

THE SUPREME COURT LIMITS CIVIL RICO CLAIMS

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ABSTRACT: *In Anza, et al, v. Ideal Steel Supply Corp., 126 S.Ct. 1991 (2006) the Supreme Court recently ruled that Ideal lacked standing to bring a civil claim under RICO § 1962(c) seeking recovery of damages to its business caused by its competitor's alleged racketeering activity of unlawfully selling products free of state and local sales tax and submitting fraudulent sales tax returns in violation of mail and wire fraud statutes. The Court ruled that Ideal could not maintain its RICO § 1962(c) claim as proximate cause was lacking for the purpose of RICO § 1964(c). The Court reasoned that there was not a direct relation between the asserted injury and the alleged injurious conduct. The Court also vacated the Second Circuit's ruling with respect to Ideal's RICO § 1962(a) claim and remanded the matter for the Second Circuit to determine if there was proximate cause. The Court's ruling will have a major impact on the scope of civil RICO claims.*

INTRODUCTION

In 1970, the Racketeer Influenced and Corrupt Organizations Act (RICO) was enacted as title IX of the Organized Crime Control Act, Pub. L. 91-542, 84 Stat. 941, as amended, 18 U.S.C. §§ 1961-1968 (2000 ed. and Supp. III). Congress plainly enacted RICO to address the problem of organized crime, and not to remedy general state-law criminal violations. *See, H. J. Inc. v. Northwestern Bell Telephone Co.*, 492 U.S. 229, 245, 109 S. Ct. 2893, 106 L. Ed. 2d 195 (1989). However, it clearly was aware that RICO would have the potential to sweep more broadly than organized crime. *Id.*, at 246-248. Although RICO essentially is intended to prevent organized crime from taking over and/or operating legitimate businesses, its scope goes well beyond that. In fact, today when the average person hears of RICO not only do images of mobsters and notorious criminals come to mind, but so do corporate CEOs and business executives due to the prosecutions garnering headlines. There is another aspect of RICO that is not in the headlines, but that is of vital importance, namely, civil RICO claims. Civil RICO claims are authorized by RICO § 1964(c).

Since a plaintiff's claim brought as a civil RICO claim will result in treble damages, plaintiff's often attempt to bring their claim under the ambit of RICO. The judiciary is aware of this "jackpot mentality" and for years has been confronted with standing challenges to civil RICO claims. It has been suggested that "the civil provisions of [RICO] are the most misused statutes in the federal corpus of law." *Spoto v. Herkimer County Trust*, 2000 U.S. Dist. LEXIS 6057 (N.D.N.Y., 2000). In *Katzman v. Victoria's Secret Catalogue*, 167 F.R.D. 649, 655 (S.D.N.Y., 1996) (citations omitted), *aff'd*, 113 F.3d 1229 (2d Cir. 1997) the court stated "Civil RICO is an unusually potent weapon--the litigation equivalent of a thermonuclear device. Because the mere assertion of a RICO claim ... has almost inevitable stigmatizing effect on those named as defendants, ... courts should strive to flush out frivolous RICO allegations at an early stage of the litigation." In *Goldfine v. Sichenzia*, 118 F. Supp. 2d 392, 394 (S.D.N.Y., 2000) the judge stated, "I surmise that every member of the federal bench has before him or her at least one -- and possibly more -- garden variety fraud or breach of contract cases that some Plaintiff has attempted to transform into a vehicle for treble damages by resort to what [has been] referred to as 'the litigation equivalent of a thermonuclear device' -- a civil RICO suit." (quoting *Schmidt v. Fleet Bank*, 16 F. Supp. 2d 340, 346 (S.D.N.Y., 1998) (quoting *Katzman v. Victoria's Secret Catalogue, supra*). As stated in *West 79th Street Corp. v. Congregation Kahl Minchas Chinuch*, 2004 U.S. Dist. LEXIS 19501 (S.D.N.Y., 2004), "To this

end, courts must be wary of putative civil RICO claims that are nothing more than sheep masquerading in wolves' clothing.” Accordingly, the courts scrutinize closely challenges to a plaintiff’s standing to bring a civil RICO claim and strictly apply the requirements necessary to successfully bring a civil RICO claim, particularly with regard to the required proximate cause element.

