

What We Need to Know About RICO

Federal and state racketeering laws are a double-edged sword that prosecutors would do well to consider before using — but that doesn't mean the Catholic Church shouldn't be concerned.

The Diocese of Buffalo, whose St. Joseph Cathedral is shown downtown, has had a RICO suit filed against it. (photo: CiEll / Shutterstock.com)

Joseph O'Brien Nation August 27, 2019

The lawsuits are flooding into New York state, after it opened a one-year window in the statute of limitations for abuse survivors to file suit against individuals and institutions accused of abuse crimes — and the new lawsuits filed in the Empire State include one utilizing the Racketeer Influenced and Corrupt Organizations (RICO) Act.

On Aug. 14, 22 plaintiffs filed a federal RICO suit against the Diocese of Buffalo, the Society of Jesus, parishes, high schools and others for an alleged “pattern of racketeering activity” that allowed for and hid clerical sexual abuse. Both current Bishop Richard Malone and his predecessor, Bishop Edward Kmiec, are named personally in the lawsuit.

Among the plaintiffs, who are not named, are several alleged victims of clerical sexual abuse. The lawsuit alleges specific instances of sexual abuse by priests and claims that the diocese failed in its duty of care toward children by allowing abusive priests to have contact with minors through parishes and schools.

Calling the diocese and affiliated organizations an “association in fact” for the purposes of federal racketeering laws, the suit alleged “common purpose” in “harassing, threatening, extorting and misleading victims of sexual abuse committed by priests” and of “misleading priests’ victims and the media” to prevent reporting or disclosure of sexual misconduct.

The suit claims that the various diocesan persons and agencies are legal “alter egos” for the diocese, completely under diocesan control, and were used to “transfer, assign, commingle and conceal assets” totaling \$90 million, and that the diocese violated federal racketeering laws by using the internet and mail to “deceive the public about the illicit sexual conduct rampant within the Diocese of Buffalo.”

As the RICO lawsuit is being brought by federal law, it does not directly stem from the New York law opening the one-year window. But it was filed at almost the same time as the window went into effect, on Aug. 15.

RICO and the Church

To many observers, it seemed startling that the Diocese of Buffalo would be the subject of a RICO lawsuit. But using this 1970 federal law against the Church is nothing new.

Plaintiffs have in the past used RICO in civil suits against the Catholic Church on numerous occasions in cases related to sexual abuse and the resulting cover-ups. Each case, however, has either been hung up in the courts or resulted in either dismissal or settlement out of court.

Passed into law in 1970, RICO was designed primarily to fight crimes committed by organized crime, as well as corporations and nonprofit organizations. Churches fall into that last category. The law has both a criminal and civil component, and most experts agree that it is easier to win on civil grounds.

A civil case — which, unlike a criminal case, rewards triple damages — must establish that a crime stated in the federal RICO statutes was committed (such as gambling, murder, kidnapping, arson, drug dealing, bribery); that there is a pattern of criminal activity; and that the case is filed within a four-year statute of limitation.

In New York, any racketeering charges, according to Geoffrey Nathan, a lawyer writing for the Federal Charges website, fall under federal statutes.

"The Racketeer Influenced and Corrupt Organizations (RICO) Act defines racketeering in New York as a federal crime," he writes, "and the consequences for those convicted of this crime can include a variety of fines, the relinquishment of profits and property, and prison sentences."

Among the most visible RICO cases against the Church in the U.S. related to sexual abuse are a 1994 suit brought against the Diocese of Camden, New Jersey, and a 2008 suit brought against the Diocese of Norwich, Connecticut. In the Camden case, charges of conspiracy were brought against the diocese due to incidents of sexual abuse by 30 diocesan priests. In the Norwich case, conspiracy charges were brought against the diocese, which was accused of covering up for six priests of the diocese accused of sexual abuse. In both cases, however, the dioceses settled out of court (Camden in 2003 and Norwich in multiple settlements at various times) for an unspecified amount.

In a well-reported 2002 case, civil RICO charges were leveled at Bishop Anthony O'Connell, following him through the three dioceses that he served — as a priest for the Diocese of Jefferson City, Missouri; a bishop of the Diocese of Knoxville, Tennessee; and a bishop of the Diocese of Palm Beach, Florida (replacing Bishop Joseph Symons after he had admitted to sexually abusing boys). Bishop O'Connell was forced to resign as bishop of Palm Beach after he also admitted that he had molested two young men.

