Pleading Standing And Proximate Cause In Civil RICO Claims

Daniel J. Polatsek

*Although some courts collapse standing and proximate cause into a single analysis, they are two very distinct concepts. And they need to be pled distinctly and thoroughly.*

**MOST PRACTITIONERS** familiar with civil actions under the Racketeer Influenced and Corrupt Organizations Act (“RICO”) 18 U.S.C. §1961 et seq., are aware that a cause of action under section 1962(c) requires a RICO plaintiff to plead “(1) the conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity.” *Richmond v. Nationwide Cassel, L.P.*, 52 F.3d 640, 644 (7th Cir. 1994). Despite a well-settled framework of analysis for determining whether the foregoing elements have been sufficiently pled, most courts do not address the distinctions between standing and proximate cause within a civil RICO action. Recognizing these distinctions, however, can be the difference between survival or dismissal at the pleading stage.

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DISTINGUISHING STANDING FROM PROXIMATE CAUSE • Since the Supreme Court’s decision in Holmes v. Securities Investor Protection Corp., 503 U.S. 258, 268 (1992), the concepts of “standing” and “proximate cause” are frequently used as interchangeable and synonymous legal terms. Despite their interdependence, these two concepts are distinct. See Trollinger v. Tyson Foods, Inc., 370 F.3d 602, 612-13 (6th Cir. 2003) (treating standing and proximate cause as distinct concepts); Williams v. Mohawk Indus., Inc., No. 04 13740, 2005 WL 1355512, at *7 (11th Cir. Jun. 9, 2005) (same). Because a RICO plaintiff must show the injury alleged was “by the reason of” a predicate act in order to establish both standing and proximate cause, it is easy to see why some courts collapse these two concepts into a single analysis. Id. at 613 (finding overlap between the concepts of standing and proximate cause because both elements require claimants to establish that their injury was “by the reason of” a RICO predicate act violation).

Standing

Standing, however, is a threshold concept that implicates constitutional, prudential, and statutory limitations. See Trollinger 370 F.3d at 612. Thus, a standing analysis under RICO asks whether a plaintiff is entitled to bring legal action against the named defendant. Id. (characterizing the inquiry under standing as whether the plaintiff has the right to file a lawsuit). As set forth in Holmes, the issue of standing is determined by whether a direct relationship exists between the injury asserted and the injurious conduct alleged. See Holmes, 503 U.S. at 268-269 (“a plaintiff who complains of harm flowing merely from the misfortunes visited upon a third person by the defendant’s acts, generally stands at too remote a distance to recover”); see also Spinale v. United States, No. 03 Civ. 1704, 2004 WL 50873, at *15 (S.D.N.Y. Jan. 9, 2004) (finding that a RICO plaintiff must demonstrate that a direct relationship exists between the RICO plaintiff’s injury and the defendant’s injurious conduct). This “directness” requirement enunciated in Holmes hails from three different policy considerations:

• First, without the requirement, it would be too difficult to determine the injuries of an indirect plaintiff, apart from any of the other independent factors that may have caused the plaintiff’s injury. See Holmes, 503 U.S. at 269;
• Second, it eliminates the potentially complicated endeavor of apportioning damages between multiple plaintiffs who are removed from the defendant by varying degrees, while also eliminating multiple recoveries. Id.; and
• Third, it permits the directly injured victim to vindicate the law and to deter future injurious conduct. Id.

Proximate Cause

Proximate cause, on the other hand, is a merit-based concept involving common-law and prudential limitations, and examines the consequences under which the law will hold a defendant accountable. See Trollinger, 370 F.3d at 612 (referring to proximate cause as a tool used by the law to limit a person’s responsibility for the consequences of their own conduct). Simply put, proximate cause requires a causal link between the conduct alleged and the injury suffered. If the injury was unforeseeable, illogical, or speculative in nature, it is generally held that a plaintiff’s injury was not proximately caused by the defendant’s conduct. As such, the RICO plaintiff who shows a direct injury may nevertheless suffer a dismissal if the injury alleged does not satisfy the other traditional requirements of proximate cause; namely, that the wrongful conduct was a substantial and foreseeable cause of the injury alleged and that the connection to this injury was logical and not speculative. Id. at 614.
Ultimately, the concepts of standing and proximate cause remain distinct under RICO because each examines a different type of relationship. Whereas standing examines the relationship between the plaintiff and the defendant, proximate cause examines the relationship between the plaintiff and the alleged injury.

