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Jay E. Grenig

Marquette University Law School, jay.grenig@marquette.edu

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Must the Alleged RICO "Person" and the Alleged RICO "Enterprise" Be Distinct Under § 1962(c)?

by Jay E. Grenig

PREVIEW of United States Supreme Court Cases, pages 359-362. © 2001 American Bar Association.

Jay E. Grenig is a professor of law at Marquette University Law School in Milwaukee, Wis.; jgrenig@earthlink.net or (414) 288-5377. He is the co-author of *West's Federal Jury Practice and Instructions* (5th edition).

ISSUE

May a claim be maintained under § 1962(c) of RICO when the alleged RICO "enterprise" is a corporation and the "person" charged with the violation of RICO is an officer and employee of the corporation acting with the scope of his corporate duties?

FACTS

This case involves a dispute between rival boxing promoters, Cedric Kushner Promotions, Ltd. (Kushner) and Don King (King), Don King Productions, Inc., and DKP Corporation (DKP).

Because this case involves an appeal from a motion to dismiss, the following facts are based on the allegations in the complaint, so at this stage the courts are required to accept those allegations as true.

According to the complaint, Kushner and King are direct competitors in the business of promoting professional boxing matches. In this business, a promoter's financial

success depends on his ability to enter into exclusive, contractual relationships with individual boxers and then promote matches involving those fighters.

In 1995, Kushner signed an exclusive promotional contract with a boxer named Hasim Rahman. Kushman later provided Rahman with 20 professional bouts with purses to Rahman totaling hundreds of thousands of dollars. In June 1998, Kushner entered into a new exclusive promotional contract with Rahman and gave him a \$150,000 signing bonus. At Rahman's request, Kushner arranged a match against David Tua, to be televised on HBO. In September 1998, Rahman signed another agreement with Kushner for this match and received a \$25,000 advance from Kushner for training expenses.

On Aug. 22, 1998, King had one of his attorneys call Rahman. The

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CEDRIC KUSHNER PROMOTIONS,
LTD. v. DON KING ET AL.
DOCKET NO. 00-549

ARGUMENT DATE:
APRIL 18, 2001
FROM: THE SECOND CIRCUIT

Case at a Glance

In this case, two boxing promoters square off over whether a person can be held liable under RICO for conducting the affairs of a closely held corporation through a pattern of racketeering activity even if that person was acting within the scope of his employment as an officer of that corporation.

attorney told Rahman that King wanted to speak with him about the Tua fight and that he should not take the fight. King and Rahman met a short time later and King told Rahman not to fight Tua.

When King and Rahman met several days later, King gave Rahman a \$125,000 check to ensure that Rahman would not fight Tua. King told Rahman that Rahman could never be the No. 1 heavyweight challenger without King as his promoter.

In August, Kushner met with Rahman and Rahman's manager and trainer. During that meeting, Rahman confirmed that he had signed a promotional contract with King and said that King had threatened him. Kushner alleged that King was aware of plaintiff's contract with Rahman and that King's contract with Rahman directly conflicts with Kushner's contract with Rahman.

Rahman did not fight Tua in 1998. Kushner claimed that King persuaded Rahman to feign a hand injury two weeks before the fight, and the bout was subsequently canceled.

Louis DelValle, another professional boxer, was also under an exclusive promotional agreement with Kushner. Kushner arranged for DelValle to fight Darrio Mattione, a professional boxer promoted by King. King agreed to pay Kushner \$300,000 for the DelValle bout. When another bout scheduled for the same evening was canceled, King canceled the DelValle fight with Mattione. Kushner was not paid under the DelValle contract.

In 1998, Kushner filed a complaint for \$12 million in damages, asserting claims against King and DKP under the Racketeer Influenced and Corrupt Organizations Act (18 U.S.C. §§ 1961 et seq.) and for com-

mon law fraud and tortious interference with contract. In his complaint, Kushner claimed that King had violated Section 1962(c) of RICO and had conspired to do so in violation of Section 1962(d). These sections provide a basis for both civil and criminal liability under RICO. Among other things, the complaint alleged wire and insurance fraud whereby King caused DKP's controller fraudulently to alter documents and to telecopy such falsified documents to DKP's insurance agents, insurance underwriters, and others.

