RECENT DEVELOPMENTS IN BUSINESS LITIGATION

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I. CIVIL RICO

A. *Introduction*

The Racketeer Influenced and Corrupt Organizations Act ("RICO")[1] was enacted as Title IX of the Organized Crime Control Act of 1970.[2] RICO includes both criminal[3] and civil remedies,[4] triggered by "*racketeering activity*," which is broadly defined by a long list of state and federal predicate crimes.[5] One instance of "racketeering" is not sufficient to trigger RICO; there must be a "pattern" of racketeering activity, which is defined as two or more acts of racketeering activity that approaches long-term, organized criminal conduct.[6] Although civil RICO is not limited to organized crime,[7] it also is not designed to cover ordinary business disputes.[8]

RICO was originally enacted to combat organized crime in the United States, including, among other things, racketeering and illegal drug trafficking, but has morphed over the past fifty years to be asserted by governments against a wide variety of individuals and entities in the United States that have nothing to do with organized crime, *e.g.*, against Hollywood movie stars who want to get their children into the University of Southern California or into the Ivy League in Operation Varsity Blues.[9] Similarly, the civil RICO remedies,[10] which include, among other things, the right to sue in state or federal court[11] to recover treble damages and attorney fees, have morphed over the years to be asserted by private plaintiffs against a wide variety of defendants that have nothing to do with organized crime,

1. 18 U.S.C. § 1961 *et seq.*
2. Pub. L. No. 91-452, 84 Stat. 941 (1970).
3. 18 U.S.C. § 1963.
4. *Id.* § 1964.
5. *Id.* § 1961(1).
6. *Id.* § 1961(5) (noting "pattern of racketeering activity" requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity).
7. H.J. Inc. v. Nw. Bell Tel. Co., 492 U.S. 229, 230–31 (1989) (neither RICO's language nor its legislative history supporting a rule that a defendant's racketeering activities form a pattern only if they are characteristic of organized crime).
8. Calcasieu Marine Nat'l Bank v. Grant, 943 F.2d 1453, 1463 (5th Cir. 1991) (Although Congress wrote RICO in broad, sweeping terms, it did not intend to extend RICO to every fraudulent commercial transaction.).
9. *See, e.g.*, U.S. v. Singer, 2019 WL 1143900, No. 19-CR-100778-RWZ (D. Mass. Mar. 5, 2019) (alleging RICO criminal violations in connection with the college entrance bribery scandal sometimes referred to as "Operation Varsity Blues"); Geiss v. Weinstein Co. Holdings, LLC, No. 1:17-cv-09554 (S.D.N.Y. Dec. 6, 2017) (civil RICO complaint filed by six women against Harvey Weinstein, Miramax Film Corporation, et al.).
10. 18 U.S.C. § 1964(c) provides a civil cause of action for a person injured in his business or property by reason of a violation of RICO including the recovery of treble damages, cost of the suit, and reasonable attorney fees.
11. Tafflin v. Levitt, 493 U.S. 455 (1990) (state courts having concurrent jurisdiction over civil RICO claims).

like Bank of America.[12] In many instances, the threat of treble damages, the high costs of defense, and the stigma of being alleged to be in violation of RICO are enough to cause defendants to settle civil RICO claims for substantial amounts,[13] which is exactly why some commentators have concluded that civil RICO is the "Weapon of Choice" in business litigation[14] and other commentators have concluded that civil RICO is "running amok."[15] It follows that the more governments assert criminal complaints including RICO against businesses, the more civil RICO cases will be asserted since the RICO racketeering predicate is arguably met or likely proved by the criminal filing.[16]

To maintain a federal civil RICO claim, a plaintiff must allege that the defendant engaged in: "(1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity."[17] The plaintiff must show that (1) the plaintiff suffered "harm to a specific business or property interest" and (2) the injury was "a proximate result of the alleged racketeering activity."[18] A plaintiff asserting injury to property must show (1) the injury is proprietary as opposed to "personal" or "emotional" and (2) the proprietary injury resulted in "concrete financial loss."[19] Allegations of actual monetary loss or "out-of-pocket loss" can satisfy the injury requirement for a civil RICO claim.[20] RICO standing requires compensable injury and proximate cause.[21] "When a court evaluates a RICO claim for proximate causation, the central question it must ask is whether the alleged violation led directly to the plaintiff's injuries."[22] A plaintiff, however, need not plead he is a

12. Aliperio v. Bank of Am., N.A., 764 F. App'x 236 (3d Cir. 2019) (mortgagors brought action against Bank of America and other lenders as purported assignees of promissory notes that accompany mortgages, alleging that assignees violated RICO by assigning mortgages and using mortgages in credit default swap contracts).

13. *See*, *e.g.*, Haroco, Inc. v. Am. Nat'l Bank & Tr. Co. of Chi., 747 F.2d 384, 399 n.16 (7th Cir. 1984) (even "spurious claims" in civil RICO have tantalizing "*in terrorem* settlement value"); Low v. Trump Univ., LLC, 246 F. Supp. 3d 1295, 1298–99 (S.D. Cal. 2017) (approving $25 million settlement in class action complaint alleging civil RICO liability).

14. Miranda v. Ponce Fed. Bank, 948 F.2d 41, 44 (1st Cir. 1991) ("Civil RICO is an unusually potent weapon—the litigation equivalent of a thermonuclear device"); James A. Johnson, *Civil Rico–The Weapon of Choice*, 88 N.Y. St. Bar. Ass'n J. 10 (Dec. 2016).

15. John K. Cornwell, *RICO Run Amok*, 71 S.M.U. L. Rev. 1017 (2018).

16. *See*, *e.g.*, *In re* Celexa and Lexapro Mktg. and Sales Practices Litig., 915 F.3d 1 (1st Cir. 2019) (civil RICO complaint triggered by the unsealing of the United States' criminal complaint against pharmaceutical defendants for inducing off-label prescriptions of certain drugs).

17. Chaset v. Fleer/Skybox Int'l, LP, 300 F.3d 1083, 1086 (9th Cir. 2002); *see also* Black v. Corvel Enter. Comp. Inc., 756 F. App'x. 706, 708 (9th Cir. 2018).

18. Newcal Indus., Inc. v. Ikon Office Solution, 513 F.3d 1038, 1055 (9th Cir. 2008).

19. Canyon County v. Syngenta Seeds, Inc., 519 F.3d 969, 975 (9th Cir. 2008).

20. 18 U.S.C. § 1964(c); Maio v. Aetna, Inc., 221 F.3d 472, 483 (3d Cir. 2000).

21. *Newcal Indus., Inc.*, 513 F.3d at 1055.

