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From the Co-Chairs

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We are pleased to present the final issue of this year's *Competition Torts News*. In this issue, our Committee members have raised the bar with a slew of good articles:

- Mark Halligan writes on the recent amendments to the Defend Trade Secrets Act that adds certain sections to the Economic Espionage Act, which can now serve as predicate acts in a RICO case. Now, U.S. companies and other victims of trade secret theft may be able to file RICO civil actions--and obtain treble damages, attorney's fees and costs--for RICO violations based upon economic espionage and/or theft of trade secrets as the predicate offenses.
- David Stander writes on the time element of

"duration" in the context of mail and wire fraud allegations and examines a circuit split on this issue. He also looks at ambiguous language in a circuit case from then Judge Alito, which raises questions as to how the Supreme Court might rule if faced with such issue.

- This issue also contains a summary of our Committee's recent program on Competition Torts in the Trenches: Lessons on Confidentiality Agreements, Whistleblowers, and Class Actions. If you were unable to attend the teleseminar, this will provide you with valuable insight into recent developments in this area.
- Amy Starinieri Gilbert provides the Civil RICO grid and case summaries, which will update you on recent decisions in this critical area.

From Matthew Kent: **It has been a pleasure serving as Co-Chair of the Competition Torts Committee for the last three years alongside Nick Grimmer. In the fall, Dean Harvey will be joining Nick Grimmer as the incoming Co-Chairs of the Committee. I am confident that under the leadership of Nick and Dean this Committee will continue to produce excellent content, programming and thought-leadership for our members. Please reach out if you have**

Civil RICO "Pattern of Racketeering"

Circuit Split Also Exists on Measuring Duration Involving "Closed-Ended Continuity"

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INTRODUCTION

In the Winter 2017 ABA Journal of Business Torts and Civil RICO News, this author discussed that here is a split in the circuits as to whether factors other than *duration* and *frequency of acts* should be analyzed in determining "closed-ended continuity," an element to prove a "pattern of racketeering."

If such a matter reached the Supreme Court, we discussed that Justice Samuel Alito, the author of recent Supreme Court decisions pertaining to civil and criminal RICO, would likely find that continuity is a "centrally, a temporal concept" and thus "duration" and "frequency of acts" would be the paramount factors to consider.

But, how do the courts measure this time element of "duration" in the context of mail and wire fraud allegations? Remarkably, there is a split in the circuits on this issue as well, and some ambiguous language in a circuit case from then Judge Alito, which raises questions as to how the Supreme Court could rule if faced with such issue.

BACKGROUND

Most civil RICO cases involve business disputes in which the predicate crimes alleged are mail and wire fraud, 18 U.S.C. § 1341 and 18 U.S.C. § 1343, or other fraud predicates. Many of these business disputes brought as RICO claims have been previously resolved, and because the inherent nature of fraud does not involve "past conduct that by its nature projects into the future with a threat of repetition," open-ended continuity is generally not applicable.[1] Thus, many RICO claims involving fraud are often viewed under the *H.J. Inc*. closed-ended concept which requires "proof of a *series of related predicates* extending over a substantial period of time," that is, more than a "few weeks or months."[2] On the other hand, the Court in *H.J. Inc* discussed that "Congress intended 'a natural and commonsense approach to RICO's pattern element,' and that 'Congress was concerned in RICO with long-term criminal conduct.'[3]

[1] *H.J. Inc. v. Northwestern Bell Tel. Co*., 492 U.S. 229, 240-44 (1989), discussed further herein.

[2] *H.J. Inc., supra*, 492 U.S. at 242.

[3] *H.J. Inc., supra*, 492 U.S. at 237.

ISSUE

Is *duration* determined solely from the dates of the predicate acts of mailing/interstate wiring, or by the length of the fraudulent criminal activity (such as when a part of the scheme is conducted through verbal misrepresentations)? The Circuits have taken conflicting views of this language. This measuring test plays a crucial role in determining whether a federal lawsuit alleging RICO based upon mail fraud or wire fraud survives.

DISCUSSION

The Second Circuit Has Ruled That Closed-Ended Continuity Is Measured By Duration of Predicates

There are a few givens. *First*, we have concluded that duration and frequency of acts (non-sporadic) is the *sine qua non* of closed-ended continuity. *Second*, the statute itself states that a "pattern of racketeering" requires at least at least "two acts of racketeering activity." *Third*, "mailings" and "wirings" (needed to allege a section 1341 or 1343 violation), need only be "incident to an essential part of the scheme,"[4] and need not themselves contain any misrepresentations[5] (labeled "innocent mailings" by the Supreme Court in *Schmuck).*

In *H.J. Inc.*, *supra*, in addressing closed-ended continuity, the Court

"This measuring test plays a crucial role in determining whether a federal lawsuit alleging RICO based upon mail fraud or wire fraud survives."

[4] *Pereira v. United States*, 347 U.S. 1, 8 (1954)

[5] *Schmuck v. United States*, 489 U.S. 705, 715 (1989)

stated that:

> A party alleging a RICO violation may demonstrate continuity over a closed period by proving a *series of related predicates* extending over a substantial period of time. Predicate acts extending over a few weeks or months and threatening no future criminal conduct do not satisfy this requirement: Congress was concerned in RICO with long-term criminal conduct.

Id. at 242 (emphasis added).

Based on this language from *H.J. Inc*., the Second Circuit has explicitly stated that "the duration of a pattern of racketeering activity is measured by the RICO predicate acts the defendants commit." *Defalco v. Bernas*, 244 F.3d 286, 321 (2d Cir. 2001), *citing* cases. See also *GICC Capital Corp. v. Tech. Fin. Grp., Inc.*, 67 F.3d 463, 465 (2d Cir. 1995) in which the Second Circuit identified closed-ended continuity a number of "non-dispositive factors, including, *inter alia*, the length of time over which the alleged predicate acts took place, the number and variety of acts, the number of participants, the number of victims, and the presence of separate schemes."

Some district courts have also ruled that duration to be measured by the duration of the predicate acts.[6]

Three Other Circuits Focus on Duration by Length Of the Fraudulent Scheme to Defraud

In contrast to the explicit Second Circuit position, the Third Circuit, Seventh Circuit and Eighth Circuits derive their opinion from other language in *H.J. Inc*.

Seventh Circuit

The Seventh Circuit has discussed *H.J. Inc's language* that, "Congress intended 'a natural and commonsense approach to RICO's pattern

[6] *See e.g.*, *Ellis v. Warner*, 2017 WL 634287 *21 (S.D. Fla., Feb. 16, 2017) ("the relevant time period for closed ended continuity analysis is the period between the related predicate acts")

element,' and that 'Congress was concerned in RICO with long-term criminal conduct.'[7]

Based on this "natural and common sense" result, the *United States Textiles* court stated that the scheme which lasted from December of 1980 through April of 1982 involving a considerable number instances of mail and wire fraud was not necessarily a pattern stating prior precedent:

> Mail fraud and wire fraud are perhaps unique among the various sorts of 'racketeering activity' possible under RICO in that the existence of a multiplicity of predicate acts ... may be no indication of the requisite continuity of the underlying fraudulent activity. Thus, a multiplicity of mailings does not necessarily translate into a 'pattern' of racketeering activity.

Id. at 1267.

The court cited to previous Seventh Circuit precedent to state that "number of [mail fraud and wire fraud] offenses is only tangentially related to the underlying fraud, and can be a matter of happenstance"…[8] the *United States Textiles* court stated that as each allegation of mail fraud and wire fraud apparently related back to extortion allegedly achieved by the execution of one contract, the court stated that the raw number of transactions and the length of time over which those transactions occurred was pure *happenstance* in light of the underlying concern which is the "continuity" of the criminal activity.[9]

[7] *United States Textiles, Inc. v. Anheiser-Busch,* 911 F.2d 1261, 1267 (7th Cir. 1990)

[8] *United States Textiles, supra*, 911 F.2d at 1268.

