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Civil RICO And Public Officials: Understanding The Law And Avoiding Litigation

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Introduction

The term "RICO" – short for Racketeer Influenced and Corrupt Organizations – conjures up images of Al Capone, the Mafia and organized criminal activity. Certainly, a primary purpose of RICO is to provide law enforcement officials with a means to combat well organized criminal operations. But RICO also allows individuals to seek civil damages against parties that allegedly have engaged in criminal activity that results in economic loss to business and property interests. The federal courts have observed that the civil use of RICO threatens to turn business torts into unnecessarily complex litigations, and many judges look on civil RICO actions with disfavor. Despite the federal judiciary's disdain for civil RICO, such a claim has an undeniable attraction for plaintiffs. A successful civil RICO action results in trebled damages and an award of attorney fees and costs.

Public officials and employees are not insulated from civil RICO actions. Consider the following examples. A developer and landowners allege the mayor and a village trustee violated 18 U.S.C. § 1962(c) by denying building permit applications and defrauding plaintiffs with regard to the price of a water retention.[1] A village president, members of the village board of trustees and village administrators were sued under RICO for allegedly attempting to acquire a property by condemning it as "blighted" and by raising real estate taxes on the parcel to "confiscatory levels."[2] A former owner of a business alleged that the mayor of an Illinois municipality, along with a code enforcement officer, the director of building and inspection services and a police officer violated RICO provisions by issuing citations, denying permits and

[1] *New Burnham Prarie Homes, Incorporated v. Village of New Burnham*, 910 F.2d 1474, 1476, 1477-78 (7th Cir. 1990).
[2] *Pelfresne v. Stephens*, 35 F.Supp.2d 1064, 1069 (N.D.Ill. 1999).

conducting unwarranted inspections to force the plaintiff to give up his business.[3] A towing company sued a police dispatcher for violating RICO by steering a disproportionate number of motorists to one towing, wrecking and auto-body repair shops in exchange for discounted repair work on city and county vehicles.[4] A property owner alleged city officials violated RICO by engaging in a common scheme to force low income individuals to liquidate their property so the officials could acquire prime location parcels at "fire sale prices" to strengthen their negotiating position with developers seeking to acquire the land.[5]

What is both interesting and disturbing about these examples is that the actions prompting the RICO lawsuits were typical for government officials and employees. The day-to-day operations of municipalities require public officials and employees to make decisions about permits, zoning, land use, licenses and the provision of an array of services to taxpaying citizens. The fact that decisionmakers can be threatened with lengthy litigation and potentially catastrophic damages awards for conducting their duties provides a clear reason why public officials and the attorneys who represent them need to know the basic law regarding civil RICO. The need for such understanding is particularly pressing when many public officials – for instance, mayors, village presidents and trustees – provide communities with their time, energy and wisdom for little or no financial remuneration. The discussion that follows seeks to provide information to help public officials and employees avoid civil RICO litigation.

[3] *La Flamboy v. Lander*, 587 F.Supp.2d 914, 920 (N.D.Ill. 2008).
[4] *Bushnell v. Bedford County*, 432 Fed.Appx. 472, 474 (6th Cir. 2011).
[5] *Ferluga v. Eickhoff*, 408 F.Supp.2d 1153, 1156 (D.Kansas 2006).

I. The *Prima Facie* Elements Of A Civil RICO Action

The elements of a RICO violation under § 1962(c) consist of (1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity.[6] A "pattern of racketeering activity" consists of at least two predicate acts committed within a ten-year period.[7] However, "while two acts are necessary, they may not be sufficient. Indeed, in common parlance two of anything do not generally form a 'pattern.'"[8] "Predicate acts" are "acts indictable under a specified list of criminal laws, 18 U.S.C. § 1961(1)(B), including mail fraud under 18 U.S.C. § 1341, and wire fraud under 18 U.S.C. § 1343."[9]

RICO defines an "enterprise" to include "any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity."[10] A RICO enterprise must have "an ongoing 'structure' of persons associated through time, joined in a purpose, and organized in a manner amenable to hierarchical consensual decision making."[11] A plaintiff cannot establish structure by merely alleging certain acts of the enterprise. It must offer some indication of a "command structure."[12]

Furthermore, a civil RICO plaintiff must prove that an individual defendant associated with the enterprise "participated directly or indirectly in the conduct of such enterprise's affairs."[13] "Participate", for RICO purposes means having "some part in directing those affairs." In order to show a "pattern" of racketeering activity, a plaintiff must satisfy the "continuity plus

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[6] *Midwest Grinding Company, Inc. v. Spitz*, 976 F.2d 1016, 1019 (7th Cir. 1992).
[7] *Id*.
[8] *Sedima v. Imrex Company, Inc.*, 473 U.S. 479, 497, 105 S.Ct. 3275 (1985); *Chen v. Mayflower Transit, Inc.*, 315 F.Supp.2d 886, 908 (N.D.Il. 2004).
[9] *Id*.
[10] 18 U.S.C. § 1961(4).
[11] *Jennings v. Emry*, 910 F. 2d 1434, 1440 (7th Cir. 1990).
[12] *See Stachon v. United Consumers Club, Inc.*, 229 F.3d 673, 676 (7th Cir. 2000).
[13] *Richmond v. Nationwide Cassel L.P.*, 52 F. 3d 640, 645 (7th Cir. 1995).

relationship" test: the predicate acts must be related to one another *and* pose a threat of continued criminal activity.[14]

II. Caselaw Illustrating The Elements Of Civil RICO Actions Against Public Officials

An examination of several recent civil RICO lawsuits involving public officials and public employees demonstrates how the *prima facie* civil RICO elements are construed and applied by the courts. In particular, the cases discussed below illustrate how public officials' and employees' actions in governing and administering their communities can result in allegations of civil RICO violations.

