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Plaintiff's civil RICO claim goes up in smoke in Colorado grower's case, but the threat of future lawsuits remains

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On October 31, 2018, a jury in a Colorado federal civil action returned a verdict against a real property owner on its RICO claim against an adjacent cannabis grow operation, concluding that the plaintiff failed to prove financial loss caused from odors emitted from the defendant's grow operation. *Phillis Windy Hope Reilly and Michael P. Reilly v. 6480 Pickney, LLC, Parker Walton, and Camp Feel Good, LLC, case no: 1:15-cv-00349 in the U.S. District Court for the District of Colorado*. While the cannabis industry may be touting this win, in reality, the case provides prospective plaintiffs a roadmap for bringing civil RICO claims against cannabis growers nationwide.

The Reilly Case

Plaintiffs Hope and Michael Reilly initiated a lawsuit against Colorado cannabis grower Parker Walton in 2015 alleging a violation of 18 U.S.C. § 1964, which provides for a private cause of action against those engaged in racketeering activities. Section 1964 requires that a plaintiff must show that the defendant violated the **RICO** statute, and the plaintiff was injured "by reason of" that violation. 18 U.S.C. §§ 1962, 1964(c). A defendant violates **RICO** directly when he (1) participates in the conduct (2) of an enterprise (3) through a pattern of (4) racketeering activity. *See Tal v. Hogan, 453 F.3d 1244, 1261 (10th Cir.2006)*. Section 1964 allows (1) that the plaintiff shall recover threefold the damages he suffered, (2) the cost of the suit and, (3) reasonable attorney fees. The Reillys claimed that the adjacent grower's operations violated the federal Controlled Substances Act by causing odors limiting the enjoyment of their property and diminishing its value. The court dismissed the claim because it found that the Reillys failed to plead facts showing actual financial loss resulting from the diminution of property value and property damages resulting from the alleged odors.

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The Tenth Circuit U.S. Court of Appeals reversed the district court's ruling, noting that plaintiffs did not need to plead actual financial loss to allege injury to property value. Relying on Colorado nuisance law, the court held that interference with the enjoyment of property as a result of odors is an injury to the property itself, as opposed to a personal injury for which the civil RICO statute provides no recovery. The Court of Appeals, therefore, remanded the case to the district court, giving the Reillys an opportunity to prove their damages. On remand, the jury found that the Reillys failed to meet their burden to demonstrate financial loss.

Takeaway

While the Reillys may have not been successful in proving their damages, they did pave the way for other plaintiffs to successfully state a civil RICO cause of action by alleging a state law nuisance claim and a diminution of property value due to a criminal violation of the federal Controlled Substances Act. A successful civil RICO claim not only entitles the winning plaintiff to treble damages but recovery of attorney fees as well. The ability to recover attorney fees alone may prove an incentive to anti-cannabis plaintiffs even where damages may be negligible, especially where the availability of equitable relief in private civil RICO cases remains unsettled law.

To learn more about this case or for insight on how cannabis operations can defend against civil RICO claims, please feel free to contact the author or other member of Butzel Long's Cannabis Specialty Team.

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