

The RICO Report Podcast: RICO Damages**Host: Cal Stein****Recorded: 2/27/24****Cal Stein:**

Hello, and welcome back. 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 including RICO litigation.

It's been a while since we have recorded one of these. And I am pleased to say that part of the delay and part of the reason for that is that I have been working hard on a few RICO matters, including one down in Georgia, that my colleagues and I were able to win at the motion to dismiss stage and then again on appeal.

But I come to you today solo to talk about some of these issues which I have been grappling with in those cases and which I think are actually a very interesting and underrated set of RICO issues. Those are the issues surrounding RICO damages, specifically the requirement that a RICO plaintiff may only seek damages to his or her business or property. And we'll be talking a lot about that phrase today.

This is one of those RICO requirements that is right there in the statute in black and white. Lawyers cite to it and quote it all of the time in their papers. And judges do the same in their decisions. But it does not really get the attention that it probably deserves. Certainly, does not get the attention of some of the sexier elements of RICO like the RICO pattern or the RICO enterprise, which we've discussed at length on this podcast.

But nonetheless, we're going to remedy that here today by talking about RICO damages. What you can get? What you can't get? And strategies for how the defense bar and clients facing RICO claims can use these rules to their advantage including at the motion to dismiss stage.

Okay. Let's get into the meat of this issue. And we are going to start where we always start, on *The RICO Report*, which is with the RICO statute itself. And we're going to start with 18 U.S.C Chapter 1964(c), which as we know is the civil remedy provision of RICO. And here's what it says. It says, "Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefore in any appropriate United States district court."

And there are two related pieces of the provision that I just read that are really important to our analysis here. The first is that a RICO injury must be to "the business or property". The second is that the injury to business or property must be "by reason of a violation of section 1962". That is the RICO conduct section that again we have spent some time talking about on this podcast.

Today we're going to talk about both. But the real focus is going to be on the business or property section. Because the by reason of language starts to get into causation, which again we could spend an entire episode on. And I suspect at some point we will.

Let's start with an overview of RICO damages. And one of the most important seminal RICO cases that we've talked about a lot on this podcast is the US Supreme Court decision in the Sedima case. Now, before the Sedima case, courts all over the country said that a RICO plaintiff had to prove what they termed a special racketeering injury. And what that meant was that an injury arising not from the commission of the predicate acts themselves but from the use of a pattern of the predicate acts in one of the four ways section 1962 prohibits.

Now, in Sedima, the Supreme Court outright rejected this approach to RICO damages. And what the court said was that the plaintiff in a RICO case can recover damages to his or her business or property that are caused by the predicate acts themselves full stop. That really flipped the RICO damages analysis on its head from what had been the case prior to Sedima to what is the case after the Sedima case, including today.

Let's talk about what damages are available to RICO plaintiffs. And we're going to go through these relatively quickly. Because I think the flip side of this coin, what damages are not available, is actually the more interesting side. First and foremost, out-of-pocket damages. The typical, most common type of damages in pretty much any civil litigation case are of course available in a RICO action. These have been described as kind of the money – the standard value of the money paid minus any value that the plaintiff may have received.

In addition, there are restitution damages. Those are available in a RICO case to put the parties back where they were before the alleged fraud occurred. Consequential damages, this is a little bit of a bigger category but, again, available in a RICO case.

Now some courts permit certain types of consequential damages where others don't. A good example of this are lost wages due to a RICO violation. Some courts allow them. Some courts don't. Causation is of course an important factor here. Many courts have said lost wages because a party is fired for allegedly refusing to participate in a RICO violation are not recoverable. That to be recoverable, the lost wages must actually flow from RICO violations themselves.

Lost business reputation or lost goodwill, those are other types of consequential damages where there is a split amongst courts. Some say you can get it. Others say you can't. And the Supreme Court has not yet weighed in. However, the DC circuit court has weighed in and has said that a plaintiff can get reputational damages in a RICO case. And many have opined that, based on the rationale given by the DC circuit, which is of course one of, if not the most prominent circuit court, many have opined that the rationale for these damages being unavailable really has dissipated.

There are other types of consequential damages that are recoverable in certain circumstances in a RICO case. Lost profits is one. Business interruption is another. But those really go on a case-by-case basis including an analysis of causation and that by reason of language.

All right. Those are the damages that you can get or can get in certain circumstances. I want to shift and talk about what damages are not available. And I think this is really the more interesting topic when we're talking about RICO damages and especially for defense lawyers. Because these types of damages that are not available, if they are pled in a RICO complaint, can open up arguments to use on a motion to dismiss. They can open up standing arguments.

They can open up arguments that allow you to get your client out from under a RICO claim early in the process.

Let's talk about a few of these, a few of the most commonly seen categories of damages alleged by RICO plaintiffs that simply are not recoverable. The first one is one that I have seen many times and I have argued against many times. And I have actually won motions to dismiss or summary judgment many times. And those are derivative injuries.

When a party suffers a derivative injury, it is not recoverable under RICO. And this is, as I alluded to a moment ago, an issue of standing. A plaintiff who suffered a derivative injury, simply put, does not have standing to bring a RICO claim. And as you might expect, if you don't have standing, those are grounds on which a court can dismiss a RICO claim in its entirety.

What do I mean when I say a derivative injury? Well, that's an injury where a party passes along the damages that he, or she, or it has suffered to some other third-party. In that situation, the recipient of those damages, the third-party, does not have standing to sue.

