Opinion Letter May Be Actionable Under RICO

Brochures promoting investment plans sometime include an opinion letter from a lawyer concerning the tax consequences of implementing the plan. Clearly there is no attorney-client relationship between the lawyer offering the opinion and the customer. Moreover, the customer who purchases the plan will have difficulty in claiming reliance upon the opinion, in part because such opinions will include a disclaimer. But a recent case illustrates that if the lawyer knows that the opinion is wrong and that it will be relied upon by the customer, there could be liability to the customer under the Racketeer Influenced and Corrupt Organizations Act, otherwise known as RICO.

In *Ouwinga v. Benistar 419 Plan Services, Inc.,* 2012 WL 4096145, according to the allegations in the amended complaint, plaintiffs were approached by financial advisers who promoted the purported tax benefits of a financial vehicle called the Benistar 419 Plan and Trust. The plan involved the creation of welfare benefit trusts and the purchase of a financial product from two related insurance companies.

Plaintiffs got their own lawyer and accountant involved in the discussion concerning the tax consequences of the plan in a meeting with the financial advisers, wherein a tax attorney for the insurance companies participated by telephone, "providing legal assurances to the [plaintiffs] and affirming the representations about the plan's tax benefits."

The financial advisers allegedly presented, along with other documents, two books in the form of large loose-leaf binders that were produced by the company that would manage the plan that "contained information about the Plan in general [and] touted its purported advantages, tax and otherwise. …" According to the financial advisers and the binders, "Plan contributions were tax-deductible and the [plaintiffs] could take money out of the Plan at any time tax-free." The binders allegedly "highlight[ed] only positive authority and ignored certain IRS Notices and Rulings that 'would have given the Plaintiffs an (accurate) indication that the Plan Payments were not deductible.' " But the binders also included a disclaimer that the insurance companies, "made no representations about the tax benefits of the … plan."

According to plaintiffs, the representations in the binders concerning the tax consequences were supported by the financial advisers and the insurance company had "adopted and advanced the representations made in these books." Moreover, the binders also allegedly contained a legal opinion by a lawyer concerning the purported tax consequences of the plan, but which included a disclaimer that the opinion could only be relied upon by the company administering the plan.

Plaintiffs allegedly agreed to participate in the plan based upon the representations made by the financial advisers and upon the legal opinion by the lawyer. Thereafter plaintiffs made "substantial contributions" to the plan. Those contributions were used to pay premiums to the insurance companies "to purchase large insurance policies on the lives of the [plaintiffs]."

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Thereafter plaintiffs were allegedly informed by the financial advisers that "the IRS had changed the rules; that the [plaintiffs] would need to contribute additional money so the Plan could purchase new life insurance policies to keep the Plan compliant; and that each year they would need to form a new plan." Plaintiffs alleged that the financial advisers reassured them on more than one occasion about the plan's purported tax benefits. The lawyer who had written the legal opinion that was included in the binders allegedly wrote three subsequent opinion letters "assuring that under the 'new IRS rules' the … plan was still not a tax shelter and was viable against any challenge by the IRS."

About four years after they began participating in the plan plaintiffs decided that they wanted "to terminate and/or transfer policies out of the … plans." The insurance company allegedly advised them that this action would have no tax consequences and that the plan "continued to meet the IRS requirements for tax deductible treatment." The insurance companies also allegedly assured them that the IRS had never audited or caused other problems with other clients who had done buyouts.

The IRS ultimately deemed the plan an "abusive tax shelter" and assessed plaintiffs for back taxes, interest and penalties. As a result, plaintiffs brought suit against the financial advisers, the insurance companies and the lawyer who had written the opinion letters, among others. They alleged claims under RICO, 18 U.S.C. §§ 1962(c), (d), and for various claims under state law for negligent misrepresentation, among others.

The district court granted all defendants' motions to dismiss with respect to the RICO claims because plaintiffs "failed to sufficiently plead the 'conduct' and 'enterprise' elements for a valid RICO claim." The district court dismissed all of the state law claims because of the disclaimers and disclosures contained in the various documents. A three-judge panel of the 6th U.S. Circuit Court of Appeals reversed with respect to all counts.

The court found that if the allegations of the complaint were true a jury could find that the lawyer had engaged in actionable conduct under RICO. The lawyer had provided "incomplete and misleading legal opinions" — this notwithstanding the existence of "specific IRS rulings and notices" that the plan was not compliant under the code, "which were allegedly ignored in favor of older rulings and notices that were more favorable." Moreover, it was alleged that the lawyer knew that his opinion letters were being used "for the purpose of falsely promoting the plan as a tax-saving device to potential investors."

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Avoiding Liability

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The court found that this scheme, as alleged, constitutes an "enterprise," another element under RICO. Moreover, based on the lawyer's continued participation, the court found that "the Amended Complaint plausibly alleges" that he was a participant in the enterprise's affairs and not merely in his own affairs. The court also found that the issuance of four "incomplete and misleading" opinion letters can also satisfy the "pattern of racketeering" element under RICO.

In reversing the motions to dismiss with respect to the state law actions, the court found that the effectiveness of the disclaimers should not be determined at that early juncture of the lawsuit. Plaintiffs had argued that the district court inappropriately relied on the disclaimers within the context of a motion to dismiss because "they were presented and considered out of the context of the volume of documents in which they were contained."

This case demonstrates that a lawyer can be liable under RICO for offering an opinion letter, notwithstanding a disclaimer that it is only to be relied upon by his client, if the evidence is compelling enough to show that he knew that the opinion was incorrect and that non-clients would be relying upon it.