AN ILL WIND BLOWS INTO TOWN?: U.S. SUPREME COURT RULES THAT STATE COURTS HAVE CONCURRENT JURISDICTION OVER RICO CLAIMS

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I. THE UNITED STATES SUPREME COURT HAS RULED THAT STATE COURTS HAVE CONCURRENT JURISDICTION OVER CIVIL RICO CLAIMS.

In *Tafflin v. Levitt*, 493 U.S. , 107 L.Ed 2d 887, 110 S. Ct. 792 (1990), the United States Supreme Court unanimously ruled that state courts have concurrent jurisdiction over RICO claims. In opinion written by Justice O'Connor, the Court held that:

II. THE ESSENTIAL ELEMENTS OF A RICO CAUSE OF ACTION.

1. the language of the RICO statute did not divest state courts of jurisdiction; 2. a review of the legislative history revealed no evidence that Congress even considered the question of concurrent jurisdiction over RICO, much less any suggestion that Congress affirmatively intended to confer exclusive jurisdiction over such claims on the federal courts; 3. the fact that Congress modeled RICO's remedial provision (18 USCS § 1964(c) after § 4 of the Clayton Act (15 USCS § 15(a)), which has been interpreted to confer exclusive jurisdiction on the federal courts, does not mean that Congress intended, by implication, to grant exclusive federal jurisdiction over claims arising under § 1964(c); and, 4. there is no clear incompatibility between state court jurisdiction over civil RICO and federal interests.

Reduced to its three essentials, a civil RICO claim must involve: (1) a *person* who engages in (2) a *pattern of racketeering activity* (3) connected to the acquisition, establishment, conduct, or control of an *enterprise*. The Act's sanctions, however, were not intended to extend to fraudulent commercial transactions affecting interstate commerce." *Delta Truck & Tractor, Inc. v. J.I. Case Co.*, 855 F.2d 241, 242 (5th Cir. 1988)(emphasis original).

A. "Person."

A "person" within the meaning of the RICO statute "includes any individual or entity capable of holding a beneficial interest in property." 18 USCS § 1961(3). Some courts include a "continuity" limitation on the concept of "person." For example, the Fifth Circuit has concluded that a RICO person must be one that poses or has posed a continuous threat of engaging in racketeering. Delta Trucking, 855 F.2d at 242.

B. "Pattern of Racketeering Activity."

This is one of the more heavily litigated elements of a RICO claim. The Act states that "pattern of racketeering activity" requires the commission of two acts of racketeering activity within ten years of each other (excluding periods of imprisonment). 18 U.S.C.S. 1961(5). The acts establishing the pattern are generally referred to as "predicate acts."

"Racketeering activity" is broadly defined to include, among other things:

1. any act or threat involving murder, kidnapping, arson, bribery, extortion which is punishable by imprisonment for more than one year under state law; 2. mail fraud, wire fraud, financial institution fraud, extortionate credit transactions.

Generally, the predicate acts need not be the crux of the cause of action. Rather, the predicate acts merely need to be committed in furtherance of the illegal scheme.

The federal courts are turning increasing attention to the continuity of the pattern of racketeering activity. In *H.J., Inc. v. Northwestern Bell Telephone Co.*, 492 U.S. , 106 L. Ed 2d 195, 109 S. Ct. (1989), the Supreme Court attempted to clarify the continuity requirement of the pattern of racketeering activity. There had been a significant dispute among the various circuit courts as to the nature of this requirement. The Eight Circuit had held that there had to be at least two different illegal schemes. *Superior Oil Co. v. Fulmer*, 785 F.2d 252 (8th Cir. 1986). In sharp contrast, the Sixth Circuit had indicated that a pattern was established merely by showing the commission of two predicate acts. *United States v. Jennings*, 842 F.2d 159 (6th Cir. 1988). The Supreme Court concluded that a pattern of racketeering activity had two sub-elements 1) relationship and 2) continuity. A relationship among the predicate acts is established if the acts "have the same or similar purposes, results, participants, or otherwise are interrelated by distinguishing

characteristics and are not isolated events. *H.J. Inc.*, 106 L. Ed 2d at 208. With respect to continuity, the Supreme Court stated:

'Continuity' is both a closed and open-ended concept, referring to either a closed period of repeated conduct, or to past conduct that by its nature projects into the future with a threat of repetition. It is in either case centrally a temporal concept--and particularly so in the RICO context, where what must be continuous , RICO's predicate acts or offenses, and the relationship of these predicates must bear one to another, are distinct requirements. A party alleging a RICO violation may demonstrate continuity over a closed period by proving a series of related predicates extending over a substantial period of time. Predicate acts extending over a few weeks or months and threatening no future criminal conduct do not satisfy this requirement. . . . Often a RICO action will be brought before continuity can be established in this way. In such cases, liability depends on whether the threat of continuity is demonstrated. . . . Whether the predicates proved establish a threat of continued racketeering activity depends on the specific facts of each case. . . . A RICO pattern may surely be established if the related predicates themselves involve a distinct threat of long-term racketeering activity, either implicit or explicit. . . . The continuity requirement is likewise satisfied where it is shown that the predicates are a regular way of conducting defendant's ongoing legitimate business (in the sense that it is not a business that exists for criminal purposes), or of conducting or participating in an ongoing and legitimate RICO 'enterprise."

