
RICO REPORT: S02 EP03, STATE RICO STATUTES
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Cal Stein:

Hello, and thank you for joining me on this installment of the *RICO Report* where we're going to actually talk about something other than the federal RICO statute that we've been spending so much time on. But no, we are not going to stray from the central topic of this podcast, which is of course RICO law, because today we are going to be focusing on state RICO statutes, the analogs to the federal RICO statute that we have spent so much time covering in prior episodes.

My name is Cal Stein and I'm a partner in the white collar and litigation practice groups at Troutman Pepper. I represent clients in white collar, criminal and government investigations, as well as in complex civil lawsuits and in RICO litigation. I am here solo today to talk about state RICO statutes because this is a topic that is somewhat near and dear to my heart. I defend clients in RICO cases all of the time in all industries across this entire country. And while the inclusion of the federal RICO claims is almost always consistent across those cases, I do come across parallel state RICO claims under many of the various state RICO statutes, which as we are going to learn today, can be very diverse and can greatly impact the defense of the entire case. And really that is going to be the big theme for today's episode, Know Your State RICO Statute. They vary wildly from each other. They vary sometimes minimally, and sometimes significantly from the federal RICO statute.

So while they are often pleaded by plaintiffs as kind of a throw in with a federal RICO claim, state RICO claims do deserve and really demand careful attention. They are not a throwaway claim. And while certain defenses to a federal RICO claim if demonstrated may also apply to the parallel state RICO claim that's brought, any RICO practitioner who believes that he or she can simply address the federal claim in a case and count on the judge to take a throw the baby out with the bathwater approach to the state RICO claim may find themselves sorely disappointed, or worse yet may find themselves in a situation where the federal RICO claim gets dismissed, the state RICO claim remains and the case gets kicked from federal court to state court, which oftentimes is not where you want to be defending a RICO case.

So that's why we are going to cover today in some detail the state RICO statutes. The format of today's episode is going to be a little bit unique. It's going to be different from what we've done in the past. There are of course, a lot, a lot of state RICO statutes. And as I mentioned before and as we will soon learn, they are all different.

So what we're not going to do is we're not going to go through each and every state RICO statute. We could do a whole podcast series on going through state RICO statutes, though I think that might be a little bit tedious. Instead, what we're going to do is we're going to look at the federal RICO statute and the concepts, the elements, the standards that we are already familiar with, having discussed them in great detail in prior episodes. And then we're going to examine how those items may differ across the state RICO statutes generally. I'm going to give some specific examples when appropriate, but for the most part, we're going to keep the discussion today general, the goal being for all of us to understand the pivot points where your particular state RICO statute may depart from the more familiar federal RICO statute that we have covered.

Okay, let's actually start with that wind up. Let's start with the federal RICO statute as we always do. We've talked a lot about what it contains, but what I want to start with here today is what it

does not contain. Federal RICO does not contain anything that preempts state law. In fact, the legislative history for the federal RICO statute makes clear that the intent is that federal RICO would not preempt state law. The legislative history states nothing in RICO shall supersede any provision of federal, state, or other law imposing criminal penalties or affording civil remedies in addition to those provided for in this title.

Okay, so what happened to get us to today where we have federal RICO and all these state RICO laws? Well, let's do a quick history lesson. As we know, Congress enacted federal RICO in 1970. Two years later, just two years later, the states start enacting their own RICO statute. In 1972, Hawaii became the first state to enact a state RICO statute. And since then, a majority of US states, in fact 33 in particular, have enacted their own RICO statutes. And these are called all sorts of different things. Sometimes they're called baby RICO, sometimes they're called little RICO or state RICO.

Some of them have crazy names that reference racketeering. Others go out of their way not to reference racketeering. So they're not all called the same thing, but they all do spring from the federal RICO statute enactment in 1970. The states that have their own RICO statutes right now are Arizona, California, Colorado, Connecticut, Delaware, Florida, Georgia, Hawaii, Idaho, Indiana, Illinois, Kansas, Louisiana, Massachusetts, Michigan, Minnesota, Mississippi, Nebraska, Nevada, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Oregon, Pennsylvania, Rhode Island, Texas, Utah, Virginia, Washington, and Wisconsin. So if you didn't hear your state on there, it means you don't have one, or at least not yet.

