

Weeding out Marijuana Businesses with RICO [Safe Streets Alliance v. Hickenlooper, 859 F.3d 865 (10th Cir. 2017)]

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The Tenth Circuit Court of Appeals held that private landowners can bring a civil claim under the Racketeer Influenced Corrupt Organizations Act (“RICO”) against marijuana growers and their associates alleging an injury to their land. This holding will open the door for numerous lawsuits to be brought against those parties involved in the marijuana business and could have a crippling effect on the industry.

I. INTRODUCTION

In 2012, the citizens of Colorado passed Amendment 64 to the Colorado Constitution, which permits the personal use of marijuana for those twenty-one and older.¹ The state of Washington also legalized marijuana in 2012, and several states since have followed suit.² Because marijuana is illegal under the Controlled Substances Act (“CSA”),³ many questions arise dealing with the conflict of federal and state laws and the enforcement of federal laws in states that opt for legalization.

In *Safe Streets Alliance v. Hickenlooper*,⁴ the Tenth Circuit addressed some of these issues. Specifically, the court ruled that a property owner can bring a civil claim under the Racketeer Influenced and Corrupt Organizations Act (“RICO”) against marijuana growing facilities to recover for alleged injuries to their property.⁵ Although RICO was intended to eliminate organized crime, it is now being used to harm state-legalized marijuana businesses.⁶

1. COLO. CONST. art. XVIII, § 16 (2012). Amendment 64 allows for the purchase of up to one ounce of marijuana from specialty dispensaries and for individuals to grow up to six marijuana plants in their homes. *Id.*

2. See Initiative Measure No. 502, 63rd Leg., Reg. Sess. (Wash. 2013) (codified as amended in scattered chapters of WASH. REV. CODE § 69); ALASKA STAT. § 17.38.060 (2015); OR. REV. STAT. §§ 475B.010–475B.395 (2015); D.C. CODE § 48-904.01 (2015); Christopher Ingraham, *Marijuana Wins Big on Election Night*, WASH. POST (Nov. 8, 2016), <https://www.washingtonpost.com/news/wonk/wp/2016/11/08/medical-marijuana-sails-to-victory-in-florida/> [<https://perma.cc/QY9X-KZ6K>].

3. 21 U.S.C. §§ 801–904 (2012). Marijuana is considered a Schedule I drug under the Controlled Substances Act (“CSA”). *Id.* § 812.

4. 859 F.3d 865 (10th Cir. 2017).

5. *Id.* at 881. The court rejected arguments that Amendment 64 was preempted by the CSA. *Id.* at 905. The court also did not allow the states of Nebraska and Oklahoma to intervene or challenge Colorado’s marijuana laws due to lack of jurisdiction. *Id.* at 877.

6. See Organized Crime Control Act of 1970, Pub. L. No. 91-452, 84 Stat. 922 (1970) (codified as amended in scattered sections of 18 U.S.C. §§ 1961-1968 (2012)).

II. BACKGROUND

A. Case Description

Within the Meadows at Legacy Ranch in Pueblo County, Colorado, Michael and Phillis Reilly own “a beautiful rolling pasture with sweeping mountain vistas that include views of Pike’s Peak.”⁷ Although the Reillys do not live on this land, they visit the property with their children on weekends.⁸ On the property, they “ride horses, hike, and visit with friends.”⁹ The property adjacent to the west of the Reillys’ is the site of a recreational marijuana growing operation.¹⁰ The Reillys claim that the presence of the operation and the noxious odors it omits cause harm to their property.¹¹

The Reillys and Safe Streets Alliance, an anti-drug organization based in Washington, D.C., of which the Reillys are members, brought civil claims under RICO against several individuals and entities affiliated with the marijuana growing operation.¹² The district court dismissed the RICO claims, stating the Reillys had not shown “a plausible injury to their property that was proximately caused” by the marijuana growing operation’s activities.¹³ Safe Streets Alliance and the Reillys appealed to the Tenth Circuit Court of Appeals.¹⁴

B. Legal Background

1. Marijuana Legalization

Although marijuana is illegal under federal law, states have wavered since 1996, when California passed the first modern medical marijuana ballot measure.¹⁵ During the 2000s, many more states began legalizing medical marijuana, and the federal government struggled to stop the trend due to limited enforcement powers.¹⁶ In 2012, Colorado and Washington were the first two states to legalize recreational marijuana.¹⁷ The Department of Justice released a memorandum in 2013 advising federal law enforcement officials not to use resources to prosecute individuals complying with state marijuana laws.¹⁸

7. *Safe Streets*, 859 F.3d at 879.

