

RICO Meets the False Claims Act: False Billing Allegations Against Hospital Fail to Sustain Physician's RICO Suit

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A plaintiff seeking to “up the litigation ante” in an ordinary fraud or other commercial case will commonly assert a claim under the federal Racketeer Influenced & Corrupt Organizations Act¹ (RICO) because the statute imposes treble damages and attorneys’ fees. Such an attempt to gain litigation leverage often can be challenged successfully on a threshold motion to dismiss by attacking the complaint’s allegations of a RICO pattern. As one court put it, “perhaps there is even a pattern of using the ‘pattern’ requirement to trim off the excesses in civil RICO suits.”²

In a recent federal case in Pennsylvania, a plaintiff doctor tried but failed to establish a RICO pattern—and thereby sustain his RICO claim—when he piggybacked onto federal False Claims Act³ allegations that had been brought by the United States Department of Justice against a hospital where the doctor formerly held medical staff privileges.⁴ With the increasing proliferation of False Claims Act cases, particularly in the health care and pharmaceutical industries, more such attempts can be expected, and lawyers should be prepared to demonstrate that unrelated False Claims Act allegations do not satisfy RICO’s pattern requirement.

Background: The RICO Pattern Requirement

“[T]he heart of any RICO complaint is the allegation of a pattern of racketeering.”⁵ The RICO statute

provides that a “pattern requires at least two acts of racketeering activity ... the last of which occurred within ten years ... after the commission of a prior act of racketeering activity.” In *H.J. Inc. v. Northwestern Bell Tel. Co.*, the United States Supreme Court clarified and narrowed this statutory definition, holding that “to prove a pattern of racketeering activity a plaintiff or prosecutor must show that the racketeering predicates are related, *and* that they amount to or pose a threat of continued criminal activity.”⁶ The Supreme Court said that “[i]t is this factor of continuity plus relationship which combines to produce a pattern.”⁷ Although the evidence of continuity and relationship may often overlap, the two inquiries analytically are distinct prongs of the pattern element requiring separate analysis.⁸

The relationship prong (now usually referred to as “relatedness”) requires a plaintiff to show that the RICO predicate 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.”⁹ The relatedness inquiry “focuses on the interrelationship of charged RICO predicates,” thereby ensuring that a defendant is not “subjected to sanctions for committing two widely separated and isolated criminal offenses.”¹⁰ Although courts have construed the relatedness requirement broadly, some substantial connection must exist among the

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alleged predicate acts forming the alleged pattern. For example, in *Heller Fin., Inc. v. Grammco Computer Sales*, relatedness was lacking where the plaintiff financing company alleged two distinct types of criminal acts with dissimilar results, methods of commission, participants, and victims, the first type being commercial bribery of an employee of a hospital that financed office equipment through plaintiff, and the second being mail and wire fraud to obtain a loan from plaintiff.¹¹

The *H.J. Inc.* opinion focused more on the “continuity” prong than on relatedness. Continuity is “both a closed- and open-ended concept,” the former referring “to a closed period of repeated conduct” and the latter to “past conduct that by its nature projects into the future with a threat of repetition.”¹² Closed-ended continuity can be established through evidence of “a series of related predicates extending over a substantial period of time,” because “Congress was concerned in RICO with long-term criminal conduct.”¹³ Open-ended continuity requires “a threat of continued racketeering activity” that can be established through: (1) few predicate acts occurring near in time if they “include a specific threat of repetition extending indefinitely into the future;” (2) a demonstration that the alleged acts of racketeering “are part of an ongoing entity’s regular way of doing business;” or (3) attributing the predicate acts “to a defendant operating as part of a long-term association that exists for criminal purposes.”¹⁴

The Supreme Court noted that continuity is “centrally a temporal concept.”¹⁵ An open-ended series of predicate acts can satisfy the continuity requirement no matter how brief the period, so long as those acts meet the condition of “project[ing] into the future with a threat of repetition.” In contrast, whether a closed-ended scheme satisfies the continuity requirement will depend largely on its duration. Some circuits have set bright-line minimums. The Court of Appeals for the Second Circuit has never found a closed-ended pattern where the predicate acts spanned fewer than two years, while the

U.S. Court of Appeals for the Third Circuit has determined that one year is insufficient for closed-ended continuity.¹⁶

The Decision in Zubritzky

Paul Zubritzky was an obstetrician and gynecologist with medical staff privileges at a hospital in which William Provenzano was the chief executive officer. Zubritzky sued and claimed that Provenzano engaged in conduct that ultimately drove him to resign his privileges, including blaming Zubritzky for the ob/gyn department’s financial losses leading to its closure, fabricating charges that Zubritzky threatened Provenzano and another doctor, and summarily suspending Zubritzky without approval of the medical staff committee.

In his complaint, Zubritzky alleged a violation of RICO and asserted Pennsylvania state law claims for intentional interference with contractual relations, defamation, negligence, intentional and negligent infliction of emotional distress, and fraud. Provenzano moved to dismiss. The court granted the motion without prejudice and with leave to amend the complaint to include sufficient facts to establish either the closed-ended or open-ended continuity necessary to a viable RICO cause of action.

