

***RICO Report: Supreme Court to Settle Circuit Split Regarding RICO Damages Arising From Personal Injuries***

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**Cal Stein:**

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. 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 some very recent news coming out of the US Supreme Court. In particular, a decision by the High Court to hear a case that will resolve a long-standing circuit split regarding the RICO statute. That, of whether damages that flow from economic harm arising from personal injuries are in fact recoverable under RICO. The Second Circuit and the Ninth Circuit say that they are recoverable. But the Sixth Circuit, the Seventh Circuit, and the Eleventh Circuit say they are not. The Supreme Court will now resolve that, and as they have agreed to do so.

Today, we're going to go through that issue and we're going to start chronologically with the case that has worked its way up to the Supreme Court, and we'll start with it at the district court level and the Second Circuit Court opinion that is ultimately going to be appealed to the Supreme Court. The case is titled *Horn v. Medical Marijuana, Inc., Dixie Holdings, LLC*, AKA Dixie Elixirs Red Dice Holding, LLC. The plaintiff in this case is a gentleman named Douglas Horn, a commercial truck driver.

Now, Mr. Horn was in a car accident, which caused him to suffer from a hip injury, for which he needed some sort of medication or therapy to deal with the pain. Mr. Horn saw some advertisements for a CBD product called Dixie X. The advertising for this product made clear that it did not contain any THC. This was very important to Mr. Horn, because as a commercial truck driver, he was subject to random drug tests by his employer, believing that Dixie X did not contain any THC. Mr. Horn, as the complaint alleges consumed the product. He then failed a

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random drug test offered by his employer, and failed a confirmatory drug test, which confirmed the presence of THC in his system.

As a result, Mr. Horn lost his job, he lost his current and future wages, he lost his insurance, and he lost other benefits. Mr. Horn believed that Dixie X was to blame for the positive test for THC. So, as the complaint goes on, he had an independent laboratory test of the product, which confirmed the presence of THC, and which therefore, he alleges confirmed the inaccuracy of the advertisements on which he relied. Mr. Horn, among other things, brought a RICO claim at the district court level against the various defendant companies.

Now, this question, and this case involves the RICO standing requirements that we have talked about on this podcast in the past, specifically the requirement that is unique to RICO. That a plaintiff must be injured in his or her business or property. That phrase, business or property appears in the RICO statutes. The question that has worked its way up to the Supreme Court with respect to Mr. Horn's case, is whether the type of economic injuries that he has suffered, which do in fact flow from a personal injury, whether those types of economic harms constitute damage to "business or property" within the meaning of the RICO statute.

Well, the district court disagreed with Mr. Horn. The district court held that he lacked standing because he was suing for losses. For example, the loss of his earnings and wages that were derivative of or that flowed from what it called an antecedent personal injury. The district court found those did not meet the RICO standing requirement that Mr. Horn be injured in his business or property. It went up to the Second Circuit and the Second Circuit reversed and remanded the decision. The Second Circuit found that Section 1964(c) of RICO, under which Mr. Horn sued implicitly excludes recovery for personal injuries, but, that nothing in the text of RICO would support what it called an amorphous RICO standing rule that would bar Mr. Horn from suing for injuries because those economic losses happen to flow from a non-recoverable personal injury. Again, the court focused on that phrase, business, or property.

The Court, the Second Circuit here gave those terms their ordinary meaning. It found that the term business back when RICO was passed, the term business included concepts like employment. Interestingly, the Second Circuit relied in making that finding on a 1911 Supreme

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Court case that dealt with the Tariff Act of 1909. Still good precedent, perhaps a little bit questionable whether it has application here or the application the Second Circuit ascribed to it, and whether the Supreme Court will do the same remains to be seen.

But, on the basis of that case, the Second Circuit found that because the term business includes within it, the concept of employment, Mr. Horn had indeed suffered an injury to his business as contemplated by RICO, because his suit was premised on his employer terminating his employment because of the positive drug test. Okay. The Second Circuit found that in and of itself was sufficient to state an injury to his business within the meaning of RICO, and there was no reason in the text of RICO to find otherwise. Specifically, this is a quote from the Second Circuit, it wrote, "There is, in short, no reason to suppose that Congress sought to protect enterprises, to the exclusion of ordinary employees, or to protect certain means of livelihood but not others. Accordingly, when Horn lost his job, he suffered an injury to his business within the plain meaning of Section 1964(c). Because the court found Mr. Horn had suffered an injury to his business, it did not address the second prong, which is injury to property." It said so in a footnote, it was not addressing it.

