3 Ways Defendants Can Nip Civil RICO Claims In The Bud

By **Gopi Panchapakesan**


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Opportunistic plaintiffs sometimes use the federal civil Racketeer Influenced and Corrupt Organizations Act to turn a garden variety commercial fraud claim into a federal claim that exposes defendants to treble damages and an award of attorney fees.

Targets of these claims understandably seek to avoid these risks, as well as the stigma of an alleged racketeering charge.

There have been a number of recent cases in which federal courts across the country have rejected civil RICO claims at the pleading stage.

This article highlights those cases and addresses three ways in which defendants can nip civil RICO claims in the bud.

Rule 9(b)'s Particularity Requirement

RICO claims are often subject to the same attack that a defendant might mount against a common law fraud claim.

That is because RICO plaintiffs typically rely on the federal mail and wire fraud statutes to establish a pattern of racketeering activity, yet often fail to plead such fraud with the requisite specificity.

Under Federal Rule of Civil Procedure 9(b), a plaintiff must plead any claim of fraud, including mail and wire fraud:

[W]ith particularity [as to] the time, place, and manner of each act of fraud, plus the role of each defendant in each scheme.[1]

In other words, a RICO plaintiff must plead the who, what, when, where and how of the alleged fraudulent scheme.

If any aspect of the fraud is not pled with specificity, then the entire claim is subject to dismissal.

Indeed, one common mistake that RICO plaintiffs make is to impermissibly lump together numerous defendants, without identifying which defendant is alleged to have done what.

As the U.S. Court of Appeals for the Eleventh Circuit **recently observed** in Cisneros v. Petland Inc., it is improper for a RICO plaintiff to blend "the identities of the defendants" and expect a court to infer one defendant's "complicity into an allegation that specifically names" another defendant.[2]

RICO's Distinct Enterprise Requirement

RICO plaintiffs must allege an enterprise, defined under the statute to include:

[A]ny individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity.[3]

Critically, the RICO defendant must be distinct from the alleged "enterprise."[4]

A plaintiff therefore cannot allege a RICO scheme in which a single corporation is both the defendant and the enterprise, a distinction that serves to prevent the conversion of ordinary fraud claims into RICO claims.[5]

Some courts have gone even further, holding that a RICO enterprise cannot consist of a corporation and its own employees or agents to the extent those individuals are alleged to have merely conducted the ordinary affairs of the corporation.[6]

For example, the Eleventh Circuit recently affirmed, in Cisneros v. Petland, the dismissal of a RICO claim in connection with allegations that a pet store franchise had engaged in a conspiracy with its franchisee to sell unhealthy pets to consumers.[7].

The court reasoned that RICO's enterprise requirement had not been satisfied because a "generally shared interest in making money" is not the type of fraudulent scheme envisioned by the RICO statute.[8]

The U.S. Court of Appeals for the Second Circuit also recently affirmed the dismissal in Zamora v. Fit International Group of a RICO claim alleging investment fraud against JPMorgan on similar grounds, reasoning that the conduct JPMorgan was alleged to have engaged in was the "routine ... provision of financial services," including the "ordinary business activities of opening bank accounts" for the other entities that were part of the alleged enterprise.[9]

RICO's Stringent Proximate Cause Requirement

The civil RICO statute requires a plaintiff to show "that a RICO predicate offense not only was a 'but for' cause of [the plaintiff's] injury, but was the proximate cause as well."[10]

There are a number of factors that courts consider in determining whether this heightened causation standard has been met, including the ascertainability of the plaintiffs' damages attributable to the alleged wrongful conduct, the risk of multiple recoveries among different groups of plaintiffs, and the existence of more direct victims who may be in a better position to seek redress.[11]

Recently, in Doe v. Trump Corp., the U.S. District Court for the Southern District of New York dismissed a civil RICO claim against President Donald Trump and his family on these very grounds.

