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CIVIL RICO

Publication 527 Release 59 April 2018

HIGHLIGHTS

Recent Case Law

- Release 59 discusses numerous important new cases related to the RICO statute.

Recent developments discussed in Release 59 include:

In *United States v. Pinson*, 860 F.3d 152 (4th Cir. 2017), the Fourth Circuit held that the government failed to prove a single RICO conspiracy in which each conspirator shared "the same criminal objective" and the evidence was insufficient to prove an association-in-fact enterprise. The four ventures in this case lacked the "common purpose" and relationships among associates necessary to establish a RICO enterprise. *See* Chapter 3, *The Enterprise Element*, ¶ 3.01.

In *U1IT4Less, Inc. v. FedEx Corp.*, 871 F.3d 199 (2d Cir. 2017), the Second Circuit held that if a corporate defendant can be liable for participating in an enterprise comprised only of its agents, RICO liability will attach to any act of corporate wrongdoing, and the statute's distinctness requirement will be rendered meaningless. The court rejected the plaintiff's attempt to avoid the distinctness issue by alleging that the enterprise was a discrete and separately incorporated subsidiary of FedEx, rather than an association-in-fact, finding the difference immaterial. *See* Chapter 3, *The Enterprise Element,* ¶¶ 3.07[1], 3.07[2][a].

In *Roppo v. Travelers Commercial Insurance Co.*, 869 F.3d 568 (7th Cir. 2017), the Seventh Circuit reversed the dismissal of a *pro se* RICO complaint. The court found that although the complaint might not be sufficiently specific to meet the heightened pleading requirements of Rule 9(b), the allegations of conduct and racketeering activity were neither wholly insubstantial nor legally unsound. *See* Chapter 4, *The Pattern Element*, ¶ 4.04[2].

In *United States v. Odum*, 2017 U.S. App. LEXIS 24231 (6th Cir. Nov. 30, 2017), the Sixth Circuit held that if an enterprise engages in economic activity, even a *de minimis* connection to interstate commerce is sufficient to meet the interstate prong of 18 U.S.C. § 1959. The court noted that 18 U.S.C. § 1959(b)(1) uses a specific definition of "racketeering activ-

ity" that is separate from the definition of "pattern of racketeering activity" used in RICO. *See* Chapter 5, *Section 1962*, ¶ 5.04[2][a].

In *United States v. Ferriero*, 866 F.3d 107 (3d Cir. 2017), the Third Circuit established a test that asks whether racketeering was a means of conducting the enterprise's affairs, but does not foreclose satisfying the nexus when a defendant's position in the enterprise also enabled or facilitated the racketeering—two situations that may well overlap. *See* Chapter 5, *Section 1962*, ¶ 5.04[3][d].

In *RJR Nabisco, Inc. v. European Community*, ___ U.S. ___, 136 S. Ct. 2090, 195 L. Ed. 2d 476 (2016), the United States Supreme Court held that, while RICO applies extraterritorially, its civil RICO claims do not. A civil RICO plaintiff must allege *domestic* injury to its business or property. *See* Chapter 6, *Instituting a Civil RICO Action*, ¶ 6.04[5][a][x].

In *Bascunan v. Elsaca*, 874 F.3d 806 (2d Cir. 2017), the Second Circuit held that if a plaintiff alleges more than one injury, courts should separately analyze each injury to determine whether any of the injuries alleged are domestic. The court went on to hold that an injury to property is domestic only if the property was physically located in the United States, regardless of whether bank accounts in the United States were used to facilitate or conceal the theft of property abroad. *See* Chapter 6, *Instituting a Civil RICO Action*, ¶ 6.04[5][a][x].

In *Rizvi v. Urstadt Biddle Properties, Inc.*, 2018 U.S. Dist. LEXIS 7914 (D. Conn. Jan. 17, 2018), the district court held that granting an extension of time to file a motion to dismiss tolls the period for filing an amended complaint as of right. *See* Chapter 7, *Pretrial Proceedings*, ¶ 7.01.

In *Vibe Micro, Inc. v. Shabanets*, 878 F.3d 1291 (11th Cir. 2018), the court dismissed civil RICO claims for being "shotgun pleadings." The term "shotgun pleading" is a judicial conclusion that can be based on various perceived pleading deficiencies that themselves may not go to the merits of a claim. *See* Chapter 7, *Pretrial Proceedings*, ¶ 7.02[7][f].

In *Newman v. Jewish Agency for Israel*, 2017 U.S. Dist. LEXIS 202524 (S.D.N.Y. Dec. 8, 2017), foreign government officials being sued under RICO for acts taken in their official capacities were held to have common-law immunity from suit. *See* Chapter 9, *Defenses*, ¶ 9.02[3][c].

In *Gonzalez v. Velez*, 864 F.3d 45 (1st Cir. 2017), the First Circuit held that Congress intended to preclude civil RICO claims by enacting Title VII of the Civil Rights Act and the Civil Service Reform Act. *See* Chapter 9, *Defenses*, ¶ 9.14.

In *Hunt v. Moore Brothers, Inc.*, 861 F. 3d 655 (7th Cir. 2017), the Seventh Circuit affirmed a Rule 11 sanctions determination for the plaintiff's failure to comply with an arbitration obligation. The court took the occasion to characterize the plaintiff's RICO arguments as "beyond the pale" and to complain that the case was a simple commercial dispute, although that was not discernible from reading the plaintiff's complaint. *See* Chapter 10, *Remedies*, ¶ 10.09.

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Publication 527, Release 59, April 2018

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Publication 527 Release 59 April 2018

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