

# Client Alert: The Impact of "Special Considerations" on a New Civil RICO Causation Standard: The Second Circuit's Decision in *Alix v. McKinsey Co.*

## **Publications**

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Causation is a crucial factor when determining liability in cases involving civil RICO claims. Courts have long held that plaintiffs must show both factual (“but for”) causation and proximate causation to sufficiently allege a civil RICO claim and that there must be “some direct relation between the injury asserted and the injurious conduct alleged.”[1]

Yet, in a recent case out of the Second Circuit, a three-judge panel unanimously endorsed an altered causation standard in a case involving an alleged fraud and federal bankruptcy proceedings. The court’s new standard would hold a defendant liable for harm indirectly caused by his or her conduct if the case involved certain “special considerations,” which would expand traditional notions of causation and liability in similar cases. While the Supreme Court has not yet agreed to hear the case, it provides the Court with an opportunity to either reinforce long-standing precedent that direct causation is a necessary aspect of a civil RICO claim or endorse the idea that causation is a “flexible concept,” applying the Second Circuit’s broaden standard nationwide.

## **Background**

The Second Circuit case at the heart of the issue, *Alix v. McKinsey Co.*, involves two well-known consulting firms, AlixPartners [2] and McKinsey, that provide bankruptcy advising services during federal bankruptcy proceedings. Historically, both firms have sought court approval to assist parties involved in bankruptcy cases, which generates substantial fees for the firms. Court approval requires that the consulting party demonstrate that it “do[es] not hold or represent an interest adverse to the estate” and is a “disinterested person[.]” within the meaning of the Bankruptcy Code.[3] The party seeking approval must also disclose any “connections with the debtor, creditor, any other party in interest, their respective attorneys and accountants, the United States trustee, or any person employed in the office of the United States trustee.”[4]

## **District Court Dismisses Alix's Lawsuit**

In 2018, Jay Alix filed a lawsuit against McKinsey, alleging that the latter engaged in a “pay-to-play” scheme that included inaccurate and deceptive disclosure filings in bankruptcy proceedings. The complaint alleged civil RICO and various state law claims. The alleged scheme included meetings McKinsey hosted “between its clients and bankruptcy attorneys in exchange for exclusive referrals of bankruptcy assignments from those attorneys.”[5] Allegedly, McKinsey did not disclose these meetings or any of the other business connections the company had to the parties or attorneys involved in the proceedings to the bankruptcy court.[6]

According to the complaint, these connections, if disclosed, would have caused courts to disqualify McKinsey and, in at least some situations, select AlixPartners instead. AlixPartners, therefore, allegedly missed out on substantial business opportunities that it would have otherwise realized but for McKinsey's illegal scheme. According to Alix, AlixPartners' “injury was a foreseeable and direct consequence of McKinsey's failure to follow the law and a fraud on the Bankruptcy Court.”[7]

The district court determined that the allegations in the complaint failed to meet the court's pleading and proximate cause standards associated with civil RICO claims and dismissed the case. According to the district court, Alix “failed to show a sufficiently direct link between the allegedly unlawful conduct and injury,” in part because “the conduct that directly caused the alleged harm to AlixPartners was distinct from the conduct giving rise to McKinsey's alleged fraud.” [8] AlixPartners's injury was “too remote, contingent, and indirect” to sufficiently allege a claim.[9] Alix appealed the dismissal.[10]

## **Appellate Court Reverses**

In January, the Second Circuit vacated the district court's dismissal and remanded the case to the lower court, finding Alix alleged a sufficient connection between McKinsey's conduct and AlixPartners's harm. The Second Circuit also held that the lower court gave “insufficient consideration” to the impact McKinsey's alleged conduct had on the integrity of the federal judiciary, which also harmed AlixPartners and other parties involved in the case.

The court's opinion identified the negative impact the alleged fraud had on the judiciary's credibility as a “special consideration[.]” that was independent of the typical causation analysis that controls civil RICO cases.[11] The court noted McKinsey's alleged fraud directly impacted bankruptcy proceedings because inaccurate disclosures and fraudulent conduct could “corrupt” the judicial process, thereby directly harming other parties involved in the proceedings.[12] Therefore, regardless of any direct impact McKinsey's actions had on AlixPartners, the court held that the indirect harm to AlixPartners as a result of McKinsey's actions and the tainted judicial proceedings was actionable. McKinsey filed a petition for certiorari to the Supreme Court on June 28, 2022, and Alix's response is due on August 29.

## **Causation Is a “Flexible Concept”**

The Second Circuit's new causation standard alters traditional notions of causation and eases the burden on plaintiffs by eliminating the need, at least in some cases, to show direct harm from the defendant's conduct. If the Supreme Court agrees and adopts this standard nationwide, the change will have a significant impact on liability in all types of cases involving fraud.

The Second Circuit specifically distinguished Alix's case from *Anza v. Ideal Steel Supply Corp.*, [13] decided by the Supreme Court in 2006. In *Anza*, the Supreme Court rejected a plaintiff's civil RICO claims of fraud specifically because the plaintiff suffered, at most, indirect harm from defendant's alleged fraud against the state. The Court, in *Anza*, acknowledged that there was "no need to broaden the universe of actionable harms to permit [civil] RICO suits by parties who have been injured only indirectly." [14]

But the Second Circuit's decision in *Alix v. McKinsey Co.* is in tension with the Supreme Court's fundamental holding in *Anza* that a plaintiff must demonstrate that a defendant's conduct directly caused the plaintiff's specific injury in two ways. First, the Second Circuit's reversal resurrects a case in which the plaintiff's damages claim is based primarily on indirect harm from the defendant's actions, rather than any "but for" evidence of a defendant's conduct directly causing a plaintiff's injury. Second, the Second Circuit's inclusion of the federal judiciary's interest in fair proceedings and accurate filings as an additional independent harm illustrates the notion that causation is increasingly a "flexible concept" for federal courts. [15]

While the Second Circuit's holding in *Alix v. McKinsey Co.* reinforces the discretion a court has when determining the sufficiency of pleadings for each individual case, it also could reduce the importance of clear "but for" and proximate causation, which would fundamentally change the pleading standard for civil RICO claims. The Supreme Court should weigh in sooner rather than later to provide additional guidance to courts regarding the causation threshold judges should use in these important cases.

## Footnotes

[1] *Holmes v. Secs. Investor Prot. Corp.*, 503 U.S. 258, 271 (1992). See also *Hemi Group, LLC v. City of New York*, 559

U.S. 1 (2010).

[2] JayAlix, the founder and a minority owner of AlixPartners, brought the suit on behalf of the company as assignee.

[3] 11 U.S.C. § 327(a); see also *id.* § 101(14).

[4] Fed. R. Bankr. P. 2014(a).

[5] *Alix v. McKinsey & Co.*, 23 F.4th 196, 201 (2d Cir. 2022)

[6] *Id.*

[7] *Id.*

[8] *Id.* at 208.

[9] *Alix v. McKinsey & Co.*, 404 F. Supp. 3d 827, 835, 838 (S.D.N.Y. 2019), vacated and remanded, 23 F.4th 196 (2d Cir.

2022).

[10] *Alix v. McKinsey & Co.*, 20-2548, ECF 1 (2d Cir. August 4, 2020).

[11] *Id.*

[12] *Alix*, 23 F.4th at 204.

[13] *Anza v. Ideal Steel Supply Co.*, 547 U.S. 451 (2006).

[14] *Id.* at 460.

[15] *Alix*, 23 F.4th at 206.

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