

By Michael J. Kump

The Rule of Proportionality in Civil RICO Suits

Attorney's fees and costs can greatly increase the financial risk for defendants

In a civil RICO lawsuit, a jury may find the defendants liable for violating 18 USC Section 1962(c) but award only a small amount in compensatory damages. Although this amount is automatically trebled under 18 USC Section 1964(c), even this relative victory may disappear if the plaintiff files a motion for attorney's fees and costs pursuant to Section 1964(c). It would not be exceptional for the plaintiff to seek fees and costs that are far greater than the compensatory damages.

If the defense counsel opposes the fees motion on the ground that the award of fees and costs must be proportional to the amount of damages awarded by the jury, the defendant is not likely to prevail, because courts have considered whether a rule of proportionality should apply in civil RICO cases and have decided that it should not. In light of the general judicial rejection of rules of proportionality in federal fee-shifting cases, defense counsel in civil RICO cases would be wise to find other grounds upon which to attack a plaintiff's motion for

attorney's fees.

When Congress enacted the RICO statute, it expressly mandated an award of attorney's fees and costs whenever there has been an injury cognizable under RICO: "Any person injured in his business or property by reason of a violation of Section 1962... shall recover threefold the damages he sustains and the cost of suit, including a reasonable attorney's fee."¹ The RICO statute and the Clayton Act² (upon which it is based) "share a common congressional objective of encouraging civil litigation to supplement government efforts to deter and penalize the respectively prohibited practices."³ Congress passed the civil RICO statute, with its incentive of treble damages and mandatory attorney's fees and costs, to encourage victims of racketeering acts, such as mail and wire fraud, to become private attorneys general dedicated to eliminating proscribed activities.⁴ The objective of civil RICO "is thus not merely to compensate victims but to turn them

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into prosecutors, 'private attorneys general,' dedicated to eliminating racketeering activity."⁵

Defense counsel should harbor no illusion that courts are unlikely to respect this congressional objective. As stated in *Bingham v. Zolt*, "It is the trial court, not the jury, that has the responsibility of determining attorney's fees awards" in civil RICO cases.⁶ And as the U.S. Supreme Court held in *Hensley v. Eckerhart*, the deter-

mination of a reasonable fee begins with the court's calculation of a so-called lodestar figure, which equals "the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate."⁷ Although the court may increase or decrease the lodestar based upon a number of factors, there is a "strong presumption that the lodestar figure... represents a 'reasonable' fee...."⁸ Indeed, "a party advocating the reduction of the lodestar amount bears the

burden of establishing that a reduction is justified."⁹ As the Court has warned, however, "[a] request for attorney's fees should not result in a second major litigation."¹⁰

The "most critical factor" in determining a reasonable fee "is the degree of success obtained."¹¹ This does not mean, however, that a RICO plaintiff will be penalized when its recovery falls short of what it originally sought. For example, in *Bingham*, the RICO plaintiff sought more than \$10



million but recovered only \$800,000 (before trebling). The Second Circuit nevertheless affirmed a \$3 million award of fees and costs, notwithstanding the fact that “the jury awarded only a small part of the damages sought by plaintiff, three of plaintiff’s six charges were dismissed as time-barred, and the [plaintiff] prevailed against only three of eight defendants.”¹² Citing the Supreme Court’s ruling in *Hensley* that “[t]he result is what matters,”¹³ the Second Circuit explained that although the “plaintiff did not prevail on all of its claims and the jury did not find all the defendants guilty, the plaintiff obtained a jury verdict and a judgment against defendants. It won the case.”¹⁴

Similarly, in *Miltland Raleigh-Durham v. Myers*, District Judge Motley declined to reduce the lodestar amount of \$684,450 in fees and \$117,697 in costs awarded to RICO plaintiffs who recovered approximately \$1 million in damages, since the plaintiffs “succeeded on all claims despite [the defendant’s] extensive fraud.”¹⁵

Fee-Shifting

There exists some disagreement among courts over the extent to which the *Hensley* lodestar factors should apply to cases that involve, as RICO cases do, mandatory rather than permissive fee-shifting statutes.¹⁶ The Second Circuit, in a civil RICO case, noted that the “results obtained” analysis of *Hensley* and *Farrar v. Hobby* “is of limited applicability” to statutes that mandate an award of attorney fees.¹⁷ Other courts determining fees and costs in RICO cases, however, have applied the *Hensley* analysis.¹⁸ Indeed, given the provision in Section 1964(c) for a reasonable attorney’s fee in civil RICO cases, the courts must make a determination of what is reasonable, and that analysis may be likely to consider generally the same factors as in *Hensley*. For example, in a recently decided case, *System Management, Inc. v. Loiselle*, the district court concluded that it would “not place much emphasis on *Hensley* and *Farrar* when interpreting the fee-shifting provision in RICO.”¹⁹ Although the court still calculated a lodestar amount before making its award of fees and costs,²⁰ the district court put virtually no emphasis on the factor of the “results obtained.”²¹