The trial court granted King's motion to dismiss the RICO claims and also dismissed the remaining state law claims for lack of subject matter jurisdiction. 1999 WL 771366 (S.D.N.Y. 1999). Kushner then appealed to the U.S. Court of Appeals for the Second Circuit. The Second Circuit affirmed the district court, holding that, in order for there to be liability under Section 1962(c), the alleged RICO "person" and the RICO "enterprise" must be distinct. 219 F.3d 115 (2d Cir. 2000) (per curiam). Because King was an employee acting within the scope of his authority at DKP, the Second Circuit concluded that King, the RICO "person," and DKP, the RICO "enterprise," were not distinct and thus that there was no RICO liability under Section 1962(c).

The Supreme Court thereafter granted Kushner's request for review of the Second Circuit's decision. 121 S.Ct. 653 (2000).

CASE ANALYSIS

Congress enacted RICO as Title IX of the Organized Crime Control Act of 1970. The stated purpose of RICO is to seek the eradication of organized crime in the United States by strengthening the legal tools in the evidence-gathering process, establishing new penal pro-

hibitions, and providing enhanced sanctions and new remedies to deal with the unlawful activities of those engaged in crime.

RICO provides criminal and civil sanctions. A civil RICO action may be brought by either a government plaintiff or a private plaintiff "injured in his business or property." A successful plaintiff can recover treble damages in a civil RICO action. An increase in the use of the civil RICO provisions by private plaintiffs has been accompanied by complaints asserting that many civil RICO suits have been beyond the Act's scope and are abusive. See *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 499-500 (1985) (suggesting that correction of any defect inherent in RICO must lie with Congress). The courts have acknowledged confusion regarding the proper interpretation of civil RICO statutes. *Beauford v. Helmsley*, 843 F.2d 103, 104 (2d Cir. 1988), *opinion vacated*, 492 U.S. 914 (1989) ("Despite the Supreme Court's decision in *Sedima* ... , courts generally, and courts in the Second Circuit in particular, remain confused (and certainly confusing) in their construction of the statutes governing so-called civil RICO, the provision of a private civil remedy of treble damages for injury 'by reason of a violation of' the substantive provisions of [RICO]").

RICO is not limited in its scope to organized crime. *H.J. Inc. v. Northwestern Bell Tel. Co.*, 492 U.S. 229, 243-44 (1989); *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 499 (1985). Defendants, whether natural persons or corporate entities, do not have to be associated with organized crime in order to qualify as a "person" who has engaged in proscribed activities. *Schacht v. Brown*, 711 F.2d 1343, 1353-54 (7th Cir.), *cert. denied*, 464 U.S. 1002 (1983). Both legitimate

and illegitimate enterprises engaged in a pattern of racketeering are liable under RICO. *H.J. Inc. v. Northwestern Bell Tel. Co.*, 492 U.S. 229, 243-44 (1989); *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 499 (1985).

“Racketeering activity” involves the commission of a “predicate offense.” *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 495 (1985). Section 1961(1) contains a list of predicate acts. The list of predicate acts is exhaustive; no act not listed in Section 1961(1) can constitute a predicate offense for purposes of RICO.

RICO does not require that a defendant be convicted of any of the underlying predicate acts before a civil RICO action can be initiated. *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 493 (1985). A “pattern” of racketeering may encompass multiple predicates within a single scheme that were related and amounted to, or threatened the likelihood of, continued criminal activity. *H.J. Inc. v. Northwestern Bell Tel. Co.*, 492 U.S. 229, 237 (1989). The two most frequently alleged predicate acts are mail or wire fraud.

Section 1962(c) makes it unlawful for any person employed by or associated with any enterprise that is engaged in or affects 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 or collection of unlawful debt. A “person” for purposes of RICO includes any individual or entity capable of holding a legal or beneficial interest in property. 18 U.S.C.A. § 1961(3). RICO broadly determines “person” to include corporations and municipal corporations.

Section 1961 defines an “enterprise” as including “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.A. § 1961(4). See *United States v. Turkette*, 452 U.S. 576, 583 (1981) (elements necessary to establish existence of an enterprise for RICO purposes are (1) evidence of an ongoing organization, formal or informal; (2) evidence that various associates function as a continuing unit; and (3) existence separate and apart from the pattern of activity in which it engages).

RICO actions are limited to those suits in which the plaintiff can prove an ascertainable ongoing organization or “enterprise” that is distinct from a pattern of racketeering activity and whose members function as a continuing unit for a common or shared purpose. See *United States v. Turkette*, 452 U.S. 576, 583 (1981) (the “enterprise” is an entity while the “pattern” of racketeering activity is a series of criminal acts as defined by statute).