**HOW TO PROPERLY PLEAD STANDING**

After *Holmes*, satisfying the directness requirement to establish standing requires a RICO plaintiff to plead:

- The injury alleged was caused by the defendant’s commission of one or more of the predicate acts defined by 18 U.S.C. §1961(1); and
- The RICO plaintiff was the intended target of that defendant’s conduct.

**Standing And The Alleged Predicate Acts**

A RICO plaintiff must show that the injury alleged was due to the defendant’s commission of a predicate act. For this, there is simply no substitute. See *Hamm v. Rhone-Poulenc Rorer Pharmaceuticals, Inc.*, 187 F.3d 941, 952 (8th Cir. 1999) (“The class of persons who may sue under RICO is limited to those whose injuries were directly caused by RICO violations”); *Prince Heaton Enters., Inc. v. Buffalo’s Franchise Concepts, Inc.*, 117 F. Supp. 2d 1357, 1363 (N.D. Ga. 2000) (“A plaintiff cannot allege merely that an act of racketeering occurred and that he lost money [rather] [h]e must show a causal connection between his injury and a predicate act”) (quoting *Pelletier v. Zwiefel*, 921 F.2d 1465, 1498-99 (11th Cir. 1991)).

As explained by the Supreme Court in *Sedima, S.P.R.L. v. Imrex Co., Inc.*, 473 U.S. 479 (1985), an actionable RICO injury must be caused by the predicate acts alleged, because the essence of a RICO claim is the commission of predicate acts within the conduct of an enterprise. See *id.* at 497 (stating “[a]ny recoverable damages occurring by reason of a violation of section 1962(c) will flow from the commission of the predicate acts”); *Claire’s Stores, Inc. v. Abrams*, No. 86 C 9851, 1989 WL 134959 at *5 (N.D. Ill. Oct. 16, 1989) (“The measure of damages under RICO is the harm occasioned as a result of the predicate acts”). A RICO plaintiff’s failure to allege that a specifically identified predicate act proximately caused his injury is grounds for dismissal at the pleading stage. See *Vicon v. Fiber Optics Corp. v. Scivo*, 201 F. Supp. 2d 216, 219 (S.D.N.Y. 2002); *Hamm*, 187 F.3d at 952 (stating that the plaintiff must be injured by the conduct constituting the racketeering activity, “that is RICO predicate acts, and not by other conduct of the defendant”).

**Common Law Fraud, Breach Of Fiduciary Duty Not Predicate Acts**

To this end, simply alleging common-law fraud or a breach of fiduciary duty, no matter how egregious, are not predicate acts under section 1961(1). Thus, without more, allegations of common-law fraud and breach of fiduciary duty do not and cannot confer standing under section 1962(c). See *LaVay Corp. v. Dominion Fed. Sav. & Loan*, 830 F.2d 522, 529 (4th Cir. 1987) (under no circumstances could a breach of fiduciary duty constitute a pattern of racketeering activity); *Ownby v. Cohen*, 19 F. Supp. 2d 558, 565 (W.D. VA 1998) (breach of fiduciary duty is not among crimes recognized as racketeering); *Claire’s Stores, Inc.*, 1989 WL 134959 at *5 (although actionable under the common-law, breach of fiduciary duty is not a predicate act under RICO). Therefore, contrary to the beliefs of hopeful RICO plaintiffs seeking the benefit of treble damages and attorneys’ fees, there is no recourse under section 1962(c) for claims arising out of intra-corporate disputes. See *e.g.* *Vicon*, 201 F. Supp. 2d at 218 (stating “[o]nce again...an angry plaintiff tries to transform garden variety claims of fraud and breach of fiduciary duty into a RICO action”); *In Re Teledyne Defense Con-
tracting Derivative Litig., 849 F. Supp. 1369, 1377 (C.D. Cal. 1993) (dismissing RICO claim grounded in breach of fiduciary duty claims because RICO was not intended “to federalize internal corporate relationships”).