In *Ideal Steel Supply Corp. v. Anza, et al.*, 373 F.3d 251 (2d Cir. 2004) the Second Circuit Court of Appeals reversed the district court’s ruling in *Ideal Steel Supply Corp. v. Anza, et al.*, 254 F. Supp. 2d 464 (S.D.N.Y., 2003) and attempted to substantially expand the scope of civil RICO claims to encompass a claim based on the filing of fraudulent sales tax returns by a competitor, which allegedly constituted racketeering activity and was intended to and did give the defendants, Joseph Anza, Vincent Anza (collectively the Anzas), and National Steel Supply, Inc., a company owned by the Anzas, (National) a competitive advantage over Ideal Steel Supply Corp. (Ideal). The court ruled that Ideal adequately pleaded proximate cause even where the scheme depended on filing the fraudulent sales tax returns with New York State, which as a third party relied on the returns, and Ideal did not rely on the fraudulent communications. The court held that the reasonably foreseeable victims of a RICO violation are the targets, competitors and intended victims of the racketeering enterprise. The court granted standing with regard to claims under RICO § 1962(a) and (c). The Supreme Court in *Anza, et al., v. Ideal Steel Supply Corp.*, 126 S.Ct. 1991, 164 L. Ed. 2d 720 (2006) reversed the Second Circuit with regard to the RICO § 1962(c) claim. The Court ruled that Ideal could not maintain its RICO § 1962(c) claim as proximate cause was lacking for the purpose of for RICO § 1964(c) purposes as there was not a direct relation between the asserted injury and the alleged injurious conduct. The Court vacated the Second Circuit’s ruling with respect to Ideal’s RICO § 1962(a) claim and remanded the matter for the Second Circuit to determine if there was proximate cause. The Court’s ruling will have a major impact on the scope of civil RICO claims.

The impact of *Ideal Steel Supply Corp.* potentially is far-reaching. Clearly, it limits the reach of civil RICO claims in a myriad of situations involving the filing of fraudulent tax returns and other forms with the government. In fact, after the Second Circuit rendered its decision Ideal had successfully amended its complaint in its action as it proceeded through the district court to include the filing of fraudulent federal and state income tax returns in *Ideal Steel Supply Corp. v. Anza et al*, 2005 U.S. Dist. LEXIS (S.D.N.Y., 2005). Also, it may provide the reasoning to deny standing in cases where a plaintiff suffers damages from lost sales or depressed prices due to acts of a competitor involving mail fraud and/or wire fraud not relied upon by the injured party in areas such as embezzlement of funds from employee welfare benefit plans and pension plans, the misappropriation of proprietary and confidential information, the failure to pay its employees proper wages under the law and withhold and pay employment taxes and/or various predicate acts prohibited by RICO committed to artificially manipulate the sales market to its advantage. See e.g., *Regscan, Inc. v. Brewer*, 2005 U.S. Dist. LEXIS 17796 (E.D.PA., 2005). Furthermore, its impact reaches the dollar amount of damages that plaintiffs may recover due to lost sales as RICO provides for treble damages. It also eliminates an incentive for taxpayers to properly pay their taxes and to avoid fraudulent activity covered by RICO. The far-reaching implications of *Ideal Steel Supply Corp.* are attested to by the fact that the Supreme Court in *Anza v. Ideal Steel Supply Corp*, 546 U.S. ___, 126 S.Ct 713 (2005) granted certiorari and heard the case. Annually the Supreme Court receives upwards of a thousand petitions to grant certiorari and typically agrees to hear only a small percentage of the cases.

Business owners, business executives, CPAs, accountants, tax practitioners, attorneys, academics and a myriad of others in the business world should be aware of *Ideal Steel Supply Corp.* and follow its progression as the lower courts deal with the RICO § 1962(a) claim on remand. Before analyzing the holding in *Ideal Steel Supply Corp.*, a brief overview of the relevant provisions of RICO is necessary.

The civil remedies provision of RICO grants standing to "any person injured in his business or property by reason of a violation of section 1962 of this chapter [Title 18]." 18 U.S.C. §§ 1964(c) (1988 and 2000).

(emphasis added). Section 1962 provides, in relevant part: (a) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity ... to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce...(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity...

To establish standing and state a claim for civil damages under RICO, a plaintiff must allege that: (1) the defendant has violated a substantive provision of RICO § 1962; (2) an injury to the plaintiff's business or property; (3) and that the injury was caused by reason of the defendant's violation of RICO § 1962. *Moss v. Morgan Stanley Inc.*, 719 F.2d 5 (2d Cir. 1983) and *Lerner v. Fleet Bank, N.A.*, 318 F.3d 113, 120 (2d Cir. 2003), *cert. denied*, 540 U.S. 1012, 157 L. Ed. 2d 424, 124 S. Ct. 532 (2003) (quoting *Commercial Cleaning Servs., L.L.C. v. Colin Serv. Sys., Inc.*, 271 F.3d 374, 380 (2d Cir. 2001)).

