RICO Trade Secret Standard Prevails Within 9th Circ. Courts

By **Cary Sullivan** (September 19, 2023)

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Perhaps because of skepticism resulting from perceived overuse of Racketeer Influenced and Corrupt Organizations Act claims in civil litigation, federal courts in the U.S. Court of Appeals for the Ninth Circuit seem to be requiring a relatively high degree of factual detail to plead and maintain RICO claims in trade secret disputes.[1]

In this article, I review five decisions within the Ninth Circuit involving RICO claims based on predicate Defend Trade Secrets Act violations that continue this trend. These decisions address the requirements to plead a RICO enterprise and to plead and prove a pattern of racketeering activity.[2]

Pleading a RICO Enterprise

A RICO 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," which are "associated together for a common purpose of engaging in a course of conduct."[3]

The decisions below follow the trend of requiring particularized factual allegations to sufficiently plead a RICO enterprise.

NW Monitoring v. Hollander

In NW Monitoring LLC v. Hollander, the plaintiff sued former employees and others for allegedly stealing trade secrets and other confidential information in order to divert clients to competing businesses.[4] The plaintiff asserted a RICO claim based on predicate DTSA violations, but alleged only that "the enterprise [was] the association of [the individual defendants] involved in the predicate acts."[5]

The U.S. District Court for the Western District of Washington noted that allegations of a RICO enterprise must include "a purpose, relationships among those associated with the enterprise, and longevity sufficient to permit those associates to pursue the enterprise's purpose."[6]

Upon the defendants' motion to dismiss, the court found that the allegations did not include any such purpose: "NW Monitoring appears to do nothing but allege that the enterprise is the association of individuals involved in the predicate acts."[7] The court therefore dismissed the RICO claim in 2021 — with prejudice because it found the plaintiff offered "little … support" for the claim in opposing the motion to dismiss.[8]

Skye Orthobiologics v. CTM Biomedical

In Skye Orthobiologics LLC v. CTM Biomedical LLC, the plaintiffs sued former employees and others, alleging they stole trade secrets and other confidential information to develop competing products.[9] The plaintiffs asserted a RICO claim, alleging the enterprise's goal was to "defraud Plaintiffs to the RICO Defendants' profit … start[ing] with the theft and misappropriation of Plaintiffs' trade secrets."[10]

The U.S. District Court for the Central District of California found this allegation "improperly conflate[d] their enterprise with their pattern of racketeering activity," noting "the Ninth Circuit requires proof of an enterprise separate and apart from its alleged pattern of racketeering activity."[11] In 2021, the court dismissed the RICO claim with leave to amend.[12]

Upon amendment, the plaintiffs alleged that, while employed by the plaintiffs, the defendants directed business away from the plaintiffs by recruiting certain of the plaintiffs' customers and misappropriating certain trade secrets.[13] The defendants again moved to dismiss, arguing that directing business away from a competitor was nothing more than an ordinary business activity.[14]

The court disagreed. It held the specific, factual allegations of recruiting plaintiffs' customers while employed by plaintiffs, coupled with specific allegations of misappropriation and deception, were not ordinary business activities, and were instead consistent with racketeering activities.[15]

Palantir Technologies v. Abramowitz

In Palantir Technologies Inc. v. Abramowitz, the plaintiff sued an investor along with his limited liability company and his trust, alleging they stole trade secrets and other confidential information to develop competing products.[16] The plaintiff asserted a RICO claim based on predicate DTSA violations, alleging the investor used his LLC and trust to invest in the plaintiff and, over time, to get more involved in the plaintiff's business activities in order to gain access to and misappropriate the plaintiff's trade secrets.[17]

In moving to dismiss, the defendants argued the plaintiff failed to allege the LLC or trust actually "played a role" in any such misappropriation.[18] In 2020, the U.S. District Court for the Northern District of California disagreed, finding that by specifically alleging the investor used the entities to facilitate and accomplish the misappropriation, the plaintiff sufficiently alleged a RICO enterprise.[19]

Pleading and Proving a Pattern of Racketeering Activity

Under Title 18 of the U.S. Code, Section 1961(5), a pattern of racketeering activity "requires at least two acts of racketeering activity, one of which occurred after [May 2016] and the last of which occurred within ten years."[20] The plaintiff also must show the predicate acts (1) "are related" and (2) "amount to or pose a threat of continued criminal activity." as per the U.S. Supreme Court's 1989 H.J. Inc. v N.W. Bell Telephone Co. decision.[21]

The decisions below generally support the trend of requiring particularized factual allegations to sufficiently plead a pattern of racketeering activity, and to establish that such a pattern requires multiple unrelated victims.

The court in NW Monitoring also addressed the plaintiff's allegations of a pattern of racketeering activity. Relevant here, the plaintiff alleged that, during the period in which the defendants were transitioning to their new employer but were still employed by the plaintiff, they misappropriated certain trade secrets in order to divert clients to the new employer.[22]

The court held that such allegations failed to establish a pattern of racketeering activity for

two reasons: (1) the alleged activity lasted just a few months, which was "not sufficiently continuous"; and (2) the allegations did not otherwise establish that the activity would continue after that brief period.[23]

MedImpact Healthcare Systems v. IQVIA Inc.