8. *Id.*

9. *Id.*

10. *Id.*

11. *Id.*

12. *Id.* at 879–880. Safe Streets Alliance is a “nonprofit organization devoted to reducing crime and illegal drug dealing . . . interested in . . . the enforcement of federal law prohibiting the cultivation, distribution, and possession of marijuana.” *Id.* at 879.

13. *Safe Streets*, 859 F.3d at 880.

14. *Id.* at 881.

15. CAL. HEALTH & SAFETY CODE ANN. § 11362.5 (1996).

16. Alex Kreit, *Marijuana Legalization and Nosy Neighbor States*, 58 B.C. L. REV. 1059, 1060 (2017).

17. See COLO. CONST. art. XVIII, § 16 (2012); Initiative Measure No. 502, 63rd Leg., Reg. Sess. (Wash. 2013) (codified as amended in scattered chapters under WASH. REV. CODE § 69).

18. See Memorandum from James M. Cole, Deputy Att’y Gen., to U.S. Att’y’s, *Guidance Regarding Marijuana Enforcement*, at 3 (Aug. 29, 2013),

However, the marijuana industry remains faced with civil lawsuits from neighboring states and private individuals.¹⁹

2. RICO

Congress enacted RICO to fight racketeering activity and eliminate organized crime through criminal and civil remedies.²⁰ RICO commonly is known for anti-mob criminal uses.²¹ However, courts construe the act liberally, applying it to a wide range of criminal activities.²² RICO contains a civil remedies provision that “vests a private citizen with substantive rights to avoid ‘injuries’ to ‘his business or property’ caused by a pattern of racketeering activity.”²³

To be successful under RICO, a civil plaintiff must prove that (1) the defendant violated § 1962, (2) the plaintiff was injured in his business or property, and (3) the defendant’s violation was the proximate cause of the plaintiff’s injury.²⁴ In *Safe Streets*, the plaintiffs alleged that the marijuana growing operation violated § 1962(c), which states:

It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise’s affairs through a pattern of racketeering activity or collection of unlawful debt.²⁵

The plaintiffs claimed the racketeering activity the defendants engaged in was the “dealing in marijuana” and the marijuana growing operation injured their property by “emit[ing] pungent, foul odors, attract[ing] undesirable visitors, increas[ing] criminal activity, increas[ing] traffic, and driv[ing] down property values.”²⁶

<https://www.justice.gov/iso/opa/resources/3052013829132756857467.pdf> [https://perma.cc/MFB5-54MZ].

19. See *Nebraska v. Colorado*, 136 S. Ct. 1034 (2016) (declining to hear a lawsuit brought by Nebraska and Oklahoma, which urged the court to strike down Colorado’s law with the Supremacy Clause).

20. Devika Singh et al., *Racketeer Influenced and Corrupt Organizations*, 54 AM. CRIM. L. REV. 1727, 1728–29 (2017).

21. See *id.* RICO has been used to bring charges against the Hells Angels Motorcycle Club, Latin Kings, and the Gambino Crime Family. See Nathan Koppel, *They Call it RICO, and It is Sweeping*, WALL STREET J. (Jan. 20, 2011), <https://www.wsj.com/articles/SB10001424052748704881304576094110829882704>

[https://perma.cc/YFX9-GQNB]; Paula McMahon, High-ranking S. Fla. Latin Kings Gang Members Facing Racketeering Charges, SUN SENTINEL (May 12, 2015), <http://www.sun-sentinel.com/news/fl-latin-kings-indictment-20150512-story.html> [https://perma.cc/VBG4-GWP8].

22. Singh, *supra* note 20, at 1728.

23. *Safe Streets All. v. Hickenlooper*, 859 F.3d 865, 881 (10th Cir. 2017) (citing 18 U.S.C. § 1964(c) (2012)).

