

RICO Suits Against Cannabis Companies and Co-Conspirators Slow to Gain Traction

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Safe Streets Alliance v. Alternative Holistic Healing

A federal jury recently found a Colorado cannabis cultivator not liable for violating the federal Racketeer Influenced and Corrupt Organizations (RICO) statute following a three-day jury trial. The trial followed three years of litigation, including an appeal to the Tenth Circuit. While the defendants may be celebrating a hard-fought victory in this battle, the war between marijuana businesses and hostile neighbors is far from over.

To put the case in context, it is worth looking at the history of the matter. The plaintiffs were owners of property adjacent to a medical marijuana facility. The defendants were the medical marijuana facility and affiliated individuals and entities. Over the course of multiple rulings [See *Safe Sts. All. v. Alt. Holistic Healing, LLC*, Civil Action No. 1:15-cv-00349-REB-CBS, 2016 U.S. Dist. LEXIS 5934 (D. Colo. Jan. 19, 2016); *Safe Sts. All. v. Alt. Holistic Healing, LLC*, Civil Action No. 1:15-cv-00349-REB-CBS, 2016 U.S. Dist. LEXIS 36113 (D. Colo. Mar. 21, 2016)], the federal district court dismissed the case entirely in 2016 for failure to state a claim. In a June 17, 2017, decision, however, the Tenth Circuit reinstated certain counts, including the plaintiffs' RICO claims. *Safe Streets Alliance v. Hickenlooper*, 859 F.3d 865 (10th Cir. 2017).

The appellate court affirmed the lower court's dismissal in part, rejecting the plaintiffs' arguments that Colorado's recreational marijuana laws were preempted by the federal Controlled Substances Act (CSA). The ruling was limited, however, because it was based on the court's conclusion that none of the plaintiffs had standing to make such a claim because none possessed any substantive federal rights that were injured by the state law.

On the plaintiffs' RICO claims, the Tenth Circuit reversed the dismissal. The plaintiff landowners claimed the defendants' marijuana cultivation facility injured the value of their property. They also claimed that "noxious" odors from the facility negatively affected their ability to use and enjoy the property for recreation and that the operation of a federally illegal marijuana cultivation facility diminished the value of their property. The court held that each of these theories adequately stated an injury to property for purposes of RICO liability and remanded the case for a jury trial.

The jurors in the case were instructed that the plaintiffs had established the first element of a RICO

claim as a matter of law, *i.e.*, that defendants' operation of the marijuana cultivation facility was a violation of RICO. Accordingly, the jurors were only required to answer whether the plaintiffs had suffered an injury to their property interest and whether the injury, if any, was proximately caused by the RICO enterprise. The completed verdict form submitted by the jury indicated that the jurors found that the plaintiffs had suffered no injury, and that they did not prove that any injury was caused by the marijuana cultivation facility.

This verdict will likely bring the Colorado case to a close, but the Tenth Circuit's decision in this case as well rulings in other similar cases indicate that federal RICO claims remain viable.

Ainsworth v. Owenby

For example, although RICO claims in a case brought in the District of Oregon were dismissed on August 17, 2018, for failure to state a claim, *Ainsworth v. Owenby*, 326 F. Supp. 3d 1111 (D. Or. 2018), the plaintiffs were permitted to amend their complaint to address deficiencies in the pleadings. As in other similar cases, defendants included the owners of the cannabis business, property owners and other participants in the business on theories of state law nuisance and civil RICO. In dismissing the nuisance and RICO claims, the court held that the plaintiffs had failed to allege a compensable property injury under the civil RICO statute, diverging from the Tenth Circuit's reasoning in *Safe Streets Alliance*.

As in *Safe Streets Alliance*, the plaintiffs were residential neighbors of a marijuana cultivation and processing facility. They claimed that the defendants operated a greenhouse with commercial exhaust fans running 24/7, pit bull guard dogs roaming the property, marijuana refuse and debris burning, and traffic to and from the facility that transformed their quiet streets into commercial roadways. The plaintiffs claimed that they could no longer use their yards or even open their windows due to the noxious smells and noise. They also claimed that the neighboring marijuana operation lowered their property values and made them harder to sell.

