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Investigating and Litigating Large Scale Fraud Claims

Types of Large Scale Fraud Claims

There are many types of large or larger scale fraud claims. These can range from a handful of claimants or plaintiffs to hundreds of claimants depending upon the nature and type of claim. This presentation will provide you with a brief overview of some of the major types of large scale fraud cases. We will look at the claims from the perspective of defensive affirmative claims by pursuing fraud as a defense or counterclaim as well as affirmative litigation seeking to recover for acts of fraud or attempted fraud. Some of the major types of large scale fraud claims involve Racketeering Influenced Corrupt Organizations (RICO), medical billing fraud, construction defect, Workers' Compensation and class action issues. This seminar is only 60 minutes and is interactive. As such, there is not enough time to address each of these issues in full detail. However, we hope to provide you with a handout that will at least give you a starting point for future research and serve as a basic resource guide. Additionally, we hope to spark a dialogue among group attendees.

Racketeering Influenced Corrupt Organizations

When we think of RICO claims, we think of television mobsters and numbers runners. However, the federal RICO statutory scene is much broader. While federal and comparable state RICO statutes are not intended to cover ordinary fraud and malfeasance, if properly pled, the statutes can apply to many actions as long as there is some form of electronic or interstate involvement and multiple acts and participants. United States Department of Justice pursues criminal RICO violations arising out of 18 U.S.C. §§1961-1968. While insurers and their respective SIU departments may aid federal prosecutors in connection with RICO prosecutions, typically claims professionals, SIU departments and outside counsel will be involved in civil RICO actions. The first element of a RICO complaint is conduct. It merely requires that defendants who participated in the enterprise to carry out the direction of the enterprise. Enterprise is defined under 18 U.S.C. § 1961(4) as "any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity." The enterprise itself must be more than the simple undertaking of the acts of racketeering and must exist without the illegal conduct. See, United States v. Bledsoe, 675 F.2d 647, 664 (A. Cir., Denied), 495 U.S. 1040 (1982).

Next there must be a pattern of racketeering activity meaning that there must be at least two acts. See, 18 U.S.C. § 1961(5). Some cases suggest that even multiple acts of racketeering may be insufficient to establish a pattern, there must be indicia of a threat of continued criminal activity. H.J., Inc. v. Northwestern Bell Tel. Co., 492 U.S. 229, 238-39 (1989). Thus there is a requirement of continuing activity. Racketeering activity itself can be very broad and may encompass stereotypical things such as kidnapping, robbery, bribery, extortion, gambling, illegal substance trafficking and smuggling. However, it can include fraudulent activity which otherwise meet the requirements under the RICO statutory scheme for continuity and pattern.

18 U.S.C. § 1964 is the civil penalty portion or private action provision for RICO actions. It allows a successful claimant to recover three times the amount of actual damages as well as reasonable attorney's fees. For purposes of a civil RICO action, the complaint must be pled with exceptional specificity. The elements of a RICO defense are defined at 18 U.S.C. § 1962 and they include the existence of an enterprise, that the enterprise was engaged in or its activities affected interstate or foreign commerce, that the individual was employed or associated with the enterprise, and that the individual knowingly conducted that enterprise's affairs, or knowingly participated either directly or indirectly in the conduct of the enterprise's affairs. The fifth element is the pattern of racketeering activity. See the model charges for RICO actions at www.ca3.uscourts.gov. The majority of the case law involving RICO pertains to criminal prosecutions. For the model civil jury instructions for a civil RICO claim see www.3.ce9.uscourts.gov/jury-instructions/node/299. The introductory comment to the civil RICO model jury instruction notes that in order to recover under 18 U.S.C. § 1962(c), a plaintiff must prove conduct of an enterprise or a pattern of racketeering activity. In addition, the plaintiff may only recover to the extent it has been injured in its business or property by the conduct constituting the violation. Citing, 18 U.S.C. §1962(c), Sedima v. IMREX Co., Inc., 473 U.S. 479, 496 (1985). The pattern of racketeering activity is often referred to as "predicate acts." A party may be guilty of conspiracy to violate §1962(c) if he or she knowingly agree to facilitate a scheme that includes the operation or management of a RICO enterprise. The conspiracy itself cannot constitute the enterprise for purposes of establishing the elements of a RICO claim. Chang v. Chen, 80 F.3d 1923, 1298, (9 Cir. 1996). The courts will look carefully at civil RICO claims as the statute was intended to combat organized crime as distinguished from providing a mechanism by which every tort plaintiff can obtain treble damages. Oscar v. University Students Co-Operative Ass'n, 965 F.2d 783, 786 (9th Cir. 1992).

