

## Pleading RICO effectively

*In light of recent decisions, attorneys should carefully craft civil complaints to avoid early challenges*



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### Litigation

**A** Racketeer Influenced and Corrupt Organizations Act claim remains one of the most powerful weapons in a civil attorney's arsenal. But recent appellate court decisions seem at odds with one another. Are the courts expanding or limiting RICO? The short answer is both.

The Supreme Court's history of rulings on civil RICO seems almost schizophrenic. At times, the court goes to great lengths to strike down lower court restrictions on RICO. Intermixed with these decisions are a number of cases that constrict RICO. The difference could be described as procedural versus substantive restrictions.

Recent appellate court decisions have erected further barriers to plaintiffs' survival at the pleading stage. But once past the pleading stage, civil RICO, with its treble damages, can be among the most powerful threats a civil plaintiff can wield. This article discusses these recent decisions affecting civil RICO, and suggests an approach to pleading civil RICO that gives plaintiffs the best chance of surviving challenges to the pleadings.

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### ORIGINS OF CIVIL RICO

Congress passed the Racketeer Influenced Corrupt Organizations Act in 1970 to provide federal prosecutors with more effective tools to combat organized crime. But not wanting to limit RICO to criminal actions, Congress built in certain civil remedies, including injunctions, attorneys fees and perhaps the ultimate weapon of civil RICO: treble damages.

While RICO was "intended to provide new weapons ... for an assault upon organized crime and its economic roots," it was not so limited. Given many chances to contain civil RICO within its original boundaries, the Supreme Court expressly declined to do so, instead stating that the statute was intended to attack both "illegitimate" and "legitimate" organizations. It became clear, upon reviewing the congressional record, that Congress intended RICO to be construed liberally.

It wasn't until the 1980s that civil lawyers began using RICO consistently. Once it was discovered that just about any business or associated group of individuals could be considered a RICO enterprise, civil courts began seeing a flood of new RICO cases with plaintiffs trying to maximize leverage through the threat of attorneys fees and treble damages.

The flood wasn't limited to federal courts. State courts have original jurisdiction over any civil RICO claim pursuant to 18 U.S.C. §1964. In fact, the California Judicial Council Civil Case Cover Sheet, required to be filed in all superior court actions, currently lists "RICO" as a regular case category. Therefore, plaintiffs did not need federal jurisdiction to turn a breach of contract or a tort case into a more intimidating RICO action.

The expansion of civil RICO lasted more than a decade. Later, in the 1990s, federal courts finally began to limit RICO

actions, but primarily did so procedurally by imposing additional pleading requirements. Substantively, civil RICO remained as broad as ever, while courts endeavored to install a filter at the pleadings stage. Many courts began issuing standing orders requiring RICO plaintiffs to file RICO case statements in addition to their complaints. As of 2009, the majority of civil RICO claims in federal court were dismissed under Rule 12(b)(6) or Rule 56.

The elements of civil RICO are as follows: (1) conduct, (2) of an enterprise, (3) through a pattern (4) of racketeering activity, (5) resulting in injury. While these elements seem simple enough, each has developed its own body of case law, with subelements, exceptions and exceptions to the exceptions. As such, civil RICO claims are now seen by the defense bar as automatic invitations to file a motion to dismiss.

Before moving on to a discussion of how to best plead civil RICO to survive a Rule 12(b)(6) motion to dismiss, let's review some recent cases that have changed the analysis.

### CASES THAT CHANGED CIVIL RICO

*Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), was not a RICO case, but rather an antitrust case brought under the Sherman Antitrust Act. It established a new "plausibility standard" in pleading, whereby a complaint's "factual allegations must be sufficient to raise a right to relief above the speculative level on the assumption that all the allegations in the complaint are true (even if doubtful in fact)." The court further described this new plausibility standard as requiring the plaintiff to allege "enough facts to raise a reasonable expectation that discovery will reveal evidence." Thus, the notori-

ously loose concept of “notice pleading” tightened slightly. In the wake of *Twombly*, courts and litigants speculated whether the ruling applied to all federal cases, or only those filed under the Sherman Act.

That question was settled in *Ashcroft v. Iqbal*, 129 S. Ct. 1373 (2009). In that case, the Supreme Court declared that the *Twombly* rule applied to all federal civil cases. It was not limited to antitrust cases. The *Iqbal* court also distinguished the plausibility standard from the heightened pleading requirements of Rule 9(b) for fraud. In other words, a fraud complaint had to meet both standards.

