

IN THE CIRCUIT COURT OF THE FIFTEENTH
JUDICIAL CIRCUIT, IN AND FOR
PALM BEACH COUNTY, FLORIDA

**THE STATE OF FLORIDA, LAWTON M. CHILES,
JR., Individually and as GOVERNOR OF THE STATE
OF FLORIDA, DEPARTMENT OF BUSINESS AND
PROFESSIONAL REGULATION, and THE AGENCY
FOR HEALTH CARE ADMINISTRATION,**
Plaintiff(s),

v.

THE AMERICAN TOBACCO COMPANY, et al,
Defendant(s).

Case No. CL 95-1466 AH

December 13, 1996

**ORDER DENYING DEFENDANTS' MOTIONS TO
DISMISS COUNTS FIVE THROUGH EIGHT OF THE
THIRD AMENDED COMPLAINT AND ORDER
DENYING DEFENDANTS' MOTION FOR
CLARIFICATION OR RECONSIDERATION OF
THIS COURT'S RULING OF DECEMBER 6, 1996,
ON COUNT FOUR**

and

**ORDER ON DEFENDANTS' MOTION TO DISMISS
COUNT IV OF THE THIRD AMENDED COMPLAINT**

THIS CAUSE came on to be heard before me on the 6th day of December, 1996 upon the Defendants' Motions to Dismiss Counts Four through Eight of the Third Amended Complaint.

At the hearing in open Court on December 6, 1996 the Court ruled as to the motion concerning Count Four of the Third Amended Complaint. By a separate Order entered by the Court on December 11, 1996, the Court has ordered portions of Count Four stricken (preserving certain evidentiary considerations) and upheld a civil action for damages under Florida Statute 817.41. The Defendants' Motion for Clarification or Reconsideration of this Court's Ruling of December 6, 1996, on Count Four be and the same is hereby DENIED. The Court hereby ratifies and re-affirms its ruling as to Count Four of the Third Amended Complaint made in open Court on December 6, 1996 and in its December 11, 1996 Order. It is further

ORDERED AND ADJUDGED the Defendants' Motions to Dismiss Counts Five through Eight of the Third Amended Complaint be and the same are hereby DENIED. It is further

ORDERED AND ADJUDGED that all remaining Defendants in this cause shall answer Counts Four through Eight of the Third Amended Complaint on or before December 21, 1996 together with all other pleadings and/or other documents agreed to in open Court to be served on December 21, 1996 regardless of the fact that December 21, 1996 falls on a Saturday. All original pleadings shall be filed with the Clerk of Court on Monday, December 23, 1996.

By entering this Order the Court is permitting the State of Florida to maintain civil actions for violations of the Florida RICO (Racketeer Influenced and Corrupt Organization) Act, Chapter 895, Florida Statutes. The Court finds the causes of action alleged in Counts Five through Eight are independent and free-standing causes of action not based upon Chapter 409 of the Florida Statutes as amended in the 1994 Act. However, recoverable damages *may* consist, in part, of damages similar to those sought under the Act in separate counts.

The Defendants have moved to dismiss Counts Five through Eight for four separate reasons.

First, the Defendants argue that no proximate cause can be shown or alleged to sustain civil actions by the State under Florida's RICO Act. Second, the Defendants argue that no detrimental reliance has been alleged by the State (or can be alleged by the State). Third, the Defendants argue that they cannot be an "enterprise" within the meaning of the Florida RICO Statute. Finally, the Defendants argue that the State can show no damage to a property interest.

The parties have extensively briefed the issues concerning Florida's RICO Act. The Court finds that it is clear under the case law cited that a *private* party suing for relief under Florida's RICO Act must allege and prove proximate cause *and* detrimental reliance when seeking civil damages under the Act on a fraud theory. It is equally clear that when the State or Government *prosecutes* under Florida's RICO Act for *criminal* violations that detrimental reliance need not be alleged and/or proven to convict even when fraud forms the basis for the underlying acts.

What is unclear and not specifically resolved by the cases cited in the memoranda submitted is whether or not the State or Government must allege and/or prove detrimental reliance when the *State* (not a

private party) brings an action for *civil* damages under Florida's RICO Act. Analogies have been argued but this Court can find no case directly on point.

Pelletier v. Zweisel, 921 F.2d 1465 (11th Cir. 1991) is the extensive fifty-eight page opinion of the 11th Circuit dealing with RICO. The pertinent sections of *Pelletier* as set forth below form the basis of this Court's conclusions.

...Private litigants can recover for racketeering injuries under 18 U.S.C. § 1964 (c), but their injuries must "flow from the commission of the predicate acts."...This means that a *private* plaintiff who wants to recover under civil RICO must show some injury flowing from one or more predicate acts. A plaintiff cannot allege merely that an act of racketeering occurred and that he lost money. He must show a causal connection between his injury and a predicate act. If no injury flowed from a particular predicate act, no recovery lies for the commission of that act.... See *Pelletier* at p. 1497. [Emphasis added.]