[9] *Id*., at 1268. Cf., *Midwest Grinding Co., Inc. v. Spitz*, 976 F.2d 1016, 1024 (7th Cir. 1992), subsequent to *United States Textiles*, the court does not follow *United States Textiles*, but appears to follow the *H.J. Inc*. series of predicate acts argument, stating that first factor, duration, is perhaps the closest thing we have to a bright-line continuity test: the "predicate acts" must "extend[ ] over a substantial period of time"; "a few weeks or months" is considered insubstantial, citing to *H.J., Inc*., 492 U.S. at 242.

This analysis also conforms to the view of many courts in which "single-injury, single goal" fraud cases, despite multiple mailings/wirings, are considered to be "garden-variety" fraud cases which some lower courts view as not sufficiently imposing a significant societal threat. *United States Textiles, supra*, 911 F.2d at 1268-69, ("[I]t is not irrelevant, in analyzing the continuity requirement, that there is only one scheme." (internal quotation marks and citation omitted)). [10] So, it is clear under the above line of reasoning that a mail or wire fraud case involving only "single-scheme, single goal," despite multiple mailings/wirings in furtherance of that single-scheme over a long duration, would unlikely be affirmed as a viable civil RICO case in the Seventh Circuit.

Third Circuit- *Kehr Packages* and Eighth Circuit

In *Kehr Packages Inc. v Fidelcor, Inc.*,[11] the Third Circuit follows the *United States Textiles* line of reasoning and held that the duration of the fraudulent scheme was the determining factor for "closed-ended" continuity. In *Kehr Packages*, the plaintiffs alleged civil RICO violations resulting from a short-term attempt to force a single entity into bankruptcy, which was accomplished by fraudulent *oral* promises that additional financing would be provided. Despite the scheme to force plaintiffs to bankruptcy lasted only about eight (8)

[10] See also *Jackson v. BellSouth Telecommunications*, 372 F.3d 1250, 1267 (11th Cir. 2004), where the court stated that where the RICO allegations concern only a *single scheme with a discrete goal*, the courts have refused to find a closed-ended pattern of racketeering even when the scheme took place over longer periods of time; *Efron v. Embassy Suites (P.R.), Inc.*, 223 F.3d 12, 18 (1st Cir. 2000) (noting that "the fact that a defendant has been involved in only one scheme with a singular objective and a closed group of targeted victims" supports the conclusion that there is no continuity), and cited to other circuits, *Edmondson & Gallagher v. Alban Towers Tenants Ass'n*, 48 F.3d 1260, 1265 (D.C.Cir.1995) (predicate acts occurring over three year period insufficient to allege pattern of racketeering when complaint alleged a single scheme with a single goal).

[11] 926 F.2d 1406 (3rd Cir. 1991)

months, there were mailings of invoices which continued for one year and seven months (19 months).

The majority in *Kehr Packages* ruled that because mailings/wirings may just be "innocent and not even contain misrepresentations, as well as may continue after the scheme is concluded, *i.e.*, "lulling letters," the duration of the deceitful conduct is more relevant to the continuity analysis.[12] Accordingly, the majority in *Kehr Packages* held that in determining the duration of the scheme involving mail and wire fraud, the relevant criminal conduct is the defendant's deceptive or fraudulent activity, rather than otherwise innocent mailings that may continue for a long period of time. *Id.*, at 1418. Thus, although there were mailings over 19 months "incident to the scheme," the actual deceptive conduct was only eight (8) months, and therefore the court held that there was no continuity. *Id.*

The Eighth Circuit, in *Wisdom v First Midwest Bank*,[13] also follows the reasoning of *Kehr Packages*, stating the court must look to the underlying scheme to defraud, "[T]he continuity question should not be affected by the fact that a particular fraudulent scheme involved numerous otherwise 'innocent' mailings ....").

"in determining the duration of the scheme involving mail and wire fraud, the relevant criminal conduct is the defendant's deceptive or fraudulent activity"

[12] *Kehr Packages, supra*, 926 F.2d at 1414.

Justice Alito's Concurs/Dissents in Kehr Packages

In *Kehr Packages*, then Judge Alito filed an opinion which concurred in part and dissented in part. Judge Alito rejected the *Kehr Packages* majority analysis and argued that the statute, 18 U.S.C. § 1961(1), equates "racketeering activity" with the listed predicate offenses.

> Therefore, the duration of racketeering activity for the purpose of judging closed-ended continuity must equal the duration of the related predicates.[14]

Judge Alito also stated that the majority's analysis is inconsistent with the plain language of the RICO statute.[15]

But, Judge Alito somewhat moderates his position and creates ambiguity when he argued that even it were proper to look beyond the duration of the mail fraud violations and measure the duration of the deceitful conduct, the focus of inquiry should be on the fraudulent scheme, not the repetition of fraudulent statements.[16] Judge Alito further argued that

> if a fraudulent scheme is launched convincingly, there may be no need for a repetition of the fraudulent statements made at the outset. But as long as the scheme continues—as long as the original false statements are left uncorrected and victims continue to be deceived—the deceitful conduct must be regarded as continuing.

Id. at 1423.

This language implies that, like the majority in *Kehr Packages,* the continuity of the scheme is the length of time of the deceptive conduct, which could be accomplished by material verbal misrepresentations, not mere innocent mailings which could continue indefinitely.

[13] 167 F.3d 402, 407 (8th Cir. 1999)

[14] *Kehr Packages, supra*, at 1422-1423.

[15] *Id.,* at 1422.

16 *Kehr Packages, supra*, at 1423.

What is the Proper Position?

To this writer, the "duration of the scheme to defraud" position is the proper analysis. Provided that there is sufficient proof that each Defendant caused at least two mailing/wirings in furtherance of the scheme to defraud (and meet the other tests for pattern such as "relatedness"), the statutory requirements for finding a pattern of racketeering under section 1961(5) are met if the Plaintiff can sufficiently allege a "scheme to defraud" existing over a substantial period of time, usually determined to be more than one year. In such an instance, it should be irrelevant that the requisite two mailings/wirings in furtherance of the scheme may have occurred only over a short duration of time, for example, when the scheme was effected in most part by verbal misrepresentations with limited mailings/wirings.

Moreover, the Second Circuit position is inconsistent with the intent of the RICO statute, as viewed by various circuits (but not necessarily the Supreme Court) to preclude a Plaintiff from bringing a civil RICO based on a "single-scheme, single-goal" set of facts, which could otherwise have a multiplicity of mailings.

What Should Practitioners Do?

For now, practitioners in the Second Circuit clearly must allege racketeering acts consisting of mailings/wirings which are of a sufficient duration, as well as allege other factors to defeat a "single-scheme, single-goal" garden-variety fraud defense. Practitioners in the Third Circuit, Seventh Circuit and Eighth Circuits should focus on alleging a scheme of significant duration, as well as allege other factors to find closed-ended continuity.

Conclusion

Given the split in the Circuits, it is certainly possible that this issue could reach the Supreme Court. Given the outsized influence of Justice Alito on any potential civil RICO case involving pattern of racketeering, his somewhat conflicting comments in *Kehr Packages* make it difficult to discern how the Court would rule on this issue of "duration."

