CARLTON FIELDS

New York Law Journal: Criminal Immunity Under FSIA, and Civil RICO Liability for Foreign Sovereigns

October 03, 2018

The Foreign Sovereign Immunities Act, 28 U.S.C. §1602 et seq. (FSIA), is silent on the issue of criminal immunity for foreign sovereigns. The Tenth and Sixth Circuits disagree on the meaning of this silence: The U.S. Court of Appeals for the Tenth Circuit holds that the FSIA does not provide criminal immunity for foreign sovereigns, and the U.S. Court of Appeals for the Sixth Circuit holds that it does.

This circuit split regarding criminal immunity also governs whether foreign sovereigns are necessarily immune from civil claims under the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§1961-1968 (RICO). To impose civil RICO liability, a plaintiff must establish a defendant's "pattern of racketeering activity." RICO defines "racketeering activity" to include various *indictable* acts. As the Sixth Circuit reasons, if a party cannot be indicted (because of its immunity), then it cannot commit an indictable act. And, if a party cannot commit an indictable act, then it cannot be civilly liable under RICO.

This article addresses this circuit split over whether foreign sovereigns are immune from criminal prosecution and therefore immune from civil RICO liability. This article also addresses a related line of case law, within the Second Circuit, which holds that a *domestic* governmental entity cannot be civilly liable under RICO because such an entity is not capable of forming the intent necessary to commit a criminal act. This article concludes by analyzing whether, as with domestic government entities, a foreign sovereign is not capable of forming the intent necessary to be found civilly liable under RICO.

The Split Between the Tenth and Sixth Circuits

Tenth Circuit and Sixth Circuit Decisions. The Tenth and Sixth Circuits have split on whether the FSIA precludes jurisdiction over civil RICO claims against foreign sovereigns. Compare *Southway v. Central Bank of Nigeria*, 198 F.3d 1210 (10th Cir. 1999), with *Keller v. Central Bank of Nigeria*, 277 F.3d 811 (6th Cir. 2002), abrogated on other grounds by *Samantar v. Yousuf*, 560 U.S. 305 (2010).

In *Southway v. Central Bank of Nigeria*, 198 F.3d 1210 (10th Cir. 1999), the Tenth Circuit held that the FSIA does not preclude subject-matter jurisdiction for civil RICO claims against foreign sovereigns. Id. at 1215. In *Southway*, a group of plaintiffs filed a complaint naming as defendants, among others, the foreign sovereigns the Central Bank of Nigeria and the Republic of Nigeria (collectively, defendants). Id. at 1212-13. The complaint alleged that, in violation of RICO, the defendants conspired with one another to defraud and commit theft against the plaintiffs. Id. at 1213. The plaintiffs alleged various predicate acts for purposes of their civil RICO claims, including mail fraud, wire fraud, and the transfer of stolen property. Id. at 1213. The defendants moved to dismiss for lack of subject-matter jurisdiction under the FSIA arguing, in relevant part, that: (1) a foreign sovereign is immune from criminal indictment under the FSIA, (2) the predicate acts forming the basis of the plaintiffs' civil RICO claims were therefore not indictable acts, and (3) the plaintiffs' civil RICO claims necessarily failed. Id. at 1213. The district court denied dismissal, and the defendants appealed. Id. at 1213-14.

On appeal, the Tenth Circuit explained that the FSIA does not refer to foreign sovereign immunity in the criminal context. *Southway*, 198 F.3d at 1214-15. Therefore, the Tenth Circuit concluded, the defendants' argument, which relied on criminal immunity under the FSIA, necessarily failed. Id. at 1214-15 & n.4. The Tenth Circuit held that the plaintiffs' civil RICO claims were viable and relied on the FSIA's broad language that provided jurisdiction over "any nonjury civil action" in which one of the FSIA's enumerated exceptions applied. Id. at 1215-16. The appellate court also relied on the fact that RICO's language dealt with indictable "acts," and not indictable "actors." Id. at 1215 n.6. Thus, the Tenth Circuit opined, Congress which viewed sovereign immunity under the FSIA as an affirmative defense, "[s]urely viewed commercial acts such as those in which Defendants … allegedly engaged, as 'indictable' for purposes of a civil RICO claim." Id. at 1215. Therefore, the Tenth Circuit determined that the FSIA conferred subject-matter jurisdiction for civil RICO claims against foreign sovereigns, as long as one of the FSIA's enumerated exceptions applied. Id. at 1216.