24. 18 U.S.C. § 1964(c); *RJR Nabisco, Inc. v. European Cmty.*, 136 S. Ct. 2090, 2116 (2016) (Ginsburg, J., dissenting). Under RICO, any person or class of person who suffers an injury in their business or property due to a violation of § 1962 can sue for treble damages, costs of filing the lawsuit, and the cost of reasonable attorney’s fees. Singh, *supra* note 20, at 1770.

25. 18 U.S.C. § 1962(c).

26. Complaint at 1, *Safe Streets All. v. Alternative Holistic Healing, LLC*, No. 15-349, 2015 WL 5007944 (D. Colo. February 19, 2015).

III. COURT'S DECISION

The Reillys first alleged the marijuana growers were engaged in racketeering activity.²⁷ Under RICO, “racketeering activity” includes “dealing in a controlled substance” and “any offense involving . . . the felonious manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in a controlled substance.”²⁸ The court concluded that the marijuana growers fit this definition, and therefore could be engaged in racketeering activity.²⁹

The court found that the Reillys adequately alleged the marijuana growers had formed an “association-in-fact” because they allegedly worked “in concert to achieve market efficiencies toward their common aim of cultivating, distributing, and selling marijuana, which undisputedly affects interstate commerce.”³⁰ The court also found the Reillys plausibly alleged the marijuana growers each conducted the enterprise’s affairs because they all “agreed to grow marijuana for sale.”³¹ Therefore, the court held that the Reillys properly pled a violation of § 1962(c).³²

Next the court looked at the alleged injuries to the Reillys’ property. The Reillys argued that the adjacent marijuana growing operation injured their property in two primary ways.³³ First, it lowered the value of the property.³⁴ The Reillys claimed that the land at the Meadows at Legacy Ranch was used for “keep[ing] horses or build[ing] homes in a pleasant residential area.”³⁵ Because the operation is a “publicly disclosed drug conspiracy,” the Reillys claimed that their land became less suitable for those uses.³⁶ They argued that a marijuana growing operation would be a target for theft because of the large quantity of drugs located within it.³⁷ Therefore, the marijuana operation would lead to increased crime in the area.³⁸ Second, the Reillys complained about the noxious odors put off by the operation.³⁹ They contended these odors made their property less suitable for recreational and residential purposes and therefore interfered with their use and enjoyment of their property.⁴⁰ In

27. *Safe Streets*, 859 F.3d at 882.

28. 18 U.S.C. § 1961(1)(D); § 1961(1)(A).

29. *Safe Streets*, 859 F.3d at 882.

30. *Id.* at 883. Under RICO, “enterprise” is defined as “any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity.” 18 U.S.C. § 1961(4). The Reillys argued that the marijuana growers were an “association-in-fact” or “a group of persons associated together for a common purpose of engaging in a course of conduct.” *Safe Streets*, 859 F.3d at 882–83 (citing *Boyle v. United States*, 556 U.S. 938, 946 (2009)).

31. *Safe Streets*, 859 F.3d at 884. The court also found that there were proper allegations of a pattern of racketeering activity because the Reillys described various specific actions the marijuana growers took to establish and operate their enterprise. *Id.*

32. *Id.* at 884–85.

33. *Id.* at 879–80.

34. *Id.* at 879.

35. *Id.*

36. *Id.*

37. *Safe Streets*, 859 F.3d at 879.

38. *Id.*

39. *Id.* at 879–80.