***H.J. Inc.*, 106 L. Ed 2d at 209-10 (emphasis original, citations and footnotes removed).**

The federal circuit courts have already begun to grumble about the vagaries of the Supreme Court's definitions. It appears that the Supreme Court anticipated this.

The limits of the relationship and continuity concepts that combine to define a RICO pattern, and the precise methods by which relatedness and continuity or its threat may be proved cannot be fixed in advance with such clarity that it will always be apparent whether in a particular case a 'pattern of

racketeering activity' exists. The development of these concepts must await future cases, absent a decision by Congress to revisit RICO to provide clearer guidance as to the Act's intended scope.

***H.J., Inc.*, 106 L. Ed 2d at 210.**

C. "Enterprise."

The Act defines an enterprise as "any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity." 18 U.S.C.S. § 1961(4). Generally, the RICO person and the RICO enterprise must be separate entities. *Haroco v. American National Bank & Trust Co.*, 747 F.2d 384, 400 (7th Cir. 1984), *aff'd* 473 U.S. 606, 105 S. Ct. 3291, 87 L. Ed 2d 437 (1985).

III. CIVIL RICO REMEDIES.

Section 1964(a) of the Act gives the district courts of the United States fairly broad injunctive powers, including mandatory injunctive powers. Due to the precise wording of the statute, there is a question as to whether state court will enjoy the broad grant of mandatory injunctive power.

Both Civil RICO and the DTPA allow for the recovery of treble damages. However, there is a key difference. Under Civil RICO, the successful plaintiff "shall recover threefold his damages. . . " There is no discretion as to trebling under RICO. Thus, to that extent, RICO is a superior remedy to the DTPA. Civil RICO also allows for the recovery of costs and attorney's fees.

IV. POSSIBLE STATE COURT SOLUTIONS.

In dealing with what may well be a flood of RICO cases filed in state court, it is imperative that the State Bar of Texas formulate definitive rules for the handling and disposition of these types of cases. Unfortunately, Texas state courts do not enjoy many of the procedural remedies afforded to the federal courts. Although Texas has what purports to be a sanctions rule (Rule l3 of the Texas Rules of Civil Procedure), it is an ineffective tool for dealing with improvidently filed RICO cases. As is well known, the state courts in Texas do not have a corresponding Rule 11, nor do they have a rule similar to Rule 12(b) of the Federal Rules of Civil Procedure Without these rules, it would appear that the state courts do not have the capability of sanctioning the parties and/or attorneys for filing an improper RICO case. The courts also do not have a capability of dismissing the case as being improvidently filed at the commencement of the litigation. Absent these procedural rules, Texas litigants face the distinct chance that the courts could become inundated with RICO litigation without effective means of disposing these cases that were improvidently filed.

It is possible that Texas state courts have the inherent power to issue orders regarding RICO claims pursuant to Rule 166 of the Texas Rules of Civil Procedure. Rule 166 deals with pretrial procedures to the extent the court may, at its discretion, direct the attorneys to appear before it for a conference to consider the simplification of the issues. A proposal has been submitted to the Supreme Court Advisory Committee requesting modifications of Rules 166 and 13 to provide the state courts in Texas a mechanism for dealing with RICO cases. Part of the proposal to the Supreme Court Advisory Committee has been the adoption of what is referred to as a "RICO case statement." A copy of a RICO case statement issued by the Honorable Robert Porter, District Judge of the Northern District of Texas, is attached to this paper. A RICO case statement would tend to simplify the issues and permit those parties with real RICO cases to go forward while allowing the courts to dispose of improvidently filed RICO cases in an expeditious manner. Unfortunately, the United States Supreme Court's opinion in *Tafflin* was issued after the close of the meeting of the Supreme Court Advisory Committee for the 1990 amendments to the Rules. Unless the Supreme Court Advisory Committee reopens its discussions of the 1990 amendments, any definitive position by

either the Supreme Court Advisory Committee or the Supreme Court will be delayed until 1991. Under these circumstances, it is strongly recommended that any litigant confronted with a RICO case seek to have the trial court, pursuant to Rule 166, issue a RICO case statement in a form similar to that attached to this paper.

In addition, it is also recommended that the litigant confronted with the RICO case request that the court impose a strict discovery schedule as related to the Racketeering claim streamlining the extent of discovery and the time within which such discovery is to be permitted.

CONCLUSION

While RICO provides a legitimate civil remedy for the illegal acts of persons or entities violating 18 U.S.C. § 1961, *et seq*., it also poses distinct procedural and administrative problems for Texas state courts. It is incumbent upon all trial lawyers in Texas to file only legitimate RICO claims and if confronted with a RICO complaint, to seek to obtain the assistance of the court in streamlining and eliminating improperly filed RICO cases. Absent definitive rules from the Texas Supreme Court, self-regulation and restraint may be our only remedy.