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I. INTRODUCTION

§ 1 Scope Note

“RICO” is the acronym for the Racketeer Influenced and Corrupt Organizations Act, codified as Title IX of the Organized Crime Control Act of 1970. The full text of the key sections of the RICO statute are included as Appendix A.

With its charge of “racketeering” and its threat of treble damages and attorneys’ fees, RICO is the blunt instrument of civil litigation. RICO’s requirements of a culpable “person” who conducts the affairs of a distinct “enterprise” through a “pattern” of “racketeering” in a way that proximately causes injury can make RICO complex and mystifying. Adding to the complexity is the historical failure of the courts to agree on how to interpret several key provisions of the broadly drafted RICO statute. This treatise seeks to demystify RICO by focusing first on the elements common to all civil RICO claims, then on the specific issues that have most perplexed the courts and practitioners.

In representing both plaintiffs and defendants in RICO cases, we have found this outline to be a valuable resource throughout the litigation process. Section 91 contains a checklist of essential allegations. Lawyers should review that list when deciding whether they have a RICO claim or to get ideas about how a RICO claim might be attacked.

Section 93 contains barebone allegations from a sample RICO complaint. We have identified the basic allegations that should help you draft a RICO complaint. As with any civil complaint, a RICO complaint should tell a clear and compelling story. Although Rule 8(a) of the Federal Rules of Civil Procedure requires the complaint to contain “a short and plain statement of the claim,” RICO claims that are based on fraud also must satisfy Rule 9(b) of the Federal Rules of Civil Procedure by stating the circumstances constituting fraud with particularity. In mail or wire fraud cases, for example, that generally means that the plaintiff must specifically allege the time, place, and content of the fraudulent communications, as well as the parties to the communications. See Section 6, Issues Relating to Mail and Wire Fraud.

Section 92 contains a sample RICO Case Statement. Many federal judges now require the plaintiff to file some form of RICO Case Statement at the beginning of the case. Consult your local rules and your judge’s personal rules or standing orders. Even if your case is in a court that does not require a RICO Case Statement, it is good practice to fill one out whether you represent the plaintiff or the defendant. Doing so will help you identify any gaps that may exist in your case.

Section 94 discusses sources for RICO jury instructions and includes a set of sample instructions prepared by the Civil RICO Subcommittee of the American Bar Association’s Section of Antitrust Law. You may obtain a set of sample instructions, complete with commentary and notes that we have here
excluded, by contacting the American Bar Association, Publications Planning & Marketing, at www.abanet.org or 1-800-285-2221, product code 5030237.

A word of caution about defending cases where RICO claims are combined with common law claims, such as fraud or breach of fiduciary duty: There is a temptation to focus energy on defeating the RICO claims while paying less attention to the common law claims. This can be a serious mistake, especially where the common law claims allow punitive damages, which most courts have agreed are not available under RICO. Even if compensatory damages are trebled on the RICO claim, they might very well be eclipsed by a punitive damages award on the common law claims.

Similarly, plaintiffs should think carefully before playing the RICO card in federal court when the plaintiff has other common law claims arising from the same conduct. Plaintiffs may be better off in state court asserting common law claims that give punitive damages than in federal court where dismissal of the RICO claims might very well result in the dismissal of any state law claims that arise from the same alleged misconduct. Plaintiffs also should carefully consider whether it is advisable to plead RICO and common law theories based on the same conduct: a jury’s finding against the common law claim might very well undermine the RICO claim. RICO plaintiffs also should determine whether a state RICO statute is available and should be aware that RICO claims themselves may be brought in state court.2 Though state RICO laws are

not discussed in this treatise, a listing of state RICO laws is provided in Appendix B.

Finally, a word about the cases cited in this chapter. Not only is RICO law constantly changing, but there often is disagreement among circuits, and even within circuits, about how to apply RICO. Although we have tried to gather the most significant recent RICO decisions from all the circuits, we surely have omitted many decisions that may be pertinent to your case. This outline should be used as a starting point to identify those issues that merit follow-up research before you file a RICO complaint or a motion attacking a RICO claim.
II. ELEMENTS COMMON TO ALL CIVIL RICO ACTIONS

§ 2 Overview

Congress passed RICO in 1970 as part of a comprehensive legislative package aimed at combating the influence of organized crime on interstate commerce.\(^1\) RICO was enacted as Title IX of the Organized Crime Control Act of 1970.\(^2\) It was inspired in part by a 1967 report of the President’s Commission on Law Enforcement and Administration, which identified four methods through which organized crime gained control of legitimate businesses: (1) investing profits acquired from gambling and other rackets; (2) accepting business interests as a pay-off for the business owner’s gambling debts; (3) loan sharking; and (4) employing certain types of extortion.\(^3\) When it was introduced, RICO was touted as “an act designed to prevent ‘known mobsters’ from infiltrating legitimate businesses.”\(^4\)

RICO generally outlaws four types of activities:

1. Section 1962(a) prohibits a person from investing in an enterprise any income derived from a pattern of racketeering activity.\(^5\)

---

\(^1\) See S. Rep. No. 91-617, at 76 (1969) (stating that RICO’s purpose was “the elimination of the infiltration of organized crime and racketeering into legitimate organizations operating in interstate commerce.”).


\(^3\) The President’s Commission on Law Enforcement and Administration of Justice, Task Force Report: Organized Crime at 4 (1967).


2. Section 1962(b) prohibits a person from using a pattern of racketeering activity, or the collection of an unlawful debt, to acquire or maintain control over an enterprise.⁶

3. Section 1962(c) prohibits a person from conducting the affairs of an enterprise through a pattern of racketeering, or the collection of an unlawful debt.⁷

4. Section 1962(d) prohibits a person from conspiring to violate Sections 1962(a), (b), or (c).⁸

Congress defined “racketeering activity,” an element common to all of RICO’s prohibitions, to include a long list of state and federal predicate crimes.⁹ RICO is not violated by a short-term episode of “racketeering”; there must be a “pattern” of racketeering activity, meaning long-term, organized criminal conduct. Persons convicted of violating RICO are subject to imprisonment and forfeiture of certain assets.¹⁰

When it enacted RICO, Congress included a civil remedy provision that allowed private parties to sue for injuries to their business or property caused “by reason of” a defendant’s violation of RICO.¹¹ Under this provision, a private plaintiff may sue in state or federal court to recover treble damages and attorneys’ fees caused by a RICO violation.

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Enticed by the opportunity for federal court jurisdiction, treble damages, attorneys’ fees, and by the negotiating leverage that treble damages and the “racketeer” label may afford, plaintiffs and their attorneys have invoked civil RICO in a wide variety of situations far beyond the context of organized crime and traditional “racketeering.” Most frequently, civil RICO claims are premised on allegations that the defendant engaged in a pattern of racketeering activity by committing numerous acts of mail fraud or wire fraud.¹²

For the most part, courts have rejected arguments that civil RICO must be limited to conduct traditionally associated with organized crime.¹³ Nevertheless, because RICO applies only to organized long-term criminal activity, courts do not apply it to ordinary business disputes.¹⁴ Courts regularly and consistently have found that it is an abuse of the RICO statute to attempt to shoehorn an ordinary business or contractual dispute into a civil RICO cause of action.¹⁵ Such abuse can have unusually deleterious effects on


¹⁴ See, e.g., Calcasieu Marine Nat'l Bank v. Grant, 943 F.2d 1453, 1463 (5th Cir. 1991) (“[A]lthough Congress wrote RICO in broad, sweeping terms, it did not intend to extend RICO to every fraudulent commercial transaction . . . .”); Midwest Grinding Co. v. Spitz, 976 F.2d 1016, 1025 (7th Cir. 1992) (“RICO has not federalized every state common-law cause of action available to remedy business deals gone sour”).

¹⁵ See, e.g., McDonald v. Schencker, 18 F.3d 491, 499 (7th Cir. 1994) (“[T]his [RICO] appeal involved nothing more than a garden-variety business dispute recast as mail fraud . . . .”); Midwest Grinding Co. v. Spitz, 976 F.2d 1016, 1025 (7th Cir. 1992) (“[C]ivil RICO

II-3
a defendant because of the inevitable stigmatizing effect of RICO claims and the public charges of fraud often used to support them.\textsuperscript{16}

The elements common to nearly all RICO violations are (a) a culpable “person” who (b) willfully or knowingly (c) commits or conspires to the commission of “racketeering activity” (d) through a “pattern” (e) involving a separate “enterprise” or “association in fact” that (f) effects interstate or foreign commerce. The “collection of an unlawful debt” is itself a RICO violation even without a “pattern” of “racketeering activity.”\textsuperscript{17} The “pattern” and “enterprise” requirements are discussed separately in Parts III and IV below.

\section*{§ 3 The Culpable “Person”}

RICO requires a “person” who violated or conspired to violate Section 1962(a), (b), or (c). As discussed in Part IV, in cases arising under Section 1962(c), the culpable person must be separate from the enterprise. If the defendant does not manage or operate a separate enterprise, a Section 1962(c) claim will fail.

\textsuperscript{16} See Figueroa Ruiz v. Alegria, 896 F.2d 645, 650 (1st Cir. 1990) (recognizing that mere assertion of RICO claims may have stigmatizing effect on named defendants); Katzman v. Victoria’s Secret Catalogue, 167 F.R.D. 649, 660 (S.D.N.Y. 1996) (same, quoting \textit{Figueroa}), aff’d, 113 F.3d 1229 (2d Cir. 1997); see also In re Burlington Coat Factory Sec. Litig., 114 F.3d 1410, 1418 (3d Cir. 1997) (recognizing that fraud claims pose threat to business’ reputation).

\textsuperscript{17} See § 16 below.
Section 1961(3) defines a “person” as an “entity capable of holding a legal or beneficial interest in property.”\(^{18}\) Ironically, the Second Circuit has held that an organized crime “family” is not a “person” subject to suit under subsections 1964(a) or (c) (though it could be an association-in-fact enterprise that is used by a culpable person to commit racketeering).\(^{19}\) The court concluded that an illegal organization does not fall within the statutory definition because it is not capable of holding an interest in property.\(^{20}\) The Second Circuit otherwise has held that an unincorporated association may be a RICO “person.”\(^{21}\)

Government entities generally cannot be liable under RICO because they are incapable of forming the requisite criminal intent to violate the statute.\(^{22}\) For example, the Sixth Circuit has held that counties are not persons because they lack “the capability to form the mens rea requisite to the commission of the predicate acts.”\(^{23}\) Similarly, the Third Circuit has acknowledged that a


\(^{20}\) Id. at 29-30.


municipal corporation cannot be liable under RICO, although the court based its holding on the conclusion that RICO’s “mandatory award” of treble damages serves a “punitive purpose” which does not apply to public bodies.\(^{24}\) Courts have used the same reasoning to dismiss RICO claims against public school boards.\(^{25}\) Note that although a government entity may not be capable of formulating the specific intent to violate RICO, a RICO claim may in some circumstances be appropriate against individual government employees who perpetrate predicate acts.\(^{26}\)

The Sixth Circuit also has dismissed a civil RICO claim brought against the federal government because “it is self-evident that a federal agency is not subject to state or federal criminal prosecution.”\(^{27}\) The Fifth Circuit has adopted this reasoning in holding that the Federal Deposit Insurance


\(^{25}\) See, e.g., Nu-Life Constr. Corp. v. Board of Educ., 779 F. Supp. 248, 252 (E.D.N.Y. 1991) (although New York City board of education is a “person” within the meaning of RICO, it is not capable as a municipal entity of forming the necessary intent to commit a RICO violation); Dammon v. Folse, 846 F. Supp. 36, 39 (E.D. La. 1994) (refusing to impose RICO liability against a school board, not merely because municipal corporations cannot form the requisite criminal intent, but also because attempts to deter the behavior of a public corporation by way of punitive damages would be ineffective).


\(^{27}\) Berger v. Pierce, 933 F.2d 393, 397 (6th Cir. 1991).
Corporation may not be sued under RICO.\textsuperscript{28} The Federal Circuit has followed suit in dismissing a RICO claim against the Patent and Trademark Office and the Food and Drug Administration.\textsuperscript{29}

\textbf{§ 4 Mental State}

Because the racketeering activity under RICO involves predicate acts that are criminal violations, plaintiffs must plead and establish that each defendant committed the predicate acts willfully or with actual knowledge of the illegal activities.\textsuperscript{30} Thus, courts generally have held that a mere showing of reckless or negligent conduct is insufficient to establish liability under RICO.\textsuperscript{31} Moreover, a defendant’s genuine, good faith belief that it provided or sent true

\begin{itemize}
  \item \textsuperscript{28} McNeily v. United States, 6 F.3d 343, 350 (5th Cir. 1993).
  \item \textsuperscript{29} Pieczenik v. Domantis, 120 F. App’x 317, 320 (Fed. Cir. 2005).
  \item \textsuperscript{30} See Richards v. Combined Ins. Co. of Am., 55 F.3d 247, 251-53 (7th Cir. 1995) (affirming summary judgment where defendants’ failure to refund unearned premiums might have been negligence, but not intentional fraud); Emery v. Am. Gen. Fin., Inc., 71 F.3d 1343, 1346, 1348 (7th Cir. 1995) (describing intent requirement where plaintiff pleads mail and wire fraud as predicate acts); Jepson, Inc. v. Makita Corp., 34 F.3d 1321, 1328 (7th Cir. 1994) (affirming dismissal of complaint for failure to plead sufficient facts to give rise to an inference that the defendants engaged in a mail and wire fraud scheme with fraudulent intent); Commercial Cleaning Servs., LLC v. Colin Serv. Sys., Inc., 271 F.3d 374, 387 (2d Cir. 2001) (plaintiffs must allege that the defendant hired illegal aliens with actual knowledge that the aliens hired were brought into the country in violation of the predicate immigration statute); 236 Cannon Realty, LLC v. Ziss, No. 02 Civ. 66 83 (WHP), 2005 WL 289752, at *5-9 (S.D.N.Y. Feb. 8, 2005) (dismissing claim where plaintiff failed to allege that each defendant made misrepresentations upon which he relied); Gerstenfeld v. Nitsberg, 190 F.R.D. 127 (S.D.N.Y. 1999) (dismissing RICO claims because the complaint failed to allege facts giving rise to a strong inference of fraudulent intent); Friedlob v. Trs. of Alpine Mut. Fund Trust, 905 F. Supp. 843, 858-59 (D. Colo. 1995) (plaintiffs must allege that defendants committed predicate acts willfully or with actual knowledge of the illegal activities).
\end{itemize}
information is a complete defense to mail or wire fraud.\footnote{32} Although courts have granted summary judgment on the question of intent,\footnote{33} summary judgment may be difficult to obtain because intent can be inferred from circumstantial (and usually hotly disputed) evidence showing that the defendant facilitated the fraud or gained money or advantage at the expense of the plaintiff.\footnote{34}

\section*{§ 5 Racketeering Activity}

Section 1961 defines “racketeering activity” broadly to encompass any of the state and federal offenses that are listed in Section 1961(1).\footnote{35} RICO claims

\footnote{32} S. Atlantic Ltd. P'ship of Tennessee v. Riese, 284 F.3d 518, 531-32 (4th Cir. 2002); United States v. Chavis, 461 F.3d 1201, 1208 (10th Cir. 2006).

\footnote{33} See, e.g., Perez v. Volvo Car Corp., 247 F.3d 303, 319-20 (1st Cir. 2001) (affirming summary judgment because the evidence presented was insufficient to show defendant knew of or was complicit in the scheme to defraud); Schultz v. Rhode Island Hosp. Trust Nat'l Bank, 94 F.3d 721, 730-31 (1st Cir. 1996) (agreeing with district court that record did not contain “a scintilla of evidence” to support a finding that a particular defendant shared the principal wrongdoer’s specific intent to defraud the plaintiffs); Zolfaghari v. Sheikholeslami, 943 F.2d 451, 454 (4th Cir. 1991) (affirming summary judgment where district court found that a 'fair minded' jury could not find criminal intent), \textit{aff'd in part, rev'd in part on other grounds sub nom.} Tajbaksh v. Sheikholeslami, 947 F.2d 942 (4th Cir. 1991); Richards v. Combined Ins. Co. of Am., 55 F.3d 247, 251-53 (7th Cir. 1995) (affirming summary judgment where defendants’ failure to refund unearned premiums might have been negligence, but not intentional fraud); Peterson v. H & R Block Tax Servs., Inc., 22 F. Supp. 2d 795, 803-04 (N.D. Ill. 1998) (noting need to prove deliberate, intentional fraud, and granting summary judgment where evidence was insufficient for reasonable jury to infer that defendant knew that customers would have to wait more than three weeks to obtain portion of tax refunds); Budgetel Inns v. Micros Sys., No. 97-CV-301, 2002 WL 32123532, at *23 (E.D. Wis. 2002) (granting summary judgment where the plaintiff failed to present evidence giving rise to a reasonable inference of intent to defraud).

\footnote{34} See, e.g., Crowe v. Henry, 115 F.3d 294, 297 (5th Cir. 1997) (reversing summary judgment based on evidence that the defendant reorganized ownership of certain properties to make it easier to defraud plaintiff, and where the plaintiff had lost money from the defendant’s reorganization of the properties); Bruner Corp. v. R. A. Bruner Co., 133 F.3d 491, 494-96 (7th Cir. 1998) (reversing summary judgment based on evidence that defendant may have known it was buying stolen goods); Webster v. Omnitrition Int'l, Inc., 79 F.3d 776, 786 (9th Cir. 1996) (finding that creation and operation of pyramid scheme gave rise to inference of intent to defraud, and noting that “[s]pecific intent to defraud may be proven circumstantially, and is ill-suited for adjudication of summary judgment.”).

\footnote{35} 18 U.S.C. § 1961(1). In the wake of the terrorist attacks of September 11, 2001, Congress passed the “USA Patriot Act,” which, among other things, expanded the predicate
must be based on actual racketeering conduct. Conduct that amounts to
garden-variety state-law crimes, torts, and contract breaches does not qualify
as “racketeering activity” under RICO.

The offenses listed in Section 1961 are called “predicate acts” because at
least one of them must have been committed through a pattern to sustain a
RICO claim. A plaintiff need not allege that the defendant has been convicted
of the predicate act to bring a civil claim. Also, while a plaintiff may use
predicate acts targeting other victims to show evidence of a “pattern” of
racketeering, the plaintiff need only be injured by a single predicate act
committed in furtherance of the scheme.

grounds, E.C. v. RJR Nabisco, Inc., 355 F.3d 123 (2d Cir. 2004), cert. granted, judgment vacated on other
grounds, 125 S. Ct. 1968, 161 L. Ed. 845 (2005) and judgment aff’d in part, vacated in part on other
grounds, 355 F.3d 123 (2d Cir. 2004) (discussing legislative history of
Section 315 of the Patriot Act of 2001).

See, e.g., Doug Grant, Inc. v. Great Bay Casino Corp., 232 F.3d 173 (3d Cir. 2000)
(affirming dismissal of suit by casino card counters who complained about casino counter-
measures like frequent deck shuffling, that did not qualify as RICO predicate acts).

Annulli v. Pannikkar, 200 F.3d 189, 192 (3d Cir. 1999) (affirming summary judgment
for defendant and holding that theft by deception, breach of contract, and intentional
interference with contract were not predicate RICO acts), abrogation on other grounds
recognized by Forbes v. Eagleson, 228 F.3d 471 (3rd Cir. 2000); Stangel v. A-1 Freeman N.
(holding that wrongful acts allegedly committed by defendants, including breach of a
settlement agreement, did not constitute racketeering activity); Holland v. Cole Nat. Corp., No.
defendant’s activities “do not threaten the social well-being such that RICO treatment is
warranted.”).


Id.; Deppe v. Tripp, 863 F.2d 1356, 1366-67 (7th Cir. 1988) (“[M]erely because one of
the racketeering acts was not successful does not mean that it is unavailable to establish a
Moreover, courts have held that a defendant can be liable without having personally committed the predicate acts, so long as the evidence is sufficient to connect the defendant to the fraudulent scheme.\footnote{See, e.g., Casperone v. Landmark Oil & Gas Corp., 819 F.2d 112, 115 (5th Cir. 1987).}

\section*{§ 6 \textbf{Issues Relating to Mail and Wire Fraud}}

Most of the offenses listed in Section 1961(1), such as extortion, gambling, and arson, are commonly associated with criminal conduct and have little application to the ordinary business transactions that civil RICO cases usually involve. However, mail fraud (18 U.S.C. § 1341) and wire fraud (18 U.S.C. § 1343) are included as racketeering activities and are alleged as predicate acts in a “high percentage” of civil RICO claims.\footnote{Klehr v. A. O. Smith Corp., 521 U.S. 179, 191 (1997) (noting that fraud is alleged as a predicate act in a “high percentage” of civil RICO claims).}

Criminal mail fraud involves (1) a scheme based on an intent to defraud, and (2) the use of the mails to further that scheme.\footnote{In re Sumitomo Copper Litig., 995 F. Supp. 451, 455 (S.D.N.Y. 1998).} A scheme to defraud encompasses “acts of artifice or deceit which are intended to deprive an owner of his property or money.”\footnote{Vicom Inc. v. Harbridge Merchant Servs., Inc., No. 92 C 2808, 1993 WL 8340, at *4 (N.D. Ill. Jan. 8, 1993), \textit{aff'd}, 20 F.3d 771 (7th Cir. 1994).} When pled as RICO predicate acts, the elements of mail or wire fraud have been identified as (1) a plan or scheme to defraud, (2) intent to defraud, (3) reasonable foreseeability that the mail or wires will be
used, and (4) actual use of the mail or wires to further the scheme. Mailings or wirings sent or delivered through the use of “any private or commercial interstate carrier” may violate the mail fraud statute. Also, the object of the fraud must be property in the victim’s hands. As in any fraud case, a mail fraud scheme cannot be based on statements of opinion. Also, a fraud scheme cannot be based on proposed or anticipated fraudulent conduct.

Mail and wire fraud claims based on fraudulent omissions must establish that the defendant has a duty to disclose the omitted facts. For example, the Eleventh Circuit has held that a pharmacy’s failure to disclose pricing schedules for prescription medication was not a predicate act under RICO because the pharmacy had no duty to disclose its pricing schedules to customers.

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44 See Wisdom v. First Midwest Bank, 167 F.3d 402, 406 (8th Cir. 1999). See also In re Sumitomo Copper Litig., 995 F. Supp. 451, 455 (S.D.N.Y. 1998) (noting that elements of mail fraud are more broadly defined than elements of common law fraud).


47 Miller v. Yokohama Tire Corp., 358 F.3d 616, 620-22 (9th Cir. 2004).

48 Giuliano v. Fulton, 399 F.3d 381, 389 (1st Cir. 2005).


50 Langford v. Rite Aid of Alabama, Inc., 231 F.3d 1308, 1314 (11th Cir. 2000); see also Ayres v. Gen. Motors Corp., 234 F.3d 514, 522-24 (11th Cir. 2000) (holding that component part manufacturer that failed to disclose product defect as required by the National Traffic and Motor Vehicle Safety Act could not be liable for RICO based on mail or wire fraud because Congress did not provide private right of action for Safety Act disclosure violations).
The mailings and wire communications need not be fraudulent in and of themselves; innocuous or “innocent” mailings and wirings are sufficient RICO predicates as long as they further a fraudulent scheme. This is because the crux of mail and wire fraud is a scheme to defraud; the mails or wires need only be used to carry out the scheme.

In Bridge v. Phoenix Bond & Indemnity Co, the Supreme Court held that where the alleged mail or wire fraud scheme is not based on misrepresentations or omissions in particular mailings or wirings, the plaintiff need not rely on the mailings or wirings asserted as predicate acts. At least one court has held that while innocent mailings may be used to further a mail fraud scheme, they might not count as predicate acts toward establishing a pattern of racketeering unless they contain misrepresentations. Even though each use of the mails may be a separate indictable offense, courts are less likely to find the existence of a “pattern” if it is based on a series of mailings used to further a single scheme against a single victim.

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53 See Wisdom v. First Midwest Bank, 167 F.3d 402, 407 (8th Cir. 1999).

In any event, Federal Rule of Civil Procedure 9(b), requiring that fraud allegations be pleaded with particularity, applies to civil claims under RICO for which fraud is the predicate act. Hence, a plaintiff that bases its RICO claim on a mail or wire fraud scheme must allege the time, place, content of, and parties to the fraudulent communications, and must show that the plaintiff was deceived by those communications.\(^55\) If a plaintiff fails to plead fraudulent acts with specificity, the court might not consider those acts for purposes of establishing a pattern of racketeering.\(^56\)

§ 7 Predicates Based on Securities Fraud Generally Prohibited

The Private Securities Litigation Reform Act of 1995 (“Reform Act”) amended RICO to eliminate securities fraud as a predicate act except under the

\(^{55}\) See, e.g., Knoll v. Schectman, No. 06-1832-CV, 2008 WL 1868440, at *1 (2d Cir. Apr. 25, 2008); Lum v. Bank of America, 361 F.3d 217, 223-26 (3d Cir. 2004) (affirming dismissal); Chisholm v. Transouth Fin. Corp., 95 F.3d 331, 336-37 (4th Cir. 1996); Tel-Phonic Servs., Inc. v. TBS Int’l Inc., 975 F.2d 1134, 1138-39 (5th Cir. 1992) (affirming dismissal where alleged wrongs were not pleaded with sufficient particularity to constitute the RICO predicate act of wire fraud or mail fraud); Lachmund v. ADM Investor Services, Inc., 191 F.3d 777, 783-84 (7th Cir. 1999) (affirming dismissal; heightened pleading requirements of Fed. R. of Civ. P. 9(b) apply to allegations of fraud in a civil RICO complaint); Goren v. New Vision Int’l, Inc., 156 F.3d 721, 729 (7th Cir. 1998) (affirming dismissal); Emery v. Am. Gen. Fin., Inc., 71 F.3d 1343, 1348 (7th Cir. 1995); Jepson, Inc. v. Makita Corp. 34 F.3d 1321, 1328 (7th Cir. 1994) (“[L]oose references to mailings and telephone calls in furtherance of a purported scheme to do fraud will not do.”); Murr Plumbing, Inc. v. Scherer Bros. Fin. Serv. Inc., 48 F.3d 1066, 1069 (8th Cir. 1995); Mostofi v. i2 Telecom Int’l, Inc., 269 F. App’x 621, 623-25 (9th Cir. 2008); Cayman Exploration Corp. v. United Gas Pipe Line Co., 873 F.2d 1357, 1362 (10th Cir. 1989) (collecting cases).

limited circumstance where the defendant has been criminally convicted of the

securities fraud.\textsuperscript{57} Amended Section 1964(c) now provides:

> Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court ..., except 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 section 1962. The exception contained in the preceding sentence does not apply to an action against any person that is criminally convicted in connection with the fraud, in which case the statute of limitations shall start to run on the date on which the conviction becomes final.\textsuperscript{58}

After the Reform Act was passed in 1995, much of the case law focused on whether the Act could be applied retroactively to bar RICO claims based on securities fraud that occurred before the effective date of the Act.\textsuperscript{59}

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\textsuperscript{57} 18 U.S.C. § 1964(c); see also Powers v. Wells Fargo Bank, NA, 439 F.3d 1043, 1045-46 (9th Cir. 2006) (vacating dismissal of claim against defendant who had been convicted of securities fraud, but affirming dismissal of claims against co-defendants who had not been convicted).

\textsuperscript{58} Id.

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Under the Reform Act, courts have consistently rejected securities-based RICO claims regardless of the label attached or the validity of the securities claim. Indeed, the Reform Act bars a RICO claim based on securities fraud even if the plaintiff itself could not bring an action under the securities laws.

The legislative history provides: “The [Conference] Committee intends this amendment to eliminate securities fraud as a predicate offense in a civil RICO action. In addition, the . . . Committee intends that a plaintiff may not plead other specified offenses, such as mail or wire fraud, as predicate acts under civil RICO if such offenses are based on conduct that would have been actionable as securities fraud.” H.R. Rep. No. 369, 104th Cong., at 47 (1995), reprinted in 1995 U.S.C.C.A.N. 730, 746 (1995). See also Bald Eagle Area Sch. Dist. v. Keystone Fin., Inc., 189 F.3d 321, 327-30 (3d Cir. 1999) (RICO claim based on alleged Ponzi scheme was conduct actionable as securities fraud, and so was barred by the Reform Act); Aries Aluminum Corp. v. King, 194 F.3d 1311 (Table), 1999 WL 801523 [6th Cir. Sept. 30, 1999] (fraud in the sale of counterfeit securities constitutes fraud in the sale of securities barred by the Reform Act); Swartz v. KPMG LLP, 476 F.3d 756, 761 (9th Cir. 2007) (affirming dismissal because alleged fraud was in connection with sale of securities, and the sale of securities was not “incidental” to the fraud); Powers v. Wells Fargo Bank, NA, 439 F.3d 1043, 1045-46 (9th Cir. 2006) (RICO claim based on alleged Ponzi scheme barred by the Reform Act, except as to claim against defendant who had been convicted of securities fraud); Cyber Media Group, Inc. v. Island Mortgage Network, Inc., 183 F. Supp. 2d 559, 578-79 (E.D.N.Y. 2002) (misrepresentations to inflate stock price and induce stock purchase agreement could not support RICO claim because made in connection with purchase or sale of securities); Metz v. United Counties Bancorp, 61 F. Supp. 2d 364, 370-71 (D.N.J. 1999) (mail and wire fraud may not be used as predicate acts under RICO when the alleged fraud is based on conduct that would have been actionable as securities fraud); Tyrone Area Sch. Dist. v. Mid-State Bank & Trust Co., No. CIV 98-881, 1999 WL 703729, at *6 (W.D. Pa. Feb. 9, 1999), (RICO claims alleging mail fraud barred by Reform Act because the conduct underlying the claims was intrinsically connected to conduct that would be actionable under federal securities laws), aff’d, 202 F.3d 255 (3d Cir. 1999); Renner v. Chase Manhattan Bank, No. 98 Civ. 926 (CSH), 1999 WL 47239, at *5-7 (S.D.N.Y. Feb. 3, 1999) (rejecting securities-based RICO claim even after plaintiff artfully removed all references to the securities laws); RA Investments I, LLC v. Deutsche Bank AG, No. Civ.A.3:04-CV-1565-G, 2005 WL 1356446, at *6 (N.D. Tex. June 6, 2005) (RICO claim connected with the sale of “digital option contracts” barred by the Reform Act because equivalent to the sale of investment contracts).
Of course, if the conduct does not amount to securities fraud, the Reform Act bar does not apply. Also, if the defendant did not make a misrepresentation or omission in connection with the sale of securities, but merely aided and abetted those who did, the Reform Act may not apply because securities fraud cannot be based on aiding and abetting.

§ 8 Extortion as Predicate Act

Although extortion (in violation of the Hobbs Act) is more commonly a RICO predicate act in criminal RICO cases, RICO plaintiffs have alleged extortion as a predicate act in civil cases. Extortion has been asserted as a predicate act in abortion cases, based on the theory that anti-abortion protestors are members of a nationwide conspiracy to shut down abortion clinics though a pattern of racketeering activity, including extortion.


See, e.g., Westways World Travel, Inc. v. AMR Corp., 265 F. App’x 472, 474 (9th Cir. 2008) (stating that extortion is “racketeering activity” for purposes of RICO but holding that defendants failed to establish any acts constituting extortion); Robbins v. Wilkie, 433 F.3d 755, 767-68 (10th Cir. 2006) (allowing RICO claim to proceed based on alleged extortion), rev’d, Wilkie v. Robbins, 127 S. Ct. 2588, 2591-92 (2007).
For example, in *Scheidler v. National Organization for Women*,\(^65\) the Supreme Court overturned a judgment granting an injunction against anti-abortion protesters because their conduct did not amount to extortion under the Hobbs Act. To prove extortion under the Hobbs Act, the Court held that a plaintiff must show that the defendant actually obtained or sought to obtain property through wrongful means.\(^66\) It is not enough if the defendant merely deprived the plaintiff of its property.\(^67\) Because the Court concluded that the disruptive acts by the anti-abortion protesters did not arise to the predicate act of extortion, the Court rejected the RICO claim without resolving the open question of whether injunctive relief is available under RICO.\(^68\) The Supreme Court subsequently granted a writ of certiorari from the Seventh Circuit to determine whether certain “acts or threats of physical violence to any person or property” not addressed in the original Supreme Court opinion are sufficient to support the nationwide injunction that the district court imposed.\(^69\) After granting certification for the third time, the Supreme Court determined that acts of violence unrelated to robbery or extortion are insufficient to support a

\(^{65}\) 537 U.S. 393, 123 S. Ct. 1057 (2003).

\(^{66}\) 123 S. Ct. at 1067.

\(^{67}\) *Id.* at 1064-1067.

\(^{68}\) *Id.* at 1067. *See also* § 72 for discussion of equitable relief available under RICO.

violation of the Hobbs Act, and reversed and remanded with instructions to enter judgment for the petitioners.\textsuperscript{70}

In \textit{Wilkie v. Robbins},\textsuperscript{71} the Supreme Court addressed whether government officials could be liable for an extortion-based RICO claim where they allegedly used extortion to obtain an easement over private land for the benefit of the federal government. The Court said no, holding that under traditional notions of extortion, extortion is not designed to reach conduct that benefits the government, as opposed to conduct to obtain property for a personal benefit, such as the taking of a bribe.\textsuperscript{72}

\section*{§ 9 National Stolen Property Act as a Predicate Act}

Another RICO predicate act involves the interstate transportation of stolen funds in violation of the National Stolen Property Act.\textsuperscript{73} A violation of Section 2314 occurs when anyone “transports, transmits, or transfers” in interstate commerce any “goods, wares, merchandise, securities or money” worth more than $5,000, knowing that they have been “stolen, converted or taken by fraud.”\textsuperscript{74} If the Section 2314 claim is based on a theory that the goods or funds were obtained through fraud, then the fraud must be pled with

\begin{itemize}
  \item \textsuperscript{71} Id. at 2588 (2007).
  \item \textsuperscript{72} Id. at 2605-08. \textit{See also} Gillmor v. Thomas, 490 F.3d 791, 799 (10th Cir. 2007) (rejecting property owner’s extortion claim based on defendants’ application of zoning ordinances because such conduct did not rise to an effort to obtain property by “inherently wrongful means”).
  \item \textsuperscript{73} 18 U.S.C. § 2314.
  \item \textsuperscript{74} Id.
specificity to comply with Federal Rule 9(b). To violate Section 2314, the defendant need not participate in the underlying unlawful scheme to defraud; the defendant must simply cause the transportation of the funds, goods, or securities, knowing that they were procured by fraud. The flip-side of Section 2314 is Section 2315, which applies to those who receive the goods or funds knowing they were procured by fraud.

§ 10 Interstate or Foreign Commerce

A RICO claim cannot exist without some nexus to interstate commerce. A RICO enterprise is involved in “interstate commerce” when it is itself “directly engaged in the production, distribution, or acquisition of goods and services in interstate commerce.” Although the statutory language expressly requires that the “enterprise” must affect interstate commerce, courts have ruled that the interstate commerce requirement is satisfied if the activity of either the enterprise or the predicate acts of racketeering affect interstate commerce.

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76 See, e.g., United States v. Quintanilla, 2 F.3d 1469, 1474 (7th Cir. 1993); United States v. Schwab, 88 F. Supp. 2d 1275, 1280 (D. Wyo. 2000).
The required interstate commerce nexus is “minimal.”\(^{81}\) It is sufficient to show the use of interstate commerce through the use of mail, interstate wires, or other instrumentalities of interstate commerce.\(^{82}\) Although minimal, some nexus with interstate commerce must be alleged, and courts will dismiss RICO claims that do not adequately plead this requirement.\(^{83}\) Note that federal wire fraud requires an interstate use of a wire; \textit{intrastate} telephone calls are generally insufficient to establish federal wire fraud.\(^{84}\)

\(^{81}\) See DeFalco v. Bernas, 244 F.3d 286, 309 (2d Cir. 2001); Cowan v. Corley, 814 F.2d 223, 227 (5th Cir. 1987); United States v. Gardiner, 463 F.3d 445, 458 (6th Cir. 2006); United States v. Fernandez, 388 F.3d 1199, 1218 (9th Cir. 2004).


\(^{83}\) See, \textit{e.g.}, Rose v. Bartle, 692 F. Supp. 521, 534 (E.D. Pa. 1988) (dismissing § 1962(c) claim because plaintiff did not allege that the enterprises affected interstate commerce and the facts alleged showed that the enterprises were engaged only in intrastate activities), \textit{aff'd in part, vacated & rev'd in non-pertinent part}, 871 F.2d 331 (3d Cir. 1989); Bowoto v. Chevron Corp., 481 F. Supp. 2d 1010, 1014-15 (N.D. Cal. 2007) (granting summary judgment because plaintiffs did not present any evidence that alleged extraterritorial predicate acts saved money or otherwise increased companies' profit margin or that oil companies gained a competitive advantage in the United States or impacted the American economy through their alleged racketeering activity).

\(^{84}\) See, \textit{e.g.}, Smith v. Ayres, 845 F.2d 1360, 1366 (5th Cir. 1988) (affirming dismissal of RICO claim where there were no interstate telephone calls alleged in support of wire fraud predicate act); McCoy v. Goldberg, 748 F. Supp. 146, 154 (S.D.N.Y. 1990) (dismissing RICO claim where there were no interstate telephone calls alleged in support of wire fraud predicate act); Hall v. Tressic, 381 F. Supp. 2d 101, 109 (N.D.N.Y. 2005) (same); Meier v. Musburger, 588 F. Supp. 2d 883, 907 (N.D. Ill. 2008) (same). \textit{But see} Protter v. Nathan’s Famous Sys., Inc., 904 F. Supp. 101, 108-09 (E.D.N.Y. 1995) (holding that where intrastate phone calls are alleged, but the defendants were clearly involved in interstate commerce, interstate commerce for predicate act of wire fraud sufficiently pled for Rule 12(b)(6) purposes).
§ 11 Economic Motive

In *National Organization for Women, Inc. v. Scheidler*, the Supreme Court resolved an ongoing dispute among the federal courts of appeals by holding that neither a RICO enterprise nor the predicate acts of racketeering must have an economic motivation. Prior to the Supreme Court’s decision, three circuits, including the Seventh Circuit in *Scheidler v. National Organization for Women, Inc.*, had concluded that the RICO enterprise (or, at the very least, the predicate acts) must have an economic motive.

In *Scheidler*, the Seventh Circuit affirmed the dismissal of a claim that anti-abortion activists and lobbying groups had violated RICO by committing illegal acts of extortion aimed at forcing the closure of abortion clinics. Relying heavily on the Second Circuit’s reasoning in *United States v. Ivic*, the Seventh Circuit stated that the term “enterprise” in Sections 1962(a) and (b) refers to an “‘organized, profit-seeking venture.’” It concluded that the same limitation applies to Section 1962(c) because there is no indication that Congress intended that the same term mean something different in Section 1962(c) than it does in Sections 1962(a) and (b).

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87 700 F.2d 51, 59-65 (2d Cir. 1983).
88 *Scheidler*, 968 F.2d at 627 (quoting *Ivic*, 700 F.2d at 60).
89 *Id.*
In a unanimous decision, the Supreme Court reversed the Seventh Circuit and held that no proof of economic motive is required.\textsuperscript{90} The Court concluded that the plain language of Section 1962(c) and the definition of “pattern of racketeering activity” in Section 1961(1) provide no indication that an economic motive is required. The Court reasoned that Congress’ inclusion in Section 1962(c) of enterprises whose activities “affect” interstate or foreign commerce further demonstrates that a profit-seeking motive is unnecessary: “An enterprise surely can have a detrimental influence on interstate or foreign commerce without having its own profit-seeking motives.”\textsuperscript{91}

The Court rejected the Seventh Circuit’s conclusion that because the use of the term “enterprise” in Sections 1962(a) and (b) is tied to economic motivation, the same term should be applied to restrict the breadth of Section 1962(c). The Court reasoned that the word “enterprise” in subsections (a) and (b) refers to the victim of the unlawful activity — the entity that is acquired through illegal activity or the money generated from illegal activity — and that the victim may or may not be a “profit-seeking” entity.\textsuperscript{92} The Court stated that in contrast to the type of enterprise at issue in Sections 1962(a) and (b), an enterprise in Section 1962(c) connotes the vehicle of the unlawful pattern of activity, rather than the victim. The Court reasoned that since the “enterprise”

\textsuperscript{90} Scheidler, 510 U.S. at 255-58.

\textsuperscript{91} Id. at 258.

\textsuperscript{92} Id. at 259.
in Section 1962(c) is not being acquired, “it need not have a property interest that can be acquired nor an economic motive for engaging in illegal activity; it need only be an association in fact that engages in a pattern of racketeering activity.”

The Court declined to address arguments that the application of RICO to anti-abortion protestors could chill First Amendment expression. However, Justice Souter, in a concurring opinion in which Justice Kennedy joined, stressed that the Court’s opinion “does not bar First Amendment challenges to RICO’s application in particular cases.” After the case was remanded, tried, and appealed again, the Seventh Circuit acknowledged that “the First Amendment might well shield that particular conduct from being used as the basis for RICO liability,” but held that was not the case here because there was ample evidence of illegal conduct that could be regulated.

Critics have expressed concern that *Scheidler* could give rise to new RICO claims against non-profit and protest organizations. However, at least one commentator has suggested that the Court’s opinion brings within the scope of RICO only violent protests or protests involving predicate acts of racketeering.

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93 Id.
94 Id. at 262 n.6.
95 Id. at 263 (Souter, J., concurring).
Note that in revisiting the *Scheidler* case in 2003, the Supreme Court held that the disruptive acts of anti-abortion protesters did not amount to extortion under the Hobbs Act because the protesters did not obtain or seek to obtain property from the abortion clinics against which they were protesting.\textsuperscript{98} In 2006, the Supreme Court heard the case a third time, and further determined that the RICO claim failed because acts of violence unrelated to robbery or extortion do not violate the Hobbs Act.\textsuperscript{99}


III. PATTERN OF RACKETEERING

§ 12 Background

The RICO statute is intended to attack long-term, not one-shot, criminal activity. For this reason, “the heart of any RICO complaint is the allegation of a pattern of racketeering.”¹ Wary of seeing “garden variety” fraud cases dressed up as federal claims, federal courts have used the “pattern” element as a means “to trim off the excesses of a civil RICO claim.”² For litigants, the “pattern” element is often a heavily litigated issue of pleading and proof.³

Federal courts have had some difficulty articulating exactly what types of proof would be sufficient to meet the “pattern” element.⁴ Section 1961(5) of RICO provides the statutory definition of a “pattern of racketeering activity” as requiring “at least two acts of racketeering activity . . . the last of which occurred within ten years after the commission of a prior act of racketeering activity.”⁵ The problem with this definition is that it does not positively define the term, “pattern of racketeering activity.” As one commentator noted, “[b]ecause Congress chose to describe this critical element of RICO in terms of what it is not, that is less than two racketeering acts, instead of what it is, the

² See United States v. O'Connor, 910 F.2d 1466, 1468 (7th Cir. 1990).
³ Gregory Joseph, CIVIL RICO: A DEFINITIVE GUIDE 106 (2d. ed. 2000) (“[T]he pattern element has . . . generated voluminous litigation, and . . . produced inconsistent results.”)
⁴ See U.S. Textiles, Inc. v. Anheuser-Busch Companies, Inc., 911 F.2d 1261, 1266 (7th Cir. 1990) (“[A] concrete definition for precisely what activity will constitute a ‘pattern’ for purposes of the RICO statute has eluded the federal courts.”)
courts have been struggling since RICO’s passage to determine the content of the pattern element.”

The Supreme Court has twice attempted to clarify what is meant by a “pattern of racketeering activity.” The first attempt came in 1985, when the Supreme Court decided Sedima, S.P.R.L. v. Imrex Co., Inc., perhaps most notable for its discussion of the “pattern” element in footnote 14. The second decision was rendered in 1989, when the Supreme Court again addressed the “pattern” element in H.J. Inc. v. Northwestern Bell Telephone Co. In these two decisions, the Supreme Court “ruled out interpretations [of civil RICO’s breadth] at either extreme” and “ensured that the outcome of each particular case would rest on a fact-intensive analysis.”

Sedima involved a joint venture between two companies, Sedima and Imrex, that failed when Sedima became convinced that Imrex was cheating Sedima out of its fair share of the venture’s proceeds. Sedima filed several claims in federal court against Imrex, including a civil RICO claim based on predicate acts of mail and wire fraud. The federal district court dismissed the civil RICO claim for failure to state a claim on the grounds of Sedima’s lack of standing, where the only injury alleged by Sedima arose directly from the

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9 See Uniroyal Goodrich Tire Co. v. Mutual Trading Corp., 63 F.3d 516, 522, 523 (7th Cir. 1995).
10 See Sedima, 473 U.S. at 483-84.
11 Id. at 484.
Predicate acts themselves, as opposed to “some sort of distinct ‘racketeering injury.’”12 The Second Circuit affirmed, and also found the complaint defective because the defendant, Imrex, had not yet been criminally convicted of the alleged predicate acts of mail and wire fraud. For those reasons, the Court concluded that Sedima had failed to allege “pattern of racketeering activity.”13

The Supreme Court rejected both reasons and reversed the dismissal of Sedima’s civil RICO claims. The Sedima decision included a much discussed footnote regarding the meaning of a “pattern of racketeering activity.”14 Before Sedima, some courts had construed the statutory language literally by requiring only that a plaintiff plead and prove the minimum number of predicate acts required by the statutory definition.15 The Supreme Court rejected this broad reading, noting that “while two acts are necessary, they may not be sufficient,” and further noting that the legislative history suggested “that two isolated acts of racketeering activity do not constitute a pattern.”16 The Supreme Court referenced the Senate Report for the RICO bill, which stated:

The target of [RICO] is thus not sporadic activity. The infiltration of legitimate business normally requires more than one “racketeering activity” and the threat of continuing activity to be effective. It is this factor of

12 Id.
13 Id. at 485.
14 Id. at 496 n. 14.
15 See, e.g., United States v. Bascaro, 742 F.2d 1335, 1360-62 (11th Cir. 1984), abrog. on other grounds recognized by United States v. Lewis, 492 F.3d 1219 (11th Cir. 2007); United States v. Weisman, 624 F.2d 1118, 1124 (2d Cir. 1980), abrog. on other grounds recognized by Ianniello v. United States, 10 F.3d 59 (2d Cir. 1993).
16 See Sedima at 496 n. 14.
The Supreme Court also cited to another provision of the RICO statute, Title X of the Organized Crime Control Act of 1970 (the Dangerous Special Offender Sentencing Act), which defined a “pattern” as encompassing criminal acts that have the “same or similar purposes, results, participants, victims, or methods of commission, or otherwise are interrelated by distinguishing characteristics and are not isolated events.”

Sedima’s footnote 14 unleashed a wave of conflicting federal court interpretations of the “pattern” requirement. Some federal courts saw it as an open invitation to begin to use the “pattern” element to narrow the scope of civil RICO claims. Although Sedima introduced the concepts of “continuity” and “relationship,” one commentator noted that those concepts “did little to advance a coherent vision of a RICO pattern.” As the Seventh Circuit would later explain:

Requiring both continuity and relationship among the predicate acts for the pattern requirement to be met is a sound theoretical concept that is not easily accomplished in practice. This is because the terms “continuity” and “relationship” are somewhat at odds with one another. Relationship implies that the predicate acts were committed somewhat closely in

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17 Id., quoting S. Rep. No. 91-617, at 158 (1969) [alteration and emphasis in original].
20 See Barticheck v. Fidelity Union Bank/First Nat’l State, 832 F.2d 36, 38 (3d Cir. 1987) (“The Sedima dictum has been widely viewed as a signal to federal courts to fashion a limiting construction of RICO around the pattern requirement and the concepts of ‘continuity’ and ‘relationship.’”).
time to one another, involve the same victim, or involve the same type of misconduct. Continuity, on the other hand, would embrace predicate acts occurring at different points in time or involving different victims. To focus excessively on either continuity or relationship alone effectively negates the remaining prong.\textsuperscript{22}

Three principal views of the “pattern” requirement emerged following \textit{Sedima}:

\textbf{The Multiple Schemes Test.} Some courts placed greater emphasis on the “continuity” aspect of the “pattern” element by requiring allegations that the defendants engaged in multiple schemes.\textsuperscript{23} These courts reasoned that, whereas the “relationship” prong was satisfied “when two or more racketeering acts are shown to be in pursuit of the same overarching scheme,”\textsuperscript{24} the “continuity” prong was intended to be “more onerous,” requiring an allegation that a defendant “had engaged in similar endeavors in the past or that [it was] engaged in other criminal activities.”\textsuperscript{25} Although the Eighth Circuit was the only federal appeals court to interpret the “continuity” aspect of the “pattern” element as requiring more than one criminal scheme, the Fourth Circuit perhaps best articulated the pragmatic basis for such a requirement:

\begin{footnotes}
\footnotetext[22]{See Morgan v. Bank of Waukegan, 804 F.2d 970, 975 (7th Cir. 1986).}
\footnotetext[23]{See, e.g., H.J. Inc. v. Northwestern Bell Tel. Co., 829 F.2d 648, 650 (8th Cir. 1987), rev’d, 492 U.S. 229 (1989); Superior Oil Co. v. Fulmer, 785 F.2d 252, 257 (8th Cir. 1986); cf. Northern Trust Bank/O’Hare N.A. v. Inryco, Inc., 615 F. Supp. 828, 832 (N.D. Ill. 1985) (“It is difficult to see how the threat of continuing activity stressed in the Senate Report could be established by a single criminal episode.”)}
\footnotetext[24]{See H.J. Inc., 829 F.2d at 650.}
\footnotetext[25]{Id.; see also Deviries v. Prudential-Bache Securities, Inc., 805 F.2d 326, 329 (8th Cir. 1986).}
\end{footnotes}
Without attempting an all-embracing definition of the pattern requirement, we believe that a single, limited fraudulent scheme, such as the misleading prospectus in this case, is not of itself sufficient to satisfy § 1961(5). Nor do we find “a pattern” in the fact that one allegedly misleading prospectus reached the hands of ten investors. If the commission of two or more “acts” to perpetrate a single fraud were held to satisfy the RICO statute, then every fraud would constitute “a pattern of racketeering activity.” It will be the unusual fraud that does not enlist the mails and wires in its service at least twice. Such an interpretation would thus eliminate the pattern requirement altogether.26

The Fourth Circuit, however, did not adopt the Eighth Circuit’s “multiple schemes” requirement, agreeing instead with the analysis of the Seventh Circuit that such a test could “allow a large, continuous scheme to escape the enhanced penalties of RICO liability.”27

**The Multiple Acts Test.** Despite the language in *Sedima*’s footnote 14, some courts continued to interpret the “pattern” element as requiring only proof of two or more predicate acts. In *R.A.G.S. Couture, Inc. v. Hyatt*,28 the Fifth Circuit reversed summary judgment against a civil RICO claim in a case where the plaintiff alleged only two acts of mail fraud arising from an alleged scheme involving repair services and rental fees.29 The first mailing involved invoices sent on March 30, 1983; the second mailing, sent August 24, 1983, involved a letter demand for payment on those invoices.30 Despite the language

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27 Id. at 155, quoting Lipin Enterprises Inc. v. Lee, 803 F.2d 322, 324 (7th Cir. 1986).
28 See R.A.G.S. Couture, Inc. v. Hyatt, 774 F.2d 1350 (5th Cir. 1985).
29 Id. at 1352.
30 Id.
in *Sedima* stating that “while two acts are necessary, they may not be sufficient,” the Fifth Circuit held that *Sedima* was referring to “isolated” acts, whereas the two instances of alleged mail fraud in its case were “related.”31

**The Multiple Factors Test.** Other courts attempted to craft a middle course that emphasized a case-by-case, multifactor analysis. In *Morgan v. Bank of Waukegan*, the Seventh Circuit identified six factors for courts to weigh in determining whether a complaint adequately alleges a pattern of unlawful conduct: (1) the number of predicate acts; (2) the variety of predicate acts; (3) the length of time over which the predicate acts were committed; (4) the number of victims; (5) the existence of separate schemes; and (6) the occurrence of distinct injuries.32 Several other circuits adopted similar tests.33

The Seventh Circuit acknowledged that this multifactor analysis was “necessarily less than precise,” and even acknowledged the passing resemblance to Justice Potter Stewart’s famous, “I know it when I see it” test for obscenity.34 Still, the Seventh Circuit concluded that this context-based, case-by-case analysis “best reconciles the breadth of civil RICO and the Supreme Court’s directive in *Sedima*.”35

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31 *Id.* at 1355.
32 804 F.2d at 975.
34 *Id.* at 977.
35 *Id.*
The Fourth Circuit adopted a similar contextual test that emphasized the “criminal dimension and degree” of the alleged misconduct. In *HMK Corporation v. Walsey*, the Fourth Circuit explained:

The existence of a pattern thus depends on context, particularly on the nature of the underlying offenses. Attention to the nature of the underlying offenses is necessary because of the heightened civil and criminal penalties of RICO are reserved for schemes whose scope and persistence set them above the routine.

