

**NINTH ANNUAL
SOUTHERN SURETY AND FIDELITY CLAIMS
CONFERENCE
APRIL 23 - 24, 1998**

RICO AS A WEAPON IN THE FIDELITY SALVAGE BATTLE

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I. WHY USE RICO AS A RECOVERY TOOL?

A. Advantages

1. Nationwide service of process allows defendants in many different locations to be brought before one court.
2. Federal court jurisdiction, if local bias against insurance companies is an issue.
3. Treble damages, powerful settlement incentive.
4. Non-dischargeable judgments, takes away the defendants' key bargaining chip.
5. Broad-ranging unified liability based on numerous different crimes may actually simplify cases based on complicated criminal conspiracies.
6. Conspiracy, ease of proof

B. Disadvantages

1. Venue limitations restrict filing to where plaintiff resides or where cause of action arose. May mean litigating in distant forum.
2. Massively complex litigation. Usually will involve extensive motion practice and huge amounts of discovery.
3. Vigorously defended because of the stakes.
4. Expensive attorney and expert witness fees.
5. Court skepticism. Many courts look askance at RICO suits. These courts often require detailed pre-suit disclosures.
6. All of the above means that the suits are very time-consuming, perhaps over five years to verdict.

II. WHEN TO CONSIDER USING RICO.

- A. When there is a substantial loss to justify the expense of the litigation.
- B. When there are solvent defendants who can pay a judgment and for whom the

threat of a non-dischargeable RICO judgment is a powerful inducement to settle.

- C. When the scheme causing the loss is a wide-ranging criminal conspiracy involving several defendants and many distinct criminal acts. RICO is ideally suited for fraud schemes which cross state boundaries.
- D. Single-person thefts are rarely suited for RICO, as state law claims may be equally effective and more efficient to litigate.

III. IDENTIFYING THE RICO DEFENDANTS

A. RICO Violators

- 1. The actual perpetrators of the loss, the people who "manage or operate" the scheme. This includes high-level management and lower-rung participants who carry out their orders.
- 2. Each of these people must commit two predicate crimes.
- 3. *Reeves v. Ernst and Young*, 113 S.Ct. 1163 (1993) eliminated most direct RICO liability theories against most professionals as being outside the "management group."

B. RICO Conspirators, Two Classes

- 1. Criminal Conspirators: Those people who assist the overall commission of the scheme even though not committing two or more crimes themselves. This may link together people who only commit one crime, so long as they act together as criminal partners (i.e. one person sends a letter while another makes a telephone call, all towards the same fraud).
- 2. "Aiding and Abetting" Conspirators: People who commit no crime at all but who knowingly assist the perpetrators by providing information, support, facilities, supplies, or other assistance. Must prove criminal intent to assist. This conspiracy theory may be a crack in the *Reeves* wall against professional liability, since conspirators need not be part of the "operation or management" of the enterprise.

IV. IDENTIFYING THE RICO ENTERPRISE

- A. The RICO violation must involve participation in an "enterprise" which operates in interstate commerce. The scheme itself, however, need not operate across state lines.
- B. The "enterprise" affected can be a legitimate business different from the criminal activity itself. Often, the insured itself will be the "enterprise." The fraud will involve employees who "participate" in the insured's affairs through fraudulent actions.

- C. Organized criminal activity itself may also constitute an "enterprise." For example, a criminal syndicate may target the insured. While the criminals do not participate in the operation of the insured, their independent association as a criminal organization is also an "enterprise."
- D. The enterprise is defined by "association in fact" between participants. No formal organization or structure is necessary. The association can be between individuals, between companies, or a combination. However, for RICO purposes, a company cannot "associate" with its own employees. The company itself, however, can be an "enterprise" distinct from its management or employees.

V. IDENTIFYING THE PATTERN

- A. This is the easiest part of RICO. RICO specifies numerous federal and state crimes which may form the basis for a RICO violation.
- B. There must be more than one crime within a ten year period.
- C. The crimes must demonstrate "relatedness" and "continuity." These elements are satisfied if the crimes have similar purposes, methods, participants, victims, or results.

VI. IDENTIFYING THE DAMAGES

- A. Under RICO, an insurer who pays its insured's loss and is subrogated is a proper plaintiff to bring a RICO claim, including treble damages.
- B. Requires close coordination with insured to establish the insured's theory of damages at trial.

VII. JURISDICTION AND VENUE ISSUES

- A. Personal Jurisdiction and Due Process. Courts have conflicting tests for when the exercise of jurisdiction under nationwide service of process satisfies due process. Others hold that a limited due process inquiry is necessary.
- B. Eleventh Circuit test: Modified due process under *Republic of Panama v. BCCI Holdings*, 119 F.3d 936 (11th Cir. 1997). Under this test, the defendant must demonstrate that litigation in the forum will effectively deprive him of constitutional rights. Even under these circumstances, the court must weigh this burden against the federal interest at stake in bringing all RICO conspirators to trial in a single forum. As a practical matter, this is a very difficult test for any defendant to pass.
- C. Fifth Circuit test: Contacts with the United States are sufficient to satisfy due process. *Busch v. Buchman, Buchman & O'Brien Law Firm*, 11 F.3d 1255 (5th Cir. 1994)

- D. Venue: Federal venue statute allows for change under standards drawn from the older *forum non conveniens* cases.

VIII. TRIAL ISSUES

- A. Using guilty pleas to narrow the issues. If some of the defendants have pled guilty to underlying predicate crimes such as mail, wire or bank fraud, these pleas greatly simplify the proof in the RICO case.
- B. The pleas create collateral estoppel on all factual elements comprising the underlying offense. This can establish the RICO predicate crimes and the pattern.
- C. The defendants' admissions at the plea colloquy are admissible in the civil action, as are the defendants' admissions at sentencing.
- D. Finally, the defendants' guilty plea also constitute an admission to all facts charged in the indictment or information. This may be very useful in establishing enterprise, participation, and continuity.
- E. If the pleas are sufficient, summary judgment may be entered.
- F. Making the case simple for the jury. Notwithstanding RICO's legal complexity, instructions which wallow in these complexities are doomed to make the trial lawyer's task much more difficult. The instructions should be simple and general, with a minimum of legalese.

APPENDIX TO OUTLINE

1. **Various Memoranda pertaining to jurisdiction and venue.**
2. **Motion for Summary Judgement based upon guilty pleas.**
3. **Jury Instruction.**