22. Anza v. Ideal Steel Supply Corp., 547 U.S. 451, 461 (2006).

victim of the defendant's underlying crime.[23] Civil RICO claims are subject to a statutory limitations of four years[24] which begins to run "at the time [the] plaintiff knew or should have known of his injury."[25]

B. *Civil RICO Suits Against Marijuana[26] Growers*

Because marijuana remains illegal under the Controlled Substances Act,[27] any action in conjunction with a marijuana business can be considered a racketeering activity in violation of RICO. While several states have legalized the manufacturing and sale of marijuana, the drug remains illegal under federal law and a predicate act under RICO. [28] Plaintiffs against marijuana growers in many instances pursued civil RICO claims in lieu of traditional state remedies for odor and nuisance against not only the unwanted marijuana grower next door, but also against every person who had ever engaged with the marijuana business, including the banks, insurance companies, land owners, construction companies, contractors, and even the governors and state and local officials in charge of the regulatory programs that issue licenses to marijuana businesses.[29]

Two recent cases reach different conclusions regarding whether adjacent landowners can pursue compensable injuries in civil RICO claims against marijuana growers. In *Shoultz v. Derrick*,[30] the United States District Court for the District of Oregon (Portland Division) granted a motion to dismiss the civil RICO claims by property owners living in a residence in the immediate vicinity of the defendants' recently created marijuana production facility because the plaintiffs failed to allege injuries compensable under RICO.[31] Among other things, the plaintiffs alleged that: (1) the defendants' marijuana operation negatively interfered with their use and enjoyment of their property; (2) the defendants used two large greenhouses, equipped with loud, large, commercial exhaust fans which operated twenty-four hours a day, seven days a week, which became unbearably loud at times,

23. *See* Bridge v. Phoenix Bond & Indem. Co., 553 U.S. 649, 649–50 (2008).

24. *See* Agency Holding Corp. v. Malley-Duff & Assocs., Inc., 483 U.S. 143, 156 (1987).

25. Lares Grp., II v. Tobin, 221 F.3d 41, 44 (1st Cir. 2000) (citing Rodriguez v. Banco Central, 917 F.2d 664, 665 (1st Cir. 1990)).

26. "Marihuana" is the term used to define the plant Cannabis sativa L. under the Controlled Substances Act, and the terms cannabis and marijuana may be used interchangeably throughout this article. 21 U.S.C. §§ 802(16)(A), 812 (c)(10).

27. 18 U.S.C. § 1961(1). "Racketeering activity" means, among other things, "dealing in a controlled substance or list chemical (as defined in Section 102 of the Controlled Substances Act)"; marijuana or cannabis continues to be a Schedule 1 substance under the Controlled Substances Act.

28. *Id.*

29. *See* Lisa L. Pittman, Daniel Wilson & Van Cates, *Recent Developments in Business Litigation*, 54-2 Tort Trial & Ins. Practice L.J. 377, 378 (2019).

30. 369 F. Supp. 3d 1120 (2019).

31. *Id.* at 1123.

making it difficult for the plaintiffs to sleep and scaring the plaintiffs' dog; (3) the marijuana operation created a strong and pervasive stench on the plaintiffs' property, particularly on warm or humid days; (4) the noise and the odors from marijuana production made the plaintiffs no longer enjoy gardening or being outside on their property; (5) the plaintiffs were afraid of the prospect of violence after participants in the marijuana operation repeatedly fired automatic weapons into the field immediately adjacent to plaintiffs' property on October 15, 2017; and (6) the defendants diminished the market value of the plaintiffs' property by "making it more difficult to sell."[32] The court held that by conducting the marijuana operation,[33] the defendants acted as an "associated-in-fact enterprise,"[34] and the defendants were guilty of the predicate crimes of drug trafficking by violating the Controlled Substance Act.[35] The court, however, dismissed the plaintiffs' civil RICO claims because the plaintiffs failed to allege "concrete financial loss" under the decisions of the Ninth Circuit which required the plaintiffs to make good faith allegations that they attempted or currently desire to convert their property interests into a pecuniary form, *e.g.*, by selling or attempting to sell the property.[36] The court contrasted the Ninth Circuit position with the position held by the Tenth Circuit that the plaintiffs can merely allege a diminution of market value and do not need to plead unsuccessful attempts to sell their property.[37] The Tenth Circuit found that "it is reasonable [for a judge or jury] to infer that a potential buyer would be less inclined to purchase [plaintiff's] land" due to the neighboring marijuana operation.[38]

Relying in part on the reasoning in *Shoultz v. Derrick*, the marijuana operation defendants' motion to dismiss the plaintiff's civil RICO claim on similar grounds in *Momtazi Family, LLC v. Wagner et al.*[39] was denied by the United States District Court for the District or Oregon because the plaintiffs properly pleaded "concrete financial loss" by alleging specific negative impacts on the ability of the plaintiffs to "convert their property interests into pecuniary form."[40] The plaintiff in *Momtazi* owned and operated (and

32. *Id.*

33. *Id.* at 1125 ("[A]ll defendants in this case are alleged to have played significant roles in directing the affairs of the marijuana operation, including producing and trafficking the marijuana.").

34. *Id.* at 1127.

35. *Id.* at 1126 n.2.

36. *Id.* at 1128; *see also* Ainsworth v. Owenby, 326 F. Supp. 3d 1111 (D. Or. 2018) (to plausibly allege a concrete financial loss, plaintiffs "must make good faith allegations that they attempted or currently desire to convert those [property] interests into a pecuniary form").

37. Safe Streets Alliance v. Hickenlooper, 859 F.3d 865 (10th Cir. 2017).

38. *Id.* at 887–88.

39. Momtazi Family, LLC v. Wagner, No. 3:19-cv-0076-BR, 2019 WL 4059178 (D. Or. Aug. 27, 2019).

40. *Id.* at *5.

later leased to another entity to operate) a certified biodynamic vineyard on its property that grew and sold grapes to other wine producers from 2014 to present, and the defendants purchased adjacent property in 2016 on which the defendants produced and processed marijuana.[41] The plaintiff alleged the value of its property was diminished, it had been unable to market its grapes, a reservoir on its property was damaged, a calf was killed, and another cow damaged as a direct and proximate result of the defendants' activities to grow marijuana on their property.[42] The plaintiff further alleged that an order for grapes was cancelled as a result of the customer's concern that the grapes were contaminated by the marijuana smell, which would adversely affect the wine made from the grapes.[43] The plaintiff further alleged it was unable to sell grapes grown on the Momtazi property adjacent to the defendants' property because of buyers' concerns about contamination.[44] The plaintiff alleged this impact on the marketability of its grapes diminished the value of its property, including rental fees charged for the property.[45] Additionally, the plaintiff alleged that the terracing on the defendants' property caused dirt to flow downhill into the reservoir on the plaintiff's property, damaging fish and wildlife.[46] Based on the detailed allegations in the plaintiff's complaint, the court concluded that the plaintiff had sufficiently alleged a direct link between the its alleged injuries and the defendants' alleged violations of RICO and, therefore, the plaintiff had sufficiently alleged proximate cause for standing under RICO.[47] Accordingly, the court denied the defendants' motion to dismiss because the plaintiff had alleged injuries in fact that were sufficiently "concrete, particularized, and actual" as to establish the plaintiff's constitutional standing to pursue civil RICO claims against the defendants.[48]

Overall, the cases of *Shoultz* and *Momtazi* appear to provide direction as to how adjacent land owners can allege civil RICO claims against marijuana growers that will withstand motions to dismiss.

