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RICO class actions: Ninth Circuit affirms dismissal of civil RICO claims by Volkswagen dealers

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Takeaway: Class actions brought under federal RICO present significant risks for defendants. They present the opportunity for certification of a nationwide class under a federal statute, and the remedies provided under federal RICO – similar to federal antitrust remedies – include treble damages and attorneys' fees. Accordingly, attorneys defending such class actions almost always seek the pre-trial dismissal of RICO claims. A recent decision by the Ninth Circuit in one of the "clean diesel/defeat device" series of class actions reinforces the principle that, to claim a RICO injury, there must be a direct relationship between the fraudulent scheme and the injury. An injury caused by the discovery – as opposed to the perpetration – of the fraudulent scheme is not enough to establish RICO proximate cause.

Seeking to represent themselves and a putative class, three Volkswagen-branded franchise dealers that sold turbocharged direct injection (TDI) diesel engine vehicles equipped with so-called "defeat devices" – software that enabled non-compliant TDI vehicles to pass emissions tests – brought civil RICO claims against Robert Bosch GmbH and Robert Bosch LLC (collectively, "Bosch"). In re: *Volkswagen "Clean Diesel" Mktg., Sales Practices, and Prods. Liab. Litig.*, --- Fed.Appx. ---, No. 20-15034, 2021 WL 248518 (9th Cir. Jan. 26, 2021). The dealers alleged that Bosch and Volkswagen conspired to develop, implement, and promote defeat devices, thereby participating in a racketeering enterprise through a pattern of racketeering activity in violation of the federal Racketeer Influenced and Corrupt Organizations Act (RICO), and that they also conspired to violate RICO. *See* 18 U.S.C. §§ 1962(c), (d).

The dealers asserted "it was a foreseeable and natural consequence" of Bosch's participation in Volkswagen's fraudulent scheme that "once their fraud was exposed and TDIs were entirely withdrawn from the market, Plaintiffs [would lose] the opportunity to sell TDIs and also suffered injuries due to VW's buyback of TDIs." 2021 WL 248518, at *1. But to establish proximate cause under RICO, a plaintiff mush show "some direct relation between the injury asserted and the injurious conduct alleged." *Id*. (quoting *Holmes v. Secs. Inv. Protection Corp*., 503 U.S. 258, 268 (1992)). The dealers' theory of proximate cause "necessarily encompasse[d] an intervening step: the discovery of the fraud." *Id*. at *2.

According to the Ninth Circuit, the dealers' alleged RICO injury was caused not by the fraudulent scheme itself – the development, implementation, and promotion of defeat devices, coupled with the fraudulent marking of TDI vehicles – but by the discovery of the fraud. The panel ruled that "the mere possibility that the initial fraud would be discovered and ultimately cause the cessation of the TDI line and buyback program is not sufficient to establish proximate cause" under the federal RICO statute. *Id*. at *1. Thus, the panel affirmed the district court's grant of summary judgment in favor of Bosch on the essential element of proximate cause.