
**RICO REPORT: S01 EP07, DEFINING THE RICO RACKETEERING ELEMENT
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Hello, and thank you for joining me on this installment of the RICO Report. My name is Cal Stein and I am a partner in the white collar and litigation practice groups at Troutman Pepper. I represent clients in white collar, criminal, and government investigation matters, as well as in complex civil lawsuits and in RICO litigation. Today, I am doing this podcast solo because I am going to be introducing the next topic in this podcast series. And I say introducing because unlike many of our other topics, I am not going to be able to cover this one in a single episode. I am of course talking about the RICO element of racketeering activity, which are sometimes referred to as RICO Predicate acts. We are going to use those terms interchangeably. The pattern of racketeering activity has been called the heart of most RICO cases. And as you may recall from one of our very first episodes, the RICO statute does not itself make any specific conduct illegal.

It relies on conduct that is already illegal, most of which is criminalized by federal law. And what RICO does is it allows prosecutors and civil litigants to repackage that conduct that is already illegal into a RICO claim if other elements are met. Those are the things we have been talking about previously. This allows prosecutors to pursue enhanced penalties and it allows civil litigants to bring claims in civil court for criminal violations otherwise reserved for prosecutors. And as we have seen in previous episodes, the thing that allows prosecutors and plaintiffs to repackage allegations into a RICO claim is the existence or the alleged existence of a pattern of racketeering activity.

And in those episodes, we did talk about what constitutes a "pattern". How many violations over what period of time, relatedness plus continuity, all of that good stuff. But today we are going to focus not on the how many or the when, but rather on the what. What conduct by a RICO defendant will constitute racketeering activity as that term is defined by the RICO statute and by subsequent case law such that a plaintiff for a prosecutor can establish the requisite pattern. Then in future episodes, we are going to focus in on some of the most common types of racketeering activity violations that do qualify under the statute. But for today, we're going to talk generally about the racketeering activity element and what it means.

So how do we define the term racketeering activity? And we are going to start where we always do on this podcast with the words of the RICO statute itself. 18 USC section 1961 is Rico's definition section. Subsection one defines the term racketeering activity. Unsurprisingly, it's the very first term that the RICO statute defines. The definition is lengthy. Far too lengthy, in fact, for me to even read it right now.

It is lengthy because Congress, when it enacted RICO saw fit to actually list out all of the conduct and statutory violations, some state, some federal law that Congress intended to constitute racketeering activity and thus be covered by the RICO statute. Some commentators have actually observed that Congress intentionally made the list of racketeering activity very broad for the express purpose of encompassing every type of criminal conduct in which organized crime was involved. As listeners will remember, when the RICO statute was passed, it was passed primarily to combat organized crime. Although, that purpose has expanded over the years. That all may be true. However, the flip side of that analysis has proven very helpful to the defense bar. Because Congress was so explicit and arguably broad in what it included in the list of racketeering activity, any conduct or any violations that do not appear on the list is excluded from the definition. It has

become black letter law at this point that if something does not appear on Rico's list of racketeering activity, then it is not racketeering activity and is not covered by this statute.

Okay. So the definition of racketeering activity in RICO is broad, but surely there must be some organization or structure to the definition, lengthy as it may be, right? Well, there is though it is somewhat loose. Section 1961, subsection one actually breaks the definition of racketeering activity into subparts A through G. Not all these subparts are created equally. Though some are candidly more important than others. Generally speaking, the subparts correspond to the following. Subpart A refers to certain criminal offenses under state law, namely things like murder, kidnapping, gambling, arson, robbery, bribery, extortion, things like that, that constitute racketeering activity. Subsection B lists out federal criminal offenses that constitute racketeering activity, all of which are enumerated in the definition, which means they are listed out and all of which are found in title 18 of the US Code.

Subsection C of the definition refers to certain other federal criminal offenses. This time, those that appear under Title 29 dealing with labor unions. Subsection D refers to other federal offenses. This time under Title 11. Subsection E refers to violations of the current and Foreign Transactions Reporting Act. Subsection F refers to violations of the Immigration and Nationality Act. And subsection G refers to violations involving acts of terrorism. As you can probably see from that list, the categories at the beginning are much broader and encompass more types of racketeering acts than the ones at the end which are much, much narrower, some limited to even a single federal statute. So for that reason, we are going to focus our discussion today on the first three of those categories, the broadest categories. State offenses, federal offenses found in Title 18, and racketeering offenses in Title 29 that involve labor unions.

