

Broad-Based Statute

Use of RICO in Entertainment Suits

THE RACKETEER Influenced and Corrupt Organizations Act, 18 U.S.C. 1961-68, was signed into law Oct. 15, 1970, as Title IX of the Organized Crime Control Act. Congress originally intended RICO to be applicable only to situations where known members of organized crime had infiltrated legitimate businesses. In practice the civil provisions of the statute have been used to redress wrongs in a wide variety of cases, including those throughout the entertainment industry.

According to Robert Gage, a veteran of both criminal and civil RICO litigation from New York's Gage & Finneran, "In entertainment litigation, there is often no way to recreate opportunities realized and lost. You need the extra impact of RICO to make up for that."

For example, fraud allegations routinely made in contract cases can be upgraded to civil RICO claims by asserting that at least two times federal mail or wire fraud statutes were broken in the formation of the contract or in the breach of the contract. An artistic entity whose economic life often is short may have an increased incentive to pursue remedies under RICO where no other adequate remedy at law exists.

A RICO cause of action provides the civil litigant with access to federal courts as well as mandatory awards of treble damages, costs (including the cost of any investigations) and reasonable attorney fees. A RICO plaintiff must prove by a preponderance of the evidence that the defendant has employed a "pattern of racketeering" to invest, hold an interest in or control an enterprise, and that this activity has caused an injury to the plaintiff's business or property. This may encompass the commercial activities of a legitimate business. The pattern

of racketeering is defined broadly, and includes many state and federal crimes, of which mail and wire fraud mentioned earlier are the most commonly used and easiest to prove.

Current law maintains however, that there is something more to a RICO pattern than merely two predicate acts. A key ruling, *H.J. Inc. v. Northwestern Bell Telephone Co.*, 109 S. Ct. 2893 (1989), states, "a plaintiff or prosecutor must show that the predicates are related, and that they amount to or pose a threat of continued criminal activity."

Fraud With Particularity

Many RICO cases have been dismissed under Rule 9(b) of the Federal Rules of Civil Procedure for failure to plead fraud with particularity.

For example, in *Creed Taylor Inc. v. CBS Inc.*, 718 F.Supp. 1171 (S.D.N.Y. 1989), the district court wrote, "particularized allegations of fact or circumstance must be made...In general, the allegations may not be based on information and belief."

In that case, CTI claimed CBS misrepresented that it would sell the CTI catalogue at auction, which would have allowed the small jazz label to get back its masters of such notable artists as George Benson. The court set forth the following requirements for RICO mail and wire fraud allegations:

- The plaintiff must set forth the contents of the communications, how each of the communications was false and misleading, who made the communications and the time and place of the communications.
- The plaintiff must connect particular misrepresentations to particular defendants, and
- If an act of wire fraud is alleged, it must be predicated on an interstate communication.

Several of the lawsuits brought against Milli Vanilli over the duo's failure to indicate they hadn't actually sung on their recordings have alleged RICO violations. In *Graiwerv. Milli Vanilli*, 90-6266 filed in the Central District of California, the complaint alleges that the defendants:

"On more than two occasions during the past 10 years used or caused to be used the mails in furtherance of the scheme, and transmitted or caused to be transmitted by means of wired communications in interstate commerce, information for the purpose of obtaining money from plaintiff and members of the class by means of fraudulent misrepresentations and omissions." Last month, the district judge denied the plaintiff's motion for class certification, but such language is typical of RICO-based claims.

Brochure Suit

Another RICO-based suit, *Hunter Country Club Inc. v. American Society of Composers, Authors and Publishers (ASCAP)*, 91-4027 (S.D.N.Y.), alleges that the brochures the performing rights society mailed listing the composers it represents defrauded the targeted music licensee by containing false and misleading statements of fact. ASCAP has already won a suit against Hunter for copyright infringement, but Richard H. Reimer, Deputy General Counsel for ASCAP, notes this claim was filed as a separate suit because RICO cannot be brought as a counterclaim to an infringement action.

Another pending RICO suit charges a film distributor falsely represented it could directly distribute the movie "Beyond Dreams Door" without the extensive use of sub-distributors. *Beyond Dreams Door Co. v. Panorama Entertainment*

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Corp., 91-2311 (S.D.N.Y.). The plaintiff further alleges the defendant fraudulently concealed the use of sub-distributors who charged their commissions against the film.

Civil RICO might also be used based on a breach of a fiduciary duty to accurately report and remit royalties.

Use of Criminal RICO

One of the keys to successful litigation of civil RICO claims is to understand criminal RICO. If there is a criminal RICO conviction, it is presumed that there is a civil cause of action, too, so long as there is an injury to property or business. Usually, evidence of prior crimes cannot be used to assist in the conviction of a defendant, but under RICO the crime itself is defined as multiple criminal acts committed in the furtherance of the scheme.

For example, in *U.S. v. Isgro*, 751 F. Supp. 846 (1990), in the Central District of California, the government used a step-ladder approach to RICO by starting with a payola misdemeanor, turning it into mail fraud and elevating it to a RICO crime. The

case was based on the alleged use of a group of independent promoters by major record labels to buy airplay and keep other product off key stations by extortion, bribery and threats.

The trial ended, however, when the district judge withheld the testimony of a witness who may have perjured himself by testifying differently in his own case in front of the grand jury that brought the Isgro indictments.

Case Now on Appeal

The prosecutor would have had to prove the scheme to defraud the radio stations was conducted through Isgro's corporation as the enterprise. The case is now on appeal.

Isgro's defense counsel, Donald M. Re criticizes the use of RICO on the ground that "the statute is so broad that it can be used for any commercial conduct."

Fredric Dannen, author of the best-selling music business exposé "Hit Man," adds, "If the government made a successful RICO claim and got Isgro to cooperate, they could have gotten the record companies."

However, the broad use of RICO

could change. The proposed RICO Amendments Act of 1991 was approved by the House Judiciary Committee on July 30 (H.R. 1717). If Congress passes the bill, some of the controversy over the use of RICO could be resolved.

The amendments would limit the scope of RICO to "egregious criminal conduct" and increase the plaintiff's burden of proof to clear and convincing evidence in proving the RICO claim.

Two or more acts that are part of the same episode would constitute a single act and no longer be enough to sustain a cause of action. In addition, a judicial gatekeeper process would be initiated whereby the court on its own motion could dismiss a RICO claim. One of the grounds of dismissal would be that the plaintiff has an adequate remedy under a separate legal theory, such as a security statute or a contractual breach.

— Steven Jay Gabe

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