Hot Topics in Products Liability Law: Hijacking the RICO Statute to Bring a Products Liability Claim

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There is an emerging trend in products liability law where a plaintiff styles a case as a RICO claim, but at its core the gravamen of the dispute is an extension of a products liability action. To some extent, this is an attempt by the plaintiffs' bar to repackage products liability actions under another statutory scheme to increase the exposure and drive up the stakes for defendants. But in many instances, there are ulterior motives, including that under existing legal theories the alleged "harm" suffered by the plaintiff would not be sufficient to satisfy standing requirements that are a threshold hurtle to clear in order to bring suit. So in an attempt to work around that legal threshold, plaintiffs allege that they have been the victim of a RICO violation—which invokes a separate analysis to be conducted on the question of standing. In other words, this is nothing short of a concerted effort to expand the definition of "injury" for which product manufacturers can be held liable so that there are more types of harms for which a plaintiff can sue. The other reason for transforming products liability claims into RICO actions is that if a plaintiff prevails in a RICO claim, they can be awarded treble damages, attorney fees, and litigation costs—increasing the upside for plaintiffs and simultaneously driving up exposure for defendants. This is creative lawyering by the plaintiffs' bar that can be appropriately characterized as hijacking the RICO statute for a purpose that it was not originally intended to be used.

But first, what is RICO? The Racketeer Influenced and Corrupt Organizations Act ("RICO") of 1970 was enacted as a legal tool to establish new penal prohibitions. The purpose was to provide enhanced sanctions and new remedies for dealing with the unlawful activities of those engaged in organized crime. RICO provides both criminal and civil sanctions. Signed by President Nixon, this statute was originally used to criminally prosecute the mafia.

How does this apply to a products liability case? Under this theory, typically a plaintiff alleges a compensable RICO injury in the form of overpayment for a product that they never received. And because the defendant allegedly engaged in a scheme that had the purpose and direct result of selling the deceptively marketed product to the plaintiff at a false premium, the plaintiff alleges that their injuries were proximately caused by defendants' misconduct. Under this theory, a product liability plaintiff allegedly has standing to pursue a RICO claim against a product manufacturer. Notably absent from this theory of standing is *physical injury* to a plaintiff in the conventional or colloquial sense that we usually associate with products cases.

The theory is rooted in the idea that a product that is sold with a defect or other issue is not worth as much as it would have been if it had been sold without the defect. Plaintiffs allegedly suffer a RICO injury due to the lost expectation of receiving a product that they thought would perform in a certain manner.

This is another similar way of looking at depreciation-based injuries, but ups the ante by pursuing these injuries as compensable under RICO. Even though the RICO statute was originally intended to go after the mafia, it has indisputably been expanded over the years. *See, e.g., Sedima, S.P.R.L. v. Imrex Co*., 473 U.S. 479, 499-500 (1985) (noting that the statute also encompasses legitimate enterprises); *Robert L. Kroenlein Trust v. Kirchhefer*, 764 F.3d 1268, 1274 (10th Cir. 2014) (stressing that "normal businesses can also fall under RICO's broad criminal and civil rubric."); *Plains Res., Inc. v. Gable*, 782 F.2d 883, 887 (10th Cir. 1986) (same). In recent years, however, this theory has been gaining new traction on the products liability scene.

Does the law support the application of RICO liability in products cases? The majority of legal authority exploring RICO liability in products cases stands for the proposition that there is no concrete RICO injury where an alleged product defect has not actually manifested for a particular plaintiff. *See, e.g., In re: Gen. Motors LLC Ignition Switch Litig*., 2016 WL 3920353, at *1, 16 (S.D.N.Y. July 15, 2016) (rejecting claim premised on latent ignition switch defect as "speculative" and "incompatible with RICO"); *In re Bridgestone/Firestone, Inc. Tires Prods. Liab. Litig*., 155 F. Supp. 2d 1069, 1090-91 (S.D. Ind. 2001) (dismissing RICO claim as "speculative" when plaintiffs alleged that product contained inherent defects that might manifest in the future); *see also McLaughlin v. Am. Tobacco Co*., 522 F.3d 215, 228-29 (2d Cir. 2008) (cleaned up) (rejecting benefit of the bargain damages based on plaintiffs' expectation regarding "light" cigarettes); *Berg v. First State Ins. Co*., 915 F.2d 460, 464 (9th Cir. 1990) (loss of expected insurance coverage was not RICO injury where no financial loss occurred). In addition, allegations regarding the "marketing, and sale of legal goods by legitimate businesses" are insufficient to provide a plausible basis for a RICO enterprise. *See Bitton v. Gencor Nutrientes, Inc*., 2016 WL 3545346, at *3 (9th Cir. June 28, 2016); *Gomez v. Guthy-Renker, LLC*, 2015 WL 4270042, at *8 (C.D. Cal. July 13, 2015) ("Courts have overwhelmingly rejected attempts to characterize routine commercial relationships as RICO enterprises.").

How has this been playing out? Against the weight of authority summarized above, plaintiffs nevertheless attempt to expand the applicability of RICO to products cases. This legal theory has been gaining ground, particularly in California. *See e.g., Bias v. Wells Fargo & Co*., 942 F. Supp. 2d 915, 936 (N.D. Cal. 2013) (payment of marked-up fees constitutes injury to property under RICO); *Stitt v. Citibank, N.A*., 942 F. Supp. 2d 944, 954 (N.D. Cal. 2013) (same); *Newcal Indus., Inc. v. IKON Office Sols., Inc*., 2011 WL 1899404, at *2-3 (N.D. Cal. May 19, 2011) (payment of fraudulently inflated price to buy out certain accounts constitutes a concrete financial loss for RICO purposes); *Pac. Gas & Elec. Co. v. Howard P. Foley Co*., 1993 WL 299219, at *3 (N.D. Cal. July 27, 1993) (holding that "excess financing costs are a recoverable element of [RICO] damages").

Conclusion. Where a plaintiff has suffered no plausible concrete injury, it is a stretch to plead a claim sufficient to confer standing. To plug that gap, plaintiffs have increasingly been turning to this alternative—pleading the existence of a hypothetical premium that a plaintiff paid for a product that turned out to later not have the promised feature, coupled with the allegation that a product defendant acted intentionally to deceive them. While there may theoretically be a fact pattern to which this theory applies, this expansion of the RICO doctrine runs the risk of upping the ante for every routine products liability case. While this theory is far from mainstream, as the plaintiffs bar continues to test this type of theory it is one that all product manufacturers would be wise to strongly refute. This is an area of the law that will be evolving in the coming years, and with such changes come the reality that liability for product manufacturers hangs in the balance.