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A Ninth Circuit Blueprint for a RICO Class Action

Takeaway: Civil RICO claims usually present complex issues. As civil causes of action predicated on violations of criminal law, a RICO plaintiff must prove (1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity (5) causing injury to the plaintiff's business or property. Given their inherent complexity, RICO claims – especially fraud-based RICO claims – usually raise fact-intensive issues inappropriate for class certification. But, as demonstrated in a recent Ninth Circuit decision, class certifications in RICO cases remain possible, giving plaintiffs a potentially lethal weapon in winning the certification of *nationwide* federal-claim class actions seeking the treble damages and attorneys' fees mandated under the federal RICO statute.

In *Just Film, Inc. v. Buono*, 847 F.3d 1108 (9th Cir. 2017), small businesses that leased "point of sale" processing equipment for credit and debit cards filed a putative class action, alleging that the providers of credit card processing services conspired to sell fraudulent, long-term equipment leases and processing services, in violation of the federal Racketeer Influenced and Corrupt Organizations Act (RICO) and other statutes. Plaintiffs alleged the defendants (the "Leasing Defendants") engaged in two fraudulent schemes in connection with the equipment leases between the Leasing Defendants and the class members.

First, in the "Post-Lease Tax Collection Scheme," the Leasing Defendants allegedly conspired to defraud plaintiffs "by collecting or attempting to collect taxes that were not actually due or paid to any taxing authority." *Id*. at 1113. Notably, on this issue, the district court had entered a preliminary injunction earlier in this case, enjoining the collection of these taxes. The Ninth Circuit upheld this injunction in a prior appeal.

Second, in the "Property Tax Scheme," the Leasing Defendants allegedly employed a fraudulent means of collecting property taxes on leased equipment (point of sale swipe terminals and pinpads). While the Leasing Defendants should have calculated property taxes under the leases based on the actual cost of the equipment, they instead calculated the taxes using a much higher base – the stream of income a lease would generate. On this point, a Rule 30(b)(6) witness for the Leasing Defendants had conceded in a deposition that the higher base should not have been used, and that the tax should have been based on the much-lower equipment cost. Despite this admitted mistake, the Leasing Defendants never told the plaintiffs about the tax overcharge and made no effort to provide refunds to the members of the class.

Based on these alleged schemes, the plaintiffs asserted federal RICO and related claims against the Leasing Defendants. As relevant to the RICO claims, the district court certified two national classes to

pursue RICO and RICO conspiracy claims with respect to both the "Post-Lease Tax Collection Scheme" and the "Property Tax Scheme." The Leasing Defendants then filed a petition to appeal these certifications under Federal Rule of Civil Procedure 23(f), which the Ninth Circuit granted. On appeal, the Ninth Circuit affirmed the certification of the classes and, in so doing, rejected the Leasing Defendants' arguments that the plaintiffs (1) did not establish typicality, commonality, and predominance for the "Post-Lease" class and (2) did not establish commonality, predominance, and superiority for the "Property Tax" class.

The Ninth Circuit started off by noting its view that a *grant* of class certification should be accorded "noticeably more deference" than a *denial* of class certification. *Id*. at 1115. The Court of Appeals' analysis relative to both classes includes several highlights summarized below.

POST-LEASE CLASS

Typicality: The representative of this class did not directly lose money (by having her account debited for taxes and fees), while the other putative class members did. The Ninth Circuit nevertheless found that she had established typicality, because she "was injured by the same *pattern* of racketeering activity as the other class members" (the class representative's only injury consisted of the time and money she spent contesting the allegedly fraudulent taxes and related fees). *Id*. at 1116. The Court of Appeals did not consider it determinative that the class representative's injury differed from the other class members or that she relied on different criminal predicate acts that proximately caused her RICO injury. Rather, the Ninth Circuit found typicality because the representative's claims were "reasonably coextensive" with the claims of the other class members. *Id*. at 1120.

Commonality and predominance: The Leasing Defendants argued that the class representative's damages theory – the time and effort she spent contesting charges – did not lend itself to proof on a class-wide basis. The Court of Appeals rejected this argument, stating that "damage calculations alone cannot defeat certification," and that each class member need not experience identical damages from the illegal conduct. *Id*. Plaintiffs argued the class could demonstrate damages in two ways, either by proving up the amount of unauthorized debits from their accounts or proving the amount of time and effort they spent in contesting the charges. The Ninth Circuit accepted this argument, ruling that common issues in terms of establishing liability predominated over any individualized issues arising from class members' damages calculations.

PROPERTY TAX CLASS

Commonality and predominance: According to the Leasing Defendants, the district court assumed that the higher tax base – the stream of income a lease would generate – constituted an inflated figure unsupported by the record. The Ninth Circuit ruled that while plaintiffs "may or may not prevail" on that issue, it nevertheless represented "a merits question not appropriately addressed at the class certification stage." *Id*. at 1122. The Leasing Defendants further argued that plaintiffs had presented no evidence about the various tax rates in innumerable jurisdictions. This also did not matter, according to the Ninth Circuit, because, no matter the tax rate, the issue of whether the Leasing Defendants employed

the wrong tax basis under the equipment leases presented a common question that predominated over individual ones.

Superiority: While the Leasing Defendants challenged the superiority of the class device given the number of taxing jurisdiction involved (over 3,500 taxing jurisdictions), the Ninth Circuit disagreed. Noting the small recovery sought by each class member, the Court of Appeals stated: "These considerations are at the heart of why the Federal Rules of Civil Procedure allow class actions in cases where Rule 23's requirements are satisfied. This case vividly points to the need for class treatment." *Id*. at 1123.

Just Film systematically rejected numerous arguments against class certification – arguments that frequently go to the heart of a class action defendant's opposition to class certification. If left undisturbed, it could mark the beginning of even more aggressive class action efforts in the Ninth Circuit. Conversely, this latest pro-certification ruling may provide an opportunity for the U.S. Supreme Court to weigh in again on the "rigorous requirements" for certification under Rule 23.