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Mob Mentality: DOJ Wields RICO With Mixed Results

By **Phillip Bantz**

Law360 (February 17, 2023, 1:34 PM EST) -- While prosecuting a Pagans Motorcycle Club meth ring in Florida, Sean Shecter brushed off the FBI's push to bring racketeering charges into the case, even though it seemed tailor-made for the Racketeer Influenced and Corrupt Organizations Act.

RICO, Shecter said, often "muddies the waters and makes what can already be a complicated topic even more complex." Also, the penalties for racketeering were virtually the same as those under the drug distribution conspiracy charges in the case, added Shecter, a former federal prosecutor who co-chairs Lewis Brisbois' white collar practice in Fort Lauderdale.

Given his views on RICO, Shecter — and many other white collar defense lawyers — were taken aback when the U.S. Department of Justice in 2019 brought RICO charges against several JPMorgan Chase & Co. traders accused of manipulating the precious metals market through an illegal scheme known as "spoofing."

Last year, RICO charges popped up again in a white collar case against Archegos founder Bill Hwang and others at the private investment firm. Prosecutors say Hwang and his co-defendants fraudulently secured billions of dollars from banks and used the money to artificially inflate stock prices.

The Archegos market manipulation case is slated for trial in October and could be a tipping point in white collar prosecutors' use of RICO, after the strategy backfired in the JPMorgan matter.

In announcing racketeering charges against the JPMorgan traders, Brian Benzkowski, then chief of the DOJ's Criminal Division, asserted that the spoofing case involved "precisely the kind of conduct that the RICO statute is meant to punish."

The jury disagreed. Three of the four traders were acquitted of racketeering and conspiracy and found guilty of wire fraud and other related charges. Afterward, the government dropped RICO charges against the fourth trader, Christopher Jordan, shortly before his trial, which was held separately due to COVID-19 restrictions at the time. He was later convicted of wire fraud.

"The fact that the government wasn't successful in the JPMorgan case might be a warning to them that this is a complicated statute and may overly complicate cases and not give them the benefits they thought they might get from a RICO charge," said Jordan's attorney, Parvin Moyne, a partner at Akin Gump Strauss Hauer & Feld in New York and former federal prosecutor.

A pivotal difference between the Archegos and JPMorgan prosecution is that the former is more clearly focused on the company as an enterprise than the latter, which centered on a precious metals trading desk rather than JPMorgan itself, according to Moyne. She also noted that the SEC has named Archegos as a defendant in a parallel action.

"In JPMorgan, the enterprise was this desk with this group of traders, whereas in Archegos the organization is more cleanly defined," she said. "The Archegos case is very different from the JPMorgan case, so it will be interesting to see if the government is successful."

'Checks and Balances' on RICO

Racketeering charges can add thorny layers of complexity to a case, but RICO also offers advantages to prosecutors, who can wield the charge as a strategic tool, using the law's stiff penalties and the wide net it casts as a deterrent and as leverage to convince defendants to plead guilty to lesser

crimes.

Racketeering convictions carry 20-year max sentences, consecutive sentences for other related offenses and the possibility of the government seizing the business involved in the crime. RICO also allows the government to fold several crimes that occurred over long stretches of time into a single case, including certain state crimes.

"If you can show that they're the fruits of a racketeering enterprise, you can seize billions of dollars in profits," said Kevin O'Brien, a white collar partner at Ford O'Brien in New York. "You can even seize the entire business, which is a tremendous form of leverage to have in some cases."

The Organized Crime and Gang Section of the Justice Department's Criminal Division reviews and approves proposed RICO indictments. DOJ guidelines stress that using the "RICO statute, more so than most other federal criminal sanctions, requires particularly careful and reasoned application, because, among other things, RICO incorporates certain state crimes."

"There are checks and balances on the other side that will serve to potentially limit the use of RICO," said Tiffany Payne, white collar defense counsel at Moore & Van Allen in Charleston, South Carolina. "We shouldn't necessarily expect to see RICO charges pop up every time there's a high-profile white collar case."

The Biden administration's new corporate criminal enforcement policies, which emphasize prosecutorial discretion over throwing the kitchen sink at defendants — a departure from the Trump-era directive of "charge and pursue the most serious, readily provable offense" — also could affect the future application of RICO in white collar cases.

Justice Department representatives did not respond to a request for comment.

Steven Lee, vice chair of the white collar defense and investigations practice at Lewis Brisbois in Atlanta, said that if the government fails to secure a racketeering conviction in the Archegos matter or other cases that bubble up in the near future, prosecutors will be more apt to nix RICO charges in white collar prosecutions and "stick with the traditional charges of wire fraud and mail fraud."

"If they are successful, you may have more RICO indictments with these types of security matters, because it allows the government to tell the story that there was a criminal enterprise," he said.

Schecter, Lee's law partner, added, "Imagine the opening line of a trial. You can say, 'The defendant committed tax evasion or fraud,' versus, 'We're here today because the defendants engaged in a criminal enterprise in violation of RICO.' People hear that and think, 'Wow, this is like "The Sopranos" or a mob movie.' They'll pay more attention."

'Always Looking for New Tools'

As the government pushes RICO into more white collar matters, some observers are wondering when, or if, racketeering charges will come into play in the ongoing crypto industry crackdown, including the blockbuster fraud and conspiracy case against FTX founder and ex-CEO Sam Bankman-Fried, who's accused of misappropriating billions of dollars from customer funds.

"I'm waiting for Bankman-Fried to be RICO'd, though maybe it won't happen," O'Brien said. "The government got a quick indictment out, but that's just a placeholder. I assume they're working on something a little more extensive and specific."

O'Brien added, "Some cases are so vast and have such devastating economic consequences that you want to cover the waterfront and not have anyone slip through your fingers because of some quirk in a statute or a statute of limitations problem. So you use RICO. These factors come into play with the FTX case."

But other white collar lawyers, including Lee and Schecter, were betting that the government wouldn't bring RICO into the FTX prosecution.

"Why spoil a good thing?" Schecter said. "There's enough ammunition with the evidence they have

and everything he [Bankman-Fried] has stated publicly and the former FTX executives who are cooperating with the government. RICO makes it more complicated than it needs to be."

While the future expansion of RICO into the crypto industry and the white collar realm in general remains murky, at least one thing seems relatively clear: "I suspect we haven't seen the end of RICO cases in the white collar context," Payne said.

"The government is always looking for new tools and new avenues to prosecute criminal conduct," she added.

The Archegos case is U.S. v. Hwang et al., case number 1:22-cr-00240, in the U.S. District Court for the Southern District of New York.

The JPMorgan case is U.S. v. Smith, et al., case number 1:19-cr-00669, in the U.S. District Court for the Northern District of Illinois.

--Editing by Marygrace Anderson.

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