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Successfully Challenging Federal and State RICO Claims

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Plaintiffs seeking to gain leverage in ordinary commercial disputes frequently assert claims under the federal Racketeering Influenced and Corrupt Organizations Act, 18 U.S.C. § 1961, et seq. ("RICO") and its New Jersey counterpart, N.J.S.A. § 2C:41-1, et seq. ("New Jersey RICO"), because both statutes impose treble damages and attorneys' fees. Such an attempt to "up the litigation ante" often creates pleading defects that can be challenged successfully on a threshold motion to dismiss. By alleging that defendants' purpose was to defraud or commit a business tort against them, plaintiffs typically negate the existence of a RICO enterprise and fail to establish the continuity required for a RICO pattern.

Complaint Negates the Existence of a RICO Enterprise

The first common defect is conflating the enterprise with the pattern of racketeering activity. Both New Jersey and federal RICO require that the enterprise exist separate and apart from the pattern in which it allegedly engaged. *State v. Ball*, 141 N.J. 142, 161-62 (1995) ("[U]nder the RICO Act, 'enterprise' is an element separate from the 'pattern of racketeering activity,' and the State must prove the existence of both in order to establish a RICO violation . . . ."); *United States v. Riccobene*, 709 F.2d 214, 221-24 (3d Cir. 1983). As one court put it, the key inquiry is whether the enterprise would still exist were the predicate acts removed from the equation. *Goldfine v. Sichenzia*, 118 F. Supp. 2d 392, 400-401 (S.D.N.Y. 2000). In other words, if the plaintiff pleads that the alleged enterprise was formed for the purpose of perpetrating the alleged pattern of wrongful acts, then the enterprise and the pattern are really one and the same, and the "separate and apart" requirement cannot be satisfied as a matter of law.

This flaw is common because plaintiffs typically go out of their way to allege that they were the intended victims of defendants' RICO scheme. In so doing, plaintiffs essentially admit that the enterprise would not even have come into existence but for the intent to commit the wrongful acts against them, i.e., take away the pattern, and the enterprise has no reason to exist.

The decision in *300 Broadway v. Martin Friedman Assocs. P.C.*, No. 08-5514, 2009 WL 3297558 (D.N.J. Oct. 13, 2009), is instructive. Plaintiffs alleged that defendants formed a federal RICO enterprise with the "well-defined" and "common" goal to divest plaintiffs of their ownership interest in a nursing home. Judge Katharine Hayden dismissed the complaint, finding that the enterprise had "no other identity or characteristic" apart from the alleged conspiracy to divest plaintiffs' of their ownership interests and, therefore, that the enterprise was "indistinguishable from what it was formed to do." Judge Debevoise reached a similar result in *Parrino v. Swift,* No. 06-0537, 2006 WL 1722585 (D.N.J. June 19, 2006) (dismissing federal RICO count where plaintiff alleged that the enterprise was formed to defraud him of his property and therefore negated the existence of a RICO enterprise).

The authors have found no reported decisions dismissing New Jersey RICO claims on this ground, but *Ball* makes clear that the requirement that the enterprise exist separate from the pattern is the same under both New Jersey and federal RICO. Accordingly, when plaintiffs conflate the enterprise with the pattern, the claim should be subject to dismissal whether brought under New Jersey RICO or federal RICO or both. The authors believe that dismissal on this ground should be with prejudice because the judicial admission negates the enterprise element, and therefore prevents its establishment in an amended complaint.

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Plaintiffs usually assert two responses to this attack on enterprise: (1) the RICO statute does not require that the complaint include the elements of an enterprise; and (2) the evidence proving the enterprise's existence can be the same as that establishing the pattern. Both responses are true — and both are irrelevant. First, while a plaintiff is not required to plead the elements of an enterprise, where the complaint's allegations go so far as to negate the existence of an enterprise, dismissal is nevertheless proper. Second, while the proof of a RICO enterprise and pattern can be the same, the two elements must still exist separate and apart from each other.

Complaint Fails To Establish a RICO Pattern

The second common defect is a failure to establish a RICO pattern where a plaintiff alleges that a single scheme against a single victim or group violated either federal or New Jersey RICO, e.g., that defendants engaged in a series of wrongful acts directed at plaintiff.

Though phrased and defined somewhat differently, both federal and New Jersey RICO require that a complaint adequately plead a "pattern" of racketeering acts. This requirement is meant to ensure that the RICO statutes reach enterprises that engage in racketeering as a "regular way of doing business" as opposed to isolated instances of criminal conduct. *Hughes v. Consolidated Pennsylvania Coal Co*., 945 F.2d 594, 610 (3d Cir. 1991). To establish the pattern element, federal RICO requires that a plaintiff plead two subelements: continuity (referring to a "closed period of repeated conduct, or to past conduct that . . . projects into the future the threat of repetition") and relatedness (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."). *H. J. Inc. v. Northwestern Bell Tel. Co*., 492 U.S. 229, 240-42, 252 (1989).

In *Ball,* the New Jersey Supreme Court held that, unlike federal RICO, continuity is not an independent subelement in the pattern analysis under New Jersey RICO. But the Supreme Court went on to say: "The pattern of racketeering activity and the activity criminalized under RICO should be, or threaten to be, ongoing. . . . [S]ome degree of continuity, or threat of continuity, is required and is inherent in the 'relatedness' element of the 'pattern of racketeering activity.'" As a practical matter, therefore, federal and New Jersey RICO are effectively the same in requiring that the wrongful conduct "be, or threaten to be, ongoing." The case law shows that under both statutes, a single scheme with a single set of victims and a single and terminable goal rarely satisfies the pattern element because such schemes are not, and do not threaten to be, ongoing.

For instance, in *Zahl, M.D. v. N.J. Dep't of Law and Public Safety,* No. 06-3749, 2009 WL 806540 (D.N.J. Mar. 27, 2009), a federal case that dealt with both federal and New Jersey RICO claims, plaintiff doctor alleged that a former employee who reported plaintiff for billing irregularities to the New Jersey medical licensing authorities resulting in two investigations and the revocation of plaintiff's license, conspired with other defendants in violation of federal and New Jersey RICO in a scheme to force plaintiff out of his medical practice. The court denied plaintiff's motion to file amended RICO counts: plaintiff failed to establish a risk of ongoing criminal conduct because he alleged "only a racketeering scheme that has succeeded, ended, and existed only to persecute a single victim, Zahl."

When plaintiffs try to leverage ordinary business torts by dressing them up as alleged racketeering, they run into common difficulties in stating a proper RICO claim. RICO practitioners should look for these defects, and consider a motion to dispose of such claims at the outset of litigation.■