The EEA/DTSA/RICO Widens the Scope of Civil Liability for Trade Secret Theft and Foreign Economic Espionage

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The passage of the Defend Trade Secrets Act (DTSA) is a watershed event in intellectual property law. The Senate passed the DTSA on April 11, 2016 (87-0). The House of Representatives passed the DTSA on April 27, 2016 (410-2). President Obama signed the bill into law on May 11, 2016.

There is a lot of commentary and fanfare about the DTSA's creation of a federal cause of action for trade secret misappropriation and the enactment of *ex parte* seizure provisions. These are two critical amendments that can be traced back to this author's law review article in 2008 entitled *Protection of U.S. Trade Secret Assets: Critical Amendments to the Economic Espionage Act of 1996.*[1]

However, there is a much bigger development in the DTSA legislation. Although overlooked by most legal pundits, the DTSA also adds Sections 1831and 1832 of the Economic Espionage Act of 1996 (EEA)[2] as predicate criminal acts in Section 1961(1) of the Racketeering Influenced and Corrupt Organizations Act (RICO).[3]

Adding Sections 1831 and 1832 to the list of RICO predicate acts activates EEA Section 1837[4] which extends exterritorial jurisdiction to conduct occurring outside the United States if (1) the offender is a citizen or permanent resident alien of the United States, or (2) an organization that is organized under the laws of the United States or a

[1] Protection of U.S. Trade Secret Assets: Critical Amendments to the Economic Espionage Act of 1996. 7 J. Marshall Law Review Intell. Property 656 (2008).

[2] Economic Espionage Act of 1996 18 U.S.C. Sections 1831-1839.

[3] Racketeer Influenced and Corrupt Organizations Act, Title IX of the Organized Crime Control Act of 1970. 18 U.S.C. Sections 1961-1968.

[4] 18 U.S.C. Section 1837 (Applicability to Conduct Occurring Outside the United States).

State or political subdivision thereof, or (3) an act in furtherance of the offense was committed in the United States.[5] This means that the target list of potential defendants in a civil action now includes RICO defendants which extends civil liability for trade secret theft well beyond the statutory limitations of a Uniform Trade Secrets Act (UTSA) claim.

"Protecting confidential business information dates to Roman law."

Historical Development of Trade Secret Law in the United States

Protecting confidential business information dates to Roman law.[6] The development of U.S. trade secrets law began with decisions by the Massachusetts Supreme Court citing cases decided under the common law in England. The first reported trade secret decision was *Vickery v Welch*, decided in 1837[7] by the Supreme Court of Massachusetts holding that a contract for the sale of a secret process for making chocolate with a non-competition bond by the seller was lawful and enforceable. Some 30 years later, the Massachusetts Supreme Court enforced an employee's promise not to disclose the employer's trade secrets in *Peabody v Norfolk* in 1868.[8] Thereafter, notable trade secret cases were decided in New York, Pennsylvania, New Jersey and other commercial states.[9]

[5] Id.

[6] A. Arthur Schiller, Trade Secrets and the Roman Law; The Actio Servi Corrupti. Columbia Law Review Vol. 30, No. 6 (June.1930), pp. 837-845

[7] Vickery v. Welch, 36 Mass. 523 (1837).

[8] Peabody v. Norfolk, 98 Mass. 452 (1868).

[9] Pressed Steel Car Co. v. Standard Steel Car Co., 210 Pa. 464, 60 A.4 (1904); Taber v. Hoffman, 118 N.Y. 30, 23 N.E. 12 (1889); Stone v. Goss, 65 N.J. Eq. 756, 55A 736 (1903).

Trade secret cases continued to proliferate into the early 20th Century. In 1939, the American Law Institute Restatement of Torts (First) reviewed 100 years of trade secret cases in the United States and enunciated *six factors*[10] for ascertaining the existence of a trade secret that continue to be the litmus test for trade secrets today in Section 757.[11] However, the drafters of the Restatement First of Torts also enunciated an arbitrary, structural limitation on trade secrets by restricting the protection of trade secrets to only those trade secrets used continuously in operating a business.[12]

[10] Section 757 (Cmt.b.) Secrecy. The Six Factors are as follows:

(1) The extent to which information is known outside the company (the more extensively the information is known outside the company, the less likely it is a protectable trade secret);

(2) The extent to which information is known by employees and others involved in the company (the greater the number of employees who know the information, the less likely that it is a protectable trade secret);

(3) The extent of measures taken by the company to guard the secrecy of the information (the greater the security measures, the more likely that it is a protectable trade secret);

(4) The value of the information to the company and competitors (the greater the value of the information to the company and its competitors, the more likely that it is a protectable trade secret);

(5) The amount of time, effort, and money expended by the company in developing the information (the more time, efforts and money expended in developing the information, the more likely that it is a protectable trade secret);

(6) The ease or difficulty with which the information could be properly acquired or duplicated by other (the easier it is to duplicate the information, the less likely that it is a protectable trade secret).

[11] Three sections were promulgated by the American Law Institute in the Restatement of Torts (Firs): Section 757—Liability for the Disclosure or Use of Another's Trade Secret (General Principle); Section 758—Innocent Discovery of the Secret—Effect of Subsequent Notice or Change in Position; Section 759—Procuring Information by Improper Means.

[12] See Section 757 Cmt.b. Definition of a Trade Secret.

The structural limitation in Section 757 did not survive the test of time. As the United States transitioned from an "industrial revolution" society to an "information-based" society, the artificial limitation of a trade secret to something used continuously in operating a business was much too restrictive. Many trade secrets, including non-technical information and negative know-how were not eligible for common law trade secret protection.

In 1979, the National Conference of Commissioners on Uniform State Laws released the model Uniform Trade Secrets Act (UTSA).[13] Work on the UTSA began in 1968. The National Conference of Commissioners on Uniform State Laws approved the UTSA and the fifth tentative draft at the 1979 Annual Meeting of the National Conference of Commissioners on Uniform State Laws in San Diego, California. Thereafter, the American Bar Association approved the UTSA at its meeting in Chicago, Illinois, on February 4–5, 1980. Today, every state (except New York and Massachusetts) have enacted the UTSA.

The UTSA established the building blocks for the development and growth of trade secret protection in the United States. The drafters jettisoned the artificial restrictions in Section 757 Restatement of Torts and replaced it with a broad definition of trade secret that encompasses both technical and non-technical information, combination trade secrets and negative know how.[14]

The UTSA also sets forth a statutory definition of misappropriation that includes protection against the unauthorized acquisition, disclosure or use of trade secrets.[15] Damages can be recovered for plaintiff's actual loss caused by the misappropriation and for unjust enrichment not

[13] National Conference of Commissioners on Uniform State Laws, Uniform Trade Secrets Act 1979 (with 1985 Amendments).

[14] UTSA Section 1. See Uniform Law Commission, The National Conference of Commissioners on Uniform State Laws Trade Secrets Act Summary https://tinyurl.com/y6uhfleo

[15] UTSA Section 1 (Definitions).

taken into account in computing damages for actual loss.[16] A reasonable royalty is also an available remedy for the plaintiff.[17]

In an UTSA action, the trial court may award attorney's fees to the defendant if a claim of trade secret misappropriation is made in bad faith or if a motion to terminate an injunction is made or resisted in bad faith.[18] For the plaintiff, if willful and malicious misappropriation is proven, the court may award exemplary damages in an amount not exceeding two times compensatory damages plus reasonable attorney's fees.[19]

The UTSA preserves the secrecy of the alleged trade secret during the litigation and this obligation is mandatory.[20] The UTSA statute of limitations is three years after the misappropriation is discovered or by the exercise of reasonable diligence should have been discovered.[21] A continuing misappropriation constitutes a single claim.[22]

The UTSA displaces conflicting tort and restitutionary causes of action pertaining to civil liability for misappropriation of a trade secret but the UTSA does not displace contractual or other civil liability (that is not based upon misappropriation of a trade secret) and does not displace criminal liability for misappropriation of a trade secret.[23]

The Economic Espionage Act of 1996

On October 11, 1996, President Clinton signed the Economic Espionage Act of 1996 (EEA) into law.[24] The EEA imported the UTSA definition of a "trade secret" but expanded it to include "all

[16] UTSA Section 3 (Damages).

