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RICO: An Abridged Sketch

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Summary

Congress enacted the federal Racketeer Influenced and Corrupt Organization (RICO) provisions as part of the Organized Crime Control Act of 1970, 18 U.S.C. 1961-1968. In spite of its name and origin, RICO is not limited to "mobsters" or members of "organized crime" as those terms are popularly understood. Rather, it covers those activities which Congress felt characterized the conduct of organized crime, no matter who actually engages in them. RICO proscribes no conduct that is not otherwise prohibited. Instead it enlarges the civil and criminal consequences, under some circumstances, of a list of state and federal crimes.

RICO condemns: (1) any person, (2) who (a) invests in, or (b) acquires or maintains an interest in, or (c) conducts or participates in the affairs of, or (d) conspires to invest in, acquire, or conduct the affairs of (3) an enterprise (4) which (a) engages in, or (b) whose activities affect, interstate or foreign commerce (5) through (a) the collection of an unlawful debt, or (b) the patterned commission of various state and federal crimes ("racketeering activities" sometimes referred to as "predicate offenses"). Violations are punishable by fines, forfeiture, and imprisonment for not more than 20 years or life if one of the predicate offenses carries such a penalty.

Civil RICO permits anyone injured in their business or property by a RICO violation to recover treble damages, costs and attorneys' fees. In exceptional cases, at least at the behest of the government, the courts will enjoin further RICO violations, order divestiture, dissolution or reorganization, or restrict an offender's future professional or investment activities. RICO comes with tailored provisions for venue and service of process, expedited judicial action in civil cases brought by the United States, in camera proceedings, and for the use of civil investigative demands.

This is an abridgement of a report, which with full citations, footnotes, and various appendixes, appears as CRS Report 96-950, *RICO: A Brief Sketch*, by (name redacted)

Contents

Contacts

A Closer Look at the Elements

RICO outlaws the collection of an unlawful debt, or the patterned commission of two or more crimes from a series of designated state and federal crimes ("racketeering activities" often referred to as predicate offenses), in order to acquire, invest in, or conduct the activities of an enterprise whose activities occur in, or affect, interstate or foreign commerce.

Any Person

Any person may violate RICO. The "person" need not be a mobster or even a human being; "any individual or entity capable of holding a legal or beneficial interest in property" will do. Although the "person" and the "enterprise" must be distinct in the case of a subsection 1962(c) violation (conducting an enterprise's activities through racketeering activity), a corporate entity and its sole shareholder are sufficiently distinct to satisfy the enterprise and person elements of a subsection (c) violation. The "person" and "enterprise" need not be distinct for purposes of subsection 1962(a) (investing the racketeering activity proceeds in an enterprise) or subsection 1962(b) (acquiring or maintaining an enterprise through racketeering activity) violations. On the other hand, even though governmental entities may constitute or participate in a RICO enterprise and may bring a RICO cause of action, they are not considered capable of a RICO violation.

Misconduct

RICO addresses four forms of illicit activity reflected in the four subsections of Section 1962: (a) acquiring or operating an enterprise using racketeering proceeds; (b) controlling an enterprise using racketeering activities; (c) conducting the affairs of an enterprise using racketeering activities; and (d) conspiring to so acquire, control, or conduct.

The first, 18 U.S.C. 1962(a), was designed as something of a money laundering provision. It introduces several features of its own and has been described as the most difficult to prove. Under its provisions, it is unlawful for

(1) any person
(2) who is liable as a principal
    (a) in the collection of an unlawful debt or
    (b) in a pattern of predicate offenses
(3) to use or invest
(4) the income from such misconduct
(5) to acquire, establish or operate
(6) a commercial enterprise.

The "person," the pattern of predicate offense, and the enterprise elements are common to all of the subsections. For purposes of 1962(a), however, a legal entity that benefits from the offense may be both the "person" and the "enterprise." The person must have committed usury or a pattern of predicate offenses or aided and abetted in their commission, and have received income that would not otherwise have been received as a result.