For example, in Vicon, the court rejected the plaintiffs’ attempt to bootstrap a breach of fiduciary duty claim into a civil RICO claim. There, the plaintiffs based a RICO claim on the predicate act of mail fraud under 18 U.S.C. §1341. See Vicon, 201 F. Supp. 2d at 218. Specifically, the plaintiffs alleged that the defendants mailed a proxy solicitation to Vicon’s shareholders but failed to disclose certain false travel and entertainment expenses. Id. The plaintiffs further alleged that defendants committed wire fraud by transmitting a 10QSB form to the Securities Exchange Commission which failed to disclose those inflated expenses. Id.

In rejecting the plaintiffs’ RICO claim, the Vicon Court found that the injury suffered by the plaintiffs was the pilfering of its treasury by former officers, directors, and employees. Id. The purported pilferage therefore, was not accomplished by the proxy solicitations or the filing of the 10QSB to the SEC, but rather by the submission of false expense vouchers. Id. As a result, it could not be said that the alleged mail and wire frauds described as the predicate acts were the cause of plaintiffs’ injury. Id. at 219 (stating “[a] predicate act does not proximately cause an injury if it merely furthers, facilitates, permits or conceals an injury that happened or could have independently of the act”); see also Dunn v. Board of Incorporators of the African Methodist Episcopal Church, No. 2547, 2002 WL 130920, at *3 (N.D. Tex. May 14, 2002) (dismissing a RICO claim in which the alleged predicate acts were not the proximate cause of the plaintiff’s tangible loss).

Similarly, in Chera v. Chera, No. 99 CV 7101, 2000 WL 1375271 (E.D.N.Y. Sep. 20, 2000), the court rejected a RICO claim based on a breach of fiduciary duty between two brothers over the sale of partnership assets and the distributions of profits. Specifically, the plaintiff in Chera alleged his brother violated both 18 U.S.C. §§1341 and 1343 when he mailed and faxed forged documents that allowed the sale and transfer of his assets out of the partnership. In rejecting the plaintiff’s RICO claim, the court found that the plaintiff’s injuries were not caused by the alleged predicate acts but by the disposition of funds obtained as a result of those acts in breach of partnership law and the partnership agreement. Id. at *7. Put another way, the predicate acts of mail and wire fraud were directed at various third parties and were not the cause of the injuries alleged. Id. See also Claire’s Stores, Inc., 1989 WL 134959 at *5 (dismissing RICO claim alleging a breach of fiduciary duty for misappropriated corporate funds because such conduct did not constitute a RICO predicate act under section 1961(1)).

Standing And The Intended Target

The RICO plaintiff must also show that he was the intended target of the RICO scheme. See W.L. Meng v. Schwartz, 116 F. Supp. 2d 92, 95 (D. D.C. 2000) (finding that within the context of RICO a RICO plaintiff must be the “intended target of the RICO violation”) quoting In re Am. Express, 39 F.3d 395, 400 (2d Cir. 1994); G-I Holdings, Inc. v. Baron & Budd, 238 F. Supp. 2d 521, 549 (S.D.N.Y. 2002) (“[t]o have standing, plaintiffs must show that they were the ‘intended targets’ of the RICO violations”). Thus, the success of a RICO plaintiff’s claim depends in part on the ability to show that the injuries alleged were the preconceived purpose or the specifically intended consequence of the defendants’ racketeering activities, or else it is not considered the “necessary result” or “foreseeable consequence” of the defendant’s actions. See Medgar Evers Houses Tenants Assoc. v. Medgar Evers Houses Assoc., 25 F. Supp. 2d 116, 122
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(E.D.N.Y. 1998); G-I Holdings, Inc. 238 F. Supp. 2d at 549. Simply put, a RICO plaintiff cannot establish standing if the injury alleged is the derivative result of a fraudulent scheme that is actually targeting another victim.

