***RICO Report* — RICO Section 1962(b): Acquisition or Maintenance of Control Over Legitimate Enterprises**
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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 Locke. I of course represent clients in white collar criminal and government investigation matters as well as in complex civil lawsuits and in RICO litigation all over the country.

Today, we are going to be talking about a section of RICO that is sometimes and candidly often overlooked because it simply isn't used all that frequently. Now, on the *RICO Report*, we have examined in detail section 1962(c) of RICO, which of course prohibits individuals from conducting the affairs of an enterprise through a pattern of racketeering activity. And the overwhelming majority of civil RICO cases are in fact brought under Section 1962(c). But that does not mean Section 1962(c) is the only option for civil RICO litigants. And as we know from one of the very earliest episodes of the *RICO Report*, there are actually four sections of 1962 of which 1962(c) is just one.

So, today we are going to talk about one of those other sections, 1962(b), which likewise prohibits conduct and likewise gives rise to civil RICO liability, but it does so in an entirely different manner by prohibiting entirely different conduct. Yes, we still have the enterprise requirement, we still have the racketeering activity requirement, but unlike Section 1962(c) claims, Section 1962(b) is focused primarily on individuals who infiltrate and corrupt legitimate existing enterprises through a pattern of racketeering activity.

Today, we're going to talk about this section of RICO, how it's used, and how it's different than the more traditional 1962(c) RICO cases that we often see litigated and that we have talked a lot about.

All right, so let's start with an overview of section 1962(b) and we are going to start where we always start on the *RICO Report*, which is the language of the RICO statute. Section 1962(b) reads as follows. “It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly, or indirectly, any interest in or control of any enterprise which is engaged in or the activities of which affect interstate or foreign commerce.

So, as I said a moment ago, we've spent most of our time on the *RICO Report* talking about section 1962(c) because that's the most common section Civil RICO claims are brought under. But section 1962(b) remains very important, and there's some debate as to whether more claims are brought under 1962(a) or 1962(b) - doesn't really matter. There are far less of both that that are brought the 1962(c). But in my experience, I've seen more 1962(b) claims, and truth be told, I actually think section 1962(b) is a purer provision of the RICO statute because it's

directly tied to the purpose of RICO when it was passed, which of course was to combat organized crime.

As anyone can tell you one of the major issues with organized crime when it was running rampant in this country was that the mafia would infiltrate legitimate businesses, legitimate existing businesses, whether they be stores or restaurants. We all remember that famous scene from Goodfellas when Henry Hill and company used the Copacabana, they became owners in it and they used it to facilitate their criminal activities, and then when they were done using it, they burned it down, right?

Well, Section 1962(b) goes directly to this type of issue by making it illegal not to operate a criminal enterprise. That's 1962(c), but 1962(b) makes it illegal to acquire or maintain an interest in or control over an enterprise even or perhaps especially an existing legitimate enterprise. This is the classic mafia paradigm where the mob boss muscles in on a legitimate business through things like threats of physical violence, property damage, extortion, fraud, things like that.

But look with all that said, Section 1962(b) is not limited to mafia situations only. It actually has applicability today outside of the mafia and in the normal business world. For example, corporate boards of directives. That's a very fertile ground for section 1962(b) cases where you have allegations that the board of a company, perhaps, was legitimate, was operating legitimately. And then some bad guys, the RICO defendants come in, they infiltrate the board, they take it over, and they use it for improper purposes. In this example, the enterprise is the board. A formerly legitimate enterprise, but corrupted.

Another example that we see today are labor unions. And you see allegations that a labor union was a legitimate operation running legitimately until it was infiltrated by bad actors who corrupted it. In that situation, again, the existing legitimate enterprise is the union itself.

Okay, so let's now talk about the key element of a 1962(b) claim which comes right from the language I just read and it is the acquisition and maintenance of an interest in or importantly, control. Control over an enterprise. And let's talk for a moment about what constitutes control.

