

Federal Judge OKs RICO Lawsuit Against IBM Execs

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A federal judge has refused to dismiss a massive RICO suit against four high-level IBM executives who are accused of swindling a King of Prussia, Pa., firm into investing \$12 million in technology projects by hiding the truth about their market potential and continuing to solicit funds even after one of the projects had been canceled.

In his 32-page opinion in *Devon IT Inc. v. IBM Corp.*, U.S. District Judge Joel H. Slomsky dismissed a claim against IBM for aiding and abetting the RICO conspiracy, but refused to dismiss claims against IBM for fraud, breach of contract and negligent supervision.

But the most significant ruling in Slomsky's opinion is his refusal to dismiss RICO claims against the four IBM executives — Thomas S. Bradicich, Bernard S. Meyerson, James A Gargan, and Rodney C. Adkins — who are accused of operating their department as a "wide-spread Ponzi scheme" that lured investors to fund projects "with no real intention of completing the development of the projects."

Slomsky found that the complaint "complies with heightened pleading requirements for fraud" because it identifies "specific persons, dates, and conduct, which serve to place defendants on notice of the precise misconduct charged."

The suit also alleged a valid "pattern of racketeering activity" by citing a series of alleged wire frauds over more than four years, Slomsky found.

Significantly, Slomsky rejected one of the main thrusts in IBM's motion to dismiss — that nearly all of Devon's claims were waived in two broadly worded releases when the two companies struck new agreements in 2008.

Devon had urged Slomsky to disregard the releases on the grounds that Devon was fraudulently induced to sign on the basis of more deceptive promises.

Slomsky agreed and found that Devon had "sufficiently alleged such inducement."

The ruling is a victory for attorneys Maurice R. Mitts, Mark L. Rhoades and Amy L. Blackmore of Mitts Milavec in Philadelphia.

IBM spokesman Steve Eisenstadt said the company was "gratified" that Slomsky had dismissed some of the claims in the suit, and that "the remainder of Devon's claims consist of allegations that are both unproven and without merit. We will continue to defend the case vigorously."

According to the suit, executives in IBM's Systems and Technology Group approached Devon in September 2005 to pitch an investment in a new IBM server project referred to as "Blade" — a computer system designed to replace the typical stand-alone desktop personal computer.

The suit alleges that, in a presentation to Devon, Bradicich said Blade would be available for sale during the first quarter of 2006 at the competitive price of \$1,500 a unit, and that he projected that 500,000 units would be sold over the first three years.

Bradicich also allegedly said that several prominent companies such as Honda and Merrill Lynch were interested in purchasing Blade once it was available for sale, and that revenue was projected by the defendants to be more than \$33 million in the first year.

Devon agreed to develop the Blade desktop computer terminal, the suit says, while IBM developed the Blade centralized server.

But the suit alleges that many of Bradicich's claims about the marketing prospects for Blade weren't true and that Bradicich was aware at the time that they were false.

The Blade project was delayed numerous times, the suit says, and was ultimately canceled. But even after the IBM executives knew the project was dead, they continued to solicit Devon to invest in a second project — a complex data server called "iDataPlex."

In the suit, Devon claims it was not the only victim of the IBM executives' schemes.

Even though the four vice presidents knew that their proposed development projects had "no realistic prospect of completion," the suit alleges that they required their development partners to continue investing.

"To keep the scheme alive," the suit says, the executives "must continue bringing in new development partners so that money invested by the new partners can pay their obligations to prior development partners."

In Devon's case, the suit says, the executives concealed the fact that they had already terminated the Blade project in order to induce Devon to continue to invest in Blade and iDataPlex, including a \$3 million investment in March 2008 under the

iDataPlex agreement — a date after the Blade project was canceled but before it was made known to Devon.

Ultimately, in April 2008, the suit says, Devon was told that the Blade project was at the "end of life," and that the future of iDataPlex was also in doubt.

In rejecting IBM's motion to dismiss the RICO claims, Slomsky found that the suit properly alleges a "series of predicate acts that caused financial harm" to Devon, including fraudulent misrepresentations about the market potential of both Blade and iDataPlex.

The alleged misrepresentations, Slomsky said, "were made to induce plaintiffs to continue to invest in the projects in accordance with the schedule in the agreements."

The suit also satisfied the "specificity" requirement for pleading fraud, Slomsky found, by detailing the roles each of the four executives allegedly played in the scheme.

The suit says Adkins directed and approved the repeated overstatements of market projections, Slomsky noted, and that Meyerson directed the cancellation of the Blade project but concealed that fact from Devon.

Gargan was also alleged to be "knowingly involved in the misrepresentations" Slomsky noted, and "participated throughout both the Blade and iDataPlex projects," while Bradicich was alleged to be "at the forefront of the fraudulent projections and product release date on the Blade project."

(Copies of the 32-page opinion in *Devon IT Inc. v. IBM Corp.*, PICS No. 11-0610, are available from The Legal Intelligencer).