Interestingly, the Second Circuit did address what it calls the antecedent personal injury bar. This is the doctrine that the district court adopted. The Second Circuit referred to this as a restrictive interpretation of RICO, that denies RICO's standing where the loss flows from an antecedent personal injury. The Second Circuit actually gave a really good explanation of the justification for this rule, which has been adopted by those other circuits that prohibit these types of claims.

I want to go through the justification as stated by the Second Circuit, because I think it's a good formulation of it. Here's what the Second Circuit said about the antecedent personal injury bar. It said, "We understand the justification of that rule to be as follows. One, by expressly authorizing suits for injuries to a business or property. Section 1964(c) implicitly exclude suits for other types of injuries, most notably personal injuries. Two, for that implied limitation to retain significance, Congress must also have implicitly intended to exclude injuries to business or property that flow from an antecedent personal injury as most personal injuries lead to some pecuniary loss."

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In short, their concern or the concern of the courts that apply this rule is that without it, a plaintiff could easily recast a garden variety personal injury claim as a civil RICO claim. In my opinion, that is a strong argument. It is a common and bedrock principle, that every provision in a contract or a statute must be read and interpreted to give it meaning. I am persuaded by the argument that if you do not apply this bar, you are rendering meaningless or mostly meaningless RICO's very clear business or property restriction. However, I'm not the Second Circuit and the Second Circuit was not persuaded by this argument.

The Second Circuit agreed explicitly that 1964(c) does exclude recovery for personal injuries. But, the Second Circuit found that at its core, RICO is a statute designed to remedy economic injury. With respect to the negative implication that RICO excludes economic injuries derived from personal injuries, the Court said that there is no textual reason to extend the bar to economic injuries where personal injury is the precursor. The rest of the Second Circuit's opinion is devoted to explaining the reasons. The reasons why it was rejecting this antecedent personal injury bar. I think it's important to go through these, because these are the reasons that the defendant in this case is going to have to overcome to convince the Supreme Court to overrule the Second Circuit.

There were four primary reasons the Second Circuit gave. We'll go through each of them. The first reason was that Section 1964(c) of RICO uses the proximate causation standard, which of course is true. The Second Circuit reasoned that a proximate cause standard considers the permissible degree of attenuation between claimed harm and a predicate act. RICO requires some sort of direct relation between the two. From there, the Second Circuit reason that if the proximate cause standard is generous enough to include consequences of harm that flow from personal injuries, then those ought to be included within the RICO statute. It found that the antecedent personal injury bar would actually run contrary to that reasoning.

I'll read a quote from the Second Circuit here. "The antecedent personal injury bar coops that judgment, imposing a more restrictive attenuation principle that bars suit whenever there is a necessary antecedent personal injury, even wear that injury, and the resulting injuries to business or property were intended or foreseeable, i.e. proximate." Basically, the Second Circuit

is saying, look, RICO has a proximate cause standard, and this antecedent personal injury bar would impose a higher standard on causation. And as a result, we are not going to apply it.

The second reason that the Second Circuit rejected that bar is what I'll call a macro view that the phrase business or property focuses on the nature of the harm and not the source of the harm. Now, the Second Circuit found that RICO, particularly Section 1964(c) does address the source of harm elsewhere. For that reason, it's not proper to read it into the standing requirement. Here's what the Second Circuit said. "Thus, because personal injuries, including murder, and kidnapping, are expressly listed in Section 1961 as racketeering conduct that can give rise to claims under the statute. Section 1964(c) cannot be read to deny RICO standing for injuries to business or property simply because the plaintiff suffered an antecedent personal injury."

This actually relates pretty closely to the third reason that they gave, which is that the antecedent personal injury bar would actually preclude certain civil suits that are at the core of RICO's prohibition. Murder and kidnapping, which we just mentioned in the prior section are examples, but so too are extortion and loan sharking, which the Court also mentioned. Here's what the Court said about that. It said, "Yet, the antecedent Personal Injury bar would preclude recovery for injuries to business or property that flow from or are derivative of personal injuries that inevitably result from the murder of a business owner, who resists paying a demand for protection money, the kidnapping of a bar owner who refuses to sell his property to the mafia, the extortion and battery of a carwash owner who refuses to launder money, and the shooting of an individual who fails to pay an unlawful debt."

