

RICO: Businesses' Best Weapon Against Bribes, Kickbacks and Other Forms of Corporate Corruption

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In the minds of most Americans, the Racketeer Influenced and Corrupt Organizations (RICO) Act and the Godfather movies go hand-in-hand, and so they should. Remember the scene following Michael's assassination of a police officer in the first Godfather movie? Vito Corleone and all the heads of the New York families are meeting in a dark, smoky conference room, negotiating a truce to the mob war that has broken out over Don Corleone's refusal to allow his family's resources to be used in drug sales. This scene depicts the essence of a RICO claim. When RICO was passed by Congress in 1970, it was intended to be a cannon aimed at this conference room, filled with smoke, gangsters and guns.

Somewhere along the line, however, the RICO cannon ball passed through its target (the mob) and headed straight for American business. In the mid-1980s, the most common RICO enterprise was not a mob family but a corporate family. The most common racketeering activities were not murder, extortion, loan sharking and illegal gambling; they were mail and wire fraud in the form of allegedly untruthful advertisements. And the most common RICO defendants were not the heads of crime families but the heads of some of America's most prominent businesses.

Out of nowhere, RICO became a way for plaintiffs' lawyers to transform common law product liability, breach of contract and fraud claims into federal mail and wire fraud actions, which threatened to impose treble damages and attorney's fees. Coming as a surprise to many businesses, and also to many courts, this surprise left a bad taste in the mouth of America business. RICO was not a tool against organized crime but a club that threatened to undermine business and bestow an undeserved windfalls on plaintiffs' lawyers. To American business, RICO was the best example of how the good intentions of government can lead to catastrophe.

As a result of the unforeseen applications to which RICO was being put, the courts began an effort in the 1990s to limit RICO. Although the court-developed limitations and defenses are all based upon the language of the statute, the interpretation of RICO's clear language, and the recognition of the limitations arising from that language, was, and continues to be, a great feat of judicial activism.

Today, there are numerous defenses available to businesses facing RICO claims that were not available just five or ten years ago. For example there is RICO's person-enterprise distinction, RICO's proximate cause requirement, RICO's pattern of racketeering activity requirement, RICO's statute of limitations and RICO's rules of accrual. These defenses are complicated but, in the hands of an expert, these defenses

can offer considerable hope that no business need succumb to the threat of treble damages without first putting up a very good fight.

Despite all of the changes RICO has undergone since 1970, one aspect of the statute remains untouched, largely because its intended beneficiaries have never sought to employ its power. Yes, RICO was meant to protect society from the malfeasance of organized crime, but RICO was also intended to protect business from corruption and to weed out criminal business practices.

For example, earlier this year, Montgomery Wards brought a RICO claim against one of its employees and a vendor. The vendor was contracted to provide Y2K assistance to Montgomery Wards, but the vendor and the Montgomery Ward's purchasing agent who was responsible for overseeing and paying the vendor, entered an agreement whereby the agent would submit and pay the vendor's overstated invoices. Once the vendor received the inflated payments, the vendor wired a kickback to the agent. Upon discovering such a scheme, many employers would simply fire the employee and leave the matter at that -- figuring that the employee had blown the kickbacks and that there was no recourse against the vendor.

In addition to fighting the mob, RICO was designed to fight this kind of business corruption. RICO allows Montgomery Wards, and other similarly situated businesses, to not only sue the employee but also to sue the vendor. In most cases, the primary beneficiary of the scheme is the vendor, not the "judgment proof" employee. If successful, Montgomery Wards will recover from the vendor three times the value of the kickbacks and any lost profits (i.e., Montgomery Wards was probably charged more than fair market value for the computer services because there would have been no reason to pay the kickbacks if the vendor's prices had been competitive). In addition, Montgomery Wards will also recover the costs and attorneys' fees incurred in bringing the claim.

The Montgomery Wards case is simply a recent example of how RICO can be used to recover losses caused by business corruption. RICO has been used in this manner many times but, for some reason, most businesses are reluctant to use RICO for their own benefit. Perhaps this reluctance stems from RICO's frequent misuse against businesses in the 1980s and early 1990s. Perhaps this reluctance stems from the apparent enormity and complexity of a RICO claim and all of its anomalous catch phrases, like "enterprise," "racketeering activity," and "pattern of racketeering activity." Regardless of the source of the reluctance, American business should not overlook the protections and remedies afforded to it by RICO. Overzealous lawyers abused the statute in the 1980s, the statute did not abuse itself.

RICO is complicated, but no more complicated than many other laws. If a business runs across corruption in its midst, RICO is the best weapon.

Well -- second best weapon -- the first is a good lawyer who knows the statute.

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