurs via a personal injury, it is actionable as a civil RICO claim.

(09:14):

Nothing in the Supreme Court's analysis changed the fundamental requirement that RICO explicitly permits recovery for harms to business and property and implicitly excludes recovery for harm to one's person. This is, in my opinion, exactly how the Supreme Court intended its decision, *Medical Marijuana, Inc. v. Horn*, to operate. The Supreme Court clearly was not trying to change the RICO requirement from injury to business or property to personal injury. Indeed, it could not do so. Only Congress can do that, and the Supreme Court recognized that. Now, this remained, as the Eastern District of New York pointed out, a fundamental requirement of RICO. Injury to business or property remains a fundamental requirement. In that sense, this court, at least in my view, is remaining faithful to the Supreme Court decision in *Medical Marijuana, Inc. v. Horn* and rejecting this claim and granting the motion to dismiss. Look, what's the lesson here?

(10:19):

The lesson is plaintiffs are going to try to exploit and leverage the *Medical Marijuana, Inc.* decision to expand the scope of RICO damages, to use it as a catchall for all sorts of personal injuries. As RICO practitioners, particularly on the defense side, we should not let them do so. Good courts, good judges will and can still see through it the way the Eastern District of New York did here. Okay. Let's talk about another lesson that we're seeing in some of the early cases. Federal courts are reading the *Medical Marijuana, Inc. v. Horn* decision to close even more tightly arguments that Clayton Act antitrust precedents can be used to interpret and limit RICO damages. Now, as listeners may remember, when we talked about the *Medical Marijuana, Inc. v. Horn* case, in that case, *Medical Marijuana, Inc.* argued that the Supreme

Court's precedent in the antitrust space compelled the decision in its favor, and Judge Barrett addressed and explicitly rejected this argument in the majority opinion.

(11:31):

Justice Barrett recounted that the antitrust precedent that *Medical Marijuana, Inc.* pointed to largely derived from a case interpreting the Clayton Act, which preceded the RICO statute, but interpreting the Clayton Act to require a specific type of injury. Injury of the type the antitrust laws were intended to prevent. Basically, *Medical Marijuana, Inc.* was asking the Supreme Court to look at Clayton Act cases and say, look, Clayton Act cases require a "antitrust injury", therefore RICO should require a "RICO injury." But as Justice Barrett pointed out, the Supreme Court in a case called *RJR Nabisco* had already decided and already explicitly declined to apply this rule in the RICO context. Now look, this was not a main focus of the Supreme Court decision in *Medical Marijuana, Inc. v. Horn*, but it is important, and it is something that has somewhat surprisingly come up multiple times in federal court decisions in the approximately one year since.

(12:42):

Let's illustrate how it's come up with another example. This one out of the Northern District of Illinois. This was a case called the Board of Education of Joliet Township High School, District 204 v. Publicis Health, LLC. Again, it's at the motion to dismiss stage. In this case, the issue is whether costs attributable to government services, which the court refers to as sovereign or quasi-sovereign interests, are compensable under RICO as damage to one's "business or property", the standing requirement for the RICO statute. Here's what the court says. "Excluding sovereign or quasi-sovereign interests from 'business or property' in RICO relies on the Supreme Court's interpretation of the Clayton Act. In the Clayton Act, 'business or property' includes injuries to a government's interest as a party to a commercial transaction, but Clayton Act and Section 1964(c) of RICO are not interchangeable", and the citation to that assertion is *Medical Marijuana, Inc. v. Horn*.

(13:51):

This is a really important reference to the *Medical Marijuana* case, refusing to apply a Clayton Act precedent to RICO for the exact reasons that Justice Barrett articulated, and this is not the only example. There's another case in the year that has passed out of the Northern District of California called *Biederman v. FCA US LLC*. Again, very similar analysis. Very similarly, a federal court judge is picking up on this rather minor or at least non-central point in Justice Barrett's decision. *Biederman*, the court says, "Holding Section 1964(c) permits such an action, the Court noted that antitrust precedent did not aid *Medical Marijuana's* position and 'the Clayton Act and Section 1964(c) are not interchangeable'." The exact same quote that the court in the Northern District of Illinois cited. Plaintiffs grasp at this language to argue that the controlling precedent in this circuit does not apply in the civil RICO context and then citing the *Medical Marijuana, Inc. v. Horn* case again to make clear that that antitrust case, those antitrust cases, are not going to carry water in the RICO context.

(15:07):

Now, why is this so important and so interesting, at least to me? Well, it's interesting and important because RICO practitioners have long cited antitrust cases as needed, and the door may be closing on that. It has long been held that because the RICO statute was, at least in part, based on the Clayton Act, that cases interpreting the Clayton Act had value, had interpretational and precedential value when interpreting the RICO statute. It seems that lower federal courts are pulling this component of Justice Barrett's decision out of the *Medical Marijuana, Inc. v. Horn* case and using it to curtail that, to close the door, at least to some degree on using antitrust precedent to interpret RICO. This was and is something of a narrow issue, but it's actually easy to see how this hesitance could snowball, and it could grow, and we start to see fewer and fewer courts and fewer and fewer judges applying those antitrust precedents.