In my view, this is probably the most compelling argument that the Second Circuit makes, because it is bringing the antecedent personal injury bar within the ambit of what I think most people and most courts would acknowledge was the initial intent of RICO, even if it has been expanded from there. The last reason that I'm going to discuss and the fourth one that the Court gives is that, the antecedent personal injury bar when it was announced, and when it was first generated was partly based on a concern that the Second Circuit found the Supreme Court has since instructed courts to ignore. That of the increasing number of RICO claims if such a standing rule were to be recognized.

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Basically, when this rule came about, it was to curb an explosion in the number of RICO claims and RICO suits. Since then, the Second Circuit has at least interpreted Supreme Court case law to say, "Let's not worry about that. That is not a reason to read in requirements that may not be there." Well, the Supreme Court is ultimately going to have final say on that. I will be very interested to see what the Supreme Court says about that particular argument whether it has made that instruction or whether it has not.

Now, there is one more component of the Second Circuit opinion that I want to focus on. That's after it gives all of these reasons why it's rejecting the antecedent personal injury bar. It actually gives a key distinction, an area where I expect other courts to focus when trying to distinguish this case. I'm going to read a quote, the Second Circuit wrote, "In this particular case, Horn does not seek damages for any personal injury and indeed disclaims having suffered any beyond what could be construed as an unconsented bodily invasion based on his ingestion of a fraudulently misrepresented product. His only claimed injury is the loss of his employment due to the detection of an illegal substance in his body, the very substance that defendants had represented was not present in the product sold to him."

This distinction is critical, critically important, I believe, regardless of which direction the Supreme Court goes. It's useful for defendants if a plaintiff is seeking true personal injuries. By that, I mean, bodily harm, things like that. This decision will not help, does not in my view open the door for plaintiffs seeking traditional personal injuries. The only thing it does is it expands the types of damages based on economic harm flowing from personal injury. So, if you've got a true personal injury claim, a bodily harm, an illness, anything like that, this case is not going to help.

In fact, the Second Circuit makes this explicit, it writes, "We should note that under our approach, the phrase business or property is not boundless, but instead retains restrictive significance." Goes on to say, "A plaintiff cannot easily recast damages for personal injury as a financial loss of property in order to invoke civil RICO. The plaintiff must instead suffer an injury to business or property, and not all injuries can be recast to satisfy the definition of those terms. Quite obviously, a person cannot sue for non-pecuniary injuries, like loss of consortium, loss of guidance, mental anguish, and pain and suffering." That is a very important distinction here that

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I believe will remain in effect, regardless of whether the Supreme Court adopts the Second and Ninth Circuit view or takes the more restrictive approach.

Let's shift from the Second Circuit opinion to how this issue is being teed up for the Supreme Court. As I alluded to, the real reason the Supreme Court has agreed to take this case is because of the circuit split. There is a very clean circuit split that the defendant in this case said demands resolution by the Supreme Court, in which the Supreme Court agreed. Let me briefly summarize again what that circuit split is.

The Sixth Circuit, the Seventh Circuit and the Eleventh Circuit, plaintiff cannot replete personal injury lawsuits, as treble damages RICO claims, simply by focusing on the economic consequences of their personal injuries. That is the antecedent personal injury bar. It's been acknowledged by those three courts. Now, on the other side are the Second Circuit and the Ninth circuit, which have allowed civil RICO claims for those exact economic harms that flow from personal injuries, so long as the plaintiff's harm standing alone can be characterized as losses to business or property. That is the circuit split that will be resolved.

Now, the defendants' argument to the Supreme Court is that the Second Circuit, as well as the Ninth circuit are wrong. That business or property, that phrase is restrictive, and that the Supreme Court has in its prior cases, and prior precedent, made that clear, said that it is restrictive. They will argue that personal injuries are in fact the antithesis of injuries to business or property. Candidly, I think they're right about that. I question whether that argument we'll get them across the finish line, though. Because as noted by the Second Circuit, Mr. Horn here isn't necessarily seeking personal injuries that are the antithesis of business or property. The Second Circuit said as much. The Second Circuit made clear if he was seeking those, such as injuries for bodily harm, or pain and suffering, those would not be permitted.

Where I think the defendants have a compelling point is where they draw a comparison to tort law, which is very different than RICO or other statutory claims. Here's what they say in their writ of cert to the Supreme Court. They say, "Common law, tort law helps elucidate the scope of a personal injury. Under tort law, the typical recovery in a personal injury case includes medical expenses, lost wages, and pain, and suffering, and emotional distress." In other words, the



defendants are pointing out that tort cases already take into account and remedy the exact damages that Mr. Horn and other plaintiffs in the Second and Ninth Circuit may seek under RICO.

