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Once rarely seen, cases involving both FLSA claims and claims brought under RICO or ERISA are being observed more often. Still, these types of cases remain relatively scarce and are often brought on the basis of alleged facts not common in most wage litigation. There also appears to be scant upside available based upon including these additional claims in most cases where the fact pattern can be appropriately characterized as rather ordinary. Given the procedural complexities and the fact that including these types of claims in addition to FLSA claims often serves to needlessly expand and delay the progress of a case, one is left to wonder why litigants would choose to include these types of claims absent extenuating circumstances. At a minimum, it is safe to say that it will be some time before the law regarding whether these types of claims can or should be permitted to go forward in one proceeding will be settled if, in fact, the law ever develops to that point.

At least two courts have dismissed RICO claims brought alongside FLSA claims when the claims are based on the same conduct, concluding that Congress intended the FLSA to provide the exclusive remedy in such a situation. *See Eldred v. Comforce Corp.*, No. 3:08-CV-1171 (LEK/DEP), 2010 WL 812698 (N.D.N.Y. Mar. 2, 2010); *Choimbol v. Fairfield Resorts, Inc.*, No. 2:05cv463, 2006 WL 2631791 (E.D. Va. Sept. 11, 2006). These cases, however, stand in contrast to the contrary holdings in *Stickle v. SCI Western Market Support Center*, No. CV 08-083-PHX-MHM, 2008 WL 4446539 (D. Ariz. Sept. 30, 2008).

Courts have also taken different views as to whether plaintiffs can simultaneously pursue a class action for ERISA and a collective action under Section 216 of the FLSA. The court in *Geer v. Challenge Financial Investors Corp.*, No. 05-1109-JTM-DWB, 2005 WL 3503370 (D. Kan. Dec. 22, 2005) and the court in *Stickle* both held that plaintiffs could pursue a class action for ERISA or RICO claims under Rule 23 along with a collective action for FLSA claims under Section 216. The court in *Choimbol v. Fairfield*

Resorts, Inc., 475 F. Supp. 2d 557 (E.D. Va. 2006) took a different view. It appears that, the more intertwined the ERISA/RICO claims are with the FLSA claims, the stronger the argument to prevent plaintiffs from bringing a Rule 23 class action along with a Section 216 collective action. There is by no means, however, a consensus formed yet on these issues.

Recent cases on point include the following:

Stickle v. SCI W. Market Support Ctr., No. CV 08-083-PHX-MHM, 2008 WL 4446539 (D. Ariz. Sept. 30, 2008)

Plaintiffs brought an action against numerous entities and individuals alleging FLSA violations and derivative violations of ERISA (one claim for failure to keep adequate records to determine benefits due and one claim for breach of fiduciary duty) and RICO. Plaintiffs asserted that they worked for Defendants and were not paid their regular or statutorily required rate of pay for all hours worked and were not paid at time and a half for hours they worked over 40 hours a week. Several motions to dismiss were filed. Several Defendants argued that the ERISA claims should be dismissed because they are '"entirely dependent upon [Plaintiffs'] FLSA claims and thus are unripe unless and until Plaintiffs first establish an FLSA violation.'" Additionally, these Defendants claimed "Plaintiffs' RICO claims should be dismissed because Plaintiffs' mail fraud allegations are entirely predicated on purported violations of wage and hour laws, which, Defendants claim, the Ninth Circuit has held cannot be maintained based on a failure to pay overtime."

Addressing Defendants' argument that Plaintiffs' ERISA claims should be dismissed because they are unripe and entirely dependent upon Plaintiffs' succeeding on their FLSA claims, the court relied on *In re Farmers Insurance Exchange Claims Representatives' Overtime Pay Litigation*, 2005 WL 1972565 (D. Or. Aug. 15, 2005) and *Rosenburg v. IBM Corp.*, 2006 WL 1627108 (N.D. Cal. June 12, 2006) and rejected Defendants' argument. The court explained that the facts allegedly supporting the violations had already occurred and it was not a matter of speculation about future injury. Like the courts in *In re Farmers Ins. Exchange* and *Rosenburg*, the court held that

Plaintiffs' ERISA claims should be held in abeyance pending the outcome of Plaintiffs' FLSA claims.