Kushner argues that there is no express requirement in Section 1962(c) to plead distinctness between the RICO “person” and the “enterprise.” According to Kushner, any implied requirement of distinctness is necessarily satisfied by identifying separate legal entities as the RICO “person” and the “enterprise” without inquiring into the degree of distinctness. Relying on *United States v. Turkette*, Kushner says that a corporation is both a legal entity and a defined “enterprise” regardless of whether its affairs are legitimate or not. Kushner says that because he has alleged that an individual natural person (King) is an employee of a corporate enterprise (DKP), nothing more is

required to satisfy any requirement of distinctiveness.

King disagrees, claiming that the requisite “distinctness” between a RICO “enterprise” and a RICO “person” does not exist if the employee’s alleged predicate acts are committed within the scope of his or her employment and on behalf of the corporation rather than outside the scope of employment and for the employee’s own benefit. Declaring that the Second Circuit’s position is consistent with the expressed legislative intent in RICO, King contends that his purported racketeering acts are no different from those of DKP, the alleged “enterprise” on whose behalf and for whose benefit his actions were taken. It is King’s position that DKP and King are functionally identical under Section 1962(c) because, acting in his capacity as DKP’s president and for DKP’s benefit, King was DKP.

According to Kushner, Section 1962(c) is directed, in part, at employees of enterprises who have the power to conduct that enterprise’s affairs. When there is a formal legal entity identified as the RICO enterprise, such as DKP, Kushner says there is no issue of either scope of authority, legitimacy of activity, type of activity, or degree of distinctness; rather, the dispositive issue is whether the employee has the ability to operate or manage the enterprise so as to conduct its affairs through a pattern of racketeering. See *Reves v. Ernst & Young*, 507 U.S. 170, 179 (1993).

In response, King states that the appropriate test for employee liability under Section 1962(c) is whether the employee’s alleged predicate acts are conducted for the employee’s benefit and on his or her individual behalf, or, as the Second Circuit has stressed, “on behalf of

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the corporation.” King urges that in the former instance the requisite “distinctness” exists between the employee and the “enterprise” corporate employer, but that in the latter instance it does not.

SIGNIFICANCE

The Second Circuit’s decision in this case conflicts with the decisions of other courts of appeals. *See, e.g., Jaguar Cars, Inc. v. Royal Oaks Motor Car Co.*, 46 F.3d 258, 265-69 (3d Cir. 1995); *Khurana v. Innovative Healty Care Systems, Inc.*, 130 F.3d 143, 156 (5th Cir. 1997); *Davis v. Mutual Life Ins. Co. of New York*, 6 F.3d 367, 377-78 (6th Cir. 1993); *Richmond v. Nationwide Cassel L.P.*, 52 F.3d 640, 646-47 (7th Cir. 1995); *Sever v. Alaska Pulp Corp.*, 978 F.2d 1529, 1534 (9th Cir. 1992); *Brannon v. Boatmen’s First Nat’l Bank of Okla.*, 153 F.3d 1144, 1148 n.4 (10th Cir. 1998).

The First Circuit, however, appears to agree with the Second Circuit’s interpretation of Section 1962(c). *See Bessette v. Avco Financial Service, Inc.*, 230 F.3d 439, 449-50 (1st Cir. 2000).

In its *amicus* brief, the United States contends that the practical consequences of upholding the Second Circuit’s decision would be

severe. Kushner and the United States suggest that the Second Circuit’s approach would permit a criminal to incorporate and thereby take advantage of the corporate shield attendant to that separate entity and then be immune from RICO prosecution because of the Second Circuit’s overbroad distinctness rule.

King says this is incorrect. Where the corporate form is a sham, King asserts that Section 1962(c) would apply because individual actors can be held liable for using a sham corporate enterprise as a passive tool to extract money or to achieve some other illegal purpose through a pattern of racketeering activity. He argues that the real threat to justice is the sweeping application of Section 1962(c) espoused by Kushner, which would expose individuals to potential treble damage liability based on garden-variety fraud allegations simply because they are employed by a corporation that can then always be named as the RICO “enterprise.”

According to King, such exposure would discourage service by qualified individuals on boards of directors of both for-profit and charitable corporations, “which hardly seems a wise policy decision.”

ATTORNEYS FOR THE PARTIES

For Cedric Kushner Promotions, Ltd. (Richard A. Edlin (212) 848-1000)

For Don King et al. (Peter E. Fleming Jr. (212) 696-6000)

AMICUS BRIEFS

In Support of Cedric Kushner Promotions, Ltd.

National Association of Securities and Commercial Law Attorneys (Kevin P. Roddy (213) 861-7454)

The United States (Barbara D. Underwood, Acting Solicitor General (202) 514-2217)