

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

MESSODY T. PERLBERGER, : CIVIL ACTION  
individually and on behalf :  
of her minor child LAURA E. :  
PERLBERGER; KAREN PERLBERGER :  
 :  
v. :  
 :  
NORMAN PERLBERGER, et al. : NO. 97-4105

M E M O R A N D U M

Padova, J.

August , 1998

Before the Court is a Motion for Abstention for Period from 1992 to the Present, filed by Defendant Norman Perlberger and joined by Defendants G. Daniel Jones and Jones, Hayward & Lenzi, P.C. (the "Accountant Defendants"), and a Petition by Plaintiff Messody T. Perlberger for Counsel Fees, Costs and Sanctions. For the reasons set forth below, the Court will deny the Motions for Abstention and the Petition for Counsel Fees, Costs and Sanctions.<sup>1</sup>

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<sup>1</sup>In this Petition, Plaintiff Messody Perlberger seeks counsel fees, costs and sanctions in connection with the filing by Defendants of the Motions for Abstention. In this same Petition, she also sought attorney's fees, costs, and sanctions in connection with alleged violations of orders issued by this Court and by Magistrate Judge Smith. By Orders entered June 24, 1998 and June 26, 1998, respectively, those requests were previously denied. (Doc. Nos. 74 and 76.)

I. PROCEDURAL BACKGROUND

By Memorandum and Order entered on September 18, 1997, the Court granted in part and denied in part Motions to Dismiss filed by the Defendants. The Court dismissed Count II (Civil Conspiracy, 18 U.S.C. §§ 1985 and 1986), Count IV (Violation of the Federal Family Support Act of 1988, 42 U.S.C. § 601), and Count V (Violation of the First and Fourteenth Amendments). As a result, the only Federal claim remaining in Plaintiff's Complaint was Count III (Violation of RICO, 18 U.S.C. §§ 1961-68). The Court granted Plaintiff leave to amend her Complaint as to her RICO claim. The Court deferred ruling on whether it would exercise jurisdiction over Plaintiff's state law claims until Plaintiff had the opportunity to amend her RICO claim.

On December 8, 1997, Plaintiff filed a RICO Case Statement and an Amended Count III of Complaint. In response, Defendants renewed their Motions to Dismiss the RICO claim and the state law claims. By Memorandum and Order entered on February 24, 1998, the Court denied Defendants' Motions to Dismiss, found that Count VII for personal injury did not state a separate claim for relief, and exercised its supplemental jurisdiction over the fraud and emotional distress claims, pursuant to 28 U.S.C. § 1367(a). As a consequence, the following three Counts remain in the Complaint, as amended: Count I (Fraud), Count III (Violation of RICO), and Count VI (Intentional Infliction of Emotional

Distress).

## II. FACTUAL BACKGROUND

The factual allegations underlying this case are set forth in the Court's September 18, 1997 and February 24, 1998 Memoranda and Orders.

## III. DISCUSSION

In their Motions, Defendants argue that the Court should abstain from exercising jurisdiction over Plaintiffs' claims on the grounds that "there are pending proceedings in state court that may adequately address the issues of child support and alimony." (Def. Perlberger's Mot. at ¶ 19.)<sup>2</sup> Defendants do not seek the dismissal or stay of Plaintiffs' entire case. Instead, they seek to limit the temporal scope of Plaintiffs' claims, via principles of abstention. In essence, they move for partial abstention. In this regard, Defendants ask the Court to abstain with respect to events that occurred after October 21, 1991, the date of entry of the Perlbergers' final divorce decree and issuance of child support and alimony orders by the Court of

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<sup>2</sup>The Motion for Abstention filed by the Accountant Defendants merely incorporates by reference the Motion for Abstention and Memorandum of Law filed by Defendant Perlberger.