In *Keller v. Central Bank of Nigeria*, 277 F.3d 811 (6th Cir. 2002), the Sixth Circuit rejected the Tenth Circuit's analysis in *Southway*, and held that foreign sovereigns were not indictable, and therefore could not commit the predicate offenses required for civil RICO liability. Id. at 819-21.

The Sixth Circuit rejected the reasoning that was the predicate of the *Southway* decision—that the FSIA's silence on the topic of criminal jurisdiction meant that Congress had intended to hold foreign sovereigns liable. Id. Instead, the Sixth Circuit accepted the contrary analysis set forth in *Gould, Inc. v. Mitsui Mining & Smelting Co.*, 750 F. Supp. 838, 843-44 (N.D. Ohio 1990). There, the district court reasoned that the FSIA was silent regarding criminal jurisdiction because the FSIA was intended to refer only to civil and not criminal actions. *Keller*, 277 F.3d at 819-20. The Sixth Circuit found this reasoning persuasive. Under the FSIA, a "foreign state shall be immune from the jurisdiction of the courts of the United States," and the Sixth Circuit noted that the FSIA does not limit this grant of immunity to civil cases. Id. at 820 (citation and quotation omitted). Therefore, the Circuit reasoned, absent an explicit exception applicable to criminal cases, Congress' blanket grant of immunity would apply. Id. In short, because the FSIA does not mention criminal proceedings, it does not provide any exception upon which to base criminal jurisdiction.

The Sixth Circuit found equally unavailing *Southway's* analysis that the language of RICO dealt with indictable "acts," rather than indictable "actors." Id. at 820-21. In an earlier and unrelated decision, the Sixth Circuit rejected a civil RICO claim against the federal government because the federal government—as an "actor"—was not indictable. Id. at 820 (citing *Berger v. Pierce*, 933 F.2d 393, 397 (6th Cir. 1991)). Absent an international agreement or an exception listed within the FSIA, the Sixth Circuit held that jurisdiction over a foreign sovereign does not exist. Id. at 820.

Treatment of This Split by Other Federal Courts. The Second Circuit has not addressed this circuit split, even though the issue was squarely presented for review in *Kensington Intern. Ltd. v. Itoua*, 505 F.3d 147 (2d Cir. 2007). See 2006 WL 5691424, at **43-45 (Initial Brief). The Eleventh Circuit has recognized the split, but resolved the issue on waiver grounds and thereby avoided the merits. *United States v. Campa*, 529 F.3d 980, 1000-01 (11th Cir. 2008).

Some district courts have agreed with the Sixth Circuit and held that criminal immunity applies for foreign sovereigns under the FSIA and bars any RICO claim. *Dale v. Colagiovanni*, 337 F. Supp. 2d 825, 842-843 (S.D. Miss. 2004) (finding "that the [foreign sovereign defendant] is not a 'chargeable' or 'indictable' entity. Because susceptibility to being charged or indicted is a prerequisite to civil liability under 18 U.S.C. §1962(c), the Court also finds that the [foreign sovereign defendant] is immune from liability under §1962(c)[.]"), aff'd in part and vacated in part on other grounds, 443 F.3d 425, 429-30 (5th Cir. 2006) (without addressing the question herein).

Other courts, while not addressing *Southway*, have allowed RICO claims to proceed against foreign sovereigns. See, e.g., *Kensington Intern. Ltd. v. Societe Nationale Des Petroles Du Congo*, 05 CIV. 5101 (LAP), 2006 WL 846351, at *13 (S.D.N.Y. Mar. 31, 2006), rev'd in part, vacated in part by *Kensington Intern. Ltd. v. Itoua*, 505 F.3d 147 (2d Cir. 2007) (without addressing the question herein); *see also Am. Bonded Warehouse Corp. v. Compagnie Nationale Air France*, 653 F. Supp. 861 (N.D. Ill. 1987) (same). And still other courts, similar to *Southway*, have held that the FSIA does not provide

any shield from criminal proceedings. *See In re Grand Jury Proceeding Related to M/V DELTUVA*, 752 F. Supp. 2d 173, 179-80 (D. P.R. 2010).