Now, obviously these three categories are not exhaustive. We just heard that there are four more categories beyond them. Every offense listed in the definition of racketeering activity does not fit neatly into one of these categories, but for the most part, these three categories capture the majority of what we tend to see in RICO litigation as constituting racketeering activity. So for our purposes today to introduce the topic, we will use those three.

So let's start with the first subcategory, the state criminal offenses. The RICO statute describes the state offenses that constitute racketeering activity generically. That means they do not reference specific state statutes. The statute includes within the definition of racketeering activity, "Any act or threat involving murder, kidnapping, gambling, arson, robbery, bribery, extortion, dealing in obscene matter, or dealing in a controlled substance or listed chemical as defined in section 102 of the Controlled Substances Act, which is chargeable under state law and punishable by imprisonment for more than one year." That is what the definition of racketeering activity says with respect to this first category.

What is interesting about this first category is that we have Congress trying to draft a federal law, RICO, that covers all manner of state law violations, criminal violations. At first, this really would not seem to be a major problem. After all, things like murder and kidnapping and arson are illegal in all states, right? Well, that is true, but different states use different terminology to describe that conduct, and Congress struggled a bit with how to draft RICO to capture all of the conduct it intended to capture, notwithstanding the state by state quirks in the criminal codes.

So what did Congress do? Well, it described the state offenses, as I said, generically rather than enumerating a list of offenses by name or by type. For example, felony versus misdemeanor because that can vary on a state by state basis. So Congress did this by using two phrases, the first being chargeable under state law, and the second being punishable by imprisonment for more than one year. Courts have interpreted these two phrases as being Congress' way of

encompassing all state offenses that would be indictable as felonies under federal law, even if they're not considered felonies under the law of a given state.

This was Congress's way of, for lack of a better term, federalizing all of the state offenses under RICO. So they fit into the definition of racketeering activity. No matter what a state calls the offense, and no matter what level of criminal violation a state considers an offense, if it would be indictable as a felony under federal law, it qualifies as racketeering activity. So what does all of this mean in a practical sense? Well, for one thing, it means that the government or a civil plaintiff relying on a state offense predicate act is not necessarily limited to the offenses that under state law bear the label that appears in the definition of racketeering activity.

Okay, let's now move on to the second category. Federal offenses contained in Title 18. The statutory definition of racketeering activity includes "any act which is indictable under," and then it proceeds to provide a lengthy list of federal criminal violations, all of which are contained in Title 18. But the key language is any act which is indictable under. So let's start by acknowledging that this section is narrower than the one we just discussed that addressed state law. That is because to qualify as racketeering activity under this subsection, the act must be indictable under one of the specific sections of Title 18 that is listed. Therefore, unlike the state crimes, these violations are described specifically not generically. There is no wiggle room to argue about whether certain conduct in violation of Title 18 is or is not racketeering activity.

In a very real sense, this makes for the easiest and the most straightforward application of the definition of racketeering activity. If a section of Title 18 appears on the list violating it will constitute racketeering activity. If a section of Title 18 does not appear on the list violating it will not constitute racketeering activity. It is that simple. Now, RICO's list of Title 18 violations also contains parentheticals that provide some description of each statutory section. Courts have held that Congress included the parentheticals for convenience only.

Put another way, they do not limit the conduct that constitutes racketeering activity, and I must say I find the parentheticals extremely convenient. If you're not familiar with every nook and cranny of the US Criminal Code Title 18, the reminders can be quite helpful. The RICO statute lists far too many violations of Title 18 to go through them all now or really even to list them all now. But suffice it to say that this is the subcategory where some of the most frequently used type of racketeering activity are found.

Most notable are the mail fraud and wire fraud statutes, both of which are violations of Title 18 and both of which are included in the list and thus constitute racketeering activity. Mail fraud and wire fraud are by far the most commonly used predicate acts in both criminal and civil RICO cases. Many of the other very commonly used predicate acts are also found as violations of Title 18, including money laundering and obstruction of justice. We are definitely going to spend some time in future episodes discussing these categories individually and how they fit into the overall RICO picture.