C. *Civil RICO Claims Against Competitors and Government Actors*

Waste Management of Louisiana, L.L.C. v. River Birch, Inc.[49] presents the case of a landfill operator (Waste Management) bringing civil RICO claims against competitors (River Birch, which owned a competing landfill) and

41. *Id.* at *1.
42. *Id.*
43. *Id.*
44. *Id.*
45. *Id.*
46. *Id.* at *3.
47. *Id.* at *5.
48. *Id.*
49. 920 F.3d 958 (5th Cir. 2019).

state officials (*e.g.*, the Mayor of New Orleans) who were allegedly bribed by River Birch to shut down a landfill opened in the city in the aftermath of Hurricane Katrina in 2005.[50] The district court granted the defendants' motion for summary judgment to dismiss the plaintiff's claims that the $20,000 campaign contributions by River Birch to Mayor Nagin constituted a bribe that was the but-for and proximate cause of Mayor Nagin's decision to close the plaintiff's landfill.[51] On appeal, the Fifth Circuit Court of Appeals reversed the district court's decision due to circumstantial evidence that was sufficient to allow a jury to decide that the $20,000 payments were a bribe and remanded the case for further proceedings.[52] The predicate racketeering acts for civil RICO were satisfied by the $20,000 in alleged bribery payments being made by four shell corporations established by the River Birch defendants—each donating $5,000 to Mayor Nagin,[53] which violated Louisiana election law by donating to campaigns "through or in the name of another, directly or indirectly,"[54] and exceeded the campaign contribution limit per individual set at $5,000 for that election.[55] As to the bribery itself, Louisiana law requires that the bribe be made with "specific intent" to influence the conduct of the public official.[56] Specific intent need not be proved as a fact, but may be inferred from the circumstances of the transaction and the actions of the defendant, and specific intent is deemed to exist when the circumstances indicate that the offender actively desired the prescribed criminal consequences to follow his act.[57] All that is required is the "intent to influence;" "[t]he action induced need not be corrupt or illegal."[58]

The plaintiff also asserted that the defendants bribed Henry Mouton, a former commissioner for the Louisiana Department of Wildlife and Fisheries, to influence Mayor Nagin to shut down the plaintiff's landfill, thereby creating an apparent conspiracy and enterprise to violate § 1962 of RICO.[59] Significantly, Mouton previously pleaded guilty to accepting bribes from the same defendants for attempting to close down other

50. *Id.* at 961.
51. *Id.*
52. *Id.*
53. *Id.* at 968–69 (Mayor Nagin was convicted of a felony for public bribery in a different scheme in 2013, which would provide strong impeachment evidence and could allow a jury to conclude that Nagin's acceptance of bribes, while holding public office, was a part of his "pattern of conduct" or "modus operandi.").
54. La. Stat. Ann. § 18:1505.2(a)(1).
55. *See generally id.* § 18:1505.2.
56. *Id.* § 14:118 (A)(1).
57. State v. Hingle, 677 So. 2d 603, 607 (La. Ct. App. 2d Cir. 1996).
58. State v. Kyzar, 509 So. 2d 147, 151 (La. Ct. App. 1st Cir. 1987).
59. *Waste Mgmt.*, 920 F.3d at 965.

landfills.[60] Mouton apparently pleaded guilty to violating 18 U.S.C. § 371 and admitted that he received bribes to use his official position to assist the defendants by influencing public officials to shutter competing landfills, and Mouton specifically testified that the plaintiff's landfill was one of the landfills that was targeted as part of the scheme he had with the River Birch defendants and that he sent letters to the Louisiana Department of Environmental Quality, federal agencies, and the City of New Orleans on behalf of the defendants urging the closure of the plaintiff's landfill.[61] These other acts can be viewed to be "inextricably intertwined" with the alleged bribery of Mayor Nagin or both acts are part of a "single criminal episode" or the other acts were "necessary preliminaries" to the crime charged.[62]

The Fifth Circuit recognized that the Supreme Court requires both but-for cause and proximate cause in order to show injury "by reason of" a RICO violation, which requires "some direct relation between the injury asserted and the injurious conduct alleged."[63] The Fifth Circuit specifically considered whether that evidence, along with the inferences that a jury could draw from that evidence, created a fact question on these issues, and recognized that a plaintiff need not rely on direct evidence because causation can be proven with circumstantial evidence.[64] The Fifth Circuit acknowledged that a jury could conclude based on the evidence that Mouton's communication of allegedly false environmental concerns about the plaintiff's landfill to state and federal agencies was designed to have these government agencies influence Nagin to shut down the landfill and that Mouton's actions were part of the overall plan to shutter the plaintiff's landfill.[65] The Fifth Circuit concluded based on the evidence that there was a scheme to shutter the plaintiff's landfill and that the defendants' intent to bribe Mouton was connected with and could be viewed as evidence of the defendants' motive and intent to bribe Mayor Nagin.[66] While the court recognized that the issue of proving causation based on the facts was a close call, the Fifth Circuit determined that a jury should make the call rather than summarily dismissing the case at summary judgment.[67] The Fifth Circuit, therefore, vacated the district court's summary judgment and remanded the case back to the district court for further proceedings.[68]

60. *Id.* at 963.
61. *Id.* at 966.
62. *Id.* at 967; U.S. v. Williams, 900 F.2d 823, 825 (5th Cir. 1990).
63. *Id.* (citing Hemi Group., LLC v. City of New York, 559 U.S. 1 (2010); Bridge v. Phoenix Bond & Indem. Co., 553 U.S. 539 (2008)).
64. *Id.*; *see* U.S. v. Jones, 873 F.3d 482, 490 (5th Cir. 2017) (permitting jury to find RICO enterprise by circumstantial evidence); U.S. v. Griffin, 324 F.3d 330, 357–58 (5th Cir. 2003).
65. *Id.* at 967.
66. *Id.* at 967–68.
67. *Id.* at 970.
68. *Id.* at 973.

