MASSACHUSETTS Lawyers Weekly

Thwarted beneficiary can't bring civil RICO action

'PSLRA bar' precludes plaintiff's claim

By: Mass. Lawyers Weekly Staff March 4, 2022

Defense counsel

The 1st U.S. Circuit of Appeals has found that a beneficiary could not bring civil RICO claims arising from a scheme involving her uncle's business that allegedly reduced her inheritance from his estate.

The decedent, Bill Colman, owned Solar Resources, a company that developed land in Utah for salt extraction.

Plaintiff Sandra Colman Lerner alleged that her cousin, defendant Stephen Colman, caused the transfer of a valuable Utah water right from Bill's personal ownership to the company shortly before Bill — who was Stephen's uncle as well — died without a will.

When Bill died, Stephen took control of Bill's assets as personal representative of his estate and allegedly caused a majority of the company's shares to be transferred to himself, his immediate family, and his business associates.

Lerner alleged that Stephen's maneuvers prevented the water right from being distributed to Bill's heirs while reducing by more than 50 percent the share of the company's value that should have passed through the estate.

According to the plaintiff, her cousin's conduct was part of a 15-year pattern of fraudulent business activities that brought him and his associates within RICO's purview as a "criminal enterprise."

But the 1st Circuit disagreed, finding that the Private Securities Litigation Reform Act of 1995 precluded a RICO claim in a case in which the underlying pattern of fraudulent conduct, of which the plaintiff was not a victim, allegedly included fraud in the purchase and sale of securities.

"[W]e hold that the text of the PSLRA bar in section 1964(c) prohibits RICO plaintiffs from relying on as predicate acts any conduct that would have been actionable as securities fraud, regardless of whether the RICO plaintiff herself could have maintained that action," Judge William J. Kayatta wrote for the court. "[W]e affirm the judgment of the district court that this dispute belongs in a state court, not in a federal court."

The 32-page decision is *Lerner v. Colman, et al.*, Lawyers Weekly No. 01-044-22.

'Terrible' allegations

Stephen Colman's attorney, Dana A. Curhan of Boston, acknowledged that the plaintiff's allegations "sound terrible and are difficult to ignore."

However, he continued, "we categorically deny any misconduct or wrongdoing."

Curhan also noted that there is a split among the federal circuits on the main legal issue: whether acts constituting securities fraud are excluded from civil RICO's purview as predicate offenses when actionable by any individual and not just the plaintiff.

Ordinarily that might make a case a viable candidate for certiorari, he said.

"However, only one circuit agreed with the plaintiff's position, and that decision is questionable at best," Curhan said. "It is doubtful that the Supreme Court would feel compelled to resolve this issue where that one circuit may very well jump in with the majority the next time the issue comes up."

Michael F. Connolly of Boston, who represented the plaintiff, said the legislative purpose behind the PSLRA is to protect securities fraud defendants from unnecessary and unfair exposure to treble damages and attorneys' fee awards under RICO when securities laws provide adequate remedies for those injured by such fraud.

"So if someone is not bringing a securities fraud claim and wasn't injured by the securities law violations [that serve as predicate offenses for a RICO claim], but they meet all the other RICO requirements, which are very stringent, they should be able to bring a RICO case," he said.

Christian R. Jenner, a civil litigator in Providence, said the case shows that litigants should not expect federal courts to recognize a federal remedy for every alleged wrong.

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>
> ***— Christian R. Jenner, Providence***

"Despite what one might read on the internet, not every instance of wrongdoing — and not every alleged violation of federal law, even by alleged repeat offenders — is a RICO case," he said.

Robert M. Duffy, also of Providence, said the ruling removes a very powerful tool from the arsenal of plaintiffs' lawyers in the 1st Circuit.

"In addressing this policy choice, the court noted that plaintiffs like Lerner will not be without remedies," Duffy said. "Presumably, they will have their state law claims for fraud and the like."

Boston attorney Robert J. O'Regan, who handles inheritance cases, said the decision should not be read to foreclose RICO liability in all fiduciary disputes.

