

Can Employees Still Sue for Racketeering?

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In 1970 Congress enacted the Racketeer Influenced and Corrupt Organizations Act (RICO).¹ The statute initially was conceived to give the government strong powers to combat organized crime. At the same time, though, RICO gave private parties the right to bring civil cases to recover for injuries to their business or property, along with treble damages and attorneys' fees. Although several discharged employees had invoked RICO's civil provisions against their employers early on, a 1985 U.S. Supreme Court decision in a civil case ruling that "RICO is to be read broadly" encouraged many more employees (and other plaintiffs) to bring such cases.² Many of those cases alleged RICO conspiracies that led to the employee's termination. On April 26 the Court finally decided such a RICO conspiracy suit brought by an employee, placing an important limit on such suits but leaving a number of issues undecided. *Beck v. Prupis*, 68 U.S.L.W. 4320 (2000) (No. 98-1480).

The Elements of a RICO Case

RICO's liability provisions are found in three substantive sections, as well as a fourth section that prohibits conspiracies to violate the substantive sections.³ In general, RICO makes it unlawful for any person to use money derived from a pattern of racketeering activity to invest in an enterprise, to acquire control of an enterprise through a pattern of racketeering activity or to conduct an enterprise through a pattern of racketeering activity. An "enterprise" can be any legal entity, such as a corporation or partnership, or even an associated group of persons or companies. The enterprise can have different relationships to the alleged wrongdoing, depending upon which section of RICO is at issue. Most commonly in employee RICO cases, the plaintiff alleges that the company was the enterprise through which managers or affiliates of the company committed wrongs against the employee.

The types of wrongs that RICO concerns itself with are vast. The statute defines "racketeering" to include more than 80 sections of the U.S. Code, including those involving mail or wire fraud, extortion, bribery and certain labor laws. The statute also defines racketeering to include certain state felonies, such as extortion or commercial bribery laws. In RICO parlance, a violation of any law listed in RICO is known as a "predicate act." There must be a "pattern" of such acts, which requires at least two acts of wrongdoing within a 10-year period that are related in some way and continuous over time. Finally, a civil plaintiff can state a RICO claim only if his injury was caused "by reason of" the RICO violation.⁴

¹ 18 U.S.C. §§ 1961-1968.

² *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 497 (1985).

³ 18 U.S.C. §§ 1962(a)-(d).

⁴ 18 U.S.C. § 1964(c).

RICO Claims by Employees

Employees have invoked RICO for a variety of job decisions, including hiring and discharge. In these cases, the plaintiff typically alleges he was fraudulently induced to accept employment with a wrongdoer, or was terminated either for “blowing the whistle” on purported racketeering activity or for refusing to participate in it. Some employees have successfully invoked RICO in such circumstances, alleging that their adverse job actions amounted to witness tampering or obstruction of justice, both of which are predicate acts under RICO.⁵

Most courts, however, have rejected employee claims under RICO’s substantive provisions—sections 1962(a)-(c)—often because the plaintiff’s alleged injury resulted from a discharge or other act that did not qualify as a RICO predicate act. In an attempt to avoid such rulings, many employees added a conspiracy count under RICO’s subsection 1962(d), claiming that the detrimental job action was an overt act in furtherance of a RICO conspiracy. They pointed out that nothing on the face of section 1962(d) (which defines conspiracy liability) or section 1964(c) (which provides the civil cause of action) requires that the overt act be an act of “racketeering” listed in RICO.

Circuit Court Split on RICO Conspiracy Claims

The courts split on whether a person injured by an overt act in furtherance of a RICO conspiracy has a cause of action if the overt act was not a predicate act listed in the statute. Many courts treated this as a standing issue, i.e., whether a plaintiff has standing to bring a RICO conspiracy claim when he lacks standing to bring a claim under RICO’s substantive provisions.

The Majority Rule

The majority rule—applied by the 1st, 2nd, 8th and 9th Circuits, and apparently by the 6th Circuit—was based on a narrow interpretation of RICO’s conspiracy provision. These courts held that the employee could not sue for an adverse job action unless it was a predicate act.⁶ District courts within the 4th and 10th Circuits also followed this rule.⁷

The Minority Rule

The minority rule—followed in the 3rd, 5th and 7th Circuits—took a broader view of RICO’s conspiracy provision.⁸ A different district court within the 4th Circuit also followed this rule.⁹ These courts allowed plaintiffs to sue if they were injured by any overt act in furtherance of the

⁵ *Mruz v. Caring, Inc.*, 991 F. Supp. 701 (D.N.J. 1998); *Dooley v. United Technologies Corp.*, *RICO Bus. Disp. Guide* ¶ 8050, 1992 WL 167053 (D.D.C. June 17, 1992).

⁶ *Bowman v. Western Auto Supply Company*, 985 F.2d 383, 386-88 (8th Cir. 1993); *Miranda v. Ponce Federal Bank*, 948 F.2d 41, 47-48 (1st Cir. 1991); *Reddy v. Litton Indus., Inc.*, 912 F.2d 291, 294-95 (9th Cir. 1990); *Kramer v. Bachan Aerospace Corp.*, 912 F.2d 151, 154-56 (6th Cir. 1990); *Hecht v. Commerce Clearing House, Inc.*, 897 F.2d 21, 25 (2nd Cir. 1990).