A. The "Conduct" Element Of A Civil RICO Claim

In *DeFalco v. Bernas,*[15]the plaintiff – an owner of a development company and a parcel of land with deposits of sand and gravel – brought a civil RICO action against an assortment of public officials and employees from a town and a county in the state of New York.[16] These officials include the elected Supervisor of the Town of Delaware; the appointed Chairman of the Delaware Planning Board; the appointed Building Inspector of the Town of Delaware; the Tax Assessor of the Town of Delaware; the appointed Sullivan County Administrator; the chief engineer of the Town of Delaware; and the Highway Superintendent for the Town of Delaware.[17] According to the evidence from the second jury trial of plaintiff's RICO claims, plaintiff purchased a tract of land, a portion of which he devoted to a real estate development project.[18] Before closing on the land, plaintiff learned there were potentially valuable gravel deposits on

[14] *H.J., Inc. v. Northwestern Bell Telephone Co.*, 492 U.S. 229, 239, 109 S. Ct. 2893, 2900 (1989); *Sedima v. Imrex Company, Inc.*, 473 U.S. at 496, 105 S. Ct. 3275.
[15] 244 F.3d 286 (2nd Cir. 2001).
[16] *Id*. at 293.
[17] *Id*. at 294.
[18] *Id*. at 295.

part of the property.[19] After plaintiff purchased the property, the Supervisor of the Town of Delaware advised him that he would have to deal with local people, and that the supervisor would guide plaintiff through "the muddy waters" of real estate development in the Town of Delaware as long as plaintiff followed the Supervisor's suggestions.[20]

Once plaintiff began his real estate development project, the defendants made a number of demands coupled with the threat of adverse action on the project if plaintiff did not agree to do as defendants required.[21] For instance, the Supervisor suggested that plaintiff should allow the Supervisor's son cut timber on plaintiff's property. When plaintiff resisted he was told that, "[i]f you want to go by the Planning Board and you want things to go smooth, you know, this is the way it is in Sullivan County. That's it."[22] The plaintiff agreed with the defendants' suggestion that he hire particular individuals to work on the real estate project development.[23] A pattern emerged in which each time a demand was made and plaintiff resisted, the defendants used their political power to impede the development or otherwise harm plaintiff. Each time plaintiff agreed to a demand, his project was allowed to proceed.[24]

For instance, the plaintiff attempted to fire some of the individuals he hired to work on the project and he was warned that if he did so he would have major problems with his development.[25] At another point, the defendants put pressure on plaintiff to give a local contractor the entire gravel pit located on a portion of plaintiff's land. When plaintiff resisted the

[19] *Id.*
[20] *Id*. at 294-95.
[21] *Id*. at 296.
[22] *Id*.
[23] *Id.*
[24] *Id*.
[25] *Id*. at 297.

demand, the defendant Tax Assessor reassessed certain lots and more than doubled plaintiff's property taxes.[26]

Plaintiff filed a RICO action against the defendants that alleged numerous acts of extortion and bribery. A trial was held and a jury found the Town of Delaware had been operated as a RICO enterprise and that six of the defendants conducted or participated in the affairs of the town through a pattern of racketeering activity.[27] The jury found that each of the six defendants committed two or more predicate acts and it assessed monetary damages against them.[28] On appeal, the Second Circuit ruled that evidence admitted at trial was too speculative and conjectural to be admitted. A second trial was ordered. The second jury found that several defendants engaged in the RICO predicate acts of extortion and awarded plaintiff almost to $2 million in damages.[29]

On appeal of the second jury's verdict, defendants claimed there was insufficient evidence for a jury to find they conducted the affairs of the Town of Delaware.[30] The Second Circuit noted in *Reves v. Ernst & Young*, that the United States Supreme Court adopted a "operation or management" test to determine whether a defendant had sufficient connection to the enterprise to warrant liability.[31] The Second Circuit observed:

> The Court held that, to conduct or participate, directly or indirectly, in the conduct of an enterprise's affairs, "one must have some part in directing those affairs." . . . The Court stated that "the word 'participate' makes clear that RICO liability is not limited to those with primary responsibility, just as the phrase 'directly or indirectly' makes clear that RICO liability is not limited to those with a formal position in the enterprise. . . ."[32]

[26] *Id.* at 299.
[27] *Id*. at 300.
[28] *Id*.
[29] *Id*. at 304.
[30] *Id*. at 309.
[31] *Id*.
[32] *Id*. (quoting *Reves v. Ernst & Young*, 507 U.S. 170, 179, 113 S.Ct. 1163 (1993)).