These dioceses were included in the suits under the RICO law after they were charged with covering up the bishop's and other clerics' behavior. This case was dismissed on appeal in 2004 because the plaintiff's claim had exceeded the statute of limitations.

More recently, in November 2018, coinciding with the U.S. bishops' fall meeting, two federal RICO suits on civil grounds were brought against the U.S. Conference of Catholic Bishops for conspiring to cover up sexual abuse in U.S. dioceses — one in Washington, D.C., federal court and one in Minnesota federal court. These cases are still pending.

Mobs and Pews

One person who knows a good deal about RICO is Robert Blakey, a retired Notre Dame law professor and a Catholic, who wrote the original draft of the 1970 federal RICO law.

"The plaintiffs' description of the enterprise in the Buffalo case is probably valid, but they're skating on thin ice in their articulation of the alleged predicate offenses," that is, the specific crimes allegedly committed, he said.

Blakey told the Register that the RICO strategy used against the Church is the same employed against the mafia, in which the government sought to indict the invisible members of organized families through racketeering charges. It has since been used against corporations and other legitimate enterprises, Blakey noted. In a similar way, prosecutors are using RICO to bring charges against U.S. bishops for the crimes committed by their priests.

"But it's hard to show that a bishop, not in theory but in practice, supervises the parish priest," Blakey told the Register. "The priest is practically a king in his own realm. The bishop does not supervise a priest in the same sense that the head of a corporation is ultimately responsible for what his employees do. So it would be hard to make a case for what's called vicarious liability."

Blakey also said that RICO is often used as leverage for settlement rather than as a genuine attempt to bring a racketeering suit to court.

"Lawyers bring a RICO case to court because of the sense of terror that a RICO suit brings," he said. "Anybody who litigates doesn't want to litigate against triple damages — it's just too high."

"The lawyers who would defend against a RICO case usually don't know anything about the particular details of the law," he added, noting that for this reason defendants are easily intimidated into settlements.

Those lawyers bringing the cases often don't know any better, he added, noting: "One of the two federal cases brought against the Church in 2018 is so riddled with errors it's likely to be withdrawn."

Blakey also told the Register that it's a "dirty little secret" that state RICO suits are easier to prosecute than federal suits. According to Blakey, there are 35 states with RICO statutes (not including New York), and while they differ in details, generally most state RICO statutes are better equipped to target churches.

In fact, that's exactly the tack that some state attorneys general are taking. As AP reported in June, Michigan Attorney General Dana Nessel is also considering using the Wolverine State's RICO laws against the Church.

However, according to Blakey, the will to prosecute on the part of states remains a hurdle in itself.

"It takes incredible intestinal fortitude for an attorney general, state prosecutor or U.S. attorney to investigate the Church, and then not only insist on criminal punishment," but also bring civil charges against the Church. "People are scared to death of the fact that members of churches vote."

To ward off future RICO suits, Blakey told the Register, the best defense bishops have against RICO is transparency and accountability.

"Supervise your priests closely," he said. "The best defense for a bishop against RICO is to show he hasn't done anything wrong. He's not responsible for the unknowns that occur; but all the knowns that occur he should act on vigorously."

Scheidler v. NOW

According to Blakey, the federal courts have yet to decide a case in favor of sexual-abuse victims based on RICO. In part, this effort has been made more difficult after the 2006 landmark Supreme Court decision *Scheidler v. National Organization of Women (NOW)*.

In this decision, the court ruled unanimously that Pro-Life Action Network (PLAN) and its founder, Joseph Scheidler, could not be found guilty according to RICO's extortion statutes because the group was not seeking monetary gain through its protests.

"The plaintiff's theory of Scheidler was that extortion included mere coercion — trying to force someone to do something they didn't want to do," said Blakey, who argued an earlier iteration of the case, *NOW v. Scheidler*, before the Supreme Court in 1994. (The court did not issue a judgment at that time.)

"But the abortion demonstrators didn't want your property, which is extortion," Blakey said, explaining why the Supreme Court eventually ruled in Scheidler's favor. "The demonstrators only wanted to change what you were doing, which could be argued as a form of coercion. But coercion is not in RICO."

Joseph and his wife, Ann Scheidler, both Catholics, told the Register that, like prosecutors today using RICO against the Church, NOW used RICO as a way to send a message.

"The abortionists needed a symbol, a scapegoat, somebody doing the things making it difficult for them to carry on their business of aborting babies," Joseph Scheidler told the Register. "We'd go to the clinics and talk the women out of abortions and the abortionists knew they had to stop that. So if we were charged with RICO and got a great penalty, it might cut down on that sort of activity — protesting clinics. They wanted to use PLAN as a symbol for why the abortion industry was losing business."