⁷ *Sadighi v. Daghighfekr*, 36 F. Supp. 2d 279, 298-300 (D.S.C. 1999); *Masters v. Daniel Int’l Corp.*, 1991 WL 107410, at *4-5 (D. Kan. May 3, 1991).

⁸ *Khurana v. Innovative Health Care Systems, Inc.*, 130 F.3d 143, 153-54 (5th Cir. 1997); *Rehkop v. Berwick Healthcare Corp.*, 95 F.3d 285, 290 (3rd Cir. 1996); *Schiffels v. Kemper Fin. Servs., Inc.*, 978 F.2d 344, 348-51 (7th Cir. 1992); *Shearin v. E.F. Hutton Group, Inc.*, 885 F.2d 1162, 1168-70 (3rd Cir. 1989).

⁹ *Flinders v. Datasec Corp.*, 742 F. Supp. 929, 932-35 (E.D. Va. 1990).

RICO conspiracy, even if it was not a predicate act. Thus, even if the employee lacked standing to sue under RICO's substantive sections, the employee could maintain a separate conspiracy claim under section 1962(d).

Beck v. Prupis

The Supreme Court recently addressed this split of authority. In *Beck v. Prupis*, a former president of a company sued the company's directors. Beck alleged that they failed to disclose various illegal acts and his impending termination and that, had he known these things, he would not have helped the company financially and would not have been harmed when the company went bankrupt. He alleged that the defendants' acts constituted mail and wire fraud.

The 11th Circuit's Ruling

The 11th Circuit affirmed the district court's grant of summary judgment for the defendants.¹⁰ The court found that Beck had failed to prove his claim under RICO's substantive sections. Specifically, there was no evidence that he was the target of the defendants' fraud or that he had relied on anything they had done. Beck also brought a claim under section 1962(d), arguing he was fired because he refused to participate in the wrongdoing and acted as a "whistleblower" by contacting regulators. The court also affirmed on this conspiracy claim, finding that Beck lacked standing because his termination was not proximately caused by a predicate act. As such, the 11th Circuit's decision was consistent with the majority rule.

The Supreme Court's Ruling

The Supreme Court affirmed, ruling that a civil RICO plaintiff does not state a conspiracy claim unless he was injured either by a predicate act or by conduct that is otherwise wrongful under sections 1962(a)-(c). The Court thus rejected the minority rule. However, the Court left certain issues undecided and used language that plaintiffs are likely to quote in an effort to keep pursuing such claims.

Justice Clarence Thomas wrote the majority opinion. He reasoned that the common law of civil conspiracy allowed plaintiffs to recover only for injury caused by overt acts that were separately tortious, and that Congress must have adopted this law when passing RICO. He concluded that, to be consistent with this rule, an injured plaintiff cannot have a civil cause of action under section 1964(c) unless the overt act is either an act of racketeering or "independently wrongful under any substantive provision of the [RICO] statute." The Court did not venture to say what types of acts against an employee might satisfy this test. In fact, the opinion suggests that it may be decided on a case-by-case basis: "The specific type of act that is analogous to an act of a tortious character may depend on the underlying substantive [RICO] violation the defendant is alleged to have committed." Importantly, the Court observed that a plaintiff satisfying the test could "sue co-conspirators who might not themselves have violated one of the substantive provisions of § 1962."

Undecided Issues

The Court left open other legal issues implicated by Beck's case. For example, the Court did not make any law under RICO's substantive provisions found in sections 1962(a)-(c). Although the Court accepted the lower court's conclusion that Beck's termination was not racketeering activity, the opinion leaves open the possibility that a termination—in combination with other facts—may qualify as one of the types of predicate acts listed in RICO. In fact, the majority

¹⁰ 162 F.3d 1090 (11th Cir. 1998).

opinion favorably cites a 1st Circuit decision that recognized the possibility of such a claim if the plaintiff's discharge was the result of an obstruction-of-justice predicate act.¹¹

In addition, the Court did not define what it meant when it held that a plaintiff could state a claim if his injury was caused by an act that was "independently wrongful" under RICO. By way of example, however, the Court suggested that it might recognize a civil plaintiff's claim of a conspiracy to violate section 1962(a) if the plaintiff was injured by the defendants' "use or invest[ment]" of racketeering proceeds.

Finally, the Court took no position on whether a civil conspiracy claim requires that any defendant actually violated one of the substantive provisions found at sections 1962(a)-(c). The Court explicitly left open the possibility that it is "sufficient for the plaintiff to allege an agreement to complete a substantive violation and the commission of at least one act of racketeering that caused him injury."

Summary

The Court's decision in *Beck* has placed a serious limitation on the ability of discharged employees (and other civil plaintiffs) to bring conspiracy claims under RICO. Plaintiffs in courts that had followed the minority rule now must connect their injury to something more than "any overt act." At the same time, plaintiffs in courts that had followed the majority rule now have some new possible avenues for stating a claim. Furthermore, the Court has confirmed that employers (and other defendants) may be liable on a conspiracy theory even if they themselves did not violate RICO's substantive provisions. Thus, rather than closing the door to such claims, the Court has left employers exposed to further litigation over how far RICO extends.

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¹¹ *Miranda v. Ponce Fed. Bank*, 948 F.2d 41, 47-48 (1st Cir. 1991).