The Appellate Court found ample evidence from the trial record that the defendants had some part in directing the affairs of the Town of Delaware.

The record indicated that the defendant Supervisor was an elected official for approximately five years.[33] As the Supervisor, defendant served as a member of both the Town Board and the Town Legislature. The Appellate Court found the trial evidence indicated that when plaintiff resisted defendant Supervisor's suggestions about how to proceed with his real estate development, the Supervisor used his authority within the Town of Delaware to negatively affect plaintiff's project. As the court observed, "there was ample evidence from which a reasonable jury could conclude that [the Supervisor] participated in the operation or management of the Town of Delaware. Indeed, there was more than enough evidence in the record for a reasonable jury to conclude that [the Supervisor] had more than just 'some part in directing those affairs.'"[34]

The Second Circuit extended its analysis of the "conduct" element of a civil RICO claim by considering the evidence presented regarding two defendants who had no role in the operation or management of the Town of Delaware. The Court noted that, "RICO liability is not limited to those with primary responsibility for the enterprise's affairs, . . . [o]r limited to those with a formal position in the enterprise . . . An enterprise also might be 'operated' or 'managed' by others 'associated with' the enterprise who exert control over it as, for example, by bribery."[35] For instance, one of the defendants threatened adverse official action from the Town of Delaware if plaintiff did not give him stock in plaintiff's company that owned a gravel pit located on the property owned by plaintiff. The Supervisor, the Town of Delaware's Chief Engineer, Tax Assessors and its Building Inspector all pressured plaintiff to turn over his company's stock.

[33] *Id*. at 310.
[34] *Id*. (quoting *Reves v. Ernst & Young*, 507 at 179, 113 S.Ct. 1163.
[35] *Id*. at 311 (quoting *Reves v. Ernst & Young*, 507 at 179, 184, 113 S.Ct. 1163).

Once plaintiff transferred the stock, the Town immediately took action to facilitate his real estate development project.[36] The trial record included a letter from the Supervisor to plaintiff indicating that an agreement could be reached to allow an important phase of the real estate development to go forward once a defendant who was not a town official approved of plaintiff's project plans. The Second Circuit noted that this letter was strong evidence that this individual who was not a Town of Delaware official "participated in the operation or management of the Town of Delaware, had at least some part in directing the affairs of the Town and, exerted some control over it."[37]

B. The "Enterprise" Element Of A Civil RICO Claim

In *Newkirk v. Village of Steger*, the plaintiffs were seven current and former employees of the Village of Steger Police Department.[38] They brought a civil RICO claim against the Village of Steger, the Village President, the Steger Police Department, the Village Police Chief, a Village police officer and the police department's telecommunications program supervisor alleging the defendants conducted the affairs of an enterprise through a pattern of racketeering activity that included the predicate acts of obstruction of justice in violation of federal statutes and extortion.[39] The specific predicate acts occurred over a six year period and included testifying falsely before a federal grand jury and intimidating or conspiring with Village residents to lodge false complaints against the plaintiffs.[40] The alleged actions amounted to a "vendetta" against the plaintiffs for either personal or political reasons.[41] Additionally, the plaintiffs alleged the defendants sought to rig various work bids by giving contracts to potential

[36] *Id*. at 311.
[37] *Id*. at 312.
[38] 2004 WL 2191589 (N.D.Ill) *1.
[39] *Id*. at **9-10.
[40] *Id*. at *1.
[41] *Id*.

and existing contractors who were political supporters of the Village President, by having work performed without obtaining a bid when the cost of the project required a bid, and by structuring financial transactions so that the sums paid did not appear to be in excess of the statutory bid amount.[42]

The defendants filed a motion to dismiss the RICO claim arguing, *inter alia*, that plaintiffs failed to adequately allege the existence of an enterprise.[43] An "enterprise" under RICO 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."[44] A RICO enterprise can be formal or informal, but there must be some type of organizational structure.[45] According to the court, a RICO enterprise must have an ongoing structure of persons associated through time, joined in purpose, and organized in a manner conducive to hierarchical or consensual decision-making.[46] The organization must have a structure and goals separate from the predicate acts committed to advance the scheme or purpose of the enterprise.[47] Further, a RICO defendant must be "separate and distinct from the enterprise because liability depends on showing that the defendants conducted or participated in the conduct of the enterprise's affairs, not just their own affairs, through a pattern of racketeering activity."[48]

In their motion to dismiss the RICO claim, the defendants argued that plaintiffs failed to adequately allege an enterprise with a structure and goals separate from the predicate acts

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[42] *Id*. at *10.

[43] The plaintiffs also alleged a RICO conspiracy claim under § 1962(d). The court noted in this regard that, "[p]laintiffs must state a claim under § 1962(c) to establish a cause of action under § 1962(d). The court also quoted *Stachon v. United Consumers Club, Inc*. on this point, "[s]ince Appellants fail to establish a violation of section 1962(c), their section 1962(d) claim based on the same facts must fail as well." 229 F.3d 673, 677 (7th Cir. 2000) (citing *Midwest Grinding Co. v. Spitz*, 976 F.2d 1016, 1026 (7th Cir. 1992).

