

DOCKET NO. 07-4046 (CMD)

**UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT**

**IN RE: INSURANCE BROKERAGE
ANTITRUST LITIGATION
(MDL Docket No. 1663)**

**BRIEF OF *AMICUS CURIAE* NATIONAL ASSOCIATION OF
SHAREHOLDER AND CONSUMER ATTORNEYS (NASCAT) IN
SUPPORT OF APPELLANTS
(REQUEST FOR ORAL ARGUMENT)**

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INTRODUCTION

The National Association of Shareholder and Consumer Attorneys (NASCAT), by the undersigned counsel and pursuant to Fed. R. App. P 29 and Third Circuit LAR 29.1, hereby file their *Amicus Curiae* Brief on behalf of Appellants.¹

For the reasons stated herein, NASCAT respectfully submits that this Court should reverse the decision of the district court dismissing with prejudice Appellants' claims against Appellees alleging violations of the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §§ 1961-1968. *In re Ins. Brokerage Antitrust Litig.*, 2007 WL 2892700 (D.N.J. Sept. 28, 2007); A. 185-257. In this brief, NASCAT focuses its arguments on Appellants' Issue Nos. 4, 5 and 6, which concern the sufficiency of Appellants' RICO "enterprise" allegations. Appellants' Brief at 2-3.

REQUEST FOR PERMISSION TO PARTICIPATE IN ORAL ARGUMENT

Pursuant to Fed. R. App. P. 29(g), NASCAT's counsel respectfully seeks this Court's permission to participate in oral argument in this case. This appeal raises significant issues about the meaning and scope of RICO and NASCAT's counsel believe that they "may provide important assistance to" this Court because

¹ As set forth in NASCAT's Unopposed Motion Seeking Extension of Time to File *Amicus Curiae* Brief on Behalf of Appellants, filed in this Court on Feb. 25, 2008, counsel for Appellants and Appellees consented to the filing of this brief.

they have “particular expertise not possessed by any party to the case.”

Neonatology Assocs., P.A. v. Comm’r of Internal Revenue, 293 F.3d 128, 132 (3d Cir. 2002) (citation omitted); *see also Mass. Food Ass’n v. Mass. Alcoholic Bevs. Control Comm’n*, 197 F.3d 560, 567 (1st Cir. 1999) (“[A] court is usually delighted to hear additional arguments from able amici that will help the court toward right answers, and the amici can easily seek ... time to participate in oral argument.”) (citing Fed. R. App. P. 29(g)).

Three of the six issues presented in this appeal concern Appellees’ liability to Appellants for RICO violations. Appellants Br. at 2-3. Collectively, the undersigned attorneys have briefed and argued four RICO cases to the U.S. Supreme Court. *See, e.g., Anza v. Ideal Steel Supply Corp.*, 547 U.S. 451 (2006) (Roddy); *Humana, Inc. v. Forsyth*, 525 U.S. 299 (1999) (Blakey); *National Org. for Women, Inc. v. Scheidler*, 510 U.S. 249 (1994) (Blakey); *Holmes v. Securities Investor Protection Corp.*, 503 U.S. 258 (1992) (Blakey). The undersigned counsel are the authors (or co-authors) of a two-volume treatise,² as well as numerous law review articles concerning civil RICO litigation, including G. Robert Blakey & Kevin P. Roddy, *Reflections on Reves v. Ernst v. Young: Its Meaning and Impact on Substantive, Accessory, Aiding and Abetting and Conspiracy Liability Under RICO*, 33 AM. CRIM. L. REV. 1345-1702 (1996), cited

² See Kevin P. Roddy, RICO IN BUSINESS AND COMMERCIAL LITIGATION (Shepard’s/McGraw-Hill, Inc. 1991 & Ann. Supps.).

with approval by this Court in *Smith v. Berg*, 247 F.3d 532, 536-37 nn. 7-8 (3d Cir. 2001), a decision concerning civil RICO conspiracy liability.³ Professor Blakey was the Chief Counsel of the Subcommittee on Criminal Laws and Procedures of the U.S. Senate in 1969-1970, when the Organized Crime Control Act of 1970 (including RICO) was processed. He has been described as “the acknowledged author” of the RICO statute. *Roma Const. Co. v. aRusso*, 96 F.3d 566, 577 n.6 (1st Cir. 1996) (citation omitted). For these reasons, NASCAT believes that it should be permitted to participate in oral argument before this Court.