40. *Id.* at 881.

response, the growers argued the Reillys had claimed no more than “speculative injury” and could not show any proof of financial loss in the property.⁴¹

The Tenth Circuit held the Reillys properly pled injuries to their property and did not need to show specific financial loss.⁴² RICO was intended to incorporate common law principals and furthermore, Colorado has long held that when property owners sustain direct injury to their property, such injury gives rise to a nuisance claim due to noxious odors from an adjacent property.⁴³ Thus, the court reasoned that the Reillys properly pled that the odor injured their property.⁴⁴ The court also held that the value of the property reasonably could have decreased due to the location of a marijuana growing operation next door.⁴⁵

Finally, the court found that the Reillys adequately alleged that the marijuana growing operation was the proximate cause of the injuries to their property because the injuries are “*direct* byproducts of the location and manner in which the Marijuana Growers are conducting their operations that purportedly violate the CSA.”⁴⁶ Therefore, the court held that the Reillys properly pled the elements of a RICO claim and should be allowed to proceed.⁴⁷ The court remanded the case to the district court to hear the Reillys’ RICO claim.⁴⁸

IV. COMMENTARY

The Tenth Circuit’s holding set the framework for future property owners to bring a RICO claim against marijuana growing operations and their associates.⁴⁹ Since marijuana is a controlled substance under the CSA, marijuana growing operations will easily be found to be engaged in racketeering activity.⁵⁰ This ruling will certainly lead to an influx of lawsuits against those in the marijuana industry.⁵¹ In fact, property owners in Oregon

41. *Id.* The defendants suggested the court disbelieve the Reillys’ alleged injuries or consider them emotional or speculative. *Id.* at 886. However, because the case was only at the pleading stage, the court stated it was required to accept the factual allegations in the complaint as true. *Id.*

42. *Id.* at 886–89. The Reillys also claimed other damages to their property. They claimed to be injured each time they looked at the marijuana growing facility because of the reminder that crimes occurred within the facility. The court held this was not a properly pled injury because a plaintiff cannot recover for “emotional, personal, or speculative future injuries under § 1964(c).” *Id.* at 888–89.

43. *Safe Streets*, 859 F.3d at 886 (citing *Beck v. Prupis*, 529 U.S. 494, 504 (2000); *Pub. Serv. Co. of Colo. v. Van Wyk*, 27 P.3d 377, 388 (Colo. 2001)).

44. *Id.* at 887 (“It is reasonable to think that a potential buyer would be less inclined to purchase land that is burdened by a nuisance . . . than she would be to purchase the identical property if it were unencumbered.”).

45. *Id.* The court reasoned that a potential buyer could be less interested in purchasing land next to “an openly operating criminal enterprise” than land located adjacent to “a lawfully-operating retailer” or unoccupied land. *Id.*

46. *Id.* at 891 (emphasis in original).

47. *Id.* at 884–85.

48. *Id.* at 891.

49. See generally *Safe Streets*, 859 F.3d 865.

50. See 21 U.S.C. § 812 (1970); 18 U.S.C. § 1961(1)(A), (D) (2012).

51. See Cheryl Miller & Marcia Coyle, *Anti-Pot States Can’t Touch Colorado’s Marijuana Law*, *Court SAYS*, THE NAT’L L. J. (June 7, 2017), <http://www.nationallawjournal.com/id=1202788919476/AntiPot-States-Cant-Touch-Colorados-Marijuana-Law-Court-Says?sreturn=20170901233607>

filed suit against two adjacent growing operations only six days after the Tenth Circuit's ruling.⁵²

RICO is an attractive vehicle to use for an anti-legalization plaintiff, because it allows the plaintiff to circumvent state nuisance laws and bring an action in federal court.⁵³ A federal court can be more appealing to plaintiffs, because a state court may be more sympathetic to the marijuana industry.⁵⁴

RICO cases can be extremely damaging to marijuana operations, more so than state nuisance claims.⁵⁵ Under RICO, property owners are permitted to bring a lawsuit against more than only the owners and operators of the marijuana growing operation.⁵⁶ Because RICO is aimed at targeting organized crime, a RICO lawsuit can be brought against the marijuana operation owners and operators and any of their business affiliates.⁵⁷ This can include investors, dispensaries, lessors, and almost any individual or corporation associated with the enterprise.⁵⁸ The original complaint in *Safe Streets* named sixteen defendants.⁵⁹ A similar lawsuit in Oregon named forty-four defendants.⁶⁰ The marijuana industry remains very new and does not have a large number of financial investors.⁶¹ These investors may own numerous operations in the state.⁶² If they are forced to close any of their operations due to RICO lawsuits, there would likely be a large “domino effect” throughout the whole state industry.⁶³