For example, in Hamm, current and former employees brought a RICO claim under section 1962(c) seeking relief for injuries they suffered after refusing to participate in an unlawful scheme by the defendants that involved marketing drugs in an unlawful manner by promoting off-label uses. See Hamm, 187 F.3d at 948. Specifically, the alleged intent and purpose of the defendants’ scheme was designed to circulate fraudulent promotional materials in an effort to defraud hospital administrators, physicians, and other medical personnel by causing them to unlawfully prescribe certain medications. Id. The plaintiffs alleged that their refusal to participate in the purported scheme resulted in injuries to their reputation, and the denial of compensation, promotion, stock options and pension benefits. Id. at 952.

In rejecting the plaintiffs RICO claim, the Hamm Court acknowledged that “[t]he injurious acts, taken as alleged, were clearly wrong,” but nevertheless, found that the plaintiffs were without standing because the fraudulent scheme was not directed at them. Id. at 953. Rather, the scheme alleged was directed at hospitals, physicians, and other medical personnel. Id. As such, the plaintiffs were not the “intended targets of the alleged racketeering activity,” and therefore, did not have standing. Id. (emphasis added). See Dow Chem. Co. v. Exxon Corp., 30 F. Supp. 2d 673, 696 (D. Del. 1998) (dismissing RICO claim where the defendant’s RICO scheme and predicate acts were both targeted at the Patent and Trademark Office for the purpose of obtaining patent rights).

Similarly, in Chandrat v. Navillus Tile, No. 03 10093, 2004 WL 2186562 (S.D.N.Y. Sep. 28, 2004), the district court rejected a RICO claim for a plaintiff’s failure to show that he was the intended victim of the alleged RICO enterprise. In Chandrat, the plaintiff alleged that the defendants’ general contracting company engaged in a RICO scheme that concealed the defendants’ true profits. Specifically, the plaintiff alleged that the defendants’ RICO scheme consisted of altering details on customer invoices, billing customers for work never performed, making payments to fictitious employees, and taking advantage of the corporation’s benefits at its own expense. Id. at *4. As a result, the RICO scheme enabled the defendants to misrepresent their financial health and deny the plaintiff compensation under the pretext of a lack of funds.

In dismissing the plaintiff’s RICO claim, the court found that the RICO acts were actually aimed at either defrauding the defendants’ customers or diluting the corporation’s assets. Id. As a result, the court did not find that the plaintiff had sufficiently alleged that his injuries were the preconceived purpose or specifically intended consequence of the defendants’ RICO acts. In other words, the plaintiff was not the intended target of the RICO scheme alleged. See also Spinale, 2004 WL 50873, at *15 (dismissing a RICO claim when plaintiffs were third parties to the transactions constituting the racketeering acts that were responsible for their injuries).

The Intended Target Versus The Intended Beneficiary

Similar to the plaintiffs in Hamm and Chandrat, are those plaintiffs seeking relief under civil RICO as third-party beneficiaries. A RICO claim under this context generally arises when a third-party beneficiary is deprived of a benefit after a fraudulent scheme is committed against another victim or primary target. The RICO plaintiff who asserts this type of claim is generally without standing. See e.g. Firestone v. Galbreath, 976 F.2d 279, (6th Cir. 1992) (“the con-
cept of direct injury refers to the relationship between the injury and the defendant’s actions, not the plaintiffs’ pocketbooks”).

The seminal case on this issue is Firestone, in which the grandchildren of an inter vivos trust sought relief under section 1962(c) for the alleged misappropriation of funds by the trustee and executor of the will. The crux of the grandchildren’s claim was that stealing from their grandmother during her lifetime decreased the size of the estate and consequently the size of their inheritance. See Firestone, 976 F.2d at 285. In rejecting the grandchildren’s intended beneficiary theory of standing, the court found that the grandchildren employed a “flawed logic” in equating actual monetary loss to a direct injury. Id. Instead, the court found that the estate suffered the direct harm, not the family trust. As such, the grandchildren had no standing to assert a RICO claim under §1962(c). Id. See also Pik-Coal Co. v. Big Rivers Elec. Corp., 200 F.3d 884, 890-91 (6th Cir. 2000) (rejecting plaintiff’s RICO claim when plaintiff was nothing more than an intended beneficiary to a contract under which it would have earned commissions).