However, Ann Scheidler said, the Church may have a more difficult time defending itself against a RICO suit than PLAN had.

"In our case, NOW was trying to claim that Joe's rhetoric in motivating people to get out and fight abortion was causing acts of violence against clinics and abortionists," she said. "But in the Church's case, there are actually individual cases of priests and bishops guilty of crimes. The question is whether the Church itself is any more responsible for causing these crimes than Joe was for the crimes committed against abortionists."

In defending against RICO, the Church could learn from the Scheidlers' case, they told the Register, by appealing to other institutions that may also face RICO scrutiny, such as public schools and the Boy Scouts of America, which also have a record of sexual misconduct among its members.

"We were ultimately successful," Ann Scheidler told the Register, "because the courts realized that if lawyers are successful in bringing RICO against PLAN, it can also be used against the darlings of the left. The anti-war and anti-fur people, for instance, submitted amicus briefs to the court on our behalf because they recognized this law could backfire against them, too."

According to Joseph Scheidler, during arguments being heard in their case, Justice Ruth Bader Ginsberg — "who was certainly no friend of the pro-life movement" — sided with PLAN because she recognized the potentially dangerous precedent their case could set.

"During the arguments, Justice Ginsberg said that if we were guilty of RICO then so was Martin Luther King," he said.

Legal Debate

The suitability of RICO as a legal strategy remains debatable among legal experts. A 2003 article in the *Washington Law Review*, written by Laura Russell, a law student at the time, notes that state RICO laws "may prove to be adept tools to prosecute the Church and its decision-makers."

While Russell was writing before the 2006 *Scheidler v. NOW* decision, her reasoning remains current among state attorneys general who have sought to bring the law to bear against the Church's misdoings.

Russell notes that many state RICO statutes "afford a lengthy period of time to prosecute offenders" and "do not mandate a financial motive and can therefore be used against nonprofit corporations like churches."

On the other hand, as Nicholas Mancini notes in a 2002 article for the *Roger Williams University Law Review*, because sexual abuse as a form of personal injury is not included as a crime within the parameters of RICO, lawyers face nearly insurmountable hurdles in bringing RICO suits against the Church.

Mancini, a law student at the time, asserted that "if the core of the complaint is the physical or emotional injury sustained ... their suits will likely face dismissal."

The most successful route for lawyers, Mancini notes, is one that alleges "an injury to business or property sustained as a result of the actions of the Church hierarchy or in connection with alleged pay-offs or bribery attempts in the context of clergy sexual abuse. ... However, precedent, along with the need to curtail RICO's liberal interpretation, may influence courts to deny the validity of such injuries as emanating from what are, for all intents and purposes, purely physical or emotional injuries." Mancini also argues that other more potentially successful legal strategies — such as making a case for negligent hiring and supervision on the part of bishops — are already available to make a case against the Church. (RICO requires intentional conduct not negligent conduct.) He also warns that the overuse of RICO "might represent a 'point of no return' for the statute" in such a way that any organization or corporation can be subject to its penalties. (Corporations are already subject to RICO.) It was for this reason that the Scheidlers discovered several strange bedfellows writing amicus briefs on their behalf.

Recalling the history of the 1970 law, Mancini writes, "RICO was enacted as part of Congress' war against organized, underworld crime families. Although the statute's broad language and construction has resulted in its application outside the sphere of organized crime, there is strong evidence in the legislative history of the statute that such application was not intended."

Blakey told the Register, however, that such liberal application of RICO has always been present in the law.

"There may be a liberal interpretation on the part of lawyers; nevertheless, the statute itself requires liberal interpretation by the courts," he said.

No Church Exemption

According to Blakey, though, a wide application of RICO was present from the creation of the law.

He pointed to the 1989 Supreme Court decision *H.J. Inc. v. Northwestern Bell*, which rejected any attempt to narrow the law's application strictly to organized crime since, as the case brief notes, "the language is clearly very broad in RICO," regardless of the original intention behind passing the bill into law.

For this reason, the Church is a viable target for lawyers bringing RICO suits against the Church.

"It makes no difference in RICO if your collar is open or if you wear a tie," Blakey told the Register, referring to organized crime and white-collar crime, "and now it also doesn't make any difference if your collar is turned around — there is no exemption for a church organization."

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Catholic News Agency contributed to this report.