



**Garfunkel Wild**

# **Protecting Yourself From RICO Claims**

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# Introduction

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- During next 30 minutes, we are going to provide an overview of:
  - The Racketeer Influenced and Corrupt Organizations Act (RICO);
  - What RICO is and how it is used;
  - Steps you can take to keep yourself off an insurer's radar and hopefully out of a RICO lawsuit;
  - Steps to take if you find yourself on an insurer's radar; and
  - What to do if you find yourself named in a RICO case.

# What is RICO?

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- RICO can be used by federal prosecutors to bring criminal charges or by private parties to bring civil lawsuits for damages caused by racketeering activity
- Originally enacted to combat organized crime
- History of RICO use in civil context

# Elements of RICO

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- Under RICO, a plaintiff must prove the defendants:
  - participated in conduct;
  - of an enterprise;
  - through a pattern;
  - of racketeering activity (also called predicate acts, e.g., mail fraud/wire fraud); and
  - causing injury to plaintiff's business or property.
- Will touch on each of these during course of presentation

# Why is RICO Important?

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- Since about 2020, more than 300 civil RICO cases have been filed against medical providers and medical supply companies in Eastern District of New York alone.
- This number is growing as insurers have had some successes and become more emboldened.
- Cases can lump large groups of unrelated defendants into one case, including: doctors, medical practices, ASCs, DME companies, pharmacies, billing companies, personal injury law firms, collection firms, advertising companies, transportation companies, MRI facilities, etc.
- Often seen in worker's comp or no-fault context but can be brought by anyone – including major medical, peer review providers, DME companies, etc.
- Can have a ripple effect, e.g., Worker's Comp Board, hospital privileges, third party lawsuits.

# Why Do Insurance Carriers Like RICO?

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- Federal Court
  - Air of legitimacy
  - Stigma
- Cost effective – lump large groups into a single case
- Access to treble damages and joint and several liability – every defendant becomes liable for the conduct of each of the other defendants even if their participation is minimal
- Helps drive settlement
- Overall – it is the most bang for their buck!
- Never brought by itself – usually accompanied by RICO conspiracy claim as well as state law claims for fraud and unjust enrichment – best practice guidance discussed applies to any of these claims

# Risk Factors for Getting Yourself on an Insurer's Radar

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- Large volume of billing
- Changes in patterns
  - Sudden large increase in billing
  - Sudden change in services and/goods provided
  - Opening/closing practices in a “quick-hit” fashion
- Owner/provider only performing small percentage of services
- Operating from large number of medical clinics

# Risk Factors for Getting Yourself on an Insurer's Radar (cont'd)

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- Company you keep has a history of involvement in fraud schemes
- Lack of advertising
- Referral sources
- Paperwork
  - Medical reports
  - Billing submissions
- Same treatment/services for vast majority of patients



# How Do You Know if You Are on Their Radar?

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- A good way to avoid getting on the radar is to contact an attorney familiar with health care compliance and RICO considerations before starting a practice or forming a new entity – this will also help to ensure your business affairs are in order
  - This also makes things more economical in the long run if you do get a verification or EUO request later on
- Verification requests in lieu of payment
- Requests for examination under oath (EUO)
- Once these requests are made, your reimbursement payments will be frozen

# You Are on Their Radar, Now What?

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- Seems like easiest way to get paid is to comply with requests but easiest way is not always the best way – contact an attorney with experience defending EUOs and even better if they also defend affirmative RICO cases
- Prepare! Answers to EUO questions and post-EUO verification can result in getting named in a RICO suit alongside other providers
  - Work with attorney to prepare for EUO - review:
    - Offices
    - Leases
    - Employees
    - Services and/or goods billed for
    - Criteria for codes billed under
    - Paperwork
    - Financials
    - Billing
    - Referrals

# Common EUO Questions

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- How do you get your patients?
- Do you advertise for your services?
- What are the terms of your lease agreements? Amount of rent?
- Agreements with any service providers?
  - Billing companies
  - Transportation companies
  - Advertising/Marketing/Consulting companies
- Have appropriate certifications/qualifications?

# Post-EUO Verification

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- Insurer will request documents during post-EUO verification
- Will not be paid while these requests are pending
- Should not respond to certain requests
  - Bank records
  - Tax returns
  - K-1s/1099s/W-2s

# RICO Full Circle

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- Think of RICO fraud schemes as symbiotic relationships
  - Everyone benefits from the actions of everyone else – does not matter if you play a big role or a small role – if you play a role, you are part of the RICO enterprise and are just as liable
  - Clinic controllers control patients
  - Providers get access to patients by paying rent to clinic controllers
  - Clinic controllers designate
- Lack of preparation and/or providing a preview of discovery during the verification process can get you named in a RICO suit with other providers at the locations where you operate or with your referral sources
  - These answers can be used as proof of a pattern, existence of an enterprise, and racketeering activity

# What to Do if You Find Yourself Named in a RICO Case?

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- Do not panic
- Contact an attorney – best practice is to hire an attorney with experience defending these types of cases – not collection counsel
- Retain records related to everything we have discussed here today

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Justin Vogel is a Partner Director with over 20 years of experience litigating complex commercial matters with an emphasis on commercial health care disputes. He has significant experience representing physicians, various other licensed medical professionals and durable medical equipment providers against insurance carriers in connection with disputes over non-payment or underpayment of in-network and out-of-network claims, as well as claims arising from no-fault and workers comp services. Over the past decade, Justin has defended high-profile RICO claims against individual providers, large practice groups, and ambulatory surgery centers, and frequently counsel clients on strategies to limit the risk of being named as a defendant in RICO litigation.

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Alexandra Wolff is a Senior Attorney with over 10 years of litigation experience. Prior to joining Garfunkel Wild, she spent several years working for a large Long Island law firm where she conducted examinations under oath and investigated, drafted, filed, and litigated affirmative RICO cases on behalf of insurance companies. Before that, Alexandra spent roughly 6 years working as a prosecutor for the Nassau County District Attorney's office.



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