The plaintiffs claimed that they had suffered three types of injury that satisfied the "injury to property" element of a RICO claim: loss of enjoyment of their property, diminution of value of the property, and expenditures on security equipment and guns to protect themselves from perceived safety issues relating to the marijuana operation. The court held that loss of use of the property was a non-compensable personal injury for purposes of RICO liability. It also held that expenditures on security measures could not "transform their distress over neighborhood safety into an injury to property." Finally, as to the claim that their property values had been impacted, the court held that, as alleged, such harm was "abstract." Where the plaintiffs had alleged "no past or present intent to rent, sell, or otherwise monetize their property interests," they had not adequately alleged an injury to their property for purposes of RICO.

The plaintiffs have since filed an amended complaint, alleging that they had their property appraised, that the appraisals were lower than expected given the soaring real estate market, and that their ability to borrow against their equity was reduced as a result of the lower property value. It remains to be seen whether these allegations adequately allege an injury-to-property element for purposes of the RICO statute.

Bokaie v. Green Earth Coffee

Shortly after this decision was issued on August 27, 2018, a group of plaintiffs in California filed a civil RICO suit against Green Earth Coffee, alleging that they suffered injury to their property as a result of

the defendants' marijuana growing operations. In an interesting twist, that operation is allegedly not properly licensed under California law, and thus may not be a "state legal" business as other targets of RICO suits have been. The case is *Bokaie et al. v. Green Earth Coffee LLC*, 3:18-cv-05244-JST. Following the lead of plaintiffs in other cases, these plaintiffs have named individuals involved in the business, the owner of the property, and even the bank that allegedly loaned money for the acquisition of the property.

Crimson Galleria v. Healthy Pharms

In the meantime, on August 21, 2018, a federal judge in the District of Massachusetts issued a ruling on motions to dismiss in yet another civil RICO case, which allowed certain claims to go forward. *Crimson Galleria Ltd. P'ship v. Healthy Pharms, Inc.*, Civil Action No. 17-cv-11696-ADB, 2018 U.S. Dist. LEXIS 141689 (D. Mass. Aug. 21, 2018). In that suit, property owners in Cambridge claimed that a yet-to-be-opened medical dispensary was hurting their property values. In addition to suing the owner of the dispensary, the plaintiffs sued the City of Cambridge, the cultivation facility and the town in which it was located, as well as various cannabis business consultants and the dispensary's banking services provider.

The court followed the ruling of the Tenth Circuit in *Safe Streets*, holding that no private citizen could sue to enforce the Controlled Substances Act, because "allowing private litigants to interfere with the Department of Justice's discretionary decision to allow states to develop their own regulatory schemes regarding medical marijuana 'would create precisely the type of risk of inconsistent interpretations and misincentives' that strongly counsel against recognizing an implicit right to a judicially created equitable remedy." The court accordingly dismissed the government defendants.

As to the non-governmental defendants that had initially moved to dismiss on the grounds that the claims were not ripe since the dispensary had not yet opened, the court permitted the plaintiffs to amend their complaint to reflect the fact that the dispensary had since opened. Likewise, while the court noted that allegations regarding other defendants, including cannabis consultants, were insufficiently specific, the court also permitted the plaintiffs to amend their complaint as to the other defendants. However, a recent check of the docket revealed that prior to filing their amended complaint the plaintiffs voluntarily dismissed several of those defendants without prejudice, perhaps realizing that they could not provide the necessary specificity at that juncture

Conclusion

While marijuana legalization continues to expand throughout North America, there still is significant resistance from both public and private interests. Even though a Colorado jury sided with the marijuana business, the court's instruction that the business constituted a criminal enterprise for purposes of the RICO statute, as a matter of law, shows that RICO liability remains a very real concern, even for state-legal businesses.

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