[44] 18 U.S.C. § 1961(4)..

[45] *Newkirk v. Village of Steger*, 2004 WL 2191589 *11.

[46] *Id*.

[47] *Id*.

[48] *Id*. (quoting *United States v. Masters*, 924 f.2d 1362, 1367 (7th Cir. 1991) and *Reves v. Ernst & Young*, 507 U.S. 170, 185, 113 S.Ct. 1163 (1993)).

purportedly committed in furtherance of defendants' scheme. The plaintiffs argued the complaint alleged an ongoing structure of persons associated through time, joined in purpose, and organized to allow for hierarchical or consensual decision-making.[49] To support their argument, plaintiffs identified sections in their complaint that alleged the Village President used the Village for his political and personal benefit; that the Village President repeatedly reappointed the police chief after the Village Board voted to terminate him; that the Village President and the police chief were close political allies; and that the Village President and the police chief twice tried unsuccessfully to promote a police officer who also was a RICO defendant.[50] The plaintiffs argued these allegations demonstrated an enterprise that was organized in a manner amenable to hierarchical or consensual decision-making with a command structure and an 'association-in-fact" between all the defendants, with each participating in the operation and management of the enterprise.[51] The plaintiffs further contended the defendants used the Village and the police department as the means through which they could carry out their agreement to intimidate and retaliate against the plaintiffs and witnesses in order to influence the outcome of federal and state court proceedings.[52]

The court determined the plaintiffs failed to alleged the existence of a RICO enterprise, stating that:

> Whether Plaintiffs allege that the enterprise consisted of an association-in-fact of all Defendants, or merely the Village and the SPD [Steger Police Department], the court concludes that Plaintiffs have not identified an enterprise that is distinct from Defendants themselves. If Plaintiffs believe that the Village and the SPD constituted the enterprise, their claim fails, for, as noted, a RICO defendant must be separate and distinct from the enterprise. If Plaintiffs contend that the Village and the SPD were part of a larger association-in-fact, Plaintiffs have failed to allege a structure or

[49] *Id*. at 12.
[50] *Id*.
[51] *Id*.
[52] *Id*. at *14.

> purpose for such an organization separate from the alleged predicate acts.[53]

According to the court, nothing in plaintiffs' allegations demonstrated the existence of a command structure separate and apart from the defendants themselves.[54] Regarding plaintiffs' allegations in the complaint of how the Village President used the Village for his personal and political benefit, repeatedly reappointed the police chief after the Village Board voted to terminate him, that the Village President and the police chief were close political allies and the Village President and the police chief twice attempted to promote a police officer unlawfully, the court concluded that these allegations describe what the defendants purportedly did, but the contentions said nothing about the structure of the alleged enterprise itself.[55] Therefore, "[a]bsent any sign of an organizational structure, Plaintiffs' allegations are insufficient even under the liberal pleading standards of Rule 8(a)."[56]

C. The "Pattern" Element Of A Civil RICO Claim

In *Pelfresne v. Stephens*, the plaintiffs – Village Trustees who were property owners and business operators – claimed that the defendants, including the Village President, members of the Village Board of Trustees and certain Village administrators, engaged in an ongoing scheme whereby the defendants acquired property by wrongfully condemning it as "blighted" or through "sham" condemnation proceedings.[57] The plaintiffs alleged the scheme resulted in the acquisition by defendants of most of the industrial and commercial real estate in the Village.[58] The defendants either (1) used the property for facilities or businesses owned or operated by the Village and awarded themselves lucrative concessions; or (2) collusively put the properties into

[53] *Id*. (citation omitted).
[54] *Id*. at *15.
[55] *Id*. at *16.
[56] *Id.*
[57] 35 F.Supp.2d at 1069.
[58] *Id.* at 1074.

the possession of a few favored developers who, assisted by improper real estate tax exemptions, had an unfair competitive advantage over other private businesses.[59] Further, the plaintiffs alleged the defendants used their real estate control and municipal powers to enrich themselves and their own businesses.[60] To promote their scheme, the defendants allegedly manipulated zoning provisions, wrongfully denied permits and caused the Village fire prevention inspector to harass the plaintiffs.[61]

Various defendants filed motions to dismiss that focused on the elements of a civil RICO claim. One defendant argued the plaintiffs failed to allege a pattern of racketeering activity.[62] This argument asserted that the mailings at issue did not satisfy the continuity prong because the acts occurred too close together in time.[63] The court noted there are two types of continuity that may be alleged in a RICO action. "Close-ended" continuity requires a showing of duration.[64] "Open-ended" continuity exists when the specific threat of repeated acts are inherent in the very nature and scope of the scheme.[65] A RICO plaintiff can show open-ended continuity by alleging that a scheme has "'no natural ending point,' because such an allegation suggests that the conduct threatens to continue into the future."[66] The court indicated the plaintiffs had sufficiently alleged open-ended continuity to set forth a pattern of racketeering activity. The plaintiffs alleged a scheme beginning in 1979 that threatened to continue into the future.[67] The complaint asserted that at least two of the mailings at issue furthered the scheme.[68] According to the court, "[t]hese mailings satisfy the continuity prong because the scope of the alleged scheme

