Attorney Fee Recovery in State and Federal Civil RICO Claims

by Eric A. Inglis

A powerful tool in certain types of civil litigation is a claim under the federal or state Racketeer Influenced and Corrupt Organization (RICO) statutes,[1] which were originally passed as part of law enforcement's 1970s-era push to curb the influence of organized crime. The phrase "RICO violation" has migrated from legal vocabulary into the vernacular, and has maintained its connotation that someone accused of a RICO violation is connected to the criminal underworld. It is that broadly understood connotation that allows the term RICO to cause the hair to stand up on the back of the necks of practitioners and clients who receive complaints containing such claims. That alarm is justified.

Leaving aside the impact of a RICO pleading from a pop culture perspective, the claim conveys certain advantages to a successful claimant, and can be a relatively straightforward path to the recovery of attorneys' fees. Simply put, a civil RICO plaintiff is entitled to the remedies provided by the RICO statutes if it can establish that the defendant derived income from a pattern of racketeering, such as murder, kidnapping, gambling, robbery, bribery, extortion, and dealing in narcotics.[2] New Jersey courts have traditionally interpreted the type of acts that fall under the heading of "racketeering" more broadly, and typical practitioners can easily plead acts of business fraud in ways that would qualify as racketeering for the purposes of New Jersey's RICO statute (NJRICO).[3]

If the RICO claim is successfully established, then the claimant "shall recover threefold any damages he sustains and the cost of the suit, including a reasonable attorney's fee, costs of investigation and litigation."[4] The federal statute is nearly identical.

There is some guidance in New Jersey and federal case law that all practitioners should keep in mind when considering the fee-shifting components of prosecuting or defending a RICO claim.

The leading case in New Jersey interpreting NJRICO and discussing attorneys' fees is *Franklin Medical Associates v. Newark Public Schools*.[5] In *Franklin Medical*, a group of physicians brought a collection suit against the Newark Public Schools seeking recovery of various medical billings. The case, however, was a study in typical New Jersey chutzpah, because the plaintiff-physicians were seeking to recover what were ultimately found to be fraudulent bills. Newark Public Schools counterclaimed with a RICO claim on which it succeeded.

The court entered judgment on the NJRICO claim against the physician-plaintiffs, and the Newark Public Schools subsequently filed an affidavit of services and a motion to amend the judgment to have its attorneys' fees included in the judgment amount. The trial court denied the motion based upon calendar considerations. The trial judge felt the motion was not timely filed, but the facts suggest that the trial court simply had an aversion to awarding fees.

The Appellate Division had no sympathy toward that aversion. The Appellate Division reversed the trial court, stating: "the public policy considerations underlying the NJRICO damages provision strongly militate in favor of allowing Newark to recover attorney's fees and costs of suit."[6]

Franklin Medical is not a particularly groundbreaking opinion, but it does tie the award of attorneys' fees under NJRICO back to the public policy considerations that led the Legislature to include attorneys' fees as one of the battery of remedies for NJRICO violations. In light of appellate case law like this, trial courts are particularly loathe to deny statutorily per-

mitted fee allowances.

Federal case law regarding fee awards under RICO should be reviewed by any practitioner considering a RICO claim, because care taken in light of that authority could make the fee application process much smoother for the successful claimant.

There is a prevailing view among federal courts that attorneys' fees are an essential part of the relief Congress wanted to afford successful civil RICO claimants.[7] By and large, federal courts do not distinguish between fee allowances for work done to advance RICO and non-RICO legal theories, so long as the theories and claims all arise from a common set of facts.[8] For example, it is common that the same facts that give rise to a state law-based fraud, theft, or breach of fiduciary duty claim will support the RICO claim. As long as common facts support all of the theories, federal courts favor shifting all fees in favor of the successful RICO plaintiff.