D. *Civil RICO Claims Against Pharmaceutical Companies for Promoting Drugs "Off-Label" in Violation of Applicable Laws*

In re *Celexa and Lexapro Marketing and Sales Practices Litigation*[69] presents yet another case where civil RICO claims survived summary judgment because the court held that sufficient facts were alleged to let the jury decide whether the defendants' racketeering conduct caused the plaintiffs compensable economic injury.[70] In *Celexa*, the First Circuit Court of Appeals reversed the summary judgment granted by the District Court in Massachusetts against the plaintiffs' civil RICO claims that the pharmaceutical defendants (Forest Pharmaceuticals) engaged in fraud to push their antidepressant drugs on unsuspecting minors for whom the Food and Drug Administration had not approved the use of these medications, and remanded the case back to the district court for further proceedings.[71] The plaintiffs' lawsuit was preceded by a Forest Pharmaceuticals whistleblower qui tam action in 2003 which was later joined by the United States and unsealed in 2009.[72]

With respect to the predicate racketeering acts under RICO, the Federal, Food, Drug and Cosmetic Act ("FDCA") requires drug manufacturers like Forest to obtain approval from the FDA before marketing a drug for a particular medical use,[73] and the FDCA creates both civil and criminal penalties for drug manufacturers that promote the use of approved drugs for unapproved uses (referred to here as "off-label" uses).[74] The FDCA, however, does not prohibit doctors from prescribing drugs for off-label uses.[75] There is also the issue that Celexa and Lexapro were approved for use to treat major depression by adults in 1998 and 2002, respectively, and Lexapro was approved for use with adolescents in 2009, but Celexa was never approved for use with adolescents, and neither Celexa nor Lexapro were approved for use to treat depression in children.[76] The plaintiffs based their civil RICO claims on the fact that the FDA never approved Celexa for treating depression in children or adolescents and never approved Lexapro

69. *In re* Celexa & Lexapro Mktg. & Sales Practices Litig., 915 F.3d 1 (1st Cir. 2019).

70. *Id.* at 11.

71. *Id.* at 5, 14.

72. A Forest Pharmaceuticals whistleblower commenced a *qui tam* action alleging that Forest had violated the False Claims Act, 31 U.S.C. § 3729(a), by fraudulently marketing and promoting Celexa and Lexapro for the off-label treatment of depression in pediatric patients. Complaint, Gobble v. Forest Labs., Inc., No. 03-10395-NMG (D. Mass. Mar. 4, 2003), ECF No. 1. The United States later intervened in that suit, and the district court unsealed the complaint. Order Granting Motion to Unseal, U.S. *ex rel.* Gobble, No. 03-10395-NMG (D. Mass. Feb. 24, 2009), ECF No. 64.

73. 21 U.S.C. § 355(a); *see also* Mut. Pharm. Co., Inc. v. Bartlett, 570 U.S. 472 (2013).

74. *See* 21 U.S.C. §§ 331(d), 333(a), 355(a); Lawton *ex rel.* United States v. Takeda Pharm. Co., 842 F.3d 125, 128 n.4 (1st Cir. 2016).

75. *Lawton*, 842 F.3d at 128 n.4.

76. *Celexa*, 915 F.3d at 6.

for use in children and thus the detrimental or non-beneficial effects of the drugs on adolescents and children remained unknown.[77] The latter point was disputed by the parties, but the court held that the issue was close enough that it constituted a fact issue to be determined by the jury.[78]

In addition to demonstrating economic injury, the First Circuit acknowledged that a civil RICO plaintiff must prove that the defendant's racketeering conduct caused the injury,[79] but the First Circuit held that there was ample evidence that Forest spent money inducing doctors to prescribe its drugs to pediatric patients and that it would not have done so had the effort not been worth the money.[80] The First Circuit further held that a jury could find that the plaintiffs were "the primary and intended victims of [Forest's] scheme to defraud,"[81] and the plaintiffs' alleged harm of reimbursing or purchasing more pediatric prescriptions than they otherwise would have done in the absence of the racketeering acts was a "foreseeable and natural consequence" of Forest's scheme.[82] Based on the above, the First Circuit reversed the district court's summary judgment in favor of the defendants and remanded the civil RICO claims back to the district court for further proceedings consistent with the First Circuit's opinion.[83]

The first fifty years of RICO since 1970 have seen a marked increase in the number of governments asserting RICO criminal complaints against businesses and the number of private plaintiffs asserting civil RICO claims against individuals and business entities that have nothing to do with actual organized crime. Over the same time period, the faces of the defendants in each case have changed dramatically from the actual mobsters depicted in the *Godfather* and *Goodfellas* films to the actual actors and actresses in such TV series as *Desperate Housewives* and *Full House*. It is subject to debate whether this trend is a good one, but attorneys will need to keep apprised of the current state of the law for RICO and civil RICO in any event.

II. FIDUCIARY DUTIES

When asserting claims involving breaches of fiduciary duties, it is widely accepted that a claiming party must as a threshold matter allege and show

77. *Id.* at 8–9.

78. *Id.* at 11. Generally speaking, "conflicting evidence" is the hallmark of an issue that calls for fact finding, not summary judgment. *See, e.g.*, Adria Int'l Grp. v. Ferre Dev., Inc., 241 F.3d 103, 111 (1st Cir. 2001) (finding summary judgment inappropriate when evidence presented was "contested and contradictory").

79. 18 U.S.C. § 1964(c); Holmes v. Sec. Inv'r Prot. Corp., 503 U.S. 258, 268 (1992) (interpreting § 1964(c)'s language to mean that a RICO plaintiff must show both but-for and proximate causation to establish standing).

80. *Celexa*, 915 F.3d at 12.

81. *Id.* at 14 (quoting Bridge v. Phx. Bond & Indem. Co., 553 U.S. 639 (2008).

82. *Bridge*, 553 U.S. at 658.

83. *Celexa*, 915 F.3d at 18.

the existence of a fiduciary relationship.[84] Determining what relationships may give rise to fiduciary duties can vary, as most courts apply broad definitions which intend to capture any instance where one has reason to repose special trust, confidence, or faith in another, such that the other is now duty bound to act in good faith and with due regard to the interests of the one reposing confidence.[85] Application of expansive formulations is not by chance. Indeed, as one court has recently explained, a broad definition of what constitutes a fiduciary relationship is intended to respond to varied and unforeseen circumstances and relationships.[86]

While courts continue to adhere to broad principles to analyze claims of fiduciary relationships, courts have been just as consistent in applying these broad principles narrowly when dealing with business relationships.[87] In particular, in matters of commercial dealings, courts are slow to find the presence of any fiduciary relationship and, with only limited exceptions,[88] such duties are almost never inferred.[89] Despite wide acceptance of those limits, litigants continue to test the boundaries of whether fiduciary duties may be found in arm's length business and contractual dealings. On the whole, courts nationwide have continued to reaffirm that commercial relationships, absent unique circumstances, do not impose fiduciary obligations.

In *AgSouth Farm Credit, ACA v. West*, the Georgia Court of Appeals was presented with the question of whether unsuccessful loan negotiations and membership in an agricultural lending cooperative could give rise to a fiduciary relationship.[90] AgSouth is a member-owned agricultural lender.[91] The plaintiff, West Farms and its individual owners, being members of AgSouth, approached AgSouth with a complicated proposal to obtain

84. *See*, *e.g.*, UBS Fin. Servs., Inc. v. Aliberti, 133 N.E.3d 277, 288 (Mass. 2019) ("To establish a claim of breach of fiduciary duty under Massachusetts law, 'there must be a [fiduciary] duty owed to the plaintiff. . . .'"); Azure Dolphin, LLC v. Barton, 821 S.E.2d 711, 725 (N.C. 2018); RFT Mgmt. Co. v. Tinsley & Adams L.L.P., 732 S.E.2d 166, 173 (S.C. 2012).

