

WHERE THERE'S SMOKE, THERE'S A CLAIM: POTENTIAL RICO SUITS AGAINST MARIJUANA GROWS AND SUPPORTING BUSINESSES

On October 31, 2018, a federal jury in Colorado District Court returned a defense verdict in favor of a grow operation located in Rye, Colorado, absolving the business entities and individual operating the grow operation of liability under the Racketeer Influenced and Corrupt Organizations ("RICO") Act. However, the case exposes businesses and individuals participating in Colorado's marijuana industry and the insurance companies and ancillary businesses supporting or interacting with them to potential litigation.

In the present case, Plaintiffs Phillis and Michael Reilly brought claims against Colorado Governor John Hickenlooper, the Executive Director of the Colorado Department of Revenue, local governmental entities in Pueblo County, Colorado, individual Parker Walton and his businesses 6480 Pickney, LLC and Camp Feel Good, LLC, and businesses and insurance companies doing business with the grow operation.

The Reillys alleged that Walton, his businesses, the local and state governments, and the businesses supporting the marijuana grow operation had engaged in racketeering activities through their participation in and facilitation and encouragement of the commercial production of marijuana. The Reillys further alleged those activities caused them injury by decreasing the value of their real property, a 105-acre parcel located immediately adjacent to Walton's grow operation in Rye, Colorado.

The court found it was unable to prosecute the Supremacy Clause claims against the State of Colorado and dismissed the RICO claims against the local government agencies relying on federal case law which holds "government entities are not subject to RICO, either because they are incapable of forming a specific criminal intent and/or because exemplary damages are not available against municipal corporations."

The federal district court originally dismissed the remainder of the RICO claims based on the Plaintiffs' failure to plausibly plead a diminution in the value of their property. On June 7, 2017, the Tenth Circuit Court of Appeals reversed the dismissal and remanded the matter back to the lower court for further proceedings based on its determination that the Reillys had plausibly pled that Parker Walton and his business entities had violated RICO through their cultivation and eventual sale of marijuana despite compliance with Colorado's regulatory scheme.

At trial, the jury found in favor of Walton and his businesses based on a lack of damage to the Reillys' property. Walton called a chemical engineering expert who, using a device called a Nasal Ranger Field Olfactometer, determined that the odor complaints were exaggerated. Defense counsel believed the engineer's testimony was a deciding factor in the outcome.

The Tenth Circuit's determination that Walton and his businesses violated RICO will likely serve as an invitation for property owners to pursue similar claims while working harder to establish a decrease in the value of their real property caused by marijuana-related activities. State and local governments appear to be insulated from the claims, but any company or business supporting or interacting with business entities involved in Colorado's marijuana industry should think about ways to contractually limit their risk of exposure to claims like the ones brought by the Reillys in this action.

If you have any questions about this update contact Eric Lund at lunde@hallevans.com.

