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## COMPLEX LITIGATION

# Who Needs Federal RICO?

New Jersey's 'little' RICO statute has many advantages over the federal counterpart

By Mark J. Oberstaedt

**W**hen a commercial litigator uncovers fraud in a civil case, he or she must often decide whether to assert a cause of action for violation of the federal Racketeering Influenced and Corrupt Organization Act, 18 U.S.C. § 1961, et. seq. While inclusion of a federal RICO claim adds the prospect of treble damages and attorneys' fees, it also brings a shorter statute of limitations, the prospect of removal to federal court, added complexity and legal briefing, completion of a tedious RICO case statement and often difficult trial proofs.

When making that decision, many practitioners fail to consider the potential use of New Jersey's "little" RICO statute, which similarly provides for treble damages and attorney's fees, but avoids the risk of removal and requires less demanding proofs on several key substantive elements of the cause of action. N.J.S.A. §2C:41-1, et. seq. There is also a strong argument to be made that

the statute of limitations is longer, and accrues later, under N.J. RICO than under its federal counterpart. The broader scope of the N.J. RICO statute should make it an attractive option in cases where the predicate acts took place in New Jersey. *State v. Casilla*, 362 N.J. Super. 554 (App. Div. 2003).

Ever since the seminal decision by the New Jersey Supreme Court in *State v. Ball*, 141 N.J. 142 (1995), it has been widely held the N.J. RICO statute is more liberal than the federal statute on matters of substantive law. *Horowitz v. Marlton Oncology*, 116 F.Supp.2d 551 (D.N.J. 1999).

As a result of subtle textural differences and the statute's legislative history, N.J. RICO has been interpreted by the New Jersey Supreme Court in *Ball* and its progeny to be more liberal than the federal statute in several key substantive respects. First, unlike the federal statute which has been interpreted by many courts as requiring an "ascertainable structure" as a necessary component of a RICO "enterprise," the statute's legislative history and its "liberal construction" provision have been used to explain that the term "enterprise" under N.J. RICO "contains no express or implied requirement for a distinct ascertainable structure; rather, it is framed broadly to include any group of persons associated in fact." *United States v.*

*Turkette*, 452 U.S. 576 (1981); N.J.S.A. § 2C:41-6; *Ball*, 141 N.J. at 162. As such, the New Jersey statute does not compel a plaintiff, as the federal law does, to identify a specific ascertainable structure (such as a shell corporation or an identifiable group of persons).

N.J. RICO is also less restrictive with respect to defining what constitutes a "pattern of racketeering activity." In *H.J. Inc. v. Northwestern Telephone Co.*, 492 U.S. 229 (1989), the United States Supreme Court held that proof of a "pattern" of racketeering activity requires a showing of both "continuity" and "relatedness" of predicate acts. After noting that the language of the N.J. RICO differs from the language of federal RICO by providing that a "pattern" consists of at least two "incidents" as opposed to "acts," *Ball* rejected the holding of *H.J.* and held that "relatedness," but not "continuity," is necessary to establish a pattern. This distinction was immediately reinforced by the Appellate Division in *State v. Taccetta*, 301 N.J. Super. 227, 693 A.2d 1229 (App. Div. 1997), in which the court explained that the state statute, unlike the federal law, "does not ... require individualized proof of both continuity and relatedness." The federal courts have likewise recognized that "the New Jersey definition of pattern is more flexible and generous to plaintiffs than the federal standard." *Emcore Corp.*

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*Oberstaedt is a shareholder in the commercial litigation practice group at Archer & Greiner of Haddonfield. Mark thanks his colleagues, Steven J. Fram and Michael P. Hackett, for their invaluable assistance in preparing this article.*

v. *PriceWaterhouseCoopers LLP*, 102 F.Supp.2d 237 (D.N.J. 2000).