A really good example and one that we see a lot in RICO litigation involves labor unions. The 1st, 2nd, 5th, 8th and DC circuits have all found that union members, individual union members cannot bring a RICO action for damages suffered by the union itself.

In that scenario, the union is the injured party. It passes that injury on to the members. But the recipient members do not have standing to sue under RICO. The union itself would have standing but the members do not.

Another scenario where this arises frequently, perhaps even more so, involves shareholder derivative actions. This occurs when a defendant is alleged to have injured a corporation, which then causes a loss in the corporation's share value. The corporation in this situation can sue under RICO. But the individual shareholders, whose shares have been devalued, cannot. Because that is a derivative injury for which the litigant does not have standing.

This is, again, it is worth saying, a standing issue. Which means if you've got a RICO case and a RICO plaintiff who is asserting only derivative injuries, you have a standing argument that is ripe for dismissal at the motion to dismiss stage if you can convince the court of your position.

All right. A second category of damages that just are not available under RICO are personal injury damages. And these are perhaps the most obvious form of damages that are unavailable based on the statutory language we read a moment ago that limits RICO damages to one's business or property.

Now business and property are not terms that are defined in the RICO statute. But courts across the country are uniform. That whatever those terms do mean, they don't mean personal injuries. And that includes injuries for mental suffering. They are simply not recoverable under RICO.

Now this seems like a relatively easy, bright line to apply. And in many cases, it is. But as RICO jurisprudence on this topic has developed, plaintiff attorneys have become more and more clever in how they draft complaints. And sometimes what we see now are artfully drafted complaints that try to blur the line between a business and property injury which is recoverable

and a personal injury that is not. And the goal of course being to at least get the complaint beyond the motion to dismiss stage into discovery and so forth.

Now one example where I have seen this occurred is where the drafting plaintiff's attorney tries to craft personal injuries that result in property loss. A good example of this is a case where an employee asserts a loss of employment damages that stem from mental injuries the individual alleges he or she suffered due to an employer's harassment. Now this is where you need a good RICO attorney.

There are examples of cases where courts have been able to untangle this mess of damages. The injuries are personal even though the result is lost wages, which may in some circumstances be compensable under RICO. That's where the good RICO attorney can earn his or her weight.

There are other cases where the court is not able to untangle it and they rule that the injuries are compensable as business or property damages even though they are in fact personal in nature. Courts do get this wrong. It's important to look carefully at it.

All right. Let's talk now about a third category of damages, punitive damages. Now we know RICO has a mandatory treble damages provision. More on that in a moment. But beyond the treble damages provision, RICO doesn't say anything about punitive damages. And that has led some plaintiffs to try to get them in addition to treble damages. A cynic might say that's a pretty greedy approach. But it is something I have seen.

Now most courts hold that punitive damages may not be awarded under RICO. Not all of them, but most. Where defendants tend to run into trouble in these cases is in state court where there is a state or sometimes a federal RICO claim in addition to state claims. An example is in the state of Florida, where Florida state courts have in the past granted RICO plaintiffs punitive damages on top of the trebling and on top of attorney's fees.

Now if you have a RICO claim that can be trebled but there are also non-RICO claims in the case which cannot be trebled unless they're from a statute that does independently allow trebling. But if you have a RICO claim and non-RICO claim in the same case, which is not uncommon, courts will sometimes treble the RICO damages and then award punitive damages on the non-RICO claims only.

In this situation, again it's important to know the rules because it's important to argue where appropriate that the punitive damages are in fact duplicative. And sometimes you can get out from under them that way. Those are three big categories of damages that are not available to RICO plaintiffs. And as we've seen, there are arguments that can be raised at the motion to dismiss stage, to potentially deprive the plaintiff of standing or of the claim altogether.

I want to talk now about treble damages in attorney's fees, which is something we just mentioned. I think everyone who listens knows that RICO treble damages are mandatory. Again, full stop. And attorney's fees under RICO mandatory. Again, full stop.

Now the kicker here on attorney's fees is that they don't actually have to be proportional to the amount of RICO damages that are won by a plaintiff. What this means is there are cases out there where the attorney fee award is multiple times. Sometimes as many as 10 times or more

the amount of the compensatory damages, which, if nothing else, this serves to highlight why it is so important to try to get rid of RICO claims as early in the case as you can and as often as you can. Sometimes you take a shot at them at the motion to dismiss. You take another shot at summary judgment. This is why it is so important to get those cases out.

If they remain in the case, you can win the claim. And by win the claim, I mean get a low damages figure. But then you get nabbed on a big attorney's fees award and your client can still feel like he, she, or it has lost the case.

Now there is some authority out there that permits courts to diminish an attorney fee award under RICO on the basis of lost claims. And what this means is that if a RICO plaintiff brings several RICO claims or several RICO theories alleging different types of potentially compensable RICO conduct but the plaintiff doesn't win all of those claims or all of those theories, then the court is permitted to lower the amount of attorney's fees sought in proportion or based on the claims or theories that the RICO plaintiff lost and the RICO defendant was able to defeat.

However, there is no requirement that a court do this. Sometimes they do. Sometimes they don't. It can depend on a lot of factors, which is why it's important to try to get rid of these claims as early in the case as you can. And with that, I think we're out of time here today talking about RICO damages. These are all concepts that we have woven into other podcast episodes talking about other elements and other cases. And they are themes that we will continue to discuss in future episodes as well.

I really want to thank everyone for listening. If you have any thoughts or any comments about this series or about today's episode on RICO damages, 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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