

RICO Fraud in Environmental Issues: New Opportunities for Treble Damages

Thomas A. Barnard

Environmental litigators have unique expertise in federal and state environmental laws and regulations, but few have had occasion to examine the legal landscape of the Racketeering Influenced and Corrupt Practices Act (“RICO”), and fewer still have calculated the potential benefit this treble-damage statute might have in the proper case. Yet, as demonstrated in a 2008 case authored by then Federal Court of Appeals Judge, and now-Supreme Court Justice, Sonia Sotomayor, RICO can provide recovery for a client who has suffered damages due to undisclosed environmental contamination under certain circumstances. Moreover, a 2009 decision by the Supreme Court has significantly expanded the potential uses of RICO in cases involving PRPs who use environmental consultants to carry out schemes designed to conceal contamination. The well rounded environmental litigator must possess adequate knowledge of RICO to determine whether this powerful statutory tool is available.

Overview of RICO

RICO was enacted as a part of the Organized Crime Control Act of 1970. RICO’s principal target, as originally enacted, was organized crime. Through its enactment Congress sought to eradicate organized crime by providing enhanced sanctions and new remedies to deal with the unlawful activities of those engaged in organized crime.¹ Essentially, RICO prohibits four classes of activity: (1) investing income derived from racketeering activity in an enterprise that affects interstate commerce; (2) acquiring or maintaining, by means of racketeering activity, an interest in an enterprise that affects

¹ Organized Crime Control Act of 1970, Pub. L. No. 91-452, § 901 (Racketeer Influence and Corrupt Organizations), 84 Stat. 922, 941-48 (1970) (codified at 18 U.S.C. §§ 1961-1968 (1994)); *see also Beck v. Prupis*, 529 U.S. 494, 496 (2000).

interstate commerce; (3) conducting an enterprise through a pattern of racketeering activity; (4) conspiring to commit any of the above activities.²

More specifically, under section 1962(c), plaintiffs claim they were injured directly and financially by predicate acts, however, the RICO enterprise cannot be named as a defendant.³ Thus, section 1962(c) contains a distinctiveness requirement — the enterprise must be separate and distinct from the defendant.⁴ To satisfy this requirement, a complaint under section 1962(c) will usually allege that the enterprise consists of an entity such as a subsidiary and certain officers and employees because the entity alone is the deep pocket.⁵ However, as discussed below, some courts historically have required the association-in-fact enterprise to exist separate and apart from the activities of the parent entity and from the predicate acts. Finally, section 1962(d) permits plaintiffs to bring a suit if they were injured by a conspiracy to violate sections (a)-(c).⁶ One reason to bring a section 1962(d) action is to sweep in other defendants. However, most circuit courts hold that this section of RICO cannot be plead unless a plaintiff can also plead an actual violation of another section of RICO.⁷ Therefore, the prevailing law is that a section (d) claim cannot exist on its own, but any well-plead violation of section (a)-(c) can usually be accompanied by a claim brought under section (d).

The Specific Elements of a Civil RICO claim.

A civil RICO action requires a violation of both section 1962 and section 1964.⁸ As stated above, section 1962 list the four activities prohibited under RICO and section

² 18 U.S.C. § 1962

³ Darrel C. Menthe, Avoiding the Pitfalls of Pleading Civil Rico, *The Practical Litigator*, May 2007, at 55.

⁴ Gregory P. Joseph, A RICO Enterprise Must Have a Structure, *Nat'l L.J.*, Aug. 2009, at 3

⁵ *Id.*

⁶ 18 U.S.C. § 1962(d)

⁷ Darrel C. Menthe, Avoiding the Pitfalls of Pleading Civil Rico, *The Practical Litigator*, May 2007, at 55.

⁸ 18 U.S.C. §§ 1962, 1964.

