RICO Report: RICO Vicarious Liability
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Cal Stein:

Hello, and thank you for joining me on this installment of the *RICO Report*. 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 investigation matters, as well as in complex civil lawsuits, and in RICO litigation.

I come to you today, again, solo, to talk about a unique type of RICO case, one that plaintiff often choose to pursue, and one that corporate defendants in particular really dislike. I'm talking about RICO cases that are brought both against individuals who commit racketeering activity, as well as their employer under a theory of vicarious liability or *respondeat superior*. The reason plaintiffs often seek to include employers in their RICO suits is obvious. The employer is often a company with much deeper pockets to pay a damages award than an individual. That's the same reason that corporations really disliked these types of RICO cases, and have very high incentives to try to get rid of them, either at the motion to dismiss stage or the summary judgment stage.

Today, we're going to talk about these types of cases, and we're going to examine the legal standards that apply to them and arrive at some thoughts on how corporate defendants in particular can use those standards to avoid RICO liability. Simply put, there really is no consensus among courts on vicarious liability RICO claims. We're going to talk a lot today about the various standards that plaintiffs must plead, and then prove. But a common refrain from me today is going to be talking about circuit splits and how much the determinations that need to be made depend on the specific facts of a given case. That is because there really is not much consensus out there on this issue of when an employer can be vicariously brought into a case. This makes for very fertile grounds for defendants when litigating such cases, and when facing those lawsuits at the motion to dismiss stage.

There's no consensus in the RICO context, but the law on vicarious liability and *respondeat superior* generally, is actually very well established. These doctrines, they rely on principles of agency, which goes back many, many, many years. They state that really, with only minor variations across jurisdictions, that an employer may only be held civilly liable for the acts of its employees if one of three criteria are met. First, that the employees' acts are within the scope of his or her employment. Second, that the employee acts with apparent authority. Or third, the employer is reckless or negligent in supervising the employee. If one of those three is met, under the typical rules of vicarious liability and *respondeat superior*, the employer can be held liable for the acts of the individual employee.

Now, I will note that the third criterion there that I mentioned, that the employer recklessly or negligently supervises the employee, that one's technically a little bit different than the first two. So we're not going to spend much time on it today. If an employer does not properly supervise an employee, and that employee goes and commits racketeering activity, for example, really, there's a separate claim against the employer altogether. It's independent of any vicarious liability. That one is a little bit different. But let's talk about the first two, because those are really the base points for vicarious liability and *respondeat superior* generally, and in the RICO context.

Let's start with the first criterion, which talks about an employee acting within the scope of his or her employment. As you might imagine, this is a very fact specific inquiry. For example, whether the act complained of is something that is commonly done by employees or agents of the employer or not is a major, major factor. In the RICO context, courts have held things like the fraudulent sale of corporate entities, or extorting kickbacks, or extorting bribes, and investment fraud. Those are the types of things that can satisfy the standard. Not in every case, but in some.

Let's talk now about the second criterion, which is apparent authority. This is where a plaintiff had a reasonable belief that the individual who committed the wrong was acting for the employer and within and with the employer's authority. The theory in this case or in these circumstances, is that the employer should be held liable because it has put its agent in a position to commit wrongdoing while acting under its evident authority. This, of course, can overlap with the first criterion. The activities for example are so far outside the scope of employment, it would be hard for a plaintiff to argue apparent authority. Okay. That's kind of the basis of a general vicarious liability or *respondeat superior* claim.

Let's talk about how those apply in the RICO specific context. There are really two schools of thought generally here, and they focus on policy arguments. On the one hand, proponents of vicarious liability and *respondeat superior* RICO claims, argued that holding employers liable for the acts or the racketeering acts of their individual employees. That advances congressional intent, because RICO was actually enacted to protect individuals and companies from corrupt enterprises that defraud or unfairly compete with legitimate businesses. That's one view.

The other view from those who oppose vicarious liability and *respondeat superior* RICO claims argue the opposite. That actually, the primary intent of the RICO statute, when passed by Congress, was to protect businesses. To protect them from being infiltrated by racketeers in organized crime. Thus, it's not fair to penalize an employer and hold it liable for the actions of its employees who may have committed violations of the very statute, Congress enacted to protect that very corporation.

Now, we've discussed many times on this podcast that the penalties for a RICO violation can be very harsh. I'm talking of course about RICO's mandatory treble damages provision, and its mandatory attorney's fees provision. So for this reason, courts have been understandably somewhat reluctant to apply vicarious liability or *respondeat superior* with such high damages at issue. They scrutinize those claims very, very carefully, including through the lenses of those dual policy arguments I just mentioned. And as you also might imagine, this has led to disparate, and at times, contradictory judicial results.

Often, the determination of whether to apply vicarious liability or *respondeat superior* will turn on the RICO conduct that is in question, i.e., what section of 1962(a), (b), (c), or (d), the plaintiff brings his or her claim under. Now, let's start that discussion with 1962(c) claims. Because, as we know, from prior episodes, those are by far the most common, especially in the civil context. By way of reminder, 1962(c) RICO claims make it unlawful for a person employed by or associated with an enterprise to participate in the conduct or affairs of the enterprise through a pattern of racketeering activity.

Now, the key component for 1962(c) vicarious liability RICO claims is what is called the RICO person v. RICO enterprise distinction. We discussed this on a prior episode. There is briefly substantial case law out there, including Supreme Court cases, that say the RICO person cannot be the same as the RICO enterprise. They must be different, they must be distinct. Most circuits in this country have held that a RICO plaintiff cannot use theories of vicarious liability or *respondeat superior* to circumvent this requirement for 1962(c) RICO claims. For example, if a plaintiff names a corporation as a RICO defendant, in addition to other individual employees, and also names the corporation as the enterprise, most circuits will dismiss the RICO claim for failing the person, the enterprise distinction. Even if there is a vicarious liability component.