[17] *Id.*

[18] UTSA Section 4 (Attorney's Fees).

[19] *Id.*

[20] UTSA Section 5 (Preservation of Secrecy).

[21] UTSA Section 6 (Statute of Limitations).

[22] *Id.*

[23] UTSA Section 7 (Effect on Other Law).

[24] The Economic Espionage Act of 1996 (Pub.L. 104–294, 110 Stat. 3488, enacted October 11, 1996).

forms and types of financial, business, scientific, technical, economic or engineering information, including (but not limited to) patterns, plans, compilations, program devices, formulas, designs, prototypes, methods, techniques, processes, procedures, programs or codes."[25]

The economic strength, competitiveness and security of the United States rests upon protecting trade secret assets. Congress recognized that, in the wake of the birth of the Internet and the proliferation of computers, it must enact strong criminal statutes to prevent foreign economic espionage and the domestic theft of trade secret assets.[26]

The EEA (before the enactment of the DTSA) was a criminal statute and major U.S. corporations did not have immediate access to the federal courts to protect against the actual or threatened misappropriation of trade secrets. Usually absent a violation of the Computer Fraud and Abuse Act, jurisdiction was limited to UTSA state causes of action or common law claims. Unlike patents, copyrights and trademarks, access to the federal courts, including national service of process, was not available to the victims.[27]

The EEA captures any trade secret theft, including attempted offenses and conspiracies, with two criminal statutes: Section 1831 (Economic Espionage) and Section 1832 (Theft of Trade Secrets). This includes extraterritorial jurisdiction encompassing conduct that occurs outside the United States if the offender is a natural person who is a citizen or permanent resident alien of the United States (or an organization organized under the laws of the United States or a state or political subdivision) or if an act in furtherance of the offense was committed in the United States.[28]

[25] 18 U.S.C Section 1839 (Definitions).

[26] Protection of U.S. Trade Secret Assets: Critical Amendments to the Economic Espionage Act of 1996. 7 J. Marshall Law Review Intell. Property 656 (2008).

[27] *Id.*

[28] 18 U.S.C Section 1837 (Conduct Outside the United States).

Section 1831: Economic Espionage

(a) Whoever, intending or knowing that the offense will benefit any foreign government, foreign instrumentality, or foreign agent, knowingly—

(1) steals, or without authorization appropriates, takes, carries away, or conceals, or by fraud, artifice, or deception obtains a trade secret;

(2) without authorization copies, duplicates, sketches, draws, photographs, downloads, uploads, alters, destroys, photocopies, replicates, transmits, delivers, sends, mails, communicates, or conveys a trade secret;

(3) receives, buys, or possesses a trade secret, knowing the same to have been stolen or appropriated, obtained, or converted without authorization;

(4) attempts to commit any offense described in any of paragraphs (1) through (3); or

(5) conspires with one or more other persons to commit any offense described in any of paragraphs (1) through (3), and one or more of such persons do any act to effect the object of the conspiracy,

shall, except as provided in subsection (b), be fined not more than $5,000,000 or imprisoned not more than 15 years, or both.

18 U.S.C. Section 1831 (Economic Espionage).

Section 1831 is directed to foreign economic espionage. The statutory terms "foreign instrumentality" and "foreign agent" are defined terms.[29] A "foreign instrumentality" means any agency, bureau, ministry, component, institution, association, or any legal, commercial or business organization, corporation, firm, or entity that is substantially owned, controlled, sponsored, commanded, managed or dominated by a foreign government." In turn, a" foreign agent" means any officer, employee, proxy, servant, delegate, or representative of a foreign government."[30]

[29] 18 U.S.C. Section 1839(1) ("foreign instrumentality").

[30] 18 U.S.C. Section 1839(2) ("foreign agent").

Section 1832 covers any trade secret offense involving an intent to convert a trade secret knowing that it will injure any owner of a trade secret if the trade secret is related to a product or service used or intended for use in interstate or foreign commerce[31]. The statutory term "owner" is defined "to mean the person or entity in whom or in which rightful legal or equitable title to, or license in, the trade secret is reposed."[32]

A careful review of Sections 1831 and Section 1832 reveals over 25 offenses in Section 1831, over 25 offenses in Section 1832, plus offences for attempts and conspiracies to commit each offense. This translates into a matrix of over 75 offenses in Section 1831 and 75 possible offenses in Section 1832.[33]

Section 1832: Theft of Trade Secrets

(a) Whoever, with intent to convert a trade secret, that is related to a product or service used in or intended for use in interstate or foreign commerce, to the economic benefit of anyone other than the owner thereof, and intending or knowing that the offense will, injure any owner of that trade secret, knowingly—

(1) steals, or without authorization appropriates, takes, carries away, or conceals, or by fraud, artifice, or deception obtains such information;

(2) without authorization copies, duplicates, sketches, draws, photographs, downloads, uploads, alters, destroys, photocopies, replicates, transmits, delivers, sends, mails, communicates, or conveys such information;

(3) receives, buys, or possesses such information, knowing the same to have been stolen or appropriated, obtained, or converted without authorization;

(4) attempts to commit any offense described in paragraphs (1) through (3); or

(5) conspires with one or more other persons to commit any offense described in paragraphs (1) through (3), and one or more of such persons do any act to effect the object of the conspiracy,

shall, except as provided in subsection (b), be fined under this title or imprisoned not more than 10 years, or both.

18 U.S.C. Section 1832 (Theft of Trade Secrets).

[31] 18 U.S.C. Section 1832(a).

[32] 18 U.S.C. Section 1839(4).

[33] Over 25 actual offenses, plus attempts to commit over 25 actual offenses, plus conspiracies to commit over 25 actual offenses equals over 75 RICO predicate acts.

The Defend Trade Secrets Act of 2016

The Defend Trade Secrets Act of 2016, effective May 11, 2016, creates a new civil cause of action for trade secret misappropriation and requirements and procedures for *ex parte* seizure provisions into EEA Section 1836.[34] There are also "whistleblower" provisions added to Section 1833[35] and enhanced requirements in Section 1835 for protecting alleged trade secrets during litigation.[36] Section 1839 adds a definition for "misappropriation" and "improper means" copied from the UTSA.[37] There is no federal preemption so both UTSA (state) and DTSA (federal) causes of action can be filed.[38]

The DTSA also adds Section 1831 and Section 1832 as RICO predicate acts to Section 1961 of the RICO Act. This is a game-changer for civil litigation involving the theft of trade secrets and it exponentially increases the exposure of third-parties to RICO violations for foreign economic espionage and trade secret theft.

34 18 U.S.C. Section 1836 (The title of this section was "Civil Proceedings to Enjoin Violations" in the EEA. The new title is "Civil Proceedings.").

35 18 U.S.C. Section 1833 grants immunity for the confidential disclosure of a trade secret to the Government or in a court filing if protected under seal and permits the use of trade secret information in an anti-retaliation lawsuit if the trade secret information is protected by court order and kept under seal.

36 18 U.S.C. Section 1835 (As amended, Section 1835 now requires district courts to permit a trade secret holder to file a brief under seal that explains why its trade secrets should be kept confidential by the court.