85. *See*, *e.g.*, Davis v. Greenwood Sch. Dist. 50, 620 S.E.2d 65, 68 (2005); Estate of Smith, 487 S.E.2d 807, 812 (N.C. App. 1997) (quoting Curl v. Key, 316 S.E.2d 272, 275 (1984)).

86. *UBS Fin. Servs.*, *Inc.*, 133 N.E.3d at 288.

87. *See*, *e.g.*, Broussard v. Meineke Disc. Muffler Shops, Inc., 155 F.3d 331, 348 (4th Cir. 1998) (observing that fiduciary obligations "are out of place in a relationship involving two business entities pursuing their own business interests, which of course do not always coincide").

88. For example, in California, recognized examples of fiduciary relationships in the commercial context include those of trustee/beneficiary, directors and majority shareholders of a corporation, business partners, joint adventurers, and agent/principal. Hodges v. Cty. of Placer, No. C084020, 2019 WL 5558191, at *4 (Cal. Ct. App. Oct. 29, 2019) (internal quotes and citation omitted); *see also* Read v. Profeta, 397 F. Supp. 3d 597, 633 (D.N.J. 2019) (providing a similar list of recognized fiduciary relationships under New Jersey law, and further discussing how joint ventures, even though commercial in nature, implicate fiduciary duties).

89. *See*, *e.g.*, *Broussard*, 155 F.3d at 348.

90. AgSouth Farm Credit, ACA v. West, No. A19A0964, 2019 WL 5588770 (Ga. Ct. App. Oct. 30, 2019).

91. *Id.* at *1.

financing for both the farm's operations and to restructure the its long-term debt.[92] After protracted efforts to arrange for the requested financing, AgSouth ultimately informed West Farms that it could not extend the loans sought after loans at that time.[93] In response, West Farms filed suit alleging that AgSouth owed fiduciary duties to them based on their status as members of AgSouth and alleged representations that the requested loans would be funded.[94] The trial court denied AgSouth's motion for summary judgment believing that membership alone could give rise to a heightened fiduciary benefits.[95]

On appeal, however, the Georgia Court of Appeals rejected the notion that membership in a lending cooperative alone could impute fiduciary duties. Similar to other courts, Georgia law recognizes the general proposition that a fiduciary or confidential relationship may arise where one party is so situated as to exercise a controlling influence over the will, conduct, and interest of another, and that such relationships can be created by the particular circumstances of a transaction.[96] At the same time, creditors generally deal with debtors at arm's length and do not stand as fiduciaries.[97] In fact, as the court noted, Georgia law has long held that in the majority of business dealings, counterparties in commercial matters have no confidential or fiduciary duties to each other.[98] As the lower court relied solely on the plaintiffs' membership in the lending cooperative as the basis for denying AgSouth's motion, the appellate court observed that no fiduciary duty could attach on those grounds alone and reversed the trial court's denial of summary judgment.[99]

On the one hand, the appellate court's decision is a clear affirmation of the general principle that business and commercial dealings on their own do not give rise to heightened fiduciary responsibilities. At the same time, it is worth noting that the Georgia Court of Appeals did not summarily reject West Farms' argument that particular representations made by the lender might lead to the creation of a fiduciary relationship. Rather, the court of appeals observed that the trial court had not reached those factual issues in its decision, and accordingly remanded the matter for the trial court's further consideration.[100]

In another case, the Utah Court of Appeals in *1600 Barberry Lane 8 LLC v. Cottonwood Residential OP LP* reviewed the issue of whether a property

92. *Id.* at *2.
93. *Id.*
94. *Id.* at *3.
95. *Id.*
96. *Id.* (citing to Douglas v. Bigley, 628 S.E.2d 199 (Ga. Ct. App. 2006)).
97. *AgSouth*, 2019 WL 5588770 at *4 (citation omitted).
98. *Id.* (citing to Dover v. Burns, 196 S.E. 785 (1938)).
99. *See AgSouth*, 2019 WL 5588770 at *4–5.
100. *Id.*

management company owed fiduciary duties to a property owner with respect to the appropriateness of fees being charged under a property management agreement.[101] Here, applying Georgia law, the court found that no fiduciary relationship or duties arose from the contract terms contained in the property management agreement.[102] In this case, Daymark, a property management company, entered into an agreement with 1600 Barberry Lane to manage an apartment complex it owned.[103] Years later, with the owner's permission, Daymark transferred its rights and duties under the agreement to new property manager Cottonwood Residential.[104] Sometime after the transfer to Cottonwood, the owner came to believe that it was paying management fees higher than market rate.[105] In turn, the owner sued Daymark and Cottonwood alleging that these companies had fiduciary obligations to disclose that the management fees being charged under the agreement were above market. The trial court dismissed the owner's fiduciary duty claim, and the owner appealed.[106]

Affirming the dismissal of this claim, the Utah appellate court observed that the owner, in asserting its claims of fiduciary duty, relied exclusively on the management agreement as the basis of the fiduciary duty.[107] Raising no other facts or allegations in support beyond the management agreement and its terms, the appellate court viewed the dispute as one arising from commercial dealings giving rise to no duties beyond those in the agreement.[108] In such a matter, absent any circumstances indicating control or mutual confidence, there is no heightened or affirmative duty to represent or advance another party's interests, as both sides are engaged in a transaction to further their own separate business objectives.[109]

In another recent example, a federal district court in North Carolina applied similar legal principles in dismissing a claim involving allegations of fiduciary duties between two businesses. In *Nexus Techs., Inc. v. Unlimited Power Ltd.*, Unlimited Power engaged Nexus to manufacture a portable, solar powered renewable energy system initially developed by Unlimited Power.[110] As the companies worked on this project, they closely integrated their operations and even went so far as to make plans to merge.[111] Over time, however, the relationship between the two companies soured and

101. 449 P.3d 949 (Utah Ct. App. 2019).
102. *Id.* at 952, 955.
103. *Id.* at 952.
104. *Id.* at 953.
105. *Id.*
106. *Id.* at 954.
107. *Id.* at 955.
108. *Id.* at 955–56.
109. *See id.*
110. No. 1:19-CV-00009-MR, 2019 WL 4941178, at *1 (W.D.N.C. Oct. 7, 2019).
111. *Id.* at *2.

devolved into a litigated dispute over intellectual property and unrealized business plans. Among the allegations exchanged, Unlimited Power asserted a counterclaim for negligent misrepresentation which relied on an allegation that Nexus had placed itself in a position of trust and confidence with Unlimited Power.[112]

In North Carolina, as with other jurisdictions, a fiduciary relationship is synonymous with trust and confidence. Whenever there is confidence reposed on one side and resulting domination and influence on the other, a fiduciary relationship then arises.[113] Stated otherwise, a fiduciary relationship exists when one party figuratively holds all the cards.[114] However, North Carolina law is also clear that in cases of arm's length transactions between parties of equal bargaining power, a fiduciary duty cannot arise absent "exceptional circumstances."[115] In this dispute, the allegations were that the parties engaged in a business transaction while simultaneously engaging in negotiations involving a merger between them.[116] According to the Court, those circumstances suggested that the parties' relationship went beyond a typical arm's length transaction. However, even accepting that nuance, Unlimited Power alleged no facts suggesting that Nexus held all the financial power or technical information as between them. In contrast, the allegations showed that the parties collaborated, shared information, and dealt with each other in terms of a transactional business relationship.[117] Lacking any alleged circumstances going beyond their commercial dealings, the district court found no fiduciary duty and dismissed the claim of negligent misrepresentation.[118]

As these other and other recent decisions show, despite any overarching broad formulations, courts continue to scrutinize claims of fiduciary duties in commercial disputes very closely.

