

Trade secrets and RICO causes of action

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FEBRUARY 27, 2024

A statutory amendment under the Defend Trade Secrets Act (DTSA) that is often overlooked expands liability for economic espionage and trade secret theft. This amendment creates civil liability under the Racketeer Influenced and Corrupt Organizations Act of 1970 (18 USC 1961). (RICO).

Since the enactment of the DTSA on May 11, 2016, Section 18 USC 1831 (economic espionage) and Section 1832 (theft of trade secrets) are now predicate offenses in “racketeering activity” under RICO. This means that plaintiffs can sue claiming a conspiracy “through a pattern of racketeering activity” when the theft of trade secrets or economic espionage is at least one of the underlying predicate acts of racketeering.

Adding Sections 1831 and 1832 to the list of RICO predicate acts also expands the applicability of extraterritorial jurisdiction in U.S. district courts to RICO conduct occurring outside the United States if (1) the offender is a citizen or permanent resident alien of the United States, or (2) an organization is organized under the laws of the United States or a State or political subdivision thereof, or (3) an act in furtherance of the offense was committed in the United States. (18 USC Section 1837)

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Section 1831 of the Defend Trade Secrets Act prohibits the theft of trade secrets intending or knowing that the offense will benefit any foreign government, foreign instrumentality, or foreign agent. Section 1832 prohibits the theft of trade secrets intending or knowing that the offense will injure any owner of the trade secret.

The amendments fill a gap when the EEA was enacted as a criminal statute with no federal civil cause of action. Victims of trade secret theft or foreign economic espionage could report these crimes to the Justice Department, but the victims could not file a civil lawsuit for EEA violations.

To state a civil RICO claim, a plaintiff must allege (1) the existence of an enterprise affecting interstate commerce; (2) that the defendant was employed by or associated with the enterprise; (3) that the defendant participated, either directly or indirectly, in the conduct or the affairs of the enterprise; and (4) that the defendant participated through a pattern of racketeering activity that included at least two RICO predicate offenses within 10 years of each other.

A plaintiff seeking damages under RICO must allege four elements to state a claim: (1) conduct [causing injury to business or property] (2) of an enterprise (3) through a pattern (4) of racketeering activity.

RICO utilizes Section 1961 to establish predicate criminal acts as the foundation for enterprise liability for RICO defendants. A defendant can face criminal or civil liability under RICO even if the defendant has not been convicted of the underlying RICO predicate acts.

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The RICO “enterprise” is defined as any group of individuals who associate with each other for a common purpose. It need not be a formal business entity such as a corporation but may be merely an informal association of people. A RICO enterprise is distinct from the RICO defendant. RICO does not target the RICO enterprise. RICO targets the RICO defendants who corrupt legitimate enterprises through a pattern of racketeering activity.

One of the leading RICO civil actions involving trade secrets is *Brand Energy & Infrastructure Services, Inc.v. Irex Contracting Group* (USDC Eastern District of Pennsylvania 2017). The plaintiff (a construction services company) alleged that the defendants (former high-level employees) conspired to steal plaintiff’s trade secrets by leaving the company in stages. While some of the individual defendants were moving to Ivex, other individual defendants stayed at Brand to steal and siphon off Brand’s trade secrets and proprietary business information. According to the plaintiff, the defendants conspired to run Brand out of business.

The defendants moved to dismiss Brand's RICO claim because (1) Brand failed to allege facts establishing the existence of an "enterprise" and (2) Brand failed to sufficiently plead a "pattern of racketeering activity."

The court rejected both arguments. First, the facts alleged an association-in-fact enterprise in furtherance of a common scheme to steal trade secrets and put Brand out of business.

Second, the court rejected the argument that there was not sufficient evidence to establish a pattern of racketeering activity. The defendants orchestrated a scheme to defraud Brand by stealing its trade secrets, by stealing its equipment, and using its proprietary business information. Viewed together, the voluminous allegations of trade secret theft, mail and wire fraud, and interstate transportation of stolen property form a plausible pattern of racketeering activity.

About the author



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RICO civil remedies are clear-cut and mandatory. Any person injured in their business or property by reason of a violation of RICO's prohibited activities, which now include economic espionage and theft of trade secrets, can recover treble damages plus its costs and attorney fees. These damage awards are mandatory, not discretionary.

There is a new horizon in trade secrets law. With the passage of the Defend Trade Secrets Act, the Racketeer Influenced and Corrupt Organizations Act (RICO) expands liability for economic espionage and trade secret theft (under Sections 1831-1832) including extraterritorial jurisdiction worldwide under Section 1837 of the Defend Trade Secrets Act.

R. Mark Halligan is a regular contributing columnist on trade secrets law for Reuters Legal News and Westlaw Today.

This article was first published on Reuters Legal News and Westlaw Today on February 27, 2024.