CLM CLAIMS & LITIGATION MANAGEMENT ALLIANCE™

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2015 CLM Medical Legal Summit
June 3, 2015 in Chicago, IL

The RICO Act – How to Aggressively Use the Act Against the Unscrupulous in Medical Recovery Actions

I. A History of the RICO Act

The year was 1970. Richard Nixon was in the White House, Neil Armstrong just stepped foot on the moon the year before, and The Beatles were still together as a band. America was reeling from the loss of a President, a presidential candidate and civil rights leader all due to assassinations. Crime of all sorts appeared to be running rampant in America.

Against this backdrop, the United States Congress passed what even today is considered one of the most far-reaching pieces of legislation of the 20th Century. Sponsored by United States Senator John McClellan, and assisted by his Committee's Staff Attorney, Professor G. Robert Blakey who was on leave from Notre Dame University, these gentlemen envisioned and drafted the "RICO Act" more officially known as Title IX of the Organized Crime Control Act of 1970. The now-retired Professor Blakey remains one of the leading experts on RICO law in America, and frequently assists insurers in understanding civil RICO actions and testifying as an expert witness.

One of the many things making the RICO Act unique was Senator McClellan and Professor Blakey initially set out to draft legislation to continue the efforts originally begun by Attorney General Robert F. Kennedy to prosecute members of the Mafia for organized crime activity. As the legislative process unfolded, a concept was floated to pair the RICO Act's criminal penalties with a civil remedy provision to allow both individuals and corporations who are harmed by corrupt activities to not only recover their actual damages, but treble (three times) those damages and all reasonably incurred legal fees. Thus, a very unique "partnership" of both criminal and civil components merged into one of the most powerful crime and fraud fighting pieces of legislation ever adopted.

Unlike any other piece of legislation since, the federal RICO Act was signed into law by President Nixon, and only two years later beginning in 1972 a movement began across the country for individual states to adopt their own criminal and civil RICO laws. In the years since, approximately thirty states, as well as Puerto Rico and the U.S. Virgin Islands, have adopted state RICO laws. Most of these have followed the federal model including both criminal and civil prosecution and recovery provisions. With enactment

of both federal and state RICO laws mostly within a little more than a decade, the landscape of legislation to battle organized crime and fraud was altered in far-reaching ways which continue to reverberate across American courtrooms in the present.

With the ability to utilize simultaneously the federal and state RICO laws, the provisions and application of civil RICO have been employed broadly throughout the United States. In increasing numbers in recent years, insurers have begun to investigate and understand how to utilize RICO laws to pursue fraudulent activity ranging from medical provider and billing fraud through auto-theft rings, body shop repair schemes and property claims. Use by insurers of civil RICO provisions has expanded as insurance fraud has become more widespread and prevalent across our country. Also, as insurers see other carriers succeeding in recovery actions this spurs an increasing interest and confidence in considering RICO as a tool in the battle to protect honest policyholders and stop the paying of fraudulent claims.

II. The Specifics of RICO

RICO stands for the Racketeer Influenced and Corrupt Organizations Act. Each of these terms is specifically defined in the statutes. While individual state laws may vary, to utilize civil RICO, a potential civil defendant must generally have committed at least two acts of racketeering activity and be engaged in an "enterprise" the intent of which is to harm another. Racketeering activity is defined, and often referenced, in many statutes from a list of specific criminal acts. The RICO defendants must be operating the enterprise and engaging in a pattern of racketeering activity. This requires one or more individuals to be acting in concert with each other, or one or more individuals in combination with some form of business entity. For example, a group of individual medical providers, medical clinics, runners and unscrupulous attorneys may all potentially be engaged in an "enterprise" to submit improper personal injury claims. The actual submission of the fraudulent claims would form the "pattern of racketeering activity."

Both the federal and state RICO statutes contain a listing of actions which by their very nature would be viewed as meeting the requirement of a "RICO predicate offense." For purposes of analysis by insurers, such actions as defined in these statutes may include extortion, arson, embezzlement, fraud and money laundering. It certainly is not by any means a stretch to see how these acts are exactly the type of activities which fuel insurance fraud and questionable claims.

III. Use of RICO by Insurers

In recent years, insurance carriers have become more aggressive in seeking reimbursement for monies improperly paid to medical providers, body shops and even attorneys engaged in unscrupulous practices. Many insurers have found use of the RICO statute to be an effective manner to not only more aggressively seek recovery, but also for several key strategic advantages as well.

First and foremost, if you are successful in a RICO action, you can recover three times your actual damages and also recover all attorneys' fees associated with bringing and conducting the RICO investigation and subsequent litigation. This alone may result in millions of dollars in damages. Additionally, insurance carriers who have grown tired of judges prohibiting evidence of improper actions in other prior claims because those are not the specific claim at issue in the pending litigation, find RICO claims to be a "breath of fresh air." These cases not only allow, but require, the insurance company to present evidence of a pattern of racketeering activity involving multiple events and claims. When used properly, a RICO action truly allows the insurance carrier the ability to paint the entire picture for a jury of the improper actions being engaged in by the defendants seeking to improperly secure payment for fraudulent claims.

A successfully pled and pursued RICO action allows insurance carriers to truly present to a judge and jury the full picture of what many of us see constantly in our careers of unscrupulous parties banding together to commit insurance fraud, whether involving personal injury or property damage. We often wish for the chance to simply "tell the whole story" from a larger perspective than a single litigated claim. Civil RICO affords a mechanism to not only "get the bad guys," but the opportunity to finally be able to admit all of the relevant evidence and information of wrongdoing. This is oftentimes very appealing.

