

LITIGATION

BRICKS THROUGH WINDOWS, PROTECTION TAX SCHEMES, AND EARLY DISMISSAL OF CIVIL RICO CLAIMS

by David N. Ferrucci

Toward the end of HBO's legendary television series, *The Sopranos*, a classic racketeering scheme is presented. Two members of Tony Soprano's crime family enter a Starbucks-like, big-box coffee store and speak to the manager. They inform the manager that they are from the "North Ward Merchants Protection Cooperative" and offer him "round-the-clock security." Such security is needed, the mobsters explain, because even though it's an up and coming neighborhood, it still contains "some marginal types." As the mobsters further explain: "Your weekly dues to us will give you all the supplemental safety net you'll ever need."

The problem, however, is that the manager has no discretionary funds to pay the "tax"; all expenses have to "go through corporate in Seattle." But, the mobsters object, "how do you think corporate would feel if for the sake of argument, someone threw a brick through your window?" The manager is unmoved: "They've got 10,000 stores in North America. I don't think they'd feel anything." The mobsters try again: "What if, God forbid, it wasn't just vandalism? What if an employee, even the manager say, was assaulted?"

What is being presented here is classic racketeering—the so-called "protection tax" extortion scheme, a "bread and butter" of mafia-like organized crime. The United States Supreme Court has had occasion to discuss such schemes in the context of the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1961, et seq. ("RICO"); specifically, with regard to RICO's "pattern" requirement:

Suppose a hoodlum were to sell "insurance" to a neighborhood's storekeepers to cover them against breakage of their windows, telling his victims he would be reappearing each month to collect the "premium" that would continue their "coverage." Though the number of related predicates involved may be small and they may occur close together in time, the racketeering acts themselves include a specific threat of repetition extending indefinitely into the future, and thus supply the requisite threat of continuity.

***H.J. Inc. v. Northwestern Bell Telephone Co.*, 492 U.S. 229, 242 (1989).**

In the context of defending a civil RICO claim, the protection tax analogy could be the key to early dismissal. Those who litigate what on the surface appear to be garden variety business disputes occasionally discover that the plaintiff has lodged claims for racketeering under RICO.

A client's initial reaction to such a contention is generally disbelief. After all, RICO was initially established as part of the Organized Crime Control Act of 1970. But RICO's alluring civil remedies, including treble damages and attorneys' fees for the successful plaintiff, have led many plaintiffs to take otherwise garden variety business disputes and dress them as racketeering schemes.

My first advice to litigators and their clients defending such claims is to stay with your initial instincts and to keep in mind the "gangster" origins of RICO. Chances are that the alleged wrongdoing injures only the plaintiff (or a small group of plaintiffs). If so, RICO's "pattern" requirement could provide a powerful argument for dismissal.

Let's take, for example, the allegation that the defendant has violated 18 U.S.C. 1962(c), which prohibits any person from operating or managing an enterprise through a pattern of racketeering activity. In order to state a valid RICO claim under § 1962(c), a plaintiff must allege "(1) conduct, (2) of an enterprise, (3) through a pattern, (4) of racketeering activity." *Jarvis v. Regan*, 833 F.2d 149, 151-52 (9th Cir. 1987) (citations omitted).

Rarely will an ordinary business dispute, where the alleged conduct either took place over a short period of time, or allegedly injured a single victim or set of victims, satisfy RICO's "pattern" requirement. That is because RICO is not violated by a short-term episode of "racketeering." There must be a "pattern" of racketeering activity—meaning long-term, organized conduct. Stated differently, the RICO statute is intended to address repeat, rather than one-shot, criminal activity. As the Fourth Circuit has stated:

[T]he pattern requirement is meant to prevent ordinary commercial fraud from being transformed into a federal RICO claim. To determine if a fraudulent scheme rises to the level of a RICO violation, the court must determine its scale, duration and number of victims. RICO is reserved for those schemes whose scope and persistence set them above the routine.