RICO provides extensive remedies. If successful, the plaintiff can be

[<https://perma.cc/U994-PWQ2>]. The attorney that represented the Reillys stated that the Tenth Circuit's ruling is “a really powerful weapon for any property owners next to state-legal marijuana operations.” *Id.* The lawyer also stated “[w]e’ve basically proven that this can be done. I think it’s going to be a big problem for the marijuana industry.” John Schroyer, “Conspiracy” Suits Might be Legal Threat for Pot Businesses, AP NEWS (Dec. 14, 2017), <https://www.apnews.com/aa58ffde5b3e44b0877e41f703f58e03> [<https://perma.cc/Y69Q-KTKL>].

52. See Complaint at 2, *McCart v. Beddow*, No. 3:17-cv-00927 (D. Or. June 13, 2017), <https://mjbizdaily.com/wp-content/uploads/2017/12/Oregon-RICO-case.pdf> [<https://perma.cc/Y48A-2GP8>]. Another lawsuit was brought in the Northern District of California, where the plaintiff alleged five causes of action under RICO against approximately sixty-seven individuals and corporate entities “engaged in an enterprise to cultivate and distribute marijuana in violation of the Controlled Substances Act.” *Quillinan v. Ainsworth*, 4:17-CV-00077-KAW, 2017 WL 4419225, at *1 (N.D. Cal. Oct. 5, 2017), *appeal filed* Nov. 24, 2017. A similar RICO lawsuit was brought in Massachusetts. See Complaint at 2, *Crimson Galeria L.P. v. Healthy Pharms, Inc.*, No. 1:17-cv-11696-ADB (Mass. Dist. Ct. Sept. 7, 2017), <https://mjbizdaily.com/wp-content/uploads/2017/12/Massachusetts-RICO-case.pdf> [<https://perma.cc/2V2E-2ZWV>].

53. Lorelei Laird, *Noxious Neighbors? To Colorado, Marijuana is a Business—to the Federal Government, It’s a Criminal Conspiracy*, 103 ABA J. 16, 16–17 (2017). Section 1964 of RICO gives United States district courts jurisdiction to hear civil RICO cases. 18 U.S.C. § 1964(c).

54. Joshua M. Heinlein & Jacob Ayres, *Civil Challenges to Cannabis Businesses in Legal States*, LEXOLOGY (July 28, 2017), <https://www.lexology.com/library/detail.aspx?g=d88be9b7-0ef8-4042-812c-aaf1ca8ccf20> [<https://perma.cc/R5RC-FC8Q>].

55. See *id.*

56. See *id.*

57. See 18 U.S.C. § 1962(c).

58. See *id.*

59. Complaint, *supra* note 26, at 1.

60. See Complaint, *supra* note 52, at 2.

61. Art Cosgrove, *RICO Lawsuit Threatens Industry*, OREGON CANNABIS CONNECTION (Aug 15, 2017), <https://www.occnewspaper.com/rico-lawsuit-threatens-industry/> [<https://perma.cc/J2Q4-ZYZE>].

62. *Id.*

63. *Id.*

awarded triple damages, attorney's fees, and the court can issue "orders of divestiture, restrictions on future activities, dissolution, or reorganization of the enterprise."⁶⁴ In some cases, the defendant could be forced to pay for the dissolution of the enterprise.⁶⁵ Again, closing these legitimate businesses under RICO civil lawsuits could have the effect of demolishing an entire state industry.⁶⁶

Under RICO, not only can property owners allege nuisance-type claims, such as foul odor, but also that marijuana growing operations located in close proximity to their property damaged their property by its mere existence.⁶⁷ The marijuana growing operation could be a violation of § 1962 due to the illegality under federal law.⁶⁸ The result would be to impose additional restraints on marijuana cultivating operations. Many already take precautions to stop odor to prevent nuisance claims, such as having efficient ventilation systems.⁶⁹ However, marijuana businesses can do little to prevent the fact that their operation is illegal under federal law. The Tenth Circuit stated that if an operation acted discretely or "clandestinely," it might avoid the value reduction argument from landowners, but such requirements should not be imposed on businesses.⁷⁰