The court noted that certain transactions such as the acquisition of stock necessarily require “many separate statements from a variety of persons: financial statements from the accountants, opinions from the lawyers, oral statements from the parties negotiating the sale, and so forth.” Thus, the significance of a relatively large number of “predicate acts” arising from a single transaction would be diminished.

As Judge Cudahy of the Seventh Circuit Court wrote in a concurring opinion to *Lipin Enterprises Inc. v. Lee*:

Mail fraud and wire fraud are perhaps unique among the various sorts of “racketeering activity” possible under RICO in that the existence of a multiplicity of predicate acts (here, the mailings) may be no indication of the requisite continuity of the underlying fraudulent activity. Thus, a multiplicity of mailings does not necessarily translate into a “pattern” of racketeering activity. It is not clear that the same analysis would be appropriate in cases involving other kinds of predicate acts (like, for example, arson).

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36 See Zepkin, 812 F.2d at 155.
37 828 F.2d 1071, 1074 (4th Cir. 1987).
38 Id.
Another variant of the “contextual test” focuses upon the existence of “multiple episodes” as opposed to “multiple schemes.” In *Graham v. Slaughter*, Judge Getzendanner of the Northern District of Illinois interpreted the “continuity plus relationship” test as requiring “more than a single transaction but not necessarily more than a single scheme.” As an example, Judge Getzendanner described a “two-year practice of embezzling funds from a company through otherwise separate transactions” as constituting a “pattern of racketeering activity,” despite “the fact that the numerous acts arguably comprise a single criminal scheme.” In a subsequent case also in the Northern District of Illinois, Judge Aspen expanded upon the “multiple episodes” test by identifying certain “characteristics” of an “episode” that were consistent with the concept of “continuity” inherent in the “pattern” element. The “most important factor” was whether the multiple criminal acts each had “independent harmful significance,” i.e., whether the “pattern” in fact “cause[d] more than one basic injury.” The “independent harmful significance” of each predicate act could be further established by the existence of “separate victims,” where “the multiple predicate acts are directed at and harm more than one person or entity,” by the existence of “separate schemes,” or by the

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41 Id.
43 Id.
existence of “separate injuries to one victim in one scheme” separated “over time and space.”

The First, Third and Ninth Circuits rejected the “multiple episode” test in favor of a more general balancing test. However, the distinction between the “multiple episode” test rejected by these courts and a more general balancing test may be more rhetoric than reality. In Morgan, the Seventh Circuit concluded that “[i]n order to be sufficiently continuous to constitute a pattern of racketeering activity, the predicate acts must be ongoing over an identified period of time so that they can fairly be viewed as constituting separate transactions, i.e., ‘transactions somewhat separated in time and space.’” The Seventh Circuit in Morgan specifically cited Judge Getzendanner’s opinion in Graham where she endorsed a “multiple episodes” perspective, and the six Morgan factors largely track the factors identified by Judge Aspen in Ghouth.


In H.J. Inc. v. Northwestern Bell Telephone Co., the Supreme Court attempted to eliminate some of the confusion generated in the wake of Sedima and directly addressed the pattern requirement. But the H.J. Inc. decision,

44 Id. at 1336-37.
45 See Roeder v. Alpha Indus., Inc., 814 F.2d 22, 31 (1st Cir. 1987) (“We decline to adopt a definition of pattern that relies solely on whether activity can be classified as a single scheme or episode.”); Barticheck, 832 F.2d at 40 (“We decline to adopt a verbal formula for determining when unlawful activity is sufficiently extensive to be ‘continuous.’ This determination necessarily depends on the circumstances of the particular case.”); Sun Savings & Loan Ass’n v. Dierdorff, 825 F.2d 187, 193 (9th Cir. 1987) (“[I]t is not necessary to show more than one fraudulent scheme or criminal episode to establish a pattern under Sedima.”
46 See Morgan, 804 F.2d at 975.
which endorsed a “flexible” approach to the pattern issue, has also been sharply criticized for failing to provide meaningful guidance to the federal courts. As described below, most circuits now apply a multi-factor test to determine whether there is a sufficient pattern of racketeering activity.

*H.J. Inc.* involved a class action brought by telephone customers against Northwestern Bell, the Minnesota Public Utilities Commission (“MPUC”), and others alleging that over a period of six years Northwestern Bell engaged in a course of conduct, including providing cash and gifts to public officials, designed to influence the rate-making decisions of the MPUC. The Eighth Circuit applied its “multiple schemes” requirement and affirmed the dismissal of the complaint, holding that the plaintiffs’ allegation of a single fraudulent scheme was insufficient to establish a pattern of racketeering activity.

The Supreme Court reversed. Justice Brennan, writing for the majority, noted that the concept of a “scheme” was “hardly a self defining term,” and that its definition could only be found “in the eye of the beholder, since whether a scheme exists depends on the level of generality at which criminal activity is viewed.” The Court found that neither the language of the statute nor its legislative history supported the Eighth Circuit’s requirement of separate illegal schemes. The Court acknowledged that it is “difficult to formulate in the

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48 *Id.* at 238.
49 *Id.* at 233.
50 829 F.2d 648, 650 (8th Cir. 1987).
51 *See* H.J. Inc., 492 U.S. at 241 n. 3.
52 *Id.* at 240-41.
abstract any general test for continuity.” It suggested that continuity might be shown in a number of ways, such as proving a “closed-ended” scheme, consisting of a “series of related predicates extending over a substantial period of time,” or, if a lawsuit is brought before a long-term, closed-ended sequence of acts can be shown, by proving an “open-ended” scheme that poses a “threat of continuity,” i.e., conduct “that by its nature projects into the future with a threat of repetition.” The Court stated that a plaintiff could also show an open-ended scheme by alleging circumstances indicating that the predicate acts are part of the offender’s regular way of conducting business.

It is important to recognize that the Supreme Court’s holding in *H.J. Inc.* was limited to striking down the Eighth Circuit’s rigid “multiple schemes” requirement. The Court did not attempt to determine whether the plaintiffs had sufficiently alleged a “pattern of racketeering activity” under its new analysis; the Court instead remanded the case, stating that the plaintiffs’ allegations over a six-year period “may be sufficient to satisfy the continuity requirement.”

In a sharply worded concurrence, Justice Scalia, joined by Chief Justice Rehnquist and Justices O’Connor and Kennedy, criticized the Court’s opinion as “add[ing] nothing to improve our prior guidance, which has created a
kaleidoscope of Circuit positions, except to clarify that RICO may in addition be violated when there is a ‘threat of continuity.’ It seems to me this increases rather than removes the vagueness.”58 The concurring justices agreed with the majority that the Eighth Circuit’s multiple-schemes requirement lacked any support in the language or legislative history; however, Justice Scalia wrote that the Supreme Court’s explanation of “continuity plus relationship” is “about as helpful . . . as ‘life is a fountain.’”59 Despite his scathing critique, which he admitted was a bit “unfair” given that he “would be unable to provide an interpretation of RICO that gives significantly more guidance,”60 Justice Scalia concurred in the judgment that “nothing in the statute supports the proposition that predicate acts constituting part of a single scheme (or single episode) can never support a cause of action under RICO.”61

§ 14 The “Pattern” Requirement after H.J. Inc. - Relatedness, Closed-Ended Continuity, and Open-Ended Continuity

In the wake of the Supreme Court’s decisions in Sedima and H.J. Inc., most cases addressing a “pattern” of racketeering have focused more on whether the racketeering conduct is sufficiently “continuous” than whether the acts are sufficiently “related.” Both prongs of the pattern test are described below.

Relatedness. The conventional wisdom is that the “relatedness” aspect of a “pattern” is not difficult to meet, and as a result, the issue is seldom

58 Id. at 255.
59 Id. at 252.
60 Id. at 254-55.
61 Id. at 256.
To establish “related” predicate acts, a RICO plaintiff need only show that the predicate acts have similarities regarding the following characteristics:

- Purposes
- Results
- Participants
- Victims
- Methods of commission, or
- Other distinguishing characteristics.

As one commentator has observed:

These criteria are generally construed. The “same or similar purposes,” for example, can be as generic as the desire to hoodwink someone out of money; the similar “results” may be no more than to have achieved just that; the cast of similar “participants” need not be entirely uniform over time; similar “victims” may be related to one another solely by virtue of having been victimized by the same enterprise (and not necessarily even all of the same defendants); similar “methods of commission” may be as non-specifically alike as defrauding—any other similar “distinguishing characteristics” may be offered to prove that the offenses are related.

Defendants have occasionally defeated civil RICO claims because the alleged predicate acts are not sufficiently related. Some courts have required a stronger nexus than a generic goal of maximizing profits or protecting an

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62 See Medallion Television Enters., Inc. v. SelecTV of Cal., Inc., 833 F.2d 1360, 1363 (9th Cir. 1987) (“Whether the predicate acts alleged or proven are sufficiently related is seldom at issue.”). See also Feinstein v. Resolution Trust Corp., 942 F.2d 34, 44 (1st Cir. 1991).
63 See H.J. Inc., 492 U.S. at 240 (quoting former 18 U.S.C. § 3575(e)).
enterprise from discovery. For instance, in *Heller Financial, Inc. v. Grammco Computer Sales, Inc.*, the Fifth Circuit held that an alleged bribery scheme designed to secure computer leasing business from a customer was insufficiently related to an alleged mail and wire fraud committed to secure favorable loan terms from a bank, even though the bribery-induced lease was the collateral for the loan. In response to the bank’s argument that the purpose of the second scheme against the bank was to effect an immediate “reaping” of the stream of excess profits arising from the first bribery scheme, the Fifth Circuit dismissed this theory, holding that the “relationship” prong required “more than an articulable factual nexus.” The court concluded that the bank was “paint[ing] with too broad a stroke” because the economics of lease financing loans by definition involved an immediate “reaping of the profits” of a future stream of rent payments. Perhaps dispositive for the court was testimony stating that the bank would have made a loan secured by the leasing contracts whether or not the false representations that formed the basis of the mail and wire fraud allegations had been made; the effect of the false representations (regarding whether the leases included a purchase option) only affected the terms of the loan, not its availability.

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65 See *Heller Financial, Inc. v. Grammco Computer Sales, Inc.*, 71 F.3d 518 (5th Cir. 1996).
66 *Id.* at 524.
67 *Id.* at 525.
68 *Id.*
69 *Id.* at 524 n. 19.
Similarly, in *Burdick v. American Express Company*,\(^7^0\) the Second Circuit determined that an allegation of wrongful employment termination was insufficiently related to an allegation of corporate fraud, even though the plaintiff alleged that the termination was motivated by the desire to either cover-up or retaliate against the former employee’s discovery and complaint about the alleged fraud.\(^7^1\)

Courts have occasionally found a lack of “relatedness” between two sets of predicate acts where the alleged schemes conflict with each other. In *Vild v. Visconsin*,\(^7^2\) a real estate promoter sued the owner-developer of certain parcels of real estate, alleging that the parcels were unmarketable and that the promoter had been induced to agree to market the parcels through fraud and extortion. The promoter alleged other predicate acts arising from the owner-developer’s efforts to market the parcels to the general public through technical violations of direct mail solicitation and marketing regulations.\(^7^3\) The court held that the promoter was alleging two distinct types of conduct, and that “[e]ven if predicates within each of the two types of alleged conduct may somehow be interrelated, the two types of alleged conduct are not related within the meaning of RICO.”\(^7^4\) The court observed that the two underlying frauds were at counter-purposes with each other, in the sense that the first fraud alleged by

\(^7^0\) See *Burdick v. American Express Company*, 865 F.2d 527 (2d Cir. 1989).
\(^7^1\) *Id.* at 528.
\(^7^2\) 956 F.2d 560 (6th Cir. 1992).
\(^7^3\) *Id.* at 566.
\(^7^4\) *Id.*
the promoter was that he was not “allowed to benefit from the [second fraud against the general public].”\textsuperscript{75}

Similarly, in \textit{Schlaifer Nance & Co. v. Estate of Warhol},\textsuperscript{76} the Second Circuit held that two predicate schemes were insufficiently related where the goal of one scheme, to induce a licensing agency into an exclusive licensing agreement by failing to disclose that the same rights had been licensed to third parties, “was at odds” with the goal of a second scheme that was motivated by the goal of forcing the agency out of the agreement.\textsuperscript{77}

\textbf{Closed-Ended Continuity.} A key contribution of the Supreme Court’s decision in \textit{H.J. Inc.} was its recognition that “continuity” is “both a closed and open-ended concept, referring either to a closed period of repeated conduct, or to past conduct that by its nature projects into the future with a threat of repetition.”\textsuperscript{78} The Court emphasized that the concept of continuity, in either its closed or open-ended forms, is “centrally a temporal concept.”\textsuperscript{79}

Where a plaintiff alleges injuries arising out of a closed set of discrete predicate acts that do not bear the threat of future repetition, a plaintiff must prove that this “series of related predicates extend[ed] over a substantial period of time.”\textsuperscript{80} The Court did not define “substantial period of time” other than its

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\textsuperscript{75} \textit{Id.} at 567.
\textsuperscript{76} See \textit{Schlaifer Nance & Co. v. Estate of Warhol}, 119 F.3d 91 (2d Cir. 1997).
\textsuperscript{77} \textit{Id.} at 97.
\textsuperscript{78} See \textit{H.J. Inc.}, 492 U.S. at 241.
\textsuperscript{79} \textit{Id.} at 241-42.
\textsuperscript{80} \textit{Id.} at 242.
statement that conduct occurring over “a few weeks or months and threatening no future criminal conduct” was not long enough.  

Some federal courts apply almost dispositive weight to the temporal element; other courts view duration as one of many factors. The Second Circuit’s approach can be contrasted to the Seventh Circuit’s approach, at least superficially. The Second Circuit has come closest to suggesting any scheme that lasts less than two years does not sufficiently allege a closed-ended, continuous criminal scheme. Although the Second Circuit has recognized that, aside from temporal concerns, “other factors such as the number and variety of predicate acts, the number of both participants and victims, and the presence of separate schemes are also relevant in determining whether closed-}

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81 Id. In his concurring opinion, Justice Scalia stated his fear that an undue focus on temporal continuity could unwittingly create a “safe harbor for racketeering activity that does not last too long, no matter how many different crimes and different schemes are involved, so long as it does not otherwise establish a threat of continued racketeering activity.” Id. at 254 (Scalia, J., concurring). Justice Scalia also provided the colorful example of “[a] gang of hoodlums that commits one act of extortion on Monday in New York, a second in Chicago on Tuesday, a third in San Francisco on Wednesday, and so on through an entire week, and then finally and completely disbands” as beyond the scope of RICO under the Supreme Court’s interpretation. Id. The majority dismissed Justice Scalia’s concern, stating that Congress only intended RICO to address “activities that amount to, or threaten, long-term criminal activity.” Id. at 243 n. 4.

82 See Spool v. World Child Int’l Adoption Agency, 520 F.3d 178, 184-85 (2d Cir. 2008) (stating that “[a]lthough we have not viewed two years as a bright-line requirement, it will be rare that conduct persisting for a shorter period of time establishes closed-ended continuity,” which suggests that in exceptional cases, the two-year requirement could be waived); First Capital Asset Management, Inc. v. Satinwood, Inc., 385 F.3d 159, 181 (2d Cir. 2004) (“Notably, this Court has never found a closed-ended pattern where the predicate acts spanned fewer than two years,” while distinguishing Cosmos Forms Ltd. v. Guardian Life Ins. Co. of Am., 113 F.3d 308, 310 (2d Cir. 1997), which found that approximately seven acts spread over 15 months constituted an open-ended pattern); see also Cofacredit, S.A. v. Windsor Plumbing Supply Co., 187 F.3d 229, 242 (2d Cir. 1999) (holding that “[s]ince the Supreme Court decided H.J. Inc., [the Second Circuit] has never held a period of less than two years to constitute a pattern of racketeering); GICC Capital Corp. v. Tech. Fin. Group, Inc., 67 F.3d 463, 467-68 (2d Cir. 1995) (holding that though an approach that gives conclusive weight to a two-year duration is “undoubtedly somewhat mechanistic, we believe it is required to effectuate Congress’s intent to target ‘long-term criminal conduct’”).
ended continuity exists,” the Second Circuit has recently held that these additional factors have been interpreted as additional limiting factors, above and beyond the two-year minimum duration, as opposed to alternative reasons to qualify a short-lived criminal scheme as “continuous.”

The Third Circuit’s approach is similar to the Second Circuit’s, except that it appears to require a scheme lasting at least one year to support a finding of a continuous closed-ended “pattern of racketeering activity.” The Third Circuit considers duration as the “sine qua non of continuity” and sees the six factors as “analytical tools available to courts when the issue of continuity cannot be clearly determined under either a closed- or open-ended analysis.”

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83 See DeFalco v. Bernas, 244 F.3d 286, 321 (2d. Cir. 2001); accord Cofacredit, 187 F.3d at 242-44; GICC, 467 F.3d at 467-68.

84 See Satinwood, 385 F.3d at 181 (2d Cir. 2004) (“[W]hile two years may be the minimum duration necessary to find closed-ended continuity, the mere fact that predicate acts span two years is insufficient, without more, to support a finding of a closed-ended pattern.”). But cf. Spool, 520 F.3d at 184-85. District Courts in the Second Circuit have, however, treated the two-year period as a guideline as opposed to a rule. See Nafta v. Feniks Int’l House of Trade (U.S.A.), Inc., 932 F. Supp. 422, 426 (E.D.N.Y. 1996) (rejecting a bright-line rule and finding that a 15-month scheme was sufficient to constitute a pattern), and In re MTC Elec. Techs. S’holder Litig., 74 F. Supp.2d 276, 286 (E.D.N.Y. 1999) (holding that “[r]ather than apply a bright-line test of duration, most courts in [the Second Circuit] have used a multi-factor test to evaluate whether closed-ended continuity has been shown”), and Oak Beverages, Inc. v. Tomra of Mass., L.L.C., 96 F. Supp. 2d 336, 346-48 (S.D.N.Y. 1999) (considering multiple factors in a RICO claim that lasted less than two years), and Sumitomo Corp. v. Chase Manhattan Bank, No. 99 Civ. 4004 (JSM), 2000 WL 1616960, at *2 (S.D.N.Y. Oct. 30, 2000) (suggesting that fraudulent conduct lasting only 14 months can support a RICO claim where numerous parties and a substantial amount of money is involved).

85 See Tabas v. Tabas, 47 F.3d 1280, 1293 (3d Cir. 1995) (“Since H.J. Inc., this court has faced the question of continued racketeering activity in several cases, each time finding that conduct lasting no more than twelve months did not meet the standard for closed-ended continuity.”) (collecting cases). Cf. Swistock v. Jones, 884 F.2d 755, 759 (3d Cir. 1989) (finding a 14-month duration to be sufficient).

86 See Tabas, 47 F.3d at 1296 at n. 21.
The First, Eighth, and Tenth circuits also generally follow the two-step approach of the Second and Third Circuits, requiring RICO plaintiffs to first establish “closed-ended continuity” by pleading/proving a series of predicate acts of sufficient duration, and then to meet the additional requirements of the multi-factored analysis.87 For these courts, *H.J. Inc.* effected a change on how the courts are to apply the multifactored analysis, now emphasizing the importance of duration over the other factors.88

The Seventh Circuit has continued to balance the six factors identified in *Morgan v. Bank of Waukegan*89 without giving any one factor dispositive weight.90 Although “the length of time” over which the predicate acts were committed is one of the six *Morgan* factors, “[n]either the presence or absence of any one of these factors is determinative” in the Seventh Circuit.91 The focus under *Morgan* was not on the length of time, *per se*, but rather whether the predicate acts were “ongoing over an identifiable period of time so that they can fairly be viewed as constituting separate transactions.”92 Still, the Seventh

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87 See Fleet Credit Corp. v. Sion, 893 F.2d 441, 445-46 (1st Cir. 1990); Atlas Pile Driving Co. v. DiCon Financial Co., 886 F.2d 986, 994-95 (8th Cir. 1989); Resolution Trust Corp. v. Stone, 998 F.2d 1534, 1543-44 (10th Cir. 1993).

88 See, e.g., Fleet Credit Corp., 893 F.2d at 445-46 (noting that cases applying the pre-H.J. balancing test are "no longer a reliable guide").

89 See Morgan, 804 F.2d 970, 975 (7th Cir. 1986).

90 See Corley v. Rosewood Care Center, Inc. of Peoria, 142 F.3d 1041, 1049 (7th Cir. 1998). See also Vicom, Inc. v. Harbridge Merchant Serv., Inc., 20 F.3d 771, 780 (7th Cir. 1994); Olive Can Co. Inc. v. Martin, 906 F.2d 1147, 1151 (7th Cir. 1990).

91 See Uniroyal Goodrich Tire Co. v. Mutual Trading Corp., 63 F.3d 516, 524 (7th Cir. 1995).

92 See Morgan, 804 F.2d at 975.
Circuit has recognized that “the most important element of RICO continuity is its temporal aspect.” 93

Other circuits follow the Seventh Circuit’s approach and apply a multi-factored analysis in determining whether a pattern of racketeering has sufficient closed-ended continuity, without first requiring proof of “sufficient” temporal continuity. 94 For these courts, H.J. Inc. did not cause a “significant change” in the multifactored analysis, where “a pattern is the sum of various factors” including, but not limited to, duration. 95

Liquid Air Corp. v. Rogers was a pre-H.J. Inc. case in which the Seventh Circuit found a sufficient RICO pattern arising out of nineteen separate false invoices generated over a period of seven months under the theory that the “repeated infliction of economic injury upon a single victim of a single scheme is sufficient to establish a pattern of racketeering activity for purposes of civil RICO.” 96 The Seventh Circuit cited to this reasoning approvingly in the post-H.J. Inc. decision, Uniroyal Goodrich Tire Company v. Mutual Trading Corporation. 97

In another post-H.J. Inc. case, the Seventh Circuit held in United States v. Stodola that seventeen counts of bribery over a closed-ended period of twenty

93 See Roger Whitmore’s Auto. Servs., Inc. v. Lake County, Ill., 424 F.3d 659, 673 (7th Cir. 2005)
94 See, e.g., Columbia Natural Res., Inc. v. Tatum, 58 F.3d 1101, 1110-11 (6th Cir. 1995); Edmondson & Gallagher v. Alban Towers Tenants Ass’n, 48 F.3d 1260, 1265 (D.C. Cir. 1995).
95 See Columbia Natural Res., Inc. v. Tatum, 58 F.3d 1101, 1110 (6th Cir. 1995).
96 See Liquid Air Corp. v. Rogers, 834 F.2d 1297, 1305 (7th Cir. 1987).
97 63 F.3d at 524 (citing Liquid Air for the principle that the existence of a single victim does not preclude a finding of a RICO pattern, where each predicate act against that victim has independent harmful significance).
months was sufficient “continuity” to support a “pattern of racketeering activity” where the other factors were present.\(^98\) However, several district court judges in the Northern District of Illinois have suggested that *Liquid Air* might not still be good law following *H.J. Inc.*\(^99\) The seven-month period allowed in *Liquid Air* is considerably shorter than the twenty-month period in *Stodola*\(^100\).

Courts still tend to dismiss RICO claims that fail to allege more than one criminal episode or scheme, despite the holding of *H.J. Inc.* that rejected such a “rigid” limitation on RICO’s scope at the motion to dismiss stage.\(^101\) For example:

- In a 2006 decision, the Sixth Circuit affirmed the dismissal of a complaint alleging a civil RICO violation arising out of an allegation from an injured worker that his employer, his employer’s worker’s compensation insurer, and others, conspired to deny his rightful worker’s compensation benefits.\(^102\) The court noted that “even if the racketeering activity lasted for two-and-a-half years, as [plaintiff] insists, facts establishing a closed period of continuity are still lacking” because “[a]ll of the predicate acts . . . were keyed to Defendants’ single objective of depriving [plaintiff] of his benefits” and “[n]o other schemes, purposes, or injuries are alleged.”\(^103\)

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\(^{98}\) See United States v. Stodola, 953 F.2d 266, 270 (7th Cir. 1992).


\(^{100}\) But see Vicom, 20 F.3d at 780 (stating that, while the Seventh Circuit has not gone as far as the Third Circuit in holding that a duration of less than one year is, as a matter of law, insufficient, finding predicate acts occurring over a period of 9 months to present “serious durational problems.”); Uni*Quality, Inc. v. Infotronix, Inc., 974 F.2d 918, 922 (7th Cir. 1992) (concluding that “one scheme that lasted at most seven to eight months” was “precisely the type of short-term, closed-ended fraud that, subsequent to H.J. Inc., this circuit consistently has held does not constitute a pattern.”)

\(^{101}\) See H.J. Inc., 492 U.S. at 240-41.

\(^{102}\) See Moon v. Harrison Piping Supply, 465 F.3d 719 (6th Cir. 2006).

\(^{103}\) Id. at 725.
• In a 2001 decision, the Fourth Circuit affirmed the dismissal of a complaint alleging a civil RICO violation arising out of the fraudulent sale of a manufactured housing business, where the principals inflated the profitability of the business and engaged in kickback and concealment schemes over several years prior to the sale.\footnote{See GE Investment Private Placement Partners II v. Parker, 247 F.3d 543 (4th Cir. 2001).} Without specifically referencing any problem with duration, the Fourth Circuit held that the complaint failed to state a claim because “schemes involving fraud related to the sale of a single enterprise do not constitute, or sufficiently threaten, the ‘long-term criminal conduct’ that RICO was intended to address.”\footnote{Id. at 549. See also Al-Abood ex rel. Al-Abood v. El-Shamari, 217 F.3d 225, 238 (4th Cir. 2000) (refusing to find pattern based on multiple acts of mail fraud in connection with three separate schemes spanning several years where there was only a single victim and the conduct did not amount to anything more than “customary fraud”); Tudor Assoc., Ltd., II v. AJ & AJ Servicing, Inc., 36 F.3d 1094 (Table), 1994 WL 510456 (4th Cir. Sept. 20, 1994) (holding that despite the fact that the scheme lasted over ten years and involved millions of dollars, it did not rise to the level of conduct necessary to support a RICO recovery because it only involved a single scheme to inflict a single injury on a single victim).}

• In a 1995 decision, the D.C. Circuit Court of Appeals affirmed the dismissal of a complaint alleging a civil RICO violation out of a thwarted purchase of an apartment complex, where the tenants’ association that thwarted the purchase engaged in dilatory and illegal tactics over the course of approximately three years, on the grounds that it would be “virtually impossible” for a plaintiff to sufficiently state a RICO claim where there was only a “single scheme, single injury, and few victims.”\footnote{See Edmonson & Gallagher v. Alban Towers Tenants Association, 48 F.3d 1260, 1265 (D.C. Cir. 1995). See also Western Assocs. Ltd. P’ship v. Market Square Assocs., 235 F.3d 629, 633-34 (D.C. Cir. 2001) (holding that four separate predicate acts that affected only one plaintiff did not constitute a pattern of racketeering).}

• In a 1992 decision, then-Chief Justice Breyer of the First Circuit affirmed the dismissal of a complaint alleging a civil RICO violations arising from the cancellation of a government contract, despite allegations of acts ranging from late 1984 through 1986 and possibly 1989, on the primary grounds that a “pattern of racketeering activity” could not “encompass a single criminal event, a single criminal episode, a single crime (in the ordinary
non-technical sense of the word)" even if “separate parts may themselves constitute separate criminal acts.”

**Open-Ended Continuity.** Whereas “closed-ended continuity” typically requires some showing of duration over a “substantial period of time,” a litigant may be able to maintain a RICO claim arising from acts occurring over only a short period of time “so long as there is a threat that conduct will recur in the future.” “Open-ended continuity” refers to “past conduct that by its nature projects into the future with a threat of repetition.” Such a threat exists when “(1) a specific threat of repetition exists, (2) the predicates area regular way of conducting an ongoing legitimate business, or (3) the predicates can be attributed to a defendant operating as part of a long-term association that exists for criminal purposes.”

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107 See Apparel Art Intern., Inc. v. Jacobson, 967 F.2d 720, 722 (1st Cir. 1992). See also Efron v. Embassy Suites (Puerto Rico), Inc., 223 F.3d 12, 21 (1st Cir. 2000) (holding that multiple predicate acts that “comprise a single effort, over a finite period of time, to wrest control of a particular partnership from a limited number of its partners . . . cannot be a RICO violation.”)

108 See Corley, 142 F.3d at 1049; see also Vicom, 20 F.3d at 782 (“[A]lthough a RICO plaintiff must show duration to allege closed-ended continuity, open-ended continuity may satisfy the continuity prong of the pattern requirement regardless of its brevity.”)


110 See Vicom, 20 F.3d at 782 (quoting H.J. Inc., 492 U.S. at 242-43). See also Libertad v. Welch, 53 F.3d 428, 445-446 (1st Cir. 1995) (sufficient evidence to defeat summary judgment where the defendants’ regular way of conducting their affairs involved RICO predicate acts); GICC Capital Corp. v. Tech. Fin. Group, Inc., 67 F.3d 463, 466 (2d Cir. 1995) (no open-ended pattern where defendants’ “scheme was inherently terminable”); Anderson v. Found. for Advancement, Educ. and Employment of Am. Indians, 155 F.3d 500, 506 (4th Cir. 1998) (affirming dismissal for failure to allege closed or open-ended pattern of racketeering); Abraham v. Singh, 480 F.3d 351, 355-56 (5th Cir. 2007) (reversing dismissal because complaint sufficiently alleged open-ended scheme with multiple victims and where “there is no reason to suppose that [the alleged misconduct] would not have continued indefinitely had the Plaintiffs not filed this lawsuit.”); Moon v. Harrison Piping Supply, 465 F.3d 719, 726-27 (6th Cir. 2006) (affirming dismissal for failure to allege closed or open-ended continuity); Vicom, Inc. v. Harbridge Merch. Servs., 20 F.3d 771, 782-784 (7th Cir. 1994) (no open-ended continuity where (1) the plaintiff alleged a scheme that had a natural ending point, (2) the plaintiff did not allege that the RICO predicates were a regular way of conducting defendants’ business and (3) the predicates were not part of a long-term association for a criminal purpose); Allwaste, Inc. v.
Courts are quick to dismiss allegations of “open-ended continuity” that are insufficiently pled, for example, where a complaint only alleges a “hypothetical possibility of further predicate acts” based on the theory that “once a RICO violator, always a RICO violator.”\textsuperscript{111} Also, courts are generally reluctant to find a threat of continuity where the acts are part of a discrete scheme aimed at only a few individuals.\textsuperscript{112} Courts also have rejected open-

\textsuperscript{111} See Edmondson & Gallagher v. Alban Towers Tenants Association, 48 F.3d 1260, 1264 (D.C. Cir. 1995). (noting that acceptance of such a basis for open-ended continuity “would deprive the pattern requirement of all meaning.”)

\textsuperscript{112} See Giuliano v. Fulton, 399 F.3d 381, 391 (1st Cir. 2005) (no threat of repetition posed by scheme to take control of the racetrack from single individual); Efron v. Embassy Suites (Puerto Rico), Inc., 223 F.3d 12, 19-20 (1st Cir. 2000) (finding that seventeen alleged predicate acts of mail and wire fraud over 21 months did not pose a threat of continued criminal activity where the scheme had a clear and terminable goal aimed at defrauding one business); Gonzales-Morales v. Hernandez-Arencibia, 221 F.3d 45, 51-52 (1st Cir. 2000) (holding that even if the filing of two frivolous lawsuits could constitute RICO extortion, the filing of those suits, though still pending, was insufficient to show a threat of continuing criminal activity where the suits related to a single promissory note and single episode of alleged misconduct); Spool v. World Child Int’l Adoption Agency, 520 F.3d 178, 185-86 (2d Cir. 2008) (holding that no threat of continuing conduct was posed by fraudulent billing scheme to defraud a “handful of victims”); Gamboa v. Velez, 457 F.3d 703 (7th Cir. 2006) (holding that alleged scheme by police detectives over five year period to frame five individuals for murder posed no threat of continued criminal activity because the alleged scheme was distinct, non-reoccurring and had a built-in termination point); Roger Whitmore’s Auto. Servs. v. Lake County, Ill., 424 F.3d 659, 673-74 (7th Cir. 2005) (alleged scheme by sheriff to extort a discrete set of individuals to fund re-election campaign was insufficient to establish open-ended continuity, because scheme naturally concluded after the election was over); Duran v. Carris, 238 F.3d 1268, 1271 (10th Cir. 2001) (holding that multiple acts of bribery and extortion did not pose a threat of continuing criminal activity, even though the defendant threatened to keep the plaintiff involved in litigation for ten years, because acts were part of a “single scheme . . . to
ended continuity based on finite set of actions that are not likely to be repeated.\footnote{See Turner v. Cook, 362 F.3d 1219, 1230 (9th Cir. 2004).} Courts also have refused to find open-ended continuity where the racketeering activity was not actually continuing when the court considered the defendant’s motion to dismiss.\footnote{See, e.g., Turner v. Cook, 362 F.3d 1219, 1230 (9th Cir. 2004) (no open-ended continuity where one of the defendants had stopped alleged predicate acts); Winthrop Res. Corp. v. Lacrad Int’l Holding Corp., No. 01 C 4785, 2002 WL 24248 at *5 (N.D. Ill. Jan. 7, 2002) (rejecting claim of open-ended pattern where the key defendant was in receivership at time of suit and no longer participated in alleged schemes); McMahon v. Spano, No. Civ. A-96-3957, 1996 WL 627590 at *3 (E.D. Pa. Oct. 29, 1996) (noting that the “complaint offers no allegation whatsoever that defendants’ activities pose a continuing threat of racketeering activity. A full year has now passed since defendants’ most recent alleged racketeering activities”).} Other courts consider the type of threat posed when the conduct was occurring, and will not let the defendant off the hook where the conduct stopped merely because it was discovered by the plaintiff or another party.\footnote{See, e.g., Abraham v. Singh, 480 F.3d 351, 355-56 (5th Cir. 2007) (reversing dismissal because complaint sufficiently alleged open-ended scheme with multiple victims and where “there is no reason to suppose that [the alleged misconduct] would not have continued indefinitely had the Plaintiffs not filed this lawsuit.”); United States v. Busacca, 936 F.2d 232, 238 (6th Cir. 1991) (holding that “the threat of continuity must be viewed at the time the racketeering activity occurred,” and that “the lack of a threat of continuity of racketeering activity cannot be asserted by showing a fortuitous interruption of that activity such as by an arrest, indictment or guilty verdict”); United States v. Richardson, 167 F.3d 621, 626 (D.C. Cir. 1999) (same); Teamsters Local 372 v. Detroit Newspapers, 956 F. Supp. 753, 766-67 (E.D. Mich. 1997) (same); Welch Foods Inc. v. Gilchrist, No. 93-CV-0641E(F), 1996 WL 607059, at *6 (W.D.N.Y. Oct. 18, 1996) (same).}

**Pleading Pattern after Twombly.** In light of the Supreme Court’s recent opinion in *Bell Atlantic Corp. v. Twombly*,\footnote{See Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 127 S. Ct. 1955 (2007) (discussing a plaintiff’s pleading obligation within the context of antitrust law; holding that to state a claim...} RICO plaintiffs should allege enough facts to suggest a plausible RICO scheme.\footnote{Pleading Pattern after Twombly. In light of the Supreme Court’s recent opinion in *Bell Atlantic Corp. v. Twombly*, RICO plaintiffs should allege enough facts to suggest a plausible RICO scheme.}
§ 15 Constitutional Challenges

The concurring members of the Supreme Court in *H.J. Inc.* suggested that the vagueness of the statute may render RICO constitutionally defective:

No constitutional challenge to this law has been raised in the present case, and so that issue is not before us. That the highest Court in the land has been unable to derive from this statute anything more than today’s meager guidance bodes ill for the day when that challenge is presented.118

Although practitioners wasted little time in raising constitutional challenges to RICO, those efforts have been rejected.119 However, in an action alleging that a decedent’s husband fraudulently obtained control over the

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117 See *Limestone Dev. Corp. v. Vill. of Lemont, Ill.*, 520 F.3d 797, 803 (7th Cir. 2008) (stating that the rationale of *Twombly* is “applicable to a RICO case, which resembles an antitrust case in point of complexity and the availability of punitive damages and of attorneys’ fees to the successful plaintiff”); *Jennings v. Auto Meter Products, Inc.*, 495 F.3d 466, 472-76 (7th Cir. 2007) (noting that the area of antitrust law was “closely-related” to RICO; evaluating a RICO complaint under *Twombly*; and affirming the district court’s dismissal of the complaint for failure to plead continued criminal activity); *Dalton v. City of Las Vegas*, 282 F. App’x 652, 654-55 (10th Cir. 2008) (affirming dismissal of RICO claim and holding that plaintiff’s allegations of pattern did not meet the *Twombly* pleading standard); *CSX Transp., Inc. v. Meserole Street Recycling, Inc.*, 570 F. Supp. 2d 966, 970-71 (W.D. Mich. 2008) (dismissing RICO claim and holding that “[s]uch allegations fall short of what is necessary to establish a properly pleaded continuity element of a RICO claim that survives a Rule 12(b)(6) motion under the *Twombly* test”).

118 See *H.J. Inc.*, 492 U.S. at 255-56.

decedent’s investments, one judge found RICO’s pattern requirement unconstitutional as written and as applied.120

§ 16 Collection of Unlawful Debt

A defendant can violate any subsection of Section 1962 if it collects or conspires to collect “an unlawful debt.”121 Section 1961(6) defines “unlawful debt” to include debt arising from the operation of an illegal gambling business, or debts that are (a) unenforceable because of state or federal laws against usury, (b) incurred in connection with the business of lending money at an usurious rate, and where (c) the usurious rate was at least twice the enforceable rate.122 If the debt is usurious, the plaintiff need not establish any other criminal activity to establish RICO liability for the collections of an unlawful debt.123 In other words, the collection of an unlawful debt itself violates RICO even without a “pattern” of “racketeering activity.”

The collection of an unlawful debt most often involves efforts to collect gambling debts or “loan-sharking” operations that charge usurious rates. For example, where a taxicab driver sued his insurer for pressuring him to pay a debt arising from overdue insurance premiums, the First Circuit noted that

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“[a]lthough this case involves the collection of an alleged debt, it does not involve the ‘collection of an unlawful debt’ . . . [because the debt is not an] illegal debt or debt unenforceable because of usury laws.”

Collecting a fixed administrative fee or late fee, such as that charged under a rental or service agreement, generally is not considered to be “interest,” and therefore cannot be usurious. Although in some circumstances loan origination brokerage fees may be disguised interest, such fees will not support a RICO claim unless they violate state usury laws.

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126 See Lovick v. Ritemoney Ltd., 378 F.3d 433, 439-44 (5th Cir. 2004).
IV. SECTION 1962(c): THE RICO ENTERPRISE

§ 17 Overview

RICO was designed to prevent the illicit infiltration of legitimate enterprises. This explains why the conduct prohibited in Section 1962 is unlawful only if it occurs in connection with the investment in, acquisition of, or operation of an “enterprise” affecting interstate commerce. In other words, RICO generally does not target the enterprise, but the bad actors who misuse or wrongfully acquire or invest in a legitimate enterprise.

Section 1961(4) defines an enterprise 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.” Courts have interpreted this definition broadly. RICO enterprises have included an investment corporation and individual investors, relevant markets in United States Treasury notes, an estate, a bankruptcy estate, a retirement

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1 See S. Rep. 91-617, at 76 (1969) (stating that RICO’s purpose was “the elimination of the infiltration of organized crime and racketeering into legitimate organizations operating in interstate commerce”).

2 See United States v. Turkette, 452 U.S. 576, 591 (1981); Fitzgerald v. Chrysler Corp., 116 F.3d 225, 227 (7th Cir. 1997) (describing the prototypical RICO case as one in which a person “bent on criminal activity” uses control of a legitimate firm to perpetrate criminal activities).


7 Handeen v. Lemaire, 112 F.3d 1339, 1353 (8th Cir. 1997).
community, a labor union, a sole proprietorship, a government entity, a mortgage pool and a federal district court.

On the other hand, inanimate entities, such as bank accounts and securities, cannot be enterprises. For example, the Fifth Circuit has ruled that “[a] trust is neither a legal entity nor an association-in-fact. . . . As such, we have little difficulty concluding that a trust does not qualify as a legal entity enterprise as contemplated by RICO.”

As discussed in more detail below, because most RICO litigation involves claims under Section 1962(c), which prohibits a person from using an enterprise to conduct a pattern of racketeering, the cases often focus on whether the plaintiff has identified a defendant or group of defendants that is separate from the enterprise or association-in-fact enterprise.

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8 Bennett v. Berg, 685 F.2d 1053, 1060 (8th Cir. 1982), aff’d en banc, 710 F.2d 1361 (8th Cir. 1983).
9 United States v. Scotto, 641 F.2d 47, 54 (2d Cir. 1980).
10 McCullough v. Suter, 757 F.2d 142, 143 (7th Cir. 1985).
11 De Falco v. Bernas, 244 F.3d 286, 307, 309 (2d Cir. 2001) (town could be an enterprise); United States v. Warner, 498 F.3d 666, 695-96 (7th Cir. 2007) (recognizing that a state could be considered a RICO enterprise, if only because the state is often a victim of RICO schemes); United States v. Freeman, 6 F.3d 586, 596-97 (9th Cir. 1993) (holding that the offices of an assembly district could be an enterprise).
14 Guidry v. Bank of La Place, 954 F.2d 278, 283 (5th Cir. 1992).
15 Bonner v. Henderson, 147 F.3d 457, 459 (5th Cir. 1998).
§ 18 Association-in-Fact Enterprise

Any group of individuals “associated in fact though not a legal entity” may be a RICO enterprise. Courts generally require the association-in-fact enterprise to have some structure or hierarchy and ongoing legitimate purpose that is different from a group that is joined solely to violate RICO. In *United States v. Bledsoe*, the Eighth Circuit held that an association-in-fact must exhibit three characteristics: (1) a common or shared purpose among its members; (2) some continuity of structure and personnel; and (3) an ascertainable structure distinct from that inherent in the pattern of racketeering. The Fifth, Sixth, and Seventh Circuits have reached the

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17 674 F.2d 647, 664-65 (8th Cir. 1982).

18 Compare *Stephens, Inc. v. Geldermann, Inc.*, 962 F.2d 808, 815-16 (8th Cir. 1992) (reversing summary judgment for a RICO plaintiff because “[t]he only common factor that linked all these parties together and defined them as a distinct group was their direct or indirect participation in . . . [the] scheme to defraud. . . .”), with *Atlas Pile Driving Co. v. DiCon Fin. Co.*, 886 F.2d 986, 995-96 (8th Cir. 1989) (finding that association of two individuals and three construction companies was a RICO enterprise because the association, which constructed homes and sold real estate, engaged in activities apart from the fraudulent acts complained of by the plaintiff).

19 *Ocean Energy II, Inc. v. Alexander & Alexander, Inc.*, 868 F.2d 740, 748 (5th Cir. 1989) (holding that an enterprise must be an entity separate and apart from the pattern in which it engages, and must have an ongoing organization, or function as a continuing unit).

20 *Walker v. Jackson Pub. Sch.*, No. 01-1937, 01-1938, 2002 WL 1809088, at *2 (6th Cir. Aug. 5, 2002) (affirming district court’s dismissal of case because there was no evidence of chain of command or hierarchy); *VanDenBroeck v. CommonPoint Mortgage Co.*, 210 F.3d 696, 699 (6th Cir. 2000) (requiring showing of formal or informal association as part of a continuing unit separate and apart from the commission of racketeering activity).

21 *Baker v. IBP, Inc.*, 357 F.3d 685, 691 (7th Cir. 2004) (inclusion of party that did not share common purpose defeated existence of association-in-fact); *United States v. Phillips*, 239 F.3d 829, 844 (7th Cir. 2001) (a long-established street gang that functioned as a unit and had a definite structure satisfies “the statutory requirement of an enterprise”); *Stachon v. United Consumers Club, Inc.*, 229 F.3d 673, 676 (7th Cir. 2000) (finding that “vague allegations of a RICO enterprise made up of a string of participants, known and unknown, lacking any distinct existence and structure” and evidencing at most a pattern of racketeering activity is insufficient
same conclusion. As the Seventh Circuit has stated, “there must be some
structure, to distinguish an enterprise from a mere conspiracy, but there need
not be much.”22 This requirement is derived from United States v. Turkette,23 in
which the Supreme Court ruled that a RICO “enterprise” must be proven by
evidence of an ongoing association that functions as a continuing unit, and not
merely by proof of the acts of racketeering.

On the other hand, the First, Second, Ninth, Eleventh, and D.C. Circuits
have held that an associated-in-fact enterprise does not require any particular
organizational structure, separate or otherwise.24

This Circuit split may soon be resolved by the Supreme Court case, Boyle
v. United States.25 The Court granted certiorari to address whether an

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22 Burdett v. Miller, 957 F.2d 1375, 1379 (7th Cir. 1992); accord, Richmond v. Nationwide
Cassel L.P., 52 F.3d 640, 645 (7th Cir. 1995); see also Limestone Dev. Corp. v. Vill. of Lemont,
Illinois, 520 F.3d 797, 804-05 (7th Cir. 2008) (stating that “[w]ithout a requirement of
structure, ‘enterprise’ collapses to ‘conspiracy,’” and holding that the plaintiff failed to allege an
enterprise where the complaint did not identify a structure of any kind).


24 See United States v. Patrick, 248 F.3d 11, 19 (1st Cir. 2001) (refusing to put an
“ascertainable structure” requirement into jury instructions); United States v. Bagaric, 706
F.2d 42, 56 (2d Cir. 1983) (noting “it is logical to characterize any associative group in terms of
what it does rather than by abstract analysis of its structure”) abrogated on other grounds by
541, 551 (9th Cir. 2007) (holding that there need be no particular organizational structure);
United States v. Cagnina, 697 F.2d 915, 921 (11th Cir. 1983) (noting that Turkette did not
suggest that the enterprise needs to have a “distinct, formalized structure”); United States v.
Perholtz, 842 F.2d 343, 354 (D.C. Cir. 1988) (finding that enterprise is “established by common
purpose among the participants, organization, and continuity”).
association-in-fact enterprise must possess some “ascertainable structure beyond that inherent in the pattern of racketeering activity in which it engages.” The oral argument was heard on January 14, 2009.

The following cases show how courts have grappled with efforts to identify an association-in-fact enterprise. For example, in *Lockheed Martin Corp. v. Boeing Co.*, a Florida district court considered whether Boeing and its competitors that sought government contracts could constitute an association-in-fact enterprise. Lockheed argued that the group was associated together with the common goal to win government contracts. The court rejected that argument because Boeing and its competitors had not “joined together” in any way. The court concluded that the “joining together” requirement worked to prevent overreaching RICO claims while still stopping short of adopting a formal structure requirement.

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25 Boyle v. United States, No. 07-1309 (U.S.). In an unreported opinion in United States v. Boyle, 283 F. App'x 825 (2d Cir. 2007), the Second Circuit affirmed the Eastern District of New York's conviction of Boyle, without addressing the issue on appeal of whether a distinct structure is required.


29 *Id.* at 1361.

30 *Id.* at 1362-63.

31 *Id.* at 1363.
Without citing *Lockheed Martin* or its “joining together” test, the Eleventh Circuit has applied a flexible test that considers whether there is a “loose or informal association” of individuals or entities that share a “common purpose,” function as a “continuing unit,” and “furnish a vehicle” for the commission of a pattern of racketeering. The Eleventh Circuit disagreed with the Seventh Circuit’s ruling in *Baker v. IBP, Inc.*, to the extent the Seventh Circuit required all members of the association-in-fact to share the same common purpose. The Eleventh Circuit instead ruled that while the association must have a common purpose, it need not be *the sole* common purpose.

Other courts, principally in the Second Circuit, have recognized that while the enterprise and the racketeering activity are separate, analytically distinct elements, the same evidence may be used to prove both elements. In one case, the plaintiff charged that the RICO enterprise was an “association” composed of an investment bank, one of its employees, and certain other individuals who allegedly disclosed and traded on non-public information in violation of securities laws. The district court had dismissed the RICO claim because the plaintiff failed to allege an enterprise which had an independent economic existence apart from the defendants’ alleged association for the

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32 Williams v. Mohawk Indus., Inc., 465 F.3d 1277, 1284 (11th Cir. 2006); United States v. Goldin Indus., Inc., 219 F.3d 1271, 1275 (11th Cir. 2000).

33 357 F.3d 685, 691 (7th Cir. 2004) (rejecting alleged association-in-fact where its members had “divergent goals”).

