2012 WL 9429984 (C.C.H.)

Wolters Kluwer Antitrust Law Daily

Antitrust Law Daily Wrap Up

CASES

News: Story

December 14, 2012

By Tobias J. Gillett, J.D., LLM.

RICO—DNJ: RICO CLAIMS OVER ALLEGED CONCEALMENT OF ASBESTOS EVIDENCE DISMISSED

The federal district court in Newark, New Jersey, has dismissed state law Racketeer Influenced and Corrupt Organizations Act (RICO) claims brought by representatives of individuals who had died from asbestos exposure that had alleged that a talc producer and its law firm had fraudulently concealed evidence of asbestos content in a talc product (*Williams v. BASF Catalysts LLC*, December 12, 2012, Chesler, S.). Although the court dismissed the case on other grounds as well, the court found that the representatives had not alleged an injury cognizable under the RICO Act.

The individuals the plaintiffs represented had all had lawsuits alleging injury from exposure to asbestos found in the talc product, produced by a company later acquired by BASF Catalysts, Inc., dismissed, allegedly because the company and its law firm, Cahill Gordon & Reindel LLP, had deliberately concealed evidence that the talc product contained asbestos.

In a 1979 lawsuit, the representatives alleged, discovery had revealed documents containing evidence of the asbestos content of the talc product. However, the talc producer and Cahill reached a settlement agreement with the plaintiff in that case that included a confidentiality agreement preventing the disclosure of the evidence to other claimants. The evidence was then concealed or destroyed, except for selected documents that indicated an absence of asbestos. The talc producer and Cahill then promulgated false and misleading information to other claimants indicating that the talc product did not contain asbestos.

Allegedly, the scheme came to light during the discovery phase of a 2009 lawsuit against BASF brought by the daughter of a BASF research chemist who claimed she had contracted mesothelioma from asbestos in her father's workplace and from asbestos brought home on his clothing. The chemist testified about tests he had run that had indicated the presence of asbestos in the talc, and about the destruction of evidence. Later discovery allegedly resulted in the production of evidence from BASF of the talc product's asbestos content, of knowing misrepresentations about it, and of the spoliation of evidence.

The representatives filed suit, alleging a variety of state law claims, including a claim under New Jersey's version of the RICO Act. Their complaint asked the court to order BASF and Cahill to notify victims and acknowledge the deceit, disgorge profits gained through it, enjoin them from further misrepresentations, and enjoin them "from asserting any defense arising out of the fraud."

Although the court dismissed the complaint pursuant to the Anti-Injunction Act and the Constitution's Article III prohibition on advisory opinions, the court proceeded to address the merits of the RICO claim. The court preceded its discussion by noting that courts analyze the New Jersey RICO Act, which was modeled on the federal RICO Act, in conformity with the federal statute.

The court determined that the representatives had failed to adequately allege an "injury to business or property" as required under the statute. The representatives had alleged as their injury the alleged fact that they had lost the opportunity to pursue personal injury claims against BASF.

The court first noted that "personal injuries are not recognized as compensable under RICO." Moreover, the court found that, although a cause of action might constitute property under RICO in specific circumstances, the courts had carefully differentiated between causes of action based on harm to business as opposed to personal harm. The court observed that no authority had been cited that indicated that "unliquidated personal injury claims" constitute property under state law, or that the New Jersey statute had been interpreted differently from the federal statute on that issue.

Furthermore, even if a personal injury cause of action were to constitute property for RICO purposes, the court viewed the representatives' claimed injuries as "too speculative to be cognizable as a redressable injury under the statute." The court noted that a RICO injury "must consist of a concrete financial loss and not mere injury to a valuable intangible property interest."

The case is No. 11-1754 (SRC).

Jeffrey M. **Pollock** (Fox Rothschild LLP) for Kimberlee Williams. Stephen M. Orlofsky (Blank, Rome, LLP) for BASF Catalysts LLC. Robert E. Ryan (Connell Foley LLP) for Cahill Gordon & Reindel LLP.

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