The next subcategory that we're going to talk about today though are the labor racketeering offenses that are violations of Title 29 of the US code. The RICO statute definition once again includes as racketeering activity "Any act, which is indictable." There's that language again, "Under 29 USC Section 186, which deals with restrictions on payments and loans to labor organizations or 29 USC Bible 1C, which relates to the embezzling of union funds."

Interestingly, these provisions have been used far more frequently in the civil RICO context than the criminal RICO context with the DOJ and civil litigants using them to go after corrupt unions. These statutory violations, however, can become a bit complicated, especially where a prosecutor or a plaintiff is trying to apply them to an entity that is not strictly a labor union. So the application of these predicate acts are mostly limited to combating labor corruption. That

application is admittedly pretty narrow, which is why we do not see many RICO cases in this day and age based on the labor offense predicate acts.

Okay, so as noted earlier, these three subcategories do not encapsulate everything that constitutes racketeering activity under RICO, and we will talk about some types of racketeering activity that do not fall within one of these three categories in future episodes. But for the most part, and generally speaking, these three categories encompass most of what Congress considers to be racketeering activity. And more importantly, these three categories illustrate quite well, in my opinion, the overall concept of racketeering activity within the RICO statute.

So what are some of the other requirements, some of the other general requirements that come along with the element of racketeering activity in the RICO context? Well, one question I get a lot is whether a defendant needs to be convicted of the underlying predicate offenses for RICO to apply? This is a reasonable question because as I noted earlier, RICO does not create new criminal violations. It repackages existing ones, so there would be some sense for it to apply the same standards as the underlying criminal violations. But alas it does not, at least not in the civil RICO context. A civil RICO defendant need not be convicted of the underlying crimes for RICO liability to potentially attach. In fact, the defendant not even need be charged with the underlying crime for a RICO plaintiff to bring a civil RICO claim.

Another question I get is, what about attempt offenses? The statute lists murder, but it doesn't list attempted murder. Well, the answer is a bit complicated. Whether an attempt offense like attempted murder constitutes racketeering activity within the RICO statute depends on which subsection of 1961 subsection one applies. Going back to the subcategories for a moment, subsection A of 1961, subsection one, you'll recall that discusses the state offenses that constitute racketeering activity. That section says, "Any act or threat involving," and then it goes on to list the specific state offenses, murder, kidnapping, et cetera. Subsection D of 1961 subsection one includes that same language with respect to certain general federal offenses.

The other subsections of 1961, subsection one, B, C, D, F, and G do not contain this language. Instead of saying act or threat involving those subsections, say any act which is indictable under and then lists various statutes, the result of this is that attempts to commit violations mentioned in subsection A or D will constitute racketeering activity while attempts to commit violations mentioned in the other sections will not constitute racketeering activity unless the attempt to commit the offense is specifically included in the statutory definition such that it is "indictable under the listed statute." The same goes for conspiracy to commit the listed offenses.

Okay, so with that, let's take a pause and I do say pause because we are going to return to the various forms of racketeering activity in a series of future episodes. We are going to discuss certain conduct that constitutes racketeering activity, most notably mail and wire fraud, and we will talk about how those violations end up in a RICO case, what they look like, how to defend against them, all of that good stuff. We are also going to talk about some violations that do not constitute racketeering activity, or at least do not always constitute racketeering activity, despite efforts by prosecutors and the plaintiff's bar to include them.

This is a big topic. It is one that is too important and too complex to tackle in one sitting, but my hope is that by providing this overview of racketeering activity today, we have set the stage for a better understanding of the more detailed analysis that is to come in future more specific episodes. So with that, I think we are at a good place to stop. As I mentioned at the outset, today's episode is really just a primer on the concept of racketeering activity, one that we are going to dive deeper into.

I want to thank everyone for listening today, and I hope that you will all join me for those episodes where we will build on the knowledge of the racketeering activity element we began

today. If you have any thoughts or any comments about this episode or the RICO report generally, I invite you to contact me directly at callan.stein@troutman.com. You can subscribe and listen to other Troutman Pepper podcasts wherever you listen to your podcasts, including on Apple, Google, and Spotify. Thank you for listening and stay safe.

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