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Racketeering

Justices Make It Easier to Apply RICO To Informal 'Association-in-Fact Enterprises'

The U.S. Supreme Court June 8 opted for a more expansive interpretation of the scope of the Racketeer Influenced and Corrupt Organizations Act. Prosecutors and civil plaintiffs can now use the statute to go after an "association-in-fact enterprise" without proof that it has some structure separate from that inherent in the pattern of racketeering activity in which it engaged, the court held. (*Boyle v. United States*, U.S., No. 07-1309, 6/8/09)

Attorney William W. Taylor III, of Zuckerman Spaeder, Washington, D.C., told BNA that the court's broad definition of a RICO enterprise would offer the Justice Department encouragement to go after more loosely associated entities. Taylor is co-author of an amicus curiae brief submitted by the National Association of Criminal Defense Lawyers on behalf of the defendant.

The RICO statute, at 18 U.S.C. § 1962(c), makes it a federal crime for a person associated with an interstate enterprise "to participate . . . in the conduct of such enterprise's affairs through a pattern of racketeering activity." The statute states that the term "person" includes "any individual or entity capable of holding a legal or beneficial interest in property," and that the term "enterprise" includes "any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity."

Unsettled Law. The Supreme Court has made clear in prior cases that Congress intended the scope of RICO to be interpreted broadly, but just how broadly has been the subject of continuing dispute. In *United States v. Turkette*, 452 U.S. 576 (1981), the court held that the statute's definition of "enterprise" includes de facto associations, which it described as "a group of persons as-

sociated together for a common purpose of engaging in a course of conduct," and which "is proved by evidence of an ongoing organization, formal or informal, and by evidence that the various associates function as a continuing unit."

The lower federal courts, however, have continued to disagree. The Eighth and the Ninth Circuits have held that jury instructions must convey the idea that an association-in-fact enterprise has some "ascertainable structure distinct from that inherent in the conduct of a pattern of racketeering activity." In *United States v. Bledsoe*, 674 F.2d 647 (8th Cir. 1982), the Eighth Circuit explained that this construction is necessary to avoid collapsing the enterprise element with the pattern-of-racketeering-activity element. Proof of the requisite distinct structure could be demonstrated by evidence that a group of people engaged in a diverse pattern of crimes or that it had an organizational pattern or system of authority beyond what was necessary to perpetrate the predicate crimes.

Other circuits, however, have held that a RICO association-in-fact enterprise need not have some structure distinct from the pattern of racketeering activity. See, e.g., *United States v. Patrick*, 248 F.3d 11, 69 CrL 169 (1st Cir. 2001) (discussing split of authority). The case just decided by the U.S. Supreme Court came out of the Second Circuit, which adopted this latter approach in *United States v. Mazzei*, 700 F.2d 85 (2d Cir. 1983).

The defendant in this case was found guilty of being one of the "core" members of a loose-knit crew of thieves that, over the course of several years, victimized banks by robbing them or stealing from their night deposit boxes. Consistent with its approach in *Mazzei*, the Second Circuit affirmed a conviction based on a verdict from a jury that was instructed that it could "find an enterprise where an association of individuals, without structural hierarchy, form[ed] solely for the purpose of carrying out a pattern of racketeering acts" and that "[c]ommon sense suggests that the existence of an association-in-fact is oftentimes more readily proven by

what it does, rather than by abstract analysis of its structure.”

Inferring Structure From Criminal Activity. In an opinion by Justice Samuel A. Alito Jr., the Supreme Court decided that, although an “association-in-fact enterprise” must have some structure, the existence of that structure may be inferred from the evidence of the pattern of racketeering activity itself. The court noted that it recognized in *Turkette* that the evidence used to establish the pattern of racketeering activity and the evidence used to establish the enterprise may “coalesce.”

After consulting popular dictionaries for the meanings of “enterprise” and “association,” the court said that jury instructions do not even have to use the term “structure” so long as they convey three aspects of an association-in-fact: a common purpose, relationships among the participants, and a duration sufficient to permit the entity to have “affairs” that could be conducted through a pattern of racketeering activity. The court added:

As we said in *Turkette*, an association-in-fact enterprise is simply a continuing unit that functions with a common purpose. Such a group need not have a hierarchical structure or a “chain of command”; decisions may be made on an ad hoc basis and by any number of methods While the group must function as a continuing unit and remain in existence long enough to pursue a course of conduct, nothing in RICO exempts an enterprise whose associates engage in spurts of activity punctuated by periods of quiescence.

The court also rejected dissenting justices’ argument that Congress aimed the statute at “business-like entities.” RICO is not “limited to groups whose crimes are sophisticated, diverse, complex, or unique; for example, a group that does nothing but engage in extortion through old-fashioned, unsophisticated, and brutal means may fall squarely within the statute’s reach,” the court said.

Critics of the approach adopted by the court have contended that this broader construction essentially blends the substantive offense described in subsection 1962(c) with the predicate offenses and with the conspiracy offense described in subsection 1962(d). Unconvinced, the court pointed out that proof of the predicate offenses will not require the evidence of a “pattern” required by RICO. The court acknowledged that “in prac-

tice the elements of a violation of § § 1962(c) and (d) are similar,” but it emphasized that “this overlap would persist even if petitioner’s conception of an association-in-fact enterprise were accepted.”

Dissenting, Justice John Paul Stevens, joined by Justice Stephen G. Breyer, argued that the language of the statute indicates that it is aimed at corrupt business-like entities that have structure distinct from that required to commit the predicate pattern of criminal activity. The court’s decision renders the enterprise element “meaningless” in association-in-fact cases and “will allow juries to infer the existence of an enterprise in every case involving a pattern of racketeering activity undertaken by two or more associates,” Stevens complained.

Civil Side of RICO. The terms interpreted by the Supreme Court in this case are the same ones in play when plaintiffs seek treble damages or other remedies provided by the civil provisions of RICO. As *amicus curiae*, the U.S. Chamber of Commerce had urged the court to adopt the narrower construction of the statute. In its brief to the court, the chamber maintained that “[t]he unconstrained definition of enterprise adopted below allows plaintiffs to transform run-of-the-mill civil actions into RICO actions for treble damages against businesses who engage in lawful collaborations.”

Likewise, Glen Davis, of Armstrong Teasdale LLC, St. Louis, told BNA that “the impact of this case will be felt not only in criminal cases, but perhaps more importantly in civil RICO actions.” Davis described the separate-structure rule as “a sensible requirement” that differentiated the association-in-fact from the acts forming the pattern of racketeering activity.

“Under the test in *Boyle*, the existence of an association in fact can be inferred from evidence of the commission of the predicate acts alone, which breaks new ground. This may well allow a vast number of creatively framed treble damage RICO claims to reach a jury that would not have done so in the past,” Davis said.

Marc Fernich, New York, argued for the defendant. Anthony A. Yang, of the U.S. Solicitor General’s Office, Washington, D.C., argued for the government.

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