III. CLASS ACTIONS

The opioid crisis has rightfully grabbed headlines and also revealed ravaged communities. Litigation involving this crisis is varied and complex. No litigation class has yet been certified for litigation or trial purposes and multiple plaintiffs and defendants have struggled to figure out the best approach to the massive legal conundrum.

112. *Id.* at *5.
113. *Id.* (citation omitted).
114. *Id.* (citing to *Broussard*, 155 F.3d at 348).
115. *Nexus*, 2019 WL 4941178, at *5 (citing and quoting Dallaire v. Bank of Am., N.A., 760 S.E.2d 263, 266 (2014)).
116. *Id.*
117. *Id.*
118. *Id.*

On September 11, 2019, United States District Judge Polster of the Northern District of Ohio's Eastern Division issued an order which not only dynamically changed the shifting sands of the nationwide opioid litigation landscape, but possibly ushered in an entirely new era of class action litigation and, more specifically, the resolution of class action litigation.[119] With a keystroke and his signature, Judge Polster certified an unprecedented "negotiation class."[120] Unlike the now familiar settlement class—based on a negotiated settlement between a limited group of "class" representatives and defendant—a negotiation class empowers designated counsel to enter into negotiations on behalf of the entire class.[121] It requires a supermajority approval of the settlement and it also permits members of the class to opt out of the negotiations, prior to them commencing and to proceed separately.[122]

This result was actually opposed by nearly forty state attorneys general representing a variety of governments.[123] It was also opposed by a number of defendants, such as drug distributors and pharmacies.[124] But in the end, Judge Polster's groundbreaking order means that court-selected plaintiff's counsel, representing forty-nine different local governments, will attempt to negotiate a settlement on behalf of all local governments nationwide allegedly injured in America's opioid crisis.[125]

Designated counsel cannot bind the class unless a settlement proposal receives 75% acceptance of the entire voting class.[126] An interesting twist is that before any negotiations, all local governments will have a predetermined "allocation" under the formulas proposed to the court and adopted in the court's orders.[127] Prior to negotiating a settlement amount, or even receiving a settlement offer, local governments must look to the formulas to get a sense for what their share of a future unknown settlement might be.[128] The court left little time for local governments to opt out based on a dissatisfaction with the allocation formula.[129] Governments will not have the context of applying that formula to a final amount but will only be able to gauge their relative share based on the formulas.[130]

119. *In re* Nat. Prescription Opiate Litig., No. 1:17-3d-02804-DAP (N.D. Ohio Sept. 11, 2019) (mem. opinion certifying negotiation class).
120. *Id.*
121. *Id.* at 24.
122. *Id.* at 3.
123. *Id.* at 1.
124. *Id.*
125. *Id.* at 40.
126. *Id.* at 6.
127. *Id.* at 35.
128. *Id.*
129. *Id.* at 39.
130. *Id.* at 33.

The Judge gave local governments until November 22, 2019 to opt out.[131] Approximately 500 municipalities did so.

The judge also offered further protection to those who may not want to participate in the process or to be bound by it. In fact, the Judge's Order certifying the class was as careful to note what he is not ordering or doing as much as what he is.[132] There are a variety of state court lawsuits filed by some local governments, as well as a series of cases filed by attorneys general on behalf of state governments. There are also ongoing and heated disputes between attorneys representing local governments and state attorneys general as to who controls the opioid litigation and more specifically the remedies (or revenue) resulting from the litigation.

Judge Polster sought to avoid getting embroiled in that dispute and specifically stated:

> This Order does not alter existing law with respect to the relationship between any State and its political subdivisions. As already ordered in appointing Interim Negotiation Class Counsel, Doc. #: 2490, Negotiation Class Counsel are authorized to negotiate settlements with Defendants on behalf of the putative class but are ***not*** authorized to negotiate on behalf of Class members within a given State against their State government should allocation disputes arise during or following State settlements.[133]

The judge was also clear that his certification of a negotiation class did not compel any defendant to negotiate with anyone:

> This Order applies to the previously-identified 13 sets of national Defendants. None of these Defendants is required by this Order to engage with the Negotiation Class. This is a voluntary mechanism developed to address the unique circumstances of this litigation, which the Court hopes will directly or indirectly facilitate the voluntary, fair, adequate and reasonable resolution of the cities' and counties' claims pending in these MDL No. 2804 proceedings and in related state court litigation, and promote the overall resolution of the litigation.[134]

The court also anticipated the potential use of its order as precedent in later certification fights or arguments in the opioid litigation in other courts. Many are familiar with the use of settlement class certification, which often occurs simply as part of a resolution compromise, as "precedent" for certifying a litigation class in other actions. One need only follow the federal courts' ubiquitous discussion of the settlement class certification

131. *Id.* at 39.
132. *Id.* at 40.
133. *In re* Nat. Prescription Opiate Litig., No. 1:17-3d-02804-DAP (N.D. Ohio Sept. 11, 2019) (order certifying negotiation class and approving notice) at 7, ¶ 15.
134. *Id.* at 7–8, ¶ 19.

in *In re Prudential Insurance Company Sales Practice Litigation*[135] as a possible rationale for certification of a litigation class to recognize the danger for defendants in allowing such an order to be used broadly as precedent.[136]

The judge addressed this potential head on. Specifically, he did not certify a class for "any purpose other than to negotiate for the class members with 13 sets of [identified] National Defendants.[137]

In explicit terms, the court instructed that no class member (as he certified it) or any party could cite his order as precedent in support of or in opposition to the certification of "*any class* for any other purpose in *any* opioids-related litigation by or against any party."[138] Showing extreme care and caution, the court took the unusual step to even restrict any "counsel to a party" in the same manner.[139] Judge Polster went further yet and sought to restrict the use of his first of its kind order by those outside the proceedings:

> Persons not parties to this proceeding are informed that this Order and the accompanying Memorandum Opinion are not intended to serve as a precedent in support of, or in opposition to, any motion for class certification of any type pursued in any court on opioid-related matters.[140]

What the court did not explicitly limit is the use of his order as precedent in non-opioids-related litigation. Perhaps this is an acknowledgment that this opinion will of course be used as precedent by anyone pursuing a negotiating class in other types of litigation. As with the use of settlement class certifications this order's analysis of Federal Rule of Civil Procedure 23, compliance will undoubtedly be used by counsel in other litigation seeking to address issues of typicality, commonality, and predominance. Perhaps because the court certified two RICO claims and two Controlled Substance Act issues we will see its use with other RICO claims or other matters invoking the Controlled Substances Act. This court's order does not seek to restrict its use in that manner.