The second proscription, 18 U.S.C. 1962(b), is much the same except that it forbids acquisition or control of an enterprise through the predicate offenses themselves rather than through the income derived from the predicate offenses. It makes it unlawful for

(1) any person
(2) to acquire or maintain an interest in or control of

(3) a commercial enterprise
(4) through
    (a) the collection of an unlawful debt or
    (b) a pattern of predicate offenses.

As in the case of subsection 1962(a), the "person" and the "enterprise" may be one and the same. There must be a nexus between the predicate offenses and the acquisition of control. Exactly what constitutes "interest" or "control" is a case by case determination. The defendant must be shown to have played some significant role in the management of the enterprise but a showing of complete control is not necessary.

Subsection 1962(c) makes it unlawful for

(1) any person,
(2) employed by or associated with,
(3) a commercial enterprise
(4) to conduct or participate in the conduct of the enterprise's affairs
(5) through
    (a) the collection of an unlawful debt or
    (b) a pattern of predicate offenses.

Although on its face subsection 1962(c) might appear to be less demanding than subsections 1962(a) and (b), the courts have not always read it broadly. Thus, in any charge of a breach of its provisions, the "person" and the "enterprise" must ordinarily be distinct. The requirement cannot be avoided by charging a corporate entity as the "person" and the officers and employees through whom it must act as an "association in fact" enterprise. A corporate entity and its sole shareholder, however, are sufficiently distinct for purposes of subsection 1962(c).

Moreover, the Supreme Court has identified an entrepreneurial stripe in the "conduct or participate in the conduct" element of 1962(c) under which only those who participate in the operation or management of the enterprise itself meet the definition. Nevertheless, conviction requires neither an economic predicate offense nor a predicate offense committed with an economic motive.

Racketeering Activity

The heart of most RICO violations is a pattern of racketeering activities, that is, the patterned commission of two or more designated state or federal crimes. The list of state and federal crimes upon which a RICO violation may be predicated includes murder, kidnaping, gambling, robbery, arson, bribery, extortion, dealing in drugs or obscene material, mail fraud, wire fraud, and federal crimes of terrorism, to name a few.

To constitute "racketeering activity," the predicate offense need only be *committed*; there is no requirement that the defendant or anyone else have been *convicted* of a predicate offense before a RICO prosecution or action may be brought. Conviction of a predicate offense, on the other hand, does not preclude a subsequent RICO prosecution, nor is either conviction or acquittal a bar to a subsequent RICO civil action.

Pattern

As noted the Supreme Court's decision in *H.J., Inc. v. Northwestern Bell Telephone Co.*, 492 U.S. 229 (1989), quoted below, the pattern of racketeering activities element of RICO requires (1) the commission of two or more predicate offenses, (2) that the predicate offenses be related and not

simply isolated events, and (3) that they are committed under such circumstances that suggest either a continuity of criminal activity or the threat of such continuity.

Predicates: The first element is explicit in Section 1961(5): "'Pattern of racketeering activity' requires at least two acts of racketeering activity." The two remaining elements, relationship and continuity, flow from the legislative history of RICO. That history "shows that Congress indeed had a fairly flexible concept of a pattern in mind. A pattern is not formed by sporadic activity.... [A] person cannot be subjected to the sanctions [of RICO] simply for committing two widely separate and isolated criminal offenses. Instead, the term 'pattern' itself requires the showing of a relationship between the predicates and of the threat of continuing activity. It is this factor of *continuity plus relationship* which combines to produce a pattern."

Related predicates: The commission of predicate offenses forms the requisite related pattern if the "criminal acts ... have the same or similar purposes, results, participants, victims, or methods of commission, or otherwise are interrelated by distinguishing characteristics and are not isolated events."

