PARTIAL OPINION

113 F.4th 585
United States Court of Appeals, Sixth Circuit.

Andrei FENNER et al., Plaintiffs,
Phillip Burns, et al. (23-1648); Nancy Anderton, et al. (23-1696); Mike Bulaon, et al. (23-1697); Taylor Pantel, et al. (23-1698),
Plaintiffs-Appellants,
v.
GENERAL MOTORS, LLC; Robert Bosch GmbH; Robert Bosch LLC, Defendants-Appellees.

Nos. 23-1648/1696/1697/1698
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Argued: May 9, 2024
|
Decided and Filed: August 21, 2024

MOORE, J., delivered the opinion of the court in which BLOOMEKATZ, J., joined in full. KETHLEDGE, J. (pp. 605-08), delivered a separate opinion concurring in the judgment in part and dissenting in part.

OPINION

KAREN NELSON MOORE, Circuit Judge.

Plaintiffs are a group of consumers who purchased or leased a model year 2011–2016 GM Silverado or Sierra 2500 or 3500. Plaintiffs allege that they selected and ultimately purchased or leased their vehicles, at least in part, because of the Duramax diesel engine and systems therein, as advertised and represented by GM. In advertisements for the subject vehicles, GM claimed that the vehicles ran "clean diesel," had "low emissions," had "a whopping 63%" reduction of "Nitrogen Oxide (NOx) emissions" when compared to previous models and turned "heavy diesel fuel into a fine mist." GM omitted any reference to how—or when—its emissions system worked to accomplish these "clean diesel" imperatives. Contrary to GM's advertisements, however, Plaintiffs allege that the subject vehicles actually emit NOx and other pollutants at levels many times higher than (i) their counterparts, (ii) what a reasonable consumer would expect, (iii) what GM advertised, (iv) the Environmental Protection Agency's emissions standards, and (v) the levels set for the vehicles ***590** to obtain a certificate of compliance that allows them to be sold in the United States. On those bases, Plaintiffs brought this action against General Motors LLC, Robert Bosch GMBH, and Robert Bosch LLC, alleging violations of state consumer protection, fraud, and deceptive trade practices laws, as well as the Racketeer Influenced and Corrupt Organizations (RICO) Act. Defendants filed motions for summary judgment on all claims. The district court granted summary judgment, finding that (1) Plaintiffs' state-law claims were preempted by the Clean Air Act, and (2) Plaintiffs did not have standing to bring a RICO action. Because Plaintiffs' state-law claims are not impliedly preempted by the Clean Air Act, we **REVERSE** the district court's grant of summary judgment on the state-law claims. Because Plaintiffs are indirect-purchasers and thus do not have standing under RICO, however, we **AFFIRM** the district court's grant of summary judgment on the RICO claims.

I. BACKGROUND

A. Factual Background

"Plaintiffs are a group of consumers who purchased or leased a model year 2011–2016 Chevrolet Silverado 2500HD or 3500HD, or a GMC Sierra 2500HD or 3500HD" (collectively "Duramax Trucks"). R. 444 (Summ. J. Order at 1) (Page ID #48701).[1] Plaintiffs include both individuals and a putative class of consumers.[2] Defendants are General Motors LLC ("GM") and Robert Bosch GMBH and Robert Bosch LLC (collectively "Bosch"). GM manufactures the Duramax Trucks, whereas Bosch developed and manufactured engine components related to the emissions-control system for the Duramax Trucks. *See* R. 18 (First Am. Compl. ¶ 20) (Page ID #901).

The Duramax Trucks are equipped with Duramax diesel engines. *See id.* ¶ 108 (Page ID #962); D. 38 (Appellee Br. at 4). Whereas "gasoline engines require a spark from a spark plug to ignite fuel within the cylinders, diesel vehicles utilize a high level of compression to ignite the fuel." R. 365-1 (Harrington Rep. at 118) (Page ID #21127). "This causes a more powerful compression of the pistons, which produces greater engine torque (that is, more power)." R. 18 (First Am. Compl. ¶ 56) (Page ID #937); *see generally* R. 365-1 (Harrington Rep. at 13–55) (Page ID #21022–64). In addition to having more power than gasoline engines, diesel engines "typically produce ... more particulate matter (PM) and [oxides of nitrogen, also known as] NOx" than their gasoline counterparts. R. 365-1 (Harrington Rep. at 118–19) (Page ID #21127–28).