It is well established that the award of attorney’s fees in federal fee-shifting cases generally should not be reduced simply because a prevailing plaintiff seeks an award that is greater than the damages awarded at trial.²² Indeed, in *City of Riverside v. Rivera*, a civil rights case, the Supreme Court upheld an attorney’s fee award of \$245,456 when the plaintiff only recovered \$33,350 in compensatory and punitive damages.²³ In *United*

States Football League v. National Football League, an antitrust case, the Second Circuit affirmed an award of over \$5.5 million in attorney’s fees under the Clayton Act, upon which the mandatory fee-shifting provision of the RICO statute is based, even though the jury awarded the plaintiff only \$1 in damages (which was trebled).²⁴ The Second Circuit explained, “Because of the importance of the policy of encouraging private parties to bring antitrust actions, recovery of their reasonable attorney’s fees must be sustained regardless of the amount of damages awarded.”²⁵

The rule of proportionality has fared no better in civil RICO cases. In *Northeast Women’s Center v. McMonagle*, the Third Circuit upheld an award of attorney’s fees and costs of \$64,964 in a civil RICO case, even though the jury only awarded \$875 in RICO damages before trebling.²⁶ The Third Circuit ruled that “the district court properly refused to apply a proportionality rule to reduce the RICO fee award in this case,” expressly rejecting the defendants’ argument that the Supreme Court’s ruling in *City of Riverside* did not control.²⁷ In *FMC Corporation v. Varonos*, the district court refused to award any fees or costs to a prevailing RICO plaintiff, on the ground that “the amount of [the plaintiff’s] request was almost triple the amount of the actual damage award.”²⁸ The Seventh Circuit, relying upon *McMonagle* and *City of Riverside*, reversed and remanded for a determination of the plaintiff’s reasonable fees and costs.²⁹

In *Nu-Life Construction Corporation v. Board of Education*, the district court awarded fees and costs totaling \$193,266 to the RICO plaintiff, notwithstanding the fact that the jury awarded only \$23,400 in compensatory damages against some defendants and found that other defendants had not violated RICO.³⁰ The district court, relying upon *McMonagle*, *FMC*, and Second Circuit decisions rejecting proportionality in civil rights cases, “decline[d] to reduce [the plaintiff’s] fee application notwithstanding the limited pecuniary success achieved by the plaintiff Nu-Life.”³¹

Loiselle is the most recent case to consider the issue of proportionality in connection with a RICO fees application.³² After announcing it would not place much emphasis on the *Farrar* and *Hensley* factors, the district court calculated and accepted as its award the reasonable number of hours multiplied by the reasonable hourly rates.³³ As a result, the court awarded fees and costs totaling \$184,232 to the plaintiff, even though the treble RICO damages amounted to \$1,018.56.³⁴ The district court, in colorful language, explained its rejection of a proportionality rule in that RICO case: “The better part of valor is discretion.” William Shake-

spere, *The First Part of Henry The Fourth* act 5, sc. 4. But [the defendant] chose to fight this one out. Now that he has lost the battle, this Court will not exercise its discretion for no better reason than to comfort defeat.”³⁵

Defense counsel might argue against an award of fees and costs in excess of RICO damages on the ground that RICO treble damages are more than enough to accomplish the goals of deterrence and retribution. This argument misconstrues the purpose of the civil remedies afforded by the RICO statute, which is to compensate plaintiffs for their actual costs in order to encourage private attorney general suits in the enforcement of important public policies.³⁶ The refusal of the courts to apply a rule of proportionality in civil RICO cases, therefore, is consistent with the objectives underlying Section 1964(c), since the primary focus of the treble damages provision of RICO is remedial, not punitive.³⁷ As the Supreme Court also held, nor are attorney’s fees “clearly punitive.”³⁸ Thus, the remedial purposes underlying the mandatory fee-shifting provisions of Section 1964(c) “would best be served by fully compensating private attorneys general, no matter how limited their success.”³⁹

The Billing Judgment Approach

Trying a different approach, defense counsel might concede that courts have rejected application of a proportionality rule but attempt to limit that rejection to cases in which the fee awards were disproportionate to the actual amount of damages recovered by the plaintiff, not to the amount that the plaintiff sought. Under this view, known as the billing judgment approach, “an attorney’s requested fee would be judged ‘reasonable’ if it were rationally related to the monetary recovery that the attorney could have anticipated ex ante.”⁴⁰ Taking this approach, defense counsel would argue that no rational client would invest, for example, the sum of \$2 million in attorney’s fees and costs to recoup a maximum of \$300,000 in RICO treble damages.