34 Williams, 465 F.3d at 1285-86.

purpose of trading on inside information. The Second Circuit affirmed on other grounds, but expressly rejected the lower court’s holding that the enterprise and pattern of racketeering must necessarily be distinct. The court reasoned that in Turkette, the Supreme Court acknowledged that proof used to establish the pattern of racketeering “may in particular cases coalesce” with proof of the enterprise. In a more recent unpublished decision, the Second Circuit ruled that “[t]he enterprise need not necessarily have a continuity extending beyond the performance of the pattern of racketeering acts alleged, or a structural hierarchy, so long as it is in fact an enterprise as defined in the statute.”

The Sixth Circuit has adopted a hybrid approach, concluding that to survive a motion to dismiss, a plaintiff need not establish at the pleading stage that the enterprise has a structure to conduct business apart from the alleged

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37 Moss, 719 F.2d at 22.
38 Id. (quoting United States v. Turkette, 452 U.S. 576, 583 (1981)). Cf. United States v. Console, 13 F.3d 641, 650 (3d Cir. 1993) (“although the proof used to establish the existence of an enterprise and a pattern of racketeering ‘may in particular cases coalesce,’ proof of a pattern of racketeering activity ‘does not necessarily’ establish the existence of an enterprise”).
acts constituting a pattern of racketeering, but ultimately to recover, the plaintiff must prove that such a distinction exists.\footnote{McNeil v. Salan, 961 F.2d 1578 (Table), 1992 WL 102734 at *2-4 (6th Cir. May 14, 1992) (reversing dismissal against pro se litigant).}

In \textit{Odom v. Microsoft Corporation},\footnote{486 F.3d 541 (9th Cir. 2007).} the Ninth Circuit offered a detailed analysis of what may constitute an “association-in-fact,” and, applying language from \textit{United States v. Turkette},\footnote{452 U.S. 576 (1981).} held that an association-in-fact is a group of persons or entities that function as a continuing unit through an ongoing organization with a common purpose.\footnote{\textit{Odom}, 486 F.3d at 552; \textit{accord} Williams v. Mohawk Indus., Inc., 465 F.3d 1277, 1284 (11th Cir. 2006).} In so holding, the court rejected any requirement that the association-in-fact must have any particular organizational structure separate from what may be needed to facilitate racketeering activity.\footnote{\textit{Id.} at 551.} This puts the Ninth Circuit at odds with various circuits — including the Third, Fourth, Seventh, Eighth, and Tenth — that require the association-in-fact to have some structure or purpose that is separate from a conspiracy to commit racketeering.\footnote{\textit{See, e.g.}, Bachman v. Bear, Stearns & Co., 178 F.3d 930, 932 (7th Cir. 1999) (refusing to convert an alleged conspiracy into an association-in-fact enterprise, and requiring the plaintiff to show that the members of the association operated together with some ongoing purpose beyond the conspiracy to commit predicate acts).}

As noted above, the question of the extent to which an association-in-fact enterprise must have a structure apart from that inherent in an agreement to
commit racketeering may be resolved by the Supreme Court in *Boyle v. United States*.\textsuperscript{46}

\section*{§ 19 The Person/Enterprise Distinction}

Section 1962(c) prohibits any person “employed by or associated with any enterprise” from conducting the affairs of that enterprise through a pattern of racketeering.\textsuperscript{47} All courts of appeals have concluded that this language means that in a Section 1962(c) case, a party cannot be both the defendant “person” and the enterprise.\textsuperscript{48} On the other hand, as discussed in § 20 below, courts generally recognize that the defendant may be a member of a larger association-in-fact enterprise without violating the person/enterprise distinction.

Because a corporation is included in the statutory definition of a “person,”\textsuperscript{49} there has been much debate in Section 1962(c) cases about whether

\begin{footnotesize}
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\item \textsuperscript{46} 129 S. Ct. 29 (Oct. 1, 2008) (granting certiorari).
\item \textsuperscript{47} 18 U.S.C. § 1962(c).
\item \textsuperscript{48} See *Doyle v. Hasbro, Inc.* 103 F.3d 186, 191 (1st Cir. 1996) (affirming dismissal of RICO claim where plaintiff failed to identify an enterprise distinct from defendant); *Odishelidze v. Aetna Life & Cas. Co.*, 853 F.2d 21, 23 (1st Cir. 1988); *Official Publ'ns, Inc. v. Kable News Co.*, 884 F.2d 664, 668 (2d Cir. 1989); *Bennett v. United States Trust Co.*, 770 F.2d 308, 315 (2d Cir. 1985); *New Beckley Mining Corp. v. Int'l Union, United Mine Workers*, 18 F.3d 1161, 1163-64 (4th Cir. 1994); *Busby v. Crown Supply, Inc.*, 896 F.2d 833, 840 (4th Cir. 1990) (en banc); *In re Burzynski*, 989 F.2d 733, 743 (5th Cir. 1993); *Parker & Parsley Petroleum Co. v. Dresser Indus.*, 972 F.2d 580, 583 (5th Cir. 1992); *Davis v. Mutual Life Ins. Co.*, 6 F.3d 367, 377 (6th Cir. 1993); *Palmer v. Nationwide Mut. Ins. Co.*, 945 F.2d 1371, 1373 (6th Cir. 1991); *Preferred Mut. Ins. Co. v. Dumas*, 943 F.2d 52 (Table), 1991 WL 169339 at *1) (6th Cir. Sept. 4, 1991); *Richmond v. Nationwide Cassel*, L.P., 52 F.3d 640, 645-47 (7th Cir. 1995); *Bennett v. Berg*, 685 F.2d 1053, 1061 (8th Cir. 1982), aff'd en banc, 710 F.2d 1361 (8th Cir. 1983); *Schreiber Distrib. Co. v. Serv-Well Furniture Co.*, 806 F.2d 1393, 1396 (9th Cir. 1986); *Garbade v. Great Divide Mining & Milling Corp.*, 831 F.2d 212, 213 (10th Cir. 1987); *Yellow Bus Lines, Inc. v. Drivers, Chauffeurs & Helpers Local Union* 639, 883 F.2d 132, 139 (D.C. Cir. 1989), aff'd en banc on other grounds, 913 F.2d 948 (D.C. Cir. 1990); *United States v. Goldin Indus., Inc.*, 219 F.3d 1271, 1275 (11th Cir. 2000).
\item \textsuperscript{49} See 18 U.S.C. § 1961(3).
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the corporate person is separate and distinct from the individuals who operate the corporation.

In *Cedric Kushner Promotions v. King*, the Supreme Court held that the person/enterprise distinction is satisfied where a sole shareholder of a corporation conducts the affairs of his corporation. The Court reasoned that the law recognizes that an individual and a corporation are distinct legal entities, and applying the RICO statute under these circumstances is consistent with the statute’s purposes. The holding allows RICO to reach defendants who, acting either within or without the scope of corporate authority, use their company to conduct racketeering activity.

**§ 20 Intra-Corporate Enterprises**

RICO plaintiffs have sought to plead around the person/enterprise distinction by alleging that the enterprise is an association-in-fact consisting of a corporate defendant and its principals, agents, or subsidiaries.

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51 *Id.* at 163. See also United States v. Najjar, 300 F.3d 466, 484 (4th Cir. 2002) (applying *King* and holding that a corporation and its employee were two distinct entities); Katz v. Comm’r, 335 F.3d 1121, 1127 (10th Cir. 2003) (in a bankruptcy, a debtor and the bankruptcy estate are distinct legal entities); G-I Holdings, Inc. v. Baron & Budd, 238 F. Supp. 2d 521, 547 (S.D.N.Y. 2002) (finding that named partners and members of law firm were distinct entities from the law firm).

52 See also Jaguar Cars, Inc. v. Royal Oaks Motor Car Co., 46 F.3d 258, 268 (3d Cir. 1995) (holding that conduct by officers and employees who operate or manage a corporate enterprise satisfies the person/enterprise distinction); Metcalf v. Paine Webber Inc., 886 F. Supp. 503, 514 & n.12 (W.D. Pa. 1995) (interpreting *Jaguar* as holding merely that when officers and employees operate and manage a corporation and use it to conduct a pattern of racketeering, those persons are liable, and holding that when all defendant “collective entities” were acting in furtherance of corporation’s business, they were not a separate enterprise), *aff’d*, 79 F.3d 1138 (3d Cir. 1996).
Generally, such attempts to avoid the person/enterprise distinction have been rejected. Although an individual can be liable for operating the affairs of a corporation, the reverse may not be true: a corporation generally will not be liable for operating an association-in-fact enterprise that consists of itself and its officers or employees. Under that circumstance, the corporation would be accused of operating itself, not a separate enterprise as required under Section 1962(c).

For example, the Second Circuit has held that a RICO plaintiff cannot circumvent the distinctiveness requirement by alleging a RICO enterprise

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54 See id. at 164 (noting that Court’s holding that an individual can operate his company as a separate enterprise is a different case from where it is alleged that the corporation is the culpable “person” and the same corporation and its employees and agents are the enterprise); See also Libertad v. Welch, 53 F.3d 428 (1st Cir. 1993) (noting need for separate enterprise that functions as continuing unit apart from the pattern of racketeering); Discon, Inc. v. NYNEX Corp., 93 F.3d 1055, 1064 (2d Cir. 1996) (person/enterprise distinction not satisfied where separately incorporated entities acted within scope of single corporate structure and were guided by “single corporate consciousness”); Riverwoods Chappaqua Corp. v. Marine Midland Bank, 30 F.3d 339, 343-45 (2d Cir. 1994) (corporation and its employees cannot be both the defendants and the enterprise); Parker & Parsley Petroleum Co. v. Dresser Indus., 972 F.2d 580, 583-84 (5th Cir. 1992) (affirming dismissal of claim alleging an enterprise consisting of corporate defendant and its field employees); Bucklew v. Hawkins, Ash, Baptie, LLP & Co., 329 F.3d 923, 934 (7th Cir. 2003) (parent and subsidiary not distinct “unless the enterprise’s decision to operate through subsidiaries rather than divisions somehow facilitated its unlawful activity . . .”); Emery v. American Gen. Fin., Inc., 134 F.3d 1321 (7th Cir. 1998) (corporate parent and subsidiary not distinct); Fitzgerald v. Chrysler Corp., 116 F.3d 225 (7th Cir. 1997) (corporate affiliates and agents not separate from corporate defendant); Richmond v. Nationwide Cassel L.P., 52 F.3d 640, 646-47 (7th Cir. 1995) (affirming dismissal for failure to identify enterprise separate from defendants who were conducting their own affairs); Brannon v. Boatmen’s First Nat’l Bank of Okla., 153 F.3d 1144 (10th Cir. 1998) (corporate parent and subsidiary not distinct); Board of County Comm’rs v. Liberty Group, 965 F.2d 879, 885 (10th Cir. 1992); Yellow Bus Lines v. Drivers, Chauffeurs & Helpers Local Union 639, 883 F.2d 132, 141 (D.C. Cir. 1989), aff’d en banc, 913 F.2d 948 (D.C. Cir. 1990). But see Dornberger v. Metropolitan Life Ins., 961 F. Supp. 506, 524 (S.D.N.Y. 1997) (concluding that, although many members of alleged enterprise were agents carrying out the ordinary business of corporation, plaintiffs had adequately alleged an enterprise distinct from defendants where alleged enterprise also included governmental entities that were not agents of corporation); Chen v. Mayflower Transit, Inc., 159 F. Supp. 2d 1103, 1109 (N.D. Ill. 2001) (manufacturer and disclosed agents constituting an enterprise were legally distinct corporate entities with distinct roles in the enterprise).
consisting merely of a corporate defendant associating with its own employees or agents in the regular affairs of the corporation. The Second Circuit reasoned that “[b]ecause a corporation can only function through its employees and agents, any act of the corporation can be viewed as an act of such an enterprise, and the enterprise is in reality no more than the defendant itself.”

As the Fifth Circuit explained, an association-in-fact consisting of “the defendant corporate entity functioning through its employees in the course of their employment” is functionally indistinguishable from the corporation and therefore runs afoul of the person/enterprise distinction. Similarly, in Board of County Commissioners v. Liberty Group, the Tenth Circuit reversed the denial of a summary judgment motion by the defendant where the plaintiff’s RICO claim was predicated on an enterprise consisting of “nothing more than the various officers and employees of [the corporate defendant] carrying on the firm’s business.” The Eleventh Circuit has explained that the crucial factor is whether each member of the alleged association-in-fact enterprise “is free to act

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55 Riverwoods Chappaqua Corp. v. Marine Midland Bank, 30 F.3d 339 (2d Cir. 1994).
56 Id. at 344.
57 Parker & Parsley Petroleum Co. v. Dresser Indus., 972 F.2d 580, 583 (5th Cir. 1992) (affirming dismissal of claim alleging an enterprise consisting of corporate defendant and its field employees).
58 965 F.2d at 885-86. See also Yellow Bus Lines v. Drivers, Chauffeurs & Helpers Local Union 639, 883 F.2d 132, 140-41 (D.C. Cir. 1989) (rejecting enterprise consisting of a labor union and one of its officers).
independently and advance its own interests contrary to those” of the other members of the enterprise.59

Courts have allowed RICO complaints to proceed where the defendants are among the members of a separate association-in-fact enterprise.60 For example, the Eleventh Circuit has affirmed that corporate defendants can be both defendants (who may be indicted individually) and participants in an association-in-fact enterprise consisting of the same corporations and the individual defendants who ran them.61 The court noted that a defendant can be both a culpable person and a part of an enterprise: “[t]he prohibition against


60 See, e.g., United States v. Owens, 167 F.3d 739 (1st Cir. 1999) (an association-in-fact existed where there was evidence of “systemic linkages between” two sub-groups that “depended on one another both financially and structurally”); Securitron Magnalock Corp. v. Schnabolk, 65 F.3d 256, 263-64 (2d Cir. 1995) (an association-in-fact consisting of two separate and distinct corporations and a person who was an officer or agent of both corporations constitutes an enterprise); United States v. Console, 13 F.3d 1349, 1352 (3d Cir. 1993) (an association-in-fact consisting of a law firm and a medical practice satisfies RICO’s definition of enterprise); Ocean Energy II, Inc. v. Alexander & Alexander, Inc., 868 F.2d 740, 748 (5th Cir. 1989) (factual question existed as to whether alleged association of insurance companies, company subsidiaries, and local agents who allegedly sold fraudulent policies constituted a RICO enterprise); Alcorn County v. U.S. Interstate Supplies, 731 F.2d 1159, 1168 (5th Cir. 1984) (an association of individual defendants and a corporation that sold supplies to a county government by bribing a county employee could constitute an enterprise); Davis v. Mutual Life Ins. Co., 6 F.3d 367, 378 (6th Cir. 1993) (fact that RICO “person” acted through individual whose distinctness from the enterprise is open to question is irrelevant so long as the “person” itself and the enterprise are distinct); Burdett v. Miller, 957 F.2d 1375, 1379-80 (7th Cir. 1992) (concluding that association-in-fact of accountant and three sponsors of an investment could constitute an enterprise); Litton Sys., Inc. v. Ssangyong Cement Indus., Co., 107 F.3d 30 (Table), 1997 WL 59360, at *9 (Fed. Cir. Feb. 13, 1997) (determining that under Ninth Circuit precedent corporations could properly be part of association-in-fact enterprise as well as RICO defendants); Living Designs, Inc. v. E. I. DuPont de Nemours and Co., 431 F.3d 353, 361 (9th Cir. 2005) (allowing enterprise consisting of DuPont, its outside law firms, and expert witnesses retained by the law firms); United States v. Blinder, 10 F.3d 1468, 1473 (9th Cir. 1993) (an association-in-fact enterprise may consist solely of corporations or other legal entities).

the unity of person and enterprise applies only when the singular person or entity is defined as both the person and the only entity comprising the enterprise.”

§ 21 Vicarious Liability

RICO plaintiffs have attempted to evade the person/enterprise distinction by arguing that a corporation may be held vicariously liable for the acts of its employees under the doctrine of respondeat superior. As a general matter, the question will turn on whether the corporation was the bad actor and beneficiary, and not merely a passive enterprise.

Most courts of appeals have held that a corporation cannot be held vicariously liable for violations of Section 1962(c) committed by its employees—at least where the corporation is alleged to be the vicariously liable defendant and the enterprise. Those courts have concluded that the imposition of vicarious liability would defeat the purpose of RICO, which is to reach those

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63 See, e.g., Schofield v. First Commodity Corp. of Boston, 793 F.2d 28, 32 (1st Cir. 1986); Petro-Tech Inc. v. Western Co., 824 F.2d 1349, 1360 (3d Cir. 1987); Davis v. Mutual Life Ins. Co., 6 F.3d 367, 378-80 (6th Cir. 1993); D & S Auto Parts, Inc. v. Schwartz, 838 F.2d 964, 967 (7th Cir. 1988); Liquid Air Corp. v. Rogers, 834 F.2d 1297, 1304 (7th Cir. 1987); Luthi v. Tonka Corp., 815 F.2d 1229, 1230 (8th Cir. 1987); Brady v. Dairy Fresh Prods. Co., 974 F.2d 1149, 1153-54 (9th Cir. 1992); Landry v. Air Line Pilots Ass’n, 901 F.2d 404, 425 (5th Cir. 1990); Yellow Bus Lines v. Drivers, Chauffeurs & Helpers Local Union 639, 883 F.2d 132, 140 (D.C. Cir. 1989), aff’d en banc, 913 F.2d 948 (D.C. Cir. 1990); Cf. Harrah v. J.C. Bradford & Co., 37 F.3d 1493 (4th Cir. 1994) (Table, text available on WESTLAW) (noting that application of respondeat superior under § 1962(c) is a novel issue in circuit, but declining to address issue where case could be disposed of on other grounds). But see Cox v. Adm’r United States Steel & Carnegie, 17 F.3d 1386, 1406-07 (11th Cir. 1994) (rejecting the requirement that the culpable person be distinct from the enterprise and holding that respondeat superior may be applied under § 1962(c) where the corporate employer benefits from the acts of its employee and the acts were (1) related to and committed within the course of employment; (2) committed in furtherance of the corporation’s business; and (3) authorized or acquiesced in by the corporation), modified on other grounds, 30 F.3d 1347 (11th Cir. 1994).
who profit from racketeering, not those who are victimized by it. These courts have reasoned that because Section 1962(c) requires a culpable person distinct from the enterprise through which the unlawful conduct was effected, Congress did not intend to permit the enterprise to be held vicariously liable as a defendant.

As the First Circuit explained in *Schofield v. First Commodity Corp. of Boston*, it would be “inappropriate to use respondeat superior to accomplish indirectly what we have concluded the statute directly denies.”64 The District of Columbia Circuit explained, *in dicta*, that respondeat superior liability is inappropriate because liability under Section 1962(c) is aimed at punishing the person who exploits an enterprise, rather than the enterprise which is merely a passive victim. Thus, the court concluded, the concept of respondeat superior is “directly at odds” with Congress’s intent in enacting Section 1962(c).65

On the other hand, several courts of appeals and district courts have ruled that respondeat superior is appropriate under Section 1962(c) when the party to be held vicariously liable is not the alleged enterprise, and also was the central figure or aggressor in the alleged scheme.66 In *Bloch v. Prudential-

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64 793 F.2d at 33.
65 Yellow Bus Lines, 883 F.2d at 140.
66 See, e.g., Davis v. Mutual Life Ins. Co., 6 F.3d 367, 378-80 (6th Cir. 1993); Liquid Air Corp. v. Rogers, 834 F.2d 1297, 1306 (7th Cir. 1987); Brady v. Dairy Fresh Prods. Co., 974 F.2d 1149, 1154-55 (9th Cir. 1992); Cox v. Adm'r United States Steel & Carnegie, 17 F.3d 1386, 1406-07 (11th Cir. 1994) (holding that respondeat superior liability may be assessed under § 1962(c) where the corporate employer benefits from the acts of its employee and the acts were (1) related to and committed within the course of employment; (2) committed in furtherance of the corporation’s business; and (3) authorized or acquiesced in by the corporation), modified on other grounds, 30 F.3d 1347 (11th Cir. 1994); Schuster v. Anderson,
the defendants were Prudential-Bache brokers involved in the fraudulent sale of a limited partnership. The plaintiffs argued that Prudential-Bache should be vicariously liable as the brokers’ employer but did not allege that Prudential-Bache was the RICO enterprise. The district court agreed, noting that this was a case which involved common law principles of respondeat superior, and therefore was not controlled by the Third Circuit’s decision in *Petro-Tech, Inc. v. Western Co.* The court distinguished *Petro-Tech* because the plaintiffs in that case had named the defendant as the RICO enterprise, and were therefore attempting to circumvent the person/enterprise distinction by holding the defendant vicariously liable rather than directly liable. The *Bloch* court relied upon a footnote from *Petro-Tech* which stated that “there could be circumstances in which the common law of respondeat superior would hold an employer liable even when the employer did not benefit from the employee’s conduct.”

In *Oki Semiconductor Co. v. Wells Fargo Bank*, the Ninth Circuit held open the possibility that vicarious liability might be established but refused to hold a bank vicariously liable for the acts of its bank teller where the teller’s alleged money laundering was not the proximate cause of the plaintiff’s injury.

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68 824 F.2d 1349 (3d Cir. 1987).
69 Bloch, 707 F. Supp. at 193 (quoting *Petro-Tech*, 824 F.2d at 1359 n.11).
70 298 F.3d 768 (9th Cir. 2002).
and where the teller’s conspiracy to violate RICO occurred “outside the course and scope of [her] employment because it was not the kind of function Wells Fargo hired her to perform.”71 However, as noted above, the Ninth Circuit has rejected RICO claims against employers based on vicarious liability where the employer is also the alleged enterprise.72

The Third Circuit has held that an enterprise may be held vicariously liable for a violation of Section 1962(a) because that subsection of RICO does not require a distinction between the person and the enterprise.73 Similarly, the Fifth Circuit has found no barrier to vicarious liability under Sections 1962(a) and (b) when the principal has derived some benefit from the agent’s wrongful acts.74

In Liquid Air Corp. v. Rogers, the Seventh Circuit stated that respondeat superior liability is appropriate under subsections (a) and (b) if the enterprise derived a benefit from the unlawful investment or infusion of funds.75 However, in a subsequent decision, the Seventh Circuit “reject[ed] the doctrine of respondeat superior in civil RICO cases.”76 A subsequent district court decision sought to reconcile the two decisions by construing D & S as a narrow holding limited to cases in which the corporation was unaware of its employees’

71 Id. at 776.
72 See, e.g., Miller v. Yokohama Tire Corp., 358 F.3d 616, 620 (9th Cir. 2004); Brady v. Dairy Fresh Products Co., 974 F.2d 1149, 1154 (9th Cir. 1992).
73 Petro-Tech, 824 F.2d at 1361.
74 Crowe v. Henry, 43 F. 3d 198, 206 (5th Cir. 1995).
75 834 F.2d at 1307.
76 D & S Auto Parts, Inc. v. Schwartz, 838 F.2d 964, 968 (7th Cir. 1988).
misconduct, as opposed to *Liquid Air*, in which the corporation stood by silently and benefited from the wrongdoing.\textsuperscript{77}

The Ninth Circuit has adopted the reasoning of *Petro-Tech* and *Liquid Air*, holding that liability may arise under Section 1962(a) under respondeat superior principles “when the individual or entity is benefited by its employee or agent’s RICO violations.”\textsuperscript{78} The Eleventh Circuit has held that respondeat superior liability may be imposed under Section 1962(b), but only on those enterprises that derive some benefit from the RICO violation.\textsuperscript{79}

### § 22 Operation or Management of the Enterprise

Section 1962(c) makes it unlawful for a person to “conduct, or participate in the conduct of the affairs of the enterprise” through a pattern of racketeering activity.\textsuperscript{80} In *Reves v. Ernst & Young*, the Supreme Court significantly limited the reach of Section 1962(c) by holding that liability for “conducting” or “participating in the conduct of” the affairs of an enterprise is limited to persons who exercise a managerial role in the enterprise’s affairs.\textsuperscript{81} This holding significantly limited the application of Section 1962(c) to outside professionals by holding that liability for “conducting” or “participating in the

\textsuperscript{77} Harrison v. Dean Witter Reynolds, Inc., 695 F. Supp. 959, 962 (N.D. Ill. 1988); see also Dynabest, Inc. v. Yao, 760 F. Supp. 704, 711-12 (N.D. Ill. 1991) (allowing § 1962(a) and (b) claims against employer based on vicarious liability where the employer knowingly benefited from the RICO violation).

\textsuperscript{78} Brady v. Dairy Fresh Prods. Co., 974 F.2d 1149, 1155 (9th Cir. 1992).

\textsuperscript{79} Quick v. Peoples Bank, 993 F.2d 793, 797 (11th Cir. 1993).

\textsuperscript{80} 18 U.S.C. § 1962(c).

\textsuperscript{81} 507 U.S. 170, 178-79 (1993).
conduct of” the affairs of an enterprise requires a showing that the defendant directed the enterprise’s affairs.82

Before Reves, the federal courts of appeals had reached different conclusions about the degree of control required to “conduct the affairs” of an enterprise. Three circuits held that a defendant conducts the affairs of an enterprise when the defendant’s position in the enterprise “enables” it to commit the predicate acts, or when the predicate acts are “related” to the affairs of the enterprise.83

Two circuits had adopted a more restrictive view. The Eighth Circuit held that liability under Section 1962(c) requires “some participation in the operation or management of the enterprise itself.”84 The D.C. Circuit held that a defendant must exercise “significant control” over an enterprise’s affairs to be liable under Section 1962(c).85

In Reves, a bankruptcy trustee of a farmers cooperative (“co-op”), on behalf of a class of noteholders, sued an outside accounting firm that audited the co-op’s financial statements. The class alleged that the accounting firm deliberately and intentionally failed to follow generally accepted accounting principles in order to inflate the assets and net worth of the co-op and deceive

82 Id. at 178-84.
84 Bennett v. Berg, 710 F.2d 1361, 1364 (8th Cir. 1982) (en banc).
85 Yellow Bus Lines v. Drivers, Chauffeurs & Helpers Local Union 639, 913 F.2d 948, 954 (D.C. Cir. 1990) (en banc).
The Supreme Court adopted the Eighth Circuit’s test, relying largely on the dictionary definition of the terms “conduct” and “participate,” and concluded that the terms connote “an element of direction.” Justice Blackmun, writing for the majority, explained:

> Once we understand the word “conduct” to require some degree of direction and the word “participate” to require some part in that direction, the meaning of § 1962(c) comes into focus. In order to “participate, directly or indirectly, in the conduct of such enterprise’s affairs,” one must have some part in directing those affairs . . . . The “operation or management” test expresses this requirement in a formulation that is easy to apply.

Whether the “operation or management” test is in fact “easy to apply” may be debated. For example, in two similar cases brought by employees challenging their employers’ practices of hiring illegal workers, the Seventh Circuit and Eleventh Circuit reached different conclusions about the operation of the enterprise. In *Baker v. IBP, Inc.*, the Seventh Circuit concluded that the employees could not establish that the employer operated or managed the alleged association-in-fact (consisting of the employer and an immigrant aid association that helped recruit workers). The Eleventh Circuit disagreed in *Williams v. Mohawk Industries, Inc.* Noting that “the Supreme Court has yet to delineate the exact boundaries of the operation or management test,” the

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87 Reves, 507 U.S. at 177-78.
88 *id.* at 179.
89 357 F.3d 685, 691 (7th Cir. 2004).
90 465 F.3d 1277, 1286 (11th Cir. 2006).
Eleventh Circuit ruled that the complaint should not be dismissed at the pleading stage because “it is possible that the plaintiffs will be able to establish that [the employer] played some part in directing the affairs of the enterprise.”

The “operation or management” test applies to any defendant in a Section 1962(c) action, whether or not the defendant is an employee or an “outsider.” Employees or other “insiders” who knowingly help implement a RICO scheme may be liable for helping to operate or manage the affairs of the enterprise. But as discussed in more detail below, simply performing services for the enterprise, even with knowledge of an illicit activity, is not enough to establish liability under Section 1962(c); the defendant must have actually participated in the operation or management of the enterprise.

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91 Id.

92 See John E. Floyd & Joshua F. Thorpe, Don’t Fence Reves In: The Decision Is Not Limited To Professionals, 9 Civil RICO Report, No. 50 (May 18, 1994).

93 Compare United States v. Oreto, 37 F.3d 739, 750-51 (1st Cir. 1994) (concluding that collectors in loan sharking enterprise were “plainly integral to carrying out the collection process,” knowingly made and implemented decisions, and therefore participated in “operation or management”); United States v. Posadas-Rios, 158 F.3d 832, 856 (5th Cir. 1998) (distinguishing Reves and holding that a lower-rung employee need only take part in operation, not direct its affairs); MCM Partners, Inc. v. Andrews-Bartlett & Assocs., Inc., 62 F.3d 967, 978 (7th Cir. 1995) (lower-rung participants liable when they enable an enterprise to achieve its goals by knowingly implementing management’s decisions); Dale v. Frankel, 131 F. Supp. 2d 852 (S.D. Miss. 2001) (employee could be liable knowingly implementing upper management’s decisions); Reynolds v. Condon, 908 F. Supp. 1494, 1511 (N.D. Iowa 1995) (Reves test applies equally to outsiders and to insiders, such as a partner in the law firm identified as the RICO enterprise); with United States v. Viola, 35 F.3d 37, 41 (2d Cir. 1994) (“since Reves, it is plain that the simple taking of directions and performance of tasks that are ‘necessary or helpful’ to the enterprise, without more, is insufficient to bring a defendant within the scope of § 1962(c)”); LaSalle Bank Lake View v. Seguban, 54 F.3d 387, 393-94 (7th Cir. 1995) (suggesting, in dicta, that a bank teller manager may be too far down the ladder of operation to be liable under Reves).

§ 23 Application of the “Operation or Management” Test to Outsiders

Although the Court in Reves ruled that Section 1962(c) does not reach “complete outsiders” who manage their own affairs rather than the affairs of the enterprise,95 the Court also made clear that status as an outsider is not an automatic bar to liability under Section 1962(c): “the phrase ‘directly or indirectly’ makes clear that RICO liability is not limited to those with a formal position in the enterprise . . . .”96 Consequently, where the activities of an outside professional go beyond the rendition of routine professional services and are so intertwined with the corporate enterprise that the outsider can be said to “operate” or “manage” the enterprise, the outsider still faces exposure to a Section 1962(c) claim. The question is where to draw the line. Indeed, Justice Souter in his dissent argued that the conduct of the accounting firm in Reves satisfied the “operation or management” test adopted by the majority because the accounting firm performed tasks that ordinarily are managerial functions.97 By assisting the client in preparing its own books and records, Justice Souter wrote, the auditor “step[ped] out of its auditing shoes and into those of management.”98

789, 806-08 (W.D. Tenn. 2005) (finding sufficient participation in scheme to establish operation or management element).

95 507 U.S. at 185.
96 Id. at 178-79.
97 Id. at 190.
98 Id. at 190-91.
In the wake of Reves, commentators noted the challenges of establishing that outside professionals and other advisors rise to the level of operating or managing the enterprise.99 Indeed, courts regularly have applied Reves to limit the use of Section 1962(c) against corporate outsiders, particularly accountants, attorneys, bankers, and other outside professionals.100 For example, in a post-Reves decision, Baumer v. Pachl, the Ninth Circuit affirmed the dismissal of RICO claims against a limited partnership’s outside counsel.101 The plaintiffs in Baumer alleged that the attorney had knowingly prepared a partnership agreement containing false statements, and had actively engaged

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99 See, e.g., Ralph A. Pitts, Michael R. Smith and Reginald R. Smith, Civil RICO and Professional Liability After Reves: Plaintiffs Will Have to Look Elsewhere to Reach the “Deep Pockets” of Outside Professionals (Part 2), 9 Civil RICO Report, No. 21, Part 2, at 5 (Oct. 20, 1993) (“Unless the plaintiff can find some way to elevate factually the role of the professional into one of directing the enterprise’s affairs, whether the enterprise be the entity for whom the professional was rendering services or an association-in-fact of entities, for whom (not surprisingly), the professional was merely rendering services, the ‘operation or management’ test adopted in Reves should nevertheless bar the plaintiff’s claim.”); Andrew B. Weissman and Arthur F. Mathews, Long Term Impact of Reves on Civil RICO Litigation Is Uncertain, 7 Inside Litigation, No. 6, at 18 (June 1993) (same).

100 See, e.g., Azrielli v. Cohen Law Offices, 21 F.3d 512, 521-22 (2d Cir. 1994) (affirming dismissal of RICO claim against outside attorney who provided routine legal services); Cf. Stone v. Kirk, 8 F.3d 1079, 1091-92 (6th Cir. 1993) (overturning jury verdict against a sales representative who allegedly defrauded the plaintiffs in connection with the sale of investment interests in a joint venture); James Cape & Sons Co. v. PCC Constr. Co., 453 396, 401-02 (7th Cir. 2006) (affirming dismissal where outsider defendant was not involved in operating the core functions of the enterprise); Goren v. New Vision Int’l, Inc., 156 F.3d 721 (7th Cir. 1998) (dismissing a complaint that alleged that a multi-level marketing company and several individual defendants were operating an illegal pyramid scheme, where plaintiff failed to plead sufficient facts to demonstrate the individual defendants operated or managed the affairs of the enterprise); Dahlgren v. First Nat’l Bank of Holdrege, 533 F.3d 681, 690 (8th Cir. 2008) (ruling that bank’s role as creditor did not equate to having sufficient control to amount to conducting the affairs of the enterprise); Nolte v. Pearson, 994 F.2d 1311, 1316-17 (8th Cir. 1993) (affirming directed verdict in favor of outside law firm that provided tax advice and other legal services to a music company); Walter v. Drayson, 538 F.3d 1244 (9th Cir. 2008) (providing legal services does not constitute operation or management of the enterprise); Cope v. Price Waterhouse, 990 F.2d 1256 (Table), 1993 WL 102598, at *8 (9th Cir. Apr. 7, 1993) (affirming dismissal of RICO claims against outside auditors and consultants who performed routine professional services for the limited partnership enterprise).

101 Baumer v. Pachl, 8 F.3d 1341 (9th Cir. 1993).
in efforts to cover-up certain fraudulent activities engaged in by the partnership. The court concluded that these allegations were insufficient to satisfy the operation or management test because the attorney’s role “was limited to providing legal services to the limited partnership . . . . Whether [the attorney] rendered his services well or poorly, properly or improperly, is irrelevant to the Reves test.”

Similarly, in *University of Maryland v. Peat, Marwick, Main & Co.*, the plaintiffs alleged that the defendant auditing firm had performed deficient audits, issued unqualified opinions, attended board meetings, and performed other accounting and consulting services. Relying on *Reves*, the Third Circuit concluded that “not even action involving some degree of decision making constitutes participation in the affairs of an enterprise.” The court concluded that the plaintiffs’ claims were merely allegations that “Peat Marwick performed materially deficient financial services,” which were insufficient to satisfy this standard.

Unless it is obvious that the case is against a true outsider, the operation or management test is often a fact-intensive inquiry that may be difficult to

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102 *Id.* at 1344. See also Walter v. Drayson, 538 F.3d 1244, 1249 (9th Cir. 2008) (affirming dismissal of claims against a trustee’s lawyer because the attorney’s performance of services was not sufficient to conduct affairs of the associated-in-fact enterprise, as such services “did not rise to the level of direction”).

103 996 F.2d 1534 (3d Cir. 1993).

104 *Id.* at 1538-39.

105 *Id.* at 1539-40.
resolve on a motion to dismiss or for summary judgment. For example, in *Dayton Monetary Associates. v. Donaldson, Lufkin & Jenrette*, investors in certain limited partnerships sued securities traders who allegedly engaged in fraudulent transactions with the limited partnerships. The defendants moved to dismiss, arguing that under *Reves* they did not participate in the operation or management of the limited partnerships. The court denied the motion, concluding that the plaintiffs’ allegations were sufficient to demonstrate that

106 See *Aetna Cas. & Sur. Co. v. P & B Autobody*, 43 F.3d 1546, 1559-60 (1st Cir. 1994) (holding that insureds, claimants, and owners and operators of body shops involved in repairing cars insured by insurer indirectly “operated or managed” insurer by acting with purpose to cause insurer to make payments on false claims); *DeFalco v. Bernas*, 244 F.3d 286, 310-12 (2d Cir. 2001) (applying *Reves* to determine that there was sufficient evidence for a jury to find that a construction contractor had participated in the operation or management of a town where the contractor had sufficient influence over the town to halt the dedication of roads in a real estate development and a town official indicated in writing to the plaintiff developer that the contractor’s approval would be required to complete the development); *Davis v. Mut. Life Ins. Co.*, 6 F.3d 367, 380 (6th Cir. 1993) (holding that an insurance company participated in the affairs of its agent’s insurance agency because -- after receiving warnings concerning the agent’s fraudulent conduct -- the insurance company allowed or encouraged the activities to continue); *Abels v. Farmers Commodities Corp.*, 259 F.3d 910, 918 (8th Cir. 2001) (jury could infer that defendants met the operation and management test by directing a managerial employee of the Farmers Cooperative Elevator of Buffalo Center in order to maximize commissions); *Handeen v. Lemaire*, 112 F.3d 1339, 1350-51 (9th Cir. 1997) (motion to dismiss properly denied because, if evidence were presented to support allegations, court would not hesitate to conclude that law firm had participated in conducting affairs of enterprise where firm directed parties to enter into false promissory note and manipulated bankruptcy process to obtain discharge); *Webster v. Omnitrition Int’l, Inc.*, 79 F.3d 776, 789 (9th Cir. 1996) (acknowledging outside counsel’s role in operation and management of multi-level marketing company, but concluding that “purely ministerial” office did not constitute participation in the operation and management of the enterprise); *Resolution Trust Corp. v. Stone*, 998 F.2d 1534, 1541-42 (10th Cir. 1993) (upholding jury finding that parent company participated in the conduct of the affairs of an enterprise which included its subsidiary, where the parent and the subsidiary had a common chairman and CEO who participated in running the day-to-day operations of both organizations); *Williams v. Mohawk Indus., Inc.*, 411 F.3d 1252 (11th Cir. 2005) (concluding that complaint should not be dismissed where plaintiffs might be able to establish that the defendant “played some role in directing the affairs of the enterprise”), vacated on other grounds, 547 U.S. 516 (2006). *But see James Cape & Sons Co. v. PCC Constr. Co.*, 453 396, 401-02 (7th Cir. 2006) (affirming dismissal where pleadings did not show that outsider defendant was involved in operating the core functions of the enterprise).

the defendants played a significant role in directing the affairs of the association-in-fact enterprise. More recently, the Second Circuit has confirmed that the operation or management test poses “a relatively low hurdle for plaintiffs to clear, especially at the pleading stage.”

Allegations of coercion or bribery by an outsider may help the plaintiff meet its pleading burden. In Edison Electric Institute v. Henwood, a pre-Reves decision, the court upheld a RICO claim under the “operation or management” test. Edison Electric alleged that the defendant, an outside vendor, had bribed one of Edison’s key employees into diverting lucrative contracts to the defendant. The court concluded that the plaintiff’s allegations established that the vendor exercised control over the employee who, in turn, exercised control over a substantial portion of the company’s budget, thereby exercising the necessary level of participation in the management of the enterprise.

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§ 24 Liability for Aiding and Abetting

Since *Reves*, some courts have held that *Reves* is not dispositive of whether an outside defendant may be charged with “aiding and abetting” a Section 1962(c) violation by another defendant.\(^{112}\)

However, the Supreme Court’s decision in *Central Bank of Denver v. First Interstate Bank*,\(^{113}\) undermines the viability of an implied cause of action for aiding and abetting in RICO cases. In *Central Bank*, the Supreme Court, in an opinion by Justice Kennedy, held that a private plaintiff may not maintain a suit for aiding and abetting under Section 10(b) of the Securities Exchange Act of 1934.\(^{114}\) The Court reasoned that the language of the statute does not mention aiding and abetting and that it is “inconsistent with settled methodology in Section 10(b) cases to extend liability beyond the scope of management of the enterprise where affidavits portrayed attorney defendants as actively soliciting plaintiff’s tenants to bring sexual harassment complaints against him and offering payment for any such complaints); Nebraska Sec. Bank v. Dain Bosworth, Inc., 838 F. Supp. 1362, 1367-68 (D. Neb. 1993) (plaintiffs must establish that defendant had some control over RICO enterprise, regardless of whether such control is acquired legally or otherwise by bribery or other means). But see Strong & Fisher, Ltd. v. Maxima Leather, Inc., No. 91 Civ. 1779 (JSM), 1993 WL 277205, at *1 (S.D.N.Y. July 22, 1993) (allegation that creditors of corporate RICO enterprise “had substantial persuasive power to induce management to take certain actions” insufficient to satisfy the conduct requirement).

\(^{112}\) See, e.g., Standard Chlorine, Inc. v. Sinibaldi, No. 91-188-SLR, 1994 WL 796603, at *4-5 (D. Del. Dec. 8, 1994) (*Reves* does not direct that plaintiff must prove control to establish aider and abettor liability under § 1962(c)); Fid. Fed. Sav. & Loan Ass’n v. Felicetti, 830 F. Supp. 257, 261 (E.D. Pa. 1993) (holding that the Petro-Tech test is unchanged by *Reves* because *Reves* is limited to the Supreme Court’s attempt to define the word “participate” as it is used in § 1962(c) and fails to address whether aider and abettor liability is inconsistent with § 1962(c) liability); see also Charamac Prop., Inc. v. Pike, No. 86 Civ. 7919 (KMW), 1993 WL 427137, at *3-4 (S.D.N.Y. Oct. 19, 1993) (discussing *Reves* in its analysis of primary liability under § 1962(c) but not in its analysis of aiding and abetting).

\(^{113}\) 511 U.S. 164 (1994).

\(^{114}\) 17 U.S.C. § 78j(b).
conduct prohibited by the statutory text.” 115 Stating that “Congress knew how to impose aiding and abetting liability when it chose to do so,” the Court further reasoned that the fact that Congress chose to impose some forms of secondary liability under the federal securities laws but not others “indicates a congressional choice with which the courts should not interfere.” 116

Although the Supreme Court’s decision in Central Bank only addresses aiding and abetting liability under Section 10(b), its rationale calls into question the existence of implied causes of action for secondary liability under other federal statutes, such as RICO. 117

Like Section 10(b), RICO contains no explicit reference to aiding and abetting liability. Following the rationale of Central Bank, it may be argued that the absence of express aiding and abetting language in RICO indicates that Congress did not intend to establish such liability, especially since Congress expressly created vicarious liability for co-conspirators in Section 1962(d). As one commentator has stated:

Since the arguments for imputing aiding and abetting liability in the case of section 10(b) are seemingly stronger than in the case of RICO -- both because of the much stronger precedents in the circuit courts and because common law doctrines of aiding and abetting are more readily applied to a judicially implied right of

115 Cent. Bank of Denver, 511 U.S. at 177-78.
116 Id. at 176, 184.
117 See id. 511 U.S. at 200 & n.12 (Stevens, J., dissenting) (“the majority’s approach to aiding and abetting at the very least casts serious doubt, both for private and SEC actions, on other forms of secondary liability that, like the aiding and abetting theory, have long been recognized by the SEC and the courts but are not expressly spelled out in the securities statutes”).
action under section 10(b) than to a statutory cause of action under RICO -- the logic of the Supreme Court’s decision in Central Bank would seem to preclude any civil aiding and abetting liability under RICO.\footnote{Jed. S. Rakoff, Aiding and Abetting Under Civil RICO, N.Y.L.J., May 12, 1994, at 3.}

Nevertheless, some courts that have considered aiding and abetting actions under RICO in the wake of Central Bank have concluded that aiding and abetting actions remain viable. For example, in Wardlaw v. Whitney National Bank,\footnote{No. 94-2026, 1994 WL 577442, at *6 (E.D. La. Oct. 17, 1994).} the district court noted that although Central Bank “contains sweeping language which arguably could apply to RICO,” its holding was based on judicial interpretation, congressional intent, and public policies specific to Section 10(b) of the Securities Exchange Act. Accordingly, the court declined to hold that Central Bank implicitly abolished aider and abettor liability for RICO violations:

Given the narrow focus of the question addressed by the Central Bank court, and in the absence of guidance from higher courts, this Court is not warranted in concluding that Central Bank “implicitly overruled” the strong tradition of cases holding that aiding and abetting predicate acts is sufficient to support a RICO conviction.\footnote{Id. See also Rakoff, supra note 118, at 3; Dayton Monetary Assocs. v. Donaldson, Lufkin & Jenrette Sec. Corp. Nos. 91 Civ. 2050, 4944, 5000, 5622 and 6432, 1995 WL 43669, at *4-5 (S.D.N.Y. Feb. 2, 1995) (holding that Central Bank does not mandate the conclusion that aiding and abetting the commission of a predicate act cannot constitute racketeering activity under RICO); In re Managed Care Litig., 135 F. Supp. 2d 1253, 1267 (S.D. Fla. 2001) (holding that aiding and abetting liability exists under 11th Circuit precedent and Central Bank did not overrule it).}

On the other hand, in the Rolo case, the Third Circuit ruled that in light of Central Bank, there is no private cause of action for aiding and abetting a
At the district court in *Rolo*, plaintiffs argued that the “outsider” defendants were liable as aiders and abettors under *Petro-Tech Inc. v. Western Co.*, which held that an aider and abettor of two predicate acts can be civilly liable under RICO provided that all of RICO’s other requirements are met. While the district court had acknowledged that aider and abettor liability survived under *Petro-Tech*, it reasoned that it would be “illogical to allow RICO plaintiffs to circumvent the limits on liability under Section 1962(c) as defined in *Reves* simply by allowing them to use the label ‘aider and abettor.’” Accordingly, the *Rolo* court held that a defendant may be liable for aiding and abetting under Section 1962(c) only if the defendant has both (1) aided and abetted the commission of at least two predicate acts as required by *Petro-Tech*; and (2) participated in the operation or management of the enterprise as required by *Reves*.

Applying the reasoning of *Central Bank*, the court noted that “[l]ike Section 10(b), the text of Section 1962 itself contains no indication that Congress intended to impose private civil aiding and abetting liability under RICO violation. At the district court in *Rolo*, plaintiffs argued that the “outsider” defendants were liable as aiders and abettors under *Petro-Tech Inc. v. Western Co.*, which held that an aider and abettor of two predicate acts can be civilly liable under RICO provided that all of RICO’s other requirements are met. While the district court had acknowledged that aider and abettor liability survived under *Petro-Tech*, it reasoned that it would be “illogical to allow RICO plaintiffs to circumvent the limits on liability under Section 1962(c) as defined in *Reves* simply by allowing them to use the label ‘aider and abettor.’” Accordingly, the *Rolo* court held that a defendant may be liable for aiding and abetting under Section 1962(c) only if the defendant has both (1) aided and abetted the commission of at least two predicate acts as required by *Petro-Tech*; and (2) participated in the operation or management of the enterprise as required by *Reves*.

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121 Rolo v. City Investing Co. Liquidating Trust, 155 F.3d 644 (3d Cir. 1998); accord Pennsylvania Ass’n of Edwards Heirs v. Rightenour, 235 F.3d 839, 840-41 (3d Cir. 2000) (confirming that there is no aiding and abetting under RICO).

122 824 F.2d 1349, 1356 (3d Cir. 1987).


124 Cf. Clark v. Milam, 847 F. Supp. 409, 417 (S.D. W.Va. 1994) (“the use of the term ‘aiding and abetting’ is not helpful because it is the quantity and quality of the defendant’s participation in the RICO enterprise that must be evaluated” on a case-by-case basis; while plaintiffs must allege some control, the control need not be significant to impose liability under *Reves*).
RICO.” The Third Circuit reviewed its prior discussion of aiding and abetting in *Jaguar Cars*, and noted that in *Jaguar Cars* “[t]he parties did not challenge the existence of a cause of action for aiding and abetting.” The court then concluded that its “discussion of aiding and abetting a RICO violation in *Jaguar Cars* does not control our analysis in this case.”

Other courts also have concluded—either directly or in dicta—that there is no aiding and abetting liability under Section 1962(c).