37 18 U.S.C. Section 1839(5) ("misappropriation") and Section 1839(6) ("improper means"). There is an explicit statutory recognition in Section 1839(6)(B) that "improper means" does not include reverse engineering, independent derivation, or any other lawful means of acquisition of a trade secret. This statutory declartion is consistent with well-established trade secret law dating back almost 200 years.

38 See 18 U.S.C. Section 1836(3)(c). The district courts have original but not exclusive jurisdiction for DTSA civil actions.

Racketeer Influenced and Corrupt Organizations Act, Title IX of the Organized Crime Control Act of 1970

The Organized Crime Control Act (OCCA) was passed in 1970. The OCCA attacked organized crime in the United States by strengthening the legal tools available to both prosecutors and victims of organized crime. The RICO Act created four new criminal offenses[39] and a new civil cause of action for "[a]ny person injured in his business or property by reason of a violation" of those offenses.[40] As Justice Blackmun observed in 1983: "The legislative history clearly demonstrates that the RICO statute was intended to provide new weapons of unprecedented scope for an assault upon organized crime and its economic roots."[41]

The rampant rise in foreign economic espionage and trade secret theft parallels the rampant rise in "organized crime" years ago. Today, Former NSA Director General Keith Alexander says cyber-

"The legislative history clearly demonstrates that the RICO statute was intended to provide new weapons of unprecedented scope for an assault upon organized crime and its economic roots."

[39] 18 U.S.C. Section 1962(a)-(d).

[40] 18 U.S.C. 1964©.

[41] Russello v. United States, 464 U.S. 16 (1983).

espionage is causing the "the greatest transfer of wealth in history."[42] Symantec places the cost of intellectual property theft in the U.S. economy at over $250 billion a year.[43] Adding EEA Sections 1831 and 1832 as RICO predicate acts now opens entire new avenues for victims of economic espionage and trade secret theft.

RICO punishes enterprise criminality. The criminal offenses created by RICO target a pattern of racketeering activity committed by, through, or against an enterprise.[44] Organized crime is a special category of crimes involving the activities of organized criminal groups in relation to an enterprise.[45] EEA Sections 1831 and 1832 fall naturally into a RICO "organized crime" framework. Without RICO offenses, foreign governments can operate by or through foreign instrumentalities and foreign agents or other U.S. persons without exposure to civil liability under U.S. law.[46]

RICO is the key enforcement tool used by the FBI to expand criminal liability across multiple members of a criminal enterprise and to capture RICO defendants and conspirators that often reside in "safe haven" countries.[47]

The RICO statute defines "racketeering activity" to encompass over 50 federal and state offenses—now including EEA Sections 1831 and 1832—as

[42] https://www.youtube.com/watch?v=JOFk44yy6IQ_

[43] *Id.*

[44] 18 U.S.C. Section 1962 (prohibited activities). Section 1831 and Section 1832 offenses fall within RICO Section 1962 (c): It shall be unlawful for any person employed by or associated with any enterprise engaged in , or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt."

[45] See https//www.fbi.gov/investigate/organized-crime.

[46] See the Annual Report to Congress on Foreign Economic Collection and Industrial Espionage https://fas.org/irp/ops/ci/docs/fecie_fy00.pdf.

[47] See endnote 46 *supra*.

RICO "predicate" acts.[48] A RICO predicate is itself a crime. RICO utilizes Section 1961 crimes—"racketeering activity"[49]—to establish predicate criminal acts as the foundation for enterprise liability for RICO defendants. A defendant can face criminal or civil liability under RICO even if the defendant has not been convicted of the underlying RICO predicate acts.[50]

The elements of a RICO civil cause of action appear intricate and complex at first blush but are really not complicated: The plaintiff (victim) sues the RICO defendant for conducting the affairs of a distinct and separate RICO enterprise through a *pattern of racketeering activity*. A "pattern of racketeering activity" requires at least two Section 1961 predicate criminal acts committed within 10 years of each other. The United States Supreme Court has also superimposed the judicially-created requirement that the "pattern of racketeering activity" include the existence or threat of continued criminal activity.[51]

The RICO "enterprise" is defined as "any individual, partnership, corporation, association or other legal entity, and any union or group of individuals associated in fact although not a legal entity."[52] A RICO enterprise is *separate and distinct* from the RICO defendant.[53] RICO does not target the RICO enterprise. RICO targets the RICO defendants who corrupt legitimate

[48] 18 U.S.C. Section 1961.

[49] 18 U.S.C. Section 1961(1).

[50] *Sedima, S.P.R.L.* v. *Imrex Company, Inc*. The predicate acts involve conduct that is "chargeable" or "indictable" and "offenses" that are "punishable."

[51] H.J. Inc. V. Northwestern Bell Telephone Co., 492 U.S. 229 (1989). Predicate acts extending over a few weeks or months and threatening no future criminal conduct do not satisfiy a [pattern of racketeering activity]. Congress was concerned in RICO with long-term criminal conduct and whether there is a threat of continued racketeering activity.

[52] 18 U.S.C. Section 1961(4).

[53] 18 U.S.C. Section 1962(c).

enterprises through a pattern of racketeering activity.[54]

The origin of RICO is organized crime. The statute reaches RICO defendants who do "not have blood on their hands" but who operate or manage or corrupt the RICO enterprise by engaging in a pattern of racketeering activity. RICO exposes the "mastermind" or "Mr. Big" or the "Godfather" to criminal or civil liability for engaging in a pattern of racketeering activity while sitting in a three-piece suit in an executive office suite or perhaps serving as high-ranking official working for a foreign government.

The critical point for litigators is that the defendant may violate RICO even if he or she does not commit the underlying crimes, does not direct someone else to commit the underlying crimes, and does not conspire with someone else to commit the underlying crimes. A defendant can violate RICO simply by operating or managing an enterprise through a pattern of racketeering activity.

RICO/EEA Extraterritorial Jurisdiction

The RICO enterprise can encompass foreign governments, foreign instrumentalities and foreign agents. There is also applicability of Sections 1831 and 1832 to conduct outside the United States.[55] Therefore, RICO applies to extraterritorial conduct because the predicate Section 1831 and 1832 offenses themselves apply extraterritorially. This is the holding in the recent U.S. Supreme Court decision in *RJR Nabisco, Inc. v European Community* decided on June 20, 2016.[56]

RICO Treble Damages, Costs and Attorney's Fees

RICO civil remedies are clear-cut and mandatory. If a plaintiff proves $100,000 in damages resulting from a RICO violation, then

[54] United States v. Turkette, 452 U.S. 576, 591 (1981).

[55] 18 U.S.C. Section 1837.

[56] RJR Nabisco, Inc. v. European Community, 136 S. Ct. 2090.

the plaintiff gets $300,000 in damages plus its costs and attorney's fees.[57] In contrast, the plaintiff in a UTSA action must prove that the defendant's trade secret misappropriation was "willful and malicious" to recover increased damages and attorney's fees and such additional awards are discretionary with the trial court.[58] In a DTSA action, the plaintiff cannot obtain increased damages and attorney's fees if the trade secret owner has not complied with the whistleblower notification provisions in the DTSA.[59] And, like the UTSA, an award of increased damages and attorney's fees is discretionary with the trial court in a DTSA action.[60]

RICO Jurisdiction and Venue Provisions

RICO also has jurisdiction and venue provisions that favour plaintiffs.[61] Section 1965(a) provides that venue is proper in any district in which the defendant resides, is found, has an agent, or transacts his affairs. Section 1965(b) provides that in any RICO action "in which it is shown that the ends of justice require that other parties residing in any other district be brought before the court, the court may cause such parties to be summoned, and process for that purpose may be served in any judicial district of the United States by the marshal thereof." Finally, Section 1965(d) provides that all other process may be served on any person in any judicial district in which such person resides, is found, has an agent, or transacts his affairs. Combining these three statutory provisions, the courts have approved national service of process under Section 1965(b) and Sections 1965

[57] 18 U.S.C. Section 1964(c).