***Tudor Associates, Ltd., II By & Through Callaway v. AJ & AJ Servicing, Inc.*, 36 F.3d 1094 (4th Cir. 1994).**

A "pattern" of racketeering activity requires proof that the racketeering predicates are related and "that they amount to or pose a threat of continued criminal activity." *H.J. Inc.*, 492 U.S. at 239. "Continuity is both a closed- and open-ended concept, referring either to a closed period of repeated conduct, or to past conduct that by its nature projects into the future with a threat of repetition." *Id.* at 241.

Open-ended continuity is generally lacking where the plaintiff has not alleged any facts showing that "the racketeering acts themselves include a specific threat of repetition extending **indefinitely** into the future." *H.J., Inc.*, 492 U.S. at 242 (emphasis added). As one district court has explained, when assessing whether a complaint meets the continuity requirement, "the question ... must be whether the racketeering activity **inherently includes** the potential for repetition in perpetuity." *Ace Pro Sound & Recording, LLC v. Albertson*, 512 F. Supp. 2d 1259, 1267 (S.D. Fla. 2007) (emphasis in original). Drawing on the protection tax schema analogy, the *Ace Pro Sound* Court explained:

[T]he question, here, must be whether the racketeering activity inherently includes the potential for repetition in perpetuity. An example of this would be an organized crime or a gang "protection tax" forced upon neighborhood stores with the expectation that mafia members would collect the tax indefinitely at regular intervals.

512 F. Supp. 2d at 1267.

The protection tax scheme demonstrates actionable conduct that projects into the future with the threat of repetition because it leaves multiple victims in its wake as it continues indefinitely into the future and because the scheme promises to recur in the future at regular intervals. RICO cases involving multiple victims often inherently contain a continued threat of racketeering activity precisely because the conduct will continue beyond the victimization of any one target. For example, the protection tax scheme projects into the future with the threat of repetition, in part, because it is aimed at multiple victims (“a neighborhood’s storekeepers”), will continue long after the termination of any one victim, and therefore is capable of “repetition extending indefinitely into the future.” *H.J. Inc.*, 492 U.S. at 242.

This has led many courts to conclude that where a single scheme is alleged against a single victim or discrete set of victims, RICO’s pattern requirement has not been met. See e.g., *Medallion Television Enterprises v. SelectTV of California, Inc.*, 833 F.2d 1360, 1363 (9th Cir.1987) (no threat of continuity in a case involving “a single alleged fraud with a single victim”); *Sever v. Alaska Pulp Corp.*, 978 F. 2d 1529 (9th Cir. 1992) (defendants’ single purpose scheme to terminate plaintiff’s employment does not constitute a pattern for purposes of RICO”); *Buran Equip. Co. v. Hydro Elec. Constructors*, 656 F. Supp. 864, 866 (N.D. Cal. 1987) (no RICO violation where “all of the alleged offenses in this case relate to one commercial transaction and involve a single victim and single injury”); *Ricotta v. State of California*, 4 F. Supp. 2d 961, 978 (S.D.Cal.1998) (no pattern when defendants acted with the singular goal of depriving a single victim of his share of marital estate); *Homes by Michelle, Inc. v. Fed. Sav. Bank*, 733 F. Supp. 1495, 1502 (N.D. Ga. 1990) (finding no pattern where, inter alia, “plaintiffs have not alleged injury to other parties”); *Ward v. Nierlich*, 617 F. Supp. 2d 1226, 1238 (S.D. Fla. 2008) (“one scheme, causing harm to a few victims, and causing one injury does not create close-ended continuity”); *Flip Mortg. Corp. v. McElhone*, 841 F.2d 531, 538 (4th Cir. 1988) (holding that a fraudulent scheme occurring over several years but impacting only “a single victim” did not constitute a RICO violation).

The next time you are confronted by a plaintiff seeking to convert an ordinary business dispute into an elaborate racketeering scheme, think of RICO’s origins in combating organized crime, and specifically mafia protection tax schemes. It might just be your ticket to early dismissal.

FOR MORE INFORMATION CONTACT:

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