To plead a violation of the substantive RICO statute, a plaintiff must allege the existence of seven constituent elements: "(1) that the defendant (2) through the commission of two or more acts (3) constituting a 'pattern' (4) of 'racketeering activity' (5) directly or indirectly invests in, or maintains an interest in, or participates in (6) an 'enterprise' (7) the activities of which affect interstate or foreign commerce." *Moss*, 719 F.2d at 17 (citing 18 U.S.C. §§ 1962(a), 1962(b) and 1962(c)).

Racketeering activity "consists of no more and no less than the commission of a predicate act." *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 496, 87 L. Ed. 2d 346, 105 S. Ct. 3275 (1985). RICO § 1961(1)(B) defines "racketeering activity" as any act that is indictable under, inter alia, 18 U.S.C. §§ 1341 (prohibiting mail fraud), and 1343 (prohibiting wire fraud), and 1962 (prohibiting racketeering). 18 U.S.C. §§ 1341 and 1343 prohibit the use of the mail or wire communication to further "any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises." To establish the predicate act of mail or wire fraud a plaintiff must allege that "the defendants engaged in '(1) a scheme to defraud (ii) to get money or property, (iii) furthered by the use of interstate mail or wires.'" *USA Certified Merchants, LLC v. Koebel*, 262 F.Supp. 2d 319, 332 (S.D.N.Y., 2003) (quoting *United States v. Autuori*, 212 F.3d 105, 115 (2d Cir. 2000)).

A "pattern of racketeering activity" is defined as "requiring the commission of at least two of the predicate acts enumerated in 18 U.S.C. § 1961(1) within a ten-year period." *Terminate Control Corp. v. Horowitz*, 28 F.3d 1335, 1344 (2d Cir. 1994) and 18 U.S.C. § 1961(5).

In order to satisfy the requirement in RICO § 1964(c) that a plaintiff demonstrate its business or property was injured *by reason of the defendant's* violation of RICO § 1962 the plaintiff must show both "direct" and "proximate" causality. In other words, the plaintiff must establish that the RICO violation was not only the "but for" cause of the damages but was also the legally cognizable or "proximate cause" of the damages. *Holmes v. Securities Investor Protection Corp.*, 503 U.S. 258, 112 S.Ct. 1311 117 L. Ed. 2d 532, (1992) and *Lerner v. Fleet Bank, N.A.*, *supra*.

"Central to the notion of proximate cause is the idea that a person is not liable to all those who may have been injured by his conduct, but only to those with respect to whom his acts were 'a substantial factor in the sequence of responsible causation,' and whose injury was 'reasonably foreseeable or anticipated as a natural consequence.'" *Ideal Steel Supply Corp.*, 373 F.3d at 257 (quoting *Lerner v. Fleet Bank, N.A.*, 318 F.3d at 123) (quoting *First Nationwide Bank v. Gelt Funding Corp.*, 27 F.3d 763, 769 (2d Cir. 1994)) (quoting *Hecht v. Commerce Clearing House, Inc.*, 897 F.2d 21, 23-24 (2d Cir. 1990), *cert. denied*, 513 U.S. 1079, 130 L. Ed. 2d 632, 115 S. Ct. 728 (1995)).

“The requirement that a defendant's actions be the proximate cause of a plaintiff's harm represents a policy choice premised on recognition of the impracticality of asserting liability based on the almost infinite expanse of actions that are in some sense causally related to an injury. ... In marking that boundary, the Supreme Court has emphasized that a plaintiff cannot complain of harm so remotely caused by a defendant's actions that imposing legal liability would transgress our "ideas of what justice demands, or of what is administratively possible and convenient." *Ideal Steel Supply Corp.*, 373 F.3d at 257 (quoting *Commercial Cleaning Services, L.L.C. v. Colin Service Systems, Inc.*, 271 F.3d at 380) (quoting *Holmes*, 503 U.S. at 268 (other internal quotation marks omitted)).

Ideal Steel Supply Corp. involves a motion brought by the defendants to dismiss Ideal's amended complaint pursuant to Federal Rules of Procedure (Fed. R. Civ. P.) 12(b)(6) and 9(b). The district court, the Second Circuit and the Supreme Court were required to treat the allegations in the amended complaint as true and draw all reasonable inferences in favor of the plaintiff for purposes of ruling on the defendant's motion to dismiss. See, *Piccone v. Bd. of Directors of Doctors Hosp.*, 2000 U.S. Dist. LEXIS 12249 (S.D.N.Y., 2000) and *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, 507 U.S. 163, 164, 113 S. Ct. 1160, 122 L. Ed. 2d 517 (1993).