[58] UTSA Section 3 (Damages).

[59] 18 U.S.C. Section 1833.

[60] 18 U.S.C. Section 1836.

[61] 18 U.S.C. 1965(a)-(d). (Venue and Process).

[62] See e.g.,Cory v. Aztec Steel Bld., Inc., 486 F.3d 1226, 1231 (10th Cir. 2006).

(d);[62] venue under Section 1965(a)[63]; and the haling into a federal district court of out-of-district RICO defendants under Section 1965(b) if venue is proper as to at least one RICO defendant under Section 1965(a).[64]

RICO Widens the Scope of Liability for Trade Secret Theft

The UTSA and DTSA statutory causes of action impose liability on the direct misappropriator who wrongfully acquires, discloses or uses trade secrets and a very limited class of third parties who know or have reason to know that the trade secret was acquired by improper means.[65] However, in a global economy, the threat and continuing misappropriation of trade secrets involves various actors involved in sophisticated multinational schemes, conspiracies and criminal enterprises to steal trade secrets.[66] Often the bad actors involve foreign governments, foreign agents and foreign instrumentalities far removed from the actual misappropriators but who actively operate or manage the criminal enterprise to steal (or attempt to steal) trade secrets.[67] Utilizing Section 1831 and 1832 predicate offenses, all the participants and co-conspirators can now be sued in a RICO civil action in a U.S. District Court.

The EEA Section 1831 and 1832 offenses—now RICO predicate acts— capture a much wider universe of bad acts using the stolen trade secrets: "copies, duplicates, sketches, draws photographs,

[63] See, e.g., Lisak v. Mercantile Bancorp., Inc., 834 F.2d 668, 672 (7th Cir. 1987).

[64] Id.

[65] UTSA Section 1 Definitions (Misappropriation).

[66] See Economic Espionage in 2017 and Beyond: 10 Shocking Ways They Are Stealing Your Intellectual Property and Corporate Mojo, https://www.americanbar.org/publications/blt/2017/05/05_kahn.html.

[67] See U.S. Charges Five Chinese Military Hackers for Cyber Espionage Against U.S. Corporations https://www.justice.gov/opa/pr/us-charges-five-chinese-military-hackers-cyber-espionage-against-us-corporations-and-labor.

downloads, uploads, alters, destroys, photocopies, replicates, transmits, delivers, sends, mails communicates, or conveys a trade secret."[68] Sections 1831 and 1832 are perfect predicates for a pattern of racketeering activity. There are over 25 wrongful acts to choose from (in *either* Section 1831 *or* Section 1832) and 75 wrongful acts (in *either* Section 1831 *or* Section 1832) when "attempts" and "conspiracies" to commit offenses are included.

RICO Statute of Limitations and 10-Year Discovery Period

The RICO statute of limitations is four years.[69] The UTSA and DTSA statute of limitations is three years. A continuing misappropriation constitutes a single claim under the UTSA and the DTSA. However, RICO does not consolidate predicate acts into one act, so a continuing theft of trade secrets will continue the pattern of racketeering activity and extend the statute of limitations.

In addition, a RICO civil cause of action supports a 10-year discovery period because a "pattern of racketeering activity" is defined by statute as two predicate acts committed within 10 years of each other. Placing litigation holds on RICO defendants dating back 10 years (or face spoliation claims and judicial sanctions) is also a powerful weapon in RICO litigation. The district courts have uniformly held that a time-barred predicate offense may still serve as a RICO predicate offense for an otherwise timely RICO claim.[70]

Conclusion

The enactment of the DTSA is a watershed event in intellectual property law. Trade secrets are now on the same playing field as patents,

[68] 18 U.S.C. Section 1831(a)(2) and 18 U.S.C. Section 1832(a)(2).

[69] Agency Holding Corp. v. Malley-Drift Associates, Inc., 483 U.S. 143, 156 (1987).

[70] See, e.g., Hoxworth v. Blinder, Robinson & Co., 980

copyrights and trademarks with full access to the federal courts. Adding *ex parte seizure* provisions to the DTSA is also a critical amendment because defendants can now destroy trade secrets with the press of a button on a keyboard, or transfer the trade secrets to another part of the world. *An ex parte* seizure order—provides a necessary element of surprise—often necessary to protect trade secrets from destruction or transfer outside the jurisdiction of the federal court.

However, the real "gem" in the DTSA is the addition of EEA Sections 1831 and 1832 as RICO predicate acts. Now U.S. companies and other victims of trade secret theft can file RICO civil actions, based upon Section 1831 and 1832 predicate offenses, and obtain treble damages, attorney's fees and costs for RICO violations based upon Section 1831 and 1832 predicate offenses. Unleashing the offensive and deterrence impact of RICO on foreign economic espionage and trade secret theft is a huge step forward in protecting the national and economic interests of the United States. In the coming years, adding EEA Sections 1831 and 1832 as RICO predicate acts may well prove to be the most significant legislative enactment in the DTSA.

"In the coming years, adding EEA Sections 1831 and 1832 as RICO predicate acts may well prove to be the most significant legislative enactment in the DTSA."

COMPETITION TORTS PROGRAM

Competition Torts in the Trenches: Lessons on Confidentiality Agreements, Whistleblowers, and Class Actions

REPORT BY

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In November, the Competitions Torts Committee hosted a special program, *Competition Torts in the Trenches: Lessons From Recent High-Profile Cases*. In the program, our new co-chair Dean Harvey moderated an all-star panel of leading practitioners in examining the use of competition torts claims in real world settings and providing insight and advice from their headline-grabbing cases. If you missed the live program—or if you want a refresher—this article is for you. To listen to an audio recording, click here.

Confidentiality agreements and whistleblowers

Leading off the panel, Justin Berger (a principal at Cotchett, Pitre & McCarthy who focuses on whistleblower litigation and recently represented the co-founder/former CTO of Hyperloop One in litigation involving a variety of competition torts in the wake of the CTO's ouster). Berger examined what he describes as increasingly-common variant of the traditional types of post-employment disputes: whistleblowers with confidentiality agreements. He explains that this situation often begins with the termination of an executive or employee who, as a potential future competitor, had agreed to a non-compete and a confidentiality or nondisclosure clause (and possibly an agreement to destroy or return all company-related documents upon termination). But particularly in recent years, Berger says, these newly-former executives and employees may be inclined to blow the whistle on their former company via a federal False Claims Act ("FCA") claim (due to, e.g., potential overbilling or kickbacks in connection with government work in healthcare, contracting, etc.); the wrinkle comes in because the FCA mandates disclosure to the government of "substantially all material evidence and information [the whistleblower possess]," 31 U.S.C. § 3730. And while Berger notes that this is still a developing area of law, he explains that the majority of courts addressing the issue have held that public policy outweighs the contractual confidentiality obligations and allows the whistleblower to take with them documents evidencing the company's fraud on the government (so long as those documents came to them in the ordinary course of their jobs). *See, e.g.*, *United States ex rel. Ruhe v. Masimo Corp.*, 929 F.Supp.2d. 1033, 1039 (C.D. Cal. 2012) ("Relators sought to expose a fraud against the government and limited their taking to documents relevant to the alleged fraud. Thus, this taking and publication was not wrongful, even in light of nondisclosure agreements, given 'the strong public policy in favor of protecting whistleblowers who report fraud against the government.' Obviously, the strong public policy would be thwarted if [the company] could silence whistleblowers and compel them to be complicit in potentially fraudulent conduct. Indeed, the Ninth Circuit has stated that public policy merits finding individuals such as Relators to be exempt from liability for violation of their nondisclosure agreement.") (citations omitted) (citing *United States v Cancer Treatment Ctrs. of Am.*, 350 F.Supp.2d 765, 773 (N.D. Ill. 2004) (holding that relator was exempt from liability for breach of a confidentiality agreement for the disclosure to the government of documents showing that employer engaged in fraudulent healthcare billing practices) and *United States ex rel. Cafasso v. Gen. Dynamics C4 Sys., Inc.*, 637 F.3d 1047, 1061-62 (9th Cir. 2011)).