§ 25 The Enterprise under Section 1962(a), (b), and (d)

Because Section 1962(a) and Section 1962(b) do not deal with the notion of conducting a separate enterprise, most circuit courts have concluded that the person/enterprise distinction does not apply to violations of those sections. This approach permits a corporate enterprise to be held liable

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125 155 F.3d at 657; see also Pennsylvania Ass’n of Edwards Heirs v. Rightenour, 235 F.3d 839, 844 (3d Cir. 2000) (adhering to Rolo and rejecting arguments that common law principles and policy considerations mandate recognition of a private RICO aiding and abetting claim).
127 Rolo, 155 F.3d at 657.
129 See, e.g., Lightning Lube, Inc. v. Witco Corp., 4 F.3d 1153, 1190-91 (3d Cir. 1993) (collecting cases but ruling on other grounds); Shearin v. E.F. Hutton Group, Inc., 885 F.2d 1162, 1165 (3d Cir. 1989); Petro-Tech, Inc. v. Western Co., 824 F.2d 1349, 1361 (3d Cir. 1987); Busby v. Crown Supply, Inc., 896 F.2d 833, 841-42 (4th Cir. 1990); In re Burzynski, 989 F.2d
under RICO if it actually benefits from an infusion of racketeering income, but not if it is a mere target or passive instrument of a racketeering scheme.\textsuperscript{130}

For a Section 1962(d) conspiracy claim based on an agreement to violate Section 1962(c), the defendant need not agree to operate or manage the enterprise.\textsuperscript{131} Rather, the defendant may be liable if it knowingly agrees to facilitate others who operate or manage the enterprise. For example, in \textit{Brouwer v. Raffensperger, Hughes & Co.},\textsuperscript{132} the Seventh Circuit reconciled a perceived conflict between the Supreme Court’s opinions in \textit{Salinas} and \textit{Reves} by holding that to be actionable, the agreement need not be to manage the enterprise, but to “facilitate the activities of those who do.”\textsuperscript{133} The Third Circuit has similarly held that a “defendant may be held liable for conspiracy to violate Section 1962(c) if he knowingly agrees to facilitate a scheme which includes the operation or management of a RICO enterprise.”\textsuperscript{134}

\begin{itemize}
\item See also \S 21 for discussion of vicarious liability in cases under Sections 1962(a) and (b).
\item See \textit{Salinas v. United States}, 522 U.S. 52, 63 (1997) (holding that “[a] conspiracy may exist even if a conspirator does not agree to commit or facilitate each and every part of the substantive offense”). See Part VIII for a more detailed discussion of RICO conspiracies under Section 1962(d).
\item 199 F.3d at 967.
\item Smith v. Berg, 247 F.3d 532, 538 (3d Cir. 2001).
\end{itemize}
V. STANDING UNDER SECTION 1962(c)

§ 26 Background

Section 1964(c) identifies four factors that a plaintiff must establish to have standing to bring a civil RICO claim: (1) the plaintiff must be a “person” (2) who sustains injury (3) to its “business or property” (4) “by reason of” the defendant’s violation of Section 1962.¹

In *Sedima, S.P.R.L. v. Imrex Co.*,² the Supreme Court rejected the view that standing should be limited to situations where the defendant had been convicted of a criminal offense that constituted a RICO predicate act, and further refused to require a RICO plaintiff to demonstrate a “racketeering injury” distinct from the harm caused by the RICO predicate acts. The Court found that these restrictive views of RICO standing were not supported by the plain language of the RICO statute or the legislative history. Instead, the Court confirmed that a RICO plaintiff “has standing if, and can only recover to the extent that, he has been injured in his business or property by the conduct constituting the violation.”³ In other words, the plaintiff’s injury must directly “flow from the commission of the predicate acts.”⁴

As discussed in §§ 32-33 below, the Supreme Court, in *Holmes v. Securities Investor Protection Corp.*,⁵ *Anza v. Ideal Steel Supply Corp.*,⁶ and

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¹ 18 U.S.C. § 1964(c).
³ *Id.* at 496.
⁴ *Id.*
Bridge v. Phoenix Bond & Indem. Co.\textsuperscript{7} addressed the plaintiff's need to establish “proximate cause” in addition to but-for “injury in fact.” Because the RICO statute requires a plaintiff to show injury “by reason of” a predicate act,\textsuperscript{8} proximate cause is often examined as part of a court’s standing analysis, and courts generally limit “standing” to plaintiffs whose injuries were both factually and proximately caused by the alleged RICO violation.\textsuperscript{9}

Following Holmes and Anza, courts generally treat standing and proximate cause as interrelated and sometimes interchangeable concepts. Note, however, that some courts may recognize a distinction between the two concepts.\textsuperscript{10} For example, in Trollinger v. Tyson Foods, Inc.,\textsuperscript{11} the Sixth Circuit stated that standing and proximate cause are two distinct but overlapping concepts. Standing traditionally addresses who can sue, and focuses on whether the plaintiff is directly injured in fact.\textsuperscript{12} Proximate cause, on the other hand, often addresses whether a defendant may be held legally responsible for

\textsuperscript{5}547 U.S. 451 (2006).
\textsuperscript{7}128 S. Ct. 2131 (2008).
\textsuperscript{8}18 U.S.C. § 1964(c).
\textsuperscript{9}See, e.g., In re Am. Express Co. S’holder Litig., 39 F.3d 395, 399 (2d Cir. 1994), citing Holmes v. Sec. Investor Prot. Corp., 503 U.S. 258 (1992); see also RWB Servs., LLC v. Hartford Computer Group, Inc., 539 F.3d 681, 687 (7th Cir. 2008) (holding that a plaintiff pleads causation, as required for standing, if a predicate act was sufficient to cause plaintiff’s injury and that predicate act was part of the Section 1962 violation).
\textsuperscript{10}See, e.g., Trollinger v. Tyson Foods, Inc., 370 F.3d 602, 612-13 (6th Cir. 2004).
\textsuperscript{11}370 F.3d 602 (6th Cir. 2004).
\textsuperscript{12}Id. at 612, 615. Accord Anderson v. Ayling, 396 F.3d 265, 269 (3d Cir. 2005). See also Blum v. Yaretsky, 457 U.S. 991, 999-1000 (1982) (discussing standing under Article III of the United States Constitution, the Supreme Court stated, “It is axiomatic that the judicial power conferred by Art. III may not be exercised unless the plaintiff shows ‘that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant’”), citing Gladstone, Realtors v. Village of Bellwood, 441 U.S. 91, 99 (1979).
the plaintiff's injury. For example, a plaintiff may have standing to sue but may lose on the merits if an intervening event caused the injury or if the injury was not reasonably foreseeable. Conversely, one who suffers a derivative injury, such as a shareholder suing for loss in stock value, has suffered an injury that is too indirect to confer standing.

§ 27 Person

Section 1964(c) creates a private cause of action for any “person” who has suffered a compensable injury. The term “person” has been interpreted liberally to include natural persons, partnerships, joint ventures, corporations, state governmental units, and even foreign governments. However, a governmental entity may only assert a RICO claim for its own injuries. It may not sue as parens patriae on behalf of its citizens who have been injured. Qui

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13 Bridge, 128 S. Ct. at 2142; Trollinger, 370 F.3d at 612.
14 Trollinger, 370 F.3d at 615 (“From a substantive standpoint, a RICO plaintiff who can show a direct injury may still lose the case if the injury does not satisfy other traditional requirements of proximate cause—that the wrongful conduct be a substantial and foreseeable cause and that the connection be logical and not speculative”).
15 Id. at 612-13; see also Williams v. Mohawk Indus., Inc., 465 F.3d 1277, 1291-92 (11th Cir. 2006) (discussing “statutory standing” under RICO as a question of direct injury: “we must evaluate whether the plaintiff's injury is sufficiently direct to give plaintiffs standing to sue for Mohawk’s alleged RICO violations”).
16 See, e.g., Alcorn County v. U.S. Interstate Supplies, Inc., 731 F.2d 1160, 1169 (5th Cir. 1984) (permitting county to bring RICO action for alleged overpricing of office supplies sold to the county), abrogated on other grounds by United States v. Cooper, 135 F.3d 960 (5th Cir. 1998); County of Oakland v. City of Detroit, 866 F.2d 839, 847 (6th Cir. 1989) (permitting county to bring RICO action against city for overcharges for sewage services); Illinois Dep’t of Revenue v. Phillips, 771 F.2d 312, 317 (7th Cir. 1985) (permitting state tax agency to bring RICO action for alleged tax fraud); Republic of Philippines v. Marcos, 862 F.2d 1355, 1358 (9th Cir. 1988) (en banc) (permitting foreign government to assert RICO claim against former president and others for transferring assets out of country); see also City of New York v. Joseph L. Balkan, Inc., 656 F. Supp. 536, 542 (E.D.N.Y. 1987) (permitting city to bring RICO action for damage to integrity of sewer system as a result of bribery scheme).
17 See Abrams v. Seneci, 817 F.2d 1015, 1017 (2d Cir. 1987) (dismissing state parens patriae action brought under RICO); Dillon v. Combs, 895 F.2d 1175, 1177 (7th Cir. 1990)
tam actions (where the plaintiff purports to sue on behalf of the government and himself) may not be asserted under RICO. Also, unincorporated associations do not have RICO standing unless state or federal law permits them to hold an interest in property.

The Second Circuit has held that the United States government is not a “person” capable of seeking civil remedies under Section 1964(c). In Bonanno, the Second Circuit expressed concern that if the federal government were a person entitled to bring suit under Section 1964(c), it could also be subject to civil suits under the statute. The court noted that Section 7 of the Sherman Act, on which Section 1964(c) is modeled, does not authorize actions by the government. The court concluded that the structure of RICO suggests a remedial scheme whereby the United States may pursue criminal actions, while

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19 Compare Fleischhauer v. Feltner, 879 F.2d 1290, 1299 (6th Cir. 1989) (denying standing to unincorporated entity that did not have the capacity to hold either legal or beneficial title to property) with Jund v. Town of Hempstead, 941 F.2d 1271, 1282 (2d Cir. 1991) (recognizing standing of local political committees because state law permitted such committees to hold property).
21 Id. at 23.
23 Bonanno, 879 F.2d at 23.
private citizens may pursue civil actions for treble damages. The court observed that although the United States cannot sue under Section 1964(c), it can sue under Section 1964(b), which does not provide for treble damages.

As a general proposition, foreign governments are considered “persons” within the meaning of Section 1964(c) and thus have standing to bring RICO claims. In Attorney General of Canada v. RJ Reynolds Tobacco Holdings, Inc., the Canadian government brought a RICO claim against cigarette manufacturers seeking to recover costs, including lost tax revenue and increased law enforcement costs, incurred as a result of an alleged conspiracy to smuggle cigarettes into Canada in an effort to avoid taxes. As an initial matter, the court noted that as a foreign sovereign, the government of Canada had standing to bring a RICO claim. The court nevertheless dismissed the claim, insofar as it sought to prove injury as a result of lost revenue, because to assess those damages the court would have needed to pass on the validity and application of Canadian revenue laws, in violation of the common law “revenue rule.” The court also dismissed the claim, insofar as it sought to prove injury as a result of increased law enforcement costs, because such an

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24 Id. at 24.
25 Id. at 22. (See § 3, The Culpable “Person,” for a discussion of the extent to which governmental entities qualify as “persons” who may be sued under § 1964(c).)
26 See, e.g., Republic of Philippines v. Marcos, 862 F.2d 1355, 1358 (9th Cir. 1988) (holding that foreign government had standing to bring RICO claim to recover money fraudulently obtained by its former president).
27 103 F. Supp. 2d 134 (N.D.N.Y. 2000), aff’d 268 F.3d 103 (2d Cir. 2001).
28 Id. at 149-50.
29 Id. at 143-44.
injury does not state a cognizable RICO injury to commercial interests based on the principle that governmental entities “cannot recover for injuries to their general economy or their ability to carry out their functions.”

§ 28 Injury to Business or Property

Section 1964(c) provides a treble damage remedy for injury to “business or property.” Most courts have strictly construed this language to require a concrete financial loss to a proprietary interest. The injury also must be “ascertainable and definable,” such as when a plaintiff is deprived of its ability to use or transfer property. Listed below are examples of cases where the alleged injury was sufficient and insufficient. In general, courts will not

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30 Id. at 153-55, citing Town of West Hartford v. Operation Rescue, 915 F.2d 92, 103-04 (2d Cir. 1990).

31 See In re Taxable Mun. Bond Sec. Litig., 51 F.3d 518, 523 (5th Cir. 1995) (holding putative class members were without standing to bring a RICO action because they merely showed “lost opportunity,” and failed to show actual financial loss); Fleischhauer v. Feltner, 879 F.2d 1290, 1299-1300 (6th Cir. 1989) (limiting plaintiff investors’ recovery only to money they paid out as a result of racketeering activity); Imagineering, Inc. v. Kiewit Pac. Co., 976 F.2d 1303, 1310 (9th Cir. 1992) (dismissing RICO claim against prime contractors because the alleged facts did not establish “proof of concrete financial loss”); Grogan v. Platt, 835 F.2d 844, 848 (11th Cir. 1988).

32 See Isaak v. Trumbull Savings & Loan Co., 169 F.3d 390, 396-97 (6th Cir. 1999) (concluding that plaintiffs had standing to bring RICO action when camping resorts filed for bankruptcy, because “bust-out” scheme to defraud buyers was complete by the final fraudulent act of placing the property into bankruptcy).

33 See Brandenburg v. Seidel, 859 F.2d 1179, 1187 (4th Cir. 1988) (loss of interest income), overruled on other grounds by Quackenbush v. Allstate Ins. Co., 517 U.S. 706 (1996); Haroco, Inc. v. American Nat’l Bank & Trust Co., 747 F.2d 384, 398 (7th Cir. 1984) (excessive interest charges); Mendoza v. Zirkle Fruit Co., 301 F.3d 1163, 1168 n.4 (9th Cir. 2002) (workers alleging reduced wages from hiring illegal workers had a “legal entitlement to business relations unhampered by schemes prohibited by the RICO predicate statutes”); Miller v. Glen & Helen Aircraft, Inc., 777 F.2d 496, 498-99 (9th Cir. 1985) (depletion of settlement amount paid to plaintiff); Robbins v. Wilkie, 300 F.3d 1208, 1211 (10th Cir. 2002) (economic injury from interference with business and property damage), rev’d on other grounds, Wilkie v. Robbins, 127 S. Ct. 2588 (2007); Williams v. Mohawk Indus., Inc., 465 F.3d 1277, 1286-87 (11th Cir. 2006) (workers alleging reduced wages from hiring illegal workers sufficiently alleged injury to their “business interests”); see also Planned Parenthood v. American Coalition of Life Activists,
bother to determine whether or not there has been sufficient injury where a plaintiff fails to show that a predicate act has been committed.\footnote{35}

\section*{\textbf{§ 29 Injuries to Intangible Assets}}

In \textit{McNally v. United States},\footnote{36} the Supreme Court sharply curtailed the breadth of the federal mail fraud statute by reversing two mail fraud convictions arising from the payment of kickbacks to a state official. The Court

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\item See Oygard v. Town of Coventry, No. 98-7578, 1998 WL 852673, at *1 (2d Cir. Dec. 1, 1998) (unpublished opinion) (no standing where plaintiff failed to allege any “concrete financial loss” in property value from removal of radio tower from defendant’s property); First Nationwide Bank v. Gelt Funding Corp., 27 F.3d 763, 768 (2d Cir. 1994) (“risk of loss” is not injury ripe for RICO claim); In re Taxable Municipal Bond Sec. Litig., 51 F.3d 518, 522-23 (5th Cir. 1995) (farmer’s “lost opportunity” to obtain loan insufficient to constitute injury for RICO standing); Grantham & Mann, Inc. v. American Safety Prods., Inc., 831 F.2d 596, 605-06 (6th Cir. 1987) (plaintiff failed to show actual lost profits); Illinois ex rel. Ryan v. Brown, 227 F.3d 1042, 1045-46 (7th Cir. 2000) (concluding that taxpayers’ interests in recouping state monies allegedly lost as a result of complex bribery scheme involving state treasurer were too remote to support RICO standing where they suffered only in general way what all taxpayers suffer when state is victimized by dishonesty); Mira v. Nuclear Measurements Corp., 107 F.3d 466, 474 (7th Cir. 1997) (because plaintiffs failed to show economic loss, they were without standing to recover civil damages under RICO); Allum v. BankAmerica Corp., 156 F.3d 1235 (Table), 1998 WL 467021, at *2 (9th Cir. Aug. 3, 1998) (noting that because plaintiff was not deprived of his professional license when he was fired by a bank as a loan underwriter, there was no injury to business or property); Imagineering, Inc. v. Kiewit Pac. Co., 976 F.2d 1303, 1310-11 (9th Cir. 1992) (minority and women-owned subcontractors failed to show concrete financial loss stemming from prime contractors’ alleged scheme to evade set aside regulations); Peterson v. Shanks, 149 F.3d 1140, 1145 (10th Cir. 1998) (holding that inmate’s failure to allege a specific, actual injury resulting from the warden’s not enforcing prison food service contract was insufficient to state a RICO claim under New Mexico law); see also Strates Shows, Inc. v. Amusements of Am., Inc., 379 F. Supp. 2d 817, 826 (E.D.N.C. 2005) (“claim of injury based upon the failure to award a contract is based upon an ‘expectancy interest’ for which RICO does not grant standing”).
\item See, e.g., Doug Grant Inc. v. Greate Bay Casino Corp., 232 F.3d 173, 185 (3d Cir. 2000) (rejecting RICO claims by card-counting blackjack players against casinos that used “countermeasures” to thwart the players’ efforts to count cards because the casinos did not commit predicate acts by engaging in conduct expressly permitted by the Casino Control Commission); Semiconductor Energy Lab. Co. v. Samsung Electronics Co., Ltd., 204 F.3d 1368, 1380 (Fed. Cir. 2000) (concluding that defendant in a patent dispute failed to satisfy predicate act requirement of RICO where the “inequitable conduct before the PTO cannot qualify as an act of mail fraud or wire fraud for purposes of the predicate act requirement” because the Patent Office had not been defrauded of property).
\end{itemize}
held that the mail fraud statute protects traditional property rights, “but does not refer to the intangible right of the citizenry to good government.”37 In 1988, Congress voided the McNally “intangible rights” limitation by amending the mail fraud statute to provide that “the term ‘scheme or artifice to defraud’ includes a scheme or artifice to deprive another of the intangible right of honest services.”38

Although a scheme to deprive another of the “intangible right of honest services” now constitutes a criminal violation of the mail fraud statute, and often provides the basis to prosecute corrupt public officials, it is unclear what intangible injuries constitute “injury to business or property” to sustain a civil action for damages under Section 1964(c). Thus, plaintiffs have been allowed to bring RICO actions for acts of public corruption that resulted in pecuniary injury to them.39

37 Id. at 356.
38 18 U.S.C. § 1346. Since Congress ratified “honest service” mail fraud a three-way circuit split has developed in the criminal context regarding how broadly to interpret this intangible right. For a discussion of the split, see United States v. Sorich, 523 F.3d 702, 707-08 (7th Cir. 2008). See also Sorich v. United States, 129 S. Ct. 1308, 1311 (2009) (Scalia, J., dissenting from denial of certiorari) (“In light of the conflicts among the Circuits; the longstanding confusion over the scope of the statute; and the serious due process and federalism interests affected by the expansion of criminal liability that this case exemplifies. . . it seems to me quite irresponsible to let the current chaos prevail.”).
On the other hand, injuries to “expectancy interests” and “intangible property” interests do not confer RICO standing. For example, in *Price v. Pinnacle Brands, Inc.*, the Fifth Circuit stated that buyers of sports trading cards who had hoped to receive card packages containing valuable cards may have suffered injury to “expectancy interests” or to an “intangible property interest,” but that kind of injury is insufficient to confer RICO standing. The courts reasoned that although courts may use state law to establish the existence of a property interest, this does not mean that any injury for which a state law claim may be asserted is also sufficient for bringing a claim under RICO.

In *Cleveland v. United States*, the Supreme Court held that licenses fraudulently obtained from state regulators do not qualify as “property” under the mail fraud statute. In reaching this result, the Court reversed opinions by the First, Third, and Fifth Circuits that had held that licenses can qualify as property under the mail fraud statute. Although *Cleveland* was a criminal case that did not address standing for injury to business or property under Section 1964(c), in the wake of *Cleveland*, if a person loses a license as the result of a mail fraud scheme, it is unlikely that the loss of the license only

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40 138 F.3d 602 (5th Cir. 1998).
41 Id. at 607.
42 Id.
44 United States v. Bucuvalas, 970 F.2d 937, 945 (1st Cir. 1992).
46 United States v. Salvatore, 110 F.3d 1131, 1143 (5th Cir. 1997).
(without the loss of other money or property) will qualify as sufficient injury to business or property to confer standing to assert a civil RICO claim.

The Ninth Circuit has held that injuries to intangible property interests (such as harm to business reputation and lost customers) are not injuries to business or property under RICO. Other courts, however, have permitted business plaintiffs to recover for pecuniary injuries to intangible business assets.

§ 30 Personal Injuries

Courts have consistently held that personal injury and wrongful death actions cannot provide the basis for a RICO claim. Courts have applied the same analysis to bar RICO claims based on other non-proprietary injuries.
In *Diaz v. Gates*, the Ninth Circuit made a decisive change in its treatment of lost business or property as a result of personal injuries. Following review *en banc*, the Ninth Circuit held that a plaintiff’s loss of employment and employment opportunities due to false imprisonment was an injury to “business or property” within the meaning of RICO. The court rejected the notion that business or property interests harmed by a defendant’s acts must actually be the target of the predicate act, and remanded the case to determine if the plaintiff could satisfy the remaining aspects of his claim.

§ 31 Predominance of the Injury to Business or Property

A RICO action may be maintained even if the “injury to business or property” is not the predominant injury alleged. In *Northeast Women’s Center, Inc. v. McMonagle*, the Third Circuit affirmed a judgment against anti-abortion activists who entered an abortion clinic four times to picket the premises and harass employees. In *McMonagle*, the court found that tangible damage to

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50 *See, e.g.*, Zimmerman v. HBO Affiliate Group, 834 F.2d 1163, 1169 (3d Cir. 1987) (emotional distress not recoverable under RICO as a matter of law); Evans v. City of Chicago, 434 F.3d 916, 926 (7th Cir. 2006) (witness’s alleged false imprisonment, attorneys’ fees incurred defending criminal actions, and alleged loss of ability to pursue employment were personal injuries that did not constitute injury to business or property under RICO); Berg v. First State Ins. Co., 915 F.2d 460, 464 (9th Cir. 1990) (emotional distress not recoverable under RICO); *see also* Moore v. Eli Lilly & Co., 626 F. Supp. 365, 366-67 (D. Mass. 1986) (no recovery for diminution of decedent’s estate and loss of consortium). *Compare* Wooten v. Loshbough, 649 F. Supp. 531, 536 (N.D. Ind. 1986) (RICO claim could be maintained against defendant who prevented plaintiff from collecting judgment on personal injury claim), *aff’d*, 951 F.2d 768 (7th Cir. 1991).

51 420 F.3d 897 (9th Cir. 2005) (per curiam).

52 *Id.* at 901-02.

53 868 F.2d 1342 (3d Cir. 1989).
medical equipment during one of the incidents (for which defendants were assessed $887) was sufficient to establish injury to “business or property.”\textsuperscript{54} The court also held that defendants employed force, threats of force, fear, and violence in an attempt to deprive plaintiff of its property interest in running its business.\textsuperscript{55}

In contrast, the Second Circuit dismissed a RICO claim brought by a town against protesters who interfered with an abortion clinic, in part because the town’s damages, overtime pay to police officers, did not constitute injury to business or property.\textsuperscript{56}

\section*{§ 32 Causation: “By Reason Of”}

The plaintiff’s injury must be both factually and proximately caused by the defendant’s violation of Section 1962.\textsuperscript{57} While the inability to show “but for” causation is fatal to a RICO claim,\textsuperscript{58} factual causation is essential but not

\begin{itemize}
\item \textsuperscript{54} Id. at 1349.
\item \textsuperscript{55} Id. at 1350.
\item \textsuperscript{56} Town of West Hartford v. Operation Rescue, 915 F.2d 92, 103-04 (2d Cir. 1990), \textit{vacated in part}, 991 F.2d 1039 (2d Cir. 1993).
\item \textsuperscript{57} Holmes, 503 U.S. at 267-74.
\item \textsuperscript{58} See, e.g., McEvoy Travel Bureau, Inc. v. Heritage Travel, Inc., 904 F.2d 786, 793-94 (1st Cir. 1990) (plaintiffs lacked standing to bring RICO claim where fraudulent mailings were directed at third parties who were not deprived of money or property); Flair Int’l Corp. v. Heisler, 173 F.3d 844 (2d Cir. 1999) (unpublished opinion) (noting that because the only evidence of an alleged fraud - a personal meeting that did not involve communication by wire or mail - could not constitute a predicate act of mail or wire fraud, and because the meeting occurred after the period in which plaintiff suffered losses, there was no showing of “but-for” causation); Bastian v. Petren Res. Corp., 892 F.2d 680, 686 (7th Cir. 1990) (affirming dismissal of RICO claim where defendant was fraudulently induced to invest but did not allege “loss causation,” i.e., that the fraud caused plaintiff’s investment losses); see also Boczar v. Manatee Hosps. & Health Sys., Inc., 731 F. Supp. 1042, 1047 (M.D. Fla. 1990) (dismissing RICO claim where complaint did not allege facts demonstrating injury flowing from commission of predicate acts); Aeropulse, Inc. v. Armstrong & Brooks, Ltd., 740 F. Supp. 938, 943-44 (E.D.N.Y. 1990) (entering judgment for defendant where defendant fraudulently concealed excessively high
sufficient to state a RICO claim: the plaintiff also must establish legal or proximate causation.\(^59\)

In *Holmes v. Securities Investor Protection Corp.*,\(^60\) the Supreme Court applied a common law test to determine proximate cause. In *Holmes*, a fraudulent scheme injured a securities firm and its clients who purchased artificially inflated securities. The Securities Investor Protection Corp. ("SIPC") became a receiver and advanced money to protect the clients. Through subrogation, the SIPC then sued under RICO. But the SIPC was not suing on behalf of the customers that had paid too much for the securities; rather, it was seeking to sue on behalf of the customers who had been injured when the

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\(^{59}\) See *Bridge v. Phoenix Bond & Indem. Co.*, 128 S. Ct. 2131, 2141-42 (2008); *Platten v. HG Berm. Exempted Ltd.*, 437 F.3d 118, 132 (1st Cir. 2006) (no proximate cause where injury was caused by breach of contract, not by reliance on misrepresentations transmitted by mail or wire); *Camelio v. Am. Fed’n*, 137 F.3d 666, 670 (1st Cir. 1998) (no causation where there was insufficient connection between losses of union job and union membership on the one hand, and misappropriation of union funds by officials on the other); *Hecht v. Commerce Clearing House, Inc.*, 897 F.2d 21, 23 (2d Cir. 1990) ("factual causation (e.g., 'cause-in-fact' or 'but for' causation) is not sufficient"); *Steamfitters Local Union No. 420 Welfare Fund v. Philip Morris, Inc.*, 171 F.3d 912, 932-33 (3d Cir. 1999) (concluding that union health and welfare funds lack standing to sue tobacco firms for the costs of treating fund members’ smoking related illnesses because the causation chain between negative effects of smoking and tobacco firm actions is "too speculative and attenuated" to satisfy either RICO or antitrust standing); *Brandenburg v. Seidel*, 859 F.2d 1179, 1189 (4th Cir. 1988), *overruled on other grounds by Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706 (1996) (rejecting RICO claim where plaintiff barely established factual cause but failed to establish proximate cause); *Mendelovitz v. Vosicky*, 40 F.3d 182, 184 (7th Cir. 1994) (plaintiff must establish proximate cause, not merely cause-in-fact injury); *Association of Wash. Pub. Hosp. Districts v. Philip Morris, Inc.*, 241 F.3d 696, 702-03 (9th Cir. 2001) (holding that hospitals, as health care providers, did not have standing to assert RICO claim because the injuries were sustained by third-party smokers who were the direct victims in the best position to act to deter the wrongful conduct); *see also Browning v. Clinton*, 292 F.3d 235, 249 (D.C. Cir. 2002) (no proximate causation where plaintiff's failure to publish autobiography chronicling President Clinton's extramarital affairs was caused by the inability to find a publisher to buy the book rather than alleged predicate acts of threats and obstruction of justice).

firm failed and could not meet its obligations. The Supreme Court held that
the SIPC did not have standing to assert RICO claims. The Court concluded
that those who were directly injured — the securities firm and the clients —
were the ones to sue; the SIPC’s injury was too attenuated because it arose out
of the firm’s “intervening insolvency.” Creditors like the SIPC could recover
according to their priorities in bankruptcy.

In reaching this conclusion, the Court held that there must be “some
direct relation between the injury asserted and the injurious conduct alleged . . . [and] a plaintiff who complained of harm flowing merely . . . [to] a third person by the defendant’s acts was generally said to stand at too remote a
distance to recover.” The Court cautioned that its use of the term “direct”
stands for the entire common law proximate cause test.

Recognizing that the issue of proximate cause is not always cut and
dry, the Court identified three policy concerns that supported its focus on the
“directness” of the injury: (1) the less direct the injury, the more difficult it is to
ascertain the amount of damages flowing from the violation; (2) allowing
recovery for indirect injuries may needlessly force courts to apportion damages
to avoid multiple recoveries; and (3) those directly injured can generally be

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503 U.S. at 271.
52 Id.
53 Id. at 274 n.20.
54 Id. at 272 (stating that proximate cause is a flexible concept that does not lend itself to
“a black-letter rule that will dictate the result in every case”); Bridge, 128 S. Ct. at 2142 (same).
relied on to use RICO to deter harmful conduct, reducing the need to extend RICO recovery to those indirectly injured.65

In 2006, the Supreme Court in *Anza v. Ideal Steel Supply Corp.* applied the proximate cause test articulated in *Holmes* to a case between two business competitors.66 Ideal Steel accused its competitor of gaining market share at its expense by failing to pay New York sales taxes. Ideal alleged that the tax fraud allowed its competitor to charge lower prices, which in turn caused Ideal to lose business. The Second Circuit would have allowed the suit to proceed on the ground that Ideal was an intended “target” of the scheme, even though the State of New York, and not Ideal, was the direct victim.67 The Supreme Court reversed, holding that Ideal’s alleged injury was too indirect to establish proximate cause.68 The Court noted that “the central question it must ask is whether the alleged violation led directly to the plaintiff’s injuries.”69 If the answer is no, the plaintiff will not be able to establish proximate cause. In dissent, Justice Thomas argued that the Second Circuit had applied the correct test for proximate cause, and noted that the Supreme Court’s ruling would allow “a defendant to evade liability for harms that are not only foreseeable, but the intended consequences of the defendant’s unlawful behavior.”70

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65 Id. at 269.
67 373 F.3d 251, 260 (2d Cir. 2004).
68 547 U.S. at 456-61.
69 Id. at 461.
70 Id. at 470 (emphasis in original).
§ 33 The Question of Reliance

In Bridge v. Phoenix Bond & Indemnity Co., the Supreme Court addressed whether a plaintiff asserting a RICO claim predicated on mail fraud can satisfy the proximate cause requirement without establishing reliance on the defendant’s fraudulent misrepresentation. The Court resolved a long-running judicial debate by holding that such a plaintiff need not necessarily show that it relied on the defendant’s alleged misrepresentations.

In Bridge, a competitor sued another, alleging that its false statements to the county gave it an unfair advantage in auctions for tax liens. Even though the false statements were in affidavits submitted to the Cook County Treasurer’s Office, the county (unlike the State of New York in Anza) was not injured by the fraud. The competitor was the only party injured, and therefore was the party best positioned to bring a claim. The Court therefore affirmed the Seventh Circuit’s holding that “the direct victim may recover through RICO whether or not it is the direct recipient of the false statements.”

Applying the reasoning from Holmes, the Seventh Circuit noted that the proximate cause test involves a set of questions that may not be “algorithmically” applied. These questions include: “Is someone else a better enforcer? Does the presence of intermediate parties make it too hard to calculate damages—or create a risk that recovery by this plaintiff will come at

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72 Id. at 2142.
73 477 F.3d 928, 932 (7th Cir. 2007) (emphasis in original).
the expense of someone with a better claim? If so, then suit by the remotely injured person should not be allowed.74

Before the Supreme Court’s opinion in Bridge, there was disagreement among the courts concerning whether a civil RICO plaintiff asserting predicate acts of mail or wire fraud must show that the plaintiff detrimentally relied on the defendant’s fraudulent acts.75 The confusion arose in part because in a

74 477 F.3d at 930; see also Williams v. Mohawk Indus., Inc., 465 F.3d 1277, 1288-91 (11th Cir. 2006) (holding that employee plaintiffs could show proximate cause in civil RICO action against employer alleging depressed wages due to the illegal hiring of undocumented workers for the following reasons: there were no more directly injured parties who could file suit, the damages were ascertainable, and it was possible for the plaintiffs to prove that the hiring of illegal workers directly caused lower wages).

75 Compare Bank of China, New York Branch v. NBM, LLC, 359 F.3d 171, 178 (2d Cir. 2004) (“We therefore now hold that in order to prevail in a civil RICO action predicated on any type of fraud, including bank fraud, the plaintiff must establish ‘reasonable reliance’ on the defendants’ purported misrepresentations”); Metromedia Co. v. Fugazy, 983 F.2d 350, 368 (2d Cir. 1992) (requiring reliance in civil RICO action based on predicate act of mail fraud); American Chiropractic Ass’n, Inc. v. Trigon Healthcare, Inc., 367 F.3d 212, 235 (4th Cir. 2004) (rejecting RICO claim where disclosures defeated possibility of reasonable reliance); Summit Properties Inc. v. Hoechst Celanese Corp., 214 F.3d 556, 562 (5th Cir. 2000) (ruling that reliance requirement “is a commonsense liability limitation”); Central Distrribrs. of Beer, Inc. v. Conn, 5 F.3d 181, 184 (6th Cir. 1993) (requiring a showing of detrimental reliance in civil RICO action based on mail or wire fraud); Bacchus Indus., Inc. v. Arvin Indus., Inc., 939 F.2d 887, 892 (10th Cir. 1991); Sikes v. Teleline, Inc. USA, 281 F.3d 1350, 1360 (11th Cir. 2002) (holding that a plaintiff alleging a civil RICO claim based on predicate acts or mail or wire fraud must prove that “he was a target of the scheme to defraud and that he relied to his detriment on misrepresentations made in furtherance of that scheme”): with Systems Mgmt., Inc. v. Loiselle, 303 F.3d 100, 104 (1st Cir. 2002) (stating that “RICO bases its own brand of civil liability simply on the commission of specified criminal acts-here, criminal fraud-so long as they comprise a ‘pattern of racketeering activity’; and criminal fraud under the federal statute does not require ‘reliance’ by anyone: it is enough that the defendant sought to deceive, whether or not he succeeded.”); Tabas v. Tabas, 47 F.3d 1280, 1295 n.18 (3d Cir. 1995) (ruling victims of mail fraud scheme need not demonstrate reliance on the predicate mailings themselves); Brandenburg v. Seidel, 859 F.2d 1179, 1189 n. 10 (4th Cir. 1988) (stating that, while “it is not necessary to establish detrimental reliance by the victim in order to make out a violation of the federal mail fraud statute, . . . such reliance is necessary to establish injury to business or property ‘by reason of’ a predicate act of mail fraud within the meaning of § 1964(c)” overruled on other grounds by Quackenbush v. Allstate Ins. Co., 517 U.S. 706 (1996); United HealthCare Corp. v. American Trade Ins. Co., 88 F.3d 563, 571 n.5 (8th Cir. 1996) (rejecting the argument that civil RICO claim requires a showing of reliance on predicate acts of mail or wire fraud); Living Designs, Inc. v. E. I. DuPont de Nemours and Co., 431 F.3d 353, 363 (9th Cir. 2005) (declining “to announce a black-letter rule that reliance is the only way plaintiffs can establish causation in a civil RICO claim predicated on mail or wire fraud.”).
criminal RICO case, in which different standards apply, the government need not show that the intended victim was actually deceived or injured.

In *Bridge*, the Supreme Court resolved the issue and held that “a plaintiff asserting a RICO claim predicated on mail fraud need not show, either as an element of its claim or as a prerequisite to establishing proximate causation, that it relied on the defendant’s alleged misrepresentations.” According to the Court, a showing of “first-party reliance” is not necessary to ensure that there is a “sufficiently direct relationship between the defendant’s wrongful conduct and the plaintiff’s injury to satisfy the proximate-cause principles articulated in *Holmes* and *Anza*.”

In applying the “directness” test, the Court found that the respondents’ alleged injury — the loss of valuable tax liens — was the “direct result of petitioners’ fraud” and a “foreseeable and natural consequence” of petitioners’ illegal scheme. Furthermore, the Court noted that “no more immediate victim is better situated to sue” because “respondents and other losing bidders were the only parties injured by petitioners’ misrepresentations.”
The Court noted that proof of a plaintiff’s reliance on the defendant’s misrepresentations “may in some cases be sufficient to establish proximate cause . . . [however] there is no sound reason to conclude that such proof is always necessary.”82 According to the Court, “[a] contrary holding would ignore Holmes’ instruction that proximate cause is generally not amenable to bright-line rules.”83

Still, the Court did not hold that a plaintiff can prevail in a RICO action without showing that someone relied on the defendant’s misrepresentations.84 Indeed, the Court noted that a plaintiff generally will not be able to establish for the required “but-for” causation if no one relied on the misrepresentation.85 Furthermore, the complete lack of reliance also may prevent a plaintiff from establishing proximate cause. For instance, “if the county knew petitioners’ attestations were false but nonetheless permitted them to participate in the auction, then arguably the county’s actions would constitute an intervening cause breaking the chain of causation.”86

82 Id. (“By the same token, the absence of first-party reliance may in some cases tend to show that an injury was not sufficiently direct to satisfy § 1964(c)’s proximate-cause requirement, but it is not in and of itself dispositive”).

83 Id. at 2144-45.

84 Id. at 2144 (emphasis in original) (“Accordingly, it may well be that a RICO plaintiff alleging injury by reason of a pattern of mail fraud must establish at least third-party reliance in order to prove causation”).

85 Id.

86 Id.
Thus, although a plaintiff in limited circumstances may be able to establish that it was directly injured without having relied on the alleged fraud scheme, in most fraud-based RICO cases, a plaintiff that cannot show detrimental reliance on a fraudulent act will have difficulty demonstrating that it was directly injured “by reason of” that fraudulent act.

§ 34 Standing for Predicate Acts

In Holmes v. Securities Investor Protection Corp., the Supreme Court left unresolved whether a RICO plaintiff must independently meet the standing requirements of the underlying predicate acts. In Holmes, the Securities Investor Protection Corp. (“SIPC”) asserted violations of the securities laws and the mail and wire fraud statutes as the RICO predicate acts. The district court rejected the RICO claims because the SIPC was not a “purchaser or seller” of the securities, and therefore did not have standing to bring a RICO claim predicated on the violation of the securities laws. The Ninth Circuit reversed and remanded. It held that while Section 10(b) of the securities laws requires that a plaintiff be a purchaser or seller to bring suit, RICO imposes no such requirement limiting standing.

The Supreme Court reversed, but expressly declined to address the Section 10(b) standing issue. Instead, it based its holding on principles of

88 908 F.2d 1461, 1466 (9th Cir. 1990).
89 Holmes, 503 U.S. at 276.
proximate cause. In separate concurring opinions, Justice O’Connor (joined by Justices White and Stevens) and Justice Scalia indicated that they would have held that a party who brings a RICO action based on securities fraud need not meet Section 10(b)’s purchaser-seller requirement.

Justice O’Connor reasoned that the standing requirements of a predicate act should not be controlling in either criminal or civil RICO actions. For instance, she noted that the government can bring a criminal RICO action based on securities fraud without being a purchaser or seller. Justice O’Connor also pointed to Congress’ purpose of bringing “the pressure of ‘private attorneys general’ on a serious national problem for which public prosecutorial resources” are inadequate. Justice Scalia, on the other hand, advocated a test that would inquire into whether the plaintiff is within the “zone of interests” which the statute seeks to protect.

The Seventh Circuit for a time applied Justice Scalia’s “zone of interests” analysis to hold that a plaintiff cannot bring a RICO action predicated on mail fraud unless the plaintiff was the one who was deceived by the mail fraud scheme. In Israel Travel, a business sued its competitor for making

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90 See discussion infra in § 32 Causation: “By Reason Of.”
91 This conclusion largely has been rendered moot by the Private Securities Litigation Reform Act of 1995, which generally eliminates as predicate acts in civil RICO cases “conduct that would have been actionable as fraud in the purchase or sale of securities.” See § 7, Predicates Based on Securities Violations Now Generally Prohibited.
92 Holmes, 503 U.S. at 283.
93 Id. at 287-90.
94 Israel Travel Advisory Serv., Inc. v. Israel Identity Tours, Inc., 61 F.3d 1250, 1257-58 (7th Cir. 1995); see also Newton v. Tyson Foods, Inc., 207 F.3d 444, 447 (8th Cir. 2000)
slanderous statements to its customers. Although the court held that the plaintiff may have suffered enough injury to support a finding of proximate cause, the plaintiff was not within the zone of interests protected by the mail fraud statute because the plaintiff was not the one deceived by the alleged mail fraud scheme. The court instructed that where the customer, rather than the business rival is the one deceived, the business rival will be left to pursue its remedies under the common law or unfair competition statutes, not RICO.

Following the Supreme Court’s decision in Anza, the Seventh Circuit abandoned the “zone of interests” test, finding that it no longer serves an independent role.

§ 35 Specific Standing/Causation Issues and Applications

The sections that follow discuss how the courts have applied RICO standing rules in cases brought by various types of plaintiffs, such as whistle-blowers, shareholders, competitors, creditors, and HMO enrollees. In these circumstances, a primary issue often is whether the plaintiff’s injury is direct

(grounding cattle producers lacked standing to bring civil RICO claim against poultry producer where poultry producer’s alleged bribery of Department of Agriculture official to secure reduced regulations was not within “zone of interests” protected by underlying predicate act “since the alleged public corruption occurred within a statutory framework designed to protect consumers from harms attendant to the consumption of contaminated food” and cattle producers could not establish proximate causation where the injuries where “too attenuated and removed” from poultry producer’s alleged wrongs); but see Baisch v. Gallina, 346 F.3d 366, 373 (2d Cir. 2003) (recognizing that Israel Travel and Newton applied the “zone of interests” test independently of a proximate cause analysis, but noting that such an approach is inappropriate).

25 Phoenix Bond & Indemnity Co. v. Bridge, 477 F.3d 928, 933 (7th Cir. 2007)

26 Israel Travel, 61 F.3d at 1257-58; see also Byrne v. Nezhat, 261 F.3d 1075, 1112 (11th Cir. 2001) (plaintiff lacked standing where the mail fraud was perpetrated on another person).

27 Phoenix Bond & Indemnity Co. v. Bridge, 477 F.3d 928, 933 (7th Cir. 2007) (“Because a zone-of-interests approach so closely overlaps the law as developed in Holmes and Anza, it serves no independent role”).

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or derivative. Although courts generally have ruled that plaintiffs who have suffered derivative injuries do not have “standing” to bring a claim, at least one court has noted that this is not technically a “standing” issue if the plaintiff has in fact suffered a loss that can be redressed by a judgment for money damages.\(^{98}\) In any event, the question becomes whether the plaintiff has suffered an injury that is sufficiently direct to allow that plaintiff, as opposed to another more directly injured party, to bring the claim.

§ 36 Whistle Blowers

“Whistle-blowing” employees, whose employment allegedly was terminated because they reported their employer’s involvement in racketeering activity or because they refused to participate in the misconduct, lack standing to sue under RICO because their injury stems from the termination of their employment, rather than from the alleged predicate act of racketeering. In *Beck v. Prupis*,\(^{99}\) the Supreme Court held that a whistle-blower who was wrongfully terminated for reporting RICO misconduct and for refusing to participate in the conspiracy did not have standing to pursue a RICO claim

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\(^{98}\) Courtney v. Halleran, 485 F.3d 942, 950 (7th Cir. 2007) (noting that whether thrift depositors can bring a claim is not a question of “standing,” but rather “whether the depositors are entitled under RICO to bring a direct action . . . or if such a claim belongs exclusively to the FDIC at this point.”).

\(^{99}\) 529 U.S. 494 (2000) (“[R]espondents’ alleged overt act in furtherance of their conspiracy is not independently wrongful under any substantive provision of the statute. Injury caused by such an act is not, therefore, sufficient to give rise to a cause of action under § 1964(c)”).
because the overt act in furtherance of the conspiracy — the wrongful termination — was not a RICO predicate act.  

In *Pujol v. Shearson/Am. Express, Inc.*, the First Circuit affirmed the dismissal of a RICO action brought by an employee who was fired after he reported his employer’s fraudulent securities transactions. The court found that the plaintiff lacked standing because he “was not a defrauded client or investor and was not a target of any of the acts pleaded as ‘predicate acts’ in the RICO claim . . . [the plaintiff’s injuries] were not caused by the ‘predicate acts’ alleged in the complaint . . .” The First Circuit reaffirmed this holding in *Miranda v. Ponce Federal Bank*.

Frustrated whistle-blowing plaintiffs have tried to establish standing by recharacterizing the causal relationship between the racketeering activity and their injuries. In *Burdick v. American Express Co.*, the plaintiff argued that the defendants’ fraud, which led to the plaintiff’s termination, interfered with

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100 Id. at 505; see also Anderson v. Ayling, 396 F. 3d 265, 270 (3d Cir. 2005) (union members’ injury from alleged termination was too attenuated from alleged act of mail fraud).

101 829 F.2d 1201 (1st Cir. 1987).

102 Id. at 1205; accord Nodine v. Textron, Inc., 819 F.2d 347, 348-49 (1st Cir. 1987).

103 948 F.2d 41, 47 (1st Cir. 1991) (“a claim for wrongful discharge cannot be successfully pursued under RICO when the injury itself is not the result of a predicate act”); see also Hecht v. Commerce Clearing House, Inc., 897 F.2d 21, 24 (2d Cir. 1990) (“[T]he purpose of civil RICO liability does not extend to deterring any illegal act such as retaliatory firings for which there are state and common law remedies”); Kramer v. Bachan Aerospace Corp., 912 F.2d 151, 156 (6th Cir. 1990) (denying civil RICO standing to plaintiff whistleblower); O’Malley v. O’Neill, 887 F.2d 1557, 1562 (11th Cir. 1989) (“[W]e hold that there is no principled difference between a discharge for refusal to participate in the predicate acts alleged and a retaliatory discharge for reporting such illegal activity. In either case the injury does not flow directly from the predicate acts”).

104 865 F.2d 527 (2d Cir. 1989).
his ability to service his customers and to earn a livelihood.\textsuperscript{105} The Second Circuit affirmed dismissal of the complaint, holding that the harm “is simply too remotely related to the predicate acts of mail and securities fraud to support a claim under RICO.”\textsuperscript{106}

Whistle-blowing plaintiffs also have argued that they were fired not only for reporting the alleged wrongdoing, but for refusing to participate in the alleged misconduct. Courts have uniformly rejected this distinction.\textsuperscript{107}

\textbf{§ 37 “Loss Causation” and RICO Claims by Investors}

Some courts have dismissed RICO claims brought by investors who alleged they were fraudulently induced to invest because the investors did not demonstrate their investment loss was “caused” by the defendants’ RICO violations rather than market factors. In \textit{Bastian v. Petren Resources Corp.},\textsuperscript{108} investors in oil and gas partnerships brought RICO and other claims against the partnership promoters, contending the promoters issued misleading offering materials to induce the plaintiffs to invest. The Seventh Circuit

\begin{footnotesize}
\begin{enumerate}
\item[105] \textit{Id. at 529.}
\item[106] \textit{Id.; see also Hecht, 897 F.2d at 24 (loss of commissions by terminated whistle-blowing employee does not confer RICO standing).}
\item[107] \textit{See Cullom v. Hibernia Nat'l Bank, 859 F.2d 1211, 1216 (5th Cir. 1988) (court “fail[ed] to see a significant legal distinction” between reporting a RICO violation and refusing to participate); Elkins v. Chapman, 36 F. App'x 543, 544 (6th Cir. 2002) (unpublished opinion) (employee allegedly terminated for his knowledge of and refusal to participate in racketeering activities lacked standing to bring RICO claim because he “did not show that his termination, which was the only injury alleged, was an act of racketeering”); O'Malley v. O'Neill, 887 F.2d 1557, 1562 (11th Cir. 1989) (no legal distinction between discharge for refusal to participate in misconduct and a retaliatory discharge for reporting such misconduct); see also Hecht v. Commerce Clearing House, Inc., 713 F. Supp. 72, 75 (S.D.N.Y. 1989) (for purposes of standing, termination for refusal to participate in fraud is “legally indistinguishable” from termination for whistle blowing), aff'd, 897 F.2d 21 (2d Cir. 1990).}
\item[108] 892 F.2d 680 (7th Cir. 1990).
\end{enumerate}
\end{footnotesize}
rejected the RICO claim because the investors did not allege that “defendants’ violations of the RICO statute caused the investment loss that the plaintiffs seek by this lawsuit to recoup.” The panel reasoned that “[i]f the plaintiffs would have lost their shirts in the oil and gas business regardless of the defendants’ violations of RICO, they have incurred no loss for which RICO provides a remedy.”

In *First Nationwide Bank v. Gelt Funding Corp.*, the Second Circuit reaffirmed the need for a RICO plaintiff to show both “transactional” (but for) and “loss” (proximate) causation with particularity. The court affirmed the dismissal of a RICO complaint by a lender because the lender was unable to plead that the plaintiff’s misrepresentations, rather than intervening market forces, caused losses to the lender’s loan portfolio.

§ 38 Shareholders

The ability to bring a civil RICO action based on securities fraud has been severely curtailed by the Private Securities Litigation Reform Act of 1995. Before the passage of the Reform Act (see § 7, Predicates Based on Securities Violations Now Generally Prohibited), several courts of appeals held that shareholders lack standing to bring a RICO suit for diminution in the value of

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109 Id. at 686.
110 Id.; see also Cont’l Assurance Co. v. Geothermal Res. Int’l, Inc., No. 89 C 8858, 1991 WL 202378 (N.D. Ill. Sept. 30, 1991) (dismissing RICO claim based on misleading prospectus that induced investors to purchase stock because “[s]howing that others motivated you to make a bad investment is not the same thing as showing they caused the investment to go sour”).
111 27 F.3d 763 (2d Cir. 1994).
112 Id. at 772.
their stock because they cannot allege a direct personal injury distinct from that suffered by the corporation. These decisions were based on the common law principle that shareholders generally cannot assert on their own behalf claims that belong to the corporation. Shareholders also do not have standing to sue derivatively on behalf of corporations where the victim of the alleged RICO scheme was not the corporation, but a third party. However, shareholders have standing to sue for personal, non-derivative injuries.

113 See Willis v. Lipton, 947 F.2d 998, 1000 (1st Cir. 1991); Roeder v. Alpha Indus., Inc., 814 F.2d 22, 29 (1st Cir. 1987) (shareholder lacked standing to bring RICO action based on the payment of a bribe that injured corporation); Rand v. Anaconda-Ericsson, Inc., 794 F.2d 843, 849 (2d Cir. 1986) (shareholders in a bankrupt corporation lacked standing to bring a non-derivative RICO action against the corporation’s principal creditor because “[t]he legal injury, if any, was to the firm. Any decrease in value of plaintiffs’ shares merely reflects the decrease in the value of firm’); NCNB Nat’l Bank v. Tiller, 814 F.2d 931, 937 (4th Cir. 1987), overruled on other grounds sub nom., Busby v. Crown Supply, Inc., 896 F.2d 833, 840-41 (4th Cir. 1990); Whalen v. Carter, 954 F.2d 1087, 1091-92 (5th Cir. 1992); Warren v. Manufacturers Nat’l Bank, 759 F.2d 542, 544 (6th Cir. 1985); Sears v. Likens, 912 F.2d 889, 892 (7th Cir. 1990); Sparling v. Hoffman Constr. Co., 864 F.2d 635, 640 (9th Cir. 1988); Bivens Gardens Office Bldg. v. Barnett Banks of Florida, Inc., 140 F.3d 898, 906 (11th Cir. 1998) (stating that RICO standing does not arise just because a person is a shareholder or limited partner in a firm that was the target of a RICO violation; shareholder losses resulting from RICO activities against a company do not confer RICO standing).


115 See In re Am. Express Co. S’holder Litig., 39 F.3d 395, 400-01 (2d Cir. 1994) (affirming dismissal of derivative RICO claim stemming from allegation that officers of American Express had engaged in mail fraud and bribery to defame a rival and further American Express’s competitive interests; though American Express’s campaign was costly to the company, it was intended to benefit the company; therefore, its “injury” was not the “preconceived purpose” or the “specifically-intended consequence” of the alleged RICO scheme); Mendelovitz v. Vosicky, 40 F.3d 182, 187 (7th Cir. 1994) (corporation does not have standing to sue for damages allegedly accruing from actions of its directors and officers against third parties).