Governmental Entities and Criminal Intent

On a related issue, in an unpublished decision, the Second Circuit decided that *municipalities* cannot be held civilly liable under RICO. See *Rogers v. City of New York*, 359 Fed. Appx. 201, 204 (2d Cir. Dec 31, 2009). For this proposition, the Second Circuit approvingly cited *Frooks v. Town of Cortlandt*, 997 F. Supp. 438, 457 (S.D.N.Y.1998).

In *Frooks*, the Southern District of New York surveyed the case law and found that "every court in th[e] [Second] Circuit that has considered the issue has held that a municipality cannot form the requisite criminal intent to establish a predicate act, and has therefore dismissed the claim against the municipality." *Frooks*, 997 F. Supp. at 457 (collecting cases); see also *New York State Prof'l Process Servers Ass'n v. City of New York*, 14 CIV. 1266 DLC, 2014 WL 4160127, at *11 (S.D.N.Y. Aug. 18, 2014) ("[I]t is well settled *that a government entity cannot form the requisite intent* to be liable for any RICO predicate violation" (emphasis added)), aff'd sub nom. *Clarke v. de Blasio*, 604 Fed. Appx. 31 (2d Cir. 2015). Various federal courts of appeal have reached the same conclusion. *Frooks*, 997 F. Supp. at 457 (collecting cases).

Other courts within the Second Circuit have since confirmed that municipalities cannot be held liable for civil RICO claims. See *Sathue v. Niagara City Police Dep't*, 17-CV-747-FPG, 2018 WL 550520, at *4 (W.D.N.Y. Jan. 25, 2018); *Hirsch v. City of New York*, 300 F. Supp. 3d 501 (S.D.N.Y. 2018); *Rios v. Schlein*, 16-CV-6448 (KMW), 2017 WL 3671194, at *3 (S.D.N.Y. Aug. 24, 2017); *Liang v. City of New York*, 10-CV-3089 ENV VVP, 2013 WL 5366394, at *12 (E.D.N.Y. Sept. 24, 2013); *McCaffrey v. County of Nassau*, 11-CV-1668, 2013 WL 2322879, at *7 (E.D.N.Y. May 25, 2013).

When viewing this case law through the lens of the FSIA, the question necessarily arises: If a domestic government entity cannot form the intent necessary for a RICO predicate violation, then how can a foreign government entity?

In *Kensington*, cited at the end of Section I herein, the district court decided a case involving foreign sovereign immunity and noted that a *municipality could not* form the requisite mens rea under RICO. 2006 WL 846351, at *13. Nonetheless, the district court held that a foreign sovereign was not a municipality and concluded its analysis. Id. Implicitly, the district court held that a foreign sovereign was somehow different in its capacity for intent. Id. The district court did not address how a foreign sovereign could form the mens rea for a RICO violation when a domestic government could not. Id. The court also did not address the circuit split on criminal immunity under the FSIA. Id.

Unless some compelling distinction can be made between foreign and domestic sovereigns, and their capacities for intent, it stands to reason that the inability of one to form the required intent for a RICO predicate would apply to the other. Future cases will be necessary to explain the qualitative distinction between cases like *Kensington*, which hold that foreign sovereigns can commit RICO violations, with the legion of case law holding that domestic government entities cannot.

Conclusion

When litigating RICO claims involving foreign sovereigns in the Second Circuit, litigants should be aware of both: (1) the circuit split addressed above, its discussion of criminal immunity for foreign sovereigns under the FSIA, and the resulting effect on civil RICO liability; and (2) the case law within the Second Circuit on RICO immunity for domestic governmental entities, and its potential use as applied to a foreign government entity.

Authored By

Natalie A. Napierala

Michael D. Sloan

Related Practices

Appellate & Trial Support

accuracy or completeness of this outside information, nor is the inclusion of a link to be intended as an endorsement of those outside sites.