Medgar Evers is also illustrative, in which an association of tenants in a federally subsidized low-income housing project filed a RICO action against the housing project’s owner and the current and former management companies. The plaintiffs alleged that the defendants submitted false and misleading statements to the Department of Housing and Urban Development for the purpose of keeping HUD’s federal funding for their own personal benefit. See Medgar Evers Houses Tenants Assoc., 25 F. Supp. 2d at 119-21. The plaintiffs further alleged that their injury was the direct result of the defendants’ misappropriation, because the money granted to the defendants was earmarked for the upkeep of the housing project and was never used for that purpose. Id. at 121-22.

In rejecting the plaintiffs’ RICO claim, the district court found the false and misleading statements that formed the acts of racketeering were all made to HUD rather than to the plaintiffs. Id. at 121, 123. Moreover, the plaintiffs never alleged that any of the misrepresentations underlying the alleged predicate acts of mail and wire fraud were actually made to them. Id. In fact, the plaintiffs were not even aware of the misrepresentations. Id. at 121. Ultimately, the court concluded that although the housing project served as a vehicle for the commission of defendants’ racketeering acts, the plaintiffs’ injury did not flow from the defendants’ misrepresentations made to HUD. Id. at 122. Rather, the plaintiffs’ injury was the result of the defendants’ failure to spend the HUD funds for the plaintiffs’ benefit. Even though plaintiffs established they were third-party beneficiaries, and suffered at least some form of injury as the result of defendants’ RICO scheme, there were no allegations upon which standing could be conferred given the indirect relationship between the plaintiffs and the defendants. Id.

The Business Competitor Exception

Recently, in Ideal Steel Supply Corp. v. Anza, 373 F.3d 251 (2d Cir. 2004), the Second Circuit addressed whether the intended target of a RICO scheme could maintain a RICO claim even if the predicate acts were directed at another party. The short answer is yes, provided the targeted victim is a direct business competitor of the defendant. Thus, at least within the Second Circuit, it appears that standing exists when a direct business competitor engages in a RICO scheme designed to inflict a competitive injury on the plaintiff. See Anza, 373 F.3d at 264; but see Dow Chem. Co., 30 F. Supp. 2d at 695 (finding plaintiff’s fraudulent conduct was actually directed at the Patent and Trademark Office; therefore, it was irrelevant that the defendants were also attempting to inflict a competitive injury to the plaintiff).

In Anza, the plaintiff alleged that his steel mill purchasing business was the direct target of
a RICO scheme that involved a business competitor who refused to charge sales tax for cash purchases. The alleged purpose of the defendant’s conduct was to purposefully divert customers away from the plaintiff by offering a lower purchase price on the same products sold by the plaintiff. Id. at 254-55. Although the scheme allegedly targeted the plaintiff, the predicate acts were actually perpetrated against the State Tax Department through the defendant’s fraudulent and false submission of tax returns in violation of 18 U.S.C. sections 1341 and 1343 respectively. Id. at 255. However, because these acts were taken for the purpose of securing a competitive advantage against the plaintiff, a direct relationship existed to satisfy standing despite the fact that the predicate acts were committed against a third party. Id. at 263-64. As such, the plaintiff’s RICO claim was sustained.

