

1-1-1986

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Recommended Citation

Black, Barbara, "Filling in the Gap Left by Congress: What is the Statute of Limitations for Private RICO Claims?" (1986). *Faculty Articles and Other Publications*. Paper 78.

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Filling in the Gap Left by Congress: What is the Statute of Limitations for Private RICO Claims?

by Barbara Black

Malley-Duff & Associates, Inc.

v.

Crown Life Insurance Co.
(Docket Nos. 86-497 and 86-531)

Argued April 21, 1987

In increasing numbers, victims of business fraud are bringing lawsuits under the Racketeer Influenced and Corrupt Organizations Act (RICO). Since the statute does not set out a time limit for bringing suit, the courts must determine the appropriate statute of limitations. *Malley-Duff & Associates, Inc. v. Crown Life Insurance Co.* illustrates the difficulties Congress creates for the courts when it fails to provide a limitations period.

RICO makes it illegal to engage in a "pattern of racketeering activity" for certain illegal purposes. A "pattern of racketeering activity" consists of at least two acts of "racketeering activity" within a ten-year period. "Racketeering activity" is defined in terms of a number of state and federal offenses, commonly referred to as predicate offenses. In addition to criminal penalties, RICO provides that any person injured in business or property by reason of a RICO violation may recover treble damages and attorneys' fees.

ISSUE

In this case, the Supreme Court will determine the statute of limitations for a RICO treble damages claim. To answer this question, the Court must decide a number of related issues: Should the courts borrow a statute of limitations from state or federal law? Should there be a uniform statute of limitations for all RICO claims, or should the limitations period vary from case to case, depending upon the underlying offenses? If there should be a uniform period, what is the most appropriate characterization for a private RICO claim?

FACTS

Malley-Duff & Associates, Inc. had been an agent of Crown Life Insurance Company in the Pittsburgh area until Crown Life terminated the agency in February,

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1978. Crown Life said the agency was terminated because Malley-Duff failed to meet a production quota. Malley-Duff claimed that the quota was "bogus," and that the termination was part of a plan to eliminate various successful Crown Life agencies across the country.

In April, 1978, Malley-Duff filed suit against Crown Life and others, alleging violations of the antitrust laws and conspiracy to tortiously interfere with their contract. In the early stages of this case, defendants allegedly committed perjury, destroyed relevant documents, intimidated a witness and attempted to blackmail the judge originally assigned to the case.

In March, 1981, Malley-Duff brought the present suit against Crown Life and others, alleging violations of RICO based on the 1978 termination of the agency and the alleged misconduct in the earlier case.

The district court dismissed Malley-Duff's RICO claims based on the 1978 termination, on the ground that they were barred by the statute of limitations. The district court turned to the law of Pennsylvania (where the court was located) to "borrow" the limitations period of the cause of action most closely analogous to Malley-Duff's RICO claim. The district court held that common law fraud was the most closely analogous state cause of action and applied a two-year limitations period. Claims relating to events that occurred in early 1978 were therefore time-barred.

The Third Circuit Court of Appeals reversed (792 F. 2d 341 (1986)). The circuit court held that within each state, all RICO claims, regardless of the specific factual allegations, should be subject to a uniform period of limitations and that in Pennsylvania, that period is the six-year residual "catchall" statute of limitations for actions that are not governed by any more specific time period.

BACKGROUND AND SIGNIFICANCE

While RICO was originally enacted to stem the infiltration and corruption of legitimate businesses by organized crime, attorneys representing the victims of business and commercial fraud now routinely add a claim alleging a RICO violation. The principal attraction of RICO is that the successful plaintiff can recover treble damages and attorneys' fees. In *Sedima, S.P.R.L. v. Imrex Co.* (473 U.S. 479 (1985); *Preview*, 1984-85 term, pp. 411-13), the Supreme Court rejected restrictive inter-

pretations of civil RICO and held that it was indeed a federal business fraud statute. Thus, unless Congress determines to restrict use of RICO by private plaintiffs, federal courts will continue to hear an increasing number of private RICO suits.

Because Congress did not provide a limitations period for the private RICO treble damages claim, the courts must borrow a statute of limitations from another law. There are four possible approaches: 1) a uniform limitations period for all RICO claims within a state, borrowed from state law, based on a general characterization of the RICO claim; 2) a limitations period, borrowed from state law, which varies from case to case, depending upon the underlying offenses alleged in the particular case; 3) a uniform limitations period for all RICO claims, borrowed from federal law, or 4) a limitations period, borrowed from federal law, in those cases where the predicate offenses are federal offenses.

Generally, where Congress has not provided a limitations period for a federal cause of action, the courts look to the law of the state in which the court is located and borrow the statute of limitations of the most closely analogous cause of action. Thus, in *Wilson v. Garcia* (471 U.S. 261 (1985)); *Preview*, 1984-85 term, pp. 406-8), the Court assumed that the statute of limitations for a claim arising under the civil rights statute (section 1983) should be borrowed from state law. The issue in that case was how to characterize the cause of action for the purpose of determining what state statute of limitations to borrow. The Court held that the characterization of a section 1983 claim was a question of federal law. It also held that a simple, broad characterization of all section 1983 claims best served the statute's remedial purposes, rather than an approach based on an analysis of the particular facts of each claim, which would engender uncertainty and time-consuming litigation. Finally, the Court held that section 1983 claims should be characterized as personal injury actions.

