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CIVIL RICO

Publication 527 Release 57 April 2017

HIGHLIGHTS

Recent Case Law

- Release 57 discusses numerous important new cases related to the RICO statute.

Recent developments discussed in Release 57 include:

In *Vanlaanen v. Cornerstone Mortgage LLC*, 2016 U.S. Dist. LEXIS 160249 (E.D. Wis. Nov. 18, 2016), and *Michelin North America Inc. v. Vehicular Testing Servs. LLC*, 2016 U.S. Dist. LEXIS 124963 (D.S.C. Aug. 22, 2016), the courts concluded that a change in venue may be available under 28 U.S.C. § 1404 or under § 1406, but the moving defendant bears the burden of proving the appropriateness of a transfer, which is not satisfied when the relative inconveniences of the different forums are equivalent. *See* Chapter 6, *Instituting a Civil RICO Action*, ¶ 6.01[1].

In *Akishev v. Kapustin*, 2016 U.S. Dist. LEXIS 169787 (D.N.J. Dec. 8, 2016), when confronted with an allegedly fraudulent Internet used car ring operating out of Russia by misrepresenting an inventory of cars in the United States, the court acknowledged that the Supreme Court's opinion in *RJR Nabisco, Inc. v. European Community*, ___ U.S. ___, 136 S. Ct. 2090, 195 L. Ed. 2d 476 (2016), set different standards of extraterritoriality for RICO's reach as a criminal statute versus that of a private cause of action. For criminal actions, the RICO enterprise must be engaged in commerce with the United States, and the predicate acts must either occur in the United States or must themselves apply extraterritorially. For private civil actions, the Supreme Court's focus was not on the enterprise, but on where the private RICO plaintiff suffered the injury. Rejecting the contention that the plaintiff's residence in Russia was determinative of the site of injury, the court held that the locus delicti of the crime (Internet offerings of used cars allegedly located in New Jersey and Pennsylvania), was sufficient to qualify as a domestic injury. *See* Chapter 6, *Instituting a Civil RICO Action*, ¶ 6.03[4].

In *Spokeo, Inc. v. Robins*, ___ U.S. ___, 136 S. Ct. 1540, 194 L. Ed. 2d 635 (2016), the Supreme Court held that the "injury in fact" requirement of constitutional standing

is not necessarily satisfied by a mere statutory violation. The *Spokeo* opinion isolated the two requirements for injury in fact—particularization and concreteness—and held that an injury is not "concrete" simply because Congress designated the related conduct a statutory violation. Recognizing that intangible injuries may qualify as injury in fact, the *Spokeo* opinion held that a bare procedural violation (i.e., the failure to correct factual information about the plaintiff in violation of a federal credit reporting statute) may be insufficient to establish concrete injury. *See* Chapter 6, *Instituting a Civil RICO Action*, ¶ 6.04[1].

In *George v. Urban Settlement Services*, 833 F.3d 1242 (10th Cir. 2016), the Tenth Circuit upheld the sufficiency of fraud allegations against Bank of America for defrauding its mortgage holders, in conjunction with its third party vendor Urban Settlement Services, out of qualifying for assistance from a federal loan modification program in which it participated to qualify for federal bailout monies after the financial crash in 2009. The Tenth Circuit construed Rule 9(b) as permitting a trial court to consider whether any pleading deficiencies resulted from the plaintiff's inability to obtain information in the defendant's exclusive control. *See* Chapter 7, *Pretrial Proceedings* ¶ 7.02[5].

In *Goel v. Bunge*, 820 F.3d 554 (2d Cir. 2016), the Second Circuit held that a New York savings statute did not toll RICO claims. Moreover, RICO claims are governed by federal tolling rules, and federal tolling law applied to this case, even though removed from state court, because federal tolling law applies to RICO cases filed in state court. *See* Chapter 9, *Defenses*, ¶ 9.01[5][c].

New ¶ 9.01[6] discusses relation back of federal pleadings. Under the basic pleading philosophy of the Federal Rules, newly added claims generally relate back to the original commencement (filing) date of the initial complaint. For limitations purposes, if a RICO claim relates back to the original filing date, claims that are timely as of that earlier date are equally timely as of the time of their addition by way of pleading amendment. However, relation back of RICO claims is neither automatic nor certain, and courts will inquire into whether the original complaint gave the defendants fair notice of the newly alleged claims. *See* Chapter 9, *Defenses*, ¶ 9.01[6].

In *Chevron Corp. v. Donziger*, 833 F.3d 74 (2d Cir. 2016), after acknowledging that the Second Circuit had previously expressed doubts about the availability of private injunctive relief under RICO, the court upheld the district court's issuance of such relief under RICO. The *Chevron* opinion rooted judicial authority to issue injunctive relief in RICO cases by construing 18 U.S.C. § 1964(a) as a conferral of general subject matter jurisdiction upon district courts, including all attendant equitable remedies. By contrast, it construed 18 U.S.C. § 1964(b) as authorizing equitable relief for the government, but limited to nonfinal restraining orders, with 18 U.S.C. § 1964(c) limiting damages relief to private parties. According to *Chevron*, all plaintiffs—including private plaintiffs—can pursue all remedies authorized under 18 U.S.C. § 1964(a). *See* Chapter 10, *Remedies* ¶ 10.03[1].

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Publication 527 Release 57 April 2017

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