The Checklist For Pleading And Attacking Standing

There are several different considerations before reaching the determination that standing has been properly pled within the context of a RICO claim. Regardless of whether you are seeking dismissal or simply trying to survive a motion to dismiss, keep the following in mind:

• The injury alleged must be caused by the predicate acts that form the defendant’s pattern of racketeering. Simply put, if the injury does not arise out of one of the enunciated predicate acts pursuant to 18 U.S.C. section 1961(1), a RICO plaintiff is generally without standing;

• The RICO plaintiff must be the target of the RICO scheme. Simply suffering an injury that was the derivative result of a fraudulent scheme perpetrated upon another party will generally not confer standing within the context of a section 1962(c) RICO claim;

• Intended beneficiaries are generally without standing to assert a RICO claim;

What constitutes an actionable injury under section 1962(c) fails to adhere to any bright line test. However, most courts agree that section 1962(c) requires an injury that is not contingent on future events or speculative in nature.

• RICO plaintiffs who are also direct business competitors of the defendant may be able to establish standing, even if the predicate acts were directed at a third party, provided those predicate acts were intended to cause the RICO plaintiff a competitive injury.

HOW TO PROPERLY PLEAD PROXIMATE CAUSE • Unlike standing, proximate cause focuses on the relationship between the plaintiff and the injury alleged, rather than the relationship between the plaintiff and the defendant. Thus, for purposes of sufficiently pleading proximate cause, the RICO plaintiff must allege an injury that was foreseeable, concrete in nature, and not subject to speculation.

Actionable RICO Injuries

What constitutes an actionable injury under section 1962(c) fails to adhere to any bright line test. However, most courts agree that section 1962(c) requires an injury that is not contingent on future events or speculative in nature. See Maio v. Aetna, Inc., 221 F.3d 472, 495 (3d Cir. 2000) (finding that when factual speculation is required there can be no cognizable injury under RICO). Put another way, a RICO claim is strongest when the injury alleged takes the form of a concrete financial loss. See Regions Bank v.
J.R. Oil Co., LLC, 387 F.3d 721, 728 (8th Cir. 2004) (stating that a RICO injury requires proof of a concrete financial loss and not merely an injury to a valuable intangible property interest) (emphasis added); FL Receivables Trust 2002-A v. Bagga, No. 03 CV 1508, 2005 WL 563535, at *3 (E.D. Pa. Mar. 8, 2005) (characterizing a concrete financial loss as an injury that is not speculative or contingent on future events); see also Dunn, 2002 WL 1000920, at *2 (holding that for purposes of RICO a concrete financial loss must be shown; that is, an actual loss of money).

Non-Actionable Injuries

Accordingly, examples of the types of injuries that are not actionable under RICO include:

- Excessive payments for inferior health care insurance;
- Deprivation of honest governmental services;
- Fraudulently induced loans that are the subject of a pending collection action;
- Injury to a pastoral reputation;
- Potential bonus compensation;
- Lost opportunity to participate in a low-interest loan program; and
- The potential decrease in the value of real property.


Concrete Injury

This is not to say, however, that a RICO plaintiff must, in all circumstances, attach a particular dollar amount to the loss alleged. For example, in Trollinger, the plaintiffs were found to have articulated a sufficiently concrete injury when it was alleged that the former employees of a poultry processing plant suffered depressed wages as a result of the defendant’s unlawful practice of hiring illegal aliens. See Trollinger, 370 F.3d at 615, 619. Specifically, in Trollinger, the court was willing to entertain allegations which averred the following:

- A sufficient number of illegal aliens were hired to impact the plaintiffs’ wages;
- That defendant’s efforts to bring illegal aliens into the country allowed the defendant to avoid competing with other businesses for skilled labor; and
- That the plaintiffs did not choose to remain under the defendant’s employ for less money, but rather, had no choice given the surrounding economic circumstances and the defendant’s continued efforts to import illegal aliens.

Id. at 619.

Trollinger, however, seems to be a departure from what has traditionally been a resistance among the courts to speculate on market behavior. Id. Specifically, Trollinger and cases factually similar, seem to allow for some market speculation in establishing a RICO injury where the RICO scheme alleged includes claims of depressed wages and the use and employment of illegal immigrants. Id. See also Williams, 2005 WL 1355512 (sustaining RICO class action claim seeking relief for depressed wages that arose out of an unlawful scheme to employ illegal immigrants);endoza v. Zirkle Fruit Co., 301 F.3d 1163 (9th Cir. 1992) (upholding apple growers RICO claim over the improper use of illegal aliens and the resulting impact on the labor market).