Common Pleas of Montgomery County.<sup>3</sup>

Defendants rely on two distinct and very different doctrines of abstention. Defendants first argue that the Court should dismiss this suit on the basis of the Rooker-Feldman doctrine, a form of abstention that gets its name from two United States Supreme Court cases, Rooker v. Fidelity Trust Co., 263 U.S. 413, 44 S. Ct. 149 (1923) and District of Columbia Court of Appeals v. Feldman, 460 U.S. 462, 103 S. Ct. 1303 (1983). Defendants argue in the alternative that the Court should abstain under the principles set forth in Younger v. Harris, 401 U.S. 37, 91 S. Ct. 746 (1971).<sup>4</sup>

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<sup>3</sup>Defendants argue that Plaintiffs' claims should be limited to the period of time before October 21, 1991, which appears to be the correct date of the Perlbergers' final divorce decree, not October 19, 1991, as set forth in Defendants' pleadings. See Perlberger v. Perlberger, 626 A.2d 1186, 1190 (Pa. Super. Ct. 1993). Although the title of Defendants' Motions is "Motion for Abstention for Period from 1992 to the Present," the Motions do not contain any references to events that took place in 1992. Apparently, Defendants arrived at the 1992 date by taking the October 1991 date of the divorce decree and "rounding up" to the next year.

<sup>4</sup>Defendants conclude their Memorandum of Law with a dangling "see also" cite to Colorado River Water Conservation Dist. v. United States, 424 U.S. 800, 96 S. Ct. 1236 (1976). In Colorado River, the Supreme Court recognized another form of abstention based on principles of judicial economy and sound judicial administration. The threshold question under Colorado River is whether the state and federal actions are parallel. If the actions are not parallel, the Court does not reach the question of abstention. If the actions are parallel, the Court must analyze the six factors set forth by the Supreme Court in Colorado River and Moses H. Cone Memorial Hosp. v. Mercury Const. Corp., 460 U.S. 1, 103 S. Ct. 927 (1983). Defendants do not argue that the state and federal actions are parallel and do not

Before the Court analyzes the two abstention doctrines raised by Defendants, a few general comments about abstention are in order. There is no question that this Court has original subject matter jurisdiction over Plaintiffs' federal RICO claim and supplemental jurisdiction over Plaintiffs' pendent state law claims. Under certain limited circumstances, a federal court will decline to exercise its jurisdiction. "Abstention, nevertheless, is the exception, and not the rule." Marks v. Stinson, 19 F.3d 873, 881 (3d Cir. 1994). The Supreme Court has stated that the federal courts' obligation to adjudicate claims within their jurisdiction is "virtually unflagging." Deakins v. Monaghan, 484 U.S. 193, 203, 91 S. Ct. 523, 530 (1988). With these guiding principles in mind, the Court will address Defendants' Rooker-Feldman and Younger abstention arguments in turn.<sup>5</sup>

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analyze the six-factor Colorado River test. Therefore, it appears that Defendants are not advancing the argument that abstention is proper under Colorado River. Even if the Court interprets the inclusion of the citation to the Colorado River decision as a request for dismissal or stay of this action pursuant to the Colorado River doctrine, the Court's inquiry does not go beyond the threshold question concerning the parallelism of the state and federal actions. These actions clearly are not parallel -- they involve different parties, causes of action, and damages. Because the state and federal actions are not parallel, the Court does not need to reach the question of whether exceptional circumstances exist to justify abstention under the Colorado River doctrine.

<sup>5</sup>Plaintiffs maintain that Defendants have previously argued "to this Court that it should refrain from exercising jurisdiction because plaintiffs' claims are essentially state

A. Rooker-Feldman Abstention

Defendants argue that this Court lacks subject matter jurisdiction under the Rooker-Feldman doctrine. As explained by the United States Court of Appeals for the Third Circuit ("Third Circuit"), "[u]nder the Rooker-Feldman doctrine, lower federal courts cannot entertain constitutional claims that have been previously adjudicated in state court or that are inextricably intertwined with such a state adjudication." Gulla v. North Strabane Township, No. 97-3302, \_\_ F.3d \_\_, 1998 WL 294013, at \*2 (3d Cir. June 8, 1998). The doctrine is based on the statutory mandate that lower federal courts may not directly review the decisions of a state court. Id.; 28 U.S.C. § 1257 (West 1993). "District courts lack subject matter jurisdiction once a state

