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Class Action Monitor

So You've Been Sued Under RICO—What's Next?

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Congress enacted the Racketeering Influenced and Corrupt Organizations Act (RICO) in 1970 as Title IX of the Organized Crime Control Act. *U.S. v. Turkett*, 452 U.S. 576, 578 (1981). It was intended to target organized crime's infiltration into legitimate businesses through extortion and other criminal means. *Id.* at 586, 588. However, RICO contains both criminal and civil provisions. *Id.* The civil provisions provide for powerful remedies, including treble damages, plus costs of suit including reasonable attorneys' fees, making it a very attractive vehicle for plaintiff's lawyers and a dangerous threat to corporations, especially where a class claim is asserted. 18 U.S.C. § 1964(c). Indeed, RICO class actions against large corporate entities are becoming more common and threaten crippling damages. Further, civil RICO actions outnumber criminal RICO actions by a very wide margin.[1] Accordingly, corporate counsel need to be savvy regarding RICO's provisions, the applicable pleading requirements, common class certification issues, and how best to defend against a RICO action. RICO is exceedingly complex. Addressed below are some common pitfalls in RICO claims, potential bases to file motions to dismiss such claims, as well as important issues to keep in mind in contesting class certification in a RICO action.

RICO offenses are governed by 18 U.S.C. § 1962(a)-(c). Sections "1962(a) and 1962(b) are rarely used, and section 1962(c) is the most commonly invoked RICO provision." *Mark v. J.I. Racing, Inc.*, 1997 WL 403179, at *3 (E.D.N.Y. July 9, 1997). Section 1962(a) prevents "racketeers from using their ill-gotten gains to operate, or purchase a controlling interest in, legitimate businesses," while section 1962(b) prohibits "the takeover of a legitimate business through racketeering, typically extortion or loansharking." *Id.* Section 1962(c) is "intended to prevent the operation of a legitimate business or union through racketeering." *Id; see also Dysart v. BankTrust*, 516 F. App'x 861, 863 (11th Cir. 2013).[2]

Under section 1962(c), a RICO plaintiff must show "(1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity." *Jones v. Childers*, 18 F.3d 899, 910 (11th Cir. 1994). Racketeering activity means the carrying out of a "predicate act" enumerated in the RICO statute. *Id.* A RICO plaintiff's burden does not end there, however, as plaintiffs must also show an injury to their property or business and that the injury was "by reason of the substantive RICO violation," *i.e.*, causation. *Dysart*, 516 F. App'x at 863.

In crafting an initial response to a RICO complaint, it is important to remember that in civil RICO actions, some of the most common predicate acts of "racketeering activity" are mail and wire fraud. *See, e.g., American Dental Ass'n v. Cigna Corp.*, 605 F.3d 1283 (11th Cir. 2010); *see also, e.g., In re U.S. Foodservice Inc. Pricing Litigation*, 729 F.3d 108 (2d Cir. 2013). This fact is critical because plaintiffs must satisfy the heightened pleading standard of Federal Rule of Civil Procedure 9(b) with respect to the allegations of racketeering activity, rather than the notice pleading standard. *See Tel-Phonic Services, Inc. v. TBS Intern., Inc.*, 975 F.2d 1134, 1139-39 (5th Cir. 1992) ("We find that most of the alleged wrongs are not pleaded with sufficient particularity to constitute the RICO predicate act of wire fraud or mail fraud. Rule 9(b) requires particularity in pleading the 'circumstances constituting fraud.' This particularity requirement applies to the pleading of fraud as a predicate act in a RICO claim as well."); *see also Trudel v. Stoltz*, 67 F.3d 309 (9th Cir. 1995). A RICO pleading based on predicate acts of fraud must include the specifics of the fraud, including date, time, place, who made the alleged misrepresentations, and the content of the representations. *Id.* Accordingly, in contesting a RICO complaint, corporate counsel should carefully analyze the allegations to ensure they rise to the level of specificity 9(b) requires and raise any deficiencies promptly in a motion to dismiss.