Now, most U.S. circuit courts have ruled that control need not be “formal control.” It doesn't depend, for example, on the RICO defendants acquiring a majority of stock in a corporation or acquiring a majority of board seats in a corporation. And while ownership of a majority of stock or a majority of a board would often constitute control for 1962(b) purposes, control is a fact-specific inquiry and can be established in a number of different ways.

For example, the Second Circuit has found that a lessor, a party that is leasing property to another company to an enterprise, can actually exert control over that company, over that enterprise, through a lease under certain circumstances. And while control can be established in myriad different ways, the element does remain somewhat demanding. And it also remains a fertile ground for experienced RICO council to attack even at the motion to dismiss stage.

For example, there have been cases where a RICO plaintiff has attempted to rely on a party's title to establish control over an enterprise. Federal court cases have held that an individual's designation, for example, as a corporation's president or CEO is insufficient standing alone to establish that that individual controlled that corporation for 1962(b) purposes. Similarly, other

RICO plaintiffs have attempted to rely on the control of corporate assets, and that has often found to be insufficient. For example, there was a case that a defendant who acquired control over a corporation's trade secrets, absent more, still didn't demonstrate control for 1962(b) purposes.

This brings up an important distinction between 1962(b) and 1962(c) cases. As listeners will recall, we've spent some time, in fact, we spent a whole episode talking about what is called the distinctiveness requirement in RICO, namely that a defendant cannot be the same as the enterprise, i.e., the enterprise cannot simply be the defendants by a different name. Now, most courts that have examined this issue have ruled this requirement does not apply to 1962(b) claims. It also doesn't apply to 1962(a) claims either.

So today, as we talk about 1962(b), we aren't going to talk about this distinctiveness requirement, and that is the reason why. And this actually leads to another differentiating factor between 1962(b) and 1962(c) cases, which is the nature of the enterprise itself. Now, the definition of “enterprise” is the same for all RICO subsections. As we know, that definition is found, of course, in section 1961 of RICO, subsection 4. And it reads, “An enterprise includes any individual, partnership, corporation, association, or other legal entity in any union or group of individuals associated, in fact, although not a legal entity.”

So, the definition is the same. It allows for both existing entities like corporations and associations that have a legal identity in and of themselves to be an enterprise. And it also allows the association, in fact, enterprise, both are of course okay for 1962(b) claims.

But whereas association, in fact, enterprises are very common, and I mean very common for 1962(c) claims, they are far less common for 1962(b) claims, because 1962(b) involves the infiltration and corruption of a once legitimate enterprise. Very frequently, the enterprise in question is a corporation or a partnership, something that had a legal identity and already existed, i.e., something that is not an association, in fact, enterprise.

All right. Another area where we've spent a lot of time on this podcast is examining RICO's standing requirement. As listeners will recall, in 1964(c), subsection 1964(c) states, “Any person injured in his business or property by reason of a violation of section 1962 can sue.” The components of standing as we've discussed, are number one an injury, to one's business of property, i.e., a pecuniary injury, and number two causation. That's the by reason of language. This language in 1964(c) provide standing for all RICO claims, 1962(c) and 1962(b) claims.

But the analysis is very different. The first part is actually largely the same. It still requires pecuniary injury to business or property, money damages, et cetera. It’s the second part that’s very different. The causation, the by reasons of language.

In a 1962(c) claim, the standing requirement requires the injury to come from the predicate acts themselves, i.e., the racketeering activity. But under 1962(b), the standing requirement is different. It requires the injury to come not from the racketeering activity, but from the defendant’s acquisition or maintenance of control over the enterprise, and this is a very, very important distinction. Experienced RICO practitioners can get 1962(b) cases dismissed at the motion to dismiss stage if the plaintiff has not pleaded an injury arising from the acquisition or maintenance of control.

In fact, some courts have held that the damages that are alleged for a 1962(b) claim must be separate from damages connected to the predicate acts themselves. The Second Circuit, for example, has stated, and I quote, “Damages arising from the acquisition or maintenance of control of the enterprise must be different from the damages that flow from the predicate acts themselves.” And the Second Circuit went on in that case to illustrate this principle with the following example.