N.J. RICO also differs from federal RICO when it comes to establishing that a person has participated in the conduct of the affairs of an enterprise. In *Reeves v. Ernst & Young*, 507 U.S. 170 (1993), the United Supreme Court interpreted the phrase “to conduct or participate, directly or indirectly, in the conduct of the enterprise’s affairs,” as requiring a federal RICO defendant to have a role in directing the affairs of the enterprise. After referring to the legislative history of the N.J. RICO statute, *Ball* rejected the holding of *Reeves* as too restrictive, ruling once again that the N.J. RICO must be interpreted more liberally, and that liability under the N.J. RICO is not limited to those who participate directly in the “operation or management” of an enterprise. *Ball*, at 172-73.

This important distinction was the lynchpin for the Appellate Division’s decision in *Mayo, Lynch & Associates, Inc. v. Pollack*, 351 N.J. Super. 486 (App. Div. 2002), a case in which the plaintiff accused an attorney of having been engaged in racketeering activity violative of both federal and state civil RICO statutes. The Appellate Division upheld the trial court’s dismissal of the plaintiff’s federal RICO claim finding that the attorney did not “participate in the operation or management of an enterprise through a pattern of racketeering activity.” Instead, the court found that the attorney “acted in an advisory capacity” through what the court described as “routine activity” that did not give rise to federal RICO liability. Relying on *Ball*, however, the court reversed the dismissal of the N.J. RICO claims because, under the state law, “managerial or supervisory activities [are] not necessary; participatory conduct [is] sufficient, so long as the person had the requisite intent.”

Finally, N.J. RICO provides a different standard with respect to conspiracy. *Ball* specifically rejected federal cases that held that a defendant, to be liable for conspiracy to violate federal RICO, must agree “to commit personally at least two acts of racketeering.” *Id.* at 176. Based upon its concern that such a requirement

would “dilute the effectiveness of the RICO conspiracy remedy, and thwart [the legislative] objectives” of the N.J. RICO act, the *Ball* court held that a conspiracy claim under the Racketeering Act can be demonstrated if a defendant agrees to participate in the conduct of an enterprise with knowledge that someone associated with the enterprise will commit at least two predicate acts.

For statute of limitations purposes, there are two central legal questions: (1) how long is the statute, and (2) when does it begin to run. Neither the federal RICO nor the N.J. RICO statutes specifically answer either question.

It is now well established that federal civil RICO claims are subject to a four-year statute of limitations. *Agency Holding Corp. v. Malley-Duff & Associates, Inc.*, 483 U.S. 143, 156 (1987). The N.J. RICO statute contains a five-year statute of limitations for criminal prosecutions, but is silent with respect to civil claims. N.J.S.A. § 2C:1-6(g).

The New Jersey Supreme Court has yet to decide whether civil claims under N.J. RICO are governed by a four-year limitations period that applies to federal RICO claims or a longer period. In *Liquidation of Integrity Insurance Co.*, 245 N.J. Super. 133 (Law Div. 1990), a New Jersey trial court followed interpretations of the federal RICO statute and held that a four-year statute of limitations applied to civil N.J. RICO claims. The Integrity Court noted that “this court feels compelled to follow federal law in the case at bar and apply the four-year federal statute of limitations for claims brought under New Jersey Civil RICO claims.” The New Jersey Supreme Court subsequently rejected that reasoning when it had occasion to interpret the N.J. RICO statute for the first time five years later in *Ball*. Specifically, the Supreme Court emphasized that N.J. RICO is governed by state law principles and is not restricted by interpretations of the federal statute. Following *Ball*, the Appellate Division in *Frazier v. Bovina*, 317 N.J. Super. 23, 34 (App. Div. 1998), openly questioned whether civil claims under the N.J. RICO statute are governed by the five-year limitations period

applicable to criminal prosecutions as opposed to the four-year federal limitations period. No reported decisions have decided the issue since *Frazier*.

As a result, a strong argument can be made that the statute of limitations for civil claims under the N.J. RICO statute should be five years so that it is consistent with the criminal code. Indeed, it would seem anomalous to allow the state to prosecute RICO violators five years after the crime is committed but only allow the victims of those crimes to seek financial redress if they bring their claims within four years.