116 See, e.g., Maiz v. Virani, 253 F.3d 641, 655-56 (11th Cir. 2001) (investors and shareholders in a real estate venture had standing to assert RICO claims against organizers of the venture because the purpose of the defendants’ scheme was to target and harm the plaintiffs individually, rather than to damage the corporations); see also Adena, Inc. v. Cohn, 162 F. Supp. 2d 351, 358 (E.D. Pa. 2001) (minority shareholders of closely-held corporation had standing to pursue RICO claim where shareholders alleged that they suffered personal losses as a result of a fraudulent stock transfer agreement); BRS Assocs. v. Dansker, 246 B.R. 755, 769 (S.D.N.Y. 2000) (stating that while shareholders generally lack standing to sue for injuries to the corporation, the Second Circuit allows shareholder suits to proceed when the
§ 39 Competitors

Prior to *Anza*\(^{117}\) and *Bridge*\(^{118}\), courts disagreed as to whether competitors who are commercially disadvantaged by reason of the criminal operations of their competitors may sue under RICO.\(^{119}\)

For instance, the Second Circuit held repeatedly that a competitor who is the direct “target” of a RICO scheme may sue for injuries proximately caused, even if someone else was deceived by the alleged fraud.\(^{120}\) Conversely, the Seventh Circuit held that a business competitor harmed by alleged slanderous statements made to its customers did not have standing to assert a RICO claim based on mail fraud because such “derivative” injuries were not protected under the mail fraud statute.\(^{121}\)

compounding misrepresentations induced individual plaintiffs to “purchase over-valued securities”); *Grafman v. Century Broad. Corp.*, 727 F. Supp. 432, 435 (N.D. Ill. 1989) (shareholder had standing to bring RICO claim based on diminution of his voting power and loss of other rights based on racketeering activity directed at plaintiff); *Lochhead v. Alacano*, 697 F. Supp. 406, 413 (D. Utah 1988) (minority shareholder had standing to bring a RICO claim against corporate principals who fraudulently formed and executed a stock option plan because the alleged wrongdoing diluted plaintiff's proportionate interest in the corporation but not the overall value of the corporation).

\(^{117}\) 547 U.S. 451.

\(^{118}\) 128 S. Ct. 2131.

\(^{119}\) Commercial Cleaning Services, L.L.C. v. Colin Serv. Sys., Inc., 271 F.3d 374, 383-84 (2d Cir. 2001) (holding that competitor had standing to assert RICO claim where competitor alleged that lost profits were due to direct bidding with company that hired illegal immigrants in order to undercut its business rivals); *Mid Atl. Telecom, Inc. v. Long Distance Servs.*, Inc., 18 F.3d 260, 263-64 (4th Cir. 1994) (stating that a competitor might have standing where it is the direct target of the scheme and loses customers and revenues as a result of the scheme); *Phoenix Bond & Indemnity Co. v. Bridge*, 477 F.3d 928, 933 (7th Cir. 2007) (holding that losing bidder-competitors, and not the county, were the direct victims of mail fraud and therefore proper plaintiffs in RICO action); *cf. Israel Travel Advisory Serv., Inc. v. Israel Identity Tours, Inc.*, 61 F.3d 1250, 1258 (7th Cir. 1995).

\(^{120}\) *Ideal Steel Corp. v. Anza*, 373 F.3d 251, 261 (2d Cir. 2004); *Baisch v. Gallina*, 346 F.3d 366, 372 (2d Cir. 2003).

\(^{121}\) *Israel Travel*, 61 F.3d at 1258.
In *Ideal Steel Supply Corp. v. Anza*¹²² the plaintiff alleged that the defendant had filed fraudulent state sales tax returns and had avoided the payment of sales tax, thereby incurring lower costs and giving the defendant an unfair advantage over the plaintiff, its direct competitor. The district court dismissed the RICO complaint on the ground that the plaintiff lacked standing because its injuries were not proximately caused by the defendant’s alleged wire and mail fraud due to the fact that plaintiff did not rely on defendants’ misrepresentations.¹²³ The Second Circuit reversed and held that the plaintiff in that case had standing under the RICO statute. The Second Circuit reasoned that the defendants’ fraudulent conduct “was intended to and did give the defendant a competitive advantage over the plaintiff, [and] the complaint adequately pleads proximate cause . . . even where the scheme depended on fraudulent communications directed to and relied on by a third party rather than the plaintiff.”¹²⁴ The opinion contains an excellent summary of the decisions on this issue and specifically rejects the notion that the plaintiff’s own reliance upon the allegedly fraudulent statements is required to establish RICO standing.¹²⁵

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¹²² 373 F.3d 251 (2d Cir. 2004).
¹²³ 254 F. Supp. 2d 464, 468 (S.D.N.Y. 2003), vacated and remanded 373 F.3d 251 (2d Cir. 2004).
¹²⁴ 373 F.3d at 263.
¹²⁵ Id. at 262-63.
However, the Supreme Court reversed the Second Circuit’s decision in *Anza*, putting into question the viability of the “target theory” of causation.\footnote{126} The Court held that under *Holmes*, the competitive injury alleged in *Anza* was too indirect to establish proximate cause.\footnote{127} It reasoned that the direct victim of the alleged tax fraud scheme was the State of New York, which itself could sue to remedy the tax fraud and recover damages that would be more easy to ascertain than the lost profits alleged by the plaintiff, Ideal.\footnote{128} The Court found that Ideal’s alleged loss of business from the tax fraud scheme was too remote, given that Ideal might have lost business for reasons other than the alleged tax fraud scheme, and also given that the defendant “could have lowered its prices for any number of reasons unconnected to the asserted pattern of fraud.”\footnote{129}

With respect to the Second Circuit’s reliance on a “target theory” of causation, the Supreme Court stated “a RICO plaintiff cannot circumvent the proximate-cause requirement simply by claiming that the defendant’s aim was to increase market share at a competitor’s expense.”\footnote{130} Instead, “[w]hen a court evaluates a RICO claim for proximate causation, the central question it must ask is whether the alleged violation led directly to the plaintiff’s injuries.”\footnote{131} Because the Court held that Ideal failed to allege a sufficiently direct injury to

\footnotesize{\begin{itemize}
\item \footnote{126} Anza v. Ideal Steel Supply Corp., 547 U.S. 451, 456-57 (2006).
\item \footnote{127} Id.
\item \footnote{128} Id. at 458.
\item \footnote{129} Id.
\item \footnote{130} Id. at 460-61.
\item \footnote{131} Id.
\end{itemize}}
establish proximate cause, it did not address whether reliance is required to establish proximate cause in RICO cases predicated on mail or wire fraud.\textsuperscript{132}

As discussed in § 33, the Supreme Court resolved this issue in \textit{Bridge}, and held that a plaintiff asserting a RICO claim predicated on mail fraud need not establish that it relied on defendant’s alleged misrepresentations.\textsuperscript{133} According to the Court, first-party reliance is not necessary “to ensure that there is a sufficiently direct relationship between the defendant’s wrongful conduct and the plaintiff’s injury to satisfy the proximate-cause principles articulated in \textit{Holmes} and \textit{Anza}.”\textsuperscript{134}

The Court found that the plaintiff-competitor sufficiently stated a RICO claim predicated on mail fraud based on a number of factors: (1) the plaintiff-competitor’s alleged injury (the loss of valuable liens) was a “direct” result of the defendant-competitor’s fraud; (2) the injury was a “foreseeable and natural consequence” of defendant’s fraudulent scheme; (3) there were no “independent factors that account for [defendant’s] injury”; (4) there was no “risk of duplicative recoveries”; and (5) “no more immediate victim is better situated to sue.”\textsuperscript{135}

Still, the Court noted that the absence of first-party reliance “may in some cases tend to show that an injury was not sufficiently direct to satisfy §

\begin{itemize}
\item \textsuperscript{132} \textit{Id.}
\item \textsuperscript{133} 128 S. Ct. at 2134.
\item \textsuperscript{134} \textit{Id.} at 2144.
\item \textsuperscript{135} \textit{Id.}
\end{itemize}
1964(c)’s proximate-cause requirement.” Other courts have recognized that while a competitor’s loss of customers may be a compensable injury to business or property, if the RICO claim is based on a fraud scheme that deceived customers rather than the competitor, the competitor may have difficulty establishing proximate cause.\textsuperscript{137}

\textbf{§ 40 Creditors}

Some courts, including the United States Supreme Court, have held that third parties, such as creditors, may not bring individual RICO claims against corporate officers and directors for acts that dissipated the corporation’s assets.\textsuperscript{138} However, in \textit{Bankers Trust Co. v. Rhoades}, the Second Circuit held that a creditor of a corporation may assert RICO claims against its officers

\begin{itemize}
\item \textsuperscript{136} \textit{Id}.
\item \textsuperscript{137} Israel Travel, 61 F.3d at 1257-58; \textit{but see} Procter & Gamble Co. v. Amway Corp., 242 F.3d 539, 565 (5th Cir. 2001) (household products manufacturer had standing to assert RICO claims based on allegations that a competitor spread rumors through fraudulent mailings to customers linking the manufacturer to Satanism in order to lure away the customers; proximate causation could be established if the customers relied upon the rumors in refusing to buy the plaintiff’s products); \textit{see also} Johnson Elec. N. Am. Inc. v. Mabuchi Motor Am. Corp., 98 F. Supp. 2d 480, 488 (S.D.N.Y. 2000) (charges that a patent owner suffered financial injuries as a result of a competitor’s fraudulent mailings to customers were sufficient to establish standing where the plaintiff alleged loss of potential sales as a result of the alleged RICO violations).
\item \textsuperscript{138} \textit{See}, e.g., Holmes v. Securities Investor Protection Corp., 503 U.S. 258, 274 (1992) (party subrogated to rights of creditor-customers who never purchased manipulated stocks is not “proper plaintiff[]” in RICO action); In re Interpictures Inc. 217 F.3d 74, 76 (2d Cir. 2000) (per curiam) (holding that “[a]ppellant’s status as a creditor to the debtor does not give him either standing to prosecute or a possessory interest in” derivative RICO claims against former principles of the corporation; claims belonged to debtor’s estate); Wooten v. Loshbough, 951 F.2d 768, 771 (7th Cir. 1991) (corporate creditor cannot sue under RICO where only injury caused is general depletion of corporation’s assets); \textit{see also} Mid-State Fertilizer Co. v. Exchange Nat’l Bank, 877 F.2d 1333, 1336 (7th Cir. 1989) (holding that guarantors, like creditors, have no standing to recover directly for injuries suffered by the corporate borrower); Estate of Spirtos v. One San Bernardino County Superior Court, 443 F.3d 1172, 1176 (9th Cir. 2006) (creditor of estate in bankruptcy proceedings did not have standing to bring RICO claim on behalf of estate).
\end{itemize}
based upon dissipation of assets, a cause of action that ordinarily could only be asserted by the debtor corporation. 139  *Rhoades* has been distinguished on the ground that the misrepresentations at issue were made directly to the creditor in order to procure forgiveness of additional debt in a Chapter 11 proceeding. 140  Similarly, in *L’Europeenne de Banque v. La Republica de Venezuela*, 141 which relied on *Rhoades*, creditors claimed that an officer’s fraud induced them to forego judicial remedies.

In 1994, the Second Circuit again recognized the standing of a creditor to assert a RICO claim in *GICC Capital Corp. v. Tech. Fin. Group, Inc.* 142  In *GICC*, the defendant corporation settled unrelated litigation with GICC by issuing GICC a $500,000 promissory note.  According to the complaint, at the time the note was issued, the defendants were engaged in a scheme of looting the corporation’s assets, making it foreseeable that the corporation would not be able to repay the note.  In reversing the district court, the Second Circuit found that the timing of the note (issued just after the alleged looting began), the size

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139 Bankers Trust Co. v. Rhoades, 859 F.2d 1096, 1101 (2d Cir. 1988). See also BRS Assocs., L.P. v. Dansker, 246 B.R. 755, 769 (S.D.N.Y. 2000) (citing Bankers Trust for principle that creditor may sue officers of debtor corporation for injuries directly suffered; and holding that creditors and investors in a bankrupt limited partnership had standing only with regard to conduct “which led directly to fraudulently induced investments in and loans to” the partnership).


142 30 F.3d 289 (2d Cir. 1994).
of the note, and the “rapacious nature of the alleged looting” fairly alleged a
direct and foreseeable injury that conferred RICO standing on the creditor.143

§ 41 Limited Partners

Courts have consistently held that limited partners have no standing to
 sue for injuries to the limited partnership.144 Courts have fashioned two narrow
exceptions to the general rule. First, a limited partner may sue to recover for
direct personal distributions it would have received.145 The second exception
applies when the partnership has been dissolved and state law permits the
limited partner to sue directly for the loss of a distribution it otherwise would
have received.146

§ 42 Bankruptcy Trustees

In accordance with traditional principles of bankruptcy law, courts have
held that a bankruptcy trustee may assert RICO claims on behalf of a debtor
corporation, but not on behalf of creditors.147 A bankruptcy trustee may allow

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143 Id. at 292-93.
144 See Lincoln Nat’l Life Ins. Co. v. Silver, 966 F. Supp. 587, 619 (N.D. Ill. 1995), aff’d, 114 F.3d 1191 (7th Cir. 1997); Attick v. Valeria Assocs., L.P., 835 F. Supp. 103, 110 (S.D.N.Y. 1992). Cf. Efron v. Embassy Suites (Puerto Rico), Inc., 223 F.3d 12, 17 (1st Cir. 2000), cert. denied, 121 S. Ct. 1228, 149 L. Ed. 2d 138 (2001) (dismissing on other grounds, but noting that to state a cognizable RICO claim, a limited partner, alleging that several of his partners in a hotel project caused the project to experience financial problems so as to extract money from the partner and devalue his partnership interest, had to show that the misrepresentations caused his personal losses).
145 See Lincoln Nat’l, 966 F. Supp. at 619 (permitting suit for direct injury, but not for indirect injury to partnership).
146 Gagan v. Am. Cablevision, Inc., 77 F.3d 951, 960 (7th Cir. 1996). Cf. Whalen v. Carter, 954 F.2d 1087, 1093 (5th Cir. 1992) (stating that the partnership itself is usually the proper plaintiff, but recognizing an exception under Louisiana law: When injury to partnership is caused by a partner, the disaffected partners can sue the partner that caused the injury).
147 Detrick v. Panalpina, Inc., 108 F.3d 529, 535-36 (4th Cir. 1997) (holding that the trustee, not the debtor, had standing to pursue RICO claims); see also In re Ahead By A
the debtor to pursue a RICO claim, but only if the trustee effectively abandons its interest in the claim.\(^{148}\)

**§ 43 Insurance Policy Holders**

Insureds who have been personally defrauded into buying insurance from an insolvent insurer have been allowed to sue under Section 1962(c).\(^{149}\)

**§ 44 Utility Customers**

Generally, utility customers may not sue the utility under RICO for money that the customers lost due to fraudulent utility rates. If the customer is challenging the reasonableness of the utility rate, then the “filed rate” doctrine frequently precludes standing.\(^{150}\) By operation of the filed rate doctrine, the customer suffers no cognizable injury sufficient to support a RICO action because the customer has no legal right to be charged a lower utility

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\(^{148}\) Turner v. Cook, 362 F.3d 1219, 1225-26 (9th Cir. 2004) (holding that a letter from the trustee failed to effectuate an actual abandonment of the trustee’s interest in the debtor’s cause of action).

\(^{149}\) See Ocean Energy II, Inc. v. Alexander & Alexander, Inc., 868 F.2d 740, 747-48 (5th Cir. 1989) (reversing district court’s grant of summary judgment and holding that genuine issues of material fact existed as to whether insured established factual causation and legal causation sufficient to have standing to bring RICO claim; insured alleged injury as a result of fraud by insurance agent in selling insurance programs, which resulted in insurer being declared insolvent and unable to cover insured’s claims).

\(^{150}\) See Taffet v. Southern Co., 967 F.2d 1483, 1488 (11th Cir. 1992); see also Black Radio Network, Inc. v. Nynex Corp., 44 F. Supp. 2d 565, 573 (S.D.N.Y. 1999) (stating that the filed rate doctrine protects the utility by barring suits that allege that a regulated utility’s rates are unreasonable, and protects customers from discrimination by precluding a utility from charging customers a rate other than the filed rate).
rate than what has been defined by the legislative scheme. However, when the customer attempts to enforce rather than attack a filed rate, courts may allow the customer to sue the utility, recognizing that utilities are not exempt from RICO claims.

§ 45 Union Members

Courts have dismissed RICO claims brought by individual union members alleging misconduct by union leaders on the grounds that any injury resulting from such misconduct is suffered by the union, not by the individual members bringing suit. However, union members who are directly injured by reason of the alleged RICO scheme may have standing to pursue the claim.

§ 46 Thrift Depositors

Because damages to a failed savings and loan are assets of the institution, thrift depositors generally may not assert RICO claims for such damages.

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151 Taffet, 967 F.2d at 1488-90.
153 See Bass v. Campagnone, 838 F.2d 10, 12-13 (1st Cir. 1988); Adams-Lundy v. Ass’n of Prof'l Flight Attendants, 844 F.2d 245, 250 (5th Cir. 1988).
154 Trollinger v. Tyson Foods, Inc., 370 F.3d 602, 615-18 (6th Cir. 2004) (adding that union members had standing to sue for depressed wages caused by hiring of illegal aliens because they are in a better position than the union to sue).
155 See In re Sunrise Sec. Litig., 916 F.2d 874, 878-87 (3d Cir. 1990) (depositors lacked standing to sue officers and directors of savings and loan association because the depositors’ losses were “incidental to and dependent” on the injury to the savings and loan); Courtney v. Halleran, 485 F.3d 942, 950 (7th Cir. 2007) (denying claim by depositors, but noting that whether depositors can bring a claim is not a question of “standing,” but rather “whether the depositors are entitled under RICO to bring a direct action . . . or if such a claim belongs exclusively to the FDIC at this point.”); Hamid v. Price Waterhouse, 51 F.3d 1411, 1419-21 (9th Cir. 1995) (applying In re Sunrise Sec. Litig.)
§ 47 Taxpayers and Tax Collectors

Individual taxpayers generally do not have standing to bring suit under RICO to recover tax revenues lost as a result of defendant’s racketeering conduct because taxpayers are not the real party in interest.\(^{156}\)

On the other hand, government entities that lose tax revenue because of a RICO scheme may have standing to recover those losses.\(^{157}\)

§ 48 Trust Beneficiaries

Beneficiaries of trusts and estates generally do not have standing to assert a RICO claim for diminution of value of the estate or corpus because the injury is to the trust or the estate, which must be remedied by the trustee or other fiduciary.\(^{158}\) However, a trust beneficiary may have standing to sue where the trustee or other fiduciary is alleged to be involved with the underlying RICO violation.\(^{159}\)

\(^{156}\) See Illinois ex rel. Ryan v. Brown, 227 F.3d 1042, 1045-46 (7th Cir. 2000) (taxpayers denied standing to sue for injuries suffered by the State of Illinois as a result of allegedly corrupt loans made to a public official in exchange for deposits of state monies into non-interest bearing accounts; plaintiffs “suffered only in the general way what all taxpayers suffer when the state is victimized by dishonesty”), citing Carter v. Berger, 777 F.2d 1173 (7th Cir. 1985); see also Robinson v. Pac. Ret. Servs., Inc., No. Civ. 04-3080-AA, 2005 WL 139075, at *2 (D. Or. Jan. 21, 2005) (loss of tax revenue to county from alleged undervaluing of real estate did not cause concrete financial loss to pro se plaintiff); but see Huang v. Sentinel Gov’t Sec., 709 F. Supp. 1290, 1297 (S.D.N.Y. 1989) (distinguishing Carter and finding that where investors in limited partnership suffered direct tax losses, and IRS was merely the instrumentality through which the fraud was accomplished, investors had standing to sue as the real parties in interest).


\(^{159}\) See Turkish v. Kasenetz, 964 F. Supp. 689, 696-97 (E.D.N.Y. 1997) (beneficiary of trust “entitled to sue as beneficiary . . . because she alleges the trustees are guilty of wrongdoing and therefore it would be futile to demand they bring an action on the trust’s behalf”).
§ 49  HMO Enrollees

In *Maio v. Aetna, Inc.*, the Third Circuit rejected efforts by patients to sue their HMO under RICO by asserting that the HMO engaged in a fraudulent scheme by failing to deliver the promised “health care product,” failing to disclose physician incentives, and causing patients to overpay for inferior health care. The court indicated that “the property at issue is not real or personal property; rather, it is a contract for health insurance,” and RICO injury to those property rights cannot be established absent proof that the HMO failed to perform under the parties’ contractual agreement. The court found that the alleged injury to business or property was too abstract because it was “predicated exclusively on the possibility that future events might occur.” To establish injury, the patients would have to show that they paid for and actually failed to receive the promised medical care.

But, in a similar case, the Southern District of Florida held that patients had standing to sue their managed care insurance companies (“MCOs”) for alleged misrepresentations and omissions that allegedly caused them to overpay for coverage. The patients asserted that they were “fraudulently induced to subscribe to managed care coverage that had a market value less

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160 221 F.3d 472, 495 (3d Cir. 2000).
161 *Id.* at 489-90.
162 *Id.* at 495 (emphasis in original).
163 *Id.* at 490 (indicating that an HMO’s failure to perform “would be evidenced by . . . receipt of inadequate, inferior delayed care, personal injuries resulting therefrom, or . . . denial of benefits due under the insurance arrangement”).
164 *In re Managed Care Litig.*, 150 F. Supp. 2d 1330, 1339 (S.D. Fla. 2001).
than what [they] bargained for, namely, a policy which would not be subject to Defendants’ undisclosed fiscal policies.”\(^{165}\) Those policies included incentives allegedly paid to doctors to limit healthcare costs.\(^{166}\) Finding that the \textit{Maio} court had drawn “a dichotomy between property interests and contracts and concluded that the subscriber plaintiffs in that case possessed only contractual rights rather than a property interest in their insurance coverage,”\(^{167}\) the court determined that the approach in \textit{Maio} was “overly restrictive.”\(^{168}\) In a later decision in the same case, the court dismissed RICO claims by HMO enrollees from California, Florida, New Jersey, and Virginia under the McCarran-Ferguson Act because, unlike Nevada, those states do not provide a private right of action to victims of insurance fraud.\(^{169}\) (See § 82 dealing with statutory preemption of RICO claims.)

\section*{§ 50 Tobacco Litigation}

RICO claims have been asserted by health insurers, hospitals, HMOs, and health care trust funds in suits seeking to recover from tobacco manufacturers the increased healthcare costs due to the health risks posed by tobacco consumption. Plaintiffs in these suits generally have been unable to establish proximate cause because their injuries have been deemed to be too remote from the individuals who were actually injured by the health risks

\footnotesize{\(^{165}\) \textit{Id.} at 1338.  
\(^{166}\) \textit{Id.}  
\(^{167}\) \textit{Id.}  
\(^{168}\) \textit{Id.}  
\(^{169}\) In re Managed Care Litig., 185 F. Supp. 2d 1310, 1320-21 (S.D. Fla. 2002).}
posed by tobacco consumption. Additionally, tobacco consumers generally lack standing to pursue RICO claims because they have not been injured in their business or property.

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170 See Allegheny Gen. Hosp. v. Philip Morris, Inc. 228 F.3d 429, 444 (3d Cir. 2000) (hospital lacked standing); Texas Carpenters Health Benefit Fund v. Philip Morris, Inc., 199 F.3d 788, 789-90 (5th Cir. 2000) (labor union health funds lacked standing); Int’l Broth. of Teamsters, Local 734 Health and Welfare Trust Fund v. Philip Morris, Inc., 196 F.3d 818, 825-26 (7th Cir. 1999) (same, noting that the “injury for which the plaintiffs seek compensation is remote indeed, the chain of causation long, the risk of double recovery palpable because smokers can file their own RICO suits, and the damages wickedly hard to calculate”); Lyons v. Philip Morris Inc., 225 F.3d 909, 914-15 (8th Cir. 2000) (trustees of multi-employer health plans lacked standing); Ass’n of Wash. Public Hosp. Dists. v. Philip Morris, Inc., 241 F.3d 696, 702-03 (9th Cir. 2001) (hospitals lacked standing to bring RICO claim because alleged injuries incurred in treating patients were derivative and could be vindicated directly by the injured smokers); United Food and Comm. Workers Unions, Employers Health and Welfare Fund v. Philip Morris, Inc., 223 F.3d 1271, 1274 (11th Cir. 2000) (labor union health funds lacked standing); but see New Jersey Carpenters Health Fund v. Philip Morris, Inc., 17 F. Supp. 2d 324, 336-39 (D.N.J. 1998) (although denying multiple-employer health and welfare funds standing to assert RICO claims where alleged fraud was aimed at fund participants, holding that the funds could recover from tobacco companies for fraud directed at the funds).

171 See, e.g., Hughes v. Tobacco Inst., Inc., 278 F.3d 417, 422 (5th Cir. 2001).
VI. SECTION 1962(a): INVESTMENT OF RACKETEERING INCOME

§ 51 Investment of Racketeering Income

Section 1962(a) prohibits any person who has received income from racketeering “to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.”¹ In other words, Section 1962(a) prohibits any person from using or investing income that is derived from a pattern of racketeering activity in any interstate enterprise.

Because Section 1962(a) deals with the investment in, rather than operation of, an enterprise, most courts have ruled that the “person/enterprise” distinction required under Section 1962(c) does not apply to cases under Section 1962(a).²

Generally, where a plaintiff can trace its injuries to the investment of racketeering proceeds, it may successfully plead a Section 1962(a) claim. For example, Section 1962(a) has been invoked by a target company to charge that an acquiring firm financed its stock purchases with income derived from prior acts of securities fraud.³ Section 1962(a) has also been asserted against an enterprise that invested fraudulently obtained funds in itself.⁴ A lender stated

² See related discussion in § 21 and § 25.
⁴ Cook v. Easy Money of Ky., Inc., 196 F. Supp. 2d 508, 514 (W.D. Ky. 2001) (holding that plaintiffs’ allegations that defendants financed fraudulent check-cashing business through
a claim under Section 1962(a) when it alleged that the defendants fraudulently obtained loans that they used to invest in their various real estate enterprises as well.5 Similarly, a client successfully stated a Section 1962(a) claim against an attorney who used misappropriated client funds to take control of the client’s real property.6

Although the foregoing examples might suggest that Section 1962(a) claims are easily won, in reality it is difficult to succeed with a Section 1962(a) claim. As discussed below in § 52, successful Section 1962(a) claims are rare because plaintiffs usually cannot establish an injury that is directly traceable to the investment of racketeering income, as opposed to the predicate acts that form the basis of a Section 1962(c) claim.

§ 52 Standing Under Section 1962(a)

Civil RICO claims under Section 1962(a) present particular standing issues. To establish standing to assert a Section 1962(a) claim, most courts have concluded that a plaintiff must demonstrate injury occurring as a direct result of the defendant’s investment of racketeering income, rather than injury caused by the commission of the alleged predicate acts from which the income was derived.7 The rationale underlying the majority rule is that Section 1962(a)

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6 Crowe v. Henry, 43 F.3d 198, 205 (5th Cir. 1995).
7 Ouknine v. MacFarlane, 897 F.2d 75, 83 (2d Cir. 1990); Glessner v. Kenny, 952 F.2d 702, 708-09 (3d Cir. 1991); Rose v. Bartle, 871 F.2d 331, 357-58 (3d Cir. 1989); Abraham v.
is intended to prevent the investment of racketeering income (through money laundering and similar activities) into legitimate businesses.⁸ Although the Supreme Court has yet to resolve this issue definitively, it did note in *Beck v. Prupis⁹* that most courts have adopted the “investment injury” rule and that “arguably a plaintiff suing for a violation of § 1962(d) based on an agreement to violate § 1962(a) is required to allege injury from the ‘use or invest[ment]’ of illicit proceeds.”¹⁰

While the “investment injury” rule is the majority rule and the *Beck* ruling cited it with approval, not all circuits have adopted it. The only circuit that has expressly rejected it is the Fourth Circuit, which continues to apply the “broadly drafted” language of Section 1962(a) to hold that a plaintiff need not allege injury from the use or investment of racketeering proceeds.¹¹

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⁸ Brittingham v. Mobil Corp., 943 F.2d 297, 303 (3d Cir. 1991). See § 55 below for additional discussion of standing under Sections 1962(a) and (b).


¹⁰ *Id.* at 506 n.9. But see Titan Int’l, Inc. v. Becker, 189 F. Supp. 2d 817, 829 (C.D. Ill. 2001) (holding that because plaintiffs alleged existence of conspiracy under § 1962(d), they needed only to allege agreement to violate § 1962(a), not injury suffered as a result of investment of racketeering income).

Vicom, Inc. v. Harbridge Merchant Services, Inc., 12 the Seventh Circuit noted the majority rule but did not expressly adopt it, having affirmed the dismissal of a RICO action for failure to plead a pattern.

District courts within circuits that have not resolved this issue have reached differing conclusions as well. 13 Most district courts have held that a plaintiff must show injury from the use or investment of racketeering income. 14 However, a minority, relying upon RICO’s broad remedial purpose, have allowed Section 1962(a) actions based upon injury from predicate acts. 15

In jurisdictions that do apply the “investment injury” rule, some plaintiffs have had success bringing Section 1962(a) claims. For example, in Ideal Steel

12 20 F.3d 771, 779 n.6 (7th Cir. 1994).

13 See Grider v. Tex. Oil & Gas Corp., 868 F.2d 1147, 1149-50 (10th Cir. 1989) (citing majority and minority opinions); Early v. K-Tel Int’l, Inc., No. 97 C 2318, 1999 WL 181994, at *5-6 (N.D. Ill. Mar. 24, 1999) (holding that allegations of reinvestment of racketeering income are not sufficient to state a claim under § 1962(a), but noting that some district courts within the Seventh Circuit have found that such allegations were sufficient to state a claim).


Supply Corp. v. Anza, the Second Circuit concluded that the plaintiff successfully stated a Section 1962(a) claim. In that case, the defendant refused to charge sales tax on sales in its retail business and used the profits from its illegal activities to fund the opening of a new outlet that directly undercut the plaintiff’s business. There, the Second Circuit concluded that the plaintiff stated a Section 1962(a) claim because the investment of racketeering income in the outlet was the direct cause of the plaintiff’s injuries.

Generally, however, the “investment injury” rule raises a high bar for plaintiffs seeking to assert Section 1962(a) claims. Most courts have held that the mere reinvestment of racketeering income that permits an entity to commit more predicate acts does not create injury from the use or investment of racketeering income under Section 1962(a). In Vemco, Inc. v. Camardella, the Sixth Circuit distinguished the situation where racketeering income is invested into an innocent enterprise that harms others (which may support a Section 1962(a) claim) from one where the wrongdoer merely reinvests its racketeering proceeds so that it can continue committing predicate acts (which cannot support a Section 1962(a) claim). As the Third Circuit noted in

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17 Id. at 254-55.
18 Id. at 264.
19 See, e.g., Brittingham v. Mobil Corp., 943 F.2d 297, 303-04 (3d Cir. 1991); Vemco, Inc. v. Camardella, 23 F.3d 129, 132-33 (6th Cir. 1994); Wagh v. Metris Direct, Inc., 363 F.3d 821, 828-29 (9th Cir. 2004), overruled on other grounds by Odom v. Microsoft Corp., 486 F.3d 541, 551 (9th Cir. 2007).
20 23 F.3d 129 (6th Cir. 1994).
21 Id. at 132-33.
Brittingham v. Mobil Corp., “If [reinvestment] were to suffice, the use-or-investment injury requirement would be almost completely eviscerated when the alleged pattern of racketeering is committed on behalf of a corporation. . . . Over the long term, corporations generally reinvest their profits, regardless of the source.”

The principal criticism of the “investment injury” rule is that it renders Section 1962(a) unavailable to most putative RICO plaintiffs. However, the Tenth Circuit has noted that plaintiffs who are victimized by the infiltration of legitimate businesses would have standing under Section 1962(c), and in any event, courts must defer to the clear statutory language. Another court attributed the problem to poor drafting of Section 1962(a), which was adapted from RICO’s criminal provisions in which standing considerations are not relevant.

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22 943 F.2d at 305.
23 Grider v. Tex. Oil & Gas Corp., 868 F.2d 1147, 1150 (10th Cir. 1989).
VII. SECTION 1962(b): ACQUISITION OF CONTROL OF ENTERPRISE

§ 53 Acquisition of an “Interest in or Control of” an Enterprise

Section 1962(b) makes it unlawful for a person “to acquire or maintain, directly or indirectly, any interest in or control of any enterprise” through a pattern of racketeering activity. The Ninth Circuit has followed the Seventh Circuit in holding that the type of control required “need not be formal control and ‘need not be the kind of control that is obtained, for example, by acquiring a majority of the stock of the corporation.” Still, the control or interest must be illegitimately obtained through racketeering activity. As with Section


2 Ikuno v. Yip, 912 F.2d 306, 310 (9th Cir. 1990) (quoting Sutliff, Inc. v. Donovan Cos., 727 F.2d 648, 653 (7th Cir. 1984)). The Ninth Circuit also relied on Cincinnati Gas & Elec. Co. v. Gen. Elec. Co., 656 F. Supp. 49, 85 (S.D. Ohio 1986), a case where a party was found to have control under § 1962(b) where it had voting rights and was directly involved in management. See also United States v. Jacobson, 691 F.2d 110, 112-13 (2d Cir. 1982) (finding lease could be used to control enterprise); Fed. Info. Sys., Corp. v. Boyd, 753 F. Supp. 971, 977 (D.D.C. 1990) (finding that extortion to force corporate actions constituted attempt to control within meaning of § 1962(b)). But see NCNB Nat’l Bank of N.C. v. Tiller, 814 F.2d 931, 936 (4th Cir. 1987) (holding that bank’s right to demand payment on notes did not give it power to control enterprise), overruled on other grounds by Busby v. Crown Supply, Inc., 896 F.2d 833, 840-42 (4th Cir. 1990); Cooper Indus., Inc. v. Lagrand Tire Chains, 205 F. Supp. 2d 1157, 1166-67 (D. Or. 2002) (explaining that defendant’s designation as corporate president was insufficient evidence standing alone to establish control within the meaning of the statute); Moffatt Enters. Inc. v. Borden, Inc., 763 F. Supp. 143, 147 (W.D. Pa. 1990) (holding that the control contemplated under § 1962(b) must be of the type obtained through the acquisition of sufficient stock to affect the composition of a board of directors); Occupational-Urgent Care Health Sys., Inc. v. Sutro & Co., 711 F. Supp. 1016, 1025 (E.D. Cal. 1989) (ruled that selling stock short does not constitute an interest in or control over an enterprise).

3 Lightning Lube, Inc. v. Witco Corp., 4 F.3d 1153, 1190 (3d Cir. 1993); Abraham v. Singh, 480 F.3d 351, 357 (5th Cir. 2007) (recognizing that to satisfy § 1962(b), plaintiffs must show their injuries were “proximately caused by a RICO person gaining an interest in, or control of, the enterprise through a pattern of racketeering activity”); Advocacy Org. for Patients & Providers v. Auto Club Ins. Ass’n, 176 F.3d 315, 329 (6th Cir. 1999) (noting that RICO pleadings must allege a specific nexus between control of any enterprise and the alleged racketeering activity); Litton Indus., Inc. v. Lehman Bros. Kuhn Loeb Inc., 709 F. Supp. 438, 452 (S.D.N.Y. 1989) (requiring plaintiff to show relationship or “nexus” between pattern of racketeering and interest or control obtained), rev’d on other grounds, 967 F.2d 742 (2d Cir. 1992); In re Am. Honda Motor Co., Inc. Dealerships Relations Litig., 965 F. Supp 716, 722-23 (D. Md. 1997) (same).
1962(a), most courts have ruled that Section 1962(b) does not require the defendant to be separate from the enterprise.⁴

Plaintiffs do occasionally succeed in bringing Section 1962(b) claims just as they do under Section 1962(a). For example, in Constellation Bank, N.A. v. C.L.A. Management Co.,⁵ a lender successfully stated a claim under Section 1962(b) by alleging that the defendants had fraudulently obtained loans that they then used to acquire control over their real estate enterprise. As discussed in § 54 below, however, successful Section 1962(b) claims are generally rare because they are subject to the same standing limitations that apply to Section 1962(a) claims.

### § 54 Standing Under Section 1962(b)

To have standing to assert a claim under Section 1962(b), most courts, including all federal courts of appeals that have considered the issue, have required the plaintiff to allege injury stemming not from the defendant’s predicate acts (which is the basis for a Section 1962(c) claim), but from the defendant’s acquisition or maintenance of an interest in, or control over, the pertinent enterprise.⁶

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⁴ See § 21 and § 25.


⁶ See, e.g., Compagnie De Reassurance D'Ile de Fr. v. New Eng. Reinsurance Corp., 57 F.3d 56, 92 (1st Cir. 1995) (affirming dismissal of § 1962(b) claim for failure to allege injury separate from the fraud that constituted the predicate acts); Discon, Inc. v. NYNEX Corp., 93 F.3d 1055, 1062-63 (2d Cir. 1996) (affirming dismissal of § 1962(b) claim for failure to allege injury from the “acquisition or maintenance” of an enterprise separate from the predicate acts), vacated on other grounds, 525 U.S. 128 (1998); Lightning Lube, Inc. v. Witco Corp., 4 F.3d 1153, 1190 (3d Cir. 1993) (holding that injury must stem from defendant’s acquiring or maintaining control of enterprise as well as from the predicate acts); Abraham v. Singh, 480 F.3d 351, 357 (5th Cir. 2007) (rejecting claim under § 1962(b) but allowing claim to proceed
A broader (though distinctly minority) view is that a plaintiff may state a claim simply by alleging injury from the operation of the enterprise in which the defendant used or invested his racketeering proceeds (or maintained an interest or control). In *National Mortgage*, a California district court reasoned that, because the Supreme Court in *Sedima S.P.R.L. v. Imrex Co.* rejected the


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See In re Nat’l Mortgage Equity Corp. Mortgage Pool Certificates Sec. Litig., 682 F. Supp. 1073, 1081 (C.D. Cal. 1987), *appeal dismissed on other grounds*, 821 F.2d 1422 (9th Cir. 1987); In re Sahlen & Assocs., Inc. Sec. Litig., 773 F. Supp. 342, 369 (S.D. Fla. 1991) (ruling without elaboration that unlike §1962(a), which requires “additional causation,” §1962(b) requires injury only from the pattern of racketeering that was used to obtain control of an enterprise) (citing Avirgan v. Hull, 691 F. Supp. 1357, 1362 (S.D. Fla. 1988) (same)), *aff’d on other grounds*, 932 F.2d 1572 (11th Cir. 1991).

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concept of “distinct racketeering injury” in a Section 1962(c) case, it should not impose the concept of injury in Section 1962(a) and (b) cases.9

While National Mortgage has been heavily criticized,10 it has not been officially overruled. In Reddy v. Litton Industries, a case arising under Section 1962(a), the Ninth Circuit cited the majority rule with apparent approval.11 It noted that the National Mortgage case, which allowed claims under Sections 1962(a) and (b) where injury stemmed from predicate acts, was decided “years before” the several appellate decisions that required a Section 1962(a) plaintiff to allege an injury from the investment of racketeering income apart from any injury caused by the predicate acts.12 The Ninth Circuit found it unnecessary to decide the standing issue, however, because the plaintiff (a fired employee) did not show injury either from the investment of racketeering income or from predicate acts.13

§ 55 Rationale for Standing Under Sections 1962(a) and (b)

The primary rationale for the majority view that requires injury from conduct apart from the underlying predicate acts stems from the plain language of the remedies provided in Section 1964(c) of RICO.14 Section 1964

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9 Nat'l Mortgage, 682 F. Supp. at 1081-82.
10 See, e.g., Grider v. Tex. Oil & Gas Corp., 868 F.2d 1147, 1150 (10th Cir. 1989); Midwest Grinding Co. v. Spitz, 716 F. Supp 1087, 1090-91 (N.D. Ill. 1989).
11 912 F.2d 291, 295-96 (9th Cir. 1990).
12 Id.
13 Id. at 296.
provides that a plaintiff may recover for an injury to its business or property by reason of the violation specified in Section 1962. While Section 1962(c) focuses on predicate acts committed through the operation of an enterprise, Sections 1962(a) and (b) focus on the use or investment of racketeering income and the acquisition of an interest in or control over an enterprise. Therefore, because standing depends on injury from the “conduct constituting the violation” (in the words of the Supreme Court in *Sedima*), injury under Section 1962(c) must stem from the predicate acts, injury under Section 1962(a) must stem from the investment of racketeering income, and injury under Section 1962(b) must stem from the acquisition of an interest in or control over an enterprise.\(^{15}\)

A second rationale is that RICO is aimed at preventing the infiltration of legitimate businesses through racketeering activity.\(^{16}\) In *Vemco*, the Sixth Circuit distinguished the situation where the defendant uses racketeering income to create a new enterprise that is used to scam investors (which may support a Section 1962(a) claim) from the situation where the wrongdoer reinvests its racketeering income so it can continue to commit predicate acts itself (which only supports a Section 1962(c) claim).\(^{17}\)

On the other hand, the principal rationale for the minority view stems from a liberal construction of RICO and the fact that the Supreme Court in

\(^{15}\) *Id.*

\(^{16}\) Brittingham v. Mobil Corp., 943 F.2d 297, 303-04 (3d Cir. 1991); *Vemco*, Inc. v. Camardella, 23 F.3d 129, 131-33 (6th Cir. 1994).

\(^{17}\) *Vemco*, 23 F.3d at 132-33 (distinguishing Newmyer v. Philatelic Leasing, Ltd., 888 F.2d 385 (6th Cir. 1989)).
Sedima rejected a “distinct racketeering injury” requirement.\textsuperscript{18} This reasoning has itself been rejected precisely because Sedima was a Section 1962(c) case, where predicate acts are the wrongful conduct, and not a case under Sections 1962(a) or (b), where predicate acts are ancillary to the primary misconduct of the investment of racketeering income or the illegitimate control over an enterprise.\textsuperscript{19}

The dearth of successful claims under Section 1962(a) and (b) is perhaps not surprising given RICO’s legislative history. As one court has noted, the civil RICO statute was “spot-welded” to a criminal statute where a criminal violation may exist without any identification of a victim.\textsuperscript{20}

\textsuperscript{18} In re Nat’l Mortgage Equity Corp. Mortgage Pool Certificates Sec. Litig., 682 F. Supp. 1073, 1081 (C.D. Cal. 1987), appeal dismissed on other grounds, 821 F.2d 1422 (9th Cir. 1987).

\textsuperscript{19} U.S. Concord, 757 F. Supp. at 1060.

\textsuperscript{20} P.M.F. Servs., Inc. v. Grady, 681 F. Supp. 549, 555-56 (N.D. Ill. 1988).


VIII. SECTION 1962(d): RICO CONSPIRACY

§ 56 Basic Elements

Section 1962(d) makes it unlawful to conspire to violate subsections (a), (b), or (c) of Section 1962. The crux of a Section 1962(d) violation is the agreement to violate the substantive portions of Section 1962. As discussed in more detail below, the Supreme Court has clarified that although the conspirator need not agree to commit or facilitate every part of the substantive offense, he must “intend to further an endeavor which, if completed, would satisfy all of the elements of a substantive criminal offense.”

To state a claim under Section 1962(d), the plaintiff must allege the existence of an “agreement to participate in an endeavor which, if completed, would constitute a violation” of the RICO statute. This requires the plaintiff to make a two-part showing: (1) that the defendant agreed to facilitate the operation of an enterprise through a pattern of racketeering activity; and (2) that the defendant agreed that someone (not necessarily the defendant) would commit at least two predicate acts. The Ninth Circuit has ruled that the test is disjunctive.

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2 Oki Semiconductor Co. v. Wells Fargo Bank, Nat'l Ass'n, 298 F.3d 768, 774 (9th Cir. 2002) (“It is the mere agreement to violate RICO that § 1962(d) forbids . . . .”); United States v. Sessa, 125 F.3d 68, 71 (2d Cir. 1997).
§ 57 Agreement Concerning the Conspiracy

Before 1997, there was a split of authority as to whether each defendant in a Section 1962(d) claim had to agree personally to commit at least two predicate acts. The majority view was that to violate Section 1962(d), a defendant needed only to agree to join a conspiracy that had the commission of the predicate acts as its goal. The Supreme Court finally settled the issue in 1997 in Salinas v. United States. In Salinas, the Court held that “[a] conspiracy may exist even if a conspirator does not agree to commit or facilitate each and every part of the substantive offense.” The Court went on to state: “The interplay between subsections (c) and (d) [of RICO Section 1962] does not permit us to excuse from the reach of the conspiracy provision an actor who does not himself commit or agree to commit the two or more predicate acts requisite to the underlying offense.”

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6 Howard v. Am. Online, Inc., 208 F.3d 741, 751 (9th Cir. 2000) (“To establish a violation of section 1962(d), [p]laintiffs must allege either an agreement that is a substantive violation of RICO or that the defendants agreed commit, or participated in, a violation of two predicate offenses.”).


2 Id. at 63-64 (quoting Justice Holmes: “[P]lainly a person may conspire for the commission of a crime by a third person”).

10 Id. at 65.
The Third Circuit has applied Salinas to hold that Section 1962(d) extends beyond “those who have conspired personally to operate or manage [a] corrupt enterprise.”11 It also held that conspiracy liability is not limited only to those who are liable for a substantive violation under Section 1962 upon successful completion of the scheme.12 The court emphasized that “one who opts into or participates in a conspiracy is liable for the acts of his [or her] co-conspirators which violate [S]ection 1962(c), even if the defendant did not personally agree to do, or to conspire with respect to, any particular element.”13 Under this standard, defendants can be held liable for conspiracy if they knowingly agree to facilitate a scheme that includes the operation or management of a RICO enterprise.14

The Seventh Circuit agreed in Brouwer v. Raffensperger, Hughes & Co.15 and reconciled a perceived conflict between Salinas and Reves v. Ernst & Young,16 which held that only those who operate or manage the enterprise could be liable under Section 1962(c).17 The Seventh Circuit had long held that conspiracy involves two agreements: an agreement to conduct or to participate in the affairs of the enterprise and an agreement to commit at least two

\[12\] Id.
\[13\] Id. at 537. See also Conn. Gen. Life. Ins. Co. v. New Images of Beverly Hills, 257 F. App’x 49, 51 (9th Cir. 2007).
\[14\] Smith, 247 F.3d at 538. But see Shams v. Fisher, 107 F. Supp. 2d 266, 277 (S.D.N.Y. 2000) (wife’s voluntary presence answering phones and typing documents for the family-owned business was insufficient to show that she agreed to further the objectives of the enterprise).
\[15\] 199 F.3d 961 (7th Cir. 2000).
\[17\] Id. at 179.
The court in *Brouwer* clarified that the level of personal participation required by the first agreement is to “knowingly facilitate the activities of the operators or managers to whom subsection (c) applies. . . . It is an agreement, not to operate or manage the enterprise, but personally to facilitate the activities of those who do.”

§ 58 The Knowledge Requirement

Courts are divided over how much knowledge a defendant must have of the criminal enterprise to be a conspirator under Section 1962(d). The Second Circuit has held that the plaintiff must allege that the defendant “knew about and agreed to facilitate the scheme.” Similarly, the Seventh Circuit has stated that the defendant must knowingly agree to facilitate the activities of those who operate or manage a criminal enterprise. According to the Fourth and Fifth Circuits, the plaintiff must prove only that the “defendant participated in the conspiracy with knowledge of the essential nature of the plan.” It is “not necessary ‘to prove that the defendant knew all of the details of the unlawful enterprise or the number or identities of all the co-conspirators.’”

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18 United States v. Neapolitan, 791 F.2d 489, 499 (7th Cir. 1986).
19 199 F.3d at 967. *See also* United States v. Patrick, 248 F.3d 11, 20 (1st Cir. 2001).
21 Frost Nat’l Bank v. Midwest Autohaus, Inc., 241 F.3d 862, 869-70 (7th Cir. 2001). *See also* Brouwer, 199 F.3d at 967.
22 United States v. Tillett, 763 F.2d 628, 632 (4th Cir. 1985); United States v. Elliott, 571 F.2d 880, 903-04 (5th Cir. 1978).
§ 59 The Need for a Violation of Section 1962(a), (b) or (c)

Courts also are divided over whether a plaintiff can assert a Section 1962(d) claim absent a viable claim for a substantive violation of Sections 1962(a), (b), or (c). A number of courts have concluded that so long as the plaintiff alleges the elements necessary for a Section 1962(d) claim the conspiracy claim can stand, whether or not companion claims under another subsection of Section 1962 are dismissed. Other courts, however, have concluded that Section 1962(d) claims cannot stand alone. For example, the Ninth Circuit has held that the failure to plead the requisite elements of Section 1962(a) or 1962(c) implicitly means that a plaintiff cannot plead a

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conspiracy to violate either section. In either case, the conspiracy must relate to conduct that, if completed, would constitute a violation of Sections 1962(a), (b), or (c). If the alleged conspiracy is based on conduct that has already occurred (as opposed to an agreement concerning future illegal conduct), that completed conduct should not support a Section 1962(d) claim if it does not support a Section 1962(a), (b), or (c) claim.

In *Beck v. Prupis*, the Supreme Court considered addressing this issue but ultimately declined to do so. In that case, the Court held that an overt act that is committed in furtherance of an alleged RICO conspiracy must be “an act of racketeering or otherwise unlawful under the statute” in order to give rise to relief under Section 1962(d). The Court did not, however, decide whether the Section 1962(d) claim must be based on an actionable violation of Sections 1962(a)-(c). Specifically, the Court refused to decide whether a plaintiff who sues “for a RICO conspiracy must allege an actionable violation under §§ 1962(a)-(c), or whether it is sufficient for the plaintiff to allege an agreement to complete a substantive violation and the commission of at least one act of racketeering that caused him injury.” The Court nevertheless suggested that a Section 1962(d) claim is not automatically tied to claims under Sections

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26 Simon v. Value Behavioral Health, Inc., 208 F.3d 1073, 1084 (9th Cir. 2000), *overruled on other grounds by* Odom v. Microsoft Corp., 486 F.3d 541, 551 (9th Cir. 2007).
29 *Id. at* 507.
30 *Id. at* 506 n.10.
31 *Id.*
1962(a)-(c). It noted that a plaintiff might be able to recover for a violation of Section 1962(d) against “co-conspirators who might not themselves have violated one of the substantive provisions of [Section] 1962.” In most cases, however, the alleged scheme has already occurred and the conduct in question is already completed. If the completed conduct does not sustain a substantive violation of RICO, a conspiracy claim based on that conduct should fail.

§ 60 Conspiracy Among Corporate Agents

Courts are split as to whether a corporation can conspire with its own subsidiary or agents. The Fourth and Eight Circuits have said no, based primarily on the antitrust principle that says a corporation cannot conspire with itself because it must act through its agents. Courts within the Third Circuit are divided on the question, with the majority (and most recent) position being that “a parent corporation cannot conspire with its wholly owned subsidiary to violate Section 1962(d) of RICO because the two entities always have a ‘unity of purpose or a common design.’” Courts that do not allow intracorporate conspiracies are likely to recognize an exception where the corporate employees are alleged to have acted for their own personal interests,

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32 Id. at 506-07 (rejecting notion that “any person who has a claim for a violation of § 1962(d) would necessarily have a claim for a violation of § 1962(a), (b), or (c)”).
33 Id.
or where the parent creates the subsidiary to carry out the racketeering activity.\textsuperscript{36}

Other courts have recognized intracorporate conspiracies because corporations and their subsidiaries and employees are distinct legal entities, and, therefore, agents may be liable for their own conspiratorial actions.\textsuperscript{37}

The answer to the debate about intracorporate conspiracy liability may lie in the law of vicarious liability. A corporation should not be held vicariously liable for conspiracy to violate RICO based on the conspiracy of corporate employees who acted outside the course and scope of their employment.\textsuperscript{38} On the other hand, a corporation that conspires with its agents and reaps the benefits of that conspiracy should face liability for that conduct.