Plaintiffs' RICO claim was based on allegations that Defendants engaged in a pattern of mail fraud, whereby every time Defendants mailed a paycheck to Plaintiffs, Defendants '"mislead Plaintiffs about the amount of wages to which they were entitled, as well as their status and rights under the FLSA.'" The court rejected Defendants' ripeness argument for the same reasons it rejected the ripeness argument regarding the ERISA claims. The court also rejected Defendants' argument that Plaintiffs failed to state a claim under RICO because RICO claims cannot be predicated on alleged violations of wage and hour laws. Defendants relied on *Miller v. Yokohama Tire Corp.*, 358 F.3d 616, 621 (9th Cir. 2004) in which the plaintiffs alleged violations of state wage and hour laws and also brought RICO claims. The Ninth Circuit dismissed the RICO claims in *Miller* because they were based on a misrepresentation of law (regarding plaintiff's legal status as an exempt employee), and not on a misrepresentation of fact. The court explained that *Miller* is distinguishable because the dispute here was not over a legal question of whether Plaintiffs were properly classified, but rather a question of fact - how much pay Plaintiffs should have received. Thus, the court ruled that Plaintiffs "alleged conduct (mailing paychecks), of an enterprise (Defendants' businesses), through a pattern (continually mailing incorrect paychecks) of racketeering activity (denying Plaintiffs' pay due them)" was sufficient to overcome Defendants' motion to dismiss. The court did, however, order the RICO claim to be held in abeyance pending the outcome of the FLSA claim.

Finally, the court addressed Defendants' assertion that Plaintiffs' Rule 23 "opt-out" certification allegations, which included Plaintiffs' ERISA and RICO claims, should be struck. Defendants' argued that Plaintiffs' ERISA and RICO claims could not be maintained as Rule 23 "opt-out" claims since they were dependent on Plaintiffs' underlying FLSA claims, which are subject to the "opt-in" mechanism of § 216(b). The court relied on *Geer v. Challenge Financial Investors Corp.*, 2005 WL 3502270 (D. Kan. Dec. 22, 2005), the only case it found in which a court addressed the compatibility between opt-in FLSA and opt-out ERISA claims. The court explained that in *Geer*, the court rejected the defendants' argument that the ERISA Rule 23 class action claims were irreconcilable with the FLSA opt-in claims. The court explained that although *Geer* is

distinguishable in that the ERISA claims were not contingent upon a finding of liability under the FLSA, the court was mindful that if it did not allow Plaintiffs' ERISA and RICO claims to proceed in the instant case, the claims could later be barred by collateral estoppel or the statute of limitations. The court also noted that during oral argument Plaintiffs indicated that the opt-out classes for the ERISA and RICO claims would be limited to those plaintiffs who opted in to the FLSA case. The court thus concluded that it would hold the ERISA and RICO claims in abeyance pending the outcome of Plaintiffs' FLSA claim. "If Plaintiffs succeed on their FLSA claim, the Court will allow Plaintiffs to proceed at that time with their ERISA and RICO claims on a Rule 23 class-action basis, provided the class is narrowly defined only as to those who opted-in to the FLSA claim."

Eldred v. Comforce Corp., No. 3:08-CV-1171 (LEK/DEP), 2010 WL 812698 (N.D.N.Y. Mar. 2, 2010)

Several plaintiffs brought an action on behalf of themselves and those similarly situated against their employer, the union and other entities and individuals, alleging violations of the FLSA, RICO, and several other laws. Plaintiffs alleged that their employer and its various subsidiaries "exploited the traditional employer/union relationship in unlawfully failing to pay Plaintiffs and members of the proposed class regular and overtime wages; making unauthorized deductions from their wages; failing to provide meaningful representation; making fraudulent misrepresentations . . . , and engaging in a pattern of illegal racketeering." Several defendants moved to dismiss Plaintiffs' claims.

The court dismissed Plaintiffs' RICO claims against their employer on several grounds. The court noted that Plaintiffs based "portions of their RICO claim on violations of New York State Penal Law including larceny by false promise and scheme to defraud." RICO, however, limits the state law offenses qualifying as "racketeering activity," and larceny by false promise and scheme to defraud are not RICO predicate offenses. "Moreover, much of what Plaintiffs allege is duplicative of their claims under the FLSA." "Several circuits, including the Second, have found that where a statute provides an exclusive remedy, concurrent RICO claims based on the same conduct

should be dismissed." (Citing *Norman v. Niagra Mohawk Power Corp.*, 873 F.2d 634 (2d Cir. 1989).) "Following this approach, and finding the FLSA 'provides a sufficiently punitive scheme,' one court has held that where a plaintiff's 'RICO Claims [are] brought along side other statutes which, like the FLSA, provide 'comprehensive remedies . . . Plaintiffs' RICO claims [should be] precluded.'" (Quoting *Choimbol v. Fairfield Resorts, Inc.*, No. 2:05-CV-463, 2006 WL 2631791 at *7 (E.D. Va. Sept. 11, 2006).) This approach, the court explained, "ensures that the '[a]rtful invocation of controversial civil RICO, particularly when inadequately pleaded' does not endanger the uniform administration of core concerns of the primary enforcement scheme." (Quoting *Norman*, 873 F.2d at 637.)