The Duramax Trucks utilize several mechanisms to reduce their NOx emissions. *See* R. 366-2 (Smithers Rep. at 6–14) (Page ID #21990–98). The Duramax Trucks also utilize auxiliary emission control devices (AECDs). *See* D. 38 (Appellee Br. at 6–7). "AECDs are a typical aspect

of vehicle design used to modulate and control systems that impact vehicle emissions." R. 365-1 (Harrington Rep. at 11) (Page ID #21020). AECDs "reduce[ ] the ***591** effectiveness of the emission control system," in order to maintain other vehicle features, such as torque (i.e., power), or to "protect[ ] the vehicle against damage or accident." 40 C.F.R. § 86.004-2.

As with all vehicles sold in the United States, before the Duramax Trucks could be introduced to the U.S. market, they were subject to extensive federal government regulations and testing pursuant to the Clean Air Act (CAA). *See, e.g.*, 42 U.S.C. § 7525. A vehicle manufacturer must certify to the Environmental Protection Agency (EPA) that its vehicle meets federal emissions standards—and must obtain an EPA-issued certificate of conformity—before it can enter the U.S. market. *Id.* § 7525(a)(1).

In its application for a certificate of conformity, a manufacturer must disclose, describe, and justify to the EPA all AECDs that its vehicle utilizes. 40 C.F.R. § 86.1844-01(d)(11). The EPA then determines if the AECD has a legitimate purpose or if it is an illegal "defeat device," i.e., a mechanism that unjustifiably turns emission controls down or off in certain circumstances. *See id.* § 86.004-2. The EPA is responsible for determining when an AECD is justified and thus permissible, or when it is unjustified, and thus an unlawful defeat device. *Id.* "GM made substantial and detailed disclosures of the [Duramax Trucks'] AECDs" in its certificate of conformity applications. R. 365-1 (Harrington Rep. at 11–12) (Page ID #21020–21). The Duramax Trucks all received EPA-issued certificates of conformity, indicating that the vehicles met EPA emissions standards. D. 38 (Appellee Br. at 7–8).

In marketing its Duramax Trucks, GM advertisements stated that the Duramax Trucks "turn heavy diesel fuel into a fine mist, burning cleaner and faster with lower emissions and greater power than the previous model," R. 366-50 (Humphreys Rep. at 26) (Page ID #25538), and delivered "the latest emission control technology" that "reduc[ed] Nitrogen Oxide (NOx) emissions by a whopping 63%, when compared to" previous models, *id.* at App. D (Page ID #25594). GM advertisements also stated that the Duramax Trucks' "[a]dvanced emission control technology makes [it] one of the cleanest diesels in the segment." *Id.* (Page ID #25593). GM omitted any reference to how—or when—the "[a]dvanced emission control technology" worked. *Id.* GM never informed consumers, for example, that the emission-control system that allowed for lower NOx emissions had "significantly reduce[d] ... effectiveness ... during real-world driving conditions." R. 18 (First Am. Compl. ¶ 14) (Page ID #899). Along similar lines, GM failed to inform consumers that "high fuel economy, power, and durability" in real-world driving conditions were made possible only by utilizing AECDs to "reduc[e] emissions controls," thus causing greater levels of NOx emissions. *Id.* ¶ 18 (Page ID #900); *see* R. 366-50 (Humphreys Rep. at App. B1, App. D) (Page ID #25562–64, 25593–98) (reviewing GM and Bosch advertisements and public communications about the Duramax Trucks). Stated otherwise, GM did not tell consumers that the emission control systems that it advertised would, under some conditions, shut off.