The facts in *Ideal Steel Supply Corp.* are not complex. Both Ideal and National purchase steel mill products from manufacturers outside of New York State and distribute and sell those products, such as steel bars and sheets, and related hardware, supplies, and services, in a lumber yard setting to professional ironworkers, small steel fabricators, and do-it-yourself homeowners. Ideal and National each have a retail store in the Queens and the Bronx located a few minutes from each other. They sell to essentially the same customer base.

Ideal and National are the only substantial competitors in New York City for the products that they sell. No other businesses in the Bronx or Queens carry "the same or a similar comprehensive array of products and services or compete for the same customers." Due to their similar product lines, which comprise "generic commodities", they compete with each other principally on the basis of price. However, demand in the marketplace does not fluctuate due to prices. Rather overall demand is affected by the condition of the real estate and construction businesses and other factors beyond the control of either Ideal or National. Thus, they cannot increase demand via price reductions or marketing campaigns. In fact, absent an increase in demand, increased sales at either of the competitor's stores generally is accompanied by a concomitant decrease in sales of the other company.

Pursuant to New York State law, Ideal and National are required to charge, collect and remit to New York State a state and local sales tax totaling 8.25% on any sale not subject to an exemption. They are to remit the taxes collected and submit an account of taxable sales in monthly or quarterly returns. Both Ideal and National conduct much of their business on a cash-and-carry basis. In its complaint filed in 2002 Ideal alleged that it properly collected and remitted the sales taxes due, but since at least 1998 and continuing on National did not charge cash-paying customers any sales tax and did not report or pay to New York State any sales tax on the sales. Further, allegedly to conceal the amounts due National filed fraudulent sales tax reports with the State Tax Department either by U.S. mail or electronically (by wire) and failed to report the taxable sales, thus it misrepresented its total taxable sales.

Ideal alleged that National's "cash, no tax" sales coupled with the fraudulent reporting was a scheme intended to and which did injure Ideal because it cannot charge its customers 8.25% more than National and still compete based on the principal factor in choosing between Ideal and National, namely, price. Ideal alleged that its list prices were, on average, no higher than National's, and that but for the scheme it would not have been at a competitively significant price disadvantage. The scheme allowed National's customers to save 8.25% on their purchases, thus incurring a substantially lower bottom-line cost than

they would by purchasing the same items from Ideal, and this is at no cost to National's gross profit margin as it doesn't report the sales and remit the tax to the State.

Ideal alleged that each fraudulent filing with the State (on which the State Tax Department relied and continues to rely, enabling National to avoid the sales taxes on a significant portion of its sales) by National via U.S. mail or by wire violated either federal mail fraud statute 18 U.S.C. § 1341 or federal wire fraud statute 18 U.S.C. § 1343, respectively. Allegedly each violation constitutes a predicate act of racketeering activity, which is ongoing, punishable by RICO § 1962(c). Ideal alleged that due to these violations it had suffered lost profits exceeding \$5,000,000.

Ideal also alleged that the defendants had violated RICO § 1962(a) by reinvesting the profits gained from the "cash, no tax" scheme in violation of RICO § 1962(c) at its Queens location to open its Bronx location and also violated RICO § 1962(c) at the Bronx location with an identical "cash, no tax" scheme. Ideal alleged that the violations by National at its Bronx location caused Ideal's Bronx location to lose significant business and market share resulting in damages exceeding \$2,000,000. Furthermore, Ideal alleged that the "cash, no tax" scheme violated the terms of a settlement agreement that the parties executed in a 1997 litigation wherein they each agreed not to interfere with each other's business activities other than through legitimate and proper competition. Ideal sought treble damages on each RICO claim and single damages on the breach of contract claim.

The district court granted the defendant's motion to dismiss the civil RICO claims pursuant to Fed. R. Civ. P. 12(b)(6) as Ideal did not rely on the fraudulent communications. The Second Circuit vacated the judgment of the district court and reasoned that despite the fact that Ideal did not itself rely on the mail and wire fraud violations committed by National it had standing to assert its civil RICO claims because it alleged facts sufficient to show that the injury to its business was proximately caused by National's pattern of racketeering activity and investment of the racketeering income generated by that activity. The court opined that Ideal alleged that it was a competitor of National and was an entity directly targeted for injury by National's racketeering activities prohibited by RICO §§ 1962(a) and (c), thus there was proximate cause for Ideal's civil RICO claims. It reasoned that the racketeering activities were intended to and did give the defendants a competitive advantage over Ideal. Allegedly National's "cash, no tax" scheme was implemented to divert customers from Ideal. The court deduced that since Ideal and National sell substantially the same products in retail stores minutes apart, the lower cost paid by National's cash-paying customers due to the scheme influenced some customers to purchase from National as opposed to Ideal. The court stated that the mailing or wiring of the fraudulent sales tax reports were an essential part of the scheme otherwise National would have had to pay the sales taxes out of its own assets. Ideal was the principal intended victim of the scheme, thus as a competitor directly targeted for injury by National's RICO violations it had standing to bring a civil RICO claim for damages under RICO § 1964(c).