[59] *Id.*
[60] *Id.*
[61] *Id.*
[62] *Id.*
[63] *Id.*
[64] *Id.*
[65] *Id.*
[66] *Id.* (quoting *Viron, Inc. v. Harbridge Merchant Services, Inc.*, 20 F.3d 771, 783).
[67] *Id.*
[68] *Id.*

suggests that [defendant] Sansone may attempt to interfere with plaintiffs' property in the future."[69]

D. The "Racketeering Activities" Element Of A Civil RICO Claim

In *LaFlamboy v. Lander*, plaintiff, the owner of a business located in an Illinois village filed a multi-count complaint against the various public officials and employees (the "village defendants") and other individuals. The complaint included two civil RICO counts. The first RICO count alleged that the defendants participated in a pattern of racketeering activity over a period of six years that involved plaintiff's former business – an indoor golfing facility – in violation of 18 U.S.C. § 1962(c).[70] The second RICO count contended that the defendants violated 18 U.S.C. § 1962(d) by conspiring "to engage in a pattern of racketeering activity with the intention of cheating, defrauding, and otherwise forcing the plaintiff to give up his ownership and control of the [business]."[71] Specifically, the plaintiff alleged the village defendants engaged in an overzealous and/or wrongful pattern of issuing citations in order to harass him into selling his business. This pattern included: a citation for failing to obtain a proper business license; a citation for permitting weeds to grow too high; citations to plaintiff for serving food without a permit during a haunted house event at his business and for allowing pizza to be served at an event for disabled children at plaintiff's business; a citation for disobeying a police order by dumping stone in the parking lot of his business after being ordered not to do so; a citation for a faulty security fence; and a citation for keeping debris on business premises.[72] The plaintiff further alleged that the village defendants required him to donate a portion of the revenues he

[69] *Id.* The defendant's motion to dismiss was ultimately granted because, "plaintiffs are unable to demonstrate that they suffered injury from any of the predicate acts constituting the pattern. Without such a connection, plaintiff cannot show a compensable RICO injury."[69]
[70] *LaFlamboy v.Lander*, 587 F.Supp.2d 914, 920 (N.D.Ill. 2008).
[71] *Id*.
[72] *Id*. at 927.

collected for a concert staged at his indoor golfing facility as a "political donation" to the mayor.[73] Plaintiff also asserted that the mayor sought to gain control of his indoor golfing business through a scheme that involved ordering an appraisal of plaintiff's facility without notifying him, unnecessary inspections conducted by village employees, and a series of transactions that resulted in the village gaining ownership of the indoor golfing facility without paying the plaintiff compensation in any of the transactions.[74] In all, plaintiff alleged that the village defendants engaged in thirty separate racketeering acts designed to force him out of his business so the village could take control of it.[75] These racketeering activities included mail fraud, official misconduct and various other crimes.[76]

The village defendants filed a motion for summary judgment seeking dismissal of plaintiff's 18 U.S.C. § 1962(c) RICO claim. Defendants argued, *inter alia*, that the RICO claims asserted against them should be dismissed because the plaintiff could not prove sufficient predicate acts to establish a pattern of racketeering activity.[77] The complaint alleged the village defendants committed four types of predicate acts – official misconduct, mail fraud, obstruction of justice and "payrolling."[78] The court found that the plaintiff failed to establish a genuine issue of material fact as to some of the purported predicate acts. However, it determined that the plaintiff had provided enough evidence on at least two alleged predicate acts to survive summary judgment. As the court noted, "[t]he law is clear that a 'pattern' of racketeering requires 'at least two predicate acts each with its own essential element.'"[79]

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[73] *Id. at 928.*
[74] *Id*. at 929-934.
[75] *Id*. at 935.
[76] *Id*.
[77] *Id*. at 938.
[78] *Id*.
[79] *Id*. (quoting *RWB Servs., LLC v. Hartford Computer Group, Inc.*, 539 F.3d 681, 686 (7th Cir. 2008).

1. Official Misconduct

Of the thirty predicate acts alleged against the village defendants, twenty-one of these purported racketeering actions involved misconduct in violation the Illinois Official Misconduct statute, 720 ILCS 5/33-3. Courts have found that violations of §5/33-3(d) – "solicits or knowingly accepts for the performance of any act a fee or reward which he knows is not authorized by law" – can be considered as "bribery" such that the activity constitutes a RICO predicate act.[80] The court found that most of plaintiff's alleged official misconduct violations did not amount to bribery and could not constitute RICO predicate acts. However, the court determined that plaintiff's allegations did set forth evidence sufficient to create a genuine issue of material fact as to whether the village mayor accepted a kickback in the form of proceeds from the concert staged at plaintiff's facility in exchange for the village ignoring code violations and allowing the concert to take place.[81]

2. Mail fraud

In the complaint, the plaintiff alleged nine racketeering acts of mail fraud against the village defendants. The village defendants argued that mail fraud did not occur because none of the alleged mailings were fraudulent.[82] The court found this argument unavailing because "[a] mailing need not contain false or misleading information . . . nor cause loss on its own."[83] Rather, "[t]o support mail fraud, mailings 'only need to be in furtherance of the scheme.'"[84] According to the court, plaintiff offered evidence of at least two mailings in support of a scheme