Consumers indicated that, based on these GM representations, they believed the Duramax Trucks to be "clean diesel" vehicles. *See, e.g.*, R. 393-16 (Roberts Dep. at 195:19-24) (Page ID #38761). Consumers interpreted "clean diesel" to reflect several different things. Some consumers expected their "clean diesel" vehicles simply to comply with EPA emissions standards. *See, e.g.*, R. 363-31 (Golden Dep. at 94–95) (Page ID #18928). Other consumers expected their "clean diesel" vehicles to have lower emissions than previous diesel ***592** models, *see* R. 393-16 (Roberts Dep. at 102:1-11, 174:2-8) (Page ID #38751, 38757); to have lower emissions than other vehicles on the market, *see id.* at 195:19-24 (Page ID #38761); R. 393-19 (Henderson Dep. at 79:11-15) (Page ID #38809); or to have lower emissions, "be cleaner[,] and run a lot better" than the older pickup trucks that they previously owned, *see* R. 393-19 (Henderson Dep. at 72–73) (Page ID #38806–07). Some consumers simply measured "clean diesel" visually, expecting their vehicles not to "blow the black smoke," that diesel engines are sometimes known for. R. 393-12 (Mizell Dep. at 43:4-6) (Page ID #38675).

B. Procedural History

This case began in May 2017 when Plaintiffs Andrei Fenner and Joshua Herman filed a class action complaint against GM and Bosch. R. 1 (Compl.) (Page ID #1). Just one month later, in June 2017, eight additional Plaintiffs filed a complaint against the same Defendants. *See* R. 16 (Consol. Order at 2) (Page ID #876). In July 2017, the cases were consolidated. *Id.* at 5 (Page ID #879). On August 4, 2017, Plaintiffs filed a First Amended and Consolidated Class Action Complaint. R. 18 (First Am. Compl.) (Page ID #884). The First Amended Complaint asserted claims under RICO and various state-law causes of action related to the emissions performance of Model Years 2011-2016 GM Silverado or Sierra 2500 or 3500. *See generally id.* Specifically, the complaint alleged:

> In contrast to GM's promises, ... the Silverado and Sierra 2500 and 3500 models emit levels of NOx many times higher than (i) their gasoline counterparts, (ii) what a reasonable consumer would expect, (iii) what GM had advertised, (iv) the Environmental Protection Agency's maximum standards, and (v) the levels set for the vehicles to obtain a certificate of compliance that allows them to be sold in the United States. Further, the vehicles' promised power, fuel economy, and efficiency is obtained only by turning off or turning down emissions controls when the software in these vehicles senses they are not in an emissions testing environment.

Id. ¶ 2 (Page ID #892–93).

Both GM and Bosch moved to dismiss Plaintiffs' claims, and, on February 20, 2018, the district court denied both motions to dismiss. R. 61 (Mot. to Dismiss Order) (Page ID #3473). Relevant here, the district court found that (1) Plaintiffs' state-law claims were neither expressly nor impliedly preempted by the Clean Air Act, *id.* at 31, 33 (Page ID #3503, 3505), and (2) Plaintiffs sufficiently established standing under RICO, *id.* at 46 (Page ID #3518).

In May 2019, over 2700 plaintiffs (the "Anderton Plaintiffs") filed twenty-six complaints against GM and Bosch. *See* R. 144 (Consol. Order at 7–8) (Page ID #5847–48). Like the consolidated class action, these complaints each "allege[d] violations of RICO and a multitude of state law fraud claims." *Id.* In January 2020, the district court consolidated the Fenner class action and the Anderton Cases "for all purposes, except for trial." *Id.* at 14 (Page ID #5854). In August 2020, these cases were consolidated with two additional sets of cases—the "Bulaon Cases" and the "Pantel Cases." *See* R. 196 (Pantel Consol. Order at 12) (Page ID #11337); R. 198 (Bulaon Consol. Order at 12) (Page ID #11351).