The court reviewed the legal requirements for a civil RICO claim based on RICO § 1962(c) and held that Ideal satisfied the requirements. The court stated that the mailing or wiring of false state tax returns may constitute violations of 18 U.S.C. §§ 1341 and 1343 citing *United States v. Porcelli*, 865 F.2d 1352 (2d Cir.), *cert. denied*, 493 U.S. 810, 107 L. Ed. 2d 22, 110 S. Ct. 53 (1989) and *United States v. Slevin*, 106 F.3d 1086, 1088 (2d Cir. 1996). It further stated that two or more acts of racketeering activity may be considered a pattern of racketeering citing RICO § 1961(5) and *United States v. Indelicato*, 865 F.2d 1370, 1381-84 (2d Cir.) (en banc), *cert. denied*, 491 U.S. 907, 105 L. Ed. 2d 700, 109 S. Ct. 3192 (1989).

The court set forth a detailed analysis of the requirement in RICO § 1964(c) that a civil RICO plaintiff demonstrate that it was injured in its business or property *by reason of* the defendant's RICO violation. It noted that in applying the principles governing proximate cause related to civil RICO claims it had upheld dismissals of a variety of complaints where the alleged injury was too remote from the alleged pattern of racketeering activity citing cases such as *Sperber v. Boesky*, 849 F.2d 60 (2d Cir. 1988); *Hecht v.*

Commerce Clearing House, Inc., supra; In re American Express Co. Shareholder Litigation, 39 F.3d 395, 399 (2d Cir. 1994); and *Abrahams v. Young & Rubicam Inc.*, 79 F.3d 234 (2d Cir.), cert. denied, 519 U.S. 816, 136 L. Ed. 2d 27, 117 S. Ct. 66 (1996).

The court noted that it had consistently emphasized that the reasonably foreseeable victims of a RICO violation are the targets, competitors and intended victims of the racketeering enterprise. It cited cases in support of its position such as *Lerner v. Fleet Bank, N.A., supra; Hecht v. Commerce Clearing House, Inc., supra; Commercial Cleaning Services, L.L.C. v. Colin Service Systems, Inc., supra; County of Suffolk v. Long Island Lighting Co.*, 907 F.2d 1295 (2d Cir. 1990) and *Sedima, S.P.R.L. v. Imrex Co., supra*.

The Second Circuit further held that Ideal had standing to assert its RICO § 1962(a) claim. The court noted that under RICO § 1962(a) “the complaint ‘must allege injury ‘by reason of’ defendants’ investment of racketeering income in an enterprise,’ as distinct from injury traceable simply to the predicate acts of racketeering alone or to the conduct of the business of the enterprise. See, *Ouaknine v. MacFarlane*, 897 F.2d 75, 82-83 (2d Cir. 1990).” 373 F.3d at 264. The court went on to state “Here, part of the proceeds of defendants’ alleged “cash, no tax” scheme may properly be viewed as racketeering income, indirectly derived from their pattern of mail and wire frauds, given that those frauds enabled defendants to avoid paying 8B< (sic) percent of those proceeds to the State. And the complaint alleges that defendants used profits gained from the operation of their “cash, no tax” scheme at National’s Queens location to fund the opening of their retail outlet in the Bronx near Ideal’s outlet in that Borough. The complaint adequately stated a claim on which relief can be granted under § 1964(c) for a violation of §1962(a).” 373 F.3d at 264.

The Supreme Court reversed the Second Circuit’s ruling with regard to the claim under RICO § 1962(c) and vacated ruling with respect to Ideal’s RICO § 1962(a) claim and remanded it so that the Second Circuit can determine if there was proximate cause. In reaching its decision the Court relied heavily on and applied the principles established in *Holmes v. Securities Investor Protection Corporation*, 503 U.S. 258, 268, 112 S. Ct. 1311, 117 L. Ed. 2d 532 (1992). It stated, “[o]ur analysis begins--and, as will become evident, largely ends--with *Holmes*. 126 S.Ct. at 1995.