An equally persuasive argument can be made that a six-year statute of limitations is appropriate for civil claims under the N.J. RICO statute. The overwhelming majority of civil RICO claims are based upon predicate acts of fraud. New Jersey law employs a six-year statute of limitations for both common law fraud and Consumer Fraud Act claims. If the New Jersey Supreme Court were to look for guidance to the most analogous state law in the absence of a specific limitations period, a six-year statute would be appropriate in civil RICO cases based upon predicate acts of fraud.

The second critical issue is when the cause of action accrues and, therefore, when the statute begins to run. With respect to the federal RICO statute, the United States Supreme Court resolved a sharp circuit split and sided with those circuits that took a more restrictive approach to the accrual of federal civil RICO claims. In *Rotella v. Wood*, 528 U.S. 549 (2000), the United States Supreme Court rejected the “injury and pattern discovery” rule that had been adopted by some circuits (including the Third Circuit) and under which a federal RICO claim was held to accrue only when the claimant discovered, or should have discovered, both an injury and a pattern of racketeering activity. Although the Supreme Court did not definitively settle on a rule, it held that it would eventually adopt one of two accrual rules: (1) an “injury discovery” rule, or (2) an “injury occurrence rule” under which knowledge of injury would be irrelevant.

Since *Rotella*, the Third Circuit has chosen to adopt the more liberal “injury-discovery” rule, *Forbes v. Eagleson*, 228 F.3d 471 (3d Cir. 2000), which provides that the limitations period begins to run when the plaintiff “has discovered or, by exercising reasonable diligence, should have discovered (1) that he or she has been injured, and (2) that this injury has been caused by another party’s conduct.” Id. at 485. The Third Circuit has also ruled that if the plaintiff demonstrates that it was misled by the defendants and that the plaintiff exercised reasonable diligence in attempting to uncover relevant facts, the statute is tolled “until the plaintiff knows, or should be reasonably expected to know, the concealed facts concerning the cause of action.” Id. at 487.

Although not expressly ruled upon in any published decisions, the accrual test under the N.J. RICO statute appears to be more liberal. The New Jersey Supreme Court has demonstrated its willingness to apply state accrual rules to statutory claims that are modeled after federal laws. For example, as the Court explained in *Alderiso v. The Medical Center of Ocean County, Inc.*, 167 N.J.

191 (2001), involving a whistle blower claim under CEPA, “[a]lthough federal decisional law may serve to guide us in our resolution of New Jersey issues, we bear ultimate responsibility for the safe passage of our ship.”

Based upon the pronouncements of the Supreme Court in both *Ball* and *Alderiso*, it is reasonable to predict that the New Jersey Supreme Court would apply state accrual rules to civil claims under the N.J. RICO statute rather than federal accrual rules. Application of these rules would make available a series of doctrines that may act to save many state RICO causes of action that would be barred by the application of the federal accrual test. These doctrines include (1) the “discovery rule,” which holds that the statute of limitations period begins to run when the plaintiff has suffered actual injury and the plaintiff knows that the injury is due to the fault to another (*Martinez v. Cooper Hospital/University Medical Center*, 163 N.J. 45, 55 (2000)); (2) the “defendant-by-defendant” discovery rule, which holds that the statute of limitations can accrue at different times for

different defendants (Id. at 51-52); (3) the “continuing tort” doctrine, which holds that when an individual is subject to a continual, accumulative pattern of tortious conduct, the statute of limitations does not begin to run on any of the conduct at issue until the wrongful conduct ceases (*Wilson v. Wal-Mart Stores*, 158 N.J. 263, 272 (1999)); and (4) the “last overt act doctrine,” which holds in conspiracy cases that the statute of limitations does not begin to run until the last overt act in furtherance of the conspiracy. *Republic of the Philippines v. Westinghouse Electric Corp.*, 774 F.Supp. 1438, 1450-51 (D.N.J.).

As a result, civil causes of action under the N.J. RICO statute will likely survive longer than claims brought solely under federal RICO whether because the statute of limitations itself is longer or through the application of state-law based accrual rules.

In light of these significant differences, practitioners would be wise to analyze whether their clients are best served by asserting N.J. RICO rather than federal RICO claims in cases where the facts merit its use. ■