1964(c) provides a private treble damage action to any person injured in his business or property by reason of a violation of section 1962.⁹ Therefore, a plaintiff who pleads civil RICO under section 1962(c) must show business or property damage caused by (1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity.¹⁰

Section 1962 (c) requires conduct of an enterprise through a pattern of racketeering activity, and a RICO enterprise can include both legitimate and illegitimate enterprises. A RICO enterprise is defined to include “any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity.”¹¹

All subsections of section 1962 require a showing of a pattern of racketeering activity. The pattern element under section 1962 has two express requirements: (1) the commission of at least two of the predicate acts listed in section 1962(a)-(d); (2) within a ten year period.¹² Though the statute provided a clear indication of what is necessary to adequately plead this element, the statute also left substantial room for judicial interpretation as to what would be a sufficient condition to a successful prosecution. Accordingly, in *Sedima, S.P.R.L. v. Imrex Co., Inc.*, the Supreme Court interpreted the pattern element to require both continuity and relatedness.¹³ Thus, the predicate acts must be related to one another and must amount to or pose a threat of continued criminal activity.¹⁴ The two acts cannot be isolated events, but rather must have similar purposes

⁹ 11 18 U.S.C. § 1964(c)

¹⁰ *Rao v. BP Prods. N. Am., Inc.*, 589 F.3d 389 (7th Cir. 2009).

¹¹ 18 U.S.C. 1961(4).

¹² 18 U.S.C. 1961(5).

¹³ See *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 496 (1985) (determined from RICO's legislative history that a "pattern" implied continuous, related acts rather than sporadic activity).

¹⁴ *H.J., Inc. v. Nw. Bell Tel. Co.*, 492 U.S. 229, 239 (1989).

or resulting participants, victims, or methods of commission.¹⁵ Also, continuity of threat, a temporal requirement, can be shown as being either open-ended or closed-ended.¹⁶ To prove open-ended continuity, the plaintiff must show that the predicate acts constitute a regular way of conducting the defendant's ongoing legitimate business.¹⁷ Therefore, open-ended continuity entails proving the threat of long-term criminal conduct. For closed-ended continuity, the plaintiff must provide proof of a series of related acts extending over a substantial period of time.¹⁸ Consequently, certain courts have held that predicate acts extending over a few weeks or months and threatening no future criminal conduct do not satisfy this requirement.¹⁹

The final element to be established is the requirement that the conduct constitute racketeering activity. RICO encompasses a vast array of federal and state offenses in section 1961, but the predicate acts most relevant to environmental contamination RICO litigation are mail and wire fraud. As one commentator has noted, “[i]n those instances where Congress has indicated that the EPA monitor and audit handlers of environmentally hazardous materials, it is nearly inconceivable that any violation of the law would not be furthered through the use of the mails or wires.”²⁰

The requisite elements for establishing substantive mail and wire fraud counts are (1) a scheme to defraud and (2) the use of the mail or wires to execute or further the scheme.²¹ The first requirement, a scheme to defraud, the plaintiff must establish that the

¹⁵ Id. at 240.

¹⁶ Id. at 241.

¹⁷ *Fresh Meadow Food Services, LLC v. RB 175 Corp.*, 282 Fed.Appx 94, 95 (2d Cir. 2008).

¹⁸ Id. at 99.

¹⁹ Id.

²⁰ Lyngklip, Ian, *RICO and Environmental Harms From Hazardous Substances*, 69 U.Det.Mercy L.Rev. 255, 264 (1992).

²¹ Abrams, 2008 WL 4183344, at * 10.

defendant acted with an intent to defraud.²² A materially false statement contained in a document sent through the mail or by email clearly constitutes a fraudulent misrepresentation. The second requirement of mail and wire fraud, the mailing element, contains two factors to be proved. The plaintiff must first establish that the defendant caused the use of mails, and second, the plaintiff must demonstrate that the use was for the purpose of executing the scheme to defraud.²³

RICO'S Early Application to Environmental Crimes

Federal prosecutors have used RICO as a prosecutorial tool in cases involving improper disposal of hazardous waste, even though the statute does not define environmental crimes as predicate acts. For example, in *United States v. Paccione*, 738 F. Supp. 691 (S.D.N.Y. 1990), the court held that the government's allegations of mail fraud and wire fraud properly supported a RICO claim, and the defendant was convicted in connection of operating an illegal landfill.²⁴ Commentators have urged that RICO be amended to include environmental violations as predicate acts.²⁵ However, Congress has not done so, and RICO has not been widely used in civil cases involving environmental contamination.²⁶

The *Fresh Meadow* Case; Required Reading for Environmental Lawyers

In the 2008 case, *Fresh Meadow Food Services v. RB 175 CORP*, the court held that a viable RICO claim had been pled by a tenant, against the tenant's landlord, after the tenant incurred environmental cleanup costs addressing abandoned underground

²² Id.

