Racketeers, Mobsters, & Plaintiffs' Mass-Action Attorneys

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Briana Rosenbaum, *The RICO Trend in Class Action Warfare*, 102 **Iowa L. Rev.** (forthcoming 2016), available at SSRN.

A racketeer, a mobster, and a plaintiffs' mass-action attorney walk into a bar. What might be a decent setup for a joke is actually dead serious. Like members of organized crime, plaintiffs' mass-action attorneys are being sued under the federal Racketeer Influenced and Corrupt Organizations (RICO) statutes. Briana Rosenbaum's *The RICO Trend in Class Action Warfare* carefully considers existing remedies for frivolous litigation and critiques what she sees as the inefficacy of "the RICO reprisal."

Rosenbaum readily admits that some mass-action attorneys include frivolous claims among meritorious ones in an attempt to obtain a larger settlement, otherwise known as "specious claiming." But Rosenbaum argues that remedies for abusive litigation already exist. There are tort remedies such as malicious prosecution and abuse of process, and procedural remedies such as Fed. R. Civ. P. 11 and 28 U.S.C. § 1927. Rosenbaum posits that this existing remedial structure for vexatious litigants, while imperfect, was at least created with important countervailing policy considerations in mind, such as access to justice and administrative efficiency.

None of these countervailing policy considerations went into crafting RICO as a remedy for abusive litigation. Rosenbaum uses *CSX Transportation, Inc. v. Gilkison* as a case study to show just how poorly RICO works. *CSX* is the only known case to go to trial and result in a verdict against the plaintiffs' attorneys. It arises from asbestos litigation, where it is undisputed that the plaintiffs' law firm relied on a questionable expert who used controversial diagnostic methods. There is much to say about this case, but for purposes of understanding Rosenbaum's article, one need know only the bottom line. The asbestos litigation defendants filed a RICO claim against the plaintiffs' attorneys and demonstrated that eleven out of the 5,300 claims filed, or 0.2%, were baseless. On that evidence, CSX won its RICO claim at a jury trial, leading the parties to settle the case for $7.3 million.

To understand how this happened requires a basic understanding of RICO. First, to win a civil RICO claim, an injured party must prove that the defendant engaged in an enterprise through a pattern of racketeering. The statute provides an exhaustive list of "racketeering activity," but the most common "predicate offense" in these recent cases against plaintiffs' attorneys is mail or wire fraud. This criminal act must be shown before there is any civil liability under RICO. In *CSX*, the court found that every time the plaintiffs' law firm filed a paper with the court—such as a complaint—or sent correspondence to opposing counsel—such as a letter with a courtesy copy of a mediation request—it committed mail fraud. The court determined that it was not just the eleven fraudulent claims that established a pattern under RICO, but was instead the mass suit itself because the attorneys allegedly used the threat of a mass action that included concealed fraudulent claims to leverage a higher settlement.

CSX is a shocking case that is part of a larger trend of mass-action defendants pursuing plaintiffs' attorneys through RICO. The *CSX* numbers and facts are staggering, but perhaps appropriate if the punishment fits the crime. Rosenbaum argues that it does not. Calling on existing critiques of RICO in other contexts, Rosenbaum points out that necessary legal practice activities, such as making phone calls and filing court documents, become potentially criminal. Moreover, successful RICO claims result in treble damages, which inflate what a party would normally recover in a garden-variety malicious prosecution claim. If we are concerned with ensuring that courts remain open to aggregate litigation claims, Rosenbaum argues, RICO is much too powerful a weapon.

Rosenbaum also presents more nuanced arguments about why RICO is a poor regulation tool against frivolous claims. For example, she argues that RICO unnecessarily usurps state-law methods of regulating litigation. After all, RICO's pleading standards and burden of proof are lighter than a state-law malicious prosecution claim, and the damages are certainly larger. This makes bringing a RICO claim, rather than a state tort claim, something of a no-brainer for defendants seeking a remedy against vexatious aggregate-litigation plaintiffs' attorneys, which is exactly the problem that Rosenbaum wants to highlight. Perhaps RICO makes it too easy, producing a negative impact on aggregate litigation overall.

Finally, Rosenbaum points out that RICO is at once under- and over-inclusive. It is over-inclusive because it targets the entire mass action as a violation, not just the handful of baseless claims that may be part of that litigation. It is under-inclusive because it addresses only a sliver of the structural challenges aggregate litigation presents. Again, Rosenbaum does not dispute that over-aggregation is a problem, but relying on defendants' attorneys to regulate plaintiffs' attorney conduct seems equally problematic.

If RICO is to remain a part of the litigation game, however, Rosenbaum argues it should be reformed. When pure litigation conduct is challenged, courts could require a showing of malicious intent. This would bring RICO in line with existing common law remedies such as malicious prosecution. It also would re-balance access-to-justice concerns. Our system cannot be completely free from frivolous litigation. Indeed, we must tolerate some frivolousness in order to make room for meritorious claims. Moreover, requiring a showing of intent in the RICO context would not leave defendants without any recourse. They could still use existing remedies for pure litigation conduct, and RICO could be reserved for truly egregious litigation schemes.

Perhaps the title of this essay—*Racketeers, Mobsters, and Plaintiffs' Mass-Action Attorneys*—made sense to you as a story about three equivalent evildoers. Or perhaps, like me, this group of individuals struck you as incongruent. Regardless of which explanation most speaks to you, you will benefit from reading Rosenbaum's take on this emerging development in the civil litigation game.

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