[80] *Id*. at 939. (see quote from *United States v. Garner*, 837 F.2d 1404, 1419 (7th Cir. 1987 where the Seventh Circuit determined that a violation of § 5/33-3(d) "falls comfortably within the generic classification of bribery."
[81] *Id*. The court noted that, "[a]t the end of the concert, Plaintiff was present when . . . got the money intended for the Mayor. Plaintiff subsequently confronted the Mayor about the payment, and the Mayor did not deny receiving it.
[82] *Id*. at 941.
[83] *Id*.
[84] *Id*. (quoting *Shapo v. O'Shaughnessy* 246 F.Supp.2d 935, 957 (N.D.Ill. 2002).

to defraud. First, the evidence was sufficient to create a material issue of genuine fact as to whether the village defendants used the mails to further a scheme to purchase plaintiff's indoor golf facility for the mayor's or the village's benefit.[85] Second, plaintiff identified a series of letters mailed or caused to be mailed by the village defendants that created a question of fact as to whether they "engaged in a scheme to deprive Plaintiff – via inconsistent and/or unfair application and enforcement of Village ordinances – of his property interest in the [indoor golf facility]."[86]

3. Obstruction Of Justice

Plaintiff further alleged the village defendants engaged in obstruction of justice in violation of federal criminal statutes.[87] Such violations, if proven, could constitute RICO predicate acts. The criminal statutes in question involved federal court proceedings. The court found that plaintiff had made no attempt to present evidence that any village defendants interfered with federal court proceedings. Therefore, the alleged obstruction of justice predicate acts were dismissed.[88]

d. Payrolling

The plaintiff alleged "payrolling" as a RICO predicate. The court observed "payrolling" is not one of the types of crimes that constitutes RICO predicate acts.[89] Therefore, all plaintiff's alleged "payrolling" predicate acts were dismissed as a matter of law.[90]

[85] *Id.*
[86] *Id.*
[87] Specifically 18 U.S.C. §§ 1503 and 1512.
[88] *Id.* at 942.
[89] *Id.* at 943. *See* 18 U.S.C. § 1961(1)(A)-(B).
[90] *Id.*

III. Avoiding Civil RICO Lawsuits: Some Points To Ponder

Even when successful results are achieved, civil RICO litigation is very time consuming and expensive to defend. Public officials and employees need to avoid that time, expenditure of energy and public treasure. Municipalities need to devote their resources to serving citizens' best interests and not to paying the costs of fending off allegations that are more appropriately directed toward organized crime. This section provides some ideas that might help hard working, committed public officials and employees avoid being civil RICO defendants.

A. Extortion And Public Officials

The discussion of cases such as *LaFlamboy v. Lander* and *DeFalco v. Bernas* illustrates the kind of acts by public officials that subject them to allegations of extortion and bribery. The United States Supreme Court analyzed extortion and racketeering activity by public officials in *Wilkie v. Robbins*.[91] The Court's analysis provides insights that may be useful for public officials.

The plaintiff in this case alleged that certain employees of the Bureau of Land Management ("BLM") waged a campaign of harassment and intimidation designed to force him to grant an easement over his ranch property in Wyoming.[92] The harassment campaign by BLM included: conducting a survey on plaintiff's land after the plaintiff had refused permission; "looking closer" and "investigating harder" for possible trespass and permit violations; bringing unfounded administrative charges against plaintiff for other land-use violations; revocation of plaintiff's grazing permit and threats to impound plaintiff's cattle; and initiating formal trespass proceedings against him.[93]

[91] 551 U.S. 537, 127 S.Ct. 2588 (2007)
[92] *Id*. at 541-47.
[93] *Id*.

In reaction to the BLM campaign, plaintiff filed a RICO claim charging extortion.[94] The Tenth Circuit found that plaintiff stated a RICO action because, "Government employees who 'engag[e] in lawful actions with an intent to extort a right-of-way from [a landowner] rather than with an intent to merely carry out their regulatory duties' commit extortion under Wyoming law and within the meaning of the Hobbs Act, 18 U.S.C. § 1951."[95] *Id*. at 548-49. On appeal, the United States Supreme Court reversed this finding.

The Supreme Court determined that the Hobbs Act was not intended to apply to actions taken by governmental employees to obtain property for a government entity. The Court noted that plaintiff, "has cited no decision by any court, much less this one, from the entire 60-year period of the Hobbs Act that found extortion in efforts of Government employees to get property for the exclusive benefit of the Government." Rather, in passing the Hobbs Act in 1946, Congress' concern was "the common law conception of 'extortion'." 551 U.S. at 565. At common law, "extortion was a property offense committed by a public official who took any money or thing of value that was not due to him under the pretense that he was entitled to such property by virtue of his office." *Id*. at 564. Extortion, for purposes of Hobbs Act RICO claims, addresses public corruption, the sale of public favors for private gain, "the rough equivalent of what we would now describe as 'taking a bribe,'" not harm caused by efforts to secure property for a governmental entity. *Id*.