STATEMENT OF INTEREST OF *AMICUS CURIAE*

In accordance with Fed. R. App. P. 29(c)(3), NASCAT states that it is a nonprofit membership organization whose member law firms litigate antitrust, commercial, consumer protection, employee benefit, environmental protection, pension and securities fraud claims in federal and state courts. NASCAT's members represent victims of corporate abuse, schemes to defraud and white-collar criminal activity. In civil actions, NASCAT's members not only secure compensation for victims, but also deter wrongdoers, modify corporate behavior, and improve access by victims to justice. NASCAT's members advocate the enactment and enforcement of state and federal laws to prevent wrongful,

³ See also *United States v. Riccobene*, 709 F.2d 214, 220 (3d Cir. 1983) (citing G. Robert Blakey, *The RICO Civil Fraud Action in Context: Reflections on Bennett v. Berg*, 58 NOTRE DAME L. REV. 237, 249-280 (1982)), overruled on other grounds by *Griffin v. United States*, 502 U.S. 46 (1991).

fraudulent, and manipulative business practices, and its members are particularly interested in civil liability under RICO and corresponding state statutes, because its members represent the victims in civil RICO actions.⁴

ARGUMENT

A. **The District Court's Decision In This Case Should Be Reversed Because It Failed To Adhere To This Court's Well-Settled Precedents Authorizing RICO Plaintiffs To "Identify" The "Enterprise(s)" In Their Complaint**

We agree with Appellants that the court below failed to follow this Court's precedents applying the liberal pleading standards of Fed. R. Civ. P. 8(a) to allegations in a civil complaint identifying the members of an association-in-fact RICO "enterprise." Appellants' Br. at 75-77. We agree with Appellants that in dismissing their RICO claims, the district court failed to apply well-established standards for assessing a plaintiff's pleadings under Rules 8 and 12 of the Federal Rules of Civil Procedure. *Id.* at 75; *see, e.g., Rose v. Bartle*, 871 F.2d 331, 355 (3d Cir. 1989) ("we will review the RICO dismissals under the Rule 12(b)(6) standard").

⁴ In the Supreme Court, NASCAT has filed (or will shortly file) *amicus curiae* briefs in seven civil RICO cases: *Bridges v. Phoenix Bond. & Indem. Co.*, No. 07-210 (to be filed Mar. 19, 2008); *Mohawk Indus., Inc. v. Williams*, 547 U.S. 516 (2006); *Anza v. Ideal Steel Supply Corp.*, 547 U.S. 451 (2006); *Cedric Kushner Promotions, Ltd. v. King*, 533 U.S. 158 (2001); *Klehr v. A.O. Smith Corp.*, 521 U.S. 179 (1997); *Reves v. Ernst & Young*, 507 U.S. 170 (1992); *Holmes v. Securities Inv. Protection Corp.*, 503 U.S. 258 (1992).

We begin with familiar concepts. Section 1962(c) of RICO makes it “unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise’s affairs through a pattern of racketeering activity....” 18 U.S.C. § 1962(c). As the district court recognized (A. 197), in order to plead a violation of § 1962(c), RICO plaintiffs must allege (1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity. *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 496 (1985); *Lum v. Bank of America*, 361 F.3d 217, 223 (3d Cir. 2004). The necessary elements for a criminal RICO conviction for violations of § 1962(c) are the same. *See United States v. Irizarry*, 341 F.3d 273, 285 (3d Cir. 2003); *United States v. Console*, 13 F.3d 641, 652-653 (3d Cir. 1993).

As set forth below, under controlling and persuasive decisions issued since 1981 by the Supreme Court, this Court and district courts within this Circuit, Appellants were only required to “identify” the members of the alleged association-in-fact enterprises in a manner consistent with Rule 8(a) of the Federal Rules of Civil Procedure. In this case, however, the district court ignored controlling precedent and formulated an incorrect, result-oriented pleading standard, which it then concluded that Appellants could not satisfy.