But the *Pelletier* goes on to state:

...A scheme to defraud need not be carried out to constitute a violation of the mail and wire fraud statutes. These statutes punish unexecuted, as well as executed, schemes...This means that the government can convict a person for mail or wire fraud even if his targeted victim never encountered the deception - or, if he encountered it, was not deceived. Instead, the court uses a reasonable person test to determine whether, if the scheme had been executed, the intended victim would have acted on the misrepresentation: were the misrepresentations "reasonably calculated to *deceive* persons of ordinary prudence and comprehension..." This does not mean, however, that we look at a defendant's actions in the abstract: as the words "deceit" and "scheme" imply, the government must show, not only that the defendant's actions would have deceived a reasonably prudent person, but also that the defendant had the requisite mens rea. As this court has held, the defendant must have "had a 'conscious knowing intent to

defraud"....This mens rea element dictates, in practice, that the perpetrator of the scheme *anticipate* reliance. A defendant cannot possibly intend to deceive someone if he does not believe that his intended "victim" will act on his deception. Mail and wire fraud, just like common-law fraud, thus entail "an intention to induce the [victim] to act or refrain from action in reliance upon the misrepresentation...." When a private plaintiff relies on a violation of the mail or wire fraud statutes as a reeducate act for civil RICO, he faces an additional hurdle before he can obtain recovery: he must show not only that the mail or wire fraud statutes have been violated, but also that he has suffered injury as a result of the violation. Section 1964 (c) provides civil remedies to those persons who are injured "by reason of" racketeering activity. As we note above, when the government prosecutes the defendant under the mail and wire fraud statutes, it is not required to show that the intended victim was actually deceived and suffered injury....See *Pelletier* at pp. 1498-1499.

Therefore, for the purposes of pleading and proving a civil action for RICO brought by the *State* - as opposed to a civil action for RICO brought by a *private* party - the Court will require the same standard of pleading and proof required in criminal prosecutions by the State unless and until Florida's RICO statute is interpreted by a higher Court to mean otherwise.

The State has alleged and will be required to prove criminal intent by the Defendants. The Defendants must be proven to have made misrepresentations reasonably calculated to deceive persons of ordinary prudence and comprehension intending to induce these victims to act or refrain from acting due to these misrepresentations. To require the State in a civil action to allege and prove detrimental reliance as if it were a private party would negate the ability of the State to obtain any civil relief for racketeering activity based upon fraud. In essence, the State would be permitted to prosecute, obtain convictions, and seek draconian criminal penalties where private parties were injured without being able to obtain substantial civil damages through a separate civil RICO action when the State itself is alleged to have been injured.

In this regard it is also interesting to note Florida Statute 772.14 which reads:

Estoppel of Defendant. A final judgment or decree rendered in favor of the state in any criminal proceeding concerning the conduct of the defendant which forms the basis for a civil cause of action under this chapter, *or in any criminal proceeding under chapter 895*, shall estop the defendant in any action brought pursuant to this chapter as to all matters as to which such judgment or decree would be an estoppel as if the plaintiff had been a party in the criminal action. [Emphasis added.]

When read together with Florida Statute 772.102 (1)(a)(20), Florida Statute 772.103, and Florida Statute 772.104, it appears that if the State were to obtain a conviction for a *criminal* violation of Florida's RICO statutes that this would in and of itself estop a defendant from defending a *civil* RICO action brought thereafter. In essence, the State could prove *criminal* RICO, obtain a conviction, and obtain a *civil* remedy for a private party by having proven criminal intent without the requisite detrimental reliance required by *private* parties in *private* civil actions.

As the Florida Supreme Court stated in *Staff Tyme, Inc. v. Cohen*¹, 659 So. 2d 1064 (Fla. 1995):

Section 772.14 abrogates the requirement of mutuality of parties in the context of *civil* actions brought by crime victims under chapter 772...The statute abrogates the requirement by allowing a plaintiff in a chapter 772 *civil* suit to use as an estoppel a "final judgment or decree rendered in favor of the state" in a prior criminal proceeding that *concerned the conduct in issue* in the civil action....*See Starr Tyme, Inc.* at p.1067. [Emphasis added.]