RICO Injuries And Market Speculation

Generally speaking, courts resist speculating on market conditions for purposes of determin-
ing whether a RICO plaintiff has articulated a
cognizable injury under section 1962(c). Two
good examples of this type of resistance are Barr
111 (E.D.N.Y. 1993) and Sheperd v. Am. Honda

In Barr, the court rejected the plaintiff’s RICO
claim that it was entitled to recover millions of
dollars in lost profits resulting from the defend-
ants’ submission of fraudulent and misleading
information to the Food and Drug Adminis-
tration (“FDA”). According to the plaintiffs, the
purpose of the defendant’s scheme was to se-
cure approval from the FDA to sell a generic
version of one of the plaintiff’s drugs. See Barr,
827 F. Supp. at 115. Specifically, the plaintiffs al-
leged that they were deprived of money and
property in the form of the lost business they
might have realized from sales of its drugs had
the defendants not fraudulently obtained ap-
proval to market a competing product.

In rejecting the plaintiff’s claim, the court
found that to grant the plaintiff relief, it would
first have to speculate on the size of the cus-
tomer base from which profits were purported-
ly diverted. To this end, the court found it equally
likely that an average customer might have
just as easily decided to purchase a generic drug
produced by one of the defendant’s competi-
tor’s as opposed to the plaintiff’s name brand
version. As such, the court stated:

“[w]ere this Court to uphold [plaintiff’s] RICO
claim the trier of fact would be required to spec-
ulate as to the number of [defendant’s] cus-
tomers who would have purchased [plaintiff’s]
products, rather than the generic drugs pro-
duced by other manufacturers, had [defend-
ant’s] products not been sold in the market-
place.”

Id. at 116.

Accordingly, the plaintiff’s complaint was
dismissed. Id. See also In re Taxable Municipal
Bond Sec. Litig., 51 F.3d at 522-23 (rejecting a
RICO claim as speculative when alleged injury
was the inability to participate in a lower inter-
est loan program); Imagineering, Inc. v. Kiewit
Pacific Co., 976 F.2d 1303 (9th Cir. 1992) (finding
alleged RICO injury of subcontractor to be spec-
ulative when it could not be determined whether
the prime contractor could have secured the
various contracts in question absent the defend-
ant’s alleged RICO scheme).

Similarly in Sheperd, the court rejected a
RICO claim that sought damages for the dimin-
ished profitability of an automobile dealership.
Specifically, the plaintiffs maintained that their
dealership’s refusal to participate in a false re-
porting scheme of car sales resulted in their
dealership being allocated more unpopular and
As a result, the plaintiffs alleged their dealer-
ship was unable to sell cars as quickly and prof-
itably as the competing Honda dealerships. Id.
The plaintiffs alleged they were damaged in
two ways: first, they could not sell individual
cars as profitably as their competitors; and sec-
ond, they were forced to sell their dealership at
a “distressed” sales price. Id. at 629. Plaintiffs
further alleged an injury in the form of reduced
profitability of their dealership that resulted in a
decline in its market share, which ultimately led
to the distressed sales price. Id.

In rejecting the plaintiffs’ theory of reduced
profitability as a compensable RICO injury, the
court found that unlike a lost-volume seller, the
plaintiffs were unable to point to any specific
sales that they could have made in the absence
of the alleged diversionary tactics by the defend-
ants. Id. at 630. Moreover, assessing what por-
tion of the dealership’s diminished profitability
and market value were attributable to the defen-
dants’ wrongful conduct, apart from other
factors, would be an exercise in “sheer specula-
tion.” Id. As such, plaintiff’s RICO claim was
dismissed. See also Dow Chem. Co., 30 F. Supp.2d
Standing and proximate cause are conceptually different. Standing requires a direct relationship to the defendant before relief can be sought. Proximate cause, on the other hand, requires the injury alleged to be one that is reasonably foreseeable.

at 695-96 (dismissing plaintiff’s RICO claim when the plaintiff’s injuries of lost sales and business opportunities were contingent in part on the choices made by the plaintiff’s customers and business affiliates).

