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PERSPECTIVE

Civil RICO questions linger

By William Thomson, Shannon Mader and Richard Dudley

Jurisprudence surrounding the Racketeer Influenced and Corrupt Organizations Act (RICO) continues to evolve. Last June, the U.S. Supreme Court addressed two important issues: the extent of RICO's extraterritorial application and the scope of the injury requirement under 18 U.S.C. Section 1964(c). On the injury issue, one important question is what types of property interest are sufficient to state claims for private civil RICO plaintiffs, including whether an interest in a non-final judgment can ever qualify as such a property interest. How courts choose to resolve this and related questions going to what types of alleged harms qualify as injuries to "business or property" under RICO has the potential to shape future civil RICO litigation.

Section 1964(c) provides a private cause of action for "any person injured in his business or property by reason of a [RICO] violation." In *RJR Nabisco, Inc. v. European Cmty*., 136 S. Ct. 2090 (2016), the Supreme Court addressed this injury requirement and held — for the first time — that the statute requires private plaintiffs to plead and prove a domestic injury to their business or property. While the court recognized that "[t]he application of this rule in any given case will not always be self-evident," it declined to provide additional clarification.

RJR is just the latest case addressing RICO's injury requirement. It is well settled, for example, that "personal injuries" do not suffice under RICO because they are "not a claim for an injury to property as section 1964(c) requires." *Berg v. First State Ins. Co.*, 915 F.2d 460 (9th Cir. 1990). Similarly, courts have required private RICO plaintiffs to show injury in the form of "concrete financial loss, and not mere injury to a valuable intangible property interest." *Steele v. Hosp. Corp. of Am.*, 36 F.3d 69 (9th Cir. 1994). In determining whether a plaintiff has suffered injury to a cognizable property interest and "whether [that] particular interest amounts to property," courts often look to state law. *Doe v. Roe*, 958 F.2d 763 (7th Cir. 1992); *see also Diaz v. Gates*, 420 F.3d 897 (9th Cir. 2005) (en banc), *cert. denied*, 546 U.S. 1131 (2006) (noting this issue is "a categorical inquiry typically determined by state law").

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Applying this, many courts have held that an interest in a non-final or not-yet-existing trial court judgment is not a cognizable property interest under RICO. In *Nix v. Hoke*, the court dismissed a RICO claim based on the plaintiff's alleged loss of a favorable trial court judgment; the court noted that "the judgment sought by [the plaintiff] ... was not, and is not, plaintiff's 'property' within the meaning of § 1964(c)." 62 F. Supp. 2d 110 (D.D.C. 1999). The court explained that "allow[ing] a private RICO plaintiff to go forward on the theory that a judgment sought in litigation is already his 'property' would 'allow all factually injured plaintiffs to recover' under the statute."

Similarly, in *Bryant v. Mattel, Inc.*, the court held that the plaintiff's alleged loss of access to funds and intellectual property did not qualify as a valid RICO injury. 04-cv-9049 (C.D. Cal. Aug. 2, 2010). Noting that the plaintiff "never did and does not now have an enforceable judgment" against the defendant, the court held that there was no "harm to a specific business or property interest," and so "no injury to business or property within the meaning of RICO."

In general, courts have held that non-final judgments and causes of action are not recognized property rights because they are not "final and unreviewable." *Hosp. Ass'n of New York State, Inc. v. Toia*, 577 F.2d 790 (2d Cir. 1978); *see also Ileto v. Glock, Inc.*, 565 F.3d 1126 (9th Cir. 2009) ("We have squarely held that although a cause of action is a species of property, a party's property right in any cause of action does not vest until a final unreviewable judgment is obtained.") (internal quotations omitted).

Some courts have framed the issue in terms of ripeness. In *Lincoln House v. Dupre*, the court dismissed the plaintiff's claim as "not now ripe for judicial resolution" where the plaintiff's alleged injury was "clearly contingent on events that may not occur as anticipated or may not occur at all." 903 F.2d 845 (1st Cir. 1990). The only injury alleged by the plaintiff was "its hypothetical inability to recover" against the defendant. But this injury might never come to pass; indeed, as the court noted, it was possible that the plaintiff would lose the other action, in which case there would be no final and enforceable judgment and, therefore, "no RICO claim."