Continuity: "Continuity" is a question of time. "A party alleging a RICO violation may demonstrate continuity ... 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." But this does not mean that no RICO violation has occurred in the absence of continuity. "Often a RICO action will be brought before continuity can be established.... In such cases, liability depends on whether the *threat* of continuity is demonstrated." The Court characterized a pattern, extending over a period of time but which posed no threat of reoccurrence, as a pattern with "closed-end" continuity; and a pattern marked by a threat of reoccurrence as a pattern with "open-ended continuity."

In the case of a "closed-ended" pattern, the lower courts have been reluctant to find predicate activity extending over less than a year sufficient for the "substantial period[s] of time" required to demonstrate continuity. Whether the threat of future predicate activity is sufficient to recognize an "open-end" pattern of continuity depends upon the nature of the predicate offenses and the nature of the enterprise. "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 continuity. In other cases, the threat of continuity may be established by showing that the predicate acts or offenses are part of an ongoing entity's regular way of doing business."

Collection of an Unlawful Debt

Collection of an unlawful debt appears to be the only instance in which the commission of a single predicate offense will support a RICO prosecution or cause of action. No proof of pattern seems to be necessary. The predicate covers only usury and the collection of unlawful gambling debts. The prohibition seems to apply to both lawful and unlawful means of collection as long as the underlying debt is unlawful.

Enterprise

The statute defines "enterprise" to include "any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity." The enterprise may be devoted to entirely legitimate ends or totally corrupt objectives, and RICO reaches efforts involving both governmental and nongovernmental enterprises. Finally

as noted earlier, a corporation or other legal entity may be both the defendant and the required "enterprise" under some circumstances.

As for "associated in fact" enterprises, the Supreme Court in *Boyle* rejected the suggestion that such enterprises must be "business-like" creatures, having discernable hierarchical structures, unique modus operandi, chains of command, internal rules and regulations, regular meetings regarding enterprise activities, or even a separate enterprise name or title, *Boyle v. United States*, 129 S.Ct. 2337, 2347 (2009). The statute demands only "that an association-in-fact enterprise must have at least three structural features: a purpose, relationships among those associated with the enterprise, and longevity sufficient to permit these associates to pursue the enterprise's purpose," *Id.*, at 2346.

To satisfy RICO's jurisdictional element, the corrupt or corrupted enterprise must either engage in interstate or foreign commerce or engage in activities that affect interstate or foreign commerce. An enterprise that orders supplies and transports its employees and products in interstate commerce is "engaged in interstate commerce" for purposes of RICO. As a general rule, the impact of the enterprise on interstate or foreign commerce need only be minimal to satisfy RICO requirements. Where the predicate offenses associated with an enterprise have an effect on interstate commerce, the enterprise is likely to have an effect on interstate commerce. However, more is required where the enterprise is not engaged in economic activity.

Conspiracy

Conspiracy under subsection 1962(d) is

(1) the agreement of
(2) two or more
(3) to invest in, acquire, or conduct the affairs of
(4) a commercial enterprise
(5) in a manner which violates 18 U.S.C. 1962(a), (b), or (c).

The heart of the crime lies in the agreement rather than any completed, concerted violation of the other three RICO subsections. In fact, unlike the general conspiracy statute, RICO conspiracy is complete upon the agreement even if none of the conspirators ever commit an overt act towards the accomplishment of its criminal purpose. Moreover, contrary to the view once held by some of the lower courts, there is no requirement that a defendant commit or agree to commit two or more predicate offenses himself. It is enough that the defendant, in agreement with another, intended to further an endeavor which, if completed, would satisfy all of the elements of a RICO violation. A conspirator is liable not only for the conspiracy but for any foreseeable substantive offenses committed by any of the conspirators in furtherance of the common scheme, until the objectives of the plot are achieved, abandoned, or the conspirator withdraws. "To withdraw from a conspiracy, an individual must take some affirmative action either by reporting to authorities or communicating his intentions to his coconspirators." The individual bears the burden of showing he has done so.