Zubritzky responded with an amended complaint alleging additional predicate acts committed by Provenzano—acts that were the subject of a False Claims Act action instituted in 2006 by the United States in the Western District of Pennsylvania against the hospital. According to the False Claims Act complaint, the hospital included false statements in cost reports it submitted seeking payment from the Medicare program. Most of the allegations concerned the hospital’s reimbursement request for a substance called Procuren, even though Medicare had declared that those costs were not eligible for reimbursement. The hospital was alleged to have circumvented Medicare’s policy by falsely describing Procuren in the cost reports submitted to the agency. Although he was not aware that Procuren

ren was not a reimbursable expense, Provenzano was signatory to the allegedly fraudulent cost reports.

Zubritzky's amended complaint alleged additional predicate acts of mail and wire fraud against Provenzano premised on the False Claims Act action filed against the hospital by the United States. Zubritzky asserted that these supplementary predicate acts enlarged the time frame beyond the nine months involved with Provenzano's alleged illegal activity in attempting to defraud him and also established that Provenzano's regular course of business involved fraudulent activity and commission of predicate acts designed to increase profits at the hospital, thereby increasing his own compensation.

Provenzano filed a motion to dismiss the amended complaint on the ground that Zubritzky had failed to remedy the deficiencies of his original complaint. The court granted the second motion to dismiss, this time with prejudice on the RICO count because of Zubritzky's failed effort to replead, and without prejudice to Zubritzky's right to bring his state law claims in state court.

Analysis of the Zubritzky Decision

The court's holding was ostensibly based upon Zubritzky's failure to establish either closed-ended or open-ended continuity. The reasoning, however, was based at least as much on a failure to show relatedness under *H.J. Inc.* In effect, the court relied upon the lack of relatedness among the predicate acts to conclude that the separate schemes against Zubritzky and the United States could not be connected, and therefore, failed to satisfy the temporal requirement of continuity.

The court stated that the alleged purpose of the mail and wire fraud claims that gave rise to the False Claims Act action against the hospital was to enhance the financial success of the hospital and, correspondingly, Provenzano's compensation. In contrast, the alleged goal of Provenzano's scheme

to defraud Zubritzky, according to the amended complaint, was "to obtain the property of Zubritzky through the inducement of fear, by the fear of economic loss, and by denying Zubritzky the right and ability to make business decisions free from improper outside pressure."¹⁷ The amended complaint alleged that if Provenzano succeeded in impacting Zubritzky's medical practice detrimentally, then Zubritzky's patients would become patients of a hospital-established ob/gyn group, resulting in a financial benefit to the hospital.

The court determined that the parallels between the purposes of these separate schemes were negligible. Though both objectives could be viewed as attempts to enrich Provenzano, the connection was too attenuated to suggest a pattern of criminal activity, rather than unrelated, isolated instances. Drawing upon the relatedness factors set forth in *H.J. Inc.*, the court also found a lack of similarity in the results, methods of commission, participants, and victims of the alleged schemes. "Considering the palpable dissimilarity between the two schemes, Zubritzky's amended complaint has not alleged facts sufficient to establish the required relatedness of the predicate acts, and thereby fails to outline a pattern of racketeering activity entitling him to relief under the RICO statute."¹⁸ In effect, the court issued a hybrid decision that combined the separate prongs of relatedness and continuity to conclude that no pattern had been established.

Conclusion

False Claims Act litigation is a growth industry. The U.S. Department of Justice recently announced that it had obtained \$3 billion in False Claims Act settlements and judgments in fiscal year 2010, with \$2.5 billion, or 83 percent, of that amount coming from health care recoveries. Recent statutory amendments, which facilitate suits by alleged whistleblowers and reduce defenses, are likely to drive still higher both the volume of False Claims Act litigation and recovery amounts. The *Zubritzky* case shows that plaintiffs seeking litigation leverage may try to

take advantage of this trend, particularly against health care providers, by engrafting unrelated False Claims Act allegations in commercial litigation. Such efforts can and should be met with threshold motions challenging the existence of a RICO pattern, and, as illustrated by *Zubritzky*, can be successful.

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¹ 18 U.S.C. § 1961, *et seq.*

² *U.S. v. O'Connor*, 910 F.2d 1466, 1468 (7th Cir. 1990), *cert. denied*, 498 U.S. 1082 (1991).

³ 31 U.S.C. § 3729, *et seq.*

⁴ *Zubritzky v. Provenzano*, Civ. No. 10-342, Order (W.D. Pa., Dec. 6, 2010).

⁵ *Agency Holding Corp. v. Malley-Duff & Assocs., Inc.*, 483 U.S. 143, 154 (1987).

⁶ 492 U.S. 229, 239 (1989) (emphasis in original).

⁷ *Id.*

⁸ *Id.*

⁹ *Id.* at 240.

¹⁰ *U.S. v. Eufrazio*, 935 F.2d 553, 565 (3d Cir.), *cert. denied*, 502 U.S. 925 (1991).

¹¹ 71 F.3d 518 (5th Cir. 1996).

¹² 492 U.S. at 241.

¹³ *Id.*

¹⁴ *Id.* at 242-43.

¹⁵ *Id.* at 242.

¹⁶ *Fresh Meadow Food Serv., LLC v. RB 175 Corp.*, 282 Fed. Appx. 94, 2008 BL 134993 (2d Cir. 2008); *Hughes v. Consol-Pa. Coal Co.*, 945 F.2d 594 (3d Cir. 1991), *cert. denied*, 504 U.S. 955 (1992).

¹⁷ *Zubritzky*, Civ. No. 10-342, Order at 9 (W.D. Pa. Dec. 6, 2010).

¹⁸ *Id.* at *10.