Similarly, in *DeSilva v. North Shore-Long Island Jewish Health System, Inc.*, the court found a plaintiff's claim to be unripe where it was based on "[a] hypothetical inability to recover under certain claims that plaintiffs *might* have pursued and that *might* have been dismissed on statute of limitation grounds." 770 F. Supp. 2d 497 (E.D.N.Y. 2011). The court described the plaintiff's alleged injury as "entirely speculative and hing[ing] upon events that have not yet — and may never — come to fruition," and noted that RICO claims are "unripe where the injury alleged [is] contingent upon uncertain litigation-related events."

This is not to say that an interest in a judgment can never qualify as "property" for purposes of RICO. Some courts have recognized the "loss of a legitimate debt and related expenses" as a cognizable RICO

injury. *Bankers Trust v. Rhoades*, 859 F.2d 1096 (2d Cir. 1988). Along these same lines, some courts have recognized that a RICO action may lie where the plaintiff is prevented from collecting on a final judgment by reason of RICO violations. *See Stochastic Decisions, Inc. v. DiDomenico*, 995 F.2d 1158 (2d Cir. 1993). In such situations, it is normally the "attempt[] in vain to enforce [a] judgment" that establishes the injury to the plaintiff's property interest. *Bryant, supra*.

This question of whether an interest in a non-final judgment qualifies as "property" continues to percolate among the courts. For example, in 2014, the 3rd U.S. Circuit Court of Appeals analyzed whether "interference with a personal injury claim" constituted an injury to a property interest for purposes of the New Jersey RICO statute (which is interpreted in conformity with the federal statute). *Williams v. BASF Catalysts LLC*, 765 F.3d 306 (3d Cir. 2014). Explaining that an attempt to "interfere[] with [an] attempt to recover for [an] earlier personal injury" is not a cognizable injury, the court held an inchoate claim cannot be a property right.

On the other hand, the 9th U.S. Circuit Court of Appeals held in a 2005 case that the settling of claims for a "smaller percentage of [the plaintiffs'] alleged damages than they could have received" absent the defendant's fraudulent conduct does represent a cognizable RICO injury under Hawaii law. *Living Designs, Inc. v. E.I. DuPont de Nemours & Co.*, 431 F.3d 353 (9th Cir. 2005). Similarly, this issue may be litigated in the Southern District of Illinois. *See Hale v. State Farm Mut. Automobile Ins. Co*., 12-0660 (S.D. Ill. Sep. 16, 2016). In granting class certification, the court in *Hale* held that a purported class had demonstrated RICO damages based on "the loss of [a] judgment, a concrete and recognized property interest that the entire class possessed prior to the RICO misconduct." Explaining that the alleged injury was "based on the interest the plaintiffs and the proposed class members had in a neutral forum and the damages correspond with the undivided interest in the judgment each lost as a result of the tainted tribunal," the court held that the plaintiffs had shown class-wide damage consistent with their theory of liability.

Most courts appear likely to continue to rely on the distinction between final and non-final judgments in determining whether an alleged injury meets the RICO "business or property" prong, but many questions still remain as to whether RICO plaintiffs can rely on an interest in a judgment as the "property" for purposes of the statute. The adjudication of civil RICO cases involving alleged litigation misconduct and/or attempts to collect on money judgments will continue to shape the laws in this area, as will the Supreme Court's recent decision interpreting the statute's injury requirement.

William Thomson *is a litigation partner in Gibson, Dunn & Crutcher LLP's Los Angeles office and co-chair of the firm's Transnational Litigation Practice Group.* **Shannon Mader** *is an associate in the firm's Century City office, and* **Richard Dudley** *is an associate in the firm's Washington, DC office.*