Consequences

The commission of a RICO violation exposes offenders to a wide range of criminal and civil consequences: imprisonment, fines, restitution, forfeiture, treble damages, attorneys' fees, and a wide range of equitable restrictions.

Criminal Liability. RICO violations are punishable by fine *or* by imprisonment for life in cases where the predicate offense carries a life sentence, *or* by imprisonment for not more than 20 years

in all other cases. Although an offender may be sentenced to *either* a fine *or* a term of imprisonment under the strict terms of the statute, the operation of the applicable sentencing guidelines makes it highly likely that offenders will face *both* fine *and* imprisonment. The maximum amount of the fine for a RICO violation is the greater of twice the amount of the gain or loss associated with the crime, or $250,000 for an individual, $500,000 for an organization. Offenders sentenced to prison are also sentenced to a term of supervised release of not more than three years to be served following their release from incarceration. Most RICO violations also trigger mandatory federal restitution provisions, because the RICO offense involves a crime of violence, drug trafficking, or a crime with respect to which a victim suffers physical injury or pecuniary loss. Moreover, property related to a RICO violation is subject to confiscation.

Even without a completed RICO violation, committing any crime designated a RICO predicate offense opens the door to additional criminal liability. It is a 20-year felony to launder the proceeds from any predicate offense (including any RICO predicate offense) or to use them to finance further criminal activity. Moreover, the proceeds of any RICO predicate offense are subject to civil forfeiture (confiscation without the necessity of a criminal conviction) by virtue of the RICO predicate's status as a money laundering predicate.

Civil Liability. RICO violations may result in civil as well as criminal liability. "Any person injured in his business or property by reason" of a RICO violation has a cause of action for treble damages and attorneys' fees. No prior criminal conviction is required, except in the case of liability based on certain securities fraud predicates. Although the United States is apparently not a "person" that may sue for damages under RICO, the term does include local governments, state agencies, and foreign governments. On the other hand, private parties may not bring a RICO suit for damages against the United States or other governmental entities.

In order to recover, the plaintiff must establish an injury to his or her business or property directly or proximately caused by the defendant's RICO violation. The injury must involve a "concrete financial loss," a "mere injury to a valuable intangible property interest" such as a right to pursue employment will not do. The courts agreed generally that Section 1964(c) does not permit recovery for personal injuries since they are not injuries to "business or property," but sometimes disagree on what constitutes a qualified injury. If the underlying violation involves subsection 1962(a), it is the use or investment of the income rather than the predicate offenses that must have caused the injury. If the underlying violation involves subsection 1962(b), it is the access or control of the RICO enterprise rather than the predicate offenses that must have caused the injury.

While a criminal prosecution requires no overt act, the courts demand that RICO plaintiffs whose claim is based on a conspiracy under subsection 1962(d) prove an overt act since a mere agreement cannot be the direct or proximate cause of an injury. Moreover, the overt act itself must constitute a predicate offense.

Notwithstanding the apparent inability of the United States to sue for damages under RICO, the Attorney General may seek to prevent and restrain RICO violations under the broad equitable powers vested in the courts to order disgorgement, divestiture, restitution, or the creation of receiverships or trusteeships. This authority has been invoked relatively infrequently, primarily to rid various unions of organized crime and other forms of corruption. There is some question whether private plaintiffs, in addition to the Attorney General, may seek injunctive and other forms of equitable relief.

On the procedural side, the Supreme Court has held that (1) state trial courts of general jurisdiction have concurrent jurisdiction over federal civil RICO claims; (2) under the appropriate circumstances parties may agree to make potential civil RICO claims subject to arbitration; (3) the Clayton Act's four-year period of limitation applies to civil RICO claims as well, and the

period begins when the victim discovers or should have discovered the injury; and (4) in the absence of an impediment to state regulation, the McCarran-Ferguson Act does not bar civil RICO claims based on insurance fraud allegations.

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