Defense counsel are not likely to succeed with the billing judgment approach, however, since the Second Circuit—which is the only one to have considered it—has expressly rejected it. In *Quarantino v. Tiffany & Company*, a civil rights case, a jury awarded \$158,145 (including \$98,145 in punitive damages), and the district court calculated the plaintiff’s lodestar amount to be \$124,645.18 but only awarded fees equaling half the plaintiff’s total recovery (i.e., \$79,072.50).⁴¹ The Second Circuit held that “[e]ven setting aside considerable misgivings as to the feasibility of such precise ex ante calculations, we find that this approach conflicts with the legisla-

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tive intent and rationales of the fee-shifting statute.⁴² As a result, the Second Circuit reversed, holding that “this Court does not follow, and has not suggested that it would be inclined to follow, the billing judgment rule that the district court developed.”⁴³

Defendants sued under the civil RICO statute must understand that they can succeed in limiting damages but still fail badly by being liable for the plaintiff's attorney's fees and costs. Counsel for defendants will not make any headway arguing to the court that the award of fees and costs should be proportional to the damages awarded. The proportionality rule is directly contrary to the societal objectives upon which Congress predicated the RICO statute. Thus, rather than challenging the fees application based upon proportionality, defense counsel should attack the lodestar determination on other grounds, if possible. An attack may target two items as being excessive: the hourly rates charged by the plaintiff's counsel⁴⁴ and the number of hours billed.⁴⁵ Defendants may also challenge the lack of support for the application.⁴⁶ Furthermore, in cases in which the plaintiff prevails on some but not all claims or against some but not all defendants, defense counsel should argue that the attorney's fees should be apportioned accordingly.⁴⁷ ■

¹ 18 U.S.C. §1964(c).

² Section 4 of the Clayton Act states that “any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws...shall recover...the cost of suit, including a reasonable attorney's fee.” 15 U.S.C. §15(a).

³ *Rotella v. Wood*, 528 U.S. 549, 557 (2000).

⁴ *Agency Holding Corp. v. Malley-Duff & Assocs., Inc.*, 483 U.S. 143, 151 (1987).

⁵ *Rotella*, 528 U.S. at 557-58 (citation omitted).

⁶ *Bingham v. Zolt*, 66 F. 3d 553, 565 (2d Cir. 1995), *cert. denied*, 517 U.S. 1134 (1996) (affirming award of attorney's fees and costs under 18 U.S.C. §1964(c)).

⁷ *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983).

⁸ *Pennsylvania v. Delaware Valley Citizens' Council for Clear Air*, 478 U.S. 546, 565 (1986).

⁹ *United States Football League v. National Football League*, 887 F. 2d 408, 413 (2d Cir. 1989), *cert. denied*, 493 U.S. 1071 (1990).

¹⁰ *Hensley*, 461 U.S. at 437.

¹¹ *Id.* at 436.

¹² *Bingham v. Zolt*, 66 F. 3d 553, 565 (2d Cir. 1995), *cert. denied*, 517 U.S. 1134 (1996).

¹³ *Hensley*, 461 U.S. at 435.

¹⁴ *Bingham*, 66 F. 3d at 566-67.

¹⁵ *Miltland Raleigh-Durham v. Myers*, 840 F. Supp. 235, 240 (S.D. N.Y. 1993); *see also* *Abou-Khadra v. Bseirani*, 971 F. Supp. 710, 719-20 (N.D. N.Y. 1997) (awarding fees and costs of \$620,361.48 in civil RICO case); *Brokerage Concepts v. United States Healthcare*, 1996 WL 741885, at *16 (E.D. Pa. Dec. 10, 1996) (in which \$910,000 in fees and costs were awarded after jury awarded \$200,000 in RICO damages before trebling).

¹⁶ *Compare* RICO and Clayton Act mandatory language with 42 U.S.C. §1988(b) (“The court...may allow...a reasonable attorney's fee.”) and 16 U.S.C. §1540(g)(4) (“The court...may award costs of litigation (including

reasonable attorney and expert witness fees) to any party.”).

