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Guest commentary

S.D.N.Y. relaxes particularity requirement where innocent mailings are alleged as RICO predicate acts

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The decision in *Jerome M. Sobel & Co. v. Fleck, et al.*, 2003 WL 22839799 (S.D.N.Y. 2003) (adopted by **District Judge Richard Berman**, 2004 WL 48877 (S.D.N.Y. 2004)), is a significant decision presenting a careful analysis of several central RICO concepts. It is, however, its analysis of the particularity requirement in the context of pleading predicate acts of mail and wire fraud that the decision may have the most impact.

The **U.S. District Court, Southern District of New York** ultimately dismissed the complaint in that action for failure to plead a pattern of racketeering activity (see *Jan. 1, 2004 issue, p. 1*). However, it held that where the alleged use of the mails or wires is not in itself fraudulent, a complaint adequately alleges predicate acts of mail and wire fraud even though it does not identify a single specific mailing or use of the wires, so long as such mailings are in furtherance of a fraudulent scheme and the allegations regarding the scheme is sufficiently detailed.

Decision lowers bar for pleading fraud

In doing so, the court relaxed the pleading standards to dispense with the particularity requirements of Fed. R. Civ. P. 9(b) as it pertains to mail and wire fraud allegations, permitting the use of the mails and wires to be assumed. The decision potentially lowers the bar for asserting RICO claims predicated on claims of mail and wire fraud.

It is well-established in most Circuits that where a civil RICO claim rests on allegations of mail or wire fraud, the pleading requirements of Rule 9(b) must be satisfied. Rule 9(b) expressly requires that “the circumstances constituting the fraud or mistake shall be stated with particularity.” In *Moore v. PaineWebber, Inc.*, 189 F.3d 165, 173 (2d Cir. 1999),

the **2d U.S. Circuit Court of Appeals** ruled that, in the context of fraud-based RICO claims, Rule 9(b) requires a complaint to “specify the statements it claims were false or misleading, give particulars as to the respect in which plaintiffs contend the statements were fraudulent, state when and where the statements were made, and identify those responsible for the statements.”

3 goals of Rule 9(b)

This requirement takes on particular significance where allegations of fraud are asserted against multiple defendants. As the 2d Circuit made clear in *DiVittorio v. Equidyne Extractive Industries, Inc.*, 822 F.2d 1242, 1247 (2d Cir. 1987), “[w]here multiple defendants are asked to respond to allegations of fraud, the complaint should inform each defendant of the nature of his alleged participation in the fraud.” This requirement is intended to serve the three goals of Rule 9(b), namely: 1) to provide a defendant with fair notice of the claims against it; 2) to protect a defendant from harm to its reputation or goodwill by unfounded allegations of fraud; and 3) to reduce the number of strike suits.

Notwithstanding the foregoing, the court in *Sobel* found that the particularity requirements of Rule 9(b) did not apply to mailings or wire transmissions that are not themselves false or misleading. The court

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held that a detailed description of the underlying scheme and the connection with the alleged use of the mail or wires is sufficient to satisfy Rule 9(b). The court relied on case law holding that innocent mailings may satisfy the mailing requirement under the mail fraud statute where the mailing is part of the execution of a fraudulent scheme.

Just how little is required to haul a defendant into court to answer RICO charges under this relaxed standard is illustrated by the *Sobel* case. The dispute in that case involved a garden-variety breach of contract claim between two partners in an accounting practice. The complaint alleged that the defendant partner violated the partnership agreement by performing accounting-related services for certain clients and pocketing the fees without disclosing them or turning these sums over to the partnership.

The complaint also named as defendants certain former employees of the partnership, and the alleged clients, charging generally that these defendants conspired with defendant partner in the alleged scheme to defraud plaintiff. To convert this dispute into a RICO case, the plaintiff then charged in several conclusory boilerplate paragraphs that, in connection with the alleged scheme, tax documents and payments were forwarded through the interstate mails by the “defendants.” Nowhere, however, did the complaint set forth any facts that would identify even a single specific use of the mail or interstate wires.

The alleged use of the mail or interstate wires was simply assumed.

‘Significant and unwarranted departure’

Furthermore, Sobel asserted that such particularity was not required so long as the alleged scheme was described in detail and the complaint explained the relationship between the use of the mails or wires and the scheme itself. However, the complaint in *Sobel* did not set forth a single factual allegation that attributed any conduct whatsoever to any individual defendant other than defendant partner. Thus, the decision constitutes a significant and unwarranted departure from the 2d Circuit’s longstanding precedent requiring a fraud-based RICO complaint to inform each defendant of the nature of his alleged role in the fraud.

The *Sobel* decision has potentially far-reaching implications. Given the ubiquitous use of the interstate mails and wires in modern communications, if the mere allegation of a scheme to defraud relieves a party from pleading the use of the mails or wires with particularity but permits such use to be assumed, virtually every suit at common law would gain access to the federal courts simply by being recast as a RICO claim based on an alleged mail or wire fraud. It remains to be seen if other courts will embrace *Sobel*’s relaxed pleading standards. ■