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CIVIL RICO

Publication 527 Release 61 April 2019

HIGHLIGHTS

Recent Case Law

- Release 61 discusses numerous important new cases related to the RICO statute.

Recent developments discussed in Release 61 include:

In *United States v. Zemlyansky*, 908 F.3d 1 (2d Cir. 2018), the court explained that RICO conspiracy does not require proof that the defendant intended that specific criminal acts be accomplished. Instead, it is sufficient to show that the defendant intended that the broad goals of the racketeering scheme be realized, along with evidence that any members of the conspiracy intended that specific criminal acts be accomplished. RICO conspiracy and "basic" conspiracy therefore have qualitatively different *mens rea* requirements as to agreement and intent. In each case, however, the court must determine whether a "rational jury" could have acquitted the defendant in the first trial for similar, non-preclusive reasons. *See* Chapter 5, *Section 1962*, ¶ 5.05[1].

In *Orion Property Group, LLC v. Hjelle*, 2018 U.S. Dist. LEXIS 211295 (D. Kan. Dec. 13, 2018), the court applied a three-part test to determine if a defendant has purposefully directed his actions to justify specific personal jurisdiction: (1) an intentional act by the defendant; (2) which is expressly aimed at the forum state; and (3) with knowledge that the brunt of the injury would be felt in that state. *See* Chapter 6, *Instituting a Civil RICO Action*, ¶ 6.02[1].

In *Smith v. Smith*, 2019 U.S. Dist. LEXIS 14079 (W.D. Wash. Jan. 29, 2019), the court described standing as an inquiry into: (1) whether the plaintiff's injury is to the plaintiff's business or property; and (2) whether this injury was by reason of, or proximately caused by, a RICO violation. *See* Chapter 6, *Instituting a Civil RICO Action*, ¶ 6.04[1].

In *In re Mercedes-Benz Emissions Litigation*, 2019 U.S. Dist. LEXIS 16381 (D.N.J. Feb. 1, 2019), a RICO case against Mercedes for selling allegedly overpriced cars using misrepresented fuel emissions technology, a court looked to the Supreme Court's seminal antitrust opinion in *Reiter v. Sonotone Corp.*, 442 U.S. 330 (1979), to

conclude that consumer injury from an overpriced good constitutes property interest under both the antitrust laws and RICO. *See* Chapter 6, *Instituting a Civil RICO Action*, ¶ 6.04[5][b].

In *Harmoni International Spice, Inc., v. Hume*, 2019 U.S. App. LEXIS 2118 (9th Cir. Jan. 23, 2019), the court applied a widely used test that considers three factors, borrowed from antitrust precedent, to assess whether an injury is sufficiently direct to satisfy proximate causation under RICO: (1) whether more direct victims exist to vindicate RICO as private attorney generals; (2) the degree of difficulty in ascertaining damages attributable to the defendant's conduct; and (3) the need to apportion damages to avoid multiple recoveries. *See* Chapter 7, *Pretrial Proceedings*, ¶ 7.02[7][c].

In *Painters & Allied Trades District Council 82 Health Care Fund v. Forest Pharmaceutials, Inc*., 2019 U.S. App. LEXIS 3079 (1st Cir. Jan. 30, 2019), the First Circuit held that the unsealing of a government qui tam complaint triggers inquiry notice and inquiry notice is sufficient to commence the limitations period in a RICO suit. *See* Chapter 9, *Defenses*, ¶ 9.01[5][b][vi].

In *Griggs v. S.G.E. Management LLC*, 905 F.3d 835 (5th Cir. 2018), the Fifth Circuit upheld a trial court's order dismissing a RICO complaint under Federal Rule of Civil Procedure 41(b) for want of prosecution when the plaintiff failed to initiate arbitration more than a year after the court's order compelling arbitration. *See* Chapter 9, *Defenses*, ¶ 9.04[1].

In *Kajla v. Cleary*, 2019 U.S. Dist. LEXIS 61 (D.N.J. Jan. 2, 2019), the court invoked the *Rooker-Feldman* doctrine to deny jurisdiction to consider RICO claims brought in federal court against participants in state court proceedings, such as the state court judicial officials involved in the prior state court litigation. However, as the court held in *Kamal v. Cty. of L.A.*, 2018 U.S. Dist. LEXIS 153157 (C.D. Cal. Sept. 6, 2018), the *Rooker-Feldman* doctrine does not preclude a federal suit to set aside state court judgments that were obtained by "extrinsic fraud," but only if the state court has not adjudicated the alleged fraud. *See* Chapter 9, *Defenses*, ¶ 9.08[4].

In *Patel v. Specialized Loan Servicing, LLC*, 904 F.3d 1314 (11th Cir. 2018), the Eleventh Circuit applied the filed rate doctrine to dismiss RICO claims by plaintiffs based on rates filed with state regulators. The court dismissed consumer mortgage holders' RICO claims against loan servicers for imposing forced insurance that was subject to state rates, even though the plaintiffs were not rate payors. *See* Chapter 9, *Defenses*, ¶ 9.10[4].

In *Day v. Johns Hopkins Health System Corp*., 907 F.3d 766 (4th Cir. 2018), the Fourth Circuit described the "Witness Litigation Privilege" as an "absolute immunity." Characterizing the privilege as "broad" and a vital part of federal common law, the court recognized that while there may be issues about the scope of its application, if it applies, its protection is absolute. The court found that the immunity barred RICO claims based on allegedly false expert witness testimony given during a federal administrative hearing. After rejecting a claim that expert witnesses should lack immunity, the court held that RICO did not abrogate the Witness Litigation Privilege and it justified the dismissal of the RICO complaint. *See* Chapter 9, *Defenses*, ¶ 9.19.

In *Quick v. EduCap, Inc.*, 2019 U.S. Dist. LEXIS 572 (D.D.C. Jan. 3, 2019), the district court dismissed a RICO complaint

because it was predicated on litigation activity and failed to allege a RICO enterprise, but rejected the subsequent Rule 11 motion because its litigation ruling was not controlled by existing circuit precedent and dismissals of RICO enterprise allegations are "not uncommon." The district court declined to consider a ground upon which it had dismissed a RICO complaint, because the moving defendant had failed to include this ground in its safe harbor notice. *See* Chapter 10, *Remedies*, ¶ 10.09.

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