The Third Circuit, in *Malley-Duff*, interpreted *Wilson v. Garcia* as marking out a general approach to all statute of limitations borrowing principles and followed its three-part inquiry. It first determined that federal law should control the characterization of the RICO claim. Second, the circuit court held that all RICO claims should be characterized in the same way, and that characterization should not vary according to the facts and circumstances of a particular case. Finally, the court had to select the most appropriate state statute of limitations. In doing this, the court rejected the limitations periods for common law fraud (either two or six years in Pennsylvania) and the limitations period for civil penalty or forfeiture (two years), and selected the six-year residual "catchall" statute of limitations for actions, primarily based on statute, that are not governed by any more specific period of limitations. It noted, however, that in states which have adopted their own RICO statutes with

private causes of action, the state limitations period controlling such actions might be an appropriate choice for the federal courts to borrow.

On the other hand, the Sixth Circuit Court of Appeals distinguished *Wilson v. Garcia* in *Silverberg v. Thomson McKinnon Securities* (787 F. 2d 1079 (6th Cir. 1986)). There, the court applied the state statute of limitations applicable to the specific predicate offenses alleged in plaintiff's complaint. This then involves determining the applicable period on a case-by-case analysis.

The third approach is based on *DelCostello v. International Brotherhood of Teamsters* (462 U.S. 151 (1983)), where the Supreme Court held that federal courts should borrow a limitation period from another federal statute "when a rule from elsewhere in federal law clearly provides a closer analogy than available state statutes and when the federal policies at stake and the practicalities of litigation make that rule a significantly more appropriate vehicle for interstitial lawmaking." In *Malley-Duff*, the Third Circuit addressed the possibility of borrowing the four-year limitations period for private treble damages antitrust suits, but rejected this approach. Judge Sloviter's concurring opinion in *Malley-Duff* and in a companion case, *A. J. Cunningham Packing Corp. v. Congress Financial Corp.* (792 F. 2d 330 (3d Cir. 1986)), argues that this is the proper approach.

Finally, the fourth approach is illustrated in *Bartels v. Clayton Brokerage Co. of St. Louis* (631 F. Supp. 442 (S.D.N.Y. 1986)), where the court borrowed the statute of limitations from the Commodities Exchange Act, because the predicate offenses arose from that federal statute.

The confusion over the appropriate statute of limitations was inevitable, given congressional failure to provide one and the complexities of the RICO statute. Litigation over a collateral issue like the statute of limitations is unfortunate, especially since there are many difficult and unresolved questions of substantive law involving the interpretation of the RICO provisions. It is important that there be either a specific time limitation or an accepted approach for determining the time period. *Malley-Duff Associates & Co., Inc. v. Crown Life Insurance Co.* provides the Supreme Court with the opportunity to settle this issue.

ARGUMENTS

For Crown Life Insurance Company and Clarke Burton Lloyd (Counsel of Record, Robert L. Frantz, 57th Floor, 600 Grant Street, Pittsburgh, PA 15219; telephone (412) 562-8800)

1. The state statute of limitations most analogous to a claim for injury to business or property should be applied to all civil RICO claims and in Pennsylvania the period is two years.
2. RICO does not provide a civil remedy for a person allegedly injured by a predicate act when as that

person admits, there was no pattern of racketeering activity and there was no conspiracy in existence at the time of injury.

3. If Malley-Duff has a RICO cause of action for its termination injury, the statute of limitations began to run on the date of injury.
4. Even if this Court should hold that the statute of limitations did not start to run until Malley-Duff had knowledge or should have had knowledge of a second predicate act that it believed formed a pattern of racketeering activity, its claim is barred by the applicable two-year statute of limitations.

For Agency Holding Corp. (Illinois), Agency Holding Corp. (Ohio), Kerry Patrick Craig, Diane Pariano, Erhman Rattini Oglevee & Craig, Inc. and Robert Oglevee (Counsel of Record, John H. Bingler, Jr., One Riverfront Center, Pittsburgh, PA 15222; telephone (+12) 394-7785)

1. Civil RICO provides enhanced civil remedies against persons, who, in the course of acquiring or maintaining an interest in or conducting an enterprise through a pattern of racketeering activity, injure another directly or indirectly by one or more of the racketeering activities forming the pattern. The essence of civil RICO is that it provides its civil remedies only for injuries to business or property and only for injuries caused by a wide variety of specified "predicate" state and federal crimes.
2. The two-year Pennsylvania statute of limitations governing actions for injuring property should be applied to the civil RICO claim here based on the termination of the insurance agency contract. This is so in this case regardless of whether a uniform or a particular approach is used in choosing the applicable statute of limitations.
3. A civil RICO cause of action accrues under sections

1962(a)-(c) when a plaintiff has been injured by a predicate act which was committed in the course of a violation of one of these sections. A RICO conspiracy cause of action accrues when a plaintiff is injured by an overt act of defendants engaged in a RICO conspiracy.

For Malley-Duff & Associates (Counsel of Record, Harry Woodruff Turner, 1500 Oliver Building, Pittsburgh, PA 15222; telephone (+12) 355-6500)

1. Malley-Duff's claim is not barred because the statute of limitations for all civil RICO claims should be the statute of limitations applicable to the most analogous federal statute.
2. Alternatively, Malley-Duff's claim is not barred because, as held by the court of appeals below, RICO actions in Pennsylvania should be uniformly governed by Pennsylvania's six-year residuary statute of limitations.
3. Alternatively, Malley-Duff's claims are timely under the predicate act approach because the statute of limitations for common law fraud is six years.
4. Regardless of which statute of limitations applies, Malley-Duff's claim is not barred.

AMICUS BRIEFS

In Support of Crown Life Insurance Company, Agency Holding Corp.

Congress Financial Corporation and Philadelphia National Bank

In Support of Malley-Duff & Associates, Inc.

A. J. Cunningham Packing Corp., Chicago Dressed Beef Co., Inc., Continental Food Products, Inc., Florence Beef Company and Pierce Trading Company