[94] *Id.* at 547-48.

[95] The Hobbs Act states, "Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined under this title or imprisoned not more than twenty years, or both." 18 § 1951(a). The main purpose of the Hobbs Act is to punish interference with interstate commerce by robbery, extortion or physical violence. *United States v. Glynn*, 627 F.2d 39, 41 (7th Cir. 1980).

The Court's analysis of plaintiff's RICO claim also focused on his attempt to ground predicate acts in allegations that defendants violated a Wyoming blackmail statute. Plaintiff's strategy was futile:

> He falls back to the argument that defendants violated Wyoming's blackmail statute . . . which he says is a separate predicate offense for purposes of RICO liability. But even assuming that defendants' conduct would be "chargeable under State law and punishable by imprisonment for more than one year," 18 U.S.C. § 1961(1)(A), it cannot qualify as a predicate offense for a RICO suit unless it is "capable of being generically classified as extortionate.

551 U.S. at 567. The BLM actions did not involve acts of extortion; therefore the *Wilkie* plaintiff failed to set forth a cognizable RICO predicate act. According to the Supreme Court, even a state law felony can be a RICO predicate act only if it constitutes making money for personal gain.

The *Wilkie* court's decision carries broad implications for those who would bring civil RICO claims against public officials and employees. In *Wilkie*, a dispute arose pitting the property interests of a private individual against the interests of the government. The case recognized that public officials often address disputes with private citizens as a part of conducting civic affairs. These disputes can become contentious, particularly when issues of real property are involved. Faced with such disputes, governmental officials and employees are bound to seek to promote the interests of the public entity they serve. The *Wilkie* decision teaches that those individuals tasked with advancing governmental concerns should not be deemed as engaging in criminal conduct and subjected to civil RICO claims unless they use their positions to promote personal financial ends. The *Wilkie* court's instruction makes good sense. Otherwise, any dispute involving public and private interests could result in a governmental official or employee defending against civil RICO claims.

B. State Law Violations

In *LaFlamboy v. Lander*, the plaintiff accused defendants of engaging in racketeering activity through violations of the Illinois Official Misconduct statute. Civil RICO predicate acts have been alleged against public officials and employees in Illinois for violation of the state's public intimidation law as well.[96] The *Wilkie v. Robbins* decision indicates that only state law violations that are extortionate and that are committed to advance personal financial advantage can be considered as actionable racketeering activity for civil RICO purposes.

C. Communications While Conducting Governmental Affairs

Many civil RICO claims include allegations that public officials engage in racketeering activity through communications made with the intent to defraud. It is important to note the characteristics of wire fraud in this regard. The predicate act of wire fraud, for RICO purposes, must involve interstate communication.[97] When a complaint fails to allege any use of interstate wires, and all parties reside in the same state, it is not reasonable to infer that any interstate wire communications occurred.[98] Courts have used the interstate communications requirement to rule that intrastate communications using the telephone or facsimile transmission were not RICO predicate acts.[99]

The "interstate communication" requirement for actionable wire fraud suggests that telephone and facsimile transmission – as opposed to use of the mails – represent a prudent

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[96] *Curtis v. Wilkes*, 704 F.Supp.2d 771, 787 (N.D.Ill. 2010)

[97] *Midwest Grinding Company v. Spitz*, 976 F.2d at 1025, fn. 7; *Meier v. Musburger*, 588 F.Supp.2d 883, 907 (N.D.Ill. 2008); *Harris Trust and Savings Bank v. Ellis*, 600 F.Supp. 1118, 1122 (N.D.Ill. 1985).

[98] *Meier v. Musburger*, 588 F.Supp.2d at 907.

[99] *See, e.g., Meier v. Musburger*, 588 F.Supp.2d at 907 ("But the parties were all in the Chicago Area. Wire fraud must involve interstate communications"); *Harris Trust and Savings Bank v. Ellis*, 609 F.Supp. at 1122 ("The amended complaint fails to allege any use of interstate wires, and given the Illinois residence of all the parties it would not be reasonable to infer that any such use occurred"); *Curtis v. Wilkes*, 704 F.Supp.2d at 788-789 (It is undisputed that the parties in this case are all residents of Illinois. Because any wire communications were intrastate, not interstate as required by 18 U.S.C. § 1343, the Court grants defendants' summary judgment motion with respect to any RICO claim based on the purported acts of wire fraud)."

communication mode for public officials and employees when they conduct governmental affairs. As long as the communication is intrastate, it cannot be a RICO predicate act, unless the action satisfies the requirements of other types of racketeering activity such as extortion or bribery.