On August 19, 2022, GM and Bosch filed motions for summary judgment in the consolidated cases. R. 365 (GM Mot. Summ. J.) (Page ID #20906); R. 373 (Bosch Mot. Summ. J.) (Page ID #29812). As relevant here, Defendants argued that (1) the Clean Air Act preempted Plaintiffs' state-law ***593** claims, and (2) Plaintiffs lacked standing to bring their RICO claims under the indirect-purchaser rule. *See generally* R. 365 (GM Mot. Summ. J.) (Page ID #20906); R. 373 (Bosch Mot. Summ. J.) (Page ID #29812).

While Defendants' motions for summary judgment were pending, this court released*In re Ford Motor Co. F-150 and Ranger Truck Fuel Economy Marketing and Sales Practices Litigation*, 65 F.4th 851 (6th Cir.), *cert. denied sub nom. Lloyd v. Ford Motor Co.*, —— U.S. ——, 144 S. Ct. 332, 217 L.Ed.2d 173 (2023). Noting that the *Ford* case dismissed a "substantially similar claim as preempted by the Energy Policy and Conservation Act (EPCA)," the district court directed the parties "to show cause for why Plaintiffs' state-law claims should not be dismissed." R. 433 (Show Cause Order at 1) (Page ID #48077). On July 12, 2023, the district court granted summary judgment to Defendants, dismissing all claims "with prejudice because Plaintiffs' state-law claims are impliedly preempted by the Clean Air Act, 42 U.S.C. § 7401 *et seq.*, and Plaintiffs lack statutory standing for their RICO claim because they are indirect purchasers." R. 444 (Summ. J. Order at 1) (Page ID #48701). This appeal followed.

II. ANALYSIS

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C. RICO Claims

In a discussion totaling a mere two paragraphs, the district court found that Plaintiffs did not have standing to bring their RICO claims under the indirect-purchaser rule. R. 444 (Summ. J. Order at 16–17) (Page ID #48716–17). The district court found that, because (1) "neither GM nor Bosch ever charged Plaintiffs a dime," and (2) "Plaintiffs are trying to recover 'pass-through' overcharges," Plaintiffs therefore lack statutory standing under RICO. *Id.*

Plaintiffs argue that their RICO claims are not barred by the indirect-purchaser rule because "[t]hat rule applies only if an indirect purchaser asserts a pass-on theory of liability, but Plaintiffs make no such claim." D. 30 (Appellant Br. at 47). Stated otherwise, Plaintiffs argue that "mere proof that a plaintiff is an 'indirect purchaser' is insufficient to establish that the ***604** plaintiff lacks standing. Proof that the plaintiff seeks passed-on damages is also required, but Plaintiffs here do not seek such damages and, therefore, have RICO standing." *Id.* at 57–58. Defendants, on the other hand, argue that the indirect-purchaser rule is "a bright-line rule that authorizes suits by *direct* purchasers but bars suits by *indirect* purchasers." D. 38 (Appellee Br. at 47) (quoting *Apple, Inc v. Pepper*, 587 U.S. 273, 279, 139 S.Ct. 1514, 203 L.Ed.2d 802 (2019)). Because "the only question is whether the defendant directly sold to the plaintiff, which

did not occur here," Defendants argue that the indirect-purchaser rule bars Plaintiffs' RICO claims. *Id.* at 49.

The indirect-purchaser rule was initially developed in the anti-trust realm but applies to civil RICO claims with equal force. *See Trollinger v. Tyson Foods, Inc.*, 370 F.3d 602, 612–14 (6th Cir. 2004). Under the indirect-purchaser rule, "*indirect* purchasers who are two or more steps removed from the violator in a distribution chain may not sue." *Pepper*, 587 U.S. at 279, 139 S.Ct. 1514. The indirect-purchaser rule is "a bright-line rule that authorizes suits by *direct* purchasers but bars suits by *indirect* purchasers." *Id.* Stated otherwise, and as applicable to this case, "consumers at the bottom of a vertical distribution chain" do not have standing under RICO "to sue manufacturers at the top of the chain." *Id.* at 281, 139 S.Ct. 1514.