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court claims that should be entertained solely by a state court," that this Court rejected those arguments, that the Court's rejection of those arguments is the law of the case, and that it is an undue burden for Plaintiffs to have to once again revisit this same issue. (Pls.' Opp. at 6.) Although Defendants have previously argued that this Court should not exercise jurisdiction over this case, Defendants have never raised the issue of abstention under the Rooker-Feldman and Younger doctrines. In their first Motions to Dismiss, Defendants argued that this Court did not have jurisdiction under the domestic relations exception to federal court jurisdiction. In their renewed Motions to Dismiss, Defendants made the policy argument that RICO should not be extended to cases involving family law matters. Although it may have been more expeditious if Defendants had raised the issue of abstention in their earlier Motions, their failure to do so does not violate the law of the case doctrine. In addition, because Defendants have never before raised the issues of Rooker-Feldman and Younger abstention, the Court finds that there is no basis for awarding attorney's fees, costs, or sanctions to Plaintiffs. Therefore, the Court will deny Plaintiffs' Petition for Counsel Fees, Costs, and Sanctions.

court has adjudicated an issue because Congress has conferred only original jurisdiction not appellate jurisdiction on the district courts." Guarino v. Larsen, 11 F.3d 1151, 1156-57 (3d Cir. 1993).

As the Third Circuit noted, although the rule barring review of state decisions by lower federal courts "is easily stated, the test for determining whether a particular litigant seeks such direct review is more complex." Gulla, 1998 WL 294013, at \*2. A federal proceeding is barred under Rooker-Feldman "when entertaining the federal court claim would be the equivalent of an appellate review of [the state court] order." FOCUS v. Allegheny County Court of Common Pleas, 75 F.3d 834, 840 (3d Cir. 1996). To help make this determination, the Third Circuit has adopted the following guidelines -- "Rooker-Feldman applies only when in order to grant the federal plaintiff the relief sought, the federal court must determine that the state court judgment was erroneously entered or must take action that would render that judgment ineffectual." Id.

Defendants base their Rooker-Feldman argument on the pendency of proceedings in state court regarding child support and alimony issues. (Def. Perlberger's Mot. at ¶ 1.) In particular, Defendants state that "[t]he parties have active, pending actions [in state court] where those issues [child support and/or post-divorce alimony] should be determined."

(Def. Perlberger's Mot. at ¶ 17.) Although Defendants' pleadings are not a model of clarity, Defendants appear to argue that Rooker-Feldman bars Plaintiffs from going forward with this federal action because of the existence of ongoing and active proceedings before the state court concerning child support and alimony issues. Defendants' attempt to apply Rooker-Feldman in this context is misplaced. By definition, Rooker-Feldman applies only to final state court judgments.<sup>6</sup> Gulla, 1998 WL 294013, at \*2 (the first step in the Rooker-Feldman analysis is to determine exactly what the state court held). To the extent that the state court proceedings relied on by Defendants are still ongoing, the Court cannot abstain on the basis of Rooker-Feldman.

It may be, however, that Defendants are attempting to base their Rooker-Feldman argument on a decision apparently rendered by the Court of Common Pleas denying "retroactive application of any future support/alimony order prior to June 1997, when both parties filed for modification." (Def. Perlberger's Mot. at ¶ 14.)<sup>7</sup> The Court finds that Rooker-Feldman principles are not applicable in connection with this state court order. First, Defendants identify this order as "interlocutory." (Id.) The Rooker-Feldman doctrine applies to "the final adjudications of a

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<sup>6</sup>As explained below, Younger abstention applies to ongoing state court proceedings.

<sup>7</sup>Defendants did not attach a copy of the state court decision.

state's highest court." Feldman, 460 U.S. at 483 n.16, 103 S. Ct. at 1316 n.16. The Third Circuit has interpreted the doctrine also to encompass final decisions of lower state courts. Port Auth. Police Benev. Ass'n v. Port Auth., 973 F.2d 169, 178 (3d Cir. 1992). Therefore, Rooker-Feldman does not apply to interlocutory orders that, by definition, are provisional and not final.

Defendants also attach documents to their Motions relating to Messody Perlberger's Petition for Retroactivity for Child Support (Id. Ex. 4), in which she seeks to increase the child support award based on a retroactivity date of December 1993. Her Petition sets forth a series of alleged abuses perpetrated by Defendant Perlberger. Significantly, the Petition contains no averments relating to the alleged RICO and state law claims pending before this Court. Under these circumstances, the Court finds that Plaintiffs' federal claims are not inextricably intertwined with the state court's decision on Messody Perlberger's Petition for Retroactivity for Child Support. In particular, Plaintiffs can succeed on their federal claims without a finding by this Court that the Court of Common Pleas erred when it denied the Retroactivity Petition.