(16:29):

Okay. Let's talk about the third lesson we can glean from these early cases, and that is about how the courts are grappling with the question of how they define injury, how they define a plaintiff's injury in light of *Medical Marijuana, Inc. v. Horn*. Now, this was one of the biggest issues that the Supreme Court grappled with, was how to go ahead and define a RICO injury within a context that would allow them to reach the decision that they did. Sure enough, that issue is now arising at the district court level, with RICO plaintiffs arguing that Horn substantially broadened the definition of injury. As I predicted in the episode on *Medical Marijuana, Inc. v. Horn*, courts are struggling with this a little bit, and that does in fact seem to be the case. This is something that courts are likely to continue to struggle with, at least in the early going, but courts are looking for ways to avoid resolving this issue, right?

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Rather than take it on headlong, courts are looking for ways to resolve cases and rule on these motions without taking a strong position on what the definition of injury is, which at least to me indicates that we probably are going to need more higher court interventions, certainly at the Circuit Court level and potentially one day again at the Supreme Court level, because this was a question that they largely left unanswered in the *Medical Marijuana, Inc. v. Horn* decision. Again, something pointed out by the dissents, both by Kavanaugh and by Justice Thomas. But again, let's use an example of a recent case to illustrate this point. This time we're going to go to the Western District of Kentucky in a case called Timothy J. McIlwain v. Jefferson County. This is a case in which a plaintiff brought a civil RICO claim, and one of the injuries he alleged was the loss of his legal license, which he claimed qualified as an injury to his business or property because it hurt his business.

(18:37):

Here's what the court started to say about that. The plaintiff writes that Horn adopted a "broad definition of injury." But the majority opinion in *Horn* expressly did not opine on what it means for a plaintiff to be injured in his property under 1962(c). All right, let's pause there. Having pointed out the argument and what the Supreme Court has said, one option for the Western District of Kentucky would've been for the court and the judge to address it and decide whether or not this

particular claimed harm qualified as a RICO injury, but the court chose not to. Instead, the court chose to punt the issue. Here's what the court said. McIlwain writes that the postponement of his reinstatement to the New York Bar hurt his business, and because of *Horn*, this is now an injury. At the motion to dismiss stage for a pro se litigant, this may be sufficient to satisfy prong to an injury to his business or property.

(19:50):

However, the court need not make a final determination because as explained below, prong three is not met and both RICO claims fail as they do not meet the statutory standing requirements. The statutory standing requirement the court then examined in that respect was the causation requirement. A couple of things on this. First and foremost, one could actually read that statement as suggesting that the injury the plaintiff here claimed did in fact qualify as an injury, albeit at the rule stage and under the rule 12 standard. But putting that aside, I actually think the second point is the more important one, which is what I had referenced before. Rather than actually grapple with this issue and actually decide what is an injury under the new decision in *Medical Marijuana v. Horn*, the court simply just moved on. It just punted and moved on to a more defined prong that of causation.

(20:50):

When it ultimately resolved that issue, ruling that causation was not met even at the rule 12 stage, it grounded that decision in good old, clear Supreme Court precedents, our old friends, *Anza v. Ideal Steel*, and *Hemi Group*, two of the cases that I cite most frequently in motion to dismiss practice. What's the big lesson here? Well, I think the big lesson is as we as RICO practitioners are grappling with the implications of *Medical Marijuana v. Horn*, so too are the lower courts, and we should always be looking not just to put that decision before the court, but to give courts other ways to rule in our favor. Courts, at least so far, have seemed hesitant to make sweeping decisions about what is and what is not an injury under RICO. Largely, and I'm guessing here, but I feel comfortable guessing, largely because they don't want to get overruled.

(21:53):

Judges don't like to get overruled, so don't make them. Don't put them in the spot where they have to make that type of decision and risk getting overruled. Ground your argument, even at the rule 12 stage in causation. There are lots of great causation cases that support it, and I think you are going to see more courts doing what the Western District of Kentucky did in gravitating towards other areas and other prongs and other standards, including causation, where the precedent, including at the Supreme Court level, is far more solidified. With that, we are out of time here today, so I want to bring this discussion to a conclusion, at least for now. I have no doubt we will be returning to the *Medical Marijuana, Inc. v. Horn* decision and returning to the implications of that decision as we get more and more federal district court decisions and ultimately Circuit Court decisions interpreting it.

(22:49):

But I really want to thank everyone for listening. If anyone has any thoughts or any comments about the series or about today's episode, I invite you to contact me directly at

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