Further fueling the race toward RICO actions have been a number of notable successes by insurance carriers in pursuing RICO claims. State Farm has brought several RICO actions in recent years resulting in multi-million dollar jury verdicts including one case exceeding $12 million dollars in recovery. In like manner, Allstate has pursued several RICO actions including the successful trial last year of a RICO case against a noted chain of chiropractic clinics and related parties, successfully recovering nearly $2 million in actual damages. Under the RICO Act, that award by the court trebles to $6 million and then attorney fees are assessed as well. Before you rush to the phone to call your local defense counsel to file a RICO action to "go after the bad guys," however, consider carefully RICO may also be a two-edged sword.

RICO actions are truly the "atomic bomb" of insurance-related litigation. From the time the statute was first adopted a half-century ago, it was intended to be utilized appropriately to bring down those engaged in fraudulent activities by invoking either civil or criminal prosecution and penalties. RICO was, and remains, closely associated with the concept and practice of organized crime and all those words may conjure up in one's mind.

A number of insurance carriers have learned the hard way the risk of filing a RICO action for which a proper and firm foundation may not exist. Insurers who attempt to utilize RICO for purposes of leverage or as a "scare tactic" will find themselves potentially facing not only bad faith claims from first-party insureds, but claims for defamation, abuse of process and even emotional distress if the insurer is not eventually successful in being able to sustain and prove the RICO allegations. RICO cases require

the utmost of preparation, knowledge and skill. All of these attributes must exist to the highest level before litigation is considered or filed.

The United States Supreme Court has implied naming a person or entity a defendant in a civil RICO proceeding may, in certain situations, be no different than being named a defendant in any other type of litigation. While this may afford insurers some level of protection, the reality is many of these cases may still reach a jury and those jurors may be inclined to award large amounts of damages to defendants if they believe the insurance carriers did not have a sufficient legal basis to bring the RICO allegations. Regardless of whether a RICO action is filed as a civil case by the insurer, or by the United States Justice Department in a criminal action, the basic allegations of RICO remain the same. You are accusing someone of being engaged in activities which are tantamount to organized crime and you should at all times utilize the utmost of caution before proceeding.

IV. Preparing the Successful RICO Case

One of the many pitfalls to avoid in civil RICO litigation is viewing these types of cases as being similar to other insurance law or civil litigation matters. Frequently, a party files a lawsuit intending to use the discovery process to prove and substantiate the allegations asserted. Doing so in a RICO action may expose your company to great peril.

A successful RICO recovery action may take years of preparation before filing in the state or federal court. Witness interviews, expert evaluation reports, conferences with local and state insurance and law enforcement officials as well as independent reviews of the evidence all may be necessary, and expensive, steps to be undertaken prior to filing the RICO action. Most experienced civil RICO attorneys will take no offense, but encourage their insurer clients to engage an outside "RICO expert" to evaluate the insurer and attorney's combined investigative work and the proposed RICO pleading. The expert can afford in advance of filing a written opinion and evaluation of the worthiness of the RICO Act as applied to the facts and allegations to be pled. An outside and truly independent review of this nature may be worth its "weight in gold" if you are later called upon to demonstrate in court why your company or law firm felt it truly had a good faith basis to proceed with the RICO action filing.

Attorney John Floyd of Atlanta has authored a leading textbook on civil RICO litigation and warns:

> *On a cautionary note, it is important to realize that RICO statutes involve the interaction of criminal and civil law. The key to treble damages (and in many states, injunctive relief) is not proof of civil torts, but rather specific criminal offenses. So it is very important to be very familiar with the essential elements of those offenses, which most civil practitioners do not regularly encounter.*

Perhaps more than any other area of insurance law, carriers who wish to consider use of civil RICO as a tool to battle fraud and recoup monies paid for fraudulent activities must

be very cautious in selecting legal counsel. RICO claims are not for the faint of heart, and you should carefully interview counsel and require them to prove and document their knowledge and experience in the field of civil RICO litigation. You do not want to find your company in a position where your RICO case is dismissed for lack of evidence or statutory compliance and you, together with your legal counsel, are then sued and you learn for the first time in the deposition of your own counsel they have no experience nor qualifications in handling the RICO action which they undertook on behalf of your company!

V. RICO: A View to the Future

There is a high probability there will not be as far-reaching an anti-crime law passed in most of our remaining lifetimes as the RICO Act, nor a more effective tool for battling insurance fraud. As insurers continue efforts to battle back against the ever-widening reach of insurance fraud, and as those engaged in fraud expand their efforts in new and more organized manners, RICO will become an even more valuable tool. It will be used to fight fraud and recover substantial amounts of monies paid to fraudulent providers and individuals. A RICO action could also be an excellent way for insurers to show their legitimate and honest policyholders the company is at the forefront of fighting to hold down the high cost of fraud. We must be prepared to use this tool effectively, and as the weapon it was intended to be to fight those engaged in organized and improper activities to harm others. Like any weapon, though, it must be respected and used only with the utmost of caution, and by those who are properly trained to use it correctly.

Although it has taken more than four decades, insurers are beginning to truly appreciate the breadth and power of civil RICO actions as an important tool in battling insurance fraud. We should not be fearful of a law which was enacted for the purpose of providing a method of recovery and severe penalties for those who engage in improper and fraudulent activities. We must, however, approach these cases with the utmost of preparation and diligence, and then we will truly see the rewards of what was envisioned by this key and historic legislation's authors so many years ago.