²³ Id.

²⁴ See also *United States v. Case*, 684 F.Supp. 109 (D.N.J.1988), *aff'd*, 866 F.2d 1413 (3rd Cir. 1988).

²⁵ Reilly, Brendan, *Using RICO To Fight Environmental Crime: The Case For Listing Violations of RCRA As Predicate Offenses For RICO*, 70 Notre Dame L. Rev. 651 (1995).

²⁶ *But see Abrams v. Ciba Specialty Chemicals Corporation*, 2008 WL 4183344, * 10 (S.D. Ala. 2008); *.Standard Equipment, Inc. v. Boeing Co.*, 1985 WL 70 (W.D.Wash. 1985).

storage tanks (“USTs”) on the leased premises.²⁷ According to the complaint, the landlord knew of the USTs but obtained a “clean” Phase One environmental report from his consultant by (i) forging an affidavit stating that the USTs had previously been removed; then (ii) purposely misdirecting the consultant so that subsurface sampling took place in areas other than the USTs’ actual location.²⁸ Also, according to the plaintiff, the landlord gave false testimony – stating that he personally witnessed the USTs’ removal -- in a deposition arising out of a state court case brought by the landlord against the tenant.²⁹ On these facts, the court found that the tenant had adequately pled a “pattern of racketeering activity,” and that the landlord’s predicate acts (mail and wire fraud) were “committed as part of an ongoing scheme by [landlord] to fraudulently misrepresent the environmental condition of the Property to his commercial advantage.”³⁰

Another significant aspect of *Fresh Meadow* is that the lease, which was otherwise binding upon the tenant, had expressly capped the landlord’s liability for environmental contamination. Accordingly, the tenant’s RICO claim was in a sense an “end run” around the plain language of the lease. The Second Circuit acknowledged this fact, but stated that RICO’s private right of action “creates treble damage actions out of business disputes that would otherwise never be in federal court,” and that “this defect – if defect it is – is inherent in the statute as written, and its correction must lie with Congress.”³¹

²⁷ *Fresh Meadow Food Services v. RB 175 CORP.*, 282 Fed.Appx. 94 (2nd Cir. 2008).

²⁸ 282 Fed.Appx. at 95-6.

²⁹ *Id.* at 96-7.

³⁰ *Id.* at 99.

³¹ *Id.* at 100.

In *Boyle*, the Supreme Court Abrogated Hundreds of Lower Court Decisions³²

RICO cases are unusually difficult to plead, and the vast majority of RICO claims are dismissed early in the litigation. One of the problems faced by plaintiffs is defining the “enterprise,” sometimes referred to as the “first rule” of pleading a RICO claim.³³ Prior to 2009, several of the federal circuits, including the Seventh Circuit, required allegations that the enterprise have a “structure and goals separate from the predicate acts themselves.”³⁴ Some courts had stated the test for “enterprise” as follows: whether the enterprise “would still exist were the predicate acts removed from the equation.”³⁵ These courts required that the enterprise “exhibit structural continuity where there is an organizational pattern or system of authority that provides a mechanism for directing the group’s affairs on a continuing, rather than an ad hoc, basis.”³⁶ By requiring evidence of a “structural continuity” existence separate from the predicate acts, the courts effectively limited RICO’s reach to include only those operations that were formal enough to have created a hierarchy, or promulgate bylaws, or otherwise operate in a business-like fashion.

Therefore, in cases similar to *Fresh Meadow*, where the PRP knows of contamination and devises a scheme to conceal the information through knowing misstatements in documents deposited in the mail (predicate act: mail fraud) and in

³² Dr. Randy Gordon, in a recent law review article, opined that as a result of the *Boyle* decision, “we have lost the certainty brought by hundreds of lower court cases telling us that an association-in-fact enterprise has to have an existence separate and apart from the alleged pattern of racketeering.” Gordon, Randy D., *Clarity and Confusion: RICO’s Recent Trips to the United States Supreme Court*, 85 Tul.L.Rev. 677, 715 (2011).