In *Holmes*, Securities Investor Protection Corporation (SIPC), a private corporation with a duty to reimburse the customers of registered broker-dealers who became unable to meet their financial obligations, alleged that Robert Holmes, the defendant, conspired with others to manipulate stock prices. The fraud committed resulted in a precipitous drop in the price of the stock, which in turn caused two broker-dealers financial difficulties resulting in their liquidation and inability to meet their obligations to their customers. Hence, SIPC had to advance nearly \$13 million to cover the claims of customers of those broker-dealers. SIPC sued Holmes on the theory, among others, that he violated RICO §1962(c). SIPC claimed that it was subrogated to the rights of those customers of the broker-dealers who did not purchase manipulated securities. The Court ruled against SIPC reasoning that the nonpurchasing customers’ injury was not proximately caused by the defendant’s conduct, because “the conspirators have allegedly injured these customers only insofar as the stock manipulation first injured the broker-dealers and left them without the wherewithal to pay customers’ claims.” *Id.*, at 271.

The *Holmes* Court rejected an interpretation of the “by reason of” language of RICO § 1964(c) to require only that the RICO violation was a “but for” cause of the plaintiff’s injury. It noted the “unlikelihood that Congress meant to allow all factually injured plaintiffs to recover.” *Id.*, at 266. Rather, the *Holmes* Court applying the common-law principles of the proximate cause element required a direct relation between the plaintiff’s injury and the defendant’s injurious conduct. It found the connection between the alleged stock manipulation and the broker-dealers customers’ losses and as too remote since it was purely contingent on the harm suffered by the broker-dealers.

Applying the direct connection principle of *Holmes*, the Court ruled that Ideal could not maintain its claim under RICO § 1962(c). It viewed the direct victim of the pattern of mail and wire fraud as New York State and not Ideal. The State was being defrauded and losing tax revenues. The Court stated, “The proper referent of the proximate-cause analysis is an alleged practice of conducting National's business through a pattern of defrauding the State. To be sure, Ideal asserts it suffered its own harms when the Anzas failed to charge customers for the applicable sales tax. The cause of Ideal's asserted harms, however, is a set of actions (offering lower prices) entirely distinct from the alleged RICO violation (defrauding the State). The attenuation between the plaintiff's harms and the claimed RICO violation arises from a different source in this case than in *Holmes*, where the alleged violations were linked to the asserted harms only through the broker-dealers' inability to meet their financial obligations. Nevertheless, the absence of proximate causation is equally clear in both cases.” 126 S. Ct. at 1997.

The Court supported its conclusion by applying the rationales for the directness requirement to the facts of the case. It noted that difficulty can arise when a court tries to determine the damages caused by a remote action. As *Holmes* stated, “[t]he less direct an injury is, the more difficult it becomes to ascertain the amount of a plaintiff's damages attributable to the violation, as distinct from other, independent, factors.” 503 U.S. at 269. The Court opined, “[t]he injury Ideal alleges is its own loss of sales resulting from National's decreased prices for cash-paying customers. National, however, could have lowered its prices for any number of reasons unconnected to the asserted pattern of fraud. It may have received a cash inflow from some other source or concluded that the additional sales would justify a smaller profit margin. Its lowering of prices in no sense required it to defraud the state tax authority. Likewise, the fact that a company commits tax fraud does not mean the company will lower its prices; the additional cash could go anywhere from asset acquisition to research and development to dividend payouts.” 126 S.Ct. at 1997.

The Court also saw a lack of directness as Ideal’s lost revenues could have been caused from factors other than the alleged RICO violations. Thus, the courts would have to sort through all the reasons that businesses gain and lose customers and perform a complex assessment to ascertain what amount of Ideals’ lost revenues were the result of National’s lowered prices.

Despite the lack of any risk of duplicative recoveries, another consideration in the proximate cause determination, the Court saw the speculative nature of Ideal’s claim as further evidence that Ideal’s injury was not the direct result of the RICO violations. It provided, “[a] court considering the claim would need to begin by calculating the portion of National's price drop attributable to the alleged pattern of racketeering activity. It next would have to calculate the portion of Ideal's lost sales attributable to the relevant part of the price drop. The element of proximate causation recognized in *Holmes* is meant to prevent these types of intricate, uncertain inquiries from overrunning RICO litigation. It has particular resonance when applied to claims brought by economic competitors, which, if left unchecked, could blur the line between RICO and the antitrust laws.” 126 S.Ct. at 1998.

Citing *Holmes*, the Court noted that where the immediate victims of a RICO violation can be expected to pursue their own claim, thus vindicating the laws, a direct causal connection is even more necessary. The *Holmes* Court stated, “directly injured victims can generally be counted on to vindicate the law as private attorneys general, without any of the problems attendant upon suits by plaintiffs injured more remotely.” 503 U.S. 269-270. Accordingly, the Court reasoned New York State will pursue its remedies against National if the allegations are true. Its claims will be relatively straightforward and easier to determine the taxes owed as opposed to determining the sales lost by Ideal.

