

**Second Circuit: fraudulent lawsuit allegations insufficient to maintain RICO claim  
United States - McDermott Will & Emery**

**Infringement  
Enforcement**

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- **Kim alleged that defendants conspired to sue him for trademark infringement and filed RICO claim**
- **District court granted defendants' motion to dismiss for failure to state claim**
- **Second Circuit held that mere allegations of fraudulent litigation activities cannot constitute racketeering activity**

In *Kim v Kim* (Case Nos 16-2944; 16-3115 (2d Circuit, February 27 2018) (Sack J)), addressing the sufficiency of allegations to sustain a claim under the Racketeer Influenced and Corrupt Organisations (RICO) Act, the US Court of Appeals for the Second Circuit has affirmed the dismissal of a complaint alleging a scheme to fraudulently bring a trademark infringement lawsuit.

## Background

In 2014 Sik Gaek Inc, a restaurant owner, sued Daniel Kim and his restaurant, Yogi's II Inc, over the use of a trademark that Sik Gaek claimed to own. Sik Gaek alleged that Kim and Yogi's II had failed to pay a \$2 million fee under a licence agreement, and that Kim had attempted to register the trademark for himself. The district court granted summary judgment in favour of Kim, and the remaining claims against Yogi's II were later dismissed as agreed by the parties.

Kim later filed a lawsuit against Sik Gaek and the other plaintiffs from the prior lawsuit. Kim claimed that the prior lawsuit was an "ill-conceived scheme" designed "to extort \$2 million" from him, alleging that the defendants had submitted false documents posing as owners of the trademark. These false documents formed the predicate acts alleged by Kim for his RICO conspiracy claim against the defendants. The defendants moved to dismiss Kim's RICO conspiracy claim for failure to state a claim, and the court granted the motion. Kim had also moved to amend his complaint, and the district court denied that motion. Kim then appealed these and other rulings to the Second Circuit.

## Second Circuit decision

To state a claim for a RICO violation under 18 USC § 1692, a plaintiff must show conduct of an enterprise through a pattern of racketeering activity. 'Racketeering activity' means any act indictable under certain statutes, such as wire fraud or mail fraud. On appeal, the Second Circuit agreed that Kim's allegations failed to allege racketeering activity. Kim alleged that the defendants prepared and electronically filed several false declarations with the court over the span of four years. Finding supporting decisions from the First, Fifth, 10th and 11th Circuits, the Second Circuit held that allegations of frivolous, fraudulent or baseless litigation activities - without more - cannot constitute racketeering activity.

The Second Circuit largely adopted the district court's main reasons for why litigation activities should not qualify as racketeering activity. First, the district court reasoned that every failed lawsuit could be the subject of a later RICO claim. Second, allowing RICO claims based on litigation activities would collaterally attack the finality of judgments. Third, such an interpretation of RICO would deter litigants from pursuing actions in court.

The Second Circuit also affirmed the district court's denial of Kim's motion for leave to amend, finding that any proposed amendments - also based on litigation activities - would have been futile.

## Practice note

Where a plaintiff alleges that the defendants engaged in a single fraudulent lawsuit, such allegations alone do not constitute racketeering activity under RICO.

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