With respect to the enterprise requirement, which is another area where corporate counsel should focus attention at the motion to dismiss stage, the plaintiff's burden is to show that the person committing the predicate act of racketeering activity, or the RICO wrongdoer, is conducting "the affairs of the enterprise through a pattern of racketeering activity." *See Riverwoods Chappaqua Corp. v. Marine Midland Bank, N.A.*, 30 F.3d 339, 344 (2d Cir. 1994). RICO defines "enterprise" as "any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity." 18 U.S.C. § 1961(4). Importantly, a majority of circuit courts of appeal have held that "the person [*i.e.*, the RICO wrongdoer] and the enterprise referred to must be distinct," and, therefore, "a corporate entity may not be both the RICO person and the RICO enterprise under section 1962(c)." *See Riverwoods*, 30 F.3d at 344; *see also Wilcox v. First Interstate Bank of Oregon, N.A.*, 815 F.2d 522, 529 (9th Cir. 1987) ("In *Rae v. Union Bank*, 725 F.2d 478, 481 (9th Cir.1984), we rejected the argument that a corporate defendant could be both the RICO person and the RICO enterprise under 18 U.S.C. § 1962(c)."). Therefore, a plaintiff does not allege an actionable RICO claim by alleging that a defendant corporation is the party engaged in the pattern of racketeering activity, and that such defendant corporation is also the "enterprise" to which the conduct relates.

Corporate counsel should be aware, however, that if a corporation is the enterprise, an employee for the corporation may be the RICO wrongdoer. *Conte*, 703 F. Supp. 2d at 133-34 ("[A]n employee of a corporation is legally distinct from the corporation itself and therefore can function as a RICO person where the corporation is the alleged RICO enterprise."). Moreover, a corporation could also associate itself "with others," *i.e.*, an association-in-fact, "to form an enterprise that is sufficiently distinct from itself." *Riverwoods*, 30 F.3d at 344. Despite these apparent exceptions to the requirement that the corporate wrongdoer be distinct from the enterprise, a plaintiff still cannot allege that the enterprise consists merely of the "corporate defendant associated with its own employees or agents carrying on the regular affairs of the defendant . . . ." *Id.* Accordingly, in reviewing RICO allegations, corporate counsel should carefully analyze whether the plaintiff(s) have properly pled the enterprise requirement.

Corporate counsel should also scrutinize the allegations relating to the "pattern" requirement in any RICO complaint, because the "pattern" requirement is difficult to plead. Indeed, a pattern of racketeering activity requires a showing of at least two predicate acts of racketeering in a ten-year period. 28 U.S.C. § 1961(5). However, courts have interpreted this provision to require more than simply two isolated predicate acts. *H.J. Inc. v. Nw. Bell Tel. Co.*, 492 U.S. 229, 237-38 (1989) (finding "the statement that a pattern requires at least two predicates implies that while two acts are necessary, they may not be sufficient") (internal quotations omitted). In fact,

the United States Supreme Court has found that "[s]ection 1961(5) concerns only the minimum *number* of predicates necessary to establish a pattern; and it assumes that there is something to a RICO pattern *beyond* simply the number of predicate acts involved." *Id.* Courts have thus found in numerous circumstances that two acts, "without more" are not sufficient. *See United States v. Indelicato*, 865 F.2d 1370, 1382 (2d Cir. 1989). There must be more than "sporadic activity" and more than "two widely separated and isolated" offenses. *H.J. Inc. v. Nw. Bell Tel. Co.*, 492 U.S. 229, 237-38 (1989) (internal quotations and citations omitted) (finding "[t]he term 'pattern' itself requires the showing of a relationship between the predicates…and of the threat of continuing activity"); *see also SKS Constructors, Inc. v. Drinkwine*, 458 F. Supp. 2d 68, 77 (E.D.N.Y. 2006). If there are any deficiencies in the allegations regarding the "pattern" of racketeering activity, corporate counsel should be sure to highlight them at the earliest possible time.

Allegations of causation are also often defective and, thus, the basis for a successful motion to dismiss. Importantly, to plead a RICO offense, plaintiffs need to allege plausible facts demonstrating a proximate relationship between the conduct and the harm. *Holmes v. Sec. Investor Prot. Corp.*, 503 U.S. 258, 268 (1992). Even if a class of plaintiffs pleads and proves all of the other RICO elements, recovery under RICO is unavailable if there is a remote or "purely contingent" or indirect link between the acts of racketeering and the alleged damages. *HEMI Group, LLC v. City of N.Y.*, 130 S. Ct. 983, 985 (2010); *see also Vanderbilt*, 735 F. Supp. 2d at 698-99.

Causation is also an important issue in the context of class certification. Much to the delight of the plaintiff's bar, in 2008, in *Bridge v. Phoenix Bond & Indemnity Co.*, 553 U.S. 639, 649 (2008), the U.S. Supreme Court held that there is no requirement that a plaintiff show first-person reliance when the predicate act of a RICO claim is mail fraud. Prior to this decision, it was common for defendants to argue that each member of a putative class must show first person reliance and, accordingly, that the requirement under Rule 23(b)(3) that common questions of law and fact predominate over individualized issues for a damages class to be certified could not be satisfied. While at first blush the *Bridge* decision portended an avalanche of RICO class actions, the impact has been more modest than anticipated because the U.S. Supreme Court was clear that it was not eliminating the requirement of causation, which in many cases can raise a myriad of individualized issues. *Id.* at 658 ("In most cases, the plaintiff will not be able to establish even but-for causation if no one relied on the misrepresentation."). Causation should thus be a focal point of corporate counsel at the class certification stage.