Choimbol v. Fairfield Resorts, Inc., No. 2:05cv463, 2006 WL 2631791 (E.D. Va. Sept. 11, 2006)

Plaintiffs brought an action against their current and former employers asserting claims for violations of the FLSA, RICO, and state common law. Plaintiffs alleged that Defendants conspired to manipulate and falsify hourly rates of immigrant workers by misrepresenting the minimum wage and overtime pay for which they were entitled. Plaintiffs' RICO count alleged that "Defendants committed predicate acts of mail fraud, wire fraud and money laundering in violation of [RICO]." Defendants moved to dismiss the RICO claim, arguing that it sought remedies precluded by the FLSA. The court agreed with Defendants and dismissed the RICO count. The court held that the "FLSA provides a sufficiently punitive scheme to address the Defendants' misconduct in this case." Viewing the issue as one of first impression, the court was persuaded that circuit precedent involving other types of claims asserted in tandem with a RICO claim compelled the conclusion that the RICO claim was precluded here because the FLSA provides a comprehensive remedy for the claimed wrongs and it was evident that Congress intended for the FLSA to supply the exclusive remedy in a case such as that at bar.

Geer v. Challenge Fin. Investors Corp., No. 05-1109-JTM-DWB, 2005 WL 3503370 (D. Kan. Dec. 22, 2005)

Plaintiffs, former employees of Defendants, brought an action alleging various violations of the FLSA and state law. Plaintiffs moved for leave to amend their complaint to add four potential class action claims under ERISA, including (1) a claim for wrongfully refusing to allow Plaintiffs and other current and former employees to participate in a defendant's 401k plan; (2) a claim for interference with protected rights; (3) a claim to enforce the terms of the 401k plan; and (4) an ERISA federal common law fraud claim. Defendants argued in opposition that the proposed ERISA claims should not be allowed because they are futile and because "the opt-out nature of these proposed class action claims are irreconcilable with the opt-in nature of the FLSA collective action claims."

The court first determined that the ERISA claims sought to be added were not futile and then addressed Defendants' 'irreconcilability" argument. Citing *LaChapelle v. Owens-Illinois, Inc.*, 513 F.2d 286, 288 (5th Cir. 1975); *Leuthold v. Destination Am., Inc.*, 224 F.R.D. 462, 470 (N.D. Cal. 2004); and *McClain v. Leona's Pizzeria, Inc.*, 222 F.R.D. 574, 576-77 (N.D. Ill. 2004), Defendants argued that courts have disallowed "such irreconcilable claims in the same case because they could lead to confusion in the handling of the claims." Plaintiffs responded that the above cases were distinguishable because "they apply to situations in which the plaintiffs raised essentially duplicative claims as both opt-in and opt-out classes, covering the same wrongful action and damages." Citing *Frank v. Gold'n Plump Poultry, Inc.*, No. 04-1018, 2005 WL 2240336, at *5 (D. Minn. Sept. 14, 2005), Plaintiffs contended that "courts have regularly allowed plaintiffs to pursue concurrent § 216(b) collective actions and Rule 23 class actions in the same case where the claims underlying each action are different."

The court reviewed the cases cited by Defendants and found them factually distinguishable. The court explained that the "seminal case, *LaChapelle*, involves the question of whether class action cases under the ADEA should proceed pursuant to Rule 23 or Section 216. The other cases all appear to involve situations where plaintiffs seek to use Section 216 for their FLSA claims while also using Rule 23 procedures concerning related state law *wage* claims. In the present case, however, the nature of the claims

Plaintiffs seek to assert are completely separate-wage claims and ERISA claims." Additionally, the court stated that it was premature to determine whether or not the ERISA claims should proceed as a Rule 23 class action as no certification motion was pending. The court noted, though, that if a 216(b) collective action were certified, then the opt-in plaintiffs would be permitted to assert ERISA claims even if a Rule 23 class was not certified.

Barrus v. Dick's Sporting Goods, Inc., No. 05-CV-6253 CJS, 2010 WL 3075730 (W.D.N.Y. Aug. 5, 2010)

Plaintiffs, current and former employees of merged sporting goods retailers, filed a lawsuit alleging that Defendants violated the FLSA, ERISA, RICO, and state law. Specifically, Plaintiffs alleged that Defendants violated ERISA by (1) breaching their fiduciary duty relating to the crediting of hours for 401(k) purposes and (2) violating recordkeeping provisions. Plaintiffs alleged that Defendants engaged in conduct unlawful under RICO by mailing paychecks reflecting allegedly known incorrect wages and containing alleged misleading information about the amount of overtime worked, resulting in mail fraud. Defendants moved to dismiss the ERISA and RICO claims, and the court granted the motion.