Now, the defendants go on to lean even harder into the tort law comparison. They argued that if the Supreme Court were to affirm the Second and Ninth Circuit's view, that would allow plaintiffs to transform just any standard run of the mill tort claim into a RICO case, and they give three examples, all of which I think are fairly compelling. First, the defendants posit that under the Second and Ninth Circuit approach, a peanut allergy sufferer could bring a RICO suit against a food manufacturer for any medical expenses that he or she suffered if food labels failed to disclose that products were manufactured in a facility that also processes peanuts. Similarly, the defendants posit that a plaintiff could use RICO against a hot air balloon manufacturer, if the manufacturer's shoddy labor practices cause the balloon to crash injuring the company's CEO, and thus harming the bottom line. The final example that defendants posit is that, a customer could lob a RICO claim against a casino if the slippery casino floor caused that customer to break bones in a slip and fall with the customer asserting lost wages damages for missed work.

Now, I find these examples compelling because all three are classic tort cases, classic tort circumstances that tort law exists to remedy, not RICO. I think that's the point that defendants are trying to make here, which is, we have to keep RICO for what it is. We cannot transform or allow plaintiffs to transform RICO into a catch all tort statute. In fact, this is what the defendants say to the Supreme Court in trying to get the Supreme Court to take this case. I found it incredibly powerful. They write, "RICO's providence confirms that civil RICO is not a supercharged state tort statute." At the end of the day, that is what the Supreme Court is going to decide here, whether to allow RICO to become a supercharged state tort statute or not.

We are nowhere near a decision by the Supreme Court in this case, but it is one that I certainly will be watching very carefully. If the Second and Ninth Circuit view becomes the prevailing standard, we can expect to see a lot more RICO claims. I don't think there's any debate about that. We will see more tort lawsuits include RICO claims. We will see more product liability lawsuits include RICO claims. In fact, we may get to a point, if this becomes the prevailing view



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where most product liability lawsuits include a RICO claim by a plaintiff looking to get treble damages and attorney's fees.

I want to make one more point here, which is, I don't believe if this Second and Ninth Circuit view becomes the prevailing view. I don't believe that it's just going to be a matter of adding more RICO claims to lawsuits that already exist. I think this decision, if it goes in that way, will lead to more lawsuits, a lot more lawsuits. We've talked a lot on this podcast about RICO's treble damages and attorney's fees provisions, and how they are very attractive to both plaintiffs and plaintiff's attorneys.

The possibility of getting that type of windfall are going to make cases more attractive, particularly to plaintiff attorneys. For example, whereas, a terminated employee for whatever reason, like Mr. Horn or someone else, whereas a terminated employee may not have a high enough salary based only on his or her wages to entice a plaintiff's attorney to bring a lawsuit on his or her behalf on a contingency. That may not be the case if all of a sudden, those wages can be trebled. And if all of a sudden, they can win attorney's fees at the end of the day. Those numbers increase the damages pot significantly. I am confident, if not certain, that there will be cases if they can be reframed as a RICO claim, there will be cases that a plaintiff's attorney would have passed on before, but will now take. That's going to lead to a lot more lawsuits.

Now, of course, as the Second Circuit noted that in and of itself is not necessarily a reason to accept or reject a legal principle, but it is something that has to be taken into consideration. My own personal view, this case is something of an existential moment for RICO. For years, the defense bar has complained about how RICO has been co-opted by plaintiffs, it's been taken from this anti-mafia, anti-organized crime statute, and now applies to ordinary run of the mill business disputes. And courts, including the Supreme Court have not only allowed that to happen. At times, they've even celebrated that happening.

In my view, this would be another expansion of RICO, and a significant expansion at that. It would be an expansion that in my view would take RICO farther from what Congress intended it to be, and I don't think that's a good thing. The Supreme Court has the choice, and it's really faced with that choice about whether they're going to, in essence, rewrite the RICO statute or

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rein it in a little bit, and keep it from exploding into a supercharged state tort statute. Such a powerful phrase, and one that I think is incredibly accurate, and one that the defense bar really should be concerned about, and why we should all be focused on this case when it comes up to the Supreme Court.

With that, we are out of time here today. I want to bring this discussion to a conclusion. I really want to thank everyone for listening. If you have any thoughts or comments about this series, or about today's episode, 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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