For example, in *In re Countrywide Fin. Corp. Mortgage Mktg. & Sales Practices Litig.*, 277 F.R.D. 586, 605 (S.D. Cal. 2011), the Southern District of California denied a motion for class certification because, among other reasons, the borrower plaintiffs "failed to demonstrate that common issues predominate on the element of causation" in pleading their RICO cause of action based on defendant Countrywide's alleged fraudulent scheme to push borrowers into subprime mortgages and loans so that the loans could then be sold on the secondary securities market. *Id.* at 598. The court explained that evidence put forth by plaintiffs showed that "at least some class members elected to proceed with the loans in question despite the risks" plaintiffs were concerned with in the litigation. *Id.* at 605. Accordingly, in finding that common issues did not predominate, the court found the plaintiffs had not demonstrated that "class members would not have taken on the loans in question but for the alleged misrepresentations and omissions attributed to" the defendant. *Id.*

Similarly, in *Galas v. Lending Co.*, No. CV-12-01265-PHX-SMM, 2014 WL 4053406, at *15-16 (D. Ariz. Aug. 15, 2014), the court found that "individual inquiries" as to whether each insured class member relied on the defendant's alleged fraudulent scheme were necessary in analyzing causation. The plaintiffs had argued, citing to *Bridge*, that "third-party reliance sufficiently establishes proximate causation without individual issues predominating." *Id.* Plaintiffs argued that because a third party had relied on the defendant's fraudulent statements that the class

members' loans were compliant with regulations, the defendant was able to sell such loans "on the secondary market" without any objection leading to increased interest rates on the loans. *Id.* The court disagreed, and found that under *Bridge*, third party reliance only satisfies the causation requirement if there is a "direct relation between the injury asserted and the injurious conduct alleged." *Id.* The court found plaintiff could not make this "direct relation" showing, and accordingly that "individual inquiries regarding each class member's reliance on the allegedly fraudulent scheme would be necessary." *Id; see also Martinelli v. Petland, Inc.*, 274 F.R.D. 658, 664-65 (D. Ariz. 2011) (denying class certification where plaintiffs could not prove the "direct relation" requirement of *Bridge* on a "class-wide" basis and noting that the "direct relation" requirement warrants "particular emphasis").

Moreover, depending on the facts of the case and the type of misrepresentations, first-person reliance may still be required in order to show causation. In another post-*Bridge* RICO fraud action, the Eastern District of New York denied class certification despite the plaintiffs' arguments that, under *Bridge*, reliance was no longer required. *Calabrese v. CSC Holdings, Inc.*, No. 02-CV-5171(DLI)(JO), 2009 WL 425879, at *12 (E.D.N.Y. Feb. 19, 2009). The court explained that even post-*Bridge*, "a plaintiff asserting a civil RICO claim continues to have the obligation to demonstrate both but-for and proximate causation in order to show injury by reason of a RICO violation." *Id.* The court found that because the alleged misrepresentations at issue in the case were made directly to each victim, "a putative plaintiff cannot establish that his injury was proximately caused by the RICO violation if he cannot allege and prove that he personally relied on the misrepresentations." *Id.* Therefore, the issue of reliance as it relates to the causation requirement can still be fatal to a class certification motion in the appropriate case.

While the RICO statute is complex and intimidating because of the availability of treble damages, RICO offenses are not easy to plead, and corporate counsel can often successfully defeat RICO allegations early at the motion to dismiss stage or defeat class certification, and thereby minimize the potential exposure to the crippling treble damages authorized by the RICO statute.

1. In 2014, civil RICO claims outnumbered criminal RICO claims approximately 6 to 1. *Compare* Federal Judicial Caseload Statistics (Table D-2), http://www.uscourts.gov/Statistics/FederalJudicialCaseloadStatistics/caseload-statistics-2014.aspx (reporting that there were 123 criminal RICO cases in 2014) with Federal Judicial Caseload Statistics (Table C-2) (which indicates that there were 682 civil RICO cases in 2014).
2. 18 U.S.C. § 1962(c) states that it is illegal "for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity." 18 U.S.C. § 1962(c).