It has yet to be seen if plaintiffs under RICO will ultimately win these cases. However, it is likely that most cases will fail on the merits due to the difficulty of proving actual financial damages and showing that those damages were proximately caused by the defendant's racketeering activities.⁷¹ Despite this fact, the nuisance of these lawsuits alone can be enough to have a devastating effect on the industry.⁷²

A similar RICO lawsuit, also brought by Safe Streets Alliance on behalf of a Holiday Inn who opposed a medical marijuana shop moving into a building near the hotel, illustrates this effect.⁷³ The case was settled before it was heard in court.⁷⁴ The marijuana shop ended up closing, and the companies that worked with the shop paid settlements totaling \$70,000.⁷⁵ The bank that

64. Singh, *supra* note 20 **Error! Bookmark not defined.**, at 1769–70 (footnotes omitted).

65. *Id.* at 1770.

66. Cosgrove, *supra* note 61.

67. Safe Streets All. v. Hickenlooper, 859 F.3d 865, 891 (10th Cir. 2017).

68. *Id.* at 882.

69. Heinlein, *supra* note 54.

70. *Id.*

71. Sam Kamin, *Can You Fight Marijuana Laws with RICO Suits?*, JURIST (Apr. 6, 2015), <http://jurist.org/academic/2015/04/sam-kamin-marijuana-rico.php> [<https://perma.cc/B9TQ-QHA7>]. The Supreme Court ruled that it is insufficient to show the defendants were the but-for cause of their injuries; the RICO conduct itself must be the direct cause of the injuries. *Anza v. Ideal Steel Supply Corp.*, 547 U.S. 451, 458–61 (2006).

72. Laird, *supra* note 53, at 16–17.

73. See Complaint at 1–2, *Safe Streets All. v. Medical Marijuana of the Rockies, LLC*, No. 1:15-cv-00350 (D. Colo. Feb. 19, 2015), <https://www.scribd.com/document/256303891/Safe-Streets-Alliance-and-New-Vision-Hotels-v-Medical-Marijuana-of-the-Rockies-et-al-Complaint> [<https://perma.cc/23JZ-VAKC>].

74. Ricardo Baca, *Anti-Pot Racketeering Suit Settles, Opens Door for Future RICO Claims*, DENVER POST (Dec. 30, 2015), <http://www.denverpost.com/2015/12/30/anti-pot-racketeering-suit-settles-opens-door-for-future-rico-claims/> [<https://perma.cc/R34B-BD3B>].

75. *Id.*

provided service to the marijuana shop closed all of their accounts, and another company chose not to continue working with marijuana companies after this lawsuit.⁷⁶

Although RICO has been construed liberally by courts in order to cover a wide range of activity, the Supreme Court has noted that RICO is not without its limits.⁷⁷ Up until this point, the federal government has chosen to respect state sovereignty and not to enforce the CSA in states that have opted for marijuana legalization.⁷⁸ RICO was created to eradicate serious organized crime, not to destroy state-legalized businesses.⁷⁹ Allowing parties that oppose marijuana legalization to use RICO as a tool to ruin these marijuana businesses will surely lead to results not intended by the drafters of RICO.

V. CONCLUSION

The Tenth Circuit's holding in *Safe Streets* opens the door for individuals and groups who oppose marijuana legalization, like Safe Streets Alliance or the Reillys, to use RICO as a tool to collapse the marijuana industry. Barring a contradictory ruling in another circuit or a revision of federal marijuana laws, marijuana businesses will be forced to defend these lawsuits. This means that courts will likewise be forced to determine if these RICO lawsuits will be successful. The entire industry will be waiting to see how they rule.

76. *Id.*

77. Singh, *supra* note 20 **Error! Bookmark not defined.**, at 1728 (citing *Reves v. Ernst & Young*, 507 U.S. 170, 183 (1993)).

78. See Kreit, *supra* note 16, at 1060–61. This includes not bringing federal RICO cases against marijuana operations in states where marijuana is legal. *Id.*

79. See Racketeer Influenced and Corrupt Organizations Act, Pub. L. No. 91-452, 84 Stat. 922 (1970) (codified as amended in scattered sections of 18 U.S.C. §§ 1961-1968).