Predicate acts which are the racketeering activity upon which a RICO claim is defined broadly to include:

"Racketeering activity" means (a) any act or threat involving murder, kidnapping, gambling, arson, robbery, bribery, extortion, dealing in obscene matter, or dealing in a controlled substance or listed chemical (as defined in Section 102 of the Controlled Substances Act), which is chargeable under State Law and punishable by imprisonment for more than one year; (b) any act which is indictable under any of the following provisions of Table 18, United States Code: Section 201 (relating to bribery), Section 224 (relating to sports bribery), Sections 471, 472 and

473 (relating to counterfeiting), Section 659 (relating to theft from interstate shipment). If the act is indictable under Section 659 is felonious, Section 664 (relating to embezzlement from pension and welfare fund), Section 891-894 (relating to extortionate credit transactions), Section 1028 (relating to fraud and related activity in connection with identification documents), Section 1029 (relating to fraud and related activity in connection with access devices), Section 1084 (relating to the transmission of gambling information), Section 1341 (relating to mail fraud), Section 1343 (relating to wire fraud), Section 1344 (relating to financial institution fraud), Section 1351 (relating to fraud in foreign labor contracting), Section 1425 (relating to the procurement of citizenship or nationalization unlawfully), Section 1426 (relating to the reproduction of naturalization or citizenship papers . . .). Section 1341, 1343 and 1344 pertaining to mail fraud, wire fraud and financial institution fraud, respectively are the broad catch-all sections which are most commonly used in connection with a civil RICO action.

Insurers and their respective SIU divisions can perform asset checks to determine the feasibility of recovery in a civil RICO action. Insurers can work together in a joint effort, each with their own counsel, to make the investigation and prosecution more effective.

Construction Defect Actions

Any of us who have litigated or handled construction defect claims note that they can often be somewhat suspect, inflated and have many driving forces other than simply repairing individual homes. Construction defect actions are often filed on behalf of a single plaintiff, usually the homeowners association. However, there are cases where the individual unit owners, as a group, or in conjunction with the homeowners association will file individual claims seeking recovery for design or construction defect in the individual units as well as the common elements. An extreme scenario of construction defect litigation brought was unearthed by the FBI's Operation Grand Master which has been in place since at least 2011. A number of the targets of the investigation ultimately committed suicide. For example one target, Leon Benzer allegedly participated in and masterminded a massive plot to infiltrate and take over homeowners association boards in the Las Vegas area. Once he would infiltrate and take over the homeowners association he would manufacture construction defect claims and persuade the rest of the board to hire law firms selected by Mr. Benzer. Once case is settled netting the law firm substantial profit, Mr. Benzer would then pocket the money rather than direct same to repair the alleged deficiencies.

The majority of construction defect fraud claims are much more subtle, however. The filing in pursuit of the claims can be driven by the individual homeowners, members of the association board, as well as sometimes by counsel and even experts. If one looks hard enough they can almost always certainly find deficiencies or deviations in the construction of any large-scale residential or

condominium complex. However, the extent to which these deficiencies are merely punch-list items, maintenance, or variations which can be resolved short of litigation, or whether they warrant full scale litigation spanning years is debatable.

Admittedly, the majority of construction defect cases have some legitimacy to them. However, when faced with a large-scale construction defect claim, it makes sense to look not only at the nature of the claims, the validity of the claims, but also the players involved. A search of various members of the homeowners' association board may yield some useful information. Further, you may start to see a pattern with respect to transition report company/experts, litigation experts, repair and remediation contractors as well as on occasion plaintiff's firms.

It is important to look carefully at the remediation contractors. At best, they are sometimes opportunistic, at worst, outright fraudulent. On occasion, a subpoena to a contractor for deposition will shed new light on the case.

Workers' Compensation

There are many types of Workers' Compensation fraud ranging from premium fraud to fake or inflated or misstated claims. However, with respect to large scale Workers' Compensation fraud claims, it is necessary to have more than a dishonest claimant. Typically, there would be a network of medical providers and even attorneys involved. In certain circumstances, there may even be involvement of the employer. For example, where a factory is closing, it may be complicit in the filing and paying of hundreds of Workers' Compensation claims which are at best suspicious. A factory which is closing or a facility engaging in a large layoff may view the filing of mass Workers' Compensation claims as nominal alternate compensation for her employees.