Let's say a defendant uses or is alleged to have used a pattern of physical threats against a corporation culminating in arson, all for the purpose of extorting an interest in the plaintiff's property or its business. Now, the damages that are the cost of replacing the burned-down property are damages from the racketeering activity itself. But the plaintiff's loss in value of the business from what he gave to the defendants because of their extortion, that would be a separate injury attributable to the acquisition or maintenance of control over the enterprise.

Now, not all courts require this level of formal separation of damages. Some courts find that a plaintiff can still stay to claim under section 1962(b) by alleging injury from the operation of an enterprise in which the defendant acquired or maintained control. So again, it's important to understand the law in your specific circuit.

Okay. Now, we understand the basics of a section 1962(b) claim and you may be asking yourself, well, why would a civil plaintiff ever use 1962(b)? 1962(c) is much broader. The law is more developed. Frankly, 1962(c) claims are often easier to plead, because the nexus between the harm suffered and the racketeering activity is often more direct and more apparent than any nexus between the harm and the acquisition or maintenance of control of an enterprise.

Those are all very fair arguments, and that is why you see far more, far more 1962(c) claims than you do 1962(b) claims. But there are reasons why a plaintiff would consider and ultimately bring a 1962(b) claim instead of pursuing a 1962(c) claim or perhaps in addition to a 1962(c) claim. One of those reasons is because 1962(b) may be more appropriate if the racketeering activity was performed before the defendants associated in fact, sufficiently to form an association in fact enterprise.

For a 1962(c) claim, the racketeering activity must occur in connection with the operation of the enterprise. Thus, for a 1962(c) claim, the enterprise has to exist at the time of the racketeering activity. But what about cases where the plaintiff can only allege and point to racketeering activity that predated all of the defendants sufficiently associating in fact together? If they want to bring a RICO claim, they have to find the enterprise somewhere else. And 1962(b) provides an avenue to do just that, because the defendants can commit racketeering activity without yet associating, in fact, so long as that racketeering activity led to their acquisition or maintenance of control over an existing legitimate enterprise, i.e., a business, a corporation, something that exists with a legal identity that is not an association, in fact, amongst the defendants.

Another reason a plaintiff might bring a 1962(b) claim in lieu of or in addition to a 1962(c) claim are situations where the RICO defendant and the RICO enterprise are one and the same. This is, of course, the distinctiveness requirement that I mentioned earlier. RICO law is crystal clear that for a 1962(c) claim, the RICO defendants and the RICO enterprise have to be different. They cannot be the same. But as I mentioned, the rule does not apply to 1962(b) claims. So, in

situations where those are your allegations or those are the plaintiff's allegations, 1962(b) is candidly the only option because is 1962(c) will not work.

Now, look, all of that said, I have actually long struggled with the practicality of this concept. After all, how can an existing enterprise consider an existing corporation? How can a corporation acquire or maintain an interest in or control over itself through a pattern of racketeering activity? It really doesn't make any sense. I actually wonder if one day, if someone were to make that argument before a circuit court or even the Supreme Court, whether the court would ultimately find that 1962(b) does contain a distinctiveness requirement like 1962(c) claims do.

But we haven't had that argument made just yet and we haven't had a court rule it, so for now, RICO distinctiveness does not apply to 1962(b) claims, and if that is a challenge for a plaintiff in pleading a claim, it remains a reason why he or she would pursue a claim under 1962(b) instead of 1962(c).

And with that, we are out of time here today, so I want to bring this discussion to a conclusion. I want to thank everyone for listening. If you have any comments or any thoughts about this series or about today's episode on RICO Section 1962(b), I invite you to contact me directly at callan.stein@troutman.com. You can, of course, subscribe and listen to other Troutman Pepper Locke podcasts wherever you listen to your podcasts, including on Apple, Google, and Spotify. Thank you for listening.