Okay, I just listed off a whole bunch of states. Surely starting with Hawaii in 1972, all of those state legislatures just copied the federal RICO statute, right? Wrong, of course. As I mentioned, these statutes vary. They vary from each other. No two state RICO statutes are identical, and they all vary from the federal RICO statute. None of those state RICO statutes I just mentioned is identical to federal RICO. So what that means is between all of these RICO statutes and the federal RICO statute, we have many, many, many variations on the same concepts. Which brings us again to the theme I mentioned in the introduction, know your state RICO statute. We're going to focus on the differences, but not just what is different. We're going to focus on how those differences actually matter and we're going to try to highlight some of those key differences that are likely to have significant impacts on the strategy of defending these cases.

So let's start again with the basics. And again, before we get to all of the textual and interpretive differences between federal and state RICO statutes, let's start with some context. And to do that, let's look at the purpose behind RICO statutes generally, both federal and state, as that is something that very frequently informs how courts interpret those statutes. As discussed for federal RICO, it was passed as part of the Organized Crime Control Act of 1970. That law included a very detailed statement of Congress's findings and the purpose in passing that law.

US Congress' findings included the following. Number one, organized crime in the US is highly sophisticated, diversified, and widespread. Number two, it drains billions from the economy through unlawful conduct. Number three, organized crime derives a major portion of its power through money obtained from illegal endeavors like syndicated gambling, loan sharking, and theft. Number four, that money is used to infiltrate and corrupt legitimate businesses and labor unions. And number five, organized crime continues to grow because of defects in the evidence gathering process that inhibits the prosecution of wrong doers.

Now, those are some, not all of the findings, but I think you can see from those findings how Congress went from those facts to the RICO statute. And this detailed statement has actually provided a lot of help and a lot of context for federal courts interpreting the federal RICO statute. So again, when the state started to enact their own statutes, one would think that with this

model of a legislative findings, state legislatures would either make their own findings that were similar or simply incorporate the findings made by the US Congress, right? Nope, not the way they did it. And not only did they not incorporate Congress' findings, only some of the states made their own legislative findings, about half of the states. And again, those vary greatly.

So why does all of this matter? Well, there is a lot of federal law interpreting federal RICO and its requirements, and many of those cases are based on Congress' intent and its statement of findings and that purpose that I just read. So what that means in the context of state RICO statutes is that if a state legislature did not incorporate the congressional statement, or as it did in many cases, if it incorporated an entirely different statement of its own, what that means is that federal case law and federal interpretations of federal RICO statute cannot always be applied in the state RICO setting. Sometimes it can, but sometimes it can't. Which leads us to the present podcast where we need to go through the various state RICO statutes to figure out where the differences are.

And let's get into some of those differences now. We're going to get into differences that may and frequently do exist between federal RICO and state RICO statutes. And today we're going to cover six main areas where there may be differences. This is not an exhaustive list and this is certainly not a list of the only differences, but they are, in my view, some of the most impactful areas of difference, and thus the areas that warrant the most attention in the most number of cases. So the six areas that we're going to discuss are as follows, number one, statutes of limitations. Number two, the predicate acts or racketeering activity as we've called it. Number three, the pattern element. Number four, the enterprise element. Number five, the various types of conduct that violate the RICO statute. And number six, remedies.

So let's start with number one, statutes of limitations. This is one of the key differences between federal and state RICO statutes. Federal RICO, as we have discussed, does not contain an explicit statute of limitations for civil actions. The Supreme Court, after considering all of the possibilities, ultimately decided to apply a four-year statute of limitations to federal RICO claims by analogizing the statute to the Clayton Act. This made sense because many of RICO's civil remedy provisions were in fact based on the Clayton Act, which is another federal statute.

So what about state RICO? Well, some state RICO statutes contain no statute of limitations just like the federal one, so the state courts have to do the same thing. They have to look at other analogous laws to figure it out. And those laws are going to be different than the Clayton Act because that's a federal law. For example, some courts such as Indiana have looked at the statute of limitations to the applicable predicate acts and have applied that limitations period to civil RICO claims. Other state statutes though do include a statute of limitations, right in the words of the statute, very much unlike the federal RICO statute. And these can vary from as few as three years like in Arizona, Utah, and Washington, to as many as seven years like in North Dakota. The big point though is what we come back to time and time again and that we've already mentioned twice, you have to know your state RICO law. You could miss a statute of limitations if you don't know it. Alternatively, you may be able to bring a state RICO claim even if you've missed the federal statute of limitations.