There, the plaintiffs, former participants in a multilevel marketing business opportunity, alleged that they had been misled regarding their likelihood of financial success.[12]

In dismissing the RICO claim, the court reasoned that there were any number of intervening factors that could have prevented the plaintiffs from succeeding, including the adequacy of plaintiffs' sales skills and the lack of a market for the products they were attempting to sell.[13]

Further, the myriad representations made to the plaintiffs by nonparties regarding the business opportunity led the court to conclude that the link between Trump's and his family's alleged conduct, on the one hand, and plaintiffs' losses, on the other, was attenuated.[14]

Conclusion

In 1985, 15 years after Congress passed the RICO statute, the U.S. Supreme Court paved the way for a flood of civil RICO lawsuits, holding in Sedima SPRL v. Imrex Co. that there is no prior-conviction requirement for a defendant to be held liable under the statute and that a plaintiff need not allege a racketeering injury, but only an injury caused by the underlying predicate acts.[15]

Dissenting from the high court's opinion, Justice Thurgood Marshall presciently observed that the Supreme Court's:

Interpretation of the civil RICO statute quite simply revolutionizes private litigation; it validates the federalization of broad areas of state common law of frauds.[16]

Courts appear to have heeded Justice Marshall's warning, recently showing an increased willingness to dismiss civil RICO claims that, at their core, are nothing more than ordinary commercial fraud claims.

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[1] Lancaster Cmty. Hosp. v. Antelope Valley Hosp. Dist., 940 F.2d 397, 405 (9th Cir. 1991).

[2] Cisneros v. Petland, Inc., 972 F.3d 1204, 1217 (11th Cir. 2020).

[3] 18 U.S.C. § 1961(4).

[4] See Sever v. Alaska Pulp Corp., 978 F.2d 1529, 1533 (9th Cir. 1992).

[5] See, e.g., Living Designs, Inc. v. E.I. Dupont de Nemours & Co., 431 F.3d 353, 361 (9th Cir. 2005); Ray v. Spirit Airlines, Inc., 836 F.3d 1340, 1357 (11th Cir. 2016). Note that the Supreme Court has held, however, that the "distinct enterprise" requirement can be met where the RICO "person," i.e., the defendant, is a corporate employee who "unlawfully conducts the affairs of the corporation of which he is the sole owner—whether he conducts those affairs within the scope, or beyond the scope, of corporate authority." Cedric Kushner Promotions, Ltd. v. King, 533 U.S. 158, 166 (2001).

[6] See, e.g., United Food & Commercial Workers Unions & Employers Midwest Health Benefits Fund v. Walgreen Co., 719 F.3d 849, 854 (7th Cir. 2013); Cruz v. FXDirectDealer, LLC, 720 F.3d 115, 121 (2d Cir. 2013); In re Toyota Motor Corp. Unintended Acceleration Mktg., Sales Practices, & Prod. Liab. Litig., 826 F. Supp. 2d 1180, 1202-03 (C.D. Cal. 2011).

[7] Cisneros, 972 F.3d at 1215.

[8] Id. at 1211-12.

[9] Daniel Zamora, CGC, Inc. v. FIT Int'l Grp. Corp., No. 19-2108, 2020 WL 6538312, at *2 (2d Cir. Nov. 6, 2020).

[10] Hemi Grp., LLC v. City of New York, N.Y., 559 U.S. 1, 9 (2010) (quoting Holmes v. Sec. Inv'r Prot. Corp., 503 U.S. 258, 268 (1992)).

[11] See Holmes, 503 U.S. at 269-70; Oregon Laborers-Employers Health & Welfare Tr. Fund v. Philip Morris Inc., 185 F.3d 957, 963 (9th Cir. 1999).

[12] Doe v. Trump Corp., 385 F. Supp. 3d 265, 271-72 (S.D.N.Y. 2019).

[13] Id. at 280.

[14] Id. at 281.

[15] Sedima, SPRL v. Imrex Co., 473 U.S. 479 (1985).

[16] Id. at 501.