The court dismissed the ERISA fiduciary duty claim after concluding that "Plaintiffs' allegations fail to support a plausible claim that Defendants were acting as fiduciaries when they allegedly failed to report all hours of service," and Plaintiffs' allegations that Defendants had a legal duty as ERISA fiduciaries to investigate crediting overtime pay were unpersuasive. The court found that Plaintiffs had not pled a plausible ERISA recordkeeping claim because they failed to plead exhaustion of administrative remedies provided under the plan. The court dismissed the RICO claim for several reasons. The court found that (1) Plaintiffs failed to comply with the court's local rule regarding RICO claims, (2) Plaintiffs' mail fraud allegations were not pled with sufficient particularity, (3) Plaintiffs failed to allege a plausible claim under any of the three RICO subsections, and (4) Plaintiffs had not alleged that the harm suffered was a consequence of predicate acts listed in the RICO statute.

Botello v. COI Telecom, L.L.C., No. SA-10-CV-305-XR, 2010 WL 5464824 (W.D. Tex. Dec. 30, 2010)

Plaintiffs, current and former field service technicians of the Defendants, brought an action alleging that Defendant Time Warner contracted with Defendant COI to provide certain services to Time Warner customers. Plaintiffs further alleged that they were required to sign documents improperly categorizing them as independent contractors. Plaintiffs alleged that Defendants violated the FLSA by failing to pay overtime wages and that Defendants violated ERISA by denying them pension, health, disability, and other benefits. Plaintiffs moved to certify a class on their ERISA claims and for conditional certification on their FLSA claims. Defendants moved for partial summary judgment.

The court granted Defendants' motion for summary judgment on Plaintiffs' ERISA claims. The court explained that Plaintiffs' ERISA claims failed as a matter of law because even if they were deemed common law employees, their ERISA plans expressly excluded them from coverage because they were designated as independent contractors. Having granted Defendants' motion for summary judgment on Plaintiffs' ERISA claims, the court denied class certification on the ERISA claims.

Firm Information

Brief History of Alston & Bird LLP

Alston & Bird's unique culture and core values have been developed and maintained for more than a century. Core values that are of the utmost importance to the firm include professional excellence, collegiality, teamwork, loyalty, diversity, individual satisfaction, fairness and professional development. Our culture is the underpinning for our diverse practice capabilities, the complementary structure of our nine offices and our successes to date.

The firm's history dates back to 1893 with Alston, Miller & Gaines' predecessor firms and includes significant growth through mergers including with Jones, Bird & Howell on December 1, 1982 to form Alston & Bird. Expansion into North Carolina was by way of a merger with Bell Seltzer Park & Gibson (1997), in New York with Walter, Conston, Alexander & Green (2001), in Dallas with Crews, Shepherd & McCarty LLP (2007) and in Los Angeles and Ventura County, California with Weston Benshoof Rochefort Rubalcava & MacCuish LLP (2008). Also in 2008, Alston & Bird opened an office in Silicon Valley with the addition of a lateral group in that area.

Today, the firm has offices in Atlanta, Charlotte, Dallas, Los Angeles, New York, Research Triangle, Silicon Valley, Ventura County and Washington, D.C. Our 800 attorneys provide a full range of services to domestic and international clients conducting business around the world. Counseling clients from what was initially a local context quickly expanded to regional, then national, and now spans a global economic environment. Alston & Bird has overlaid its broad range of legal skills and business knowledge with a commitment to innovation and technology.

In the face of ever-changing local, regional, national and world events, our lawyers continue to practice law at the highest levels of visibility, excellence and ethics. One of the most significant engagements in the firm's recent history began with the appointment of our partner Neal Batson by the U.S. Bankruptcy Court for the Southern District of New York as Examiner for Enron Corp. The engagement was a unique opportunity to serve an objective role in examining one of the most visible and significant corporate failures in American history. Additionally, former U.S. Senate Majority Leader, Bob Dole and others in the Legislative & Public Policy practice, give Alston & Bird clients access to a respected statesman and experts on all aspects of public policy from both sides of the aisle.

Alston & Bird has been ranked by FORTUNE magazine as one of the "100 Best Companies to Work For" for 12 years in a row. This year, the firm is ranked number 13, the only law firm ever to make the list for 12 consecutive years. Alston & Bird is the only law firm ever named to the top five and included seven consecutive years in the top 25. The recognition speaks to the culture of the firm and the environment in which we practice law and provide service to clients. The BTI Client Relationship Scorecard named Alston & Bird among its "Power Elite" for three years in a row.