

Cannabis Businesses Need to Protect Their Operations from Civil RICO Liability

November 21, 2018

Over the past few years, cannabis businesses have watched a legal threat develop and mature across the country – civil RICO claims. This threat materialized in earnest in June 2017, when the United States Court of Appeals for the Tenth Circuit allowed a case to proceed against a licensed marijuana grower in Colorado. Since then, copycat cases began to appear across the country. While the body of law needs to develop further, the early returns are in, and they are not good for would-be plaintiffs.

RICO – the Racketeering and Corrupt Organization Act – is a federal law that allows private civil lawsuits against criminal organizations. Created in 1970 to target the mafia, civil RICO has become a favorite tool of enterprising plaintiff's attorneys due to its treble damages and attorneys' fees provisions. Civil RICO usage has exploded recently outside of the world of organized crime. Plaintiffs have attacked businesses in a variety of industries, transforming ordinary business disputes into RICO prosecutions if they can characterize a business' conduct as a violation of federal law.

Several years ago, the proliferation of civil RICO extended to the cannabis industry, which clearly involves activity that violates federal drug laws. So far, these claims have taken similar forms. They usually involve allegations by a neighbor that a marijuana grower has affected the neighbor's property value, or the neighbor's use and enjoyment of their land. In essence, they are common law nuisance claims dressed in civil RICO clothing. Most troubling for the cannabis industry, many of these cases have been brought or funded by anti-cannabis organizations. Since RICO allows claims to be brought against "co-conspirators," these suits have frequently named a variety of entities (sometimes hundreds) that merely do business with the property owner or grower.

Although the expansion of RICO's use is an unwelcome development for an industry that must already navigate a complicated set of overlapping state and federal laws, these cases have – so far – been unsuccessful. In August, the United States District Court for the District of Oregon dismissed one of these suits. Earlier this month, the jury in Colorado rejected the plaintiffs' RICO claims. In both, the plaintiffs were unable to prove a cognizable injury; they could not satisfy RICO's requirement that a private plaintiff demonstrate an "injury to business or property."

These results should provide some limited comfort to the industry. However, they by no means foreclose RICO liability. Instead, they have identified the key issue – whether a plaintiff can prove tangible damage to its business or property. So far this has been a significant hurdle, but it is likely not an insurmountable one.

There are some common-sense steps that businesses can take to minimize their civil RICO risk. Since most of these cases have been brought by disgruntled neighbors, this should be taken into account when planning the location of a marijuana-related business. Hopefully, a proactive approach with the local community will reduce the likelihood of a lawsuit. Businesses should also take care to address the risk of civil RICO liability in their contracts with vendors. And vendors, for their part, should do the same.

We will be following this trend as it continues to develop.