"This was an unusual set of facts that fall within a narrow exception under the RICO statute," he said. "But if in another context — there's mail fraud or wire fraud or bribery or one of the other predicate acts — an estate or beneficiaries of an estate might still have a RICO claim."

Meanwhile, Eric D. Correira of Swansea suggested that in refiling her state law claims, Lerner consider doing so in Probate & Family Court instead of Superior Court.

"Her factual allegations fall within the scope of the Probate & Family Court's equity jurisdiction, and that court has the added benefit of being able to award attorneys' fees pursuant to [G.L.c. 215 §45], something that is not available in Superior Court," he said.

Predicate acts

The plaintiff alleged in her complaint that, in addition to ensuring that the lucrative water right became property of Solar Resources instead of potentially part of Bill Colman's estate, Stephen — following Bill's death — caused a majority of Solar Resources' shares to be transferred to himself, his siblings, Bill's ex-wife, and Stephen's longtime associates James Canavan and Daniel Flynn, both of whom were named as co-defendants in the plaintiff's suit.

Allegedly none of the recipients paid a fair price, if any, for their shares.

The plaintiff also alleged that Stephen prepared falsified documents to effectuate the stock transfers.

When Solar Resources was sold in 2012 for $11 million, Stephen allegedly received $2.5 million for his shares while proceeds from the 46 percent of shares still held by the estate were distributed to Bill's heirs.

Finally, the plaintiff claimed that Stephen concealed the nature of the stock transactions from her and other heirs when seeking consent to sell the company and that she did not learn of the scheme until 2018.

The plaintiff's civil RICO complaint, which sought treble damages and attorneys' fees, alleged four other illicit schemes carried out by the three defendants. None of those schemes caused her direct harm, but she contended that they constituted an ongoing criminal enterprise within the meaning of RICO.

U.S. District Court Judge William G. Young Jr. dismissed the complaint, finding that the predicate conduct was actionable as securities fraud. Therefore, he found, civil RICO's carve-out for securities fraud schemes barred the plaintiff's reliance on all but the Solar Resources scheme, which, standing alone, was insufficient to make out a RICO claim.

The plaintiff appealed.

Judgment affirmed

The 1st Circuit rejected the plaintiff's argument that the PSLRA bar should be read narrowly to preclude reliance only on conduct for which she personally could have brought a securities fraud action.

"[W[e agree with the district court that the better read of the statute bars reliance on conduct actionable as securities fraud,

Lerner v. Colman, et al.

THE ISSUE: Could a beneficiary bring civil RICO claims arising from her cousin's investment scheme involving their uncle's business that allegedly reduced her inheritance from their uncle's estate?

DECISION: No (1st U.S. Circuit Court of Appeals)

LAWYERS: Michael F. Connolly and William D. Black, of Rubin & Rudman, Boston (plaintiff)

Dana A. Curhan of Boston; Andrew C. Oatway of Morisi & Oatway, Quincy (defense)

regardless of who could have brought such an action," Kayatta wrote.

Had Congress intended the PSLRA bar to be read as Lerner advocated, it would have said so, the judge stated.

"Tellingly, the PSLRA employs language that is most naturally read as allowing 'no person' to rely on 'any conduct that would have been actionable,'" Kayatta observed. "[T]he combined use of 'no person,' 'any conduct,' and the passive modifying phrase 'would have been actionable' to describe a characteristic of the conduct rather than the person, all combine to make Lerner's preferred reading at best a stretch."

Meanwhile, the judge continued, nothing in the legislative history could reasonably be read to suggest "an intent to eliminate securities fraud as a predicate offense only when pleaded by certain plaintiffs."

The 1st Circuit also emphasized that application of the PSLRA bar to preclude a civil RICO claim would not leave Lerner without remedies.

"Lerner will still presumably have, at least, state-law claims for whatever conduct actually injured [her]," Kayatta said. "Indeed, Lerner's complaint alleges such claims here (state-law breach of fiduciary duty and fraud). What may be foreclosed to plaintiffs in Lerner's position is only the 'extraordinary remedy' of RICO."

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