\textbf{§ 61 Standing Under Section 1962(d)}

The existence of a conspiracy alone is insufficient to subject a defendant to civil liability under Section 1962(d). Plaintiffs must also show that they were injured by the commission of an overt act in furtherance of the conspiracy.\textsuperscript{39} In

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\textsuperscript{36} Id.

\textsuperscript{37} See Kirwin v. Price Commc’ns Corp., 391 F.3d 1323, 1327 (11th Cir. 2004) (rejecting contention that “intracorporate conspiracy doctrine” bars 1962(d) claim against a corporation and its agents); Webster v. Omnitrition Int’l, Inc., 79 F.3d 776, 787 (9th Cir. 1996) (holding that, for purposes of the RICO statute, corporation may conspire with its officers); Ashland Oil, Inc. v. Arnett, 875 F.2d 1271, 1281 (7th Cir. 1989) (same).

\textsuperscript{38} Oki Semiconductor Co. v. Wells Fargo Bank, Nat’l Ass’n, 298 F.3d 768, 775-76 (9th Cir. 2002). For a discussion of vicarious liability, see § 21.

\textsuperscript{39} See Anderson v. Ayling, 396 F.3d 265, 269-70 (3d Cir. 2005) (reasoning that “it is possible that a predicate act of racketeering that directly caused a plaintiff to lose his job could create civil RICO standing); Hecht v. Commerce Clearing House, Inc., 897 F.2d 21, 25 (2d Cir. 1990) (concluding that “injury-causing overt acts [are] the basis of civil standing to recover for RICO conspiracy violations”). See also Hamm v. Rhone-Poulenc Rorer Pharms., Inc., 187 F.3d 941, 953-54 (8th Cir. 1999) (plaintiffs did not have standing to assert a claim where injury from company’s alleged racketeering activity was indirect and activity was directed toward others); Reddy v. Litton Indus., Inc., 912 F.2d 291, 295 (9th Cir. 1990) (reasoning that plaintiff
Beck v. Prupis, the Supreme Court found that this overt act must be a predicate act of racketeering. In Beck, the Supreme Court rejected decisions from the Third, Fifth, and Seventh Circuits that had allowed plaintiffs to sue under Section 1962(d) for injuries from overt acts that did not rise to the level of racketeering activity, such as wrongful termination. The Court held that to be consistent with the common law, “a RICO conspiracy plaintiff [must] allege injury from an act that is analogous to an act of a tortious character, . . . meaning an act that is independently wrongful under RICO.”

The Sixth Circuit further articulated the standing requirements under Section 1962(d) in Grange Mutual Casualty Co. v. Mack. In that case, the Sixth Circuit ruled that standing for a RICO conspiracy claim requires a showing that the plaintiff’s injuries were actually and proximately caused by the defendant’s alleged violation of a RICO provision. The court ruled that to demonstrate proximate cause under Section 1962(d), the plaintiff must show that he or she was “injured by reason of a conspiracy to violate [one of RICO’s]

failed to establish standing because termination of employment was neither a predicate act nor necessary to effectuate purpose of the alleged conspiracy).

41 Id. at 507.
45 Beck, 529 U.S. at 504-05.
46 Id. at 505-06 (internal quotation marks and citation omitted).
48 Id. at *3-4.
In reaching its decision, the court considered the *Bridge v. Phoenix Bond & Indemnity Co.* case in which the Supreme Court ruled that a plaintiff who alleges a RICO violation based on mail fraud does not have to demonstrate reliance on the defendant’s misrepresentations to show proximate causation. Based on this precedent, the Sixth Circuit ruled that plaintiffs do not have to demonstrate reliance to have standing under Section 1962(d).

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49 *Id.* at *4* (emphasis in original).
IX. STATUTE OF LIMITATIONS

§ 62 Overview

The RICO statute does not contain an express limitations period. In 1987, however, the Supreme Court held that a four-year statute of limitations applies to all civil RICO actions. In *Agency Holding Corp. v. Malley-Duff & Associates, Inc.*, the Court concluded that a uniform federal limitations period is necessary and borrowed the limitations period from the Clayton Act, the most analogous federal statute. The Court selected the Clayton Act because RICO was patterned after that statute, which also redresses injury by awarding treble damages for “injury to business or property.”

Because the statute of limitations is an affirmative defense, it generally will not be resolved on a motion to dismiss unless the plaintiff “pleads itself out of court” by alleging facts that establish the defense. For example, if a plaintiff pleads facts showing that more than four years before filing the RICO suit, it was aware of its injury and who caused it, the complaint might be dismissed on statute of limitations grounds.

§ 63 Accrual

*Agency Holding* did not resolve when the four-year statute of limitations begins to run. As a result, the federal courts of appeals formulated different

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1 & 483 U.S. 143, 156 (1987). \\
3 & Agency Holding Corp., 483 U.S. at 150. \\
4 & Barry Aviation, Inc. v. Land O'Lakes Mun. Airport Comm’n, 377 F.3d 682, 688 (7th Cir. 2004).
\end{tabular}
}\]
accrual tests, known respectively as the “injury discovery rule” (First, Second, Fourth, Fifth, Seventh, and Ninth Circuits), the “injury and pattern discovery rule” (Eighth, Tenth, and Eleventh Circuits), and the “last predicate act rule” (Third Circuit). A fourth option, not yet applied in any circuit, is the accrual rule used under the Clayton Act, which begins to run “when a defendant commits an act that injures a plaintiff’s business.” This “injury occurrence” rule does not depend on any discovery by the plaintiff.\(^5\) (See § 65, The Clayton Act Rule.) In contrast, each of the competing civil RICO accrual rules requires some actual or constructive knowledge or discovery by the plaintiff.

The differing accrual rules reflect the special problems created by the fact that RICO provides recovery for injuries that may result from different wrongful acts that may take place over an extended period of time. For example, if a plaintiff is injured by the defendant’s first predicate act and is aware of the injury, under the Clayton Act rule and the injury discovery rule, the statute of limitations arguably may begin to run despite the fact that the injured party has no cause of action for a RICO violation until the defendant engages in further conduct that establishes a pattern. Conversely, many RICO claims involve multiple injuries caused by various predicate acts. If the racketeering acts are committed over an extended time period with different injuries inflicted at various points throughout the period, the statute of limitations may have run on the earlier injuries by the time the plaintiff sues to recover for later

ones. These issues are generally resolved through the equitable tolling of the statute of limitations or by permitting a separate claim to accrue for new injuries caused by new wrongful conduct, discussed in § 66, Separate Accrual for New Injuries.

Without settling upon a single rule, the Supreme Court has twice narrowed the spectrum of accrual rules that may be applied to RICO causes of action. In *Klehr v. A. O. Smith Corp.*, the Court rejected the last predicate act rule on grounds it is unduly solicitous of delay in raising RICO claims and inconsistent with the Clayton Act model that Congress used in enacting RICO. The Court did not, however, use *Klehr* to adopt the injury discovery, the injury and pattern discovery, or the Clayton Act accrual rule. The Court, over the objections of Justice Scalia (joined by Justice Thomas), declined to adopt the Clayton Act rule, reasoning that it “does not necessarily provide all the answers,” evidently because “a high percentage of civil RICO cases, unlike typical antitrust cases, involve fraud claims,” the bases of which are often harder to discover. Beyond abrogating the last predicate act rule, the majority did not venture further to reconcile the different accrual rules applied by the courts of appeals, noting that “the legal questions involved may be

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8 Under the last predicate act rule, a civil RICO cause of action begins to accrue when the plaintiff knew or should have known of the injury and the pattern of racketeering activity, but begins to run anew upon each predicate act forming part of the same pattern.


10 *Id.* at 191–193.
subtle and difficult,” and that, under any of those rules, the Klehrs’ claim would have been barred.\textsuperscript{11}

In \textit{Rotella v. Wood},\textsuperscript{12} a unanimous Supreme Court revisited the RICO accrual question and this time eliminated the injury and pattern discovery rule,\textsuperscript{13} while again declining to prescribe a single rule. Applying the reasoning used in \textit{Klehr}, the Court declared that the injury and pattern discovery rule clashed with the injury-focused accrual rule applied in Clayton Act suits, and noted that RICO’s goal of encouraging prompt investigation and litigation by racketeering victims would be undercut by an accrual rule that turns on discovery of a racketeering pattern.\textsuperscript{14} While it affirmed the Fifth Circuit’s application of the injury discovery rule, the Court left open the possibility that another accrual rule would apply, including the Clayton Act rule previously espoused by Justice Scalia.\textsuperscript{15} The Court also left for another day resolution of the tension between the cardinal principle of federal law that a limitations period cannot begin to run until the cause of action is complete, and the injury discovery and Clayton Act rules, under which a RICO claim could accrue before

\textsuperscript{11} Id. at 192.
\textsuperscript{12} 528 U.S. 549, 555 (2000).
\textsuperscript{13} Under the injury and pattern discovery rule, a civil RICO cause of action begins to accrue when the plaintiff discovers, or reasonably should have discovered, both the existence and source of his injury and that the injury is part of a pattern.
\textsuperscript{14} Rotella, 528 U.S. at 556–59.
\textsuperscript{15} Id. at 554 n.2.
a second predicate offense is committed and the RICO cause of action comes into being.\textsuperscript{16}

Until the Supreme Court resolves these issues, at least two alternative rules, and varying applications of those rules, remain viable. However, in practice, the courts of appeal have applied only the injury discovery rule.

\textbf{§ 64 The Injury Discovery Rule}

The First, Second, Third, Fourth, Fifth, Seventh, Eighth, Ninth, and Eleventh Circuits have held that a RICO cause of action accrues when the plaintiff discovers, or reasonably should have discovered, its injury.\textsuperscript{17} Under

\begin{itemize}
  \item \textit{First Circuit}: Lares Group, II v. Tobin, 221 F.3d 41, 43-44 (1st Cir. 2000); Rodriguez v. Banco Central, 917 F.2d 664, 666 (1st Cir. 1990);
  \item \textit{Second Circuit}: Tho Dinh Tran v. Alphonse Hotel Corp., 281 F.3d 23, 35 (2d Cir. 2002), overruled on other grounds by Slayton v. Am. Express Co., 460 F.3d 215 (2d Cir 2006); In re Merrill Lynch Ltd. P’ships Litig., 154 F.3d 56, 58 (2d Cir. 1998);
  \item \textit{Third Circuit}: Cetel v. Kirwan Fin. Group, Inc., 460 F.3d 494 (3d Cir. 2006); Prudential Ins. Co. of Am. v. United States Gypsum Co., 359 F.3d 226, 233-36 (3d Cir. 2004); Forbes v. Eagleson, 228 F.3d 471, 484 (3d Cir. 2000);
  \item \textit{Fourth Circuit}: Potomac Elec. Power Co. v. Elec. Motor & Supply, Inc., 262 F.3d 260, 266 (4th Cir. 2001); Detrick v. Panalpina, Inc., 108 F.3d 529, 537 (4th Cir. 1997);
  \item \textit{Fifth Circuit}: Rotella v. Wood, 147 F.3d 438, 439 (5th Cir. 1998), aff’d, 528 U.S. 549 (2000); Boulmay v. Rampart, 124 F. App’x 889, 891 (5th Cir. 2005);
  \item \textit{Seventh Circuit}: Barry Aviation, Inc. v. Land O'Lakes Mun. Airport Comm’n, 377 F.3d 682, 688 (7th Cir. 2004); Bontkowski v. First Nat’l Bank of Cicero, 998 F.2d 459, 461 (7th Cir. 1993);
  \item \textit{Eighth Circuit}: Stewart v. Philip Morris, Inc., 205 F.3d 1054, 1056 (8th Cir. 2000);
  \item \textit{Ninth Circuit}: Pincay v. Andrews, 238 F.3d 1106, 1109 (9th Cir. 2001); Grimmett v. Brown, 75 F.3d 506, 511 (9th Cir. 1996);
  \item \textit{Eleventh Circuit}: Pacific Harbor Capital, Inc. v. Barnett Bank, 252 F.3d 1246, 1251 (11th Cir. 2001);
\end{itemize}

\begin{itemize}
  \item see also Riddell v. Riddell Washington Corp., 866 F.2d 1480, 1489-90 (D.C. Cir. 1989) (assuming, without deciding, that the injury discovery rule applied); A. Stucki Co. v. Buckeye Steel Castings Co., 963 F.2d 360, 364–65 (Fed. Cir. 1992) (noting the division among the courts of appeals, but declining to adopt a position).
\end{itemize}
this rule, a RICO cause of action accrues upon the discovery of the injury even if the plaintiff is unaware that the injury stems from a pattern of racketeering.\textsuperscript{18} Thus, a plaintiff that discovers that it has been injured must uncover the RICO pattern, if one exists, and file suit within four years, or lose its cause of action.\textsuperscript{19}

Under the injury discovery rule, a RICO claim that is filed within four years from when the plaintiff discovers its injury may still be time-barred if a reasonable person exercising due diligence would have discovered the injury more than four years before the suit was filed.\textsuperscript{20} Borrowing a term from the securities fraud milieu, some courts applying the rule have gone so far as to hold that the clock starts to run when the plaintiff is put on “inquiry notice” of

\textsuperscript{18} See, e.g., Rotella, 528 U.S. at 555 (“we have been at pains to explain that discovery of the injury, not discovery of the other elements of the claim, is what starts the clock”); Grimmett, 75 F.3d at 510 (“plaintiff need not discover that the injury is part of a ‘pattern of racketeering’ for the period to begin to run”).

\textsuperscript{19} See Eno Farms Coop. Ass’n v. Corp. for Indep. Living, Civ. No. 3:06cv1983(AHN), 2007 WL 3308016, at *8-9 (D. Conn. Nov. 13, 2007) (holding that separate accrual rule had not been triggered and monthly payments did not constitute new and independent injuries where homebuyers brought suit more than four years after purchasing purported fee interests in property only to find that defendant sellers continued to own units, retaining the right to sell without restrictions after 15 years).

\textsuperscript{20} See, e.g., Cetel v. Kirwan Fin. Group, Inc., 460 F.3d 494, 506-09 (3d Cir. 2006) (discussing objective and subjective components of injury-discovery rule, and affirming summary judgment based on statute of limitations); Prudential, 359 F.3d at 235 (plaintiff’s constructive knowledge of existence of asbestos-containing materials in its buildings, as well as tenant complaints and government information, placed plaintiff on inquiry notice regarding the potential hazards of asbestos-containing materials more than four years before suit was filed); Mathews v. Kidder, Peabody & Co., Inc., 260 F.3d 239, 255 (3d Cir. 2001) (court employed two-step test to determine that plaintiffs were on inquiry notice and held that defendant satisfied its burden to demonstrate warning signs to plaintiffs and plaintiffs failed to satisfy burden to demonstrate due diligence); Martinez Tapia v. Chase Manhattan Bank, 149 F.3d 404, 411 (5th Cir. 1998) (limitations period started to run when plaintiff purchased real estate fund units where a “simple reading” of the offering circular and subscription agreement would have revealed alleged injury); Merrill Lynch, 154 F.3d at 60 (plaintiffs RICO claims were precluded because reasonably diligent investor would have discovered their injury when prospectuses were sent out, more than four years before suit was filed).
underlying fraud by facts that would arouse suspicion in a reasonable person. The doctrine of inquiry notice is said to trigger the limitations period once there are “storm warnings” sufficient to alert a reasonable investor of possible fraud. For that reason, the concept of “inquiry notice” is an imperfect fit for the injury discovery rule, which depends on the plaintiff’s ability to discover the injury rather than the predicate acts of fraud.

Critics have argued that under the injury discovery rule, a plaintiff who suffers injury from a single predicate act could be barred from recovery if the second predicate act that establishes a RICO pattern occurs more than four years later. In other words, such a plaintiff could lose its cause of action before it ever accrued. The Supreme Court acknowledged this hypothetical “quandary” in Rotella, remarking that it was nonetheless an insufficient

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21 See Mathews, 260 F.3d at 250–57 (affirming summary judgment on statute of limitations grounds because injury occurred at time of investment in real estate scheme, “storm warnings” put investors on notice, and alleged fraudulent concealment could not toll claim where investors failed to exercise reasonable diligence); Martinez Tapia, 149 F.3d at 409 (plaintiff should have discovered his injury when he received the documents containing details of the offer because “a written statement available to the victims of fraud that reveals that a fraud has been committed furnishes constructive or inquiry notice of the fraud”); Merrill Lynch, 154 F.3d at 60 (RICO claim barred because investors were on “inquiry notice” of “fraudulent scheme”).

22 E.g., Mathews, 260 F.3d at 252; Isaak v. Trumbull Sav. & Loan Co., 169 F.3d 390, 399 (6th Cir. 1999).

23 Love v. Nat’l Med. Enter., 230 F.3d 765, 777 (5th Cir. 2000) (emphasizing that the statute of limitations begins to run when the plaintiff has reasonable notice of its injury, not of the fraud); Tanaka v. First Hawaiian Bank, 104 F. Supp. 2d 1243, 1249 (9th Cir. 2000) (stating that under the injury discovery doctrine, the focus is on the plaintiff’s constructive notice of its injury, not on its awareness of the fraud; focusing on the plaintiff’s knowledge of the fraud is actually a form of the pattern discovery rule, which the Supreme Court rejected in Rotella).

justification for a general pattern discovery rule. It nevertheless refused to decide “whether civil RICO allows for a cause of action when a second predicate act follows the injury,” because such facts did not exist in that case. Under the traditional federal accrual principle, a statute of limitation period does not begin to run until the cause of action is complete. Some courts have incorporated this traditional principle into the injury discovery rule, holding that a pattern of racketeering must exist (even if it’s not discovered) before the limitations period begins to run and avoiding the Rotella “quandary” altogether.

§ 65 The Clayton Act Rule

As noted above, Justice Scalia (joined by Justice Thomas) argued in his concurrence in Klehr that RICO cases should be governed by the accrual rule that applies in Clayton Act cases, which holds that the four-year limitations period begins to run “when a defendant commits an act that injures a plaintiff’s

26 Id.
27 See, e.g., Rawlings v. Ray, 312 U.S. 96, 98 (1941); Clark v. Iowa City, 87 U.S. 583, 589, 22 L. Ed. 427 (1874).
28 See, e.g., Limestone Dev. Corp. v. Vill. of Lemont, Illinois, 520 F.3d 797, 802 (7th Cir. 2008); Bygrave v. Van Reken, 238 F.3d 419 (Table) 2000 WL 1769587, at *2-4 (6th Cir. Nov. 14, 2000) (avoiding Rotella quandary because injury and two alleged predicate acts occurred over four years before plaintiff filed RICO claim); Grimmett v. Brown, 75 F.3d 506, 512 (9th Cir. 1996) (“[b]ecause a RICO cause of action cannot accrue until all the elements exist, no statute of limitations can begin to tick until a pattern exists”) (citation omitted); McCool v. Strata Oil Co., 972 F.2d 1452, 1465 (7th Cir. 1992) (though injury discovery rule applies, “[t]here must, of course, be a pattern of racketeering before the plaintiff’s RICO claim accrues, and this requirement might delay accrual until after the plaintiff discovers her injury”).
business.”29 Though neither Justice Scalia nor the majority explained exactly how the Clayton Act rule would be applied in RICO cases, the majority suggested that in RICO cases involving a “continuing violation,” such as multiple predicate acts committed over a period of years, each predicate act in furtherance of the RICO violation would start the limitations period running again.30 As in antitrust cases, the defendant’s commission of separate predicate acts in furtherance of a common scheme would not permit the plaintiff to recover for injuries caused by predicate acts committed outside the limitations period.31

Though the *Klehr* majority disparaged the Clayton Act rule as not necessarily providing “all the answers,”32 the *Rotella* case restored some confidence in the rule as a legitimate alternative to the injury discovery rule. In abrogating the injury pattern and discovery rule, the Court rebuffed the argument that the pattern requirement or prevalence of fraud in the civil RICO context are adequate reasons to depart from the Clayton Act analogy, and pointed out that “[b]y eliminating the complication of anything like an antitrust injury element we have, to that extent, recognized a simpler RICO cause of action than its Clayton Act counterpart, and RICO’s comparative simplicity in this respect surely does not support the adoption of a more protracted basic


30 See *id.* at 189.

31 See *id.*

32 *Id.* at 193.
As of the date of publication, no circuit has endorsed the pure Clayton Act rule as the rule of accrual in the RICO.

§ 66 Separate Accrual for New Injuries

Most courts of appeals, regardless of the accrual rule applied, have adopted a “separate accrual rule” to permit a plaintiff to bring a RICO action each time a plaintiff discovers or should have discovered a new injury caused by a RICO violation. One rationale for each new injury causing the accrual of a new cause of action is that a plaintiff’s right to sue under the statute is triggered not by the RICO violation itself, but by the existence of an injury caused by the RICO violation. Thus, a plaintiff may recover for an injury discovered within four years of the filing of the lawsuit, regardless of when the


34 See, e.g., Love v. Nat’l Med. Enter., 230 F.3d 765, 775 (5th Cir. 2000) (“Each time [plaintiff] became obligated to pay a fraudulent . . . insurance claim submitted by [defendant], [plaintiff] suffered an injury to its business or property, within the meaning of 18 U.S.C. § 1964(c).”); Annuli v. Panikkar, 200 F.3d 189, 197 (3d Cir. 1999) (“separate accrual” rule allows plaintiffs to “seek redress for new injuries arising out of new predicate acts that occur within the statutory period, even if those new predicate acts and resulting injuries arise out of the same pattern of racketeering behavior that began outside the four-year statutory period”); overruled on other grounds by Rotella v. Wood, 528 U.S. 549 (2000); In re Merrill Lynch Ltd. P’ships Litig., 154 F.3d 56, 59–60 (2nd Cir. 1998) (recognizing the separate accrual rule, but holding that continuing efforts to conceal initial fraud did not constitute “distinct fraudulent acts resulting in new and independent injuries”); Grimmert v. Brown, 75 F.3d 506, 511 (9th Cir. 1996) (indicating that the Ninth Circuit has adopted the separate accrual rule); Ass’n of Commonwealth Claimants v. Moylan, 71 F.3d 1398 (8th Cir. 1995) (recognizing separate accrual rule, but refusing to find new injuries where same injuries had been previously pursued in earlier state court litigation); Bingham v. Zolt, 66 F.3d 553, 559–61 (2d Cir. 1995) (holding that because different diversions of royalties due estate constituted new and independent injuries, plaintiffs could recover for each diversion that occurred within four years of the filing of the RICO action); McCool v. Strata Oil Corp., 972 F.2d 1452, 1464–66 (7th Cir. 1992) (under the separate accrual rule “a new cause of action under RICO arises on the occurrence of each separate injury”); Rodriguez v. Banco Cent. Corp., 917 F.2d 664, 666 (1st Cir. 1990) (adopting separate accrual rule and remanding case to district court to make the relevant factual determinations); State Farm Mut. Auto. Ins. Co. v. Ammann, 828 F.2d 4, 5 (9th Cir. 1987) (Kennedy, J., concurring).

35 See, e.g., Bankers Trust v. Rhoades, 859 F.2d 1096, 1103–05 (2nd Cir. 1988).
RICO violation or any of the underlying predicate acts occurred.\textsuperscript{36} The separate accrual rule is generally limited, however, to situations where there is a new injury from new wrongful conduct; different injuries from the same conduct do not usually permit a separate suit, unless there is a late developing injury that cannot be proven in the first suit.\textsuperscript{37} Therefore, a “plaintiff cannot use an independent, new act as a bootstrap to recover for injuries caused by other predicate acts that took place outside the limitations period.”\textsuperscript{38} Also, a plaintiff may not be able to obtain separate accrual based on wrongful acts that are not RICO predicate acts.\textsuperscript{39}

\section*{§ 67 Equitable Tolling, Equitable Estoppel, and Fraudulent Concealment}

The equitable doctrines discussed in this section differ from the discovery rules discussed above. The discovery rules turn on the plaintiff’s knowledge or

\textsuperscript{36} Id. at 1105 (“Under this [separate accrual] rule, each time plaintiff discovers or should have discovered an injury caused by defendant’s violation of § 1962, a new cause of action arises as to that injury, regardless of when the actual violation occurred.”).

\textsuperscript{37} See, e.g., Klehr v. A. O. Smith Corp., 521 U.S. 179, 190 (1997) (plaintiff must point to a separable, new predicate act within the limitations period to take advantage of the separate accrual rule); McCool, 972 F.2d at 1465 n.10 (explaining that “a new cause of action accrues only when there is a new instance of wrongful conduct and a new injury”); Sasser v. Amen, No. C 99-3604, 2001 WL 764953 at *7 (N.D. Cal. July 2, 2001) (under separate accrual rule, RICO claims against cosmetics distributor were time-barred where alleged scheme had been in place for thirteen years, plaintiffs had voiced concerns in the past, and the plaintiffs failed to allege any new and independent injuries).

\textsuperscript{38} Klehr, 521 U.S. at 190; accord Grimmett v. Brown, 75 F.3d 506, 512–14 (9th Cir. 1996); McCool, 972 F.2d at 1465–66 & n.10; see also Limestone Dev. Corp. v. Vill. of Lemont, Ill., 520 F.3d 797, 800–02 (7th Cir. 2008) (comparing RICO claims to sexual harassment claims where the “continuing violation” doctrine only delays the running of the statute of limitations until the “cumulative effect” of prior acts make it plain the plaintiff has suffered actionable injury).

\textsuperscript{39} Apollon Waterproofing and Restoration, Inc. v. Bergassi, No. 01 Civ. 8388 (LMM), 2003 WL 1397394 (S.D.N.Y. March 20, 2003) (ruling that fraudulent conveyance that was not a RICO predicate act could not be used to obtain a separate accrual of the statute of limitations) aff’d 87 F. App’x 757 (2d Cir. 2004).
constructive knowledge of injury, whereas fraudulent concealment, equitable
tolling, and equitable estoppel depend on the plaintiff’s knowledge or
constructive knowledge of the facts supporting his cause of action.40

The Supreme Court recognizes equitable tolling, equitable estoppel, and
fraudulent concealment as distinct equitable doctrines.41 In practice, however,
their similarities have caused confusion over which doctrine applies in a given
case.42 Since Agency Holding, the federal courts have uniformly upheld the
application of federal equitable tolling and equitable estoppel principles in the
context of civil RICO. These principles include tolling during periods of mental
incapacity or disability.43 Courts have differed, however, over how to apply the
doctrine of fraudulent concealment.

Some courts have argued that, like equitable tolling, fraudulent
concealment tolls the statute of limitations only if the plaintiff exercised due
diligence to discover its claim.44 Other courts have argued that, like equitable

40 See, e.g., Wolin v. Smith Barney Inc., 83 F.3d 847, 852 (7th Cir. 1996); Oshiver v. Levin,
Fishbein, Sedran & Berman, 38 F.3d 1380, 1390 (3d Cir. 1994).

41 United States v. Beggerly, 524 U.S. 38, 49 (1998) (Stevens, J., concurring); accord Zipes
v. Trans World Airlines, Inc. 455 U.S. 385, 393 (1982) (holding that timely filing of
discrimination claims is “a requirement that, like a statute of limitations, is subject to waiver,
estoppel, and equitable tolling.”)

42 Judge Posner has written a series of opinions examining the courts’ overlapping
applications of these doctrines. See, e.g., Flight Attendants Against UAL Offset v. Comm’r,
165 F.3d 572, 575–77, (7th Cir. 1999); Currier v. Radio Free Europe, 1363, 1367 (7th Cir. 1998);
Wolin v. Smith Barney, Inc., 83 F.3d 847, 852 (7th Cir. 1996); Cada v. Baxter Healthcare
Corp., 920 F.2d 446, 450–51 (7th Cir. 1990).

43 See, e.g., Mandarino v. Mandarino, 180 F. App’x 258 (2d Cir. 2006) (equitable tolling
during period of alleged mental incapacity should not have been decided on a motion to
dismiss, but ultimately more than vague and conclusory allegations of the incapacity must be
established).

44 See, e.g., J. Geils Band Employee Benefit Plan v. Smith Barney Shearson, Inc., 76 F.3d
1245, 1252–55 (1st Cir. 1996); see also Klehr, 521 U.S. at 194 (collecting cases).
estoppel, fraudulent concealment estops a defendant who has engaged in fraudulent concealment from invoking the statute of limitations whether or not the plaintiff has exercised reasonable diligence to discover the fraud. In *Klehr*, the Supreme Court resolved the issue by holding that for the purposes of civil RICO, “‘reasonable diligence' does matter, and a plaintiff who is not reasonably diligent may not assert ‘fraudulent concealment.’” The *Klehr* court was silent as to whether a plaintiff must also establish due diligence when asserting equitable estoppel on the grounds of non-fraudulent acts (*e.g.* false imprisonment).

In addition to due diligence, plaintiffs arguing fraudulent concealment must establish that “(1) the defendant wrongfully concealed material facts relating to the defendant's wrongdoing; [and] (2) the concealment prevented plaintiff's discovery of the nature of the claim within the limitations period.” The courts employ varying language to describe the requirements these elements impose. Most courts use the phrases “affirmative acts” or “active misleading” to require the plaintiff show that the defendant took affirmative

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45 See, *e.g.*, Wolin, 83 F.3d at 852. (“[Equitable tolling and equitable estoppel] differ critically in scope in the following respect: when the plea is equitable tolling rather than equitable estoppel, the defendant is innocent of the delay (though not of course of the original wrong), so the plaintiff must use due diligence to be allowed to toll the statute of limitations; . . . . In the case of equitable estoppel, which requires active misconduct by the defendant, the plaintiff is not required to be diligent.”).

46 521 U.S. at 194.


steps to conceal the claim through fraud.⁴⁹ Other courts describe frauds as “self-concealing,” allowing plaintiffs to prove fraudulent concealment without such affirmative acts when the fraud that concealed the claim was part of the underlying offense.⁵⁰

Prior to Klehr, the distinction between actively misleading and self-concealing fraud mirrored the distinction between equitable estoppel and equitable tolling, the latter distinguished by its due diligence requirement.⁵¹ Klehr rejected this distinction when it held that civil RICO plaintiffs must always establish due diligence when pleading fraudulent concealment.⁵² The varying language now merely reflects that a claim may be fraudulently


⁵⁰ See, e.g., Wolin, 83 F.3d at 852; Cada v. Baxter Healthcare Corp., 920 F.2d 446, 450–51 (7th Cir. 1990); Riddell v. Riddell Washington Corp., 866 F.2d 1480, 1492 (D.C. Cir. 1989) (holding that a jury could reasonably find that affirmative misrepresentations by four separate individuals about plaintiff’s stock valuation were part and parcel of the alleged fraud, thus rendering the fraud self-concealing); Weil v. Long Island Sav. Bank, F.S.B., 200 F.R.D. 164, 175 (E.D.N.Y. 2001) (plaintiffs may prove fraudulent concealment by showing that the fraudulent scheme is self concealing; a kickback scheme is a self-concealing fraud by nature); In re Sumitomo Copper Litig., 120 F. Supp. 2d 328, 346 (S.D.N.Y. 2000) (stating that “the plaintiff may prove the concealment element either by showing that the defendant took affirmative steps to prevent the plaintiff’s discovery of his claim or that the wrong itself was of such a nature as to be self-concealing.” The defendants’ wrongful action was self concealing in that they had to conceal that their “bids for copper contracts were not commercial and that the resulting prices were not inflated”). But cf. 131 Maine St. Assocs. v. Manko, 179 F. Supp. 2d 339, 348 n.11 (S.D.N.Y. 2002) (while acknowledging self-concealing fraud standard, court held that the strong evidence that defendants used affirmative acts to conceal fraud made it unnecessary to go “down the murky road of deciding what constitutes self-concealing fraud”).

⁵¹ Wolin, 83 F.3d at 852.

⁵² 521 U.S. at 194.
concealed either through the same fraud that constitutes the underlying claim or by new, separate fraudulent activity.\textsuperscript{53}

RICO plaintiffs should be careful to note that both equitable tolling and fraudulent concealment require the plaintiff plead sufficient facts to establish that despite its due diligence, the plaintiff could not have discovered its RICO claim.\textsuperscript{54} The plaintiff also must plead fraudulent concealment with particularity as required by Rule 9(b) of the Federal Rules of Civil Procedure.\textsuperscript{55}

Also, a RICO plaintiff facing a statute of limitations problem should consider arguing that the limitations period should be equitably tolled until it could determine, exercising reasonable diligence, that its injury stems from a pattern


\textsuperscript{54} See, e.g., In re Merrill Lynch Ltd. P’ships Litig., 154 F.3d 56, 60 (2nd Cir. 1998); Davis v. Grusemeyer, 996 F.2d 617, 624 (3d Cir. 1993) (noting that defendant’s fraudulent concealment is irrelevant if plaintiff is otherwise on notice of the potential claim); Bontkowski, 998 F.2d at 462; Emrich v. Touche Ross & Co., 846 F.2d 1190, 1199 (9th Cir. 1988); Pocahontas Supreme Coal Co. v. Bethlehem Steel Corp., 828 F.2d 211, 220 (4th Cir. 1987); Poling v. K. Hovnanian Enters., 99 F. Supp. 2d 502, 512 (D.N.J. 2000) (plaintiffs were not entitled to toll limitations period because they did not allege that they made diligent efforts to uncover disposition of assets); Simpson v. Putnam County Nat’l Bank of Carmel, 20 F. Supp. 2d 630, 634 (S.D.N.Y. 1998) (plaintiff who did not assert due diligence in uncovering claim may not assert fraudulent concealment).

of racketeering.\textsuperscript{56} A plaintiff will not be able to avail itself of equitable tolling if it cannot demonstrate that it exercised reasonable diligence in its effort to investigate its injuries and its claim.\textsuperscript{57}

It is also possible that pending parallel criminal proceedings may work to toll a civil RICO claim based on the same conduct.\textsuperscript{58} Class action tolling also is available.\textsuperscript{59}

\textbf{§ 68 Limitations Period for Predicate Acts}

Courts have uniformly held that a cause of action that would be time-barred if it was brought independently may nevertheless serve as a predicate act for an otherwise timely RICO claim.\textsuperscript{60}

\begin{footnotesize}
\begin{enumerate}
\setcounter{enumi}{55}
\item See, \textit{e.g.}, McCool v. Strata Oil Corp., 972 F.2d 1452, 1465 (7th Cir. 1992) (noting that equitable tolling may delay the running of the statute of limitations \textquotedblleft while a victim diligently investigates the possible existence and extent of a pattern of racketeering\textquotedblright).
\item See, \textit{e.g.}, Ballen, 23 F.3d at 337 (incorrectly referring to class action tolling as \textquotedblleft equitable tolling\textquotedblright); Bankers Trust, 859 F.2d at 1105; Prieto v. John Hancock Mut. Life Ins. Co., 132 F. Supp. 2d 506, 519 (N.D. Tex. 2001) (holding that class action tolling is available for civil RICO claims both when a class is decertified and when putative class members opt out of settlement). RICO class actions are discussed in § 88.
\end{enumerate}
\end{footnotesize}
X. RELIEF

§ 69 Standard of Proof

In *Sedima, S.P.R.L. v. Imrex Co.*, the Supreme Court discussed, in dictum, the standard of proof that should be applied in civil RICO actions.1 The Court suggested that the criminal standard of proof does not apply to RICO’s civil provisions.2 It noted that “[i]n a number of settings, conduct that can be punished as criminal only upon proof beyond a reasonable doubt will support civil sanctions under a preponderance standard.”3 However, the Court expressly declined to decide the applicable standard of proof.4 Since *Sedima*, every court of appeals that has addressed the issue has held that the preponderance standard applies in civil RICO actions.5

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2 *Id.*
3 *Id.*
4 *Id.*
5 *See First Circuit*: Aetna Cas. Sur. Co. v. P & B Autobody, 43 F.3d 1546, 1560 (1st Cir. 1994) (requiring proof by a preponderance of the evidence that defendant engaged in pattern of racketeering activity);

*Second Circuit*: Cullen v. Margiotta, 811 F.2d 698, 731 (2d Cir. 1987) (citing *Sedima* for the proposition “that there is no indication that Congress intended to depart from the preponderance standard in civil RICO cases”), *overruling on other grounds recognized by* Riverwoods Chappaqua v. Marine Midland Bank, N.A., 30 F.3d 339, 347 (2d Cir. 1994) (citing Agency Holding Corp. v. Malley-Duff & Assocs., Inc., 483 U.S. 143 (1987));

*Third Circuit*: United States v. Local 560, Int’l Bhd. of Teamsters, 780 F.2d 267, 279–80 n.12 (3d Cir. 1985);

*Fourth Circuit*: South Atl. Ltd. P’ship of Tenn. v. Riese, 284 F.3d 518, 530 (4th Cir. 2002) (requiring proof by a preponderance of the evidence that defendant engaged in pattern of racketeering activity);

§ 70 Punitive Damages

Courts have been nearly unanimous in holding that punitive damages are not available under RICO. Courts have reasoned that punitive damages are precluded under RICO because “civil remedy provisions of RICO . . . provide treble damages which are themselves punitive in character.” At least one court has held, however, that the question whether civil RICO can support

Sixth Circuit: Fleischhauer v. Feltner, 879 F.2d 1290, 1296 (6th Cir. 1989) (“The Supreme Court [in Sedima] has hinted, but not held, that [the preponderance standard] is the appropriate evidentiary standard. . . . Other circuits specifically addressing this issue have followed the Court’s suggestion. . . . [W]e are in agreement”); Hofstetter v. Fletcher, 905 F.2d 897, 903 (6th Cir. 1988) (rejecting defendant’s argument that plaintiff should be required to prove mail and wire fraud by clear and convincing evidence);

Seventh Circuit: Am. Auto. Accessories, Inc. v. Fishman, 175 F.3d 534, 542 (7th Cir. 1999); Liquid Air Corp. v. Rogers, 834 F.2d 1297, 1301 (7th Cir. 1987);

Eighth Circuit: Bieter Co. v. Blomquist, 987 F.2d 1319, 1320 (8th Cir. 1993) (civil RICO provisions require findings by preponderance of the evidence);

Ninth Circuit: Fireman’s Fund Ins. Co. v. Stites, 258 F.3d 1016, 1023 (9th Cir. 2001); Wilcox v. First Interstate Bank, 815 F.2d 522, 531 (9th Cir. 1987);


punitive damages is still sufficiently unclear such that a claim for RICO punitive damages should survive a motion to dismiss.\(^7\)

Though treble damages certainly appear to have a punitive component, the Supreme Court has noted that treble damages provisions often fall on different points along the spectrum between purely compensatory and purely punitive.\(^8\) In \textit{PacifiCare Health Systems, Inc. v. Book}, the Court emphasized that the treble damages allowed under RICO, like those allowed under the Clayton Act upon which RICO is modeled, are “remedial in nature,” given that they are designed to provide a remedy for economic injury suffered as a result of the prohibited conduct.\(^9\) The Court did not address to what extent, if any, it considers RICO treble damages to be punitive. Accordingly, enterprising plaintiffs might very well attempt to use the \textit{PacifiCare} decision to seek punitive damages in addition to the treble damages allowed under RICO.

\section*{§ 71 Attorneys’ Fees}

Section 1964(c) expressly allows a prevailing party to recover reasonable attorneys’ fees in a civil RICO case.\(^10\) To recover attorneys’ fees, a party must “prevail”; there is no statutory right to receive attorneys’ fees in a case resulting

\begin{itemize}
\item \(^8\) \textit{PacifiCare Health Sys., Inc. v. Book}, 538 U.S. 401, 405–06 (2003).
\item \(^2\) \textit{Id.} at 406.

\item \(^10\) 18 U.S.C. § 1964(c) (2006); Bonilla v. Volvo Car Corp., 150 F.3d 88, 92 (1st Cir. 1998) (“under RICO, attorney’s fees and costs are awarded only to a plaintiff who establishes liability and injury”); Uniroyal Goodrich Tire Co. v. Mut. Trading Corp., 63 F.3d 516, 525 (7th Cir. 1995); Aetna Cas. Sur. Corp. v. P & B Autobody, 43 F.3d 1546, 1570 (1st Cir. 1994).
\end{itemize}
in settlement. Additionally, the Ninth Circuit has held that Section 1964(c) permits only prevailing plaintiffs to recover attorneys’ fees, although prevailing defendants are not precluded from recovering attorneys’ fees when authorized elsewhere.

In awarding attorneys’ fees under RICO, courts must first decide an appropriate “lodestar” fee amount and then determine whether a fee multiplier should be applied to the lodestar. While noting that a fee multiplier is permissible under RICO, many courts have declined to apply a fee multiplier to the lodestar. The Sixth Circuit rejected use of a multiplier based on the Supreme Court’s ruling in City of Burlington v. Dague, in which the Court ruled “that enhancement for contingency is not permitted under the [typical federal] fee shifting statutes.” Other courts, however, have looked favorably upon multipliers under RICO.

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\(\uparrow\downarrow\) 505 U.S. 557 (1992).

\(\uparrow\uparrow\) Davis v. Mut. Life Ins. Co. of N.Y., 6 F.3d 367, 380–82 (6th Cir. 1993).

§ 72 Availability of Equitable Relief

Section 1964(a) of RICO provides that federal district courts may issue orders to “prevent and restrain” violations of Section 1962. The statute expressly provides that injunctive relief is available in civil RICO suits brought by the United States. It is not yet clear, however, whether injunctive relief under Section 1964(a) is available in private lawsuits as well as government proceedings, or whether the treble damages remedy of Section 1964(c) is the exclusive remedy for private plaintiffs.

The circuit courts have taken a variety of approaches to answering whether equitable relief is available in private civil RICO actions. The First Circuit has not addressed this issue directly but has expressed doubt that injunctive or other equitable relief is available in private civil RICO actions. The Second Circuit has twice indicated that, were it to address the issue, it would conclude that Section 1964(a) does not provide equitable relief to private plaintiffs. The Third, Fourth, Eighth and Tenth Circuits have declined to decide this issue. The Ninth Circuit concluded in Religious Technology Center

weighed in favor of applying a multiplier to the lodestar); see also Hanrahan v. Britt, 174 F.R.D. 356, 368–69 (E.D. Pa. 1997) (finding attorney’s fees reasonable under either percentage of recovery or lodestar method and mentioning that multipliers of between 3 and 4.5 are common).

19 Lincoln House, Inc. v. Dupre, 903 F.2d 845, 848 (1st Cir. 1990).
21 Northeast Women’s Ctr., Inc. v. McMonagle, 868 F.2d 1342, 1355 (3d. Cir. 1989) (noting controversy but expressing no opinion). The Third Circuit has stated that the entry of a preliminary injunction freezing the assets of a corporation is appropriate in an action brought,
that injunctive relief is not available to private litigants under Section 1964(c). Numerous district courts have reached the same conclusion as the Ninth Circuit. The Fifth Circuit initially noted approval of *Wollersheim* in *In re Freedman Litigation* but has since retreated from this stance. The

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22 796 F.2d 1076, 1082–89 (9th Cir. 1986). *But see* Republic of the Phil. v. Marcos, 862 F.2d 1355, 1364 (9th Cir. 1988) (granting preliminary injunction where RICO claims were presented with pendent state law claims).


24 843 F.2d 821, 828–30 (5th Cir. 1988) (finding *Wollersheim* persuasive but declining to decide whether all forms of equitable relief are foreclosed to private litigants under RICO; *see also* Richard v. Hoechst Celanese Chem. Group, Inc., 355 F.3d 345, 355 (5th Cir. 2003) (declaring to allow disgorgement where defendant had ceased conduct, and therefore, disgorgement would be inappropriately punitive rather than directed to prevent future violations).
Sixth Circuit has sustained issuance of an injunction under the lower court’s general equitable powers, based on its pendent jurisdiction over state law claims, without deciding whether Section 1964(a) of RICO affords such relief to private plaintiffs. The Sixth Circuit has also noted that it finds *Wollersheim* persuasive. The Seventh Circuit disagreed with *Wollersheim* in *National Organization for Women, Inc. v. Scheidler*, and concluded that injunctive relief is available in private RICO actions.

The Supreme Court opted not to resolve the issue in *Scheidler v. National Organization for Women, Inc.* when it reversed the Seventh Circuit on other grounds. In the meantime, another district court followed the Seventh Circuit in *Scheidler* and held that injunctive relief is available to a private plaintiff bringing a civil RICO action. Other district courts have either assumed,

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25 See Bolin v. Sears, Roebuck & Co., 231 F.3d 970, 977 (5th Cir. 2000) (noting *Freedman* but allowing injunctive relief under RICO for private plaintiff where defendant did not contest such claim); Conkling v. Turner, 18 F.3d 1285, 1296 (5th Cir. 1994) (noting that “[t]his court has not yet decided whether RICO affords private litigants the option of equitable remedies” and declining to decide the issue).


27 Ganey v. Raffone, 91 F.3d 143 (Table), 1996 WL 382278, at *4 n.6 (6th Cir. July 5, 1996) (noting that the analysis in *Wollersheim* is persuasive but declining to decide the issue).

28 267 F.3d 687, 695–700 (7th Cir. 2001), aff’g 897 F. Supp. 1047, 1083 (N.D. Ill. 1995), rev’d on other grounds, 537 U.S. 393 (2003). But see Baker v. IBP, Inc., 357 F.3d 685, 691 (7th Cir. 2004) (noting that the availability of equitable relief to private litigants under RICO “is a question that has divided the circuits, and that the Supreme Court did not resolve in *Scheidler*”).


without discussion, that such relief is available\textsuperscript{31} or, after discussion, have found such relief to be available.\textsuperscript{32}

At least one district court has held that Section 1964(a), at most, permits courts to enter orders “to prevent and restrain” violations of Section 1962, and therefore an order prohibiting disposition or transfer of assets pendente lite to secure execution of a judgment is beyond the scope of Section 1964(a).\textsuperscript{33} Another district court adopted the reasoning of \textit{Wollersheim} in holding that a RICO claim does not give a federal court authority to enjoin a state court foreclosure proceeding.\textsuperscript{34} The plaintiffs claimed that their case fell within an exception to the Anti-Injunction Act,\textsuperscript{35} which permits federal courts to use their injunctive powers to intervene in ongoing state proceedings if expressly authorized by an act of Congress. The court reasoned that in order to qualify under the “expressly authorized” exception, “an Act of Congress must have created a specific and uniquely federal right or remedy, enforceable in a federal court of equity, that could be frustrated if the federal court” did not enjoin the


\textsuperscript{33} Ashland Oil, Inc. v. Gleave, 540 F. Supp. 81, 84–86 (W.D.N.Y. 1982).


state action.\textsuperscript{36} The court held that because the RICO statute does not expressly provide injunctive relief to civil plaintiffs, the RICO action in federal court did not fit within the “clearly established” exception to the Anti-Injunction Act.\textsuperscript{37}

The D.C. Circuit used a tobacco case to rule that disgorgement is not an available remedy under Section 1964(a).\textsuperscript{38} The court reasoned that the statutory language offers three alternatives to protect against future violations: divestment, injunction, and dissolution. Disgorgement, on the other hand, is aimed at separating the wrongdoer from prior ill-gotten gains. As such, it is not a forward-looking remedy designed to “prevent or restrain.”\textsuperscript{39} As noted above, other courts have left open that disgorgement may be available — at least to the government — if it is fashioned to prevent a future violation, such as if the funds are being used to promote future illegal conduct.\textsuperscript{40}

\textbf{§ 73 Rule 11 Sanctions}

As every federal practitioner is no doubt well aware, Rule 11 of the Federal Rules of Civil Procedure authorizes federal courts to impose sanctions upon any party or attorney who files a pleading or other document that lacks evidentiary support or is not “warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law.”\textsuperscript{41} As of

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\textsuperscript{36} P.R.F., 1992 WL 385170, at *2 (quoting Mitchum v. Foster, 407 U.S. 225, 237 (1972)).
\textsuperscript{37} P.R.F., 1992 WL 385170, at *3.
\textsuperscript{38} United States v. Philip Morris USA Inc., 396 F.3d 1190, 1201 (D.C. Cir. 2005).
\textsuperscript{39} \textit{Id}.
\textsuperscript{40} United States v. Carson, 52 F.3d 1173, 1181–82 (2d Cir. 1995).
\textsuperscript{41} Fed. R. Civ. P. 11(b)(2)–(3).
\end{flushleft}
December 1, 1993, the Federal Rules of Civil Procedure were amended to allow a claim based on the belief that factual contentions will be “likely to have evidentiary support after a reasonable opportunity for further investigation or discovery.” Because of RICO’s complexity, it is a prime candidate for reliance on this provision of the Federal Rules.