Okay, let's shift to the second area of difference, which are the predicate acts or the racketeering activity. We know from our episode on racketeering activity that courts have called this the heart of any RICO case. We also know from that episode that in the federal RICO statute, Congress actually did us all a favor by actually listing out every single predicate act that constitutes racketeering activity. It put it right in the definition of the term in 18 USC 1961 subsection 1. Because the federal RICO statute provides this list, the term racketeering activity

is interpreted very narrowly. Only conduct that appears on the list can constitute racketeering activity. Nothing else.

State RICO laws take different approaches. This is not a one size fits all thing. Again, depending on the state. One approach is simply to incorporate the federal definition of racketeering activity. An example here is the Delaware RICO statute, which specifically incorporates racketeering activity as that term is defined in Section 1961 1 of the federal RICO statute. A second approach is for a state RICO statute to include a broad range of activity in violation of that state's specific laws. An example here is the Georgia RICO statute, which we'll point to a couple of times today. There it incorporates all sorts of violations of Georgia law and actually lists out the statutes. Other states are less specific. They incorporate state violations by description rather than statutory citation.

And the third approach that some states adopt is to include activity within the definition of racketeering activity that violates other laws, including federal laws and even foreign laws. So for example, Arizona lists out certain foreign laws, the violation of which can constitute racketeering activity. All of the state RICO statutes utilize one or more of these approaches, sometimes combining them to prohibit a broad array of conduct. And depending on how they do it, the scope of racketeering activity for a particular state statute is going to be broader or could perhaps even be narrower than federal RICO. Either way, it is not the same and should not be treated the same.

Let's look at the next difference, which is to the pattern element. We know how important the pattern element is to federal RICO, but what about state RICO statutes? Well, as you might imagine from what I've said so far, there are a lot of variations despite the pattern element's central importance to federal RICO law. As we know from our episode on the pattern element, pattern means continuity plus relationship. That's the test that the Supreme Court had set forth. So what does state RICO laws say about the first part of that standard, the continuity prong?

And to understand the continuity prong, we go back of course to the Supreme Court case, H.J. Inc. That's where we get the dual concepts of open-ended and closed-ended continuity. But of course, H.J. Inc's continuity standard was based on the legislative history of federal RICO, which as we said earlier, has not been adopted by many states who have enacted state RICO statutes. That means that the H.J. Inc test, which has become so ingrained in federal RICO jurisprudence, is not something that can just be poured over to any state RICO claimed to define the continuity element. In fact, some state supreme courts have outright rejected the continuity element altogether. The examples here are Colorado and Oregon. Other states have applied the H.J. Inc continuity either in the text like Michigan and Utah, which have codified it or in the court decisions. Again, the lesson is the same, know your state RICO statute.

All right. What about the second part of the pattern standard, that of a relationship? This prong, again, springs from RICO's legislative history. So again, it cannot just be poured over from federal to state. On the federal level, we look at the Supreme Court's decision in the Sedima case to understand that for a RICO, a relationship requires the racketeering activity to have similar purposes, results, participants, victims, methods of commission, those types of things.

Now, most states have codified some form of this relationship test with most provisions making clear that isolated incidents will not suffice. Several states, however, require the predicate acts to have a relationship with the alleged enterprise. That's a bit of a new sub-RICO element that we don't see as much on the federal RICO side. Minnesota and New York, say for example, that the racketeering activities must be related by a common scheme or plan or a shared criminal purpose. These provisions, of course, contemplate RICO claims where the enterprise is the

entity committing the violation and not a victim of the racketeering act, so the applicability is not universal.

Okay. Let's shift to talking about the enterprise element, and this is a bit of a brief discussion, but an important one. Again, the enterprise element is critical to all of the sections of the federal RICO statute, although a little bit different for each. So let's start with the definition of an enterprise that is found in federal RICO. Section 1961 subsection 4 makes clear that an enterprise for RICO purposes may include any individual, partnership, corporation, association or other legal entity, and any union or group of individuals associated in fact.

State RICO statutes sometimes define the term enterprise differently. Some exclude entities on this list. For example, many state statutes do not include individuals within the definition of enterprise. That is a very critical distinction and it could in fact be a dispositive distinction in the right case. Again, know your state RICO statute. Conversely, some state RICO statutes actually include additional entities that are not referenced in the federal definition. An example here is many states include sole proprietorships explicitly in the definition. Again, it could in the right case be a critical determination so you have to make sure you know how your particular state defines what an enterprise is and what an enterprise can be.

