

Attorney Facing Civil RICO Claim Ordered to Produce Attorney–Client Communications Made in Furtherance of Alleged Scheme to Manufacture TCPA Claims

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A federal court presiding over a civil RICO action recently ordered prolific plaintiff’s attorney Jeffrey Lohman to produce his firm’s communications with its clients. See *Navient Sols., LLC v. Law Offices of Jeffrey Lohman, P.C.*, No. 19-461, 2020 WL 1172696, at *1 (E.D. Va. Mar. 11, 2020). This decision shows that the crime-fraud exception may overcome the attorney–client privilege where a lawyer allegedly participates in a scheme to manufacture TCPA claims. It also suggests that such conduct might form the basis of a civil RICO claim.

The plaintiff in that case, Navient Solutions, alleged that the defendants, including Lohman, operated a fraudulent scheme to manufacture TCPA lawsuits. The defendants allegedly recruited student-debtors into signing up for a sham debt-relief program and told them to stop making loan payments owed to Navient, to pay defendants instead, and to follow a script to induce telephone calls from Navient that would — and ultimately did — form the basis for TCPA claims that were filed by Lohman and others. After patiently uncovering these facts in discovery in various TCPA cases, Navient went on the offensive by bringing a civil RICO claim predicated on alleged mail and wire fraud involved in the scheme.

In discovery, Navient requested that Lohman, his law firm, and several other attorneys at his firm (the “Lohman Defendants”) produce communications and other documents they had exchanged with existing, former, or potential student-debtor clients. The Lohman Defendants objected on the basis of attorney–client privilege. In response, Navient argued that the documents were discoverable and that the court should compel production based on the crime-fraud exception to the attorney–client privilege. The Lohman Defendants countered that the crime-fraud exception is inapplicable because Navient did not allege that their clients gave information to them for purposes of committing a crime or fraud. They also alleged that Navient had not met its prima facie evidentiary burden to establish a crime or fraud, arguing that litigation activity cannot form the basis of a civil RICO claim.

The court rejected both of the Lohman Defendants’ arguments. First, it held that the crime-fraud exception may apply even when it is the attorney alone (and not the client) that allegedly engaged in criminal or fraudulent conduct. It also noted that, in any event, there was at least some evidence that

the clients had engaged in (or were at least aware of) fraudulent conduct by participating in a scheme to defraud Navient out of millions of dollars it was owed in outstanding student debt.

Second, it found that the civil RICO claim was about more than just litigation activity. Rather, Navient had alleged and pointed to evidence that the Lohman Defendants had committed wire and/or mail fraud in perpetuation of the alleged scheme, including via their mailings and calls to student-debtors regarding their loans. Accordingly, the court reasoned that the claim was about more than just litigation activity and held that Navient had met its evidentiary burden. The court also noted that, even if the only acts alleged by Navient were litigation activity, litigation activity can, in and of itself, form the basis for a civil RICO claim. Accordingly, it ordered the Lohman Defendants to produce the communications it had withheld on the basis of the attorney–client privilege.

While both the court and Navient focused on the allegations that the defendants had schemed to defraud Navient of loan payments, it is worth noting that the Lohman Defendants’ alleged misconduct included filing manufactured claims. Similarly, the court noted, albeit in dicta, that litigation activity can sometimes form the basis of a predicate offense for a civil RICO claim. This may lend support for defendants to bring civil RICO claims — either as counterclaims or as independent actions — if they marshal evidence that TCPA plaintiffs and/or their attorneys engaged in a predicate RICO offense such as mail or wire fraud. Still, the conduct alleged here seems extreme even by TCPA standards, so it remains to be seen whether civil RICO claims by TCPA defendants will become the order of the day.

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National Law Review, Volume X, Number 85

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