Now, there are some circuits, most notably the third, seventh, eighth, and ninth as well as some district courts, but those circuits that has found that an employer that is not named as the enterprise may still be liable for RICO claims if its employees committed racketeering act within the apparent or actual scope of their authority. What do we learn from this? Namely, for 1962(c) claims, vicarious liability or *respondeat superior* liability is going to turn on the role that the employer played or allegedly played in the alleged racketeering activity.

For example, if there are allegations that the corporation acted passively, for example, no benefit accrued to it from the racketeering activity, or if it was only low-level employees who are engaged in the racketeering activity. Well, then, the employer in that situation may actually be found to be the victim of the conduct and not liable for it. Conversely, courts out there have imputed vicarious liability to an employer where it was the recipient of some unjust benefit from the racketeering activity, or if the employer was active in the racketeering activity, because it was done by senior level employees, even under 1962(c).

All right. Let's shift now and talk about the other sections of 1962. We'll start with 1962(a), and 1962(b). By way of reminder, 1962(a) prohibits the receipt of income derived from a pattern of racketeering activity, and 1962(b) prohibits the acquisition of any interest in or control of an enterprise through a pattern of racketeering activity. Now, we can deal with these together and separately from 1962(c) claims, because under these sections, there is no RICO person v. RICO enterprise distinction. That distinction only exists for 1962(c) claims. That is critical here.

But again, courts are still split on whether to apply vicarious liability under these sections. On the one hand, courts have found that Congress did specifically draft these sections differently than section 1962(c), specifically to protect legitimate businesses from being infiltrated by criminal activity. As a result, the argument goes that since employers are the intended beneficiaries of RICO, they should not be held vicariously liable for the acts of their employees. The eighth circuit is the one that is most on point here. Albeit in dicta, it has stated that vicarious liability is not available under RICO claims.

Now, other courts, of course, have come out the other way, focusing on the employer's participation in the racketeering activity along the same lines as we saw in 1962 (c) claims. Here, as examples, we've got the third, seventh, ninth, and eleventh circuit. All of them have held that employers can be held vicariously liable under subsections A and B, when the employer is an "active perpetrator" of the racketeering activity, or a "central figure" in the scheme. And even more generally, when the agents commit racketeering activity that benefits the corporation. Again, all of this is highly fact specific, there is no bright line, like there appears to be in the eighth circuit, at least as stated in the dicta we just spoke about.

Now, briefly, I want to mention 1962(d) claims, which prohibit conspiring to violate any of the provisions of 1962, namely (a), (b), or (c). Again, there's no person v. enterprise distinction inherent to 1962(d) claims. But, because Section D requires a related violation of one of the other sections, which could include of course, subsection C, application of vicarious liability or *respondeat superior* is likely going to depend on which corresponding section of 1962 the plaintiff relies upon.

Now, I do want to talk about one final postscript to this discussion. Because, as you may be thinking right now, this is all pretty confusing, and pretty disparate, and there's no consensus here. We've got circuit splits. Couldn't Congress step in and resolve some of this. Couldn't Congress step in and say what its intent was or what it intends right now. In fact, Congress did try to do so at one point. Way back in 1986, there was something called the RICO reform bill that was making its way through the House of Representatives. A draft of that bill, an early draft of it actually included a section that specifically set out when vicarious liability and *respondeat superior* would be applicable to RICO claims.

The standard that Congress set out in that early version of the bill was a very high standard that a plaintiff would have to prove to put the employer vicariously on the hook for the racketeering activity of its employees. Basically, what that draft of the bill said was, that employer could be held liable to the extent that, one, the racketeering act was knowingly engaged in by an officer, director, partner, or employee of the employer. Two, that the racketeering activity was authorized or ratified, either by an executive officer or the governing board. And three, that the racketeering activity intended to benefit and did benefit the employer. That was the standard that Congress in its wisdom came up with and put into this early version of the bill. As I noted, it's much higher than traditional vicarious liability or *respondent superior* legal standards that we've been talking about, and that apply in non-RICO cases.

However, this legislation did not pass. In fact, it didn't even make it out of the House. The RICO reform bill, there was one passed by the House, but it ultimately didn't include the language I just read. It didn't include anything about vicarious liability or *respondent superiority*. Instead, it said nothing about it, went to the Senate, and ultimately, the Senate didn't pass it anyways. But what we have here is proof that this issue of when employers should be vicariously liable for the RICO activity of their employees. We have proof that this is an issue that is an obviously important one. It's obviously a confusing one. It's one that even Congress has recognized is subject to varying rules, and one that it should really take up itself. But even Congress in 1986 was unable to answer the question. It's also telling that it hasn't tried to do so since.

What we're left with is that RICO litigants are left to untangle themselves from these vicarious liability rules on a case-by-case basis, and often on a court-by-court basis, as well. That is why it remains important for any corporation, any employer facing a RICO suit that involves these concepts of vicarious liability or *respondeat superior* to have counsel that can analyze the appropriate rules in the jurisdiction and make the proper arguments and motions at the appropriate time. It's possible and I have seen, I have litigated cases where a RICO claim can be eliminated or dismissed altogether. Because the law in the jurisdiction in question does not support the type of vicarious liability the plaintiff is pushing.

With that, we are out of time here today, so I do want to bring this discussion to a conclusion. I want to thank everyone for listening. If you have any thoughts or any comments about this series or about today's episode, 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.