The recent Eleventh Circuit U.S. Court of Appeals decision in *American Dental Association v. CIGNA Corp.*, 605 F.3d 1283 (2010), was among the first to apply the *Twombly* and *Iqbal* standards to a RICO case. Because most civil RICO cases involve a predicate act of mail or wire fraud, the *American Dental* case provided a glimpse at how difficult pleading civil RICO will be post-*Iqbal*. While the ADA seemingly had strong facts, it couldn't survive the double gauntlet of Rule 9(b) plus plausibility.

### **RICO VIOLATORS AND THEIR ROLES**

Keep in mind that you do not need to name each RICO violator as a defendant. The RICO enterprise could consist of anywhere from a few to hundreds of members, but you may only wish to sue one or two of them. If so, give adequate attention to describing the alleged misconduct of the nondefendant violators as well so that the RICO “enterprise” is fully pleaded.

### **PATTERN OF RACKETEERING ACTIVITIES**

A pattern of racketeering activity is established by specifying the “predicate acts” or violations of a qualifying underlying statute. This frequently involves the federal mail fraud and/or wire fraud statute. If you choose mail fraud or wire fraud as your predicate act, keep in mind that these allegations must meet the heightened specificity required by Rule 9. Include the usual “who, what, when and where” of the fraud. Whenever possible, quote the exact language of the fraudulent misrepresentation, or attach it to the

complaint. Simply paraphrasing or summarizing the misrepresentations invites a challenge.

### **ALLEGE CONTINUITY BROADLY**

One of the key factors to establishing a pattern of racketeering activity is alleging that the predicate acts were sufficiently “continuous” within the meaning of *H.J., Inc. v. Northwestern Bell Telephone Co.*, 492 U.S. 229 (1989). There are two types of continuity, open-ended and closed-ended. Open-ended continuity applies when the predicate acts have every indication of continuing into the future. Closed-ended continuity applies when the predicate acts appear to have stopped, but at one time continued for a sufficient amount of time. There is no bright-line rule for the length of time required for closed-end continuity (which is judged on a case-by-case basis), but periods of time as short as three months have sufficed. Six months is a more realistic guideline, but anything less than a year could be fatal based on lack of sufficient duration.

If possible, try to allege both, in the alternative. For instance, if your predicate act involves a series of three fraudulent e-mails sent over a period of one year, the last of which was sent six months ago, try to allege facts indicating that further e-mails may be forthcoming, if at all possible.

### **ARE THE PREDICATE ACTS ‘RELATED’?**

The “pattern” aspect of a pattern of racketeering activity has been held to require that each of the individual predicate acts be, in some way, “related” to the others. This requirement comes from the definition of a pattern itself. Therefore, in the example above, describe how each e-mail is related to the common thread. List as many commonalities as possible. Were they all sent to and from the same IP addresses, from the same computers? Did they further the same end? If possible, quote a specific phrase that was repeated in each of these e-mails.

### **DISTINGUISH CORPORATE DEFENDANTS FROM THE ENTERPRISE**

If the enterprise you allege is a cor-

poration, keep in mind that a RICO enterprise cannot be one and the same as the RICO defendant. This distinction comes from the rule that a person cannot conspire with himself. If the corporate defendant acted only through its officers and employees, then it cannot be deemed separate and apart from the enterprise. If possible, try to identify at least one member of the enterprise who was outside the corporation. Remember, you do not need to name this additional person or entity as a defendant.

### **INTERSTATE COMMERCE REQUIREMENT**

All RICO complaints must allege that the offending activities affected the exchange of interstate or foreign commerce. Typically, if your predicate act is based on mail fraud or wire fraud, the effect on interstate commerce is essentially built into the predicate act. Nevertheless, be sure to state that the mail or wire transmissions, including e-mails, affected interstate commerce, even if the communications were between adjoining offices.

Finally, keep in mind that many district court judges require a RICO case statement to be filed with the complaint. Use the court's “Order Re RICO Statement” not only to structure your RICO case statement, but to structure the complaint itself. On the other hand, most state court judges do not require RICO case statements. Nevertheless, if you file a RICO action in state court (and if the defendant does not remove it to federal court), you would do well to find a RICO case statement from a local federal judge and use it as a checklist to ensure that your complaint meets all of the RICO criteria. Most importantly, do not rely solely on a treatise or RICO Case Statement. RICO law is constantly evolving in every circuit, and new published opinions are emerging almost every month. Look for the most recent updates before filing your complaint.

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