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RICO class actions – Northern District of Georgia sends Georgia RICO class action based on federal predicates back to state court

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Takeaway: RICO defendants usually move to dismiss civil racketeering claims. And when it comes to motions to dismiss, RICO defendants almost always prefer to be in federal – as opposed to state – court. Accordingly, whenever a civil RICO complaint is filed in state court, a RICO defendant will look long and hard at the possibility of removing the case to federal court and then moving to dismiss it. RICO plaintiffs, on the other hand, often do their best to file complaints in state court that cannot be removed to federal court, such as, for example, bypassing federal RICO and alleging claims only under state RICO statutes. Indeed, a plaintiff asserting a claim under a state RICO statute generally does not implicate federal question jurisdiction even by asserting federal predicate acts in support of their state RICO claim, although there are narrow circumstances where the presence of federal questions within a state law claim are so substantial as to give rise to federal question jurisdiction. The district court recently addressed these issues in *Hoipkemier v. Miller*, No. 1:24-CV-00600-TWT, 2024 WL 4829486 (N.D. Ga. Nov. 18, 2024), concluding that the action should be remanded to state court.

In *Hoipkemier*, the plaintiffs filed a putative class action based on a complicated "conservation easement syndication scheme," in which promoters allegedly induced investors to buy units in a fund on the promise that they would be able to claim valuable charitable tax donations on their personal income tax returns. 2024 WL 4829486, at *2. In fact, according to the complaint, the purported conservation easement supposedly justifying the tax deductions under Internal Revenue Service (IRS) regulations and guidance was based on a series of fraudulent representations and omissions, ultimately resulting in the disallowance of the deductions by the IRS and ensuing penalties.

The plaintiffs filed their original complaint in Georgia state court, alleging violations of the Georgia RICO Act based on predicate acts of federal mail and wire fraud as well as a predicate act under Georgia state securities law. The RICO defendants removed the case to federal court, asserting both federal question and diversity jurisdiction. They also moved to dismiss the RICO claims. The plaintiffs moved to remand and the district court granted the motion, sending the case back to Georgia state court. The district court then denied the motions to dismiss as moot.

State RICO statutes – such as Georgia's RICO statute – typically permit a civil RICO plaintiff to rely on violations of federal law as RICO predicate acts forming a pattern of racketeering activity, including violations of the federal mail and wire fraud statutes. On the issue of federal question jurisdiction, however, a state law RICO claim based on federal predicate acts usually does *not* give rise to federal question jurisdiction. In the leading case of *Ayres v. General Motors Corp.*, 234 F.3d 514 (11th Cir. 2000), however, the Eleventh Circuit ruled that a Georgia RICO claim based *exclusively* on federal predicate

acts that also raised a substantial question under another federal statute (in that case, the National Traffic and Motor Vehicle Safety Act), gave rise to federal question jurisdiction.

In *Hoipkemier*, the RICO defendants relied on *Ayres* in supporting removal to federal court, arguing that the Georgia RICO claim depended on federal predicates and also raised a substantial question under an appraisal standard codified in IRS regulations. But the district court rejected that argument, emphasizing the narrow reach of federal question jurisdiction under cases such as the *Ayers* case. Unlike in *Ayers*, the district court observed, the complaint in *Hoipkemier* did not rely exclusively on federal predicate acts, but also was based on a predicate act under Georgia state securities law. Accordingly, "[t]he presence of both state and federal predicate acts means that interpreting federal law is not strictly necessary or otherwise 'essential' to the cause of action in question." 2024 WL 4829486, at *5. Moreover, addressing the defendants' arguments based on the need for a federal court to interpret and apply governing IRS regulations, the "mere need" to interpret and apply federal IRS regulations in the context of a state RICO violation was not enough to "to open the 'arising under' door" as required to show federal question jurisdiction. *Id.* (quoting *Adventure Outdoors, Inc. v. Bloomberg*, 552 F.3d 1290, 1300 (11th Cir. 2008)).

The defendants' effort to keep the case in federal court based on diversity jurisdiction also failed because of their failure to submit evidence within their control to prove minimal diversity jurisdiction under the Class Action Fairness Act (CAFA). The district court ruled: "The Defendants do not dispute that they possess the relevant records, yet they have not relied on those records in asserting CAFA jurisdiction. Rather, they rely exclusively on the one sentence offered by the Plaintiffs [to the effect that there are approximately 100 members in the putative class], but this reliance is insufficient to establish a preponderance of the evidence. Therefore, the Court holds that it does not have diversity jurisdiction based on CAFA." *Id*. at *6.