Berger also provides a laundry list of additional potential claims and defenses which might be worth consideration in this context, depending on the applicable state law. For instance, he cites California Labor Code § 1102.5 as creating a private right of action (including double back pay) and providing very broad protection for employees who believe the company has engaged in wrongdoing, preventing retaliation (including termination, demotion, etc.) against an employee who reports or might report the suspected illegality to law enforcement or internal decision-makers. He also references potential claims for wrongful termination in violation of public policy, state-level false claims act claims, breach of fiduciary duty (if, e.g., the plaintiff was a minority shareholder), and defamation (given the tendency he has seen for "smack talk" inside the company when noteworthy individuals are ousted).

Finally, Berger offers some simple advice to minimize the likelihood of litigation in the first place: "treat your employees well." He explains that being a whistleblower plaintiff can take a large professional and personal toll, so in his experience, the less upset an individual is at unfair treatment on their way out, the less they are motivated to elevate a situation to a whistleblower lawsuit (and vice versa). So particularly if a departing employee "knows where the bodies are buried," Berger offers, the company might be well advised to err on the side of severance generosity.

Competition torts and class actions

Our next panelist, Bethany Kristovich (a litigation partner with Munger, Tolles & Olson who focused on complex civil litigation with an emphasis on class actions) offered valuable lessons from two of her recent class action bench trials. In both trials, she defended a tobacco company against unfair competition claims (under California and Massachusetts law) stemming from the plaintiffs' allegations that cigarettes marketed as "light" were no safer than other cigarettes. Although both cases resulted in liability findings (i.e., the courts found violations of unfair competition law), the California case resulted a defense verdict because the court excluded plaintiffs' damages model, and in the Massachusetts case—where the class sought approximately $1.5 billion—the court similarly found no actual damages but awarded each class member $25 of statutory damages under Massachusetts law for a total of only around $5 million.

Despite losing on liability but winning on damages, Kristovich points to two non-damages aspects of the cases which she believes played a large role in the defense-favorable outcomes. First, she posits that defense counsel in competition/ consumer protection class actions may often be too quick to effectively cede liability and focus instead on minimizing damages. She says that often, the defense's damages model will be much palatable if the trier of fact is convinced that any violation was merely "on the margin defensible conduct" as opposed to egregious wrongdoing. To this end, Kritovich suggests making every effort to depose absent class members, particularly when the defense client's customers tend to have strong positive feelings about the product. Second, Kristovich advises that revisiting and emphasizing arguments against class certification through trial can lead to lower (or no) damages. She explains that where the defense continues to show that, despite the possibility of harm to some of class members, other class members were not harmed, it can "take away some of the heat" from allegations that they harmed a broad group of people. She also offers that absent class member depositions can provide very useful evidence for opposing class certification. However, Kristovich cautions that the choice of whether (and to what extent) to oppose class certification is a crucially important strategic decision: defeating class certification leaves the defendant open to future claims, whereas a defense verdict against a certified class acts as collateral estoppel with respect to all members of the class.

Finally, with respect to the use at trial of absent class member testimony, Kritovich advises that counsel should be wary of taking the typical "boring" approach for designating and presenting video depositions; she says that, particularly because numerous depositions will be used, it can be crucially important to make the presentation interesting, punchy, and thematically organized.

Tortious Interference and NDAs

Our final panelist, Tim Perry (an of counsel in Wilmer Hale's Securities and Litigation/ Controversy Departments who focuses on white collar matters, government enforcement defense, and internal investigations) recently represented a defense contractor who won contract for the manufacture of specialized submarines and subcontracted the provision of several components to a company in Europe. As could be expected in light of the sensitivity of the information at issue, Perry says, the subcontract contained a nondisclosure agreement ("NDA"), which eventually became the centerpiece of claims made against the contractor by a company who acted as the middle-man between the contractor and subcontractor. In addition to suing the subcontractor for breach of a purported contract whereby it was to receive a percentage of the subcontractor's fees, the middleman plaintiff also sued the contractor, alleging two competition torts under California law: tortious interference with contract and tortious interference with prospective economic relationship. The middleman argued that the "interference" at issue was that the contractor's NDA with the subcontractor interfered with its ability to act as a middleman by effectively excluding it from future discussions amongst the contractor and the subcontractor about the submarines.

Perry explains that the fact that NDAs are a prevalent and ordinary business practice in many contractor settings (and that NDAs are often necessary when dealing with, e.g., sensitive military technology) does not stop plaintiffs from bringing competition torts claims (such as tortious interference) arising out of the existence of an NDA. Perry offers a substantive point and a procedural points in explanation. In terms of substance, Perry says that, at least under California law, there is no defense that "these sorts of NDAs are normal and common," and that the "intent" element of "intentional interference" is not specific intent, but includes knowing that a natural consequence of your actions will be to interfere with another's contract or prospective economic relations. In other words, Perry explains, a party may ultimately be liable for an ordinary business practice if they know it will interfere, even if they do not otherwise intend to interfere and the interference is merely a collateral effect. In terms of procedure, Perry explains that the causation and intent elements of these torts are typically quite fact-intensive, meaning plaintiffs are often able to defeat defendants' attempts at summary judgment, which, in turn, raises the costs and risks of defending the case at trial and gives those plaintiffs substantially more settlement leverage and motivation to sue.

When asked what companies should do to minimize the risk of competition tort claims in situations involving normal (and even otherwise necessary) business behavior, Perry explained that in many industries, defending against these sorts of claims must simply be viewed as a cost of doing business and that there are no silver bullets. He did, however, recommend that "making a record," i.e., clearly communicating your (non-tortious) intentions to the various parties ahead of time can minimize some risk of a lawsuit and "help the atmospherics" if claims are eventually made. Perry also offered that to minimize the risks of claim for tortious interference with contract, it can help to become familiar with any contracts potentially impacted by your clients' proposed actions by allowing them to tailor their conduct around those contracts. Finally, with respect to claims for tortious interference with prospective economic relations, Perry reminds us that the "interference" must be independently unlawful. To this end, Perry recommends that reviewing the jury instructions early and often in a case can prove invaluable.

Case Notes

Amy Starinieri Gilbert
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KNOWLEDGE REQUIRED FOR PROOF OF ENTERPRISE

Eighth Circuit Affirms Grant of Summary Judgment Finding Plaintiffs Failed to Produce Evidence Sufficient to prove Actual Knowledge of Enterprise

Rosemann v. St. Louis Bank, 858 F.3d 488 (8th Cir. 2017)

CLICK HERE FOR CASE

A group of Plaintiff-investors appealed the district court's grant of Defendant, St. Louis Bank's, motion for summary judgment. This case flows from the legal consequences of Martin Sigillito's Ponzi scheme known as the British Lending Program (BLP). Sigillito maintain commercial accounts at St. Louis Bank during the Ponzi scheme's life. Plaintiff-investors sought to recoup the losses due to BLP and sued St. Louis Bank for, among other things, conspiracy to violate RICO. In affirming summary judgment on behalf of St. Louis Bank, the Court found that Plaintiffs must not only prove the elements of a RICO violation, but also that St. Louis Bank objectively manifested an agreement to participate in the affairs of the enterprise. The Court found that the fact that St. Louis Bank merely associated with Sigillito, knew about the conspiracy, and was present during conspiratorial discussion was insufficient to show that St. Louis Bank conspired with Sigillito to violate RICO. Instead, the Court held that Plaintiffs were required to produce evidence that St. Louis Bank was aware of the scope of the enterprise and intended to participate in it. The Court rejected Plaintiffs' argument that they have proven a conspiracy to violate RICO by producing evidence that Sigillito used one of the accounts to pay personal expenses and loans with St. Louis Bank, finding that evidence insufficient to prove St. Louis Bank's actual knowledge.