All right, let's shift now to, in many ways, the most significant area of potential difference between federal RICO and state RICO, that of the RICO conduct. We will recall from our episode on the RICO conduct that federal RICO statute contains four separate types of violations of the statute found in subsections 1962(a), (b), (c), and (d), and we'll run through them very briefly just as a reminder. 1962(a) prohibits the use of income derived from a pattern of racketeering activity to acquire or operate an enterprise. 1962(b) prohibits acquiring or maintaining control of an enterprise through a pattern of racketeering activity. 1962(c), which is by far the most common RICO subsection, prohibits conducting the affairs of an enterprise through a pattern of racketeering activity. And 1962(d) is the RICO conspiracy provision.

State RICO statutes follow a similar pattern to the federal RICO statute, but only to a point. There are times when there are very significant differences. Let's take a look at two of these subsections in particular where we see some of these differences. Let's start with Section 1962(a) of federal RICO. Many state RICO statutes don't even have an analog to 1962(a), Arizona, California, Georgia, and North Dakota are examples. So those states do not even prohibit the conduct that the federal RICO statute prohibits under section 1962(a). That is not a very frequently used RICO section, but if it is used in those states, there cannot be a viable state RICO claim.

Let's talk about Section 1962(c), which as I said is by far the most common RICO provision. And as you would expect, virtually every state has a 1962(c) analog. However, several states have not adopted the Supreme Court standard, which was set forth in the Reeves case, then a 1962(c) violation or the analog in the state statute can only be established if the defendant "participated in the operation or management of the enterprise." So that limitation does not exist in many state RICO analogs. For example, Indiana, Ohio, and New Jersey. What that means is those state statutes open up this type of claim to a much broader range of potential defendants.

On the 1962(d) RICO conspiracy conduct, most state RICO statutes do have this provision. And in the states where the RICO statute does not explicitly have a conspiracy provision, many courts in those states have inferred one. Still, there are major, major differences. For example, some state RICO statutes require proof of an overt act to establish a RICO conspiracy. The federal RICO statute does not require that. Other states have actually broadened their RICO conspiracy provisions to cover a wider range of conduct. For example, state of Colorado makes it a RICO violation to "endeavor to violate the statute." And Colorado courts have interpreted the

word endeavor to encompass even attempts to violate the statute. Again, broadening the scope. These distinctions may seem nuanced, they may seem technical, they may seem hyper-technical based on one or two words in the statute that are different from federal RICO, but they underscore the importance of understanding those differences and the state court's interpretation because they can be very significant.

So let's turn to the final area of difference that I'm going to highlight today as being, in my view, quite important, and that is remedies under the RICO statutes. Federal RICO, of course, has a civil remedies provision that allows anyone who meets the requirements to sue under the statute. It's a private right of action available to any civil litigants. This is not at all the case for all state statutes, however. Some state RICO statutes contain no private right of action, meaning private civil litigants cannot bring state RICO claims in that particular state. Other states give the right only to the attorney General to bring a civil action, and other states permit recovery of civil damages only if there has been a parallel criminal conviction. So the state RICO statutes, some of them at least, have much narrower civil remedies provisions.

Federal RICO also, of course, famously imposes treble damages for RICO violations as well as attorney's fees. Again, state statutes vary wildly on this. For example, in Arizona, treble damages can be awarded, but unlike the federal statute, they are not mandatory. Utah doesn't offer treble damages, but it does offer double damages. And Hawaii and Washington limit recovery to single damages only. Similarly, under federal RICO, the prevailing view of courts is that a plaintiff cannot get both treble damages and punitive damages. Some state courts have come out the other way, Delaware, Georgia, Indiana, Mississippi, Oregon, and Wisconsin being examples. The other key damages provision in federal RICO is that the plaintiff can only recover injuries to his business or property. And what this does is it excludes personal injury damages amongst others, but the key exclusion is personal injury damages. Again, some state RICO statutes simply do not limit damages in this manner. They allow plaintiffs to recover for personal injuries caused by RICO violations. Georgia is a notable example here.

So having just run through all of those potential differences, it's not hard to see how a state RICO statute claim in the right case could be very different, potentially more significant, potentially less significant than a federal RICO statute claim. They could be based on the exact same conduct. They could be against the exact same party. They could have the exact same theory of the case, but the damages and the exposure for a client could be significantly different. Again, this is why it is so important and I will say it again and again to know your state RICO statute and to not just assume that everything you know about Federal RICO is going to apply.

And with that, we are out of time here today. I want to bring this discussion to a conclusion, and I want to really thank everyone for listening. If you have any thoughts or any comments about this series or today's episode on state RICO statutes, 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 podcasts, including on Apple, Google, and Spotify. Thank you for listening and stay safe.

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