Courts initially were reluctant to impose Rule 11 sanctions in RICO cases. One court stated: “[W]e recognize that we are dealing in an area of the law which is at best nebulous and rapidly evolving.” However, since many issues under RICO are now settled law, courts have not hesitated to impose sanctions if a RICO claim is patently deficient: “Particularly with regard to civil RICO claims, plaintiffs must stop and think before filing them.” As one court noted: “There was a day when clever counsel were admired by some for inventive methods to resurrect dead litigation. That day has passed.” Indeed, as RICO became a more familiar part of civil practice, awards of sanctions also

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43 In re Gas Reclamation, Inc. Sec. Litig., 663 F. Supp. 1123, 1126 (S.D.N.Y. 1987) (denying motion for sanctions); accord Cal. Architectural Bldg. Prods., Inc. v. Franciscan Ceramics, Inc., 818 F.2d 1466, 1472 (9th Cir. 1987) (RICO complaint was not “so lacking in plausibility” as to justify Rule 11 sanctions); Does 1-60 v. Republic Health Corp., 669 F. Supp. 1511, 1518–19 (D. Nev. 1987) (refusing to invoke Rule 11 sanctions where RICO complaint was lacking specificity as to predicate acts); J.D. Marshall Int’l, Inc. v. Redstart, Inc., 656 F. Supp. 830, 835–36 (N.D. Ill. 1987) (lack of clarity in RICO law is one reason to deny sanctions); Khaimi v. Schonberger, 664 F. Supp. 54, 64 (E.D.N.Y. 1987) (“The body of law surrounding RICO is in a state of flux and the arguments advanced by plaintiff herein cannot be viewed as so frivolous to merit sanction. To conclude otherwise may have the effect of chilling creative advocacy.”), aff’d, 838 F.2d 1203 (2d Cir. 1987).
44 Pelletier v. Zweifel, 921 F.2d 1465, 1522 (11th Cir. 1991). The court went on to hold that the district court abused its discretion in refusing to impose sanctions for filing frivolous RICO claims. Id.
45 Stagner v. Pitts, 7 F.3d 1045 (Table), 1993 WL 375809, at *3 (10th Cir. Sept. 20, 1993) (sanctioning plaintiffs for baseless RICO claim and failure to notify court of prior release).
became increasingly common.\textsuperscript{46} In one case, the Seventh Circuit reversed a
district court order that denied a defendant’s motion for sanctions, holding that
the RICO action clearly was barred by the statute of limitations and, among

\textsuperscript{46} See, e.g., Skidmore Energy, Inc. v. KPMG, 455 F.3d 564 (5th Cir. 2006) (affirming Rule 11 sanctions against plaintiffs who pled factually groundless RICO complaint alleging money laundering, terrorist activity, and participation in organized crime); White v. Clay, 23 F. App’x 407, 408 (6th Cir. 2001), adopting 2001 WL 1793746 (W.D. Ky. Mar. 14, 2001) (ordering sanctions where, inter alia, plaintiff failed to investigate RICO claim); Pioneer Lumber Treating, Inc. v. Cox, 5 F.3d 539 (Table), 1993 WL 370971, at *3–5 (9th Cir. Sept. 22, 1993) (affirming sanctions where plaintiff’s “complaint was deficient in almost all requirements of pleading a RICO claim”); O’Malley v. New York City Transit Auth., 896 F.2d 704, 709 (2d Cir. 1990) (plaintiff’s claim was “perhaps the most ‘baseless’ RICO claim ever encountered by this court. . . . Mere lack of clarity in the general state of some areas of RICO law cannot shield every baseless RICO claim from Rule 11 sanctions”); Ryan v. Clemente, 901 F.2d 177, 181 (1st Cir. 1990) (sanctions warranted against plaintiff who failed to investigate before accusing state officials of participating in a RICO enterprise); Chapman & Cole v. Itel Container Int’l, 865 F.2d 676, 683–85 (5th Cir. 1989) (affirming sanctions against defendant for RICO counterclaim filed based on unverified hearsay); Fahrenz v. Meadow Farm P’ship, 850 F.2d 207, 209–11 (4th Cir. 1988) (affirming sanctions order on plaintiff who pressed ahead with RICO case after key witnesses repudiated accusations which formed basis of plaintiff’s case); Lupo v. R. Rowland & Co., 857 F.2d 482, 486 (8th Cir. 1988) (affirming sanctions where plaintiff added RICO count to complaint without proper factual basis); Med. Emergency Serv. Assocs., S.C. v. Foulke, 844 F.2d 391, 398–401 (7th Cir. 1988) (affirming sanctions order on plaintiff for failure to investigate before filing RICO complaint); Stone v. Int’l Bhd. of Teamsters, 865 F.2d 1330 (Table), 1988 WL 145092, at *5 (D.C. Cir. Dec. 30, 1988) (affirming sanctions order where it was apparent plaintiff had no standing to raise RICO claim); Martinez v. Martinez, 207 F. Supp. 2d 1303, 1308–09 (D.N.M. 2002) (holding Rule 11 sanctions warranted after court warned counsel about deficient original complaint, and after counsel still failed to adequately allege elements of RICO claim in amended complaint); Gold v. The Last Experience, No. 97 CIV. 1459 (JGK), 1999 WL 156005, at *3–4 (S.D.N.Y. Mar. 22, 1999) (entering Rule 11 sanctions order because plaintiff proceeded with RICO action despite knowing it was barred by earlier settlement agreement); Rodriguez-O’Ferral v. Trebol Motors Corp., 154 F.R.D. 33, 35 (D.P.R. 1994) (“attorneys utterly failed in their responsibility to investigate and evaluate the facts prior to filing the complaint and in their equally vague response to the court’s RICO order”), aff’d, 45 F.3d 561 (1st Cir. 1995); Project 74 Allentown, Inc. v. Frost, 143 F.R.D. 77, 89–92 (E.D. Pa. 1992) (imposing sanctions upon plaintiff-real estate purchasers and their attorneys for failing to investigate RICO claims, and because there was no reasonable basis for their claims or for their responses to seller’s discovery requests), aff’d, 998 F.2d 1004 (3d Cir. 1993); Brandt v. Schal Assocs., Inc., 131 F.R.D. 485, 503 (N.D. Ill. 1990) (entering Rule 11 sanctions against plaintiff’s attorney in excess of $350,000 for filing RICO claim in “massive contract-based dispute”), aff’d, 960 F.2d 640 (7th Cir. 1992); Henry v. Farmer City State Bank, 127 F.R.D. 154, 156 (C.D. Ill. 1989) (“[plaintiffs’] RICO theory was wacky, sanctionably so”); Wardwell v. Metmor Fin., Inc., Civ. A. No. 88-122-S, 1988 WL 156801, at *2 (D. Mass. Nov. 3, 1988) (“it should have been patently obvious to any attorney who had made the most basic investigation into the prerequisites of such a [RICO] claim that they had no business filing it in the first place”).
other defects, failed to allege a pattern of racketeering. The court also noted that the plaintiff's counsel had acknowledged “that it did not know the basis of liability against the defendants but it still was proceeding with its action.”

Courts are less likely to impose sanctions in cases involving elements of RICO that are unsettled. In one case, the district court declined to impose Rule 11 sanctions, even though the plaintiffs’ RICO allegations failed to conform to the Fourth Circuit’s clear definition of an enterprise, because other circuits had decided the issue differently. The court reasoned: “[t]he dismissal of this count against [defendant] demonstrates that it is not ‘warranted by existing law’; the contrary decisions in other circuits suggest that it was supported by a ‘good faith argument for the extension, modification or reversal of existing law.”

47 Fred A. Smith Lumber Co. v. Edidin, 845 F.2d 750, 752–54 (7th Cir. 1988).
48 Id. at 754.
50 Id.; accord Smith v. Our Lady of the Lake Hosp., 960 F.2d 439, 445 (5th Cir. 1992) (noting that sanctions were not appropriate where one defendant lacked economic motivation for the alleged fraud under RICO because law was not settled whether the RICO offenses must be economically motivated); Beverly Gavel, Inc. v. DiDomenico, 908 F.2d 223, 227–30 (7th Cir. 1990) (in denying sanctions the court stated “[g]iven that the practical implications of the pattern requirement were at best uncertain at the time plaintiffs filed their complaint, we do not think that plaintiffs’ assertions regarding predicate acts and a pattern of racketeering were without a factual or legal basis”); Kolfenbach v. Mansour, 36 F. Supp. 2d 1351, 1354 (S.D. Fla. 1999) (denying motion for Rule 11 sanctions because retroactive application of 1995 Reform Act barring securities fraud-based civil RICO claims was “not entirely settled”); Scott v. Steingold, No. 97 C 7871, 1998 WL 704287, at *10 (N.D. Ill. 1998) (holding that Rule 11 sanctions were not warranted where plaintiff was attempting to clarify retroactive application of Private Securities Litigation Reform Act of 1995 to RICO); Young v. West Coast Indus. Relations Ass’n, 144 F.R.D. 206, 216 (D. Del. 1992) (holding that sanctions were inappropriate where existing law at the time of the complaint made it reasonable for plaintiffs to conclude that a pattern alleged to have occurred over an 11–14 month period sufficiently met the continuity element and “there had been and apparently continues to be uncertainty” regarding the assertion of deceptive predicate acts); Arnold v. Moran, 687 F. Supp. 232, 237 (E.D. Va. 1988)
Sanctions Against Attorneys. Given the unique nature of RICO claims, attorneys are at particular peril that sanctions will be awarded directly against them as well as their clients. As the Fifth Circuit stated in affirming a district court’s award of sanctions against the plaintiff and its attorneys, an attorney’s duty to conduct an investigation prior to filing a complaint is particularly important in RICO actions:

Given the resulting proliferation of civil RICO claims and the potential for frivolous suits in search of treble damages, greater responsibility will be placed on the bar to inquire into the factual and legal bases of potential claims or defenses prior to bringing such suit or risk sanctions for failing to do so.51

Courts have reached very different conclusions in evaluating whether an attorney conducted a reasonable investigation prior to filing RICO claims.52

(no Rule 11 sanctions even though claim was defective in Fourth Circuit, because other circuits might have allowed claim). But see Chris & Todd, Inc. v. Arkansas Dep’t of Fin. & Admin., 125 F.R.D. 491, 496 (E.D. Ark. 1989) (attorney sanctioned for filing amended complaint after court warned attorney that it intended to apply the Eighth Circuit’s restrictive definition of pattern of racketeering activity).

51 Chapman & Cole v. Itel Container Int’l, 865 F.2d 676, 685 (5th Cir. 1989), (quoting Black & Magenheim, Using the RICO Act in Civil Cases, 22 HOUS. L. REV. 20, 24–25 (1984)); see also Byrne v. Nezhat, 261 F.3d 1075, 1115–17 (11th Cir. 2001) (upholding Rule 11 attorney sanctions in case involving federal and state RICO claims when attorney failed to conduct factual investigation, failed to research the law, and committed other acts of bad faith); Avirgan v. Hull, 932 F.2d 1572, 1582 (11th Cir. 1991) (upholding $1.1 million sanction against public-interest law firm and its clients because RICO claims brought in connection with the Iran-Contra affair were made in bad faith and were designed to “ vexatiously” multiply the proceedings); Watowa v. Nystrom, No. 91-2292-0, 1991 WL 286924, at *1 (D. Kan. Dec. 5, 1991) (holding that Rule 11 sanctions were warranted where plaintiffs had previously sought relief from defendants on substantially similar grounds and stating that the “court will simply not tolerate repetitious, unfounded litigation”); Henry v. Farmer City State Bank, 127 F.R.D. 154, 159 (C.D. Ill. 1989) (“[a]ttorneys are specially trained to examine existing law in light of the facts presented. The attorney must bear the sanction for filing a complaint which violates Rule 11 by being unsupported by the law invoked in the complaint”).

52 Compare Ins. Benefit Admin’rs, Inc. v. Martin, 871 F.2d 1354, 1357–59 (7th Cir. 1989) (sanctions upheld where client provided facts to support his claim that he was an independent contractor but attorney had access to several documents indicating that client was an employee), and Bryant v. Brooklyn Barbeque Corp., 130 F.R.D. 665, 670 (W.D. Mo. 1990)
Under Rule 11 an objective, rather than subjective, standard is used to evaluate an attorney’s decision to file a suit.\(^{53}\) Not surprisingly, courts generally reserve Rule 11 sanctions for cases of unusual misconduct, and they continue to deny most Rule 11 motions.\(^{54}\)

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\(^{54}\) See, e.g., Beeman v. Fiester, 852 F.2d 206, 209–12 (7th Cir. 1988) (affirming order denying sanctions); Creative Bath Prods. v. Conn. Gen. Life Ins. Co., 837 F.2d 561, 564 (2d Cir. 1988) (affirming order denying sanctions); Int’l Bhd. of Teamsters v. Carey, 163 F. Supp. 2d 271, 286 (S.D.N.Y. 2001) (denying Rule 11 sanctions where complaint failed to allege sufficient closed-ended continuity); Clifford v. Hughson, 992 F. Supp. 661, 671–72 (S.D.N.Y. 1998) (denying Rule 11 sanctions and holding that a reasonable attorney could believe RICO claim had a chance to succeed, particularly where court had encouraged plaintiff to continue to amend its complaint in order to state a claim).
XI. JURISDICTION, VENUE, AND PREEMPTION

§ 74 Subject Matter Jurisdiction

Federal courts have subject matter jurisdiction over RICO claims pursuant to 28 U.S.C. § 1331 and 18 U.S.C. § 1964(c). If, however, a plaintiff fails to plead sufficient facts to support a RICO claim, a federal court may find the claim does not present a federal question. For example, in Oak Park Trust & Savings Bank v. C.G. Therkildsen, the district court dismissed a RICO counterclaim on procedural grounds because the defendant had not answered the complaint. The Seventh Circuit held that while the court had properly rejected the RICO counterclaim, it should have been rejected for lack of subject matter jurisdiction rather than the reasons offered by the district court. Even though a plaintiff’s failure to prove its case does not normally deprive a court of jurisdiction, the Seventh Circuit noted that the counterclaim alleged no more than a breach of contract or simple fraud claim. Therefore, the court held that the “RICO theory is so feeble, so transparent an attempt to move a state-law dispute to federal court and avoid the state statute of limitations, that it does

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1 209 F.3d 648 (7th Cir. 200).
2 Id. at 650.
3 Id. at 651.
4 Id.
not arise under federal law at all.”

Indeed, filing a bogus RICO claim to invoke federal jurisdiction can invite sanctions.

§ 75 Personal Jurisdiction and Service of Process

Section 1965(b) of RICO provides that process may be served “in any judicial district of the United States” when required by the “ends of justice.” Section 1965(d) allows process to be served “in any judicial district in which such person resides, is found, has an agent, or transacts his affairs.” Accordingly, courts have approved nationwide service of process under both Section 1965(b) and Section 1965(d). In Cory v. Aztec Steel Building, Inc., the Tenth Circuit analyzed the cases addressing nationwide service of process under Sections 1965(b) and (d) and concluded that the better reasoned approach is to apply Section 1965(b), holding: “When a civil RICO action is brought in a district court where personal jurisdiction can be established over at least one defendant, summonses can be served nationwide on other defendants if required by the ends of justice.”

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5  Id.

6  Williams v. Aztar Gaming Corp., 351 F.3d 294, 300 (7th Cir. 2003) (vacating judgment for lack of subject-matter jurisdiction and directing plaintiff to show cause why he should not be sanctioned for filing frivolous RICO claim).


9  Compare ESAB Group, Inc. v. Centricut, Inc., 126 F.3d 617, 626–27 (4th Cir. 1997) (holding that court had jurisdiction because defendant was served under nationwide service of process provision in Section 1965(d)) and Republic of Panama v. BCCI Holdings (Luxembourg) S.A., 119 F.3d 935, 942 (Section 1965(d) “provides for . . . nationwide service of process”) with PT United Can Co., Ltd. v. Crown Cork & Seal Co., 138 F.3d 65, 70–72 (2d Cir. 1998) (finding that Section 1965(b) provides for nationwide service of process) and Stauffacher v. Bennett, 969 F.2d 455, 460 (7th Cir. 1992) (finding nationwide service of process in Section 1965(b)).

10  468 F.3d 1226, 1231 (10th Cir. 2006).
justice” is a flexible concept, the court declined to offer an exact definition, but it did rule that, without more, the plaintiff’s allegation that it suffered injury in the forum state did not meet the “ends of justice” standard under Section 1965(b). The court also rejected the notion that the “ends of justice” depend on whether all defendants would be amenable to suit in a single forum.

Some courts have held that such “nationwide service of process” provisions also confer personal jurisdiction over a defendant in any judicial district, so long as the defendant has minimum contacts with the United States. In *Lisak v. Mercantile Bancorp, Inc.*, the Seventh Circuit reversed the district court’s dismissal of a RICO claim for lack of personal jurisdiction, concluding that minimum contacts with the forum state are unnecessary in federal question cases—such as those arising under RICO—because the court is exercising the judicial power of the United States rather than that of an individual state.

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11 *Id.* at 1232.

12 *Id.*


14 834 F.2d 668 (7th Cir. 1987).

Other courts have taken the opposite view, holding that that the RICO statute provides a basis for nationwide jurisdiction only when one of the defendants has minimum contacts with the forum.\(^\text{16}\)

In *Heller v. Deutsche Bank*,\(^\text{17}\) the court discussed personal jurisdiction based either on general (i.e., continuous and systematic) or claim-specific contacts with the forum.\(^\text{18}\) According to *Heller*, even a single claim-specific contact is sufficient to confer personal jurisdiction under RICO when the

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\(^{16}\) See FC Inv. Group LC v. IFX Markets, Ltd., No. 07-7037, 2008 WL 2468431, at *8–9 (D.C. Cir. June 20, 2008) (holding that personal jurisdiction based on minimum contacts must be established as to at least one defendant); Cory v. Aztec Steel Bldg., Inc., 468 F.3d 1226, 1231 (10th Cir. 2006) (holding that the "ends of justice" require more than suffering injury in the forum state to support nationwide service of process); PT United Can Co., Ltd. v. Crown Cork & Seal Co., 138 F.3d 65, 71 (2d Cir. 1998) (holding that a civil RICO action may be brought only in a district court where personal jurisdiction based on minimum contacts is established as to at least one defendant); 800537 Ontario Inc. v. Auto Enter., Inc., 113 F. Supp. 2d 1116, 1127 (E.D. Mich. 2000) (holding that RICO only authorizes nationwide service of process upon other defendants if the court has personal jurisdiction over at least one defendant); Anderson v. Indiana Black Expo, Inc., 81 F. Supp. 2d 494, 505 (S.D.N.Y. 2000) (holding that RICO does not confer universal personal jurisdiction over all RICO defendants, and requiring at least one defendant to have minimum contacts with the forum); World Wide Minerals Ltd. v. Republic of Kazakhstahn, 116 F. Supp. 2d 98, 108 (D.D.C. 2000) (holding that RICO does not permit the court to assert jurisdiction when none of the defendants is subject to personal jurisdiction in the forum).


\(^{18}\) *Id.* at *2–3.
defendant injures the plaintiff through activities purposely directed at residents of the forum state and the defendant does not present a compelling case that such jurisdiction is unreasonable.\textsuperscript{19}

\textbf{§ 76 Application of RICO to Extraterritorial Conduct}

RICO is silent about its extraterritorial reach. Several courts have grappled with whether the statute permits a court to exercise subject matter jurisdiction over claims based on conduct that occurred outside the United States. Whether RICO applies to acts occurring outside the United States depends upon whether Congress intended the statute to apply to such conduct, not on a choice of law analysis.\textsuperscript{20}

Canons of statutory construction provide that in the absence of clear legislative intent to the contrary, there is a presumption against extraterritorial application of United States law.\textsuperscript{21} Yet some courts have inferred that in enacting RICO, Congress intended to eliminate wrongful conduct wherever it occurs.\textsuperscript{22} Drawing from the securities and antitrust laws, courts have applied the “conduct” and “effects” test to find that RICO applies to extraterritorial

\textsuperscript{19} Id. at *3; see also Burger King Corp. v. Rudzewicz, 471 U.S. 462, 472-77 (1985).

\textsuperscript{20} Liquidation Comm’n of Banco Intercontinental, S.A. v. Renta, 530 F.3d 1339, 1351–1352 (11th Cir. 2008); Orion Tire Corp. v. Goodyear Tire & Rubber Co., Inc., 268 F.3d 1133, 1137 (9th Cir. 2001).


\textsuperscript{22} See United States v. Noriega, 746 F. Supp. 1506, 1517 (S.D. Fla. 1990), aff’d, 117 F.3d 1206 (11th Cir. 1997) (“Given the Act’s broad construction and equally broad goal of eliminating the harmful consequences of organized crime, it is apparent that Congress was concerned with the effects and not the locus of racketeering activities.”).
conduct where the defendant’s conduct within the United States affects U.S. citizens and commerce within the United States.\footnote{Poulos v. Caesars World, Inc., 379 F.3d 654, 663–64 (9th Cir. 2004); see also Liquidation Comm’n of Banco Intercontinental, S.A. v. Renta, 530 F.3d 1339, 1351–1352 (11th Cir. 2008) (holding that RICO applied extraterritorially where conduct in furtherance of the RICO conspiracy occurred in the United States but the effects of the conspiracy were felt elsewhere); OSRecovery, Inc. v. One Groupe Int’l, Inc., 354 F. Supp. 2d 357, 365–68 (S.D.N.Y. 2005) (applying “conduct” and “effects” test).}

In \textit{Alfadda v. Fenn},\footnote{935 F.2d 475 (2d Cir. 1991).} the plaintiffs, foreign nationals, sued a foreign defendant under RICO. The alleged predicate acts included violations of the Securities Exchange Act of 1934,\footnote{See 15 U.S.C. § 78(b). Note that, except in limited circumstances, securities fraud is no longer recognized as a RICO predicate act.} based upon a sale of securities that took place in part in the United States. The plaintiffs alleged that the defendants had diluted plaintiffs’ stake in a Saudi Arabian venture in contravention of an offering prospectus, and that defendants had diverted the proceeds from the sale of additional shares for their personal benefit. The court reasoned that extraterritorial application of RICO turned on Congress’ intent. The court noted that there is “no indication that Congress intended to limit [RICO] to infiltration of domestic enterprises. The mere fact that the corporate defendants are foreign entities does not immunize them from the reach of RICO.”\footnote{Alfadda, 935 F.2d at 479 (citation omitted).} The defendants’ commission of predicate acts within the United States provided a basis for subject matter jurisdiction for the RICO claims.\footnote{Id. at 480; see also Sumitomo Corp. v. Chase Manhattan Bank, No. 99 Civ. 4004(JSM), 2000 WL 1616960, at *2 (S.D.N.Y. Oct. 30, 2000) (holding that subject matter jurisdiction was proper even though most of the relevant acts occurred outside the United States when the plaintiff had alleged predicate acts, including fund transfers and wire communications, that}
One district court has extended RICO to actions occurring wholly outside the United States where the acts had a substantial effect on United States commerce. In *United States v. Noriega*, the United States government brought RICO claims against former Panamanian dictator Manuel Noriega. Noriega, charged with various drug smuggling activities, moved to dismiss the claims for lack of subject matter jurisdiction because the alleged predicate acts did not take place in the United States. The court held that RICO conferred jurisdiction on such conduct, noting that the statute’s prohibitions “are on their face all-inclusive and do not suggest parochial application.” The court reasoned that failure to extend RICO to reach extraterritorial conduct would “frustrate RICO’s purpose by allowing persons engaged in racketeering activities directed at the United States to escape RICO’s bite simply by moving their actions abroad.”

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were committed within the United States for the benefit of a major United States corporation); Starlight Int’l, Inc. v. Herlihy, 13 F. Supp. 2d 1178, 1185 (D. Kan. 1998) (denying foreign defendant’s motion to dismiss for lack of subject matter jurisdiction where plaintiff had alleged both the use of the United States mail and wires to defraud and that the transfer of funds affected interstate commerce); C.A. Westel De Venezuela v. Am. Tel. & Tel. Co., No. 90 Civ. 6665, 1992 WL 209641, at *15–17 (S.D.N.Y. Aug. 17, 1992) (holding that subject matter jurisdiction was proper when the plaintiff had alleged predicate acts of mail and wire fraud committed within the United States, even though the majority of the alleged racketeering conduct occurred in Venezuela).


29 Id. at 1516.

30 Id. at 1517. But see Alfadda v. Fenn, 159 F.3d 41, 45–48 (2d Cir. 1998) (dismissing RICO suit brought by Saudi plaintiffs against French bank in United States on grounds of forum non conveniens); Jose v. M/V Fir Grove, 801 F. Supp. 349, 356–58 (D. Or. 1991) (holding that Congress did not intend RICO to be applied extraterritorially to foreign defendants based upon claims of foreign plaintiffs when the conduct did not occur within United States territory); Peters v. Welsh Dev. Agency, No. 86 C 2646, 1991 WL 172950, at *6–7 (N.D. Ill. Aug. 29, 1991) (holding that acts occurring wholly outside United States insufficient to confer jurisdiction, but acknowledging extraterritorial reach is proper if predicate acts subject to criminal sanctions under United States law).
The Second Circuit has ruled that U.S. courts generally will not interpret and enforce foreign revenue laws, and on that basis affirmed the dismissal of a RICO claim brought by foreign nations alleging that a cigarette smuggling operation caused injury due to lost tax revenue. Another court refused to apply RICO to foreign conduct that injured foreign plaintiffs.

§ 77 Application of RICO to Actions by Foreign Sovereigns

The Tenth Circuit has ruled that the Foreign Sovereign Immunities Act (“FSIA”) confers subject-matter jurisdiction over civil RICO claims against foreign states, their agencies, and their instrumentalities when either the commercial activity exception or another exception contained in the FSIA, applies. In addition, the Sixth Circuit has ruled that a foreign sovereign’s actions can fall under the commercial activity exception to the FSIA when a foreign government acts as a private player in the market rather than as a regulator of the market. The Sixth Circuit held, however, that a foreign sovereign cannot be sued for civil RICO claims because a foreign sovereign is not indictable. The court stated that the conclusion may not be the same for individuals who commit criminal acts when acting outside the scope of the authority of the sovereign.

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31 European Cmty. v. RJR Nabisco, 424 F.3d 175, 179 (2d Cir. 2005).
33 Southway v. Cent. Bank of Nigeria, 198 F.3d 1210, 1216 (10th Cir. 1999).
35 Id. at 821.
36 Id.
§ 78 Concurrent Jurisdiction, Removal, Abstention, and Res Judicata

Concurrent Jurisdiction: Section 1964(c) provides in part that “any person injured in his business or property by reason of a violation of Section 1962 may sue therefore in any appropriate United States district court.” In *Tafflin v. Levitt*, the Supreme Court held that state courts have concurrent jurisdiction over RICO suits.

Removal: Despite the existence of concurrent jurisdiction, RICO claims filed in state court may be removed to federal court. Once removed, the federal court may properly remand the case back to state court if the RICO claims are “intertwined” with state law fraud claims.

Abstention: Federal courts also have addressed whether a federal court should abstain from hearing a civil RICO action under the *Colorado River* abstention doctrine because a state suit between the parties concerning the

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39 See 28 U.S.C. § 1441(a) and (b); Weisman v. Fribush, 911 F.2d 726 (Table), 1990 WL 116844, at *1 (4th Cir. 1990) (RICO and state claims were properly removed); Gallagher v. Donald, 803 F. Supp. 899, 903–04 (S.D.N.Y.) (case which involved RICO, common law fraud, state law claims, and securities claims was removable under 28 U.S.C. § 1441(a), (b), notwithstanding removal bar contained in federal securities statute), aff’d on reconsideration, 805 F. Supp. 221 (1992); Lichtenberger v. Prudential-Bache Sec., Inc., 737 F. Supp. 43, 44 (S.D. Tex. 1990) (*Tafflin* does not prohibit removal of RICO actions).
40 28 U.S.C. § 1441(c); Metro Ford Truck Sales, Inc. v. Ford Motor Co., 145 F.3d 320, 327–28 (5th Cir. 1998) (remanding RICO claim to state court because RICO claims were “so intertwined” with state law fraud and misrepresentation claim); Holland v. World Omni Leasing, Inc., 764 F. Supp. 1442, 1443-44 (N.D. Ala. 1991) (holding that a removed action involving state law claims of fraud, misrepresentation, and breach of contract, as well as RICO claims, should be remanded because the alleged predicate acts of racketeering were “so intertwined with, and so indistinguishable from, [the] state law claims”); cf. Marrical v. Allstate Ins. Co., Civ. No. 92-3134, 1992 WL 277977, at *1 (E.D. Pa. Sept. 30, 1992) (remand is not mandated merely because state courts have concurrent jurisdiction over civil RICO claims).
same conduct is pending. The Fourth Circuit held in *New Beckley Mining Corp. v. United Mine Workers* that a federal district court abused its discretion by abstaining from hearing a federal RICO action because concurrent jurisdiction “does not mandate that the district court surrender jurisdiction.” 41 In *New Beckley*, a mining company sued its employees’ union in state court, seeking an injunction to prevent violence in connection with a strike. The company then filed a federal action, alleging RICO and state law claims arising from incidents that occurred during the strike. Finding that the cases involved different issues, different sources of law, and different remedies, the court held that the two cases were not parallel and that therefore abstention under the *Colorado River* doctrine was improper. 42

Federal courts also have addressed whether a federal court should abstain from hearing a civil RICO action under the *Burford* abstention doctrine because the exercise of federal review would be disruptive of state efforts to establish a coherent policy regarding matters of substantial public import. In *Metro Riverboat Associates, Inc. v. Bally’s Louisiana, Inc.*, 43 the court abstained from considering a RICO suit where the gravamen of the suit implicated a complex regulatory scheme governing gaming and casinos. The court reasoned

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41 946 F.2d 1072, 1074 (4th Cir. 1991).
42 Id. at 1074. See also Al-Abood v. El-Shamari, 217 F.3d 225, 232 (4th Cir. 2000) (affirming district court’s decision not to abstain based on the *Colorado River* doctrine where a suit pending in Monaco did not involve substantially the same issues); Cohen v. Reed, 868 F. Supp. 489, 499 (E.D.N.Y. 1994) (presence of a federal statutory cause of action is a factor that points against abstention). But see Lawrence v. Cohn, 778 F. Supp. 678, 683–86 (S.D.N.Y. 1991) (district court should abstain from hearing plaintiffs’ civil RICO claim when the claim could be heard in a pending state court action), vacated, 816 F. Supp. 191 (S.D.N.Y. 1993).
that abstention was proper because a comprehensive administrative scheme existed, the state possessed a substantial interest in regulating this area of the law, there was a need for a unified approach, and action by the federal court would disrupt the regulatory scheme.\(^{44}\)

In contrast, in *In re Managed Care Litigation*,\(^{45}\) the court held that abstention was not required under the *Burford* abstention doctrine to avoid interference with state health benefits payment programs. The court reasoned that a court should “abstain only under extraordinary circumstances in which the state’s interests are clearly paramount,” and in that case, the defendant failed to show that the RICO action would adversely affect the state’s managed care regulations.\(^{46}\)

**Res Judicata:** A federal RICO claim will be barred by res judicata if the RICO claim could and should have been brought in an earlier state court action.\(^{47}\)

\(^{44}\) *Id.*


\(^{46}\) *Id.*

\(^{47}\) See, e.g., Misischia v. St. John’s Mercy Health Sys., 457 F.3d 800 (8th Cir. 2006) (affirming of dismissal of RICO claim based on res judicata because plaintiff could have filed claim in prior proceeding); Monterey Plaza Hotel Ltd. P’ship v. Local 483 of the Hotel Employees and Rest. Employees Union, AFL-CIO, 215 F.3d 923, 928 (9th Cir. 2000) (holding that RICO claim was barred by res judicata when the same harms and primary rights were litigated and decided in the state court); Fox v. Maulding, 112 F.3d 453, 457–58 (10th Cir. 1997) (holding that RICO claim was barred by res judicata where it should have brought as compulsory counterclaim in Oklahoma foreclosure action); Zhang v. Se. Fin. Group, Inc., 980 F. Supp. 787, 794–95 (E.D. Pa. Sept. 3, 1997) (RICO claim barred by res judicata where claim was based on contention that promissory note was invalid and constituted collateral attack on confessed judgment); Guzzello v. Venteau, 789 F. Supp. 112, 116–17 (E.D.N.Y. 1992); Kaufman v. BDO Seidman, 787 F. Supp. 125, 128–30 (W.D. Mich. 1992), aff’d, 984 F.2d 182 (6th Cir. 1993).
§ 79 Choice of Law Provisions

In a somewhat unusual opinion that has since been withdrawn, the Ninth Circuit held that, despite a contractual choice of law provision indicating that financial services and related agreements would be governed by the law of the Bailiwick of Jersey, the investor plaintiff could still bring RICO claims against defendants in the United States.\(^{48}\) The court held that the defendants could not use a contract to insulate themselves from liability where the plaintiff was asserting torts that were also crimes under United States law.\(^ {49}\) The court concluded that to allow such a result would frustrate the fundamental federal policies embodied by RICO.\(^ {50}\)

§ 80 Preemption

A defendant may assert a preemption defense to convince a federal court to decline to exercise jurisdiction over claims involving the regulatory authority of governmental agencies. Note that preemption is a defense that may or may not affect subject-matter jurisdiction. Federal laws may preempt conflicting state laws. However, if two federal laws collide, then the doctrines of “primary jurisdiction” and “abstention” are triggered, which means that the case should


\(^{49}\) Govett, 112 F.3d at 1021.

\(^{50}\) Id. at 1022. See also Magellan Real Estate Inv. Trust v. Losch, 109 F. Supp. 2d 1144, 1162 (D. Ariz. 2000) (holding that RICO claims were outside the scope of the choice of law provisions in the contracts).
be stayed rather than dismissed for lack of subject-matter jurisdiction.\footnote{51} As discussed in more detail below, a preemption defense will fail where the RICO action would not interfere with state regulatory authority.

\textbf{§ 81 Implied Preemption Under Filed Rate Doctrine}

In \textit{Taffett v. Southern Co.},\footnote{52} (\textit{Taffett I}), a panel of the Eleventh Circuit reversed two independent district court decisions that dismissed RICO claims against utility companies. The plaintiffs alleged that the two companies engaged in fraudulent accounting procedures to reduce their taxes and charge higher utility rates. In each case, the district courts had dismissed the RICO claim, holding that the RICO claim was preempted under the “filed rate doctrine” because a plaintiff’s verdict would usurp agency authority to regulate utility rates. The panel reversed, concluding that a RICO action against utilities would enhance, not undermine, the state’s authority to set reasonable and uniform rates.\footnote{53} The Eleventh Circuit vacated the panel’s decision in \textit{Taffett I} and granted rehearing.\footnote{54}

On rehearing the Eleventh Circuit, en banc (\textit{Taffett II}), held that the filed rate doctrine precluded the utility customers’ RICO claim.\footnote{55} The \textit{Taffett II} court noted that under Alabama and Georgia law a consumer does not have a

\footnotesize{51} Baker v. IBP, Inc., 357 F.3d 685, 688 (7th Cir. 2004); see also Trollinger v. Tyson Foods, Inc., 370 F.3d 602, 608–10 (6th Cir. 2004) (discussing application of “Garmon preemption”).

\footnotesize{52} 930 F.2d 847 (11th Cir. 1991).

\footnotesize{53} \textit{id.} at 856.

\footnotesize{54} Taffett I, 958 F.2d 1514 (per curiam).

\footnotesize{55} Taffett v. Southern Co., 967 F.2d 1483 (11th Cir. 1992).
property right in the utility rate the consumer pays, both states have “elaborate administrative schemes” to ensure utility rates are just and reasonable, and the state judiciaries have no authority to set utility rates. The Taffett II court therefore concluded that allowing consumers to recover damages for fraudulent rates would “disrupt greatly the states’ regulatory schemes and, in the end, would cost consumers dearly.” A damage award also would have the effect of retroactively reducing the utility rates and would undermine state regulatory schemes by discouraging public participation in the state’s rate-making process in favor of judicial relief. Because the state utility commissions had authority to set prospective rates low to compensate consumers for past fraudulent or otherwise excessive rates, the court held that an award of RICO damages for fraudulent rate-making would unnecessarily disrupt the states’ utility regulation schemes. The court also concluded that the filed rate doctrine applies equally to federal and state rate-making authorities and that the doctrine even applies when the regulated entity itself engaged in fraud to obtain approval of a filed rate.

The Eighth Circuit similarly held that the filed rate doctrine barred the telephone customers’ civil RICO claim. The Eighth Circuit concluded that the

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56 Id. at 1490–91.
57 Id. at 1491.
58 Id. at 1492–93.
59 Id. at 1493–94.
60 Id. at 1494–95.
relief the class sought would disturb the state public utility commission’s rate making decisions because RICO damages could only be measured by comparing the difference between the rates the commission originally approved and the rates it would have approved absent the fraudulent conduct.62

The Second Circuit reached a similar conclusion in Wegoland, Ltd. v. NYNEX Corp.63 In Wegoland, the court agreed with the Eleventh Circuit’s holding in Taffett II and the Eighth Circuit’s holding in H.J. Inc. in affirming the dismissal of RICO claims based on unreasonable utility rates. The court adopted the district court’s reasoning and its conclusion that there is no general exception to the filed rate doctrine in actions for fraud committed on the regulatory agency, and that the filed rate doctrine mandated dismissal of plaintiffs’ RICO claims.64

However, one district court within the Second Circuit has read the district court decision in Wegoland to allow RICO claims to go forward in spite of the filed rate doctrine. In Gelb v. American Tel. & Tel. Co.,65 the plaintiffs alleged that AT&T carried out a scheme to defraud class members by concealing the costs of using the AT&T calling card. AT&T contended that any RICO claim was preempted by the filed rate doctrine. The court examined in

62 Id. at 492–94.
63 27 F.3d 17 (2d Cir. 1994).
64 Id. at 17; see also Sun City Taxpayers Ass’n v. Citizens Util. Corp., 45 F.3d 58, 62 (2d Cir. 1995); Cullum v. Arkla, Inc., 797 F. Supp. 725, 728–29 (E.D. Ark. 1992) (facts presented were indistinguishable from those in H.J. Inc., which was controlling), aff’d, 994 F.2d 842 (8th Cir. 1993); Feiner v. Orange & Rockland Util. Inc., 862 F. Supp. 1084, 1087 (S.D.N.Y. 1994).
detail the history and purpose of the filed rate doctrine and concluded that, notwithstanding other courts’ decisions to the contrary, the filed rate doctrine would not preempt a RICO claim based on fraud which was only indirectly related to the tariff at issue.\textsuperscript{66} The court noted that it was “entirely consistent” with \textit{Wegoland} to allow the plaintiffs’ RICO cause of action to survive the filed rate doctrine, and found “no reason to employ the doctrine in a manner that in effect extends a regulated entity’s immunity from suit.”\textsuperscript{67}

Another district court within the Second Circuit has relied on \textit{Wegoland} to allow RICO claims to proceed against a utility.\textsuperscript{68} There, the plaintiffs brought a RICO claim alleging that the defendant telephone company failed to comply with the terms of its filed tariff. The court held that the filed rate doctrine did not bar plaintiffs’ RICO claims because: (1) plaintiffs were attempting to enforce a tariff, not challenge the reasonableness of a filed rate; (2) the tariffs did not explicitly limit plaintiffs’ remedies; (3) there was no public utility exception to RICO; and (4) the case law did not support the defendants’ position.\textsuperscript{69}

\textbf{§ 82 Statutory Preemption}

RICO claims may be preempted by a federal statute if the RICO claim would disrupt an established regulatory scheme.

\textsuperscript{66} \textit{Id.} at 1029.

\textsuperscript{67} \textit{Id.} at 1029–30; \textit{see also} Sun City Taxpayers’ Ass’n v. Citizens Utils. Co., 847 F. Supp. 281, 290–91 (D. Conn. 1994) (no exception to filed rate doctrine for fraud on the regulatory agency), aff’d, 45 F.3d 58 (2d Cir. 1995).


\textsuperscript{69} \textit{Id.} at 574.
McCarran-Ferguson Act: RICO claims involving insurance fraud may be preempted by the McCarran-Ferguson Act, which provides that “the business of insurance” is a matter of state, not federal, control. The McCarran-Ferguson Act precludes the application of a federal statute (like RICO) if: (1) the statute does not specifically relate to the business of insurance; (2) the acts challenged under the statute constitute the business of insurance; (3) the state has enacted laws regulating the challenged acts; and (4) the federal statute would invalidate, impair and supersede the state statute.

Applying these factors, several courts have held that McCarran-Ferguson preempts RICO claims because application of RICO would impair, invalidate or

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20 15 U.S.C. §§ 1011–1014. Specifically, Section 2(b) of the McCarran-Ferguson Act provides; “No Act of Congress shall be construed to invalidate, impair or supersede any law enacted by any State for the purpose of regulating the business of insurance . . . unless such Act specifically relates to the business of insurance.” 15 U.S.C. § 1012(b).

21 In determining if a practice constitutes the “business of insurance,” a court must consider (1) whether the practice has the effect of transferring or spreading a policyholder’s risk; (2) whether the practice is an integral part of the policy relationship between the insurer and insured; and (3) whether it is limited to entities within the insurance industry. United Life Ins. Co. v. Pireno, 458 U.S. 119, 129 (1982). Several courts have found no preemption under McCarran-Ferguson where the challenged practice did not constitute the “business of insurance.” See, e.g., First Nat’l Bank v. Sedgwick James of Minnesota, 792 F. Supp. 409, 418–19 (W.D. Pa. 1992) (finding no preemption when plaintiffs alleged a “nationwide scheme to induce lenders to extend credit to otherwise unqualified borrowers through the sale of worthless surety-type policies to borrowers because that practice did not constitute the business of insurance); Elliott v. ITT Corp., 764 F. Supp. 102, 104 (N.D. Ill. 1991) (holding that McCarran-Ferguson did not preempt RICO claim when claim was based primarily on “the particulars on credit extension” and “not the business of insurance per se”).

22 See, e.g., Merchants Home Delivery v. Hall & Co., 50 F.3d 1486, 1489 (9th Cir. 1995); Cochran v. Paco, Inc., 606 F.2d 460, 464 (5th Cir. 1979). Other courts, however, have interpreted the Supreme Court’s decision in United States Dep’t of Treasury v. Fabe, 508 U.S. 491 (1993), as mandating only a three prong test. Accordingly, these courts eliminate the “acts challenged under the statute constitute the business of insurance” requirement. See, e.g., Autry v. Nw. Premium Servs., Inc., 144 F.3d 1037, 1042 (7th Cir. 1998) (holding that the three-prong test is the appropriate test to employ in McCarran-Ferguson Act preemption analysis); Doe v. Norwest Bank Minnesota, N.A., 107 F.3d 1297, 1305 n.8 (8th Cir. 1997); Ambrose v. Blue Cross & Blue Shield of Va., Inc., 891 F. Supp. 1153, 1158 n.4 (E.D. Va. 1995), aff’d per curiam, 95 F.3d 41, 1996 WL 482689 (4th Cir. 1996) (unpublished table decision).
supersede the state’s regulatory provisions.⁷³ These courts have concluded that applying RICO would frustrate the state regulatory framework because RICO would allow for a private suit in an area in which state law mandates administrative enforcement.⁷⁴ A RICO action will not be allowed to proceed where “the intrusion of RICO’s substantial damages provisions into a state’s regulatory program” would impair state law.⁷⁵ Similarly, courts have held that where state law mandates a shorter limitations period, RICO’s inherent four-year limitations period is preempted.⁷⁶

On the other hand, the McCarran-Ferguson Act does not preempt RICO claims where the RICO claim supplements or complements state law.⁷⁷ For example, the Ninth Circuit found that a RICO claim was not preempted by the


⁷⁴ See, e.g., Ambrose, 891 F. Supp. at 1165 (stating that private RICO actions “would convert a system of public redress into a system of private redress”); Everson, 898 F. Supp. at 544; Wexco, 820 F. Supp. at 204 (observing that private RICO action would “upset the balance of relationships between insurance entities and insureds under Pennsylvania’s administrative enforcement scheme).

⁷⁵ Doe, 107 F.3d at 1307; see also, e.g., Kenty, 92 F.3d at 392 (observing that RICO would impair Ohio law due to differences in remedies, liability and standards of proof between statutes); Ambrose, 891 F. Supp. at 1165; Wexco, 820 F. Supp. at 204 (availability of treble damages, costs and attorney’s fees under RICO would impair Pennsylvania law).


⁷⁷ See, e.g., Genord v. Blue Cross & Blue Shield, 440 F.3d 802 (6th Cir. 2006) (affirming denial of motion to dismiss RICO claim because claim did not invalidate, impair, or supersede the relevant Michigan statute regulating insurance).
McCarran-Ferguson Act even though California law provided only for administrative remedies.\textsuperscript{78} The Ninth Circuit concluded that because RICO and California law prohibited the same acts, RICO did not impair, invalidate, or supersede California law.\textsuperscript{79}

In \textit{Humana v. Forsyth},\textsuperscript{80} the Supreme Court upheld the Ninth Circuit’s determination that the McCarran-Ferguson Act does not preempt RICO where a state’s insurance law provides only for administrative remedies.\textsuperscript{81} In its discussion of whether a federal law directly conflicts with state law the Court held: "When federal law does not directly conflict with state regulation and when application of the federal law would not frustrate any declared state policy or interfere with a state’s administrative regime, the [Act] does not preclude its application."\textsuperscript{82} The Court allowed the RICO claim because RICO’s private right of action and treble damages provisions did not directly conflict

\textsuperscript{78} Merchants Home Delivery v. Hall & Co., 50 F.3d 1486, 1492 (9th Cir. 1995); see also Sabo v. Metro. Life Ins. Co., 137 F.3d 185, 194–95 (3d Cir. 1998) (holding that RICO cause of action can be brought despite Pennsylvania insurance scheme which did not provide for a private cause of action (citing Merchants Home Delivery)).

\textsuperscript{79} Merchants, 50 F.3d at 1492; see also Forsyth v. Humana, Inc., 114 F.3d 1467, 1480 (9th Cir. 1997) (reaching same conclusion under Nevada law); In re Managed Care Litig., 135 F. Supp. 2d 1253, 1259–60 (S.D. Fla. 2001) (holding that RICO action was not barred by the McCarran-Ferguson Act because the defendants failed to demonstrate that application of the RICO statute would significantly impair rather than advance the interests of state insurance laws or that the court’s action would disrupt a state administrative system); Dornberger v. Metro. Life Ins. Co., 961 F. Supp. 506, 520 (S.D.N.Y. 1997) (finding no preemption where federal law can be used to punish the same substantive conduct as state insurance law, regardless of differences in procedures or remedies); J.J. White, Inc. v. William A. Graham Co., No. Civ. A. 96-6131 1997 WL 134896, at *3 (E.D. Pa. Mar. 17, 1997) (concluding that RICO claim “would supplement, rather than supplant” Pennsylvania insurance law).

\textsuperscript{80} 525 U.S. 299 (1999).

\textsuperscript{81} Id. at 313.

\textsuperscript{82} Id. at 301.
with or impair state law, but complemented Nevada’s statutory and common law remedies.83

Following *Humana*, the Fourth Circuit has held that RICO does not impair the administrative scheme under Virginia insurance statutes.84 Similarly, in a detailed opinion, the Third Circuit has ruled that allowing a RICO claim brought by a participant in an employee benefit plan alleging illegal rejections of payouts to disabled insureds would not impair the regulatory scheme under the New Jersey insurance laws, and therefore would not be barred by the McCarran-Ferguson Act.85

**National Labor Relations Act:** Several courts have held that RICO claims are preempted by the National Labor Relations Act (“NLRA”)86 where the “underlying conduct of the plaintiff’s RICO claim is wrongful only by virtue of the labor laws.”87 Applying this analysis, several courts of appeals have found RICO claims preempted where the predicate acts involved unfair labor practices in violation of Sections 7 and 8 of the NLRA.88

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83 *Id.* at 719. Cf. In re Managed Care Litig., 185 F. Supp. 2d 1310 (S.D. Fla. 2002) (distinguishing *Humana* to dismiss RICO claims by HMO enrollees from California, Florida, New Jersey, and Virginia under the McCarran-Ferguson Act because unlike Nevada, those states do not provide a private right of action to victims of insurance fraud).


86 29 U.S.C. § 158.


88 *E.g.*, Adkins v. Mireles, 526 F.3d 531, 542 (9th Cir. 2008); Tamburello v. Comm-Tract Corp., 67 F.3d 973, 979 (1st Cir. 1995) (“Because plaintiff's claim hinges upon a determination of whether an unfair labor practice has occurred, we conclude that his RICO claims are subject to the primary jurisdiction of the NLRB”); Talbot, 961 F.2d at 662; Brennan v. Chestnut, 973 F.2d 644, 647 (8th Cir. 1992) (“pilots RICO claim is preempted by *Garmon* as it involves
For example, in *Talbot v. Robert Matthews Distrib. Co.*, the Seventh Circuit held that the NLRA preempted a plaintiff’s RICO claim alleging that the defendant’s labor practices constituted a fraudulent pattern of racketeering.\(^8\) Similarly, in *Brennan v. Chestnut*, the Eighth Circuit decided that a RICO claim was preempted where the plaintiff alleged mail fraud, wire fraud, and extortion arising from the defendant’s coercion of employees and its termination of union members who engaged in union activity.\(^9\) The First Circuit similarly concluded that a RICO claim alleging that the defendants intimidated and coerced the plaintiff into quitting his job in retaliation for his union activities as a union steward was subject to the primary jurisdiction of the National Labor Relations Board (“NLRB”), and thus preempted.\(^1\) Several district courts have ruled that RICO claims are preempted under similar circumstances.\(^2\)

\(^8\) Talbot, 961 F.2d at 662.

\(^9\) Brennan, 973 F.2d 647.

\(^1\) Tamburello, 67 F.3d at 978.

On the other hand, the NLRA does not preempt RICO claims based on predicate acts that are illegal independent of the labor laws. For example in *Teamsters Local 372 v. Detroit Newspapers,* the district court held that the RICO claim was not preempted because there was no need to look to the labor laws to determine whether predicate acts alleging arson, robbery, destruction of property, and physical assault by unions were illegal. As instructed by the Seventh Circuit, “[w]hen the predicate offenses of a particular claim under RICO are federal crimes other than transgressions of the labor laws, no dispute

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There are three generally recognized exceptions to the NLRB’s primary jurisdiction. The NLRB does not have primary jurisdiction: (1) where Congress has expressly carved out an exception to the NLRB’s primary jurisdiction; (2) when the regulated activity touches “interests so deeply rooted in local feeling and responsibility that, in the absence of compelling congressional direction,” courts “could not infer that Congress had deprived the States of the power to act”; and (3) where the regulated activity is merely a peripheral or collateral concern of the labor laws. Tamburello, 67 F.3d at 978–79. See *Vaca v. Sipes,* 386 U.S. 171, 179–80 (1967). Courts have relied on this last exception in holding that RICO claims are not preempted where the alleged predicate acts are illegal without reference to the labor laws. See *e.g.*, United States v. Boffa, 688 F.2d 919, 930–33 (3d Cir. 1982) (NLRA did not preempt RICO claim, based on alleged scheme to defraud employees of economic benefits created in collective bargaining agreement, because a federal statute independently proscribed the conduct); United States v. Palumbo Bros., Inc., 145 F.3d 850, 869–70 (7th Cir. 1998) (holding that criminal sanctions for RICO violations were remedies for proscribed conduct independent of those available in a NLRB proceeding, and thus, the preemption doctrine had no application); Mariah Boat, Inc. v. Laborers Int'l Union of North America, 19 F. Supp. 2d 893, 899–900 (S.D. Ill. 1998) (holding that civil RICO charges may survive preemption where predicate acts violate RICO independent of the NLRA); *cf.* A. Terzi Prods., Inc. v. Theatrical Protective Union, 2 F. Supp. 2d 485, 503–04 (S.D.N.Y. 1998) (recognizing split in circuits over preemption between labor law and other federal statutes); Chicago Dist. Council of Carpenters Pension Fund v. Ceiling Wall Sys., Inc., 915 F. Supp. 939, 943 (N.D. Ill. 1996) (same); Capozza Tile Co. v. Joy, No. 01-108-P-C, 2001 WL 1057682 (D. Me. Sept. 13, 2001) (rejecting union’s argument that NLRA preempted employer’s RICO claims based on fraudulent inducement, but granting union’s motion to dismiss for failure to plead pattern of racketeering); Teamsters Local 372 v. Detroit Newspapers, 956 F. Supp. 753, 759 (E.D. Mich. 1997).

