

Barring RICO Claims Based On Alleged Securities Fraud

Law360, New York (July 28, 2011) -- In *MLSMK Investment Co. v. JP Morgan Chase & Co.*, No. 10-3040-cv, 2011 (2d Cir. July 7, 2011), the United States Court of Appeals for the Second Circuit affirmed the dismissal of claims brought under the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1962 and 1964, seeking to hold defendants liable for allegedly conspiring with Bernard L. Madoff to perpetrate his now-infamous Ponzi scheme.

The court held that plaintiff's RICO claims were precluded by Section 107 of the Private Securities Litigation Reform Act of 1995, codified at 18 U.S.C. § 1964(c), which bars civil RICO claims based upon predicate acts of securities fraud.

In so holding, the court resolved in the affirmative the unsettled question whether the Reform Act bars civil RICO claims predicated on acts of securities fraud, even where a plaintiff cannot otherwise pursue a securities fraud action against the defendant.

Plaintiff MLSMK Investment Company, a trading partner for Madoff's market-making business, lost its \$12.8 million investment when Madoff was arrested and his assets seized on Dec. 11, 2008. Thereafter, MLSMK brought suit in the United States District Court for the Southern District of New York asserting several state law claims against defendants JP Morgan Chase & Co. and JP Morgan Chase Bank NA. MLSMK also brought a federal RICO claim alleging that the defendants had conspired with Madoff to defraud his victims.

MLSMK contended that, prior to Madoff's arrest, defendants had undertaken a due diligence investigation into Madoff's business activities and learned that his investment business was a fraud, but nonetheless continued to trade with and provide business services to him. MLSMK thus asserted that the defendants were liable for conspiracy to violate RICO by aiding and abetting Madoff's fraudulent enterprise.

The district court dismissed MLSMK's complaint in its entirety. On appeal, the Second Circuit affirmed by summary order the district court's dismissal of MLSMK's state law claims. See *MLSMK Investment Co. v. JP Morgan Chase & Co.*, No. 10-3040-cv, 2011 (2d Cir. June 6, 2011). The Second Circuit also affirmed the district court's dismissal of MLSMK's RICO claim, concluding that the claim was barred by Section 107 of the Reform Act.

Section 107 of the Reform Act, often referred to as the “RICO amendment,” provides that “no person may rely upon any conduct that would have been actionable as fraud in the purchase or sale of securities to establish a violation of [18 U.S.C. §] 1962.”

Prior to its enactment, “fraud in the sale of securities” was a predicate offense for purposes of both criminal and civil RICO actions. As a consequence, plaintiffs frequently asserted RICO claims in tandem with securities fraud claims, enticed by RICO’s promise of treble damages plus attorneys’ fees in the event of a successful suit.

Since the RICO amendment’s enactment in 1995, district courts in the Second Circuit have split on the issue of its scope, with some courts holding that the RICO amendment bars all RICO claims “that would have been actionable as fraud in the purchase of securities,” while others concluding that the RICO amendment bars RICO claims only in cases where the plaintiff could have otherwise brought a securities fraud claim against the defendant.

Here, the Second Circuit adopted the former position, reasoning that the statute’s plain meaning and legislative history compelled this result. As a result, the Second Circuit affirmed the district court’s dismissal of MLSMK’s RICO claims, which were predicated on alleged acts of securities fraud, notwithstanding that MLSMK could not assert a private aiding and abetting securities fraud claim against the defendants.

This decision of first impression in the Second Circuit clarifies the scope of the RICO amendment’s bar and establishes that plaintiffs unable to bring a private securities fraud action against a defendant cannot turn to RICO to assert claims premised upon predicate acts of securities fraud.

--By John Stigi, Sheppard Mullin Richter & Hampton LLP

John Stigi is a partner in the Los Angeles and Palo Alto, Calif., offices of Sheppard Mullin.

The opinions expressed are those of the author and do not necessarily reflect the views of the firm, its clients, or Portfolio Media, publisher of Law360. This article is for general information purposes and is not intended to be and should not be taken as legal advice.

All Content © 2003-2011, Portfolio Media, Inc.