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Litigating in Florida: Updates and Recent Decisions

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Introducing Berger Singerman's inaugural issue of "Litigating in Florida: Updates and Recent Decisions." This monthly newsletter will discuss recent cases and developments in Florida litigation for the benefit of our professional colleagues in Florida and elsewhere.

Florida Theft Claim: Lack of Evidence of Causation Merited Directed Verdict

The Second District Court of Appeals of Florida reversed a final judgment on the claim of civil theft (Section 772.11, Florida Statutes) in *Winters v. Mulholland*, No. 2D08-5270, 2010 WL 323035 (Fla. 2d DCA Jan. 29, 2010), and found that defendant was entitled to a directed verdict due to the lack of evidence of causation. As stated by the court, "[t]he facts in this case are enough to make any legal ethics professor cringe." Lawyer Winters left the plaintiff's law firm, taking with him several client files – either in hard copy or by hacking the law firm's computer system, courtesy of his paramour (a former paralegal of the law firm). Winters also told the clients that the name partner of his former law firm was retiring and therefore would be unable to continue to service their files. Twelve of the firm's most lucrative clients followed Winters when he left the firm. When Winter refused to return the files, the law firm brought suit asserting various claims, including Florida and federal RICO claims, civil theft, conversion, tortious interference, and an accounting. As damages, the law firm sought the attorneys' fees received by Winters from the cases of the twelve clients who left the firm.

The only claim that was ultimately submitted to the jury was the Florida civil theft claim – Section 772.11, which provides for recovery of treble damages plus attorneys' fees and costs. Under Florida law, a civil theft claim requires proof "by clear and convincing evidence that he or she has been injured in any fashion" by reason of a violation of certain statutory violations, including under Section 812.014 (criminal theft statute), which states that a person commits theft if he "knowingly obtains or uses, or endeavors to obtain or to use, the property of another, with intent to, either temporarily or permanently, (a) Deprive the other person of a right to the property or a benefit from the property [or] (b) Appropriate the property to his or her own use or to the use of any person not entitled to the use of the property."

The evidence at trial clearly established that a theft occurred, but the court noted that the cause of action for civil theft also required that the plaintiff prove injury by reason of the violation of a statutory provision. The plaintiff presented no evidence that the theft of the client files was connected to the loss of the clients. The court stated that the theft, "loathsome as it might have been," was not shown to have caused any damage. "As the plaintiff seeking damages, [the law firm] had the burden to present evidence to prove

each of the elements of his statutory civil theft claim – one of which was causation. When Mulholland failed to present any evidence to prove this element, Winters was entitled to a directed verdict in his favor."

While the Florida civil theft statute (and its provision for treble damages and attorneys' fees) can be a powerful cause of action, this case reminds litigants that a court must and will direct the verdict in the defendant's favor when there is no evidence of a requisite element such as causation.

RICO Claim Subject to Strict Interpretation of Proximate Cause

The United States Supreme Court issued an opinion reaffirming its commitment to a strict interpretation of the proximate cause requirement in cases brought under the Racketeer Influenced and Corrupt Organizations Act (RICO). On January 25, 2010, in *Hemi Group, LLC v. City of New York*, No. 08-969, 2010 WL 246151 (U.S. Jan. 25, 2010), the Court reversed the Second Circuit Court of Appeals' denial of the Defendant Hemi Group, LLC's motion to dismiss and held that the City of New York failed to state a cause of action under RICO due to the absence of proximate causation. The facts are fairly straightforward: the City of

New York taxes the possession of cigarettes, and Hemi sells cigarettes to New York City residents online. Federal law requires Hemi to submit customer information to the states into which it ships the cigarettes under the Jenkins Act. The City sued Hemi under RICO, alleging that the failure of Hemi to file the required customer information to the State caused it to lose tens of millions of dollars in unrecovered cigarette taxes. Specifically, the City stated that the “interstate sale of cigarettes and the failure to file Jenkins Act reports identifying those sales” constitute predicate offenses of mail and wire fraud under RICO.

Reiterating the holding in *Holmes v. Securities Investor Protection Corp.*, 503 U.S. 258 (1992), the Court found the “injury” in this case too attenuated to survive a motion to dismiss. Here, the City alleged that Hemi committed fraud by failing to submit customer information to the State, which in turn would have been passed on to the City so the City could collect taxes due. The Court rejected that theory of injury, quoting *Holmes*: “The general tendency of

the law, in regard to damages at least, is not to go beyond the first step.’ . . . Our cases confirm that the ‘general tendency applies with full force to proximate cause inquiries under RICO. Because the City’s theory of causation requires us to move well beyond the first step, that theory cannot meet RICO’s direct relationship requirement.” That is, because the relationship between the Defendant and the injury was more than one step removed, the Court found that the Defendant did not “cause” the injury. The Court further opined that the injury to the City was caused by the customers’ failure to pay their taxes, as opposed to Hemi’s failure to file Jenkins Act reports. Thus, “the conduct directly causing the harm was distinct from the conduct giving rise to the fraud.” The Court found causation particularly attenuated because “the City’s theory of liability rests not just on separate actions, but separate actions carried out by separate parties.” The Court therefore refused to extend RICO liability to cases “where the defendant’s fraud on the third party . . . has made it easier for a fourth party . . . to

cause harm to the plaintiff.” It would be more appropriate the Court suggested, for the State, rather than the City, to sue the defendant.

Litigants in a RICO action are advised to adapt their “proximate causation” analysis in both pleadings and case dispositive motions. The Supreme Court rejected the notion that proximate cause exists when the injury is simply “foreseeable.” Rather, there must be a “sufficiently ‘direct relationship’ between the fraud and the harm.” ■

**Courtesy of Berger Singerman’s Dispute Resolution Team with offices in Fort Lauderdale, Miami, Boca Raton and Tallahassee.*

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