METICULOUS PREDOMINANCE ASSESSMENT SINKS PHARMA MARKETING RICO CLASS ACTION

by Lindsay D. Breedlove

Given the breadth of the Racketeer Influenced and Corrupt Organizations Act of 1970 (RICO), the treble damages, and the ability to pursue those damages on behalf of an entire class, it is little wonder that RICO class actions have become attractive vehicles for plaintiffs and dangerous threats to defendants. Defendants facing such suits frequently reach for typical class-related defenses, including that the various alleged fraudulent representations give rise to individual questions regarding reliance and causation, and thus fail to meet Federal Rule of Civil Procedure 23(b)(3)'s predominance requirement. In a small subset of cases, however, the defendants' representations were not directed at class members at all; rather, class plaintiffs claim that representations directed at others caused them economic harm. Class-action defendants have had less success opposing certification in this context by invoking the reliance and causation principles most often cited in RICO cases, and must instead craft fact-specific arguments based on more obscure case law.

Facing a RICO class action, Forest Laboratories, Inc. and Forest Pharmaceuticals, Inc. (collectively "Forest") sought to defeat certification with reliance arguments. The U.S. District Court for the District of Massachusetts was not persuaded by those arguments, however, concluding that the case fell into that small subset where reliance does not matter. Based on the facts of the case, the court instead ventured into less-well-travelled jurisprudential territory. It ultimately held that even if reliance issues did not prevent certification, proceeding on a class-wide basis was inappropriate because common issues did not predominate with regard to but-for causation, injury, and damages. *Painters & Allied Trades Dist. Council 82 Health Care Fund v. Forest Labs., Inc. (In re Celexa & Lexapro Mktg. & Sales Practices Litig.)*, 2016 U.S. Dist. LEXIS 72056 (D. Mass. June 2, 2016) (*Celexa & Lexapro*). The court's careful analysis of the plaintiffs' evidentiary offerings as to those elements is worth exploring.

In 2009, plaintiffs across the country began bringing individual and class claims against Forest related to the antidepressants Celexa and Lexapro. Plaintiffs claimed that Forest misrepresented the efficacy of those drugs in treating pediatric patients with major depressive disorder. Only half of the studies Forest performed showed that Celexa and Lexapro worked in adolescents, and yet Forest pressed the Food and Drug Administration for pediatric approval. *Id.* at *3-5. Forest allegedly marketed both Celexa and Lexapro as effective for pediatric patients. *See id.* at *17. Plaintiffs claimed that this amounted to fraud actionable under RICO and sought treble damages associated with the economic harm allegedly suffered when they purchased or paid for prescriptions of Celexa and Lexapro that would not otherwise have been written. *Id.* at *16.

On June 2, 2016, the court declined to certify a class of third-party payors (TPPs) that reimbursed the medical expenses of plan members. *Id.* at *2. The class dispute centered on Rule 23(b)(3)'s predominance requirement. Specifically, the parties contested whether Painters and Allied Trades District Council 82 Health Care Fund (Painters), the named TPP plaintiff, could establish causation, injury, and damages through common proof. *Id.* at *15.

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To evaluate predominance, the court looked specifically at the evidence Painters intended to use to satisfy each element of its RICO claim. With respect to causation, courts have interpreted RICO to require proof that the defendant's unlawful conduct was both the "but for" and "proximate" cause of a plaintiff's loss. *See Holmes v. Securities Inv. Protection Corp.*, 503 U.S. 258, 268 (1992). In general, defendants have had some success defeating class claims on proximate-cause grounds, relying on the variety of supposed misrepresentations that each potential class member allegedly experienced. The *Celexa & Lexapro* case is noteworthy because Forest did not prevail on proximate cause, but rather persuaded the district court to carefully look at and ultimately reject Painters' argument regarding predominance as to other RICO elements.

First, the court held that Painters had not met its burden with regard to but-for causation. RICO's but-for causation standard "asks whether the plaintiff would have suffered injury absent the alleged misconduct." *Celexa & Lexapro*, 2016 U.S. Dist. LEXIS 72056, at *22. Painters did not need to "prove a series of negatives or exclude every other possible cause of injury," the court explained. It would, however, need to "show that it suffered the sort of injury that would be the expected consequence of the defendant's wrongful conduct" and, at the class-certification stage, was required to establish that it could likely do so with common proof to satisfy Rule 23(b)(3)'s predominance requirement. *Ibid* (internal quotation marks omitted).

Painters relied on the expert report of Dr. Meredith Rosenthal in an attempt to satisfy RICO's but-for causation requirement. Dr. Rosenthal performed an econometric regression analysis that purported to tie Forest's allegedly fraudulent marketing activities to an increase in the number of prescriptions written for Celexa and Lexapro. Dr. Rosenthal did not, however, measure the impact of allegedly fraudulent marketing activities on sales stemming from those activities, but rather concluded as a general matter that all marketing activities have approximately the same impact on all sales as fraudulent marketing activities have on fraudulently induced sales. The court held that Dr. Rosenthal's assumption that the interplay between all marketing activities and all sales could serve as a "reasonable proxy" for the interplay between fraudulent marketing activities and fraudulently induced sales lacked support. *Id.* at *28-29. And that "flaw" in her report "preclude[d] Painters from using [Dr. Rosenthal's] report as sufficient evidence of but-for causation" for the purpose of establishing predominance. *Id.* at *29. Because Painters' damages model rested just as heavily on Dr. Rosenthal's report, the court held that Painters had not established that common issues would predominate with regard to damages either. *Id.* at *34-35.

Next, the court found Painters' arguments regarding injury to be equally unpersuasive. Painters claimed to have suffered economic harm because it paid for prescriptions that would not have been written if Forest had not engaged in allegedly fraudulent marketing regarding the efficacy of Celexa and Lexapro for pediatric patients. Efficacy was therefore "at the apex of the dispute over Painters' ability to establish class-wide RICO injuries with common proof." *Id.* at *31. Because the studies regarding pediatric efficacy for Celexa and Lexapro were "equivocal," the court concluded that efficacy issues would "likely require individualized assessment of the utility of Celexa and/or Lexapro for each patient based upon his or her particular medical circumstances." *Id.* at *33. Nothing in the record suggested that "those patient-specific determinations will not overwhelm the class-wide determinations." *Ibid.* For this reason, too, the court denied Painters' motion for class certification. *Id.* at *34.

The *Celexa & Lexapro* court embraced the importance of evaluating predominance by carefully analyzing the evidence Painters intended to use to support each element of its claim, showing a willingness to explore less common class-certification concerns based on the specific facts of the case. The court's analysis should serve as a model for other courts facing motions to certify classes in both RICO cases and cases that raise similarly complex liability and damages theories.