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SECOND CIRCUIT REVIEW

Expert Analysis

Litigation Activity in a Single Lawsuit Is No Basis for Civil RICO Claim

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For over 30 years, retaliatory civil RICO actions, often brought by disgruntled former litigation adversaries, alleging predicate acts of fraudulent litigation activity, have been the object of public policy concern for the district courts of the Second Circuit. *See, e.g., von Bulow by Auersperg v. von Bulow*, 657 F. Supp. 1134, 1143 (S.D.N.Y. 1987). In a matter of first impression likely to impact a litigant's ability to successfully plead certain civil RICO claims in the future, the U.S. Court of Appeals for the Second Circuit ruled that an alleged *single* frivolous, fraudulent or baseless lawsuit cannot constitute a viable RICO predicate act of racketeering activity. *Kim v. Kimm*, 884 F.3d 98 (2d Cir. 2018). In so ruling, the Second Circuit concurred with long-established district court precedent and four other courts of appeals on the issue, while simultaneously declining to declare all civil RICO actions based on litigation activity categorically meritless. *See id.* at 104 (discussing precedent).

> Disgruntled former litigation adversaries often bring retaliatory civil RICO actions alleging fraudulent activities in prior lawsuits.

RICO's Statutory Framework

The Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. §§1961, et seq., was enacted by Congress to counter the infiltration and corrupt influence of organized crime. *See* U.S. Dep't of Justice, "Criminal RICO: 18 U.S.C. §§1961-1968, A Manual For Federal Prosecutors" 4–8 (6th rev. ed. 2016). RICO, however, is not limited to violent crimes and may attach to any act indictable under federal criminal statutes including mail and wire fraud.

Moreover, Section 1964(c) of the act creates "a private right of action to any person injured in its business or property by reason of a violation of activities

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prohibited by section 1962." To successfully bring a civil RICO action, a plaintiff must establish: (1) a violation of section 1962 (criminal RICO); (2) an injury to business or property; and (3) that the injury was caused by the violation of section 1962. To adequately allege a violation of section 1962, a plaintiff must show: (1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity. "Racketeering activity" is defined as any "act" indictable under federal criminal statutes, including the mail and wire fraud statutes (18 U.S.C. §§1341, 1343), and the obstruction of justice statute (18 U.S.C. §1503). 18 U.S.C. §1961(1). A "pattern of racketeering activity" is defined by the statute as "at least two acts of racketeering activity" within a 10-year period. 18 U.S.C. §1961(5).

Within this statutory framework, disgruntled former litigation adversaries often bring retaliatory civil RICO actions alleging, among other things, that certain litigation activities in prior lawsuits were fraudulent. *See, e.g., Kashelkar v. Rubin & Rothman*, 97 F. Supp. 2d 383, 385 (S.D.N.Y. 2000), *aff'd sub nom. Kashelkar v. Ruben & Rothman*, 1 F. App'x 7 (2d Cir. 2001). *Kim* is one such case.

RICO Allegations in 'Kim'

Kim involved an earlier, and rather protracted, litigation between restaurateurs over the use of a Korean barbecue restaurant trademark pursuant to a trademark licensing agreement. In an unpublished opinion, the district court granted partial summary judgment in favor of then-defendant Daniel Kim on plaintiffs' claims for breach of contract, fraudulent trademark registration, and trademark infringement. The remaining claims were voluntarily dismissed by the parties. Kim, an attorney representing himself pro se, then brought a civil RICO action alleging that, among other things, all the participants in the earlier lawsuit including the restaurateur, his wife and business partner, their two attorneys, and an accountant (collectively, "Defendants") engaged in a scheme to fraudulently sue Kim for trademark infringement.

Kim alleged that, during the trademark infringement suit, at least three defendants prepared, signed, and filed four sworn declarations knowing the declarations were false. Kim asserted that the fraudulent litigation activity constituted obstruction of justice, mail fraud, and wire fraud pursuant to Section 1962 of the RICO Act, and were the required multiple predicate acts to show a pattern of racketeering activity.

Defendants moved to dismiss the action on numerous grounds including failure to plead the required predicate acts for a RICO claim.

District Court's "Thorough And Well-Reasoned Analysis"

The district court found that "the majority of predicate acts alleged [by Kim] concern[ed] actions … taken by defendants in the course of the [trademark infringement] litigation." Citing a "growing body of persuasive authority from this and other jurisdictions," the court concluded that "[w]ell-established precedent and sound public policy preclude[d] such litigation activities from forming the basis for predicate acts under Section 1962(c)." Op. and Order at 8, *Kim v. Kimm*, No. 15-CV-04784 (E.D.N.Y. Aug. 9, 2016).

The court explained that "this rule … evolved in response to overreaching plaintiffs who

have sought to use RICO against former litigation adversaries instead of[,] or in addition to[,] state law causes of action such as abuse of process and malicious prosecution." Notably, the court pointed out that the rule "does not leave parties facing fraudulent litigation without recourse." Parties may still seek redress in a tort lawsuit for malicious abuse of process or malicious prosecution, and by pursuing Rule 11 sanctions. *Id*. at 8–9, 12.

District Court Precedent and Public Policy Grounds Affirmed

The Second Circuit affirmed in an opinion written by Judge Sack, joined by Circuit Judges Jacobs and Parker. The court stated its "agree[ment] with the district court's thorough and well-reasoned analysis" and adopted the three "compelling policy arguments" outlined by the district court for supporting this new rule.

First, the Second Circuit explained that "[i]f litigation activity were adequate to state a claim under RICO, every unsuccessful lawsuit could spawn a retaliatory action, which would inundate the federal courts with procedurally complex RICO pleadings." Second, the court agreed that "permitting such claims would erode the principles undergirding the doctrines of res judicata and collateral estoppel, as such claims frequently call into question the validity of documents presented in the underlying litigation as well as the judicial decisions that relied upon them." Third, the Second Circuit concluded that "endorsing [an alternative] interpretation of RICO would chill litigants and lawyers and frustrate the well-established public policy goal of maintaining open access to the courts because any litigant's or attorney's pleading and correspondence in an unsuccessful lawsuit could lead to drastic RICO liability."

Curtailing the scope of its decision, the Second Circuit stopped short of declaring all civil RICO actions based on litigation activity categorically meritless. "We conclude only that where, as here, a plaintiff alleges that a defendant engaged in a single frivolous, fraudulent, or baseless lawsuit, such litigation activity alone cannot constitute a viable RICO predicate act."

Conclusion

The ruling in *Kim* solidifies a pre-existing and well-established body of district court precedent. By narrowing the ruling to claims based on a single lawsuit, however, the Second Circuit leaves the door open for courts to consider those civil RICO claims alleging predicate acts that "amount[] to far more than mere 'litigation activities,' and … [involve] extensive and broader schemes to defraud" or that involve a fraudulent criminal scheme "entirely external to, and independent of, any of the particular disputes between the litigants in the civil actions that were improperly filed and litigated by the … defendants in execution of their scheme" consistent with *United States v. Eisen*, 974 F.2d 246 (2d Cir. 1992). *See Curtis & Assocs. v. Law Offices of David M. Bushman*, 758 F. Supp. 2d 153, 176 (E.D.N.Y. 2010), *aff'd sub nom. Curtis v. Law Offices of David M. Bushman*, 443 F. App'x 582 (2d Cir. 2011) (quoting *Nakahara v. Bal*, No. 97 CIV. 2027 , 1998 WL 35123, at *9 (S.D.N.Y. Jan. 30, 1998)).