³³ *Jennings v. Emry*, 910 F.2d 1434, 1439-40 (7th Cir. 1990).

³⁴ See, e.g., *Stachon v. United Consumers Club, Inc.*, 229 F.3d 673, 675 (7th Cir. 2000).

³⁵ *Schmidt v. Fleet Bank*, 16 F.Supp.2d 340, 349 (S.D.N.Y. 1998); *Banco Del Atlantico, S.A. v. Stauder*, 2005 WL 1925830 at *8 n.2 (S.D. Ind. 2005).

³⁶ *Manhattan Telecommunications Corp., Inc. v. Dialamerica Marketing, Inc.*, 156 F.Supp.2d 376, 380-81 (S.D.N.Y. 2001).

emails or telephone calls (predicate act: wire fraud), through the use of a third-party consultant (co-conspirator), the challenge of establishing an “enterprise” separate and apart from the predicate acts was daunting. In this situation, the actors’ collective purpose was to conceal environmental contamination, through existing business relationships, for whatever period time was required to succeed in the deception. Yet under the “structure” test above, where the predicate acts themselves could not be considered as evidence of the enterprise, the RICO claim likely would fail.

However, in *Boyle v. United States*, the Supreme Court greatly altered the RICO landscape by relaxing the association-in-fact test.³⁷ In *Boyle*, the Court affirmed a jury instruction in a criminal case that told the jury that “[c]ommon sense suggests that the existence of an association-in-fact is often-times more readily proven by what it does, rather than by abstract analysis of its structure.”³⁸ The Court explained that an enterprise-in-fact need not have a “structural hierarchy,” “chain of command,” or “membership dues, rules and regulations.” Instead, an enterprise requires only three structural features: a purpose, relationships among those associated with the enterprise, and longevity sufficient to permit these associates to pursue the enterprise’s purpose.³⁹ Importantly, the Court held that the evidence used to prove the pattern of racketeering activity (i.e., the predicate acts) and the evidence establishing an enterprise “may in particular cases coalesce.”⁴⁰

³⁷ *Boyle v. United States*, 129 S.Ct. 2237 (2009).

³⁸ 129 S.Ct. at 2242.

³⁹ *Id.* at 2244.

⁴⁰ *Id.* at 2245. While the Court quoted in part from its prior holding in *United States v. Turkette*, 452 U.S. 576, 101 S.Ct. 2524 (1981), as if this interpretation of “association-in-fact” was not new, it is clear from the hundreds of post-*Turkette* lower court decisions holding otherwise that the *Boyle* ruling greatly expands the reach of RICO by eliminating the requirement of any formal structure for this type of enterprise.

At least one commentator believes that *Boyle* “radically redefines the outward bounds of a RICO ‘enterprise,’ and [w]ith one stroke, the Court effectively eviscerated the holdings of scores of cases in which lower courts had held that there must be a sharp distinction between the alleged associational enterprise and the predicate acts.”⁴¹ Judge Posner, writing for the Seventh Circuit Court of Appeals, recently observed that the *Boyle* decision “throws all in doubt,” when considering prior precedent concerning structural requirements for associations under RICO.⁴²

***Boyle* Expands Use of RICO in Environmental Context**

The relaxation of the “enterprise-in-fact” element likely allows the use of RICO in many environmental contamination scenarios. Consider a PRP with a sketchy environmental compliance record, who discovers that historic releases from its operations have potentially migrated to neighboring properties. If the PRP decides to avoid investigation and cleanup costs by concealing its releases, the stage has been set for a series of predicate acts, performed by actors constituting “RICO persons,” through the use of an “association-in-fact enterprise.”

In such a setting, the PRP may make false statements to the United States Environmental Protection Agency (“USEPA”) and/or state counterpart agencies, intended to conceal the fact that releases of hazardous substances had occurred. If the PRP and co-conspirators used the United States mail to transmit these false statements, the persons likely engaged in mail fraud, and if they used email or telephone service, the persons likely engaged in wire fraud.⁴³ Assuming that the PRP is a regulated entity (e.g., that it is

⁴¹ See *supra* note 35, 85 Tul.L.Rev. at 678, 705.

