RICO Allegations in Consumer Secured Transaction Cases

Alvin C. Harrell, Oklahoma City University School of Law

Available at: https://works.bepress.com/alvin_harrell/234/
The United States Courts of Appeals' decisions on this issue have evolved, from a simplistic (and clearly erroneous) conclusion that state law does not apply under section 547,31 to an also simplistic but contrary analysis,32 to a well reasoned and compelling analysis by the Tenth Circuit,33 and now back again to a simplistic analysis in Fitzgerald that ignores the applicable provision and basic structure of section 547.

In a sense the cases have come full circle. With an equal split among the circuits, decisions misconstruing the plain meaning of a federal statute, and adverse implications for an important and well developed body of state law,36 perhaps it is time for the United States Supreme Court to resolve the issue.

III. Certificate of Title “Nonperfection”

In Matter of Patterson,37 Patterson pledged her car to Spradlin as collateral for a loan from him. Patterson signed the title in blank and delivered it to Spradlin to hold until the loan had been repaid. Spradlin did not perfect his security interest by lien entry on the title certificate. When Patterson defaulted, Spradlin had the title to the vehicle transferred into his name as owner. Whereupon, Patterson filed bankruptcy, and the bankruptcy court found that Spradlin’s security interest was not perfected, as there was no lien entry on the title certificate, as required by the Alabama statute governing perfection of a security interest in a vehicle. (The Alabama statute is typical in this regard.) The court did not treat Spradlin having the vehicle registered in his name as being the “indubitable equivalent” of a lien entry; moreover, the court noted that even if it found Spradlin’s security interest to be perfected, the security interest would be subject to being set aside as a preference, as the transfer was made within the preference period.38

On the basis of Patterson, it can be argued that a secured party becomes unperfected when it transfers title to the vehicle from the debtor to the secured party. Among other things, the Patterson holding may invite bankruptcy filings by debtors in cases where the secured party transfers the certificate of title into its name preparatory to conducting a UCC section 9-504 repossession sale.

RICO Allegations in Consumer Secured Transaction Cases

By Alvin C. Harrell

Three recent consumer credit decisions involving Racketeer Influenced and Corrupt Organizations Act (RICO)4 allegations deserve note. Kenty v. Bank One, Columbus, N.A.5 was another of several recent cases attacking lenders for “force placing” collateral protection insurance when the debtor breaches his or her obligation to maintain such coverage.6 In Kenty the usual debtor allegations in forced placed insurance cases were rejected, but the Sixth Circuit concluded that the debtor’s fraud claim was sufficient to state a cause of action under RICO. This adds a dangerous new element to a possible trend towards criminalizing commercial and consumer contract disputes.4

Similarly, in Emery v. American General Finance, Inc.,7 Seventh Circuit Chief Judge Posner surprised many observers who had come to admire his consistency of analysis, by holding that the practice of “loan-flipping”8 could violate the

---

2. 67 F.3d 1237 (6th Cir. 1995).
5. 71 F.3d 1543 (7th Cir. 1995).
6. “Loan-flipping” occurs when a lender encourages a borrower to refinance his or her loans on a frequent basis, so as to incur (Continued on next page)
RICO statute even though the lender complied with all applicable statutory and case law requirements. In a dissenting opinion that one might have considered illustrative of Judge Posner's judicial philosophy, Judge Coffey pointed out that a RICO statute directed at organized crime is not a proper vehicle for bailing out a debtor from a bad bargain in an otherwise lawful transaction.

In response to Judge Posner's reasoning that an allegation of fraud is a sufficient basis for a RICO claim, Judge Coffey noted that in *Emery* there was no allegation of a single false statement in any of the correspondence or documents between the parties. Judge Posner's conclusion, that a failure to disclose information that is not required by law to be disclosed may violate RICO, represents a questionable foray into judicial policy-making, no matter how compelling the individual's predicament.

The third example in this trilogy of RICO decisions is actually a pair of cases, *Perino I* and *Perino III*. In *Perino I* the debtor alleged that resale of consumer chattel paper at a discount in a secondary market transaction constituted a fraudulent scheme and an illegal kickback in violation of the RICO statute. In this case the plaintiff alleged that the lender was a racketeering enterprise and that it violated the Mail Fraud Statute by purchasing consumer chattel paper at a discount to face value. The court rejected these allegations, noting that such discounts have long been customary in resales of debt instruments and that all required consumer disclosures were given. This decision led to *Perino II*.

The same debtor tried again in *Perino II*, claiming this time a violation of state bribery laws as the predicate act for a RICO claim. This claim was also rejected, on grounds that the state law in question did not provide for imprisonment for more than one year as required by RICO.

---


7. 1995 WL 177935, 1.


9. *For example, where such discounts may lead American taxpayers to pay higher interest rates for consumer debt, the issue of their legality is justifiable. See 1995 U.S. Dist. LEXIS 15864.


---

**Casenote: Field v. Mans**

By Stephanie Burke*

The United States Supreme Court has now spoken as to the level of creditor reliance necessary to except a debt from discharge under Bankruptcy Code section 523(a)(2)(A). Field v. Mans was a bankruptcy case on appeal from the United States Court of Appeals for the First Circuit. The creditors filed a complaint in the debtor's Chapter 11 case and sought to except their debt from discharge as a debt resulting from fraud. The bankruptcy court found for the debtor. On appeal, the United States District Court for the District of New Hampshire affirmed. The United States Court of Appeals for the First Circuit also affirmed. The United States Supreme Court reversed, in an attempt to provide some uniformity and clarification regarding the proper standard for exception from discharge due to fraud under Bankruptcy Code section 523(a)(2)(A). In June, 1987, the Fields sold their interest in certain real estate to a corporation controlled by the respondent Phillip Mans for $462,500. Mans supplied $275,000 toward the purchase price and personally guaranteed a $187,500 purchase money debt secured by a second mortgage on the property. The mortgage had a clause requiring the creditors' consent to any conveyance of the property during the term of the secured indebtedness. If Mans failed to gain consent, the entire unpaid balance on the note would become payable upon an unauthorized sale.