The Court rejected the reasoning of the Second Circuit that the indirect route National took to injure Ideal it is immaterial because the Anzas sought to gain a competitive advantage over Ideal. The Court stated,

“[a] RICO plaintiff cannot circumvent the proximate-cause requirement simply by claiming that the defendant's aim was to increase market share at a competitor's expense.” 126 S.Ct at 1998.

Accordingly, the Court held that Ideal failed to satisfy the proximate cause requirement with regard to the RICO § 1962(c) claim and reversed the Second Circuit. Since Ideal did not satisfy the proximate cause requirement, the Court ruled that it had no occasion to address whether a showing of reliance by Ideal on the alleged fraud perpetrated by National is necessary to sustain its claim.

With regard to Ideal’s claim under RICO § 1962(a) that National’s tax scheme provided them with funds to open the Bronx store causing Ideal to lose sales, the Court declined to rule on Ideal’s claim since the Court of Appeals had upheld Ideal’s claim without addressing the proximate cause requirement. Thus, the Supreme Court did not want to consider the RICO § 1962(a) claim “without the benefit of the Court of Appeals' analysis, particularly given that the parties have devoted nearly all their attention in this Court to the § 1962(c) claim.” 126 S.Ct. at 1999. Accordingly, the Court vacated the Second Circuit’s ruling with regard to the RICO §1962(a) claim and remanded it to the Second Circuit for a determination with respect to proximate cause.

CONCLUSION

With its ruling in *Ideal Steel Supply Corp.* the Supreme Court has severely limited the lawsuits that may be brought under the civil enforcement provisions of RICO provided for in RICO § 1964(c). The Court’s requirement that there be a direct connection between the plaintiff’s injury and the alleged injurious RICO violation for there to be proximate cause will preclude many potential lawsuits. The Court’s stringent proximate cause requirement will prevent the recovery of damages in cases alleging a RICO § 1962(c) violation that are not related to organized crime—the generally intended target of RICO. However, it may also prevent recoveries for injuries caused by RICO violations that Congress intended to remedy through the provision in RICO for civil suits such as losses sustained by business competitors due to quintessential organized criminal activity. Justice Thomas’ example in his dissent illustrates this well. He wrote, “[f]or example, an organized crime group, running a legitimate business, could, through threats of violence, persuade its supplier to sell goods to it at cost, so that it could resell those goods at a lower price to drive its competitor out of the business. Honest businessmen would be unable to compete, as they do not engage in threats of violence to lower their costs. Civil RICO, if it was intended to do anything at all, was intended to give those businessmen a cause of action. Cf. *Sedima*, 473 U.S., at 521-522, 105 S. Ct. 3275, 87 L. Ed. 2d 346 (Marshall, J., dissenting). Yet just like respondent, those businessmen would not themselves be the immediate target of the threats; the target would be the supplier. Like respondent's injury, their injury would be most immediately caused by the lawful activity of price competition, not the unlawful activity of threatening the supplier. Accordingly, under the Court's view, the honest businessman competitor would be just an ‘indirect’ victim, whose injury was not proximately caused by the RICO violation.... Civil RICO would thus confer no right to sue on the individual who did not himself suffer the threats of violence, even if the threats caused him harm.” 126 S.Ct. at 2006.

There are some definite unintended negative consequences as a result of *Ideal Steel Supply Corp.* Taxpayers failing to collect and remit sales taxes who file fraudulent sales tax returns by mail or wire are now aware that they will not be subject to civil RICO claims for treble damages by competitors injured by their scheme. Further, their liability will not extend to damages resulting from the fraudulent filing of income tax returns, various reports required by the government and any scheme involving a RICO violation and the sending of a fraudulent communication by mail or wire on the grounds that the violation was intended to and did give them a competitive advantage over their competitor as the reasonably foreseeable victims of their RICO violation will not be held to be the targets, competitors and intended victims of their racketeering enterprise. Treble damages due to the violations will not serve as incentive to collect and pay sales tax, pay the income tax due and file accurate reports with the government.

Those who have been injured by the RICO violations of their competitors have been placed on notice that they will not have standing to bring civil RICO claims against a competitor as the foreseeable victim of the RICO violation for treble damages when the competitor engaged in a pattern of racketeering activity such as National's "cash, no tax" scheme which was intended to and did give them a competitive advantage. While there is a slight glimmer of hope that the Second Circuit will find proximate cause with respect to Ideal's RICO § 1962(a) claim that National's tax scheme provided them with funds to open the Bronx store causing Ideal to lose sales, in light of the direct connection standard set forth by the Supreme Court it is highly unlikely that Ideal will prevail.