The federal courts have also approved relatively large RICO-related fee awards where only a small number of RICO claims were successful and numerous other ancillary claims were dismissed. For example in *Northeast Women's Center v. McMonagle*, the Third Circuit upheld a fee award of $64,946 despite the plaintiff being awarded a RICO treble damage award of only $2,661.[9] Similarly, the federal district court for the District of Massachusetts awarded $184,231.75 in attorney's fees to the only two successful plaintiffs among 10 named plaintiffs who prevailed on just one RICO claims that resulted in only a $1,018.56 award.[10]

The language of the various cases cited above, and commonsense, should lead practitioners to incorporate certain practices into their billing practices in cases that might involve fee shifting under RICO. If pleadings, motions, or research are to advance non-RICO causes of action, but those non-RICO claims are the predicate acts for RICO liability, billing entries should reflect that. If the case concerns claims unrelated to RICO, or claims against defendants against whom there are not RICO claims, the practitioner might consider a separate billing number for the RICO claims or the RICO defendants. While such timekeeping might prove onerous, it is less onerous than trying to reconstruct or divide efforts at the conclusion of a successful litigation.

There can be few more agonizing experiences than putting in all the effort required to win a RICO claim only to have the attorneys' fee denied or reduced because of poor timekeeping practices. Winning a RICO claim on behalf of a client is uniquely satisfying, and is one of the few results that can make a client feel the justice system works for victims of fraud and similar crimes. The experience of winning such a victory can quickly spoil, however, if the attorney's poor timekeeping requires the client, rather than the tortfeasor, to pay for the successful attorney's time.

A final cautionary note regarding the tie-in between RICO and attorneys' fees can be found in the underlying procedural rules in New Jersey and the federal level regarding fee shifting in the event of frivolous pleadings. A RICO claim is a very strong attack, and can provoke a variety of responses, from entreaties to settle to counterclaims for RICO violations. Within that range of possibilities is also a notice pursuant to Federal Rule of Civil Procedure 11 or New Jersey Court Rule 1:4-8.

There are reported cases in federal courts in which Rule 11 sanctions have been imposed for frivolously filed RICO claims.[11] The lesson of these cases is that the heavy artillery of a RICO claim should be deployed carefully, and in a way that does not diminish the claimant's leverage. ⚖

Endnotes

1. 18 U.S.C. 1964 and N.J.S.A. 2C:41-1 *et seq.*
2. 18 U.S.C. 1962(c) and N.J.S.A. 2C:41-1.1(c).
3. *State v. Ball*, 141 N.J. 142, 157 (1995).
4. N.J.S.A. 2C:41-4(c).
5. 362 N.J. Super. 494 (App. Div. 2003).
6. *Id.* at 517.
7. *Alcorn County v. U.S. Interstate Supplies*, 731 F.2d 1160 (5th Cir. 1984), *overruled by United States v. Cooper*, 135 F.3d 960 (5th Cir. 1998) and *overruled in part Mallery v. Taylor,* 792 So. 2d 226 (Miss. 2001).
8. *Abell v. Potomac Ins. Co.*, 858 F.2d 1104 (5th Cir. 1988), *reh, en banc, den.* 863 F.2d 882 (5th Cir. 1988), *vacated on other grounds, remanded*, 492 U.S. 914, 109 S. Ct. 3236, 106 L. Ed. 2d 584 (1989), *on remand, remanded on other grounds*, 884 F.2d 196 (5th Cir. 1989), *cert den.*, 492 U.S. 918, 109 S. Ct. 3242, 106 L. Ed. 2d 589 (1989).
9. 889 F2d 466 (3rd Cir. 1989), *cert den.*, 494 U.S. 1068, 110 S. Ct. 1788, 108 L. Ed. 2d 790 (1990).
10. *Sys. Mgmt. v. Loiselle*, 154 F. Supp. 2d 195 (D. Mass. 2001).
11. *Brandt v. Schal Assocs.*, 131 F.R.D. 485 (N.D. Ill. 1990).

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