Plaintiffs are correct that the indirect-purchaser rule typically applies to indirect-purchasers who are seeking pass-through overcharges. *See, e.g. Trollinger*, 370 F.3d 602. Plaintiffs point to several cases in which this court and others have held that the indirect-purchaser rule bars claims by indirect-purchasers seeking pass-through charges. *See* D. 30 (Appellant Br. at 47–57). That indirect-purchasers' claims for pass-through charges are covered by the indirect-purchaser rule, however, does not mean that other claims by indirect-purchasers are necessarily outside the indirect-purchaser rule. Plaintiffs point to no authority that suggests that the indirect-purchaser bright-line rule applies *only* to indirect-purchasers seeking pass-through overcharges. Supreme Court precedent is clear: "*indirect* purchasers who are two or more steps removed from the [RICO] violator in a distribution chain may not sue" under RICO. *Pepper*, 587 U.S. at 279, 139 S.Ct. 1514. Nowhere in that bright-line rule are pass-through charges mentioned.

The Supreme Court in *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 730–32, 97 S.Ct. 2061, 52 L.Ed.2d 707 (1977), listed three reasons for adopting the indirect-purchaser rule: "(1) facilitating more effective enforcement of antitrust laws; (2) avoiding complicated damages calculations; and (3) eliminating duplicative damages against antitrust defendants." *Pepper,* 587 U.S. at 285, 139 S.Ct. 1514. The Plaintiffs here further argue that none of these "policy considerations that animated the *Illinois Brick* decision come into play here." D. 45 (Reply Br. at 26). Even if Plaintiffs are correct that these reasons for the indirect-purchaser rule do not apply in the current case, however, "the bright-line rule of *Illinois Brick* means that there is no reason to ask whether the rationales of *Illinois Brick* 'apply with equal force' in every individual case."[6] *Pepper*, 587 U.S. at 285, 139 S.Ct. 1514 (quoting *Kansas v. UtiliCorp United, Inc.*, 497 U.S. 199, 216, 110 S.Ct. 2807, 111 L.Ed.2d 169 (1990)). The bright-line rule applies, and we will "not engage in 'an unwarranted and counterproductive exercise to litigate a series ***605** of exceptions.'" *Id.* (quoting *UtiliCorp United*, 497 U.S. at 217, 110 S.Ct. 2807).

III. CONCLUSION

Because Plaintiffs' state-law claims are not impliedly preempted by the Clean Air Act, we **REVERSE** the district court's grant of summary judgment on the state-law claims. Because Plaintiffs are indirect-purchasers and thus do not have standing under RICO, however, we **AFFIRM** the district court's grant of summary judgment on the RICO claims.

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Footnotes

[6] Though we must be faithful to the Supreme Court's admonition against finding exceptions to the indirect-purchaser rule based on the rationales of the rule, Plaintiffs' point is well taken. In *Pepper*, the Supreme Court explained that, "if manufacturer A sells to retailer B, and retailer B sells to consumer C, then C may not sue A." 587 U.S. at 280, 139 S.Ct. 1514. Under this bright-line rule, it matters not whether retailer B is actually injured by manufacturer A's unlawful conduct; even if consumer C is the only injured party, "C may not sue A." *Id.* We would be remiss not to note the consequences of such a bright-line rule that mixes law and economics but does not necessarily reflect economic reality today. Under this rule, major manufacturers can insulate themselves from all antitrust and RICO liability, simply by selling their products through intermediaries. Because the business and success of intermediary car dealerships is dependent on car manufacturers, for example, consumers cannot rely on the intermediary car dealerships to vindicate their interests. As this case illustrates, car dealerships are not suing car

manufacturers for RICO violations; doing so is against the intermediary's interest. As a result, average car consumers have no recourse and major manufacturers are insulated from any liability. At bottom, rules must be supported by sensible principles. In a world with interdependent vertical economic structures, a bright-line indirect-purchaser rule does not facilitate effective enforcement of RICO and antitrust laws nor eliminate duplicative damages—this rule, instead, immunizes major manufacturers from any RICO or antitrust liability and hurts consumers. *See* *id.* at 285, 139 S.Ct. 1514. A bright-line indirect-purchaser rule is, accordingly, unsupported by sensible principles.

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