D. Immunity And Public Officials

In *Pelfresne v. Stephens*, the Village President sought to have the court dismiss civil RICO claims filed against him based on the doctrine of legislative immunity.[100] Under the doctrine of legislative immunity, legislators are entitled to absolute immunity only when they operate in "the sphere of legitimate activity."[101] Courts grant legislators absolute legislative immunity for activities such as "(1) core legislative acts such as introducing, debating and voting on legislation; (2) activities that could not give rise to liability without inquiry into legislative acts and the motives behind them; and (3) activities essential to facilitating or preventing the core legislative process."[102] The complaint alleged that the Village President, as a part of a broader conspiracy with other defendants singled out plaintiffs and attempted to acquire their land and prevent competition through fraudulent means.[103] Further, plaintiffs alleged they entered into a settlement agreement with the Village President and other defendants in which they agreed to transfer to the Village a parcel of their property for road-widening purposes.[104] In exchange, the defendants agreed that the plaintiffs retained the right to use the property in certain ways through 2005 with erecting restaurants being one of the permissible uses.[105] The plaintiffs alleged that the Village President and other defendants never intended to follow the settlement agreement,

[100] *Id*. at 1070.
[101] *Id*.
[102] *Id*. (quoting *Biblia Abierta v. Banks*, 129 F.3d 899, 903 (7th Cir. 1997)).
[103] *Id*. at 1070-71.
[104] *Id*. at 1071.
[105] *Id*.

and they breached the agreement by preventing one of the plaintiffs from placing a restaurant on her property and by attempting to acquire the plaintiffs' parcels by eminent domain.[106]

The court determined that such alleged actions by the Village President were administrative acts, rather than core legislative acts or activities essential to facilitating the legislative process. The Court denied the Village President's motion to dismiss plaintiffs' RICO claims on the basis of legislative immunity stating that, ". . . signing the agreement with no intent to perform its terms and subsequently breaching the agreement amounted to administrative acts, and therefore [the court] denies [defendants'] motion to dismiss on the ground that they are entitled to legislative immunity."[107]

Public officials who engage in legislative activities – e.g. mayors, village presidents, aldermen or trustees – may be able to avail themselves of a legislative immunity defense to civil RICO allegations. What must be remembered is this defense has a limited scope. When public officials engage in activity that is administrative, rather than legislative, in nature, the immunity will not be available. But actions that can be deemed legislative should be protected through legislative immunity.

E. The Role Of Personal Financial Gain In Civil RICO Actions

A common theme running through the cases discussed here is the role personal financial gain or enhanced political power of public officials plays in a civil RICO cause of action. In *Pelfresne v. Stephens*, plaintiffs alleged a scheme of racketeering activity that purportedly resulted in personal enrichment or increased political power to the political officials named as defendants. The plaintiff in *LaFlamboy v. Lander* alleged village officials and employees forced him to make a "political donation" to the mayor in exchange for municipal personnel relaxing

[106] *Id*.
[107] *Id*.

code provisions so the plaintiff could stage a concert at his indoor golfing facility. The complaint in *DeFalco v. Bernas* sets forth numerous acts of extortion and bribery allegedly committed by town and county officials that allowed them to profit personally at the expense of a property owner who sought to bring a real estate development to fruition.

The Supreme Court makes it clear in *Wilkie v. Robbins* that extortion requires the presence of personal avarice to become an actionable RICO predicate act. One of the elements of mail fraud is "an intent to defraud."[108] For mail fraud purposes, "defraud" has the common understanding of damaging a person's property rights by dishonest methods or schemes, and usually signifies "the deprivation of something of value by trick, deceit, chicane or overreaching."[109] To prove intent to defraud, a plaintiff must show a defendant has committed a willful act with "the specific intent to deceive a cheat, usually for the purpose of getting financial gain for one's self or causing financial loss to another."[110] Without avaricious intent, there can be no mail fraud.[111]

Thus, one of the best defenses public officials and employees have to civil RICO allegations is honest work for the communities they serve. If plaintiffs cannot show that public servants used positions of authority and influence to promote their personal and political interests at the expense of others, then their civil RICO allegations will be empty, meritless and unsuccessful.

[108] *United States v. Sloan*, 492 F.3d 884, 890 (7th Cir. 2007).
[109] *Richards v. Combined Insurance Company of America*, 55 F.3d 247, 252 (7th Cir. 1995).
[110] *United States v. Sloan*, 492 F.3d at 890.
[111] *Richards v. Combined Insurance Company of America*, 55 F.3d at 252.

Conclusion

The authors currently are engaged in civil RICO litigation involving clients with whom they have enjoyed an attorney-client relationship spanning five decades. This means the authors lived, with the clients, the events that now underlie the RICO claims. The authors believe that every precaution was taken to assure that the would-be plaintiff's rights were protected. The authors know, first hand, that the civil RICO allegations now pled, are baseless and scurrilous in the extreme. Nonetheless, the prospect of a federal jury trial looms large in the clients' future.

The point is that civil RICO claims, in the local government context, provide proof of the old legal saws that: (1) under the American judicial system, anybody can claim anything; and (2) as far as the court is concerned, both sides are lying.

As municipal lawyers, we all must advise our clients in matters of property acquisition and code enforcement. Most of our clients are volunteers who are pure of heart and motive. However, civil RICO provides the pluperfect forum for angry and irrational property owners to drag these volunteers through the federal system at taxpayer expense. Therefore, it behooves us to use these exemplar cases to advise these clients to conduct their necessary governmental business in a manner that is least likely to give axe grinding property owners a basis, no matter how fanciful, for bringing a civil RICO claim.