These types of layoff/plant closing Workers' Compensation fraud claims typically involve alleged respiratory and hearing injury. Other types of Workers' Compensation fraud may involve a series of claimants at different times with different injuries all using either the same law firm, a same medical clinic or both. It is difficult to detect and prosecute these types of fraud without an astute claims professional picking up patterns. We are all familiar with the signs of a suspicious employee Workers' Compensation claim including reporting after weekends or vacations, late reporting, already having counsel on board at the time the injuries reported, refusing of treatment or diagnostic testing, and an employee who is either disgruntled or facing layoff or termination. However, when looking for patterns where the medical providers being involved some signs that further investigations warranted include injury for treatment that employee does not remember receiving. This assumes that the employee is not complicit in fraud. Repetitive provider notes and repetitive treatment without change for reported symptoms or complaints, multiple claims for the same alleged injured worker form type reporting despite treatment for different conditions in different patients. Other red flags include failure to respond to request for records or additional information and a general sense that the clinic is a mill.

The primary type of Workers' Compensation fraud attributable to employers is premium fraud and that itself can be the subject of an entire seminar. However, in large-scale fraud cases, the typical situation is where the employer is complicit in the submission of mass Workers' Compensation filings

despite lack of injury or illness. This is typically in order to avoid any type of direct payments such as severance or avoid a lawsuit for mass layoffs or termination. Workers' Compensation fraud is a significant and growing segment of all insurance fraud claims.

The broadest aspect obviously competent experienced SIU or outside licensed investigator involvement at an early stage is key. An interesting issue is where you believe you have a fraud claim which involves medical providers and/or counsel to what extent is it necessary to have an expert witness to demonstrate not only that the conduct of the professionals deviated from acceptable practices, but rises to the level of fraud. It may often be difficult to find an experienced Workers' Compensation attorney willing to serve as an expert to address the attorney component part of this. It may be easier to find an experienced Workers' Compensation medical professional. However, these large-scale claims which may have an impact on the overall industry do pose practical challenges in their prosecution.

Class Action Issues

Class actions present their own challenges in meeting or defeating class certification. It is generally not easy to meet the requirements for class certification. Whether you have a large scale claim that has passed the muster and been certified as a class action, or simply an ad hoc group of individuals asserting the same or similar claims, it will typically fall into one of the other categories discussed. Class action litigation does present some additional challenges inasmuch as it is more difficult to conduct specific discovery as to specific claimants. However, nothing precludes surveillance and investigation while the litigation is ongoing. Further, if all the claimants are truly similarly situated to the degree that certification was granted, exposure of one or a subgroup of the claimants, providers or counsel as a fraud will usually dispose other remaining claims.

Medical Billing

The medical billing in healthcare fraud is another burgeoning segment of insurance fraud. In 2014 the federal government recovered nearly \$5,700,000 in health care fraud. See www.healthcarefinancenews.com/slideshow/biggest-healthcare-fraud-2015-running-list. Coding schemes such as unbundling codes, double billing, miscoding and upcoding are common.

Fraud can range from kickback schemes, direct medical provider billing fraud, pharmacy scams as well as prescribing, recommending or referring treatment for procedures that are unnecessary and perhaps even dangerous to the patient. Another area overrun with fraud is durable medical equipment. Many providers are non-existent. A visit to the facility can confirm whether it exists. For clinics a site visit can shed light on whether the equipment is present for the diagnostic and treatment previously billed, whether the facility appears to be a claim center versus a medical practice and whether physicians are present. Where the equipment is provided, patients often receive substandard equipment or equipment that may not support any therapeutic benefit for the patient. Alternative modalities such as chiropractic, acupuncture, repetitive procedures and codes are also red flags. Unusually clear handwriting, layman's terms, codes that do not match narrative may indicate forgery.

Special Challenges

While the scale of a large fraud scheme can sometimes make it easier to recognize patterns, identify problematic experts and the like, there is no doubt they also pose special challenges. Working together with other SIU departments with appropriate counsel can be a solution. Exchange of information on suspect providers, attorneys, and experts can also help to root out large or repeat scams. Dedicating the resources to look at each of the individual claimants and their documentation in detail is difficult and in some cases not practical. "Spot" check may be necessary and more detailed examination done once suspicions are confirmed or a pattern discerned.