

4 Tips For Defending Against Tribal RICO Claims

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In the last decade, tribal entities and officials have increasingly become the subjects of civil suits alleging violations of the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1962 et seq. When originally proposed, RICO was described as “an act designed to prevent ‘known mobsters’ from infiltrating legitimate businesses.”[1] “RICO was intended to combat organized crime, not to provide a federal cause of action and treble damages to every tort plaintiff.”[2] Despite its original intent, however, RICO is now too often used to transform an otherwise garden-variety tort claim into a frivolous headline-grabbing lawsuit, presumably with the hope that it will scare the defendants into a hasty settlement agreement.



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Most recently, the Tribal Council of the Cheyenne and Arapaho Tribes of Oklahoma, along with a handful of individually named tribal members filed a RICO suit against the tribe’s governor, former tribal officials, several nontribal members and two law firms.[3] The complaint alleges that the defendants “took control of the Tribal government and gaming enterprises” and that “[t]hrough a concerted and systematic program of fraud, coercion, intimidation, extortion, bribery, and deception, these individuals stole and otherwise diverted hundreds of millions of dollars in Tribal money for their own personal benefit, as well as for those who substantially assisted them in this scheme.”[4] Although these allegations may seem fantastic and better-suited for a movie script, these are the types of claims underlying many tribal RICO suits.



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There are a few potential reasons that tribal RICO lawsuits have increased. As the epicenters of gaming, tribal casinos offer a convenient setting for far-fetched narratives of racketeering conspiracies, which, even if false, may initially seem compelling enough to be both distressing to the defendants and intriguing to the media. RICO plaintiffs come from a variety of sources, including disgruntled patrons, unsuccessful competitors and tribal members embroiled in a political dispute.[5] Additionally, the breadth of the definition of “racketeering activity” under the statute — which includes both violent crimes of murder, robbery, kidnapping and lesser crimes of gambling, bribery and mail fraud — makes filing a RICO complaint relatively easy.[6]

But a party accused of RICO need not immediately acquiesce to an unreasonable settlement demand

simply out of fear of litigating an alleged violation. Although a frivolous RICO claim cannot necessarily be prevented, the following tips and strategies are intended to help to make navigating such a claim more manageable.

Assert All Forms of Immunity

A tribal entity's or official's first line of defense should be an exhaustive review of its potential immunity defenses. For tribes or their economic entities such as casinos, sovereign immunity may provide the necessary basis for dismissal.[7] Another immunity defense to consider, where applicable, is judicial immunity, which widely insulates judges and others who perform judicial functions from civil liability from their judicial acts, even when done maliciously or corruptly.[8] When defending individual tribal employees or officials, it is important to remember that the U.S. Supreme Court recently held that a tribe's sovereign immunity is not implicated where a suit is brought against a tribal employee in his or her individual capacity for a tort committed within the scope of his or her employment.[9] Thus, employees or officials sued for RICO who fall into those circumstances are unlikely to succeed on a sovereign immunity defense.[10]

Scrutinize the Pleadings

Second, counsel must closely review the complaint to ensure both compliance with the heightened pleading standards of FRCP 9(b), and sufficiency of the pleadings under FRCP 12(b)(6). To establish a RICO violation, a defendant must have participated in (1) the conduct of (2) an enterprise that affects interstate commerce (3) through a pattern (4) of racketeering activity or collection of unlawful debt.[11] To satisfy the "pattern of racketeering" requirement, the plaintiff must allege not only that defendants had committed two or more predicate acts, but also that predicates themselves amount to, or that they otherwise constitute threat of, continuing racketeering activity.[12] Failure to adequately plead under either rule is adequate grounds for dismissal.[13]

Under Rule 9(b), a party alleging fraud or mistake "must state with particularity the circumstances constituting fraud or mistake." This heightened pleading requirement applies to fraud-based predicate acts alleged as the basis of a RICO claim.[14] A plaintiff must "state the time, place, and specific content of the false representations as well as the identities of the parties to the misrepresentation." [15] In effect, Rule 9(b) imposes a higher standard by which the fraud-based elements of a plaintiff's RICO claim will be reviewed on a motion to dismiss; under Rule 9(b), a plaintiff's allegations must "do more than plausibly state a claim entitling the plaintiff to relief." [16] Thus, counsel should carefully review a RICO complaint for vague or conclusory language or allegations of fraud, as it may fail to meet the 9(b) standard.[17]

Similarly, the complaint should be carefully analyzed to determine whether it meets the requirements of Rule 12(b)(6). A plaintiff is required to allege "enough facts to state a claim to relief that is plausible on its face." [18] Thus, labels, conclusions, formulaic recitations of the elements of a cause of action, and naked assertions devoid of factual enhancement will not pass muster under Rule 12(b)(6). If a complaint fails to provide sufficient facts under a cognizable legal theory on a RICO violation, the court may grant the defendant's motion to dismiss.[19]

Double Check Your Insurance

Before relying on insurance coverage for defense of a RICO claim against tribal officials or employees, it is prudent to consult with any insurance carriers immediately upon receiving notice of a lawsuit. The

carrier will likely take the position that it is only obligated to provide coverage for losses and expenses arising from “wrongful” acts — i.e., acts caused by the insured’s negligence. Because, by definition, the predicate acts for RICO are knowing, willful and/or intentional in nature, the carrier may disclaim coverage of the defense for such claims. It is best to have this information early in the proceedings as it is likely to influence litigation strategy.