While the Supreme Court's ruling in *Ideal Steel Supply Corp.* did not garner headlines and will go unnoticed by the general populace, all those in the business community should be aware of it and follow the RICO § 1962(a) claim as it works its way through the lower courts on remand. In the interim, it's a good reminder to remember the old axiom, "honesty is always the best policy", even if there may not be a potential civil RICO claim with treble damages!

REFERENCES

Abrahams v. Young & Rubicam Inc., 79 F.3d 234 (2d Cir.), *cert. denied*, 519 U.S.16, 136 L. Ed. 2d 27, 117 S. Ct. 66 (1996)

Anza v. Ideal Steel Supply Corp, 546 U.S. ___, 126 S.Ct 713 (2005)

Commercial Cleaning Servs., L.L.C. v. Colin Serv. Sys., Inc., 271 F.3d 374 (2d Cir. 2001)

County of Suffolk v. Long Island Lighting Co., 907 F.2d 1295 (2d Cir. 1990)

Federal Rules of Procedure 9(b) and 12(b)(6)

First Nationwide Bank v. Gelt Funding Corp., 27 F.3d 763, 769 (2d Cir. 1994)

Goldfine v. Sichenzia, 118 F. Supp. 2d 392, 394 (S.D.N.Y., 2000)

Hecht v. Commerce Clearing House, Inc., 897 F.2d 21, 23-24 (2d Cir. 1990), *cert. denied*, 513 U.S. 1079, 130 L. Ed. 2d 632, 115 S. Ct. 728 (1995)

H. J. Inc. v. Northwestern Bell Telephone Co., 492 U.S. 229, 245, 109 S. Ct. 2893, 106 L. Ed. 2d 195 (1989)

Holmes v. Securities Investor Protection Corp., 503 U.S. 258, 117 L. Ed. 2d 532, 112 S. Ct. 1311 (1992)

18 U.S.C. § 1341

18 U.S.C. § 1343

Anza, et al. v. Ideal Steel Supply Corp., 126 S.Ct. 1991, 164 L. Ed. 2d 720 (2006)

Ideal Steel Supply Corp. v. Anza et al., 373 F.3d 251 (2d Cir. 2004)

Ideal Steel Supply Corp. v. Anza et al., 254 F. Supp. 2d 464 (S.D.N.Y., 2003)

- Ideal Steel Supply Corp. v. Anza et al*, 2005 U.S. Dist. LEXIS (S.D.N.Y., 2005)
- In re American Express Co. Shareholder Litigation*, 39 F.3d 395, 399 (2d Cir. 1994)
- Katzman v. Victoria's Secret Catalogue*, 167 F.R.D. 649 (S.D.N.Y. 1996) *aff'd*, 113 F.3d 1229 (2d Cir. 1997)
- Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, 507 U.S. 163, 164, 113 S. Ct. 1160, 122 L. Ed. 2d 517 (1993)
- Lerner v. Fleet Bank, N.A.*, 318 F.3d 113 (2d Cir. 2003), *cert. denied*, 540 U.S. 1012, 157 L. Ed. 2d 424, 124 S. Ct. 532 (2003)
- Moss v. Morgan Stanley Inc.*, 719 F.2d 5 (2d Cir. 1983)
- Title IX of the Organized Crime Control Act*, Pub. L. 91-542, 84 Stat. 941, as amended, 18 U.S.C. §§ 1961-1968- Racketeer Influenced and Corrupt Organizations Act (RICO)
- Ouaknine v. MacFarlane*, 897 F.2d 75 (2d Cir. 1990)
- Piccone v. Bd. of Directors of Doctors Hosp.*, 2000 U.S. Dist. LEXIS 12249 (S.D.N.Y., 2000)
- Regscan, Inc. v. Brewer*, 2005 U.S. Dist. LEXIS 17796 (E.D.PA. 2005)
- Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 496, 87 L. Ed. 2d 346, 105 S. Ct. 3275 (1985)
- Schmidt v. Fleet Bank*, 16 F. Supp. 2d 340, 346 (S.D.N.Y., 1998)
- Sperber v. Boesky*, 849 F.2d 60 (2d Cir. 1988)
- Spoto v. Herkimer County Trust*, 2000 U.S. Dist. LEXIS 6057 (N.D.N.Y., 2000)
- Terminate Control Corp. v. Horowitz*, 28 F.3d 1335 (2d Cir. 1994)
- United States v. Autuori*, 212 F.3d 105, 115 (2d Cir. 2000)
- USA Certified Merchants, LLC v. Koebel*, 262 F.Supp. 2d 319 (S.D.N.Y., 2003)
- West 79th Street Corp. v. Congregation Kahl Minchas Chinuch*, 2004 U.S. Dist. LEXIS 19501 (S.D.N.Y., 2004)