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'Medical Marijuana v. Horn': High Time for RICO Reform

Even if Horn does not upend American tort law, it makes clear that a judicial fix to civil RICO will not be forthcoming. It is time to take the [Supreme] Court up on its advice and turn to Congress.

By Jonah M. Knobler
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Earlier this month, the U.S. Supreme Court decided *Medical Marijuana v. Horn*, holding (by a 5–4 vote) that some personal injury claims are cognizable under RICO's private civil cause of action. *Horn* continues a troublesome trend: judicial broadening of civil RICO to reach scenarios Congress never intended. Although *Horn*'s immediate impact may prove less than cataclysmic, its lesson is clear: The court has no appetite for fixing the mess civil RICO has become, and an approach to Congress is needed.

RICO's Enactment and Expansion

The Racketeer Influenced and Corrupt Organizations Act was enacted via the Organized Crime Control Act of 1970. The statute's preface declared that its "purpose" was "the eradication of organized crime in the United States." Congress specified a long list of existing crimes and dubbed them RICO-prosecutable acts of "racketeering." Almost as an afterthought, Congress added a private civil cause of action, complete with treble damages and attorney fees. The result was what courts have dubbed "the litigation equivalent of a thermonuclear device"—but Congress felt that America's war with the Mafia justified extreme measures.

For RICO's first decade, its civil remedy went virtually unused. Then, the Supreme Court vastly expanded its scope. This began with *Sedima, S.P.R.L. v. Imrex* (1985), where a 5–4 majority held—contra the statute's title, preface, and legislative history—that cognizable RICO injuries do not require an "organized crime nexus." The dissenters worried that this would "federaliz[e] ... broad areas of state common law" and expose "legitimate businesses" to a deluge of unintended treble-damages suits. After all, many contract and tort disputes involve false statements and use of the mails or wires—and thus could be styled as mail or wire fraud, RICO-eligible acts of "racketeering."

Subsequent decisions continued this trend. For example, in *H.J. v. Northwest Bell Telephone* (1989), the court gave RICO's "pattern" requirement a broad reading unconstrained by any organized crime limitation. And *Boyle v. United States* (2009) did the same for RICO's "enterprise" requirement. Only in one area—RICO's proximate causation standard—has the court refused to give the statute's language an "expansive reading."

The result has been just what the *Sedima* dissenters feared. Civil RICO is virtually never invoked against its intended Mafia target. Overwhelmingly, it is wielded against "legitimate businesses in

ordinary commercial settings." 473 U.S. at 506. That result is ironic, since RICO's legislative history shows that Congress meant to protect "legitimate businesses" from extortion—not provide a tool to extort them. As Justice Thurgood Marshall recognized, however, civil RICO now "giv[es] rise to the very evils [the statute] was designed to combat."

Horn Extends RICO to (Some) Personal Injury Claims

Even as the Supreme Court expanded civil RICO's sweep, most lower courts agreed that it had no role in personal injury suits. After all, RICO's private-right-of-action language gives a claim only to one "injured in his *business or property*." 18 U.S.C. § 1964(c) (emphasis added). In *Horn*, however, the Court upended this prevailing understanding.

The majority interpreted the key statutory phrase—"injured in his business or property"—as limiting only the "kinds of harm" for which a RICO plaintiff may recover, and not the "cause of the harm" that may ground a RICO suit. Thus, a plaintiff injured in an accident or assault may be able to recover his resulting economic losses under RICO, even though he cannot recover his noneconomic damages, such as pain and suffering.

The dissenters begged to differ. In their view, "the term 'injured' is a tort-law term of art" that "should be given its established common-law meaning." And under that "common-law" meaning, economic losses flowing from a personal injury are not themselves "injuries" to the plaintiff's business or property; they are a form of damages resulting from an "injury" to the plaintiff's person. But this reasoning did not carry the day.