Consult With An Expert

A tribal official faced with defending RICO claims should promptly consult and retain legal counsel who is well-versed in white collar litigation and understands the nuances of federal Indian law. RICO litigation is high-stakes and demands effective tribal defense counsel

Although becoming the subject of a RICO lawsuit can be overwhelming, tribal official defendants need not panic. While it is easy to file an attention-grabbing RICO complaint, RICO is much harder to prove. A thoughtful and attentive approach can quickly resolve the claims while allowing the tribe and tribal officials focus on the more important task of governing.

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[1] Jed. S. Rakoff & Howard W. Goldstein, RICO Civil and Criminal Law and Strategy, § 1.01, at 1–4 (2000 ed.) (quoting S.Rep. 91-617 at 76 (1969)).

[2] *Oscar v. Univ. Students Co-Op. Assoc.*, 965 F.2d 783, 786 (9th Cir. 1992).

[3] Complaint, *Cheyenne and Arapaho Tribes of Oklahoma, et al. v. Foster, et al.*, No. 5:17-CV-01048 (W.D. Okla. Oct. 2, 2017).

[4] *Id.* at 5.

[5] See, e.g., *Gristede's Foods Inc. v. Unkechaug Nation*, 532 F. Supp. 2d 439 (E.D.N.Y. 2007) (store owner brought action under RICO alleging that Indian tribes, tribal members, and businesses engaged in unauthorized sale of untaxed cigarettes to non-tribe members); *Gillette v. Gaming Entm't (Indiana)*, 2016 WL 4919992, at *1 (S.D. Ind. Sept. 14, 2016) (gaming patron sued tribal casino after she defaulted on loans received from the casino); Complaint, *Paskenta Band of Nomlaki Indians, et al., v. Crosby, et al.*, 2015 WL 1260739 (Mar. 10, 2015 E.D.Cal.) (alleging RICO defendants rigged the electoral process to ensure continued election of certain persons to Tribal Council seats); *Vargas v. Morongo Casino Resort & Spa, et al.*, 2009 WL 871453 (C.D.Cal.) (alleging RICO based on a slip and fall in a tribal casino).

[6] 18 U.S.C. § 1961.

[7] See *Breakthrough Mgmt. Grp. Inc. v. Chukchansi Gold Casino & Resort*, 629 F.3d 1173 (10th Cir.

2010) (reversing and remanding district court's decision denying the Casino's motion to dismiss RICO claims).

[8] *Stump v. Sparkman*, 435 U.S. 349, 356 (1978).

[9] *Lewis v. Clarke*, 137 S. Ct. 1285, 1286, 197 L. Ed. 2d 631 (2017).

[10] See *Rabang v. Kelly*, C17-0088-JCC, 2017 WL 1496415, at *7 (W.D. Wash. Apr. 26, 2017) (following *Lewis v. Clarke* to find no jurisdictional bar based on sovereign immunity).

[11] *Eclectic Properties East LLC v. Marcus & Millichap Co.*, 751 F.3d 990, 997 (9th Cir. 2014).

[12] *Apache Tribe of Oklahoma v. Brown*, 966 F. Supp. 2d 1188, 1196 (W.D. Okla. 2013).

[13] Although dismissal is proper for failure to plead with sufficient specificity under Rule 9(b) or failure to state a claim under Rule 12, the court may provide the complaining party the opportunity to amend the pleadings to comply with the applicable standards. See *Krainski v. Nev. ex rel. Bd. of Regents of Nev. Sys. of Higher Educ.*, 616 F.3d 963, 972 (9th Cir. 2010) (dismissal with prejudice is "improper unless it is clear, upon de novo review, that the complaint could not be saved by any amendment.").

[14] *Miccosukee Tribe of Indians of Florida v. Cypress*, 814 F.3d 1202 (11th Cir. 2015) (holding when the underlying allegations assert claims that are akin to fraud, the heightened pleading standards apply to the RICO claims); *Perkumpulan Investor Crisis Ctr. Dressel-WBG v. Regal Fin. Bancorp, Inc.*, 781 F. Supp. 2d 1098, 1108 (W.D. Wash. 2011).

[15] *Perkumplan* at 1108.

[16] *Id.* at 1109 (emphasis added).

[17] *Apache Tribe of Oklahoma v. Brown*, 966 F. Supp. 2d 1188 (W.D. Okla. 2013) (granting motion to dismiss on basis that tribe failed to plead with requisite particularity claim that tribal member, law firms, attorneys, and bank committed mail and wire fraud by providing Interior Department with false communications and representations, where tribe did not identify any particular communication with Department nor means of communication, and did not identify who made or who received communications).

[18] *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007).

[19] See *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1990) (holding dismissal under 12(b)(6) can be based on the lack of a cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal theory); *Birdnecklace v. Steele*, 2008 WL 1766720, at *6 (D.S.D. Apr. 11, 2008) (dismissing plaintiff's RICO claims under FRCP 12(b)(6) upon failure to show a sufficient connection between alleged RICO predicate acts and claimed damages).