PATTERN OF RACKETEERING

Second Circuit Affirms Dismissal of RICO Claims for Failure to Sufficiently Plead Continuous and Related Predicate Acts

Reich v. Lopez, 858 F.3d 55 (2d Cir. 2017)

CLICK HERE FOR CASE

Plaintiffs, former ambassador to Venezuela and his consulting firm, filed suit against two companies and their officers who had secured high-valued energy-sector contracts from Venezuelan government, alleging, among other things, violations of RICO. Plaintiffs appealed the district court's dismissal of the RICO claims and the Second Circuit affirmed. While the Court found that Plaintiffs successfully alleged an enterprise and predicate acts, the case turned on whether those predicate acts amounted to a pattern of racketeering activity. The Court noted that a "pattern of racketeering activity" requires that the predicate acts pose a threat of continuous criminal activity and that they are related. The Court found that Plaintiffs failed to sufficiently allege close-ended continuity, or activity that occurred over a long period of time in the past, or open-ended continuity, which include a threat of criminal activity in the future. Here, the Court found that the two alleged two phone calls that Plaintiffs argued established wire fraud were only a few months apart and therefore not enough for closed-ended continuity, and that the phone calls included no future threat of repetition, and therefore did not demonstrate open-ended continuity. Plaintiffs also failed to sufficiently allege the relatedness of the predicate acts, which requires similar purposes, results, participants, victims, and methods of commissions. In affirming the dismissal of the RICO claim, the Court found that the methods of commission, victims, and results of the two phone calls alleged were all dissimilar and weighed against relatedness.

INJURY IN FACT

Sixth Circuit Affirms Dismissal Finding Plaintiffs Failed to Allege Injury-in-Fact

Wall v. Michigan Rental, 852 F.3d 492 (6th Cir. 2017)

CLICK HERE FOR CASE

Plaintiffs, former tenants, brought putative class action against their former landlord and related companies, alleging violations of RICO and Michigan state law to the tune of $6.6 million. Between 2012 and 2014, the Plaintiff-tenants rented rooms from Defendant and his companies (together, "Defendant"). Defendant collected roughly $2550 in security deposits from the three plaintiffs when they agreed to lease rooms in his buildings. The plaintiffs lived in Defendant's properties while attending the University of Michigan. When they moved out, they received their security deposits back, minus small deductions—uncontested by the plaintiffs—that Alawi withheld to cover minor damages to the properties. Plaintiffs appealed the district court's dismissal of the RICO claims and the Sixth Circuit affirmed. First, the Court found that Plaintiffs lacked standing to bring the claim because Plaintiffs failed to satisfy the injury-in-fact requirement. The Court explained that to satisfy the injury requirement under RICO, plaintiffs must show that the illegal racketeering activity injured them in their business or property. Because the Court had already found that Plaintiffs lacked injury of any kind—reasoning that paying a security deposit upon moving in and receiving the security deposit back upon moving out did not constitute an injury—the Court also found that Plaintiffs could not show an injury within the meaning of the statute.

Civil RICO Issue Grid

A Pleading
B Venue and Jurisdiction
C Constitutionality
D Statute of Limitations
E Discovery
F Section 1962(a) Liability
G Section 1962(b) Liability
H Section 1962(c) Liability
I Section 1962(d) Liability
J Interstate Commerce
K Enterprise
L Person
M Predicate Acts
N Pattern of Racketeering Activity
O Aiding and Abetting/Respondeat Superior
P Standing and Injury
Q Causation
R Damages
S Attorneys' Fees and Costs
T Arbitration
U Equitable Relief
V Class Action
W Trial
X Miscellaneous (Other Issues and Defenses)
MD Motion to Dismiss
SJ Summary Judgment Motion
Gr Granted
Den Denied

	A	B	C	D	E	F	G	H	I	J	K	L	M	N	O	P	Q	R	S	T	U	V	W	X	MD	SJ	Gr	Den
D.C. Circuit																												
United States v. Philip Morris USA Inc., 855 F.3d 321 (D.C. Cir. 2017)																					●			●				
First Circuit																												
Second Circuit																												
Reich v. Lopez, 858 F.3d 55 (2d Cir. 2017)	●												●												●		●	

	A	B	C	D	E	F	G	H	I	J	K	L	M	N	O	P	Q	R	S	T	U	V	W	X	MD	S J	Gr	Den
Rosenshein v. Meshel, No. 16-3189-CV, 2017 WL 1439957, at *1 (2d Cir. Apr. 21, 2017)	●			●																					●		●	
Friedman v. JPMorgan Chase & Co., No. 16-1913-CV, 2017 WL 1495935, at *1 (2d Cir. Apr. 26, 2017)	●																								●		●	
Singh v. NYCTL 2009-A Trust, No. 16-2814-CV, 2017 WL 1087936, at *1 (2d Cir. Mar. 21, 2017)	●																							●	●		●	
Third Circuit																												
Ne. Revenue Servs., LLC v. Maps Indeed, Inc., No. 15-3742, 2017 WL 1363875 (3d Cir. Apr. 12, 2017)	●							●																	●		●	
Hawk Mountain LLC v. Ram Capital Grp. LLC, No. 16-3627, 2017 WL 1969670, at *1 (3d Cir. May 12, 2017)	●			●																					●		●	
Fourth Circuit																												

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Fifth Circuit																												
Armendariz v. Chowaiki, No. 16-50905, 2017 WL 1201005 (5th Cir. Mar. 30, 2017)	●																								●		●	
Sixth Circuit																												
Wall v. Michigan Rental, 852 F.3d 492 (6th Cir. 2017)	●															●									●		●	
Seventh Circuit																												
Mains v. Citibank, N.A., 852 F.3d 669 (7th Cir. 2017)	●																								●		●	
Eighth Circuit																												
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Yagman v. Gabbert, No. 15-55904, 2017 WL 1056097 (9th Cir. Mar. 21, 2017)	●													●											●		●	

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Lee v. Washington, No. 16-35472, 2017 WL 1959401, at *1 (9th Cir. May 11, 2017)	●																								●		●	
Okawaki v. First Hawaiian Bank, No. 16-16011, 2017 WL 1020387, at *1 (9th Cir. Mar. 16, 2017)	●																								●		●	
Woolsey v. J.P. Morgan Ventures Energy Corp., No. 15-56697, 2017 WL 2056981, at *1 (9th Cir. May 12, 2017)	●																							●	●		●	
Dale v. Bank of Am. Corp., No. 14-16927, 2017 WL 1396185, at *1 (9th Cir. Apr. 19, 2017)	●																								●		●	
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Yagman v. Cornell Companies, Inc., No. 15-56581, 2017 WL 1950425, at *1 (9th Cir. May 10, 2017)	●																								●		●	

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Hampton v. Steen, No. 14 -36025, 2017 WL 1969490, at *1 (9th Cir. May 12, 2017)	●										●														●		●	
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