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# RICO class actions: District of New Jersey dismisses with prejudice federal RICO claims asserted by indirect purchasers

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**Takeaway**: Class actions brought under federal RICO present significant risk, because 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 usually seek the dismissal of RICO claims at the earliest possible opportunity. A recent decision by the District of New Jersey in one of the "clean diesel/defeat device" series of class actions reinforces the principle that, because federal RICO was modeled on the federal antitrust laws (the Clayton Act), the "indirect purchaser" standing rule applies and will support the early dismissal of RICO claims by indirect purchasers.

In *Rickman v. BMW of North America, Civ*. No. 18-4363(KM) (JBC), 2020 WL 3468250, at *1 (D.N.J., June 25, 2020), over forty named plaintiffs filed a putative class action against BMW and Robert Bosch entities for their alleged participation in the "clean-diesel emissions scandal." Their amended complaint asserted one claim under federal RICO and seventy-eight counts under the statutes and common law of various states.

But none of the named plaintiffs' automobiles were purchased directly from BMW or Bosch (Bosch allegedly controlled the "defeat device" software). Rather, the named plaintiffs alleged that they purchased their cars from either a BMW dealer, a private party, or at auction. Moreover, the allegations showed that most of the cars were purchased on the secondary market and not from any authorized BMW dealer.

In *Holmes v. Sec. Inv'r Prot. Corp* ., 503 U.S. 258 (1992), the Supreme Court held that because 18 U.S.C. § 1964(c) – the provision granting a private right of action under RICO – was modeled on the Clayton Act, federal antitrust principles govern civil RICO claims. In *McCarthy v. Recordex Service, Inc*., 80 F.3d 842 (3d Cir. 1996), the Third Circuit applied *Holmes* when it dismissed, for lack of standing, antitrust and RICO claims asserted by plaintiffs who were not the direct purchasers of allegedly overpriced photocopies.

Applying the indirect purchaser rule, as applied in *Holmes, McCarthy*, and number of district court decisions in the Third Circuit (including several by the District of New Jersey), the district court dismissed the named plaintiffs' RICO claims. 2020 WL 3468250, at *8-10. Further, because any further amendment would be futile, the district court specified that the dismissal was with prejudice. *Id*. at *17. But because federal subject matter jurisdiction was not eliminated by the dismissal – the plaintiffs' claims gave rise to both regular diversity jurisdiction as well as diversity jurisdiction under the Class

Action Fairness Act – the plaintiffs were free to prosecute their seventy-eight claims under state law. *Id*. at *4. And the district court rejected all of the defendants' challenges to the plaintiff state-law claims, deferring several arguments for later consideration at the class certification phase. *Id*. at *10-17.