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With increasing frequency, however, plaintiffs have attempted to end-run Congress’ prohibition and, through state RICO claims, are seeking the RICO-type remedies Congress sought to eliminate with the PSLRA. This article briefly addresses the following question: Should such state RICO claims be permitted or are they barred by the federal doctrine of “conflict pre-emption”?

SEC leaders warned of use of RICO in securities suits


Thus, to completely eliminate the “treble damage blunderbuss of RICO” in securities fraud cases, Congress amended the federal RICO statute in § 107 of the PSLRA to foreclose the use of RICO in such cases. Mathews v. Kidder, Peabody & Co., 161 F.3d 156, 164 (3d Cir. 1998) (quoting 141 Cong. Rec. H2771 (daily ed. March 7, 1995) (statement of then Representative Christopher Cox, R-Calif., now chairman, SEC)).

For the next several years, the PSLRA seemed to have its intended effect. Plaintiffs in more recent years, however, have begun alleging state RICO claims and seeking treble damages based on alleged predicate violations of the 1934 Act that they are barred from bringing under the federal SEC statute. See, e.g., In re Tyco Int’l Ltd., M.D. Docket No. 02-1335-B, 2007 U.S. Dist. Lexis 42401, at *53-*80 (D.N.H. June 11, 2007); Capitol First Corp. v. Todd, No. 04-6439, 2006 U.S. Dist. Lexis 93359, at *44-*49 (D.N.J. Dec. 27, 2006); Ferris, Baker, Watts Inc. v. Deutsche Bank Sec. Ltd., nos. 02-3682, 02-4845, U.S. Dist. Lexis 22588, at *11-*18 (D. Minn. Nov. 5, 2004); Metz v. United Counties...
rect conflict with the purpose of § 107 of the PSLRA—eliminating treble damages for conduct actionable as securities fraud. Congress’ purpose in passing § 107 of the PSLRA would be rendered virtually meaningless if plaintiffs can avoid the prohibition by filing state RICO, instead of federal RICO, claims.

Interpreting lack of express congressional pre-emption

The argument opposing pre-emption is grounded in the presumption against pre-emption, especially when a state’s historic police powers are implicated, and the express pre-emption plays no part in determining whether implied pre-emption is appropriate. (It is also worth noting that at the time the PSLRA and SLUSA were enacted there was no evidence that the use of state RICO was widespread.) Moreover, a law’s relative importance to the state is not material once a conflict is found. See Gade, 505 U.S. at 108. Further, before 2007, no court had ever addressed whether such state law RICO claims were pre-empted by the PSLRA.

Last fall, in the first case to squarely present the pre-emption question, a New Jersey superior court judge considered these very arguments in the context of a motion to dismiss. The court ruled that state law RICO claims based on alleged predicate federal securities fraud violations are not pre-empted by the PSLRA. See Order Denying Defendants’ Motion to Dismiss, Fairfax Financial Hldgs. Ltd. v. S.A.C. Cap. Mgmt., No. MRS-L-2032-06 (Morris Co., N.J., Super Ct. Oct. 3, 2007). In explaining its decision, the court recognized that it was a “very close issue,” but ultimately reasoned that the plaintiffs’ state law racketeering claims would only present a “slight disruption” to the purposes of § 107 of the PSLRA and, therefore, should not be pre-empted. Transcription of Oral Argument, Fairfax (Morris Co., N.J., Super Ct. Sept. 7, 2007).

If decisions allowing state law RICO claims to go forward are widely followed, however, state law RICO claims for treble damages may again become routine in securities fraud litigation, whether brought in state courts as pure state law RICO claims or as supplemental state law claims accompanying claims under the 1934 Act and Rule 10b-5 in federal courts. If so, the implications for the nation’s capital markets and the securities industry could be, as Congress recognized in 1995 when it passed the PSLRA, far-reaching.

Do the PSLRA and the federal ‘conflict pre-emption’ doctrine bar state RICO claims for federal securities fraud violations?


According to this argument, if Congress had a problem with state law RICO claims, it could have acted when it drafted the PSLRA or SLUSA, but it did not.

However, as dictated by the Supreme Court, the lack of express congressional pre-