¹⁷ *Stochastic Decisions, Inc. v. DiDomenico*, 995 F. 2d 1158, 1168 (2d Cir. 1993), *cert. denied*, 510 U.S. 945 (quoting *United States Football League v. National Football League*, 887 F. 2d 408, 412 (2d Cir. 1989), *cert. denied*, 493 U.S. 1071 (1990)).

¹⁸ *See, e.g., Northeast Women's Ctr. v. McMonagle*, 889 F. 2d 466, 470 (3d Cir. 1989), *cert. denied*, 494 U.S. 1068 (1990).

¹⁹ *Systems Mgmt., Inc. v. Loiselle*, 154 F. Supp. 2d 195, 206 (D. Mass. 2001).

²⁰ *Id.* at 208.

²¹ *Id.* at 209-11.

²² *See, e.g., Fair Housing of Marin v. Combs*, 285 F. 3d 899, 907-08 (9th Cir. 2002) (affirming an award “more than five times the amount of the compensatory and punitive damage awards combined”); *Cowan v. Prudential Ins. Co.*, 935 F. 2d 522, 526 (2d Cir. 1991) (Iodestar “should not be reduced simply because a plaintiff recovered a low damage award”).

²³ *See City of Riverside v. Rivera*, 477 U.S. 561, 564-65 (1986).

²⁴ *See United States Football League v. National Football League*, 887 F. 2d 408, 413-16 (2d Cir. 1989), *cert. denied*, 493 U.S. 1071 (1990).

²⁵ *Id.* at 412.

²⁶ *See Northeast Women's Ctr. v. McMonagle*, 889 F. 2d 466, 471-75 (3d Cir. 1989), *cert. denied*, 494 U.S. 1068 (1990).

²⁷ *Id.* at 474-75.

²⁸ *FMC Corp. v. Varonos*, 892 F. 2d 1308, 1316 (7th Cir. 1990).

²⁹ *Id.*

³⁰ *See Nu-Life Const. Corp. v. Board of Educ.*, 795 F. Supp. 602, 607 (E.D. N.Y. 1992), *aff'd*, 28 F. 3d 1335 (2d Cir. 1994).

³¹ *Id.*

³² *See Systems Mgmt., Inc. v. Loiselle*, 154 F. Supp. 2d 195, 207 (D. Mass. 2001).

³³ *Id.* at 209-11.

³⁴ *Id.* at 212.

³⁵ *Id.*

³⁶ *See Rotella v. Wood*, 528 U.S. 549, 557-58 (2000).

³⁷ *See Shearson/Am. Express, Inc. v. McMahon*, 482 U.S. 220, 240-41 (1987).

³⁸ *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 492 (1985) (citation omitted).

³⁹ *Systems Mgmt., Inc. v. Loiselle*, 154 F. Supp. 2d 195, 207 (D. Mass. 2001).

⁴⁰ *See Quaratino v. Tiffany & Co.*, 166 F. 3d 422, 425 (2d Cir. 1999).

⁴¹ *Id.* at 424.

⁴² *Id.* at 426.

⁴³ *Id.*; *see City of Riverside v. Rivera*, 477 U.S. 561, 585 (1986) (Powell, J., concurring: “[A] district court, in fixing fees, is obligated to give primary consideration to the amount of damages awarded as compared to the amount sought.”).

⁴⁴ *See, e.g., Vanke v. Block*, 2002 WL 1836305, at *7 (C.D. Cal. Aug. 8, 2002) (finding hourly rates to be excessive and reducing the rates accordingly).

⁴⁵ *See, e.g., Farmer v. Arabian Am. Oil Co.*, 31 F.R.D. 191, 193 (S.D. N.Y. 1962), *rev'd in part*, 324 F. 2d 359 (2d Cir. 1963), *rev'd*, 379 U.S. 227 (1964) (“[P]arties to a litigation may fashion it according to their purse and indulge themselves and their attorneys, but they may not foist their extravagances upon their unsuccessful adversaries.”).

⁴⁶ *See, e.g., Dailey v. Societe Generale*, 915 F. Supp. 1315, 1328 (S.D. N.Y. 1996), *aff'd in relevant part*, 108 F. 3d 451 (2d Cir. 1997) (criticizing “entries listed simply as ‘telephone call,’ ‘consultation,’ and ‘review of documents’”).

⁴⁷ *See Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983).

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