Finally, it may be that Defendants' are attempting to base their Rooker-Feldman argument on the state court's dismissal of Messody Perlberger's Petition to Vacate or Strike the Divorce

Decree. If they are, this attempt is unavailing. The state court never reached the merits of this Petition because Messody Perlberger withdrew the Petition with prejudice. Perlberger v. Perlberger, Civ.A.No. 97-4105, 1997 WL 597955 (E.D. Pa. September 16, 1997). Rooker-Feldman does not apply where the state court did not reach the merits of a claim. Marks v. Stinson, 19 F.3d at 886 n.11. This Court is not barred by Rooker-Feldman from hearing Plaintiffs' RICO and fraud claims because, under the circumstances present here, this Court will not be faced with a situation where it will be asked to review a determination of the state court.<sup>8</sup> Id.; Ernst v. Child and Youth Services of Chester County, 108 F.3d 486, 491-92 (3d Cir. 1997)(Rooker-Feldman did not preclude the district court from exercising jurisdiction over the substantive due process claims against county child welfare defendants by a grandmother, who was the sole guardian of a granddaughter, arising from child welfare department's taking and retaining custody of granddaughter for a five-year period during dependency proceedings); Schaffren v. Philadelphia Corp. for Aging, Civ.A.No. 92-5858, 1997 WL 701313, at \*6-8 (E.D. Pa. Nov. 7, 1997)(no abstention under Rooker-Feldman because award of

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<sup>8</sup>Similarly, the petition for modification of support action filed by Messody Perlberger in the Court of Common Pleas cannot form the basis for this Court's abstention under Rooker-Feldman. According to Defendants, the Court of Common Pleas dismissed this petition for lack of prosecution without reaching the merits. (Def. Perlberger's Mot. at ¶¶ 5-7, Exs. 1 and 2.)

damages in federal civil rights action would not interfere with state court competency determination). The Court finds that this case is closely akin to Ernst and FOCUS, in which the Third Circuit held that the requested relief in the federal actions would not interfere with state court judgments.

In support of their Motions, Defendants rely solely on Rahim v. Ehrlich, No. 97-1639, slip op. (3d Cir. March 10, 1998), an unpublished memorandum opinion. Because Rahim is in the form of an unpublished memorandum, it is not binding precedent on this Court. Tobin v. Haverford School, 936 F. Supp. 284, 293 (E.D. Pa. 1996); Chapter 5.3, Third Circuit Internal Operating Procedures (West 1998) ("An opinion which appears to have value only to the trial court or the parties is ordinarily not published."). Only published opinions have precedential value in the Third Circuit. Chapter 5.2, Third Circuit Internal Operating Procedures.

Even though the Court is not bound by Rahim, the Court finds that Rahim is readily distinguishable from this case. In Rahim, the plaintiffs filed a civil rights suit in federal court concerning an ongoing dispute between Berks County and the plaintiffs concerning the custody of the plaintiffs' minor children. As the result of dependency proceedings concerning reports of injury and endangerment of the plaintiffs' children, the Court of Common Pleas awarded custody to the Berks County

Children & Youth services, and the children were placed in foster homes. In their federal suit, the plaintiffs requested, inter alia, the return of their children. The Third Circuit determined that under Rooker-Feldman the state and federal claims were "inextricably intertwined." The Third Circuit based its decision on the fact that the plaintiffs had asked the federal court to return their children to them, and thus in essence had asked the federal court to overrule the state court order awarding custody to the Berks County Children & Youth Services.

Unlike in Rahim, Plaintiffs in this case have not asked the Court to overrule or alter in any way the child support and alimony orders issued by the Court of Common Pleas. Instead, Plaintiffs seek treble damages, attorney's fees, and costs against all of the alleged participants of the RICO enterprise. 18 U.S.C.A. § 1964(c)(West 1984 & 1998 Supp.) In addition, Plaintiffs seek the full range of available damages that allegedly resulted from the Defendants' fraudulent conduct and intentional infliction of emotional distress. The Court recognizes that a measure of a portion of Plaintiffs' damages may be the amount of child support and alimony that Plaintiffs allege they were deprived of in the state court proceedings as a result of Defendant Perlberger's alleged misrepresentation of his assets. This, however, will not have the effect of overruling the state court's child support and alimony orders.