The Impact of *Comcast v. Behrend* on Food Labeling Class Action Litigation

By Konrad L. Cailteux and Christopher D. Barraza

Over the past few years, an ever-growing number of food labeling class actions have been filed in courts across the United States. The cases typically involve claims against manufacturers over the allegedly misleading use of the terms "all-natural," "100% natural" and "organic" on product labels that contain artificial ingredients; or they are filed against food, beverage, and dietary supplement companies for making allegedly false health claims about their products. Corporate defendants have had modest success defending these food labeling class actions, in particular by using the U.S. Supreme Court's decision in *Comcast Corp. v. Behrend*, 133 S. Ct. 1426 (2013), to defeat them at the class certification stage.

To provide a refresher, the plaintiffs in *Comcast* alleged that Comcast Corporation entered so-called "clustering transactions" that enabled it to monopolize cable television services in the Philadelphia market area. The plaintiffs moved to certify a class under Rule 23(b)(3), proposing four separate and alternative theories of antitrust impact. In granting class certification, the district court accepted one theory of antitrust impact as capable of class-wide proof and rejected the rest. Notably, the plaintiffs' expert presented a damages model that addressed impact based on all four impact theories. He "did not isolate damages resulting from any one theory of antitrust impact." On appeal, Comcast argued that the model's failure to isolate impact and damages resulting only from the remaining theory of class-wide impact precluded certification. The Third Circuit affirmed the grant of certification, but the Supreme Court reversed, reasoning that to satisfy the Rule 23(b)(3) predominance requirement, a plaintiff must present a damages model that is "consistent with [his or her] liability case."[1] The plaintiffs in *Comcast* failed to meet this burden because their damages expert's economic model improperly measured damages stemming from alternative liability theories and related antitrust injuries that were no longer in the case.[2]

When the Supreme Court decided *Comcast* two years ago, it was described as a "game-changer" that would make it more difficult for plaintiffs to obtain class certification by requiring class-wide proof of damages under Fed. R. Civ. P. 23(b)(3) at the certification stage. Since *Comcast*, though, the federal circuit courts of appeal have, by and large, narrowly interpreted the decision as standing for just two propositions: (1) when moving for class certification under Rule 23(b)(3), the plaintiffs' model for determining class-wide damages must measure damages that result from the class's asserted theory of injury; and (2) individualized damages do not automatically defeat Rule 23(b)(3) certification.[3] Notwithstanding the narrow reading of *Comcast* by circuit courts,[4] corporate defendants have been able to use the decision to their advantage to defeat certification in a number of food labeling class actions.

For example, in *Brazil v. Dole Packaged Foods, LLC*, 2014 WL 2466559 (N.D. Cal. Nov. 6, 2014), 2014 WL 5794873 (N.D. Cal. May 30, 2014), a putative class challenged the "all natural" labeling on Dole's packaged fruit products, which allegedly contain ascorbic acid and citric acid. On May 30, 2014, the Northern District of California certified a national class seeking injunctive relief, but limited the damages class to cover only California consumers. The court determined predominance was lacking for the proposed national class for money damages, as non-resident class members' claims would have to be decided under the consumer protection laws of the states in which they live, requiring the court to apply the laws of all 50 states. Further, the court held that the proper measure of restitution in such a mislabeling case is the amount necessary to compensate the purchaser for the difference between the product as labeled and the product as-received. The court did, however, approve the plaintiffs' proposed regression model of damages analysis. This victory proved pyrrhic, as the court subsequently decertified the damages class, finding plaintiff's proffered damages model failed to provide a means for showing damages through common proof, and thus could not meet the predominance requirements set forth in *Comcast*. Ultimately, the court granted Dole's motion for summary judgment, finding insufficient evidence

that the "all natural" labeling was likely to mislead reasonable consumers. 2014 WL 6901867 (N.D. Cal. Dec. 8, 2014).

In *Lilly v. Jamba Juice Co.*, 2014 WL 4652283 (N.D. Cal. Sept. 18, 2014), the plaintiffs sought certification of a putative class alleging that "all natural" labeling on Jamba Juice home smoothie kits was misleading because the kits contained several synthetic ingredients. The defendants opposed class certification, arguing *inter alia* that the plaintiffs failed to satisfy *Comcast* because they did not provide enough expert evidence that damages could be calculated on a class-wide basis consistent with their theory of liability. The district court agreed, finding that the plaintiffs did not submit any evidence about how the damages models could fairly be determined or at least estimated, as required by *Comcast*.