MedImpact Healthcare Systems Inc. v. IQVIA Inc. involved the only merits ruling — i.e. summary judgment — on a RICO claim in a trade secret dispute, and addressed a question of first impression in the Ninth Circuit as to whether separate but related corporate entities constitute a single victim for purposes of RICO liability.[24]

In that case, the plaintiffs sued the parent company of a former joint venture partner, among others, for allegedly misappropriating trade secrets and other confidential information to develop competing products.[25] The court found the plaintiffs established that the defendants acquired the plaintiffs' former joint venture partner for the purpose of misappropriating certain trade secrets.[26]

The defendants moved for summary judgment on the RICO claim, arguing the "alleged acquisition … scheme and misappropriation of trade secrets" were all part of a single scheme of misappropriation, waged against a single victim, because the plaintiff entities were related companies and therefore could not constitute the requisite pattern of racketeering activity.[27]

The U.S. District Court for the Southern District of California agreed, holding in October 2022 that separate but related entities within the same corporate family constitute a single victim for purposes of RICO liability, and that a "single fraud perpetrated on a single victim" cannot establish the requisite pattern of racketeering activity.[28]

American Career College Inc. v. Medina

The 2020 American Career College Inc. v. Medina decision provides little guidance because the Central District of California did not address the factual sufficiency of the RICO allegations. In that case, the plaintiffs sued former employees and a competitor for allegedly stealing trade secrets and other confidential information in order to divert clients to the competitor.[29]

The plaintiffs alleged a total of five predicate acts underlying their RICO claim, including DTSA violations. The defendants moved for judgment on the pleadings, arguing the plaintiffs failed to allege any viable predicate acts.[30]

Although the court dismissed two of the predicate violations,[31] the court held that the plaintiffs sufficiently "pleaded three valid federal predicate acts [including DTSA violations] ... one more predicate act than is required to demonstrate a pattern of racketeering activity," and therefore denied the motion.[32] The court's simplistic analysis of the RICO claim did not extend beyond the bare number of viable predicate violations.

Conclusion

While RICO claims in trade secret disputes are still relatively new, published cases within the Ninth Circuit over the past few years provide helpful guidance in predicting what courts will require to plead and prove such claims going forward.

For example, courts likely will require particularized factual allegations of a specific design

or intent to misappropriate in order to sufficiently plead a RICO enterprise. Courts also likely will require at least several examples of predicate conduct, occurring over a lengthy period of time, and involving multiple unrelated victims, in order to sufficiently plead and prove a pattern of racketeering activity.

These holdings arguably require more than is expressly required by statute. That may be the result of perceived overuse of RICO claims in civil litigation.

Nevertheless, while RICO claims represent a powerful and relatively new tool for trade secret plaintiffs, they should be aware that courts may hold them to a higher standard of pleading and proof to maintain such claims — and defense counsel certainly will do all they can to support that high bar going forward.

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Disclosure: The author represented MedImpact in the MedImpact Healthcare Sys. v. IQVIA Inc. case, which has concluded, with all windows of appeal closed.

[1] Updates information in Cary D. Sullivan, RICO, in Trade Secrets Litigation & Protection: A Practice Guide to the DTSA and the CUTSA, ch. 26, at 420-431 (Randall E. Kay, Rebecca Edelson & Robert Milligan eds., 2022). In the chapter, six published decisions within the Ninth Circuit address this issue. Since the 2016 enactment of the Defend Trade Secrets Act, DTSA 18 U.S.C. § 1831, et seq. violations qualify as predicate conduct for claims under the Racketeer Influenced and Corrupt Organizations ("RICO") Act. 18 U.S.C. § 1961(1).

[2] The elements of a civil RICO claim are: (1) conduct; (2) of an enterprise; (3) through a pattern; (4) of racketeering activity; (5) causing injury to the plaintiff's business or property by the conduct constituting the violation. 18 U.S.C. § 1962(c).

[3] 18 U.S.C. § 1961(4); U.S. v. Turkette, 452 U.S. 576, 583 (1981).

[4] NW Monitoring LLC v. Hollander et al., 534 F. Supp. 3d 1329 (W.D. Wash. Apr. 15, 2021).

[5] Id. at 1341.

[6] Id. (quoting Boyle v. United States, 556 U.S. 938, 946 (2009)).

[7] Id. at 1341.

[8] Id.

[9] Skye Orthobiologics LLC, et al. v. CTM Biomedical LLC et al., No. CV 20-3444-DMG (PJWx), 2021 WL 6102520 (C.D. Cal. Feb. 9, 2021).

[10] Id. at *11.

[11] Id. at *11 (citing Odom v. Microsoft Corp. et al., 486 F.3d 541, 551 (9th Cir. 2007)).

[12] Id. at *16.

[13] Skye Orthobiologics LLC, et al. v. CTM Biomedical LLC, et al., No. CV 20-3444-DMG (PVCx), 2021 WL 6104163, at *3 (C.D. Cal. Aug. 30, 2021).

[14] Id.

[15] Id.

[16] Palantir Techs. Inc. v. Abramowitz et al., No. 19-cv-06879, 2020 WL 9553151 (N.D. Cal. July 13, 2020).

[17] Id. at *8.

[18] Id. at *3.

[19] Id. at *9.

[20] 18 U.S.C. § 1961(5).

[21] H.J. Inc. v. N.W. Bell Tel. Co., 492 U.S. 229, 239 (1989).

[22] NW Monitoring LLC, 534 F. Supp. 3d at 1334–35.

[23] Id. at 1341 (quoting Howard v. Am. Online Inc., 208 F.3d 741, 750 (9th Cir. 2000)).

[24] MedImpact Healthcare Sys. Inc., et al. v. IQVIA Inc. et al., No. 18cv1865-GPC(DEB), 2022 WL 6281793 (S.D. Cal. Oct. 7, 2022).

[25] Id. at *3.

[26] Id. at *29.

[27] Id.

[28] Id.

[29] Am. Career Coll. Inc., et al. v. Medina et al., No. CV 21-698 (PSG) (SKx), 2021 WL 5263858 (C.D. Cal. Sept. 28, 2021).

[30] Id. at *3-4.

[31] Id. *4-6.

[32] Id. at *6.