As in prior cases, the dissent also worried that the majority's approach "would federalize many traditional personal-injury tort suits" such as "everyday product liability claims." When Congress enacted RICO, the dissent rightly noted, it "did not purport to usher in such a massive change to the American tort system." But the majority brushed this concern aside, insisting that "the correction" of such consequences "must lie with Congress."

Practical Consequences of 'Horn'

Has *Horn* transformed RICO into a federal products liability statute? It's too soon to know, but the impact may be narrower than that.

For starters, while the court held that "injury to business or property" encompasses some economic losses flowing from personal injury, it did not decide which losses qualify. Indeed, the majority cautioned that "'business' may not encompass every aspect of employment," and "'property' may not include every penny in the plaintiff's pocketbook." Thus, it may turn out that the types of economic damages normally sought in personal injury suits—lost wages and medical expenses—are not recoverable under RICO after all. As the dissent noted, all we know for sure is that "the aftermath of the Court's opinion" will be "a mess" as lower courts "grapple with" the key question the court left unanswered.

Second, as the majority emphasized, other statutory barriers may prevent personal injury claims from proceeding as RICO suits. These include RICO's proximate cause requirement and its

requirement of a “pattern” of racketeering. The “pattern” element hardly seems like a major obstacle, as most product liability plaintiffs can point to multiple allegedly false statements in product labeling or advertising. But the proximate cause requirement should have bite. As *Horn* noted, RICO requires “direct” causation; “foreseeability does not cut it.” Indeed, the majority strongly hinted that *Horn’*s own claim will flunk this requirement on remand. Thus, many financial losses stemming from personal injuries may be barred as too indirect.

Time for a Legislative Solution

Even if *Horn* does not upend American tort law, it makes clear that a judicial fix to civil RICO will not be forthcoming. It is time to take the court up on its advice and turn to Congress. There is precedent for a legislative narrowing of RICO in response to judicial expansion. After the court greenlighted civil RICO as a vehicle for securities-fraud suits, the 1995 Private Securities Litigation Reform Act (PSLRA) barred most RICO suits based upon conduct already actionable under securities laws. Congress acted in response to urging by the Securities and Exchange Commission and the business community, which emphasized that the securities laws already “provide[d] adequate remedies” for securities fraud, and that it was “unnecessary and unfair to expose defendants in securities cases to the threat of treble damages and other extraordinary remedies provided by RICO.” What was true for securities fraud is equally true for products liability suits. A PSLRA-style amendment carving out such claims would seem equally justified.

But while welcome, an amendment limited to personal-injury claims would not fix the fundamental problem. A more thoroughgoing reform would require a nexus to Mafia-style organized crime, abrogating the 5–4 *Sedima* decision that started us down this path. Other possibilities include requiring a criminal conviction for the alleged acts of racketeering as a precondition to a civil RICO suit; requiring the Justice Department to greenlight the filing of any civil RICO complaint, after finding that the underlying conduct would warrant criminal prosecution; imposing heightened pleading requirements; prohibiting civil RICO suits from proceeding as class actions, because the availability of treble damages and attorney’s fees obviates the “negative-value suit” concern class actions are meant to address; holding civil RICO plaintiffs to a clear-and-convincing burden of proof, as many states already do for civil fraud claims; and/or narrowing the list of “racketeering” crimes to remove mail and wire fraud, which are responsible for almost all of RICO’s mission creep.

One might assume that, in this era of partisan gridlock, any reform proposal would be dead on arrival. But supermajorities of both houses approved the PSLRA’s narrowing of RICO—including not just Republicans, but liberal Democrats like Ted Kennedy. Both left-leaning organizations like the American Civil Liberties Union and AFL-CIO and right-leaning ones like the Chamber of Commerce have advocated for civil RICO reform. And jurists both liberal (e.g., Thurgood Marshall) and conservative (e.g., William Rehnquist) have lambasted the status quo. Thus, a legislative fix might have a fighting chance—and *Horn* may be just the impetus needed.

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