

## RICO and Eminent Domain: Condemnation or Crime?

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In recent months, many clients and website visitors have sought my advice on how RICO can be used to thwart allegedly criminal eminent domain proceedings brought by municipalities. It appears municipalities are increasingly using their power of eminent domain not to condemn land so that a street or firehouse can be constructed but to oust one business in favor of another.

The power of eminent domain must be based upon a **public benefit**. The public benefit arising out of a new highway or school is obvious, but how does the public benefit when one business' property is condemned so that the city may sell the property to another business?

Municipalities argue that the public benefit from such activity is increased revenue from property taxes.

For example, imagine a very busy interstate highway running through an urban area. For decades, this highway has been predominantly populated by car dealerships with huge parking lots full of new and used cars. Then one day a large national retailer approaches the city and says, "we're looking for a new place to build our headquarters; too bad there is no land available here." The city thinks about it for two seconds, and says, "well, we can just condemn the car lots and sell the land to you," and that's exactly what the city does. The city condemns the land owned by the car dealerships and then sells the land to the retailer. The public benefit? A large office complex will have a much higher property value than a bunch of parking lots so more money flows to the city in the form of higher property taxes.

Obviously, the ousted owners do not view the city's actions as altruistic. The ousted owners believe the city has stolen their property through the power of condemnation and given it to someone else.

### Can such conduct give rise to a RICO claim?

As with most questions of law, there is no general answer. A RICO claim would most likely exist if the benefited business was bribing the city officials responsible for condemning property and there was a long history of bribes, condemnation, and city land sales to the briber. In such a case, bribery -- not eminent domain -- would be the issue, and a RICO claim can be predicated on acts of bribery.

To predicate a RICO claim simply on the wrongful use of a city's eminent domain power is a difficult task. Two reported decisions in the case of *Pelfresne v. Village of Rosemont*, 22 F. Supp.2d 756 (N.D. Ill. 1998) and 35 F. Supp.2d 1064 (N.D. Ill. 1999) shed light on some of the hurdles an ousted property owner is likely to confront.

In *Pelfresne*, the plaintiff alleged that city officials had been trying to acquire plaintiff's property since 1979 by condemning it as "blighted" and by raising the real estate taxes to confiscatory levels. The city, plaintiff's claimed, initiated fraudulent tax proceedings

against the property, supported by false affidavits from tax officials, all in an effort to further raise plaintiff's property taxes. It was also alleged that city officials breached a previous settlement agreement with plaintiff, requiring the plaintiff to obtain a zoning permit to open a restaurant on the property, even though the property was zoned for commercial use and, therefore, no such permit was required. When the plaintiff applied for the permit, the application was denied.

Plaintiff claimed that Defendants' actions were doubly motivated: 1) the defendant city officials wanted to use the property for facilities or businesses owned or operated by the Village and award themselves lucrative concessions; and 2) the city officials wanted to put the property into the hands of a few favored developers who, aided by improper real estate tax exemptions, have the ability to compete unfairly with private business. Coincidentally, some of the city officials' businesses benefited from sweet-heart leases with these favored developers. Plaintiff asserted that the sham eminent domain proceedings constituted a pattern in that almost all of the industrial and commercial real estate in the city had been acquired by condemnation or eminent domain, or by the threat thereof, and was controlled by the defendant city officials.

The first hurdle the Plaintiff in *Plefresne* had to overcome was legislative immunity. The city officials argued they could not be held liable because the exercise of their eminent domain authority was a legislative function. 35 F. Supp. 2d at 1070. The court held that even if the zoning resolutions constituted legislative functions, the city officials' other allegedly wrongful behavior (e.g., refusing the grant permits and initiating tax proceedings) were administrative functions that were not immune.

Defendants also argued that, although plaintiff named individual city officials as defendants, the actual defendant was the city, and a city cannot constitute a defendant person under RICO section 1964(c). 22 F. Supp. 2d at 760. The court was not persuaded by the defendants' effort to recast plaintiff's complaint. Because the Defendants were the city officials, not the city, the allegations were sound. Plaintiff initially named the Office of the Mayor as the enterprise, which the court held to be improper, since it was the city not the Office of the Mayor that had authority to condemn property. The court, however, gave Plaintiff leave to amend its complaint to name the city as the enterprise. *Id.* at 762.

Plaintiff based its pattern of racketeering activity allegations on two letters mailed by the city officials: one letter denying Plaintiff's restaurant permit and another letter informing Plaintiff of the eminent domain action. Plaintiff alleged that these letters constituted acts of mail fraud. Defendants argued that the letters were not acts of mail fraud because they contained no fraudulent statements. The court sided with Plaintiff and held that a mailing need only further a scheme to defraud and need not contain any actual fraudulent statements itself. If, in fact, the city officials were engaged in a scheme to defraud plaintiff through sham eminent domain proceedings, then the letters furthered that scheme and were sufficient to constitute mail fraud. *Id.* at 764.

The court also held that Plaintiff had sufficiently alleged a “pattern” on the basis of the two mailings, because Plaintiff alleged an ongoing scheme to use the eminent domain process for wrongful purposes and the mailings were part of that ongoing scheme. *Id.* at 763. The court’s conclusion on pattern is thinly supported. A defendant is only liable for engaging in a pattern of racketeering activity, i.e., mail fraud or some other criminal conduct enumerated in section 1961(1). If other actions engaged in by the city officials were not subject to sanction under RICO, then it is questionable whether the two instances of mail fraud were sufficient to constitute a pattern.

Finally, with regard to injury, Plaintiff claimed lost rent on the restaurant and lost property value by reason of the eminent domain proceedings. The court held that Plaintiff’s lost rent and present lost property value was compensable, but damages based on the future reduced value of the property were too speculative. *Id.* at 765.

As *Plefresne* demonstrates, the largest impediment to a RICO claim arising out of eminent domain proceedings is alleging and proving a pattern of racketeering activity. If a city only once condemns property in favor of another business, then obviously a pattern will be difficult to establish. Ideally, the city officials should have a history of engaging in this type of behavior.

In addition, a RICO claim would be aided by acts beyond mail or wire fraud. Some clients have complained about city officials threatening to reduce city services unless they cooperated with the condemnation proceedings and other clients relate threats of increased traffic enforcement around their business (i.e., the city threatening to ticket customers for little or no reason unless the business cooperates). Arguably, such activity could constitute extortion under 18 U.S.C. § 1951. The more blatant such extortion, the better the basis of a RICO claim.

In short, the strongest RICO claims based on eminent domain would arise out of a long pattern of wrongful eminent domain proceedings, which included acts of extortion by city officials.

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