However Defendants' Rooker-Feldman argument is characterized, the Court finds that this doctrine does not bar the Court from entertaining Plaintiffs' RICO and state law claims. The Court's exercise of jurisdiction over Plaintiffs' claims will not affect the child support and alimony orders that have been rendered by the Court of Common Pleas. A finding in this Court that Defendant Perlberger and the other Defendants conspired to conceal information from Plaintiffs and the state court during and after the state court proceedings will not require a determination that the state court erred in rendering its decision based on the information that it had before it. The state court orders will remain in effect despite the outcome of Plaintiffs' proceedings in this Court. Therefore, the Court will deny Defendants' Motions on the basis of the Rooker-Feldman doctrine.

#### B. Younger Abstention

Defendants also maintain that this Court should abstain from exercising jurisdiction under the Younger abstention doctrine. "Three requirements must be met before Younger abstention is appropriate: (1) there must be an ongoing state judicial proceeding to which the federal plaintiff is a party and with which the federal proceeding will interfere, (2) the state proceedings must implicate important state interests, and (3) the

state proceedings must afford an adequate opportunity to raise the constitutional claims." FOCUS, 75 F.3d at 843. Even if a showing is made that the three requirements are met, such a showing does not require a district court to abstain. Marks v. Stinson, 19 F.3d at 881. "Where federal proceedings parallel but do not interfere with the state proceedings the principles of comity underlying Younger abstention are not implicated." Id. at 882.

The Court assumes that there are ongoing proceedings in the Court of Common Pleas concerning child support and alimony issues.<sup>9</sup> Nevertheless, the Court finds that the first and third requirements of the Younger abstention doctrine are not present here. Plaintiffs are proceeding in this Court with a federal RICO claim and state law fraud and emotional distress claims. Nothing contained in Defendants' Motions suggests that these claims are also pending before the Court of Common Pleas. The Court questions whether Plaintiffs could in fact bring these claims as part of the state court proceedings.<sup>10</sup> In this regard

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<sup>9</sup>Plaintiffs do not contradict Defendants' assertion that there are ongoing state court proceedings that involve the Perlbergers and concern child support and alimony issues.

<sup>10</sup>The Court recognizes that state courts have concurrent jurisdiction over civil RICO claims. Tafflin v. Levitt, 493 U.S. 455, 110 S. Ct. 792 (1990). Nevertheless, the ongoing state court proceedings on which Defendants base their Younger argument stem from the underlying divorce proceedings of the Perlbergers. Defendants do not contend that Plaintiffs could pursue their RICO claim in those state court proceedings.

it is important to note that the state court action only involves the Perlbergers. In this action, Plaintiffs have alleged a widespread fraudulent scheme that was purportedly perpetrated by Defendant Perlberger along with other Defendants who are not parties to the state court action -- to wit, Amy Lundy Brennan, Perlberger Law Associates, the Accountant Defendants, and Allen Rothenberg.<sup>11</sup> Although the federal action is related in some ways to the state court action, the proceedings in this Court will not interfere with the state court proceedings. For these reasons, the Court will also deny Defendants' Motions on the basis of the Younger abstention doctrine.

#### IV. CONCLUSION

For the foregoing reasons, the Court will not abstain from asserting jurisdiction over Plaintiffs' claims. In addition, the Court will deny Plaintiffs' Petition for Counsel fees, Costs, and Sanctions.

An appropriate Order follows.

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<sup>11</sup>Even if Plaintiffs could have raised the RICO, fraud, and emotional distress claims in the state court action, their failure to do so would not result in dismissal under Younger. Marks v. Stinson, 19 F.3d at 882; see also FOCUS, 75 F.3d at 843-44.



as well as Plaintiff's Petition for Counsel Fees, Costs and Sanctions (Doc. No. 65), Defendant Perlberger's Response (Doc. No. 69), and Defendants Jones and Jones, Hayward and Lenzi's Response (Doc. No. 72), **IT IS HEREBY ORDERED** that

1. The Motions for Abstention by Defendants Perlberger and Defendants Jones and Jones, Hayward and Lenzi are **DENIED**.

2. With respect to that aspect of Plaintiff's Petition for Counsel Fees, Costs, and Sanctions seeking counsel fees, costs, and sanctions against Defendants in connection with the Motions for Abstention, Plaintiff's Petition is **DENIED**.

BY THE COURT:

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John R. Padova, J.