⁴² *Jay E. Hayden Foundation v. First Neighbor Bank, N.A.*, 610 F.3d 382, 388 (7th Cir. 2010).

⁴³ See, e.g., *United States v. Boisture*, 563 F.3d 295 (7th Cir. 2009) (finding that mailings to Indiana Department of Environmental Management supported mail fraud conviction).

a hazardous waste generator under the Resource Conservation and Recovery Act (“RCRA”)), it is probable that these false statements were repeated given the number regular reporting requirements under RCRA and other federal environmental laws.⁴⁴ Accordingly, the “pattern of racketeering activity” will be established, as in the *Fresh Meadow* case.

However, under pre-*Boyle* case law the injured plaintiff likely would have difficulty establishing an “enterprise-in-fact” due to a lack of formal structure underlying the PRP’s relationship with its consultant and other persons involved in concealing the contamination. But *Boyle* now allows this type of case to proceed. No longer are RICO plaintiffs required to present evidence of an enterprise’s bylaws, membership dues, rules or regulations in order to establish an “association-in-fact.”⁴⁵ *Boyle* requires only: (i) a purpose (here, to conceal past contamination and violations and prevent investigations that might reveal such information); (ii) a relationship among the persons (here, the relationship between the PRP, its environmental consultant and others centered on environmental reporting and compliance matters); and (iii) longevity sufficient to permit these persons to pursue the scheme (here, the time spanning typical reporting periods to the regulators, plus any *ad hoc* communications furthering the scheme).

Treble Damage and Attorney Fees Award Under RICO Is Consistent With Harsh Criminal Penalties for Environmental Violations

The severe penalties for civil RICO violations, applied in the environmental context, would be consistent with criminal penalties for violations of RCRA and other federal environmental laws. A recent example illustrates this point. In *United States v.*

⁴⁴ See, e.g., *United States v. Paccione*, 738 F.Supp. at 699 (“The allegations of mail and wire fraud are not invalidated as predicate acts because the alleged enterprise is accused of violations of environmental laws as well.”)

⁴⁵ *Boyle*, 129 S.Ct. at 2245-46.

Anches, Stephen Swift was sentenced to 27 months imprisonment, three years of supervised release, and a \$7,500 fine for transporting and storing soil (contaminated with tetrachloroethylene, excavated in connection with clean-up of a spill) without a RCRA permit.⁴⁶ The owner of property on which the spill occurred, pleaded guilty and was sentenced to five years probation, a \$300,000 fine, and was ordered to immediately pay \$84,000 to EPA as reimbursement of cleanup costs.⁴⁷

Conclusion

Environmental litigators must be alert to facts that could support their clients' claims under RICO. The prospect of treble damages, especially when the damages include the cost of remediation,⁴⁸ plus an award of attorneys' fees, provides significant incentive to establish a RICO case if at all possible. The recent decisions in *Fresh Meadow* and *Boyle* compel environmental attorneys to determine at the discovery stage whether their clients may now be able to take advantage of the RICO statute.

Thomas A. Barnard is a partner at Taft Stettinius & Hollister LLP and focuses his practice in complex litigation, particularly involving environmental, insurance coverage, takings and securities issues. Reach him at tbarnard@taftlaw.com or 317-713-3601.

This article originally appeared on Law360.com.

⁴⁶ *United States v. Anches*, Case No. CR 08-00577DAE

⁴⁷ *Id.*

⁴⁸ Cleanup costs incurred "by reason of" a defendant's RICO violations would be subject to RICO's treble damage provision. 18 U.S.C. § 1964(c); *see, e.g., Fresh Meadow*, 2008 WL 2669337 (plaintiff suffered costs of tank removals and excavation of contaminated soils); *Cuzzupe v. Paparone Realty*, 596 F.Supp. 988 (D.N.J. 1984); *Terra-Products v. Kraft General Foods*, 653 N.E.2d 89, 92 (as to measure of damages, "[I]and subject to hazardous waste or PCB contamination is required to be remediated virtually without regard to cost.")