Likewise, in *In re POM Wonderful LLC Mktg. & Sales Practices Litig.*, 2014 WL 1225184 (C.D. Cal. Mar. 25, 2014), a class action alleging that the defendant falsely and misleadingly advertised that certain juice products provide various health benefits, the court granted the defendant's motion for class decertification on the grounds that neither of the plaintiffs' damages models satisfied *Comcast*'s requirement that class-wide damages be tied to a legal theory. *Id.* at *6. And, in *Werdebaugh v. Blue Diamond Growers*, 2014 WL 2191901 (N.D. Cal. May 23, 2014), the court granted the defendant's motion to decertify a damages class on the grounds that the plaintiff's damages models suffered from incurable deficiencies that render them incapable of satisfying *Comcast*.

A decision issued earlier this year in *In re ConAgra Foods, Inc.*, however, shows that *Comcast* will not be a cure for all putative food labeling class actions.[5] The plaintiffs in *In re ConAgra Foods Inc.* alleged that ConAgra's Wesson brand cooking oils contained genetically modified organisms and were therefore not "100% Natural" as stated on the products' labels.[6] The court granted in part the plaintiffs' amended motion for class certification, concluding that the combined approaches of the plaintiffs' two damages experts allowed them to produce a class-wide damage figure attributable solely to ConAgra's alleged misconduct. The decision is noteworthy for two reasons. First, it marked a reversal of the court's prior denial of a motion for class certification by plaintiffs. In denying the previous certification attempt, the court reasoned that the plaintiffs' original damages expert failed to provide a damages methodology that isolates and quantifies damages associated with the plaintiffs' specific theory of liability, as required by *Comcast*. Second, the court allowed the plaintiffs to proceed by creating a hybrid damages model that could serve as a template for future food labeling class actions.

While the "sea change" anticipated by many commentators following the *Comcast* decision may not have occurred in all cases, defendants in food labeling class actions have enjoyed some success in leveraging *Comcast*'s clarification of the requirements of Rule 23(b)(3) to thwart certification of putative classes. However, it remains to be seen whether courts will follow *ConAgra* by giving plaintiffs a second bite at the apple when attempting to satisfy *Comcast*.

1. *Comcast*, 133 S.Ct. at 1433.
2. *Comcast*, 133 S. Ct. at 1435.
3. *See, e.g., Roach v. T.L. Cannon Corp.*, --- F.3d ---, No. 13-3070-cv, (2d Cir. 2015) (*Comcast* "simply" requires that a damages calculation reflect the associated theory of liability, and discussing the "well-established" principle that individualized damages do not automatically defeat Rule 23(b)(3) certification); *In re Nexium Antitrust Litig.*, --- F.3d ---, No. 14–1521, (1st Cir. 2015) ("Comcast did not require that plaintiffs show that all members of the putative class had suffered injury at the class certification stage — simply that at class certification, the damages calculation must reflect the liability theory."); *In re Urethane Antitrust Litig.*, 768 F.3d 1245, 1257–58 (10th Cir. 2014) ("*Comcast* did not rest on the ability to measure damages on a class-wide basis"); *In re Deepwater Horizon*, 739 F.3d, 790, 817 (5th Cir. 2014) (rejecting, post-*Comcast*, the argument "that certification under Rule 23(b)(3) requires a reliable, common methodology for measuring class-wide damages" (internal quotation marks omitted)); *Butler v. Sears, Roebuck & Co.*, 727 F.3d 796, 801 (7th Cir. 2013) (holding, upon remand in light of *Comcast*, that "the fact that damages are not identical across all class members should not preclude class certification"); *In re Whirlpool Corp. Front–Loading Washer Prods. Liab. Litig.*, 722 F.3d 838, 860–61 (6th Cir. 2013), cert. denied, 134 S.Ct. 1277 (2014) (noting that *Comcast* was "premised on existing class-action jurisprudence" and that "it remains the 'black

letter rule' that a class may obtain certification under Rule 23(b)(3) when liability questions common to the class predominate over damages questions unique to class members"); *Leyva v. Medline Indus. Inc.*, 716 F.3d 510, 513 (9th Cir. 2013) (reiterating Ninth Circuit precedent, post-*Comcast*, that "damage calculations alone cannot defeat certification")).

4. Indeed, courts appear to have taken the dissent in *Comcast* to heart, in which Justice Ginsburg stated the "the opinion breaks no new ground on the standard for certifying a class action under Federal Rule of Civil Procedure 23(b)(3)." *Comcast*, 133 S. Ct. at 1436.
5. Case No. CV 11-05379 MMM (AGRx) (N.D. Cal. Feb. 23, 2015) (slip op.).
6. *Id.*

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