The order makes clear it does not stay or impose restrictions on any parties' right to proceed with their claim or with discovery. It goes even further to make sure individual parties could proceed toward trial or an individual settlement if they choose:

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135. *In re* Prudential Ins. Co. Sales Practice Litig., 148 F.3d 283 (3d Cir 1998).

136. *See also* Moore v. Painewebber Inc., 306 F.3d 1247 (2d Cir. 2002); *In re* Life USA Holding Inc., 242 F.3d 136 (3d Cir. 2001); Johnston v. HBO Film Mgmt., 265 F.3d 178 (3d Cir. 2001).

137. *In re* Nat. Prescription Opiate Litig., No. 1:17-3d-02804-DAP (N.D. Ohio Sept. 11, 2019) (order certifying negotiation class and approving notice) at 6, ¶ 13.

138. *Id.* (emphasis added).

139. *Id.*

140. *Id.* at 6–7.

> Accordingly, this Order is without prejudice to the ability of any Class member to proceed with the prosecution, trial and/or settlement, in this or any court, of an individual claim, or to the ability of any Defendant to assert any defense thereto. This Order does not stay or impair any action or proceeding in any court, and Class members may retain their Class membership while proceeding with their own actions, including discovery, pretrial proceedings, and trials. In the event a Class Member reaches a settlement or trial verdict, it may proceed with its settlement/verdict in the usual course without hindrance by virtue of the existence of the Negotiation Class. *Such Class Member may not, however, collect on its individual settlement/judgment and also participate in any Class settlement fund.*[141]

Importantly, the court also said that nothing in its order is meant to prejudice *any* party's ability to oppose the certification of the negotiation class or "any other class, proposed for litigation or a settlement with respect to opioid-related claims defense, issue or question."[142]

Judge Polster felt compelled to issue a subsequent memorandum to clarify his intended restrictions and the fact that he reserved the power unto himself to determine if a plaintiff was improperly seeking a double recovery by participating in more than one settlement:

> The highlighted language is not as precise as it should be. First, it fails to account for the fact that the Class is authorized to negotiate settlements with 13 sets of defendants and that a Class settlement may be defendant-specific. Thus, if a Class member collects on an individual settlement or judgment against one defendant, it may not participate in any Class settlement fund as to that defendant, but otherwise may participate in Class settlements as to other defendants.[143]

He further clarified his ruling:

> The underlying principle is that Class members should not be able to participate in a Class settlement if that participation is inequitable to other Class members or to the defendant, given any related recovery from the same defendant. But the ways in which this issue could arise are many and complex and they evade a simple rule. The Court therefore deems it most prudent to re-state the principle as a presumption against double-recoveries, but to reserve authority to determine in the context of actual situations whether Class members with prior judgments or settlements should be precluded from participation in the Class's settlement.[144]

141. *Id.* at 6, ¶ 14 (emphasis added).
142. *Id.*
143. *In re* Nat. Prescription Opiate Litig., No. 1:17-3d-02804-DAP (N.D. Ohio Oct. 4, 2019) (order clarifying negotiation class certification order) at 2.
144. *Id.*

The certification of a negotiation class is certainly novel and will be challenged on multiple fronts. The attorneys general from thirty-seven states and the District of Columbia have already attacked the negotiation class scope as unconstitutional. Judge Polster himself concedes he does not have jurisdiction over the attorneys general or their individual cases.[145] The attorneys general go further, however, and argue that the certification of a class of local governments usurps the State Government's authority and sovereignty.[146] Further, they argue that only the states have the right to approve or allocate settlement proceeds between local governments within their jurisdiction.[147]

It has been reported that the Ohio Attorney General Dave Yost specially objected to the binding nature of the formulas before anyone knew the total settlement:

> This process is fundamentally flawed because it binds people to buy a pig in a poke. Every community has to make a determination whether they're in or out before they even know what the deal is.[148]

Others have attacked Judge Polster's certifications as not being in keeping with Article III of the United States Constitution or Rule 23 of the Federal Rules of Civil Procedure. The argument is that neither Article III nor Rule 23 contemplates a "negotiating class" and do not give the judiciary a blank check to "create organizations to pursue other activities in the interest of their members, including negotiation of contracts."[149] Judge Polster rejected such arguments noting that Rule 23 "does not dictate, nor therefore limit, the use to which the class mechanisms can be applied."[150]

The court also used his more recent order to clarify that by not opting out of the negotiation class a plaintiff did not waive its right to contest jurisdiction.[151] It seems several municipalities had moved for remand from federal court and did not want their failure to opt out of the negotiating class to be deemed as an admission of jurisdiction. The court agreed with

145. *In re* Nat. Prescription Opiate Litig., No. 1:17-3d-02804-DAP (N.D. Ohio Sept. 11, 2019) (memorandum opinion certifying negotiation class) at 31.

146. *Id.*

147. *Id.*

148. Alison Frankel, *Opioid MDL Judges OKs Novel Negotiating Class as 'likely to promote global settlement*,' Reuters, Oct. 29, 2019, https://www.reuters.com/article/us-otc-opioids/opioid-mdl-judges-oks-novel-negotiating-class-as-likely-to-promote-global-settlement-idUSKCN1VX2RE.

149. *Id.*

150. *In re* Nat. Prescription Opiate Litig., No. 1:17-3d-02804-DAP (N.D. Ohio Sept. 11, 2019) (memorandum opinion certifying negotiation class) at 8.

151. *In re* Nat. Prescription Opiate Litig., No. 1:17-3d-02804-DAP (N.D. Ohio Oct. 4, 2019) (order clarifying negotiation class certification order) at 3.

the plaintiffs and made it clear that he would not consider a decision to not opt out as a waiver of a pending argument regarding jurisdiction.[152]

It is worth noting that this idea of a "negotiating class" has been championed by Duke University Law Professor Francis McGovern. Professor McGovern, along with Harvard Law Professor William Rubenstein, pushed the idea in a proposed Law Review Article "The Negotiation Class: A Cooperative Approach to Class Actions Involving Large Stakeholder"[153] Reading the court's orders relating to certification is obviously key to understanding the process set up by Judge Polster, but a deeper understanding can be gained by studying this article. Professor McGovern was not just a legal scholar submitting this draft concept to millions on the internet, he was also a previously designated special master appointed by the court to help it and the parties with settlement negotiations in the opioid MDL. And as the court noted in its Memorandum Opinion and Order:

> A Court-appointed Special Master (Professor Francis McGovern) has overseen extensive settlement negotiations. The Defendants have insisted throughout on the need for a "global settlement," that is, a settlement structure that resolves most, if not all, lawsuits against them arising out of the opioid epidemic. This has created an obstacle to settlement. In a standard settlement class action, the class members can opt out of the class after the settlement is reached. With thousands of counties and cities already litigating, the Defendants in this MDL are concerned that many of these Plaintiffs could opt out. The Defendants would then have paid a lot of money to settle non-litigating claims but would still have to ligate a host of potentially significant claims. This situation required creative thinking. The Special Master, in conjunction with experts and the parties in the case, developed an innovative solution: a new form of class action entitled "negotiation class certification.[154]

It is no surprise that this court's certification of a negotiation class follows closely the concepts outlined by McGovern and Rubenstein:

> Our proposed mechanism for harnessing claimants' cooperative instincts is a new form of class certification that we call "negotiation class certification." Under this approach, class members would work together to generate a metric for distributing a lump sum settlement across the class. They would then ask the court to certify a "negotiation class" and to direct notice to the class members informing them that counsel will negotiate a lump sum settlement and that, if achieved the lump sum amount would be put to a vote, with a supermajority vote binding the class; the notice would also explain the distributional

152. *Id.*

153. Francis E. McGovern & William B. Rubenstein, *The Negotiating Class: A Cooperative Approach to Class Actions Involving Large Stakeholders*, Duke L. Sch. Pub. L. & Legal Theory Series No. 2019-41 (June 13, 2019).

154. *In re* Nat. Prescription Opiate Litig., No. 1:17-3d-02804-DAP (N.D. Ohio Sept. 11, 2019) (memorandum opinion certifying negotiation class) at 2.

metric. Any class member that did not want to bind itself to either the distributional metric or the supermajority voting process could opt out.[155]

And that is precisely what Judge Polster did on September 11, 2019. Time will tell if the concept is sustained by the courts and if it works to resolve such a complex matter with so many competing interests.

IV. REMEDIES

An Arizona district court decision in the last year established that states have supremacy over federal court decisions in expanding and contracting their own filed rate doctrines irrespective of what federal courts may decide.

In *Castillo v. Johnson*,[156] a group of defendants that the federal judge in that case called "the Bribery Defendants," were sued for racketeering, unjust enrichment, and "conspiring to unlawfully raise utility rates through racketeering, wire fraud, and bribery of a public servant."[157]

In response to these claims, the Bribery Defendants actually alleged that the bribery allegations against them were barred by the filed rate doctrine ("FRD").[158] In other words, the utility rates in question were allegedly subject to a merely ministerial approval by an authorized administrative agency. That meant, they argued, that there was no remedy for their conduct related to their utility rates so long as their utility rates were authorized.[159]

The Bribery Defendants' argument was not entirely invented. In fact, their argument was based on decades of decisions by federal courts applying the federal FRD.[160] From the inception of the FRD, the originating issue in the federal cases involved federal agencies regulating utilities.[161]

The utilities sued in those federal cases previously filed rates for approval by federal administrative agencies which had the power to regulate them.[162] The federal FRD was made by federal judges as a kind of blanket defense to throw over any perceived attack on rates approved by authorized agencies.[163] Federal courts have held accordingly that the FRD defense applies whether or not the attack on authorized rates is direct or collateral, including in litigation in which federal judges would have to evaluate or

155. McGovern & Rubenstein, *supra* note 153.
156. Castillo v. Johnson, No. CV-17-04688-PHX-DRY, 2019 WL 4222289 (D. Ariz. Sept. 5, 2019).
157. *Id.* at *1.
158. *Id.* at *2–4.
159. *Id.*
160. *Id.*
161. *Id.*
162. *Id.* at *3.
163. *Id.*

calculate rates already approved as "reasonable" by authorized administrative agencies.[164]

Shorthand references in the federal case law of the FRD speak within a cryptic framework of "nonjusticiability" of the reasonableness of an authorized filed rate, and "nondiscrimination" among the parties which pay that rate.[165]

The federal judge rejected the Bribery Defendants' argument in *Castillo*, however. First, the federal FRD just could not apply in this case. "Because no federal rate is implicated here, the federal filed rate doctrine is inapplicable."[166]

Second, whether or not Arizona has its own FRD, and whether or not it would apply here anyway, the relevant Arizona administrative authority had already expressly rejected the idea that utility rates in Arizona can be obtained by bribery:

> The Court is unpersuaded that Arizona has adopted a version of the filed rate doctrine. Nor is the Court persuaded that the doctrine, assuming one has been adopted, would apply to the type of conduct at issue here. Nevertheless, even assuming that Arizona has adopted a filed rate doctrine and that it applies under these circumstances, the doctrine does not bar Plaintiffs' claims because the [Arizona Corporation] Commission repudiated the doctrine in this instance. The Court therefore denies the Bribery Defendants' motion to dismiss.[167]

The federal court's three-part analysis of state FRD in this case is instructive. The court's analysis tracks the development of the FRD in federal courts and how the doctrine might be anticipated in the state courts, if at all.

First, the court looked to whether the forum state has adopted a version of the FRD.[168] In the course of its opinion, the federal court cautioned that this first question cannot be answered simply by resorting to federal filed rate precepts.[169]

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164. *E.g.*, Saunders v. Farmers Ins. Exch., 440 F.3d 940, 943 (8th Cir. 2006); Hill v. Bellsouth Telecomm's, Inc., 364 F.3d 1308, 1316 (11th Cir. 2004); Wegoland Ltd. v. Nynex Corp. Wegoland Ltd. v. Nynex Corp., 27 F.3d 17, 18 (2d Cir. 1994); *see, e.g.*, Dennis J. Wall, *An Update to: Filed Insurance Rates Do Not Belong to the Federal Government. They Belong to the States*, New Appleman on Insurance: Current Critical Issues in Insurance Law 25–26 (Summer 2019); Dennis J. Wall, *Filed Insurance Rates Do Not Belong to the Federal Government. They Belong to the States*, New Appleman on Insurance: Current Critical Issues in Insurance Law 21–22 (Winter 2018).

165. *Wegoland*, 27 F.3d at 19. Wall, *Filed Insurance Rates*, *supra* note 164, at 23–27.

166. *Castillo*, 2019 WL 4222289, at *3.

167. *Castillo*, 2019 WL 4222289, at *8.

168. *Id.* at *3–7.

169. *Id.*

Second, the federal court looked to see whether a state FRD could be applied on the merits.[170] Even assuming that a state FRD could apply to these facts—after showing that the facts of this case could not support any filed rate doctrine here—the federal court turned to the last of the trio of questions.[171]

Third and finally, the relevant state administrative agency had already taken action that "repudiated the doctrine in this instance."[172] Simply put, no filed rate doctrine can ever be applied in the face of state administrative agency action that repudiates it in the case at bar.

If this decision from Arizona is followed elsewhere, it will require any state FRD limiting remedies to be left to the individual states to develop. State FRDs will simply not be left to federal judges to impose. The rules of state FRDs remain to be developed by the states.

170. *Id.*
171. *Id.*
172. *Id.* at *6.