



## News Release

For Immediate Release

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### **DRI Requests High Court Review of Ominous Second Circuit Ruling in Class Action**

*Ruling in US Foods, Inc. v. Catholic Healthcare West, et al. Places It in Opposition to Numerous Other Circuits*

**CHICAGO – (March 4, 2014)**—DRI – The Voice of the Defense Bar has filed an amicus brief supporting Supreme Court review in *US Foods, Inc. v. Catholic Healthcare West, et al.* The brief was submitted by DRI’s Center for Law and Public Policy. DRI was joined in the brief by the U.S. Chamber of Commerce. The case involves certification of a class action that contradicts rulings by numerous other circuits in a way that will transform garden-variety contract disputes between businesses and their customers into nationwide class action suits involving astronomical damages.

The case revolves around a pricing practice common in the food distribution industry called “landed cost.” Landed cost is higher than the actual cost because, under the contracts, USJ is entitled to receive a pass back income from vendors on all sales. Plaintiffs argue that the vendors in this case were controlled by USF to artificially inflate the costs. Given the competitiveness in the food marketplace, systematic overcharging is virtually impossible.

Plaintiffs’ lawyers claim that the practice violates the provisions of the Racketeer Influenced and Corrupt Organizations Act (RICO). The original target of RICO was the activities of organized crime. Prior to this decision, civil RICO actions were not traditionally amenable to class action treatment because of the need for each plaintiff to prove individual reliance on the alleged fraud. This case removes that barrier by permitting a class-wide *presumption* of reliance on behalf of all class members who qualify by the simple act of having paid a USF invoice, thus relieving plaintiffs of their burden of proving individual reliance. By bringing the action under RICO, plaintiffs will be allowed to obtain treble damages.

“This is breathtaking in its audacity” said John Kouris, DRI Executive Director. “It is a problem that was contrived by plaintiff lawyers. Even the named plaintiffs said there was not a problem, that they chose USF because it offered the best prices overall, or the best combination of price and service. They were so satisfied that some of them had not even read their contracts.”

On presumption of reliance, the Second Circuit goes against rulings in the Fifth, Eighth, and Ninth Circuits. On the allowable measure of damages (treble damages) for RICO fraud, the Second Circuit is in opposition to rulings in the Fifth, Sixth, Eighth, and Ninth circuits. And in permitting a 50-state breach of contract action to proceed absent the plaintiffs’ providing an extensive analysis showing that there are

no state law differences, the Second Circuit ruling conflicts with contrary holdings from the D.C., Third, Fourth, Fifth, Sixth, and Eleventh Circuits.

Collectively, the rulings allow plaintiff lawyers to create a class of 75,000 U.S. Food customers with the potential for treble damages under RICO.

“If the Second Circuit’s decision stands, courts will become not dispensers of justice, but dispensers of corporate assets to plaintiff lawyers and class members who have suffered no harm,” said Jonathan Cohn, one of the authors of the amicus brief. “Expect the number of plaintiff lawyer-generated class actions to multiply, with the effect that companies will be forced to settle cases, however meritless, rather than hazard the ruin of a monumental damage judgment.”

DRI brief authors Jonathan F. Cohn and David R. Carpenter of Sidley Austin LLP in Washington, DC and Los Angeles respectively, are available for interview or for expert comment through DRI’s Communications Office.

For the full text of the amicus brief, [click here](#).

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*For more than fifty years, DRI has been the voice of the defense bar, advocating for 22,000 defense attorneys, commercial trial attorneys, and corporate counsel and defending the integrity of the civil judiciary. A thought leader, DRI provides world-class legal education, deep expertise for policy-makers, legal resources, and networking opportunities to facilitate career and law firm growth. For more information, log on to [www.dri.org](http://www.dri.org)*