Checklist For Pleading Or Attacking Proximate Cause

As with standing, there are several different factors to be considered before reaching the determination that proximate cause has been properly pled. Therefore, regardless of whether you are the movant or respondent to a motion to dismiss, consider the following:

• Generally speaking, a RICO injury is only actionable if it is a concrete financial loss, or at the very least, not speculative;
• Therefore, a RICO injury is not actionable if it requires calculating an indeterminable amount of future or lost profits, or alternatively, requires the court to speculate on certain aspects of market behavior such as consumer buying trends;
• There appears to be a narrow exception for RICO class actions alleging injuries involving depressed wages. Specifically, some courts seem to permit RICO plaintiffs to speculate on certain market behaviors in establishing a RICO injury when the scheme alleged pertains to the dilution of a given labor pool through the use and employment of illegal immigrants.

CONCLUSION • Although sometimes referred to interchangeably, standing and proximate cause are conceptually different. Standing requires a direct relationship to the defendant before relief can be sought. As such, facts must be pled that show the injury alleged is not simply the derivative result of a fraudulent scheme that was actually committed against someone else. Proximate cause, on the other hand, requires the injury alleged to be one that is reasonably foreseeable. Accordingly, facts must be pled that show a concrete or quantifiable injury that is not the product of speculation.

Pragmatically speaking, a RICO plaintiff who fails to address each of these concepts separately raises the risk of dismissal at the pleading stage, while a RICO defendant who fails to attack each of these concepts separately deprives itself of an additional basis to have a RICO complaint dismissed. Accordingly, each of these concepts should be addressed separately and distinctly at the pleading stage.

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Pleading Standing And Approximate Cause In Civil RICO Claims

• The issue of standing is determined by whether a direct relationship exists between the injury asserted and the injurious conduct alleged:

  __ The injury alleged must be caused by the predicate acts that form the defendant’s pattern of racketeering. Simply put, if the injury does not arise out of one of the enunciated predicate acts pursuant to 18 U.S.C. section 1961(1), a RICO plaintiff is generally without standing;

  __ The RICO plaintiff must be the target of the RICO scheme. Simply suffering an injury that was the derivative result of a fraudulent scheme perpetrated upon another party will generally not confer standing within the context of a section1962(c) RICO claim;

  __ Intended beneficiaries are generally without standing to assert a RICO claim;

  __ RICO plaintiffs who are also direct business competitors of the defendant may be able to establish standing, even if the predicate acts were directed at a third party, provided those predicate acts were intended to cause the RICO plaintiff a competitive injury.

• Even a RICO plaintiff who shows a direct injury may nevertheless suffer a dismissal if the injury alleged does not satisfy the other traditional requirements of proximate cause; namely, that the wrongful conduct was a substantial and foreseeable cause of the injury alleged and that the connection to this injury was logical and not speculative:

  __ Generally speaking, a RICO injury is actionable only if it is a concrete financial loss, or at the very least, not speculative;

  __ Therefore, a RICO injury is not actionable if it requires calculating an indeterminable amount of future or lost profits or alternatively, requires the court to speculate on certain aspects of market behavior such as consumer buying trends;

  __ There appears to be a narrow exception for RICO class actions alleging injuries involving depressed wages. Specifically, some courts seem to permit RICO plaintiffs to speculate on certain market behaviors in establishing a RICO injury when the scheme alleged pertains to the dilution of a given labor pool through the use and employment of illegal immigrants.

• Some examples of non-actionable injuries include:

  __ Excessive payments for inferior health care insurance;

  __ Deprivation of honest governmental services;

  __ Fraudulently induced loans that are the subject of a pending collection action;

  __ Injury to a pastoral reputation;

  __ Potential bonus compensation;

  __ Lost opportunity to participate in a low-interest loan program; and

  __ The potential decrease in the value of real property.