The case at bar is certainly not one alleging "garden variety" business fraud. In its Third Amended Complaint the State alleges a parade of horrors that would seem to make out a case for the "mother of all RICO actions." The State will be required to prove by clear and convincing evidence the criminal and evil intent it has alleged. However, if the State can prove its case, the alleged injuries and damages sought would dwarf any grievous damages and injuries alleged to have flowed from Defendants' alleged enterprises and alleged patterns of racketeering activity are the

type for which the Legislature intended the Florida RICO Act to be applied. What is alleged is so far-reaching and all encompassing that if liability is proven, application of RICO civil relief and recovery would undoubtedly be warranted. No cocaine cartel, gambling empire, or white-collar scheme has even approached the damage allegedly done to the State as alleged in the Plaintiffs' case. However, recognizing the stigma an alleged RICO violation carries with it, the Court reminds all parties that *allegations* made and clear and convincing *proof* are two very different things.

As to the remaining attacks by the Defendants upon the State's civil RICO claims the Court finds the State has sufficiently pled and alleged Florida Rico violations to withstand the Defendants' Motions to Dismiss. Issues relating to proximate cause may be argued again on Motions for Summary Judgment.

Holmes v. Securities Investor Protection Corporation 503 U.S. 258, 117 L.Ed.2d 532, 112 S.Ct. 1311 (1992) (the "SIPC" case) discusses the proximate cause issue at length.

First, this Court notes that *SIPC* dealt with no State or Government cause of action. Once again, only private parties were involved. Second, "non-purchasing customers" and "SIPC" never dealt directly with the violator. In our case allegations include direct dealings between the Defendants and the Plaintiffs or their agents and regulators.

Finally, the Court notes the language of Justice Scalia in his concurring opinion:

...The ultimate question here is statutory standing: whether the so-called *nexus* (mandatory legalese for "connection") between the harm of which this plaintiff complains and the defendant's so-called predicate acts is of the sort that will support an action under civil RICO...One of the usual elements of statutory standing is proximate causality. It is required in RICO...because it has always been the practice of common-law courts (and probably of all courts, under all legal systems) to require as a condition of recovery, unless the legislature specifically prescribes otherwise, that the injury have been proximately caused by the offending conduct...Yet another element of statutory standing is compliance with what I shall call the "zone-of-interests" test, which seeks to

¹ No relation to the undersigned Judge.

determine whether, apart from the directness of the injury, the plaintiff is within the class of persons sought to be benefited by the provision at issue...It seems to me obvious that the proximate-causes of action created by 18 U.S.C. 1964 are not uniform, but vary according to the nature of the criminal offenses upon which those causes of action are based...It will vary with the underlying violation....See *Holmes* at pp. 1327-1328.

Finally, the Defendant has raised concerns about the complexity of the case, the August 4, 1997 trial setting, discovery problems, etc. if the Court permits the Third Amended Complaint to stand with Counts Five through Eight intact.

First, the Court notes that the State's intention to add RICO counts has been known to the defense since early October, 1996 at the latest, i.e., at least ten months before the scheduled trial date.

Second, this Court has signed more orders in this one case admitting lawyers pro hoc vice than in all the Court's prior cases in all divisions put together over the past twenty years. The number of lawyers working on this one case for the defense (and for the State) is mind-boggling. To claim a lack of ability to prepare between now and August, 1997 strains this Court's credulity.

Third, for several months all parties have been diligently preparing for the January 24, 1997 hearing on the State's motion to claim punitive damages on its negligence and/or strict liability claims. Record evidence must be proffered to the Court on January 24, 1997 to sustain any claims for punitive damages. The type of evidence required must be similar, if not the same, evidence required to sustain the Florida RICO claims, i.e., criminal-type activities. In essence, in preparing for the January 24, 1997 hearing, the defense will be discovering the State's RICO case as well.

The concerns expressed by the defense have been considered by this Court but are found to be less significant than the right and ability of the State to present all the facts and legal theories arguable based upon those facts.

However, the Court will permit *no further amendments* to the Third Amendment Complaint. It is

ORDERED AND ADJUDGED that the trial of this case shall proceed on the Third Amended Complaint as set forth in this Order beginning August 4, 1997 subject to Motions for Summary Judgment to

be heard by the Court during the week of June 30, 1997 or any earlier date agreed to by the parties.

ORDER ON DEFENDANTS' MOTION TO DISMISS COUNT IV OF THE THIRD AMENDED COMPLAINT

December 11, 1996

This cause came on for hearing on Defendants' Motion to Dismiss Count IV of the Third Amended Complaint. After due consideration of the memoranda and argument of counsel and being fully advised, it is ORDERED:

1. Defendants' Motion to Dismiss Count IV directed to plaintiffs' claims based upon violation of Section 817.41, Florida Statutes, is DENIED.

2. Defendants' Motion to Dismiss Count IV directed to the other alleged statutory violations (chapters 400 and 501 and Sections 859.06 and 823.01, Florida Statutes) is GRANTED. Such dismissal is without prejudice to plaintiffs' right to raise such alleged statutory violations as proof of negligence in further proceedings herein.