Id. at 761. See also *Buck Creek Coal,* 917 F. Supp. at 610 (no preemption of RICO claim based on theft and vandalism); *Hood v. Smith's Transfer Corp.,* 762 F. Supp. 1274, 1286 (W.D. Ky. 1991) (no preemption because RICO claims involving losses from an employee stock option plan were “not dependent on any underlying allegations of unfair labor practice”); *MHC v. Int'l Union, United Mine Workers of America,* 685 F. Supp. 1370, 1378 (E.D. Ky. 1988) (no preemption where defendant unions were alleged to have committed murder and arson because no interpretation of labor law necessary to make determination of liability).
falls within the Labor Board’s primary jurisdiction, even if labor relations turn out to be implicated in some fashion."\textsuperscript{96} The Ninth Circuit similarly held that the NLRA preempted a RICO claim where the alleged predicate acts of mail and wire fraud constituted an unfair labor practice such as bargaining in bad faith.\textsuperscript{97}

RICO claims also may be preempted by Section 301 of the Labor Management Relations Act ("LMRA").\textsuperscript{98} Preemption under the LMRA depends on whether the RICO claim involves rights and obligations that exist independent of the collective bargaining agreement.\textsuperscript{99} If resolution of the RICO claim is substantially dependent upon analysis of the terms of a labor agreement, then that claim is “inextricably intertwined with consideration of the terms of the labor contract,” and therefore preempted.\textsuperscript{100} Similarly, a RICO claim will be preempted by the Railway Labor Act ("RLA")\textsuperscript{101} if the RICO claim

\textsuperscript{96} Baker v. IBP, Inc., 357 F.3d 685, 689 (7th Cir. 2004); accord Trollinger v. Tyson Foods, Inc., 370 F.3d 602, 608–11 (6th Cir. 2004).

\textsuperscript{97} Adkins v. Mireles, 526 F.3d 531, 542 (9th Cir. 2008).


\textsuperscript{101} 45 U.S.C. §§ 151–188.
depends on rights arising under a collective bargaining agreement. In sum, RICO claims are preempted by labor statutes where the court must look to federal labor law to determine whether fraud or another illegal act has occurred.

§ 83 Preemptive Effect of Other Statutes

Courts have ruled that RICO claims are preempted by Section 501(a) of the Depository Institutions Deregulation and Monetary Control Act of 1980, the Employee Retirement Income Security Act (“ERISA”), Section 210 of the Energy Reorganization Act of 1974, Section 405 of the Surface Transportation Assistance Act of 1982, the Federal Insecticide, Fungicide, and Rodenticide Act (“FIFRA”), as well as the Civil Service Reform Act of 1978

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103 Mann, 848 F. Supp. at 995 (observing that preemption under RLA is a “subset within broad rule” that RICO claims are preempted if courts must look to federal labor statutes).

104 12 U.S.C. § 1737f-7(a) (exempting certain type of loans from application of state law).


106 Smith v. Sentry Ins., No. 1:91-CV-2537-JOF, 1993 WL 358459, at *2-3 (N.D. Ga. Aug. 31, 1993) (concluding that plaintiff’s RICO claim, based on former employer’s fraudulent misrepresentation of pension benefits he was to receive, was preempted by ERISA).


(“CSRA”). In contrast, at least one court has expressly held that the Cigarette Labeling and Advertising Act did not preempt civil RICO claims.\textsuperscript{110}

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{109} Pub. L. No. 95-454, 92 Stat. 1111 (codified as amended in scattered sections of 5 U.S.C.); see Ferris v. Am. Fed’n of Gov’t Employees, 98 F. Supp. 2d 64, 69 (D. Maine 2000) (holding that CSRA precluded federal employee’s claims under RICO against other federal employees to the extent that her claims were based on personnel actions, and requiring plaintiff to seek redress under CSRA because it provides a comprehensive remedy for adverse personnel actions).
\item \textsuperscript{110} See Falise v. Am. Tobacco Co., 94 F. Supp. 2d 316, 357 (E.D.N.Y. 2000) (concluding that the Cigarette Labeling and Advertising Act does not apply to deliberate acts of deception or misrepresentation).
\end{itemize}
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XII. THIRD-PARTY PRACTICE

§ 84 Contribution and Indemnification

RICO contains no express provisions concerning claims for contribution or indemnification. Although no court of appeals has addressed the issue, the district courts have uniformly held that common law contribution and indemnification are not available.\(^1\)

One federal district court decision is illustrative. In *Friedman v. Hartmann*,\(^2\) the court applied the two-part test articulated by the Supreme Court in an antitrust case, *Texas Industries, Inc. v. Radcliff Materials, Inc.*,\(^3\) and concluded that RICO defendants could not bring a third-party action for contribution or indemnification against their attorneys.\(^4\) The Supreme Court in

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\(^3\) 451 U.S. 630, 638 (1981).

\(^4\) Other district courts have followed this analysis. See, e.g., Janiszewski, 2007 WL 2688882, at *5-6; Boone, 613 F. Supp. at 1153-54; Daniels, 329 F. Supp. 2d at 982.
Texas Industries ruled that a right to contribution arises: (1) through the affirmative creation of a right of action by Congress, either expressly or impliedly; or (2) through the power of federal courts to “fashion a federal common law of contribution.”

The Friedman court reasoned that RICO neither expressly nor impliedly provides a right of contribution, that the availability of treble damages in RICO actions indicates that Congress intended to punish and deter unlawful conduct, and Congress did not intend to alleviate the liability of those who violate RICO. The court further noted that it had no power to fashion a federal common law of contribution because such formulations are only necessary to protect “uniquely federal interests” and contribution among RICO violators does not implicate any “uniquely federal interests.” Accordingly, the court concluded that there is no right to contribution under RICO. The court applied the same reasoning to reject the claim for indemnification.

One district court has upheld a contract-based claim for contribution. In Sikes v. American Tel. & Tel. Co., the defendants were accused of violating RICO by marketing and operating a 900-number telephone game. Defendant Teleline, Inc. developed and operated the game, while defendant AT&T provided

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5 451 U.S. at 638.
6 Friedman, 787 F. Supp. at 416.
7 Id. at 417.
8 Id. at 418.
9 Id.
billing services. Before the lawsuit was filed, Teleline had expressly agreed to indemnify AT&T for any legal liability arising from operation of the game. The agreement also contained an express contribution provision. The court refused to uphold the indemnification provision, stating that to do so would enable a party to shift its entire RICO liability to another culpable person and thus subvert the policies of the statute. However, the court permitted the contract-based claim for contribution to go forward. The court reasoned that there is no harm in allowing two parties who have contractually agreed to share the penalties of unlawful conduct in which they are both found to have engaged to fulfill that agreement. Because neither party would escape liability entirely, RICO’s deterrent purposes would still be served.

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11 Id. at 1581.
12 Id.
13 Id. at 1583.
XIII. SURVIVAL, ASSIGNMENT, AND ARBITRATION

§ 85 Survival

In cases where the RICO plaintiff dies before achieving a judgment, there exists a question whether the RICO claim survives and may be pursued by a proper representative party under Rule 25(a)(1) of the Federal Rules of Civil Procedure. That rule provides that “if a party dies and the claim is not thereby extinguished, the court may order substitution of the proper party.” As discussed below, the answer depends on whether the court determines RICO is more penal or remedial in nature.

RICO contains no express provision regarding survival or abatement of civil claims. In the absence of a specific statutory directive, federal common law governs the survival of a cause of action founded on federal law. The general rule is that an action for a penalty does not survive the death of the plaintiff. To determine whether an action is penal, the court must consider (1) whether the purpose of the action is to redress individual wrongs or wrongs to the public; (2) whether recovery runs to the individual or the public; and (3) whether the authorized recovery is wholly disproportionate to the harm suffered.

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2 Zatuchni v. Sec’y of Health and Human Svcs., 516 F.3d 1312, 1329 n.8 (Fed. Cir. 2008).
3 Schreiber v. Sharpless, 110 U.S. 76, 80 (1884); Smith v. Dep’t of Human Services, State of Okl., 876 F.2d 832, 834-35 (10th Cir. 1989).
4 Smith, 876 F.2d at 835; Murphy v. Household Finance Corp., 560 F.2d 206 (6th Cir. 1977).
The Fourth Circuit has held that RICO claims survive the death of a party.\(^5\) Although the court acknowledged that RICO contains criminal penalties and that an action for a penalty does not survive, the court stated that the “primary purpose” of RICO is “remedial.”\(^6\) The court acknowledged, however, that “civil RICO is a square peg, and squeeze it as we may, it will never comfortably fit in the round holes of the remedy/penalty dichotomy.”\(^7\)

Several district courts similarly have held that civil RICO claims are remedial in nature and therefore survive.\(^8\) Other district courts have held that RICO claims are penal in nature and therefore do not survive the death of a party.\(^9\)

One state appellate court has held that civil RICO claims against a defendant may survive and that an estate, through its administrator, is a

\(^5\) Faircloth v. Finesod, 938 F.2d 513, 517 (4th Cir. 1991).
\(^6\) Id. at 518.
\(^7\) Id.
\(^9\) See, e.g., Hoffman v. Sumner, 478 F. Supp. 2d 1024, 1031 (N.D. Ill. 2007) (ruling that RICO claim did not survive death of defendant based on “minority” view that RICO’s treble damages are punitive in nature); Confederation Life Ins. Co. v. Goodman, 842 F. Supp. 836, 838 (E.D. Pa. 1994) (holding that civil RICO claims do not survive the death of the defendant and stating that there was sufficient evidence that Congress intended the treble damages provision of RICO to serve a predominantly punitive purpose); see also Summers v. FDIC, 592 F. Supp. 1240, 1243 (W.D. Okla. 1984) (holding that RICO’s treble damages provision is essentially penal, barring assessment of treble damages against the FDIC).
“person” and has capacity to be sued on a RICO claim. That court noted disagreement among the federal district courts on the issue, but allowed the civil RICO claims to survive because they allegedly occurred both before and after the decedent’s death.

In 2003, the Supreme Court ruled in PacifiCare Health Systems, Inc. v. Book that RICO damages, like damages under the Clayton Act (the model for RICO), are “remedial in nature” because they provide a remedy for concrete financial loss to business or property. In light of that holding, RICO claims should survive the death of the plaintiff under the rationale that damages under RICO, even though trebled, are primarily remedial in nature.

§ 86 Assignability

As in the case of survival, the RICO statute is silent on the issue of assignability. The Third Circuit has held that a RICO claim may be assigned if the assignment is express. In Lerman, the defendant corporation was held to have a valid assignment of the claims of a predecessor corporation. The court noted that the assignment was “unambiguous and all-inclusive.” The court based its reasoning on precedent holding certain Clayton Act claims assignable

11 Id.
13 Lerman v. Joyce Int’l, Inc., 10 F.3d 106, 112 (3d Cir. 1993); see also Rogers v. McDorman, 521 F.3d 381, 385 (5th Cir. 2008) (plaintiff bank directors brought RICO claims which had been assigned to them from the bank).
14 Id.
only by express terms. Because the Clayton Act provision,\footnote{15 U.S.C. § 15.} “served as a model for the provision of the RICO statute authorizing private civil actions,” the court adopted the rule of assignability applied in those cases.\footnote{Lerman, 10 F.3d at 112.} Most of the district courts that have addressed the issue have also concluded that RICO claims are assignable.\footnote{Resolution Trust Corp. v. S & K Chevrolet, 868 F. Supp. 1047, 1054 (C.D. Ill. 1994); Fed. Ins. Co. v. Parelo, 767 F. Supp. 157, 163 (N.D. Ill. 1991); Nicolls Pointing Coulson, Ltd. v. Transp. Underwriters of La., Inc., 777 F. Supp. 493, 494-96 (E.D. La. 1991); Fed. Ins. Co. v. Ayers, 760 F. Supp. 1118, 1120 (E.D. Pa. 1990); In re Nat’l Mortgage Equity Corp. Mortgage Pool Certificates Sec. Litig., 636 F. Supp. 1138, 1152-56 (C.D. Cal. 1986).} Further, when a RICO claim is assigned the assignee assumes the same rights, title and interest possessed by the assignor.\footnote{Perry v. Globe Auto Recycling, Inc., 227 F.3d 950, 953 (7th Cir. 2000) (holding that a plaintiff who was precluded from bringing his own RICO claim was not precluded from bringing a RICO claim that had been assigned to him from another plaintiff who was not precluded).}

\section*{§ 87 Arbitrability of RICO Claims}

The Supreme Court held in \textit{Shearson/American Express, Inc. v. McMahon}\footnote{482 U.S. 220 (1987).} that RICO claims are arbitrable. In reaching its conclusion, the Court relied heavily on its prior decision in \textit{Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.},\footnote{473 U.S. 614 (1985).} in which the Court held that antitrust claims are arbitrable.

The arbitrability of RICO claims raises strategic issues which the careful practitioner should consider. For example, a party may waive its right to
arbitration by failing to demand arbitration on a timely basis. A determinative factor in deciding if a party has waived its right to arbitration is whether the delay created prejudice against the opposing party.

A plaintiff whose complaint includes both arbitrable RICO claims and other non-arbitrable claims should file suit asserting all claims and obtain a stay pending arbitration so as to ensure that the statute of limitations does not expire on its non-arbitrable claims while awaiting arbitration. Unless a stay of arbitration is entered, all proceedings pursuant to an arbitration agreement are enforceable, and unasserted contractual rights may be waived.

21 See, e.g., Restoration Preservation Masonry, Inc. v. Grove Europe Ltd., 325 F.3d 54, 61 (1st Cir. 2003) (four year delay from filing to removal, during which state court litigation was active, resulted in waiver); Gilmore v. Shearson/American Express, Inc., 811 F.2d 108, 112-13 (2d Cir. 1987) (withdrawal of motion to compel arbitration prevented defendant from subsequently pursuing arbitration), overruling on other grounds recognized by McDonnell Douglas Fin. Corp. v. Pa. Power & Light Co., 849 F.2d 761, 763-64 (2d Cir. 1988); Hoxworth v. Blinder, Robinson & Co., 980 F.2d 912, 925-27 (3d Cir. 1992) (defendants waived right to arbitration by actively litigating case for almost one year before moving to compel arbitration); Hoffman Constr. Co. v. Active Erectors & Installers, Inc., 969 F.2d 796, 798-99 (9th Cir. 1992) (party waived its right to arbitrate a RICO claim when it pursued certain non-RICO claims in state court); National Found. for Cancer Research v. A.G. Edwards & Sons, Inc., 821 F.2d 772, 775 (D.C. Cir. 1987) (filing of answer that included 15 affirmative defenses, but did not mention arbitration, barred subsequent motion to compel arbitration); but see Nesslage v. York Secs., Inc., 823 F.2d 231, 234 (8th Cir. 1987) (defendant did not waive right to seek arbitration, despite two year delay in filing petition to compel and active participation in discovery).


Additionally, a prior arbitration may have a preclusive effect on RICO claims to be litigated.25

Courts generally will enforce arbitration agreements whenever possible.26 In determining whether a RICO claim is within the intended scope of an arbitration agreement, courts are guided by the principle that any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration.27 The Supreme Court provided more support for arbitration in *PacifiCare Health Systems, Inc. v. Book.*28 The arbitration agreements at issue precluded the arbitrator from awarding punitive damages. The parties opposing arbitration argued that this remedial limitation, combined with the punitive nature of treble damage awards, prevented the arbitrator from awarding treble damages, and therefore prevented the arbitrator from being

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25 See Benjamin v. Traffic Exec. Ass'n Eastern R.R., 869 F.2d 107, 110 (2nd. Cir. 1989) (arbitration panel's factual finding regarding the underlying acts upon which RICO claim was based had preclusive effect); C. D. Anderson & Co. v. Lemos, 832 F.2d 1097 (9th Cir. 1987) (RICO claim precluded by former arbitration concerning the same dispute); Greenblatt v. Drexel Burnham Lambert, Inc., 763 F.2d 1352, 1361 (11th Cir. 1985) (RICO claim partly collaterally estopped by the findings of a previous arbitration proceeding dealing with the same facts asserted in the RICO claim). But see Green Tree Fin. Corp. v. Honeywood Dev. Corp., No. 98 C 2332, 2001 WL 62603, at *4-5 (N.D. Ill. Jan. 24, 2001) (explaining that, in part, whether or not the prior arbitration of a dispute precludes later RICO claim is a matter for the trial court's discretion).

26 See, e.g., Peoples Sec. Life Ins. Co. v. Monumental Life Ins. Co., 867 F.2d 809, 813-14 (4th Cir. 1989) (court enforced arbitration clause of settlement agreement even though plaintiff alleged that agreement was procured by fraud); Hill v. Gateway 2000, Inc., 105 F.3d 1147, 1151 (7th Cir. 1997) (enforcing arbitration clause contained in terms inside computer box).

27 See Larry's United Super, Inc. v. Werries, 253 F.3d 1083, 1085 (8th Cir. 2001) (where agreement required arbitration of "all disputes between [the parties] relating to this Agreement," RICO claims were subject to arbitration); Grynberg v. BP P.L.C, No. 1:08-CV-00301-(JDB), 2008 WL 4868650, at *3 (D.D.C. Nov. 12, 2008) (although plaintiffs styled their complaint as a criminal FCPA action outside the scope of broad arbitration provision, court found that case was in fact a RICO action, subject to arbitration); General Media, Inc. v. Shooker, No. 97 Civ. 510 (DAB), 1998 WL 401530, at *9-11 (S.D.N.Y. Jul. 16, 1998) (arbitration provision covering "any dispute" included allegations of civil RICO violations).

able to provide “meaningful relief” under *Paladino v. Avnet Computer Technologies, Inc.* Two factors prompted the Court to send the case back to arbitration: first, the Court noted that it has long treated treble damages under RICO as being remedial in nature; second, and partly in light of that precedent, the Court ruled that it was ambiguous whether the parties intended their “no punitive damages” language to mean “no treble damages” under RICO. Noting the Court’s presumption in favor of arbitration, the Court sent the case back to arbitration to allow the arbitrator to determine how the parties intended to construe the remedial limitations in the arbitration agreements.
XIV. RICO CLASS ACTIONS

§ 88 Class Certification of RICO Claims

In appropriate circumstances, RICO cases may be pursued as class actions. For plaintiffs, proceeding as a class can be advantageous when each individual plaintiff’s damages may be too small to warrant full-scale litigation. By aggregating several smaller claims, plaintiffs, as a group, may be able to pursue their remedies more effectively. Defendants also may prefer the efficiencies afforded by class treatment. By aggregating claims, the defendant and the court can avoid needless repetition of the same witnesses, evidence, and legal issues. Defendants can also avoid inconsistent results due to the res judicata preclusive effect of class action litigation.

To obtain class certification, a representative party must satisfy the requirements of Rules 23(a) and (b) of the Federal Rules of Civil Procedure. The four elements of Rule 23(a) require a showing that: (1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class.

The proposed class also must fit within one of the categories described in Rule 23(b) of the Federal Rules of Civil Procedure. Most plaintiffs in RICO class actions have sought to bring their actions under Rule 23(b)(3), which provides that an action may be maintained as a class action if “the court finds that the
questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy.”¹

Plaintiffs in RICO actions have had mixed results in attempting to have their RICO claims certified in a class action. The question generally turns on whether the alleged injuries were caused by a common set of misrepresentations (usually written), as opposed to a variety of disparate misrepresentations (often oral). As discussed below, cases where the same or similar misrepresentations were made to the named plaintiffs and members of the proposed class are more likely to be certified.² On the other hand, courts that have denied class certification usually have done so where individual questions of causation predominate over common issues.³


² See, e.g., Eisenberg v. Gagnon, 766 F.2d 770, 786-87 (3d Cir. 1985) (ruling that class should have been certified where named plaintiffs, and presumably class members, relied on virtually identical offering materials); Carnegie v. Household Int’l, Inc., 376 F.3d 656, 661 (7th Cir. 2004) (disagreeing with Fifth Circuit’s presumption against reliance in Sandwich Chef and noting ways to address individual issues of recovery); Klay v. Humana, Inc., 382 F.3d 1241, 1247-49 (11th Cir. 2004) (ruling that standard misrepresentation justified class certification); In re Zyprexa Prods. Liab. Litig., 253 F.R.D. 69 (E.D.N.Y. 2008) (holding that common issues predominated over individualized issues); Chisolm v. TranSouth Fin. Corp., 184 F.R.D. 556, 564 (E.D. Va. 1999) (“churning” scheme used to sell, repossess, and resell used cars utilized uniform documents and a single plan to support typicality requirement); Dornberger v. Met. Life Ins. Co., 182 F.R.D. 72, 81 (S.D.N.Y. 1998) (uniform insurance sales manual used by Metropolitan agents in Europe constitutes a written device for the perpetration of fraud similar to the way a prospectus creates a unifying device in a securities fraud case); Rohlfing v. Manor Care, Inc., 172 F.R.D. 330, 338 (N.D. Ill. 1997) (collecting cases illustrating that courts have adopted two different approaches to the reliance requirement in RICO class action suits based on fraud).

³ See, e.g., McLaughlin v. Am. Tobacco Co., 522 F.3d 215, 222-30 (2d Cir. 2008) (reversing class certification and holding that individual issues of causation and injury predominated); Johnston v. HBO Film Mgmt., Inc., 265 F.3d 178, 190-94 (3d Cir. 2001) (class
The Supreme Court decision in *Bridge v. Phoenix Bond & Indem. Co.* (discussed in § 33 above),\(^4\) may open the door to the certification of more RICO class actions. In *Bridge*, a RICO case that did not involve a class action, the Court held that a plaintiff asserting a RICO claim predicated on mail fraud may be able to establish proximate cause without showing that the plaintiff relied on the alleged misrepresentations.\(^5\) The circumstances of that case, however, were somewhat unique because the plaintiff could show that it was directly injured by a fraud committed on third-party government officials.\(^6\)

Although an argument can be made under *Bridge* that individual issues of reliance should no longer predominate over other common issues,\(^7\) it remains true that individual questions of proximate cause may still


\(^5\) *Id.* at 2145.

\(^6\) *Id.*

\(^7\) See, e.g., *In re Zyprexa Prods. Liab. Litig.*, 253 F.R.D. 69 (E.D.N.Y. 2008) (noting that, after *Bridge*, plaintiffs need not show first-party reliance, holding that common issues predominated over individualized issues, and certifying class in a RICO class action).
predominate to defeat class certification, particularly where not all proposed
class members were allegedly victimized by the same misrepresentations.
Under the Supreme Court’s decisions in Holmes⁸ and Anza,⁹ a RICO plaintiff
must be the party directly harmed by the violation.¹⁰ This means that in most
fraud-based RICO cases where the defendant makes misrepresentations to the
plaintiff, the plaintiff is not likely to show it was directly injured unless it relied
on the misrepresentations to its detriment. If different representations are
made to different members of the proposed class, individual questions of
causation likely will predominate.

The cases below discuss the application of the predominance
requirement to RICO class actions.

§ 89 Cases Denying Class Certification

Those courts that have denied class certification in RICO actions, have
typically reasoned that the RICO claims alleged by the plaintiffs involve a
variety of alleged misrepresentations that give rise to individual questions
regarding causation and thus fail to meet the Rule 23(b)(3) predominance
requirement.¹¹

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¹⁰ See, e.g., Ironworkers Local Union No. 68 v. AstraZeneca Pharm. LP, 585 F. Supp. 2d
1339 (M.D. Fla. 2008) (dismissing RICO claims in a class action and holding that the alleged
third-party reliance was insufficient to establish proximate cause because the alleged harm to
the plaintiffs was too remote).
(reversing the district court’s grant of class certification and holding that the predominance
requirement was not satisfied because the issues of reliance, causation and injury would
require more individualized inquiries); Sandwich Chef of Texas, Inc. v. Reliance Nat’l Indemnity
Some courts have used “reliance” as short-hand for proximate cause.\textsuperscript{12}

In *Sandwich Chef of Texas, Inc. v. Reliance Nat’l Indemnity Ins. Co.*, the Fifth Circuit went so far as to say that “the pervasive issues on individual reliance that generally exist in RICO-fraud actions create a working presumption against class certification.”\textsuperscript{13}


\textsuperscript{13} \textit{Id.}
In *Sandwich Chef*, a class of worker’s compensation policy-holders alleged that their insurers had committed mail and wire fraud by intentionally overcharging them over the course of fourteen years.\(^{14}\) The district court certified the class based on two different theories of proximate cause. The first theory was that one part of the class consisted of plaintiffs who allegedly relied directly on the defendants’ misrepresentations. The district court reasoned that businesses generally can be said to rely on the validity of invoices they receive, and concluded that the plaintiffs demonstrated reliance by paying the invoices they were sent. The second theory was based upon part of the class, which consisted of plaintiffs who allegedly were the intended target of misrepresentations made to third party insurance regulators.\(^ {15}\)

The Fifth Circuit reversed, finding that the district court applied faulty presumptions of causation in the plaintiffs’ favor. In assessing the Rule 23(b)(3) requirement, the court noted that Section 1964(c) only authorizes private suits by persons injured in their business or property “by reason of” a violation of Section 1962. The court further noted that the “by reason of” language imposes a proximate cause requirement on the plaintiffs.\(^ {16}\) The court noted that in its analysis, reliance can be used as shorthand for proximate cause.\(^ {17}\) In most instances, the court found that individual reliance was the

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\(^ {15}\) *Id.*

\(^ {16}\) *Id.* at 218-19.

\(^ {17}\) *Id.* at 222.
best indicator of proximate causation.\textsuperscript{18} By presuming reliance simply because the plaintiffs paid the invoices they were sent, however, the district court ignored the defendants’ counter-argument that some plaintiffs agreed to pay the amount charged on the invoices. Because various plaintiffs may have understood and agreed to pay the alleged overcharges, the court concluded that individualized issues of causation predominated under Rule 23(b)(3).

The court also rejected the plaintiffs’ argument that misrepresentations made to third party regulators proximately caused the plaintiffs’ injuries. The court noted that the “target theory” of causation was to be narrowly applied, and did not override the general requirement of direct causation articulated in \textit{Holmes}.\textsuperscript{19} Although the court acknowledged that the “target theory” had been applied in the past when a misrepresentation made to a third party had the intended result of injuring a foreseeable plaintiff, the court ultimately concluded that the relationship between the plaintiff’s injury and the fraudulent statements made to the insurance regulators was not sufficiently direct to amount to proximate cause.\textsuperscript{20} Any misrepresentations made to the insurance regulators could not, in and of itself, have caused the plaintiffs’ injuries. Rather, the court concluded that the injuries could only have occurred if the plaintiffs were duped by false invoices. Because the payment of the invoices was the direct cause of the alleged injury, the court ruled that

\textsuperscript{18} Id.
\textsuperscript{19} Holmes, 503 U.S. 258 (1992).
\textsuperscript{20} Sandwich Chef, 319 F.3d at 220-24.
each plaintiff had to prove that it relied to its detriment on the validity of the invoices.\textsuperscript{21}

Several courts also have concluded that individual issues regarding calculation of damages may defeat class certification. For example, in \textit{Lester v. Percudani},\textsuperscript{22} the proposed class was a group of individuals who purchased newly constructed houses through a program operated by the defendants. The plaintiffs alleged that the defendants drew them in by advertising low monthly payments, but fraudulently manipulated monthly tax and mortgage estimates to appear lower than they were.\textsuperscript{23} A little over a year after the plaintiffs purchased their homes, their properties were reassessed and their taxes increased substantially. This forced many plaintiffs to default on their loans and lose their homes. The plaintiffs sought damages under 1964(c) for the increase in taxes and other injuries that occurred as a result of the defendants’ alleged wire and mail fraud.\textsuperscript{24}

The court refused to certify the RICO class under Rule 23(b)(3) because individual issues predominated the plaintiff’s claims.\textsuperscript{25} In assessing the Rule 23(b)(3) requirement, the court in \textit{Lester} noted that Section 1964(c) only authorizes private suits by persons injured in their business or property “by reason of” a violation of Section 1962, and that the “by reason of” language

\begin{itemize}
\item \textsuperscript{21} \textit{Id.} at 223-24.
\item \textsuperscript{22} 217 F.R.D. 345 (M.D. Pa. 2003).
\item \textsuperscript{23} \textit{Id.} at 347.
\item \textsuperscript{24} \textit{Id.} at 348.
\item \textsuperscript{25} \textit{Id.} at 352.
\end{itemize}
imposes a proximate cause requirement on plaintiffs. This meant that the plaintiffs had to demonstrate that the defendants’ misrepresentations actually caused them to purchase their homes at a manipulated price. Whether or not reliance was required, the court found that causation would be a fact-intensive inquiry into the “individual circumstances of the buyers and their reactions to the allegedly deceptive conduct of defendants.”

The court also noted that proof of damages must be presented when class-wide injury cannot be presumed, and the court rejected the plaintiffs’ argument that the court could presume reliance based on a “fraud on the market” theory. The court reasoned that the “fraud on the market” theory used in securities cases could not apply, because the defendants did not deceive the plaintiffs through one common event that affected the entire market. Rather, the plaintiffs were individually defrauded in multiple, distinct transactions. The damages suffered by each plaintiff required an analysis of many different factors, including the increase in taxes that occurred after reassessment, and the difference between the actual and represented value of the plaintiffs’ homes. Proving such damages created “the prospect of holding hundreds or

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26 Id. at 352-53; see also Brandenburg v. Seidel, 859 F.2d 1179, 1187-88 & n.10 (4th Cir. 1988) (to recover in a civil action for damages under RICO, private plaintiffs must establish: (1) a violation of Section 1962; (2) an injury to their business or property; and (3) the requisite causal connection between the injury and the violation of Section 1962), overruled on other grounds by Quackenbush v. Allstate Ins. Co., 517 U.S. 706 (1996), Haroco, Inc. v. Am. Nat’l Bank & Trust Co. of Chicago, 747 F.2d 384, 398 (7th Cir. 1984), aff’d, 473 U.S. 606 (1984).

27 Lester, 217 F.R.D. at 353.
thousands of individual hearings” and illustrated that individual issues rather than common issues predominated.\textsuperscript{28}

\section*{§ 90 Cases Granting Class Certification}

In contrast to cases such as \textit{Sandwich Chef} and \textit{Lester}, other courts have concluded that common questions of causation predominated over individual questions. In most of those cases, the courts found that the alleged fraudulent statements were uniform or that the circumstances otherwise indicated that reliance by members of the class could be presumed.\textsuperscript{29} For example, in \textit{Klay v. Humana, Inc.}, a group of physicians alleged that various health maintenance

\textsuperscript{28} \textit{Id.} at 352.

\textsuperscript{29} See, e.g., Eisenberg v. Gagnon, 766 F.2d 770, 786-87 (3d Cir. 1985) (class should have been certified where named plaintiffs, and presumably class members, relied on virtually identical offering materials in choosing to invest); Klay v. Humana, Inc., 382 F.3d 1241, 1247-49 (11th Cir. 2004); Stanich v. Travelers Indem. Co., 249 F.R.D. 506 (N.D. Ohio 2008) (certifying class where alleged fraud arose from use of standardized form documents); Marin v. Evans, No. CV-06-3090, 2008 WL 2937424, at *2-7 (E.D. Wash. July 23, 2008) (certifying class of former employees alleging a company-wide policy of hiring illegal immigrants had a common impact of decreased wages, even where the individual damages may differ); Denney v. Jenkens & Gilchrist (S.D.N.Y. 2004) (certifying settlement class where tax shelter scheme was based on written opinion letters that were “materially uniform”); In re Sumitomo Copper Litig., 182 F.R.D. 85, 92-93 (S.D.N.Y. 1998) (where plaintiff alleges that the same conduct affected all class members, and where the relevant proof will not vary among class members, then factual differences between class subgroups in the amount of damages, types of purchasers, manner of purchase, etc., do not prevent class certification); Weil v. The Long Island Sav. Bank, FSB, 200 F.R.D. 164, 174-76 (E.D.N.Y. 2001) (granting certification where plaintiffs’ claim that defendant bank concealed fees used as kickbacks was common to the class, as “reliance issues do not predominate . . . [when the] inquiry is on the common question of liability,” and where a class was the best way to handle the matter); Chisolm v. TranSouth Fin. Corp., 194 F.R.D. 538, 560-61 (E.D. Va. 2000) (noting that reliance in the case before it was “self-proving” and adding civil RICO claims to the “narrow contexts” within which presumed reliance is generally favored by courts, such as “securities litigation, . . . credit-card schemes, consumer loans, prescription drug pricing, breach of commission contract claims, and Truth in Lending Act actions”); Garner v. Healy, 184 F.R.D. 598, 602-03 (N.D. Ill. 1999) (individual reliance questions did not predominate where there was standardized course of conduct involving uniform misrepresentations and plaintiffs did not rely on individualized oral misrepresentations or advertising); Kline v. First W. Gov’t Sec., Inc., No. CIV.A. 83-1076, 1996 WL 153641, at *11-12 (E.D. Pa. January 24, 1996) (“Whether [written offering materials] contained misrepresentations and omitted material facts about the First Western trading program is the central question in this case and will predominate over whatever issues of individual reliance must ultimately be adjudicated”).
organizations ("HMOs") defrauded them with respect to payments for medical services provided to HMO subscribers by underpaying and unreasonably delaying payment. The district court certified three classes, including a global class to pursue the RICO claims. On appeal, the defendants argued that the certification was improper under Rule 23(b)(3) because individual issues of reliance predominated. The Eleventh Circuit rejected that contention, stating that the plaintiffs alleged that the defendants made a standard misrepresentation — "that the defendants would honestly pay physicians the amounts to which they were entitled." The court noted that "while each plaintiff must prove his own reliance in this case, we believe that, based on the nature of the misrepresentations at issue, the circumstantial evidence that can be used to show reliance is common to the whole class." The court specifically found that its method of using circumstantial evidence common to the class as a proxy for individual reliance "is a far cry from the type of 'presumed' reliance we invalidated in Sikes."

In Carnegie v. Household Int'l, Inc., the Seventh Circuit rejected both the presumption against class certification applied in Sandwich Chef and the idea

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30 382 F.3d 1241, 1247-49 (11th Cir. 2004).
31 Id. at 1250.
32 Id. at 1258.
33 Id.
34 Id. at 1259.
35 Id. (referencing Sikes v. Teleline, Inc., 281 F.3d 1350, 1354-58 (11th Cir. 2002) (rejecting district court's use of presumption of reliance as improperly eliminating class-plaintiffs' burden)).
presented in *Lester* that fact-intensive damages inquiries should defeat class certification.\(^{36}\) The Seventh Circuit highlighted the difference between the liability and remedy phases of class action litigation, and found that the question of whether the defendants violated RICO is an issue distinct from the entitlement of each particular plaintiff to relief. The court reasoned that once a determination regarding RICO liability was made, a global settlement would be “natural and appropriate” and would obviate the need for any individualized hearings regarding injury. If such a settlement were not reached, solutions for determining individual questions of injury included “(1) bifurcating liability and damage trials with the same or different juries; (2) appointing a magistrate judge or special master to preside over individual damages proceedings; (3) decertifying the class after the liability trial and providing notice to class members concerning how they may proceed to prove damages; (4) creating subclasses; or (5) altering or amending the class.”\(^{37}\)

In short, while the Fifth Circuit remains hostile to RICO class actions based on a narrow view of the need for plaintiffs to show individual reliance, in most courts the ability to obtain class certification will depend on the nature of the underlying predicate acts and the circumstances surrounding the alleged injury. Where a RICO scheme is based on uniform misrepresentations, it is easier for plaintiffs to show that the members of the class suffered injury “by reason of” a common course of conduct. On the other hand, where the RICO

\(^{36}\) 376 F.3d 656 (7th Cir. 2004).

\(^{37}\) *Id.* at 661.
scheme is based on a variety of misrepresentations or omissions, or where there is evidence of intervening acts that might have interrupted the causal chain, individual issues will likely predominate to defeat class certification.
XV. PRACTICE MATERIALS

§ 91 Checklist of Essential Allegations

Set forth below is a non-exhaustive checklist for counsel to consider when bringing or defending a RICO case.

A. Has the plaintiff alleged a racketeering offense enumerated in Section 1961(1)? (See § 5, Racketeering Activity.)

1. If the plaintiff has alleged mail fraud (18 U.S.C. § 1341) or wire fraud (18 U.S.C. § 1343) as predicate acts, has the plaintiff met the particularity requirements of Rule 9(b) of the Federal Rules of Civil Procedure by properly alleging the time, place, content of the fraudulent communications, and the identity of the parties to the communications?

2. Has the plaintiff alleged that the defendant committed the alleged predicate acts willfully or with actual knowledge of the illegal activities?

3. Has the plaintiff alleged how its injury was proximately caused by the alleged racketeering activity?

B. Has the plaintiff alleged that the defendant conducted the racketeering activity through a pattern? (See Part III, Pattern of Racketeering.)

1. Are the predicate acts related and continuous?
   a. Has the plaintiff alleged that the predicate acts are related by having the same or similar purposes, results, participants, victims, methods of commission or are otherwise interrelated by distinguishing characteristics?
   b. Has the plaintiff alleged that the predicate acts are continuous by alleging a closed-ended scheme, consisting of a series of related acts extending over a substantial period of time, or an open-ended scheme?
   c. If the plaintiff has alleged an open-ended scheme, has it established a threat of continuity through the duration of the alleged misconduct or the threat of continuing criminal conduct?
C. Has the plaintiff alleged that the racketeering activity affects an enterprise involved in interstate commerce? (See Part IV concerning the RICO Enterprise.)

1. Has the plaintiff alleged that the racketeering activity affects individuals, partnerships, corporations or some other group associated in fact, although not a legal entity?

2. Is the enterprise directly engaged in the production, distribution, or acquisition of goods and services in interstate commerce?

3. Has the plaintiff improperly alleged an enterprise consisting of a corporation and its officers or agents?

4. Is the enterprise distinct from the culpable person?

5. If the plaintiff has alleged an association-in-fact enterprise, has it alleged that the group has a hierarchy and structure separate from the alleged pattern of racketeering?

6. Did the culpable person operate or manage the affairs of the enterprise?

D. Does the defendant qualify as a culpable person? (See § 3, The Culpable “Person.”)

1. If the plaintiff is alleging a violation of Section 1962(c), is the alleged culpable person properly distinct from the alleged enterprise?

2. Has the plaintiff improperly alleged that a government entity is the culpable person?

E. Does the plaintiff meet the RICO standing requirements? (See Part V, Standing Under Section 1962(c).)

1. Is the plaintiff a “person” meaning an entity capable of holding a legal or beneficial interest in property?

2. Has the plaintiff alleged an injury to its business or property by the conduct constituting the violation?

   a. Has the plaintiff alleged a concrete injury to a proprietary interest?
b. If the plaintiff alleges an injury to an intangible business asset, does the relevant jurisdiction permit plaintiffs to recover under RICO for such an injury?

c. Has the plaintiff improperly alleged a personal injury?

d. Has the plaintiff properly alleged factual and proximate cause?

(1) Has the plaintiff alleged that but for the conduct constituting the violation it would not have been injured?

(2) Has the plaintiff pled sufficient facts to meet the proximate cause requirement, considering the foreseeability of the injury, the existence of any intervening causes, and the directness of the causal connection between the alleged violation and the injury?

(3) Is the plaintiff’s alleged injury too indirect or derivative to confer standing?

(4) If the plaintiff is alleging mail or wire fraud based on misrepresentations, has the plaintiff alleged detrimental reliance on the alleged misrepresentations by someone? Was the plaintiff or a third party deceived by the fraud scheme? (If not, a showing of causation is unlikely.)

F. Is the RICO claim barred by the four-year statute of limitations? (See Part IX, Statute of Limitations.)

1. Does your jurisdiction apply the injury discovery rule to decide when the statute of limitations begins to run?

2. Should the running of the statute of limitations be equitably tolled?

a. Has plaintiff filed its RICO claim within four years after the plaintiff discovered or reasonably should have discovered its injury?

b. Has the plaintiff alleged it exercised reasonable diligence to discover the claim?
c. Has the plaintiff alleged sufficient facts under Rule 9(b) of the Federal Rules of Civil Procedure to establish **fraudulent concealment**?

d. Has the plaintiff suffered new injuries from different conduct that would allow a separate accrual rule to apply?

G. Claims under Sections 1962(a), (b), and (d).

1. If the plaintiff is alleging a violation of **Section 1962(a)**, has the plaintiff alleged that it was injured by the investment of racketeering income? (See Part VI, Section 1962(a): Investment of Racketeering Income.)

2. If the plaintiff is alleging a violation of **Section 1962(b)**, has the plaintiff alleged that it was injured by the acquisition of an interest or control over an enterprise? (See Part VII, Section 1962(b): Acquisition of Control of Enterprise.)

3. If the plaintiff is alleging a violation of **Section 1962(d)**, has the plaintiff alleged that it was injured by an overt predicate act of racketeering in furtherance of the conspiracy? (See Part VIII, Section 1962(d): RICO Conspiracy.)

4. Is the **Section 1962(d)** claim based on alleged violations of Sections 1962(a), (b), or (c) that already occurred? If so, does the alleged conduct sustain a violation of those sections?

H. Has the plaintiff complied with all applicable **pleading** rules?

1. Has the plaintiff alleged fraud with particularity as required by Rule 9(b) of the Federal Rules of Civil Procedure?

2. Does your jurisdiction require the plaintiff to file a **RICO Case Statement**? (See § 92, RICO Case Statement.)

§ 92 RICO Case Statement

Certain courts require plaintiffs to submit with any RICO complaint a “RICO Case Statement” that sets forth in specific detail the supporting facts
and legal bases of their claims.\textsuperscript{1} A district court may require a RICO Case Statement either by an individual judge’s standing order or by local rule.\textsuperscript{2}

Courts have stressed the importance of compliance with these orders.\textsuperscript{3} Failure to comply with an order requiring a RICO Case Statement may result in


\textsuperscript{2} See, e.g., Frank v. D’Ambrosi, 4 F.3d 1378 (6th Cir. 1993) (case statement filed in district court pursuant to court’s standing order); Jae-Soo Yang Kim v. Pereira Enters., Inc., 694 F. Supp. 200, 203 (E.D. La. 1988) (noting district court’s standing order), aff’d, 873 F.2d 295 (5th Cir. 1989). See also Local Rule 5.1(h) of the United States District Court for the Western District of New York [May 1, 2003] (providing that upon filing of a complaint stating a RICO claim, the filing party is required to contemporaneously file and serve a RICO case statement under separate cover); Local Rule 3.2 of the United States District Court for the Eastern District of Washington [July 10, 2008] (providing that parties who assert RICO claims must file and serve a RICO case statement within ten days of filing and serving the complaint).

\textsuperscript{3} See, e.g., Marriott Bros., 911 F.2d at 1107 & n.3 (5th Cir. 1990) (stating that the district court’s order requiring a case statement from the plaintiffs after some of the defendants had moved for summary judgment was not unwarranted judicial intervention, as a case statement is a “useful, sometimes indispensable, means to understand the nature of the claims asserted and how the allegations satisfy the RICO statute”).
dismissal of the action or the imposition of sanctions. Even if your case is in a court that does not require a RICO Case Statement, you should take the time to fill one out whether you represent the plaintiff or the defendant. Doing so will help you identify any gaps that may exist in your case. An example of an order requiring a case statement is provided below.

**SAMPLE ORDER REQUIRING RICO CASE STATEMENT**

This order has been designed to establish a uniform and efficient procedure for deciding civil actions containing claims made pursuant to 18 U.S.C. §§ 1961-1968 (“Civil RICO”).

The proponent of the civil RICO claim shall file and serve [within ___ days of _______] a case statement that shall include the facts relied upon to initiate the RICO claim. In particular, the statement shall be in a form which uses the numbers and letters set forth below, unless filed as part of an amended and restated pleading (in which latter case, the allegations of the amended and restated pleading shall reasonably follow the organization set out below) and shall state in detail and with specificity the following information:

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4 See, e.g., Figueroa Ruiz v. Alegria, 896 F.2d 645, 648-49 (1st Cir. 1990) (affirming dismissal of RICO claim with prejudice as a sanction for failure to comply with order requiring plaintiffs to file a detailed explanation of the facts supporting the claim); Petrochem Insulation, Inc. v. Northern Cal. & N. Nev. Pipe Trades Council, RICO Bus. Disp. Guide (CCH) ¶ 10,071 (N.D. Cal. Mar. 19, 1992) (dismissing plaintiff's RICO claim based upon plaintiff's failure to comply with the court’s standing order regarding pleading with particularity in RICO cases), aff’d, 8 F.3d 29 (9th Cir. 1993); Chartrand v. Chrysler Corp., 785 F. Supp. 666, 668-69 (E.D. Mich. 1992) (holding that plaintiffs were subject to Rule 11 sanctions for violation of court’s order requiring them to prepare a RICO case statement). See also Ago v. Begg, Inc., No. Civ. A. 85-2229, 1988 WL 75224, at *1 (D.D.C. Feb. 24, 1988) (refusing to consider RICO case statement assertions not alleged in complaint). But see Commercial Cleaning Servs. v. Colin Service Sys., 271 F.3d 374, 386 (2d Cir. 2001) (reversing dismissal of RICO claim, where the district court dismissed the claim due to a violation of standing order’s requirement for a RICO case statement, because the standing order called for information “beyond what a plaintiff needs to present to establish a legally sufficient case”).

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XV-6
1. State whether the alleged unlawful conduct is in violation of 18 U.S.C. §§ 1962(a), (b), (c), and/or (d). If you allege violations of more than one § 1962 subsection, treat each as a separate RICO claim.

2. List each defendant and state the alleged misconduct and basis of alleged liability of each defendant.

3. List the alleged wrongdoers, other than the defendants listed above, and state the alleged misconduct of each wrongdoer.

4. List the alleged victims and state how each victim allegedly was injured.

5. Describe in detail the pattern of racketeering activity or collection of an unlawful debt alleged for each RICO claim. A description of the pattern of racketeering activity shall include the following information:

   a. List the alleged predicate acts and the specific statutes allegedly violated by each predicate act;

   b. Provide the dates of the predicate acts, the participants in the predicate acts and a description of the facts surrounding each predicate act;

   c. If the RICO claim is based upon the predicate offenses of wire fraud, mail fraud, fraud in the sale of securities, or fraud in connection with a case under U.S.C. Title 11, the “circumstances constituting fraud or mistake shall be stated with particularity,” Rule 9(b) of the Federal Rules of Civil Procedure. Identify the time, place, and contents of the alleged misrepresentations or omissions, and the identity of persons to whom and by whom the alleged misrepresentations or omissions were made;

   d. Describe in detail the perceived relationship that the predicate acts bear to each other or to some external organizing principle that renders them “ordered” or “arranged” or “part of a common plan;” and
e. Explain how the predicate acts amount to or pose a threat of continued criminal activity.

6. Describe in detail the alleged enterprise for each RICO claim. A description of the enterprise shall include the following information:

a. State the names of the individuals, partnerships, corporations, associations or other entities allegedly constituting the enterprise;

b. Describe the structure, purpose, roles, function and course of conduct of the enterprise;

c. State whether any defendants are employees, officers or directors of the alleged enterprise;

d. State whether any defendants are associated with the alleged enterprise, and if so, how;

e. Explain how each defendant participated in the direction of the affairs of the enterprise;

f. State whether you allege that the defendants are individuals or entities separate from the alleged enterprise, or that the defendants are the enterprise itself, or members of the enterprise; and

g. If you allege any defendants to be the enterprise itself, or members of the enterprise, explain whether such defendants are perpetrators, passive instruments, or victims of the alleged racketeering activity.

7. State whether you allege and describe in detail how the pattern of racketeering activity and the enterprise are separate or have merged into one entity.

8. Describe the alleged relationship between the activity and the pattern of racketeering activity. Discuss how the racketeering activity differs from the usual and daily activities of the enterprise, if at all.
9. Describe what benefits if any, the alleged enterprise and each defendant received from the alleged pattern of racketeering activity.

10. Describe the effect of the activities of the enterprise on interstate or foreign commerce.

11. If the complaint alleges a violation of 18 U.S.C. § 1962(a), provide the following information:
   a. State who received the income derived from the pattern of racketeering activity or through the collection of an unlawful debt; and,
   b. Describe the use or investment of such income.

12. If the complaint alleges a violation of 18 U.S.C. § 1962(b), provide the following information:
   a. Describe in detail the acquisition or maintenance of any interest in or control of the alleged enterprise; and
   b. State whether the same entity is both the liable “person” and the “enterprise” under Section 1962(b).

13. If the complaint alleges a violation of 18 U.S.C. § 1962(c), provide the following:
   a. State who is employed by or associated with the enterprise; and
   b. State whether the same entity is both the liable “person” and the “enterprise” under Section 1962(c).


15. Describe the alleged injury to business or property.
16. Describe the relationship between the alleged injury and the violation of the RICO statute.

17. List the damages sustained by reason of the violation of Section 1962, indicating the amount for which each defendant allegedly is liable.

18. Provide any additional information you feel would be helpful to the Court in processing your RICO claim.

§ 93 Sample Complaint Allegations

Below we have provided a rough outline of some sample allegations that might be used in a civil RICO complaint. Because most RICO elements are the same under Sections 1962(a), (b), (c) and (d), we recommend covering those elements together under a heading “Facts Common to All Counts.” As with any civil complaint, a RICO complaint should tell a clear and compelling story. Although Rule 8 of the Federal Rules of Civil Procedure requires the complaint to contain “a short and plain statement of the claim,” RICO claims that are based on fraud must satisfy Rule 9(b) of the Federal Rules of Civil Procedure by pleading the fraud with particularity. In mail or wire fraud cases, for example, this generally means that the plaintiff must specifically allege the time, place, and content of the alleged misrepresentations, as well as the parties to the communications. See § 6, Issues Relating to Mail and Wire Fraud.
IN THE UNITED STATES DISTRICT COURT

FOR THE _______ DISTRICT OF _______

Plaintiff,

v.

Defendant.

No.

COMPLAINT

Plaintiff [Name], for its Complaint against defendant [Name] alleges as follows:

INTRODUCTION

1. [We recommend using an introductory paragraph or two to provide a concise summary of the case.]

JURISDICTION AND VENUE

2. This Court has subject matter jurisdiction over this action pursuant to 18 U.S.C. § 1964 [jurisdiction may also be conferred based on diversity or supplemental jurisdiction].

3. Venue is proper in this judicial district pursuant to 18 U.S.C. § 1965 and 28 U.S.C. § 1391 because [Defendant] is subject to personal jurisdiction in this judicial district and resides in this district. [Note that Section 1965(b) of RICO provides that process may be served in “any judicial district of the United States” when required by the “ends of justice.” Courts
have held that such “nationwide service of process” provisions also confer personal jurisdiction over a defendant in any judicial district as long as the defendant has minimum contacts with the United States. See Part XI for a more detailed discussion of jurisdiction, concurrent jurisdiction, venue, service of process, removal, abstention, and preemption.]

PARTIES

4. Plaintiff [Name] is a _____ corporation with its principal place of business in __________. [Consider inserting a brief description of the plaintiff’s business. Section 1964(c) creates a private right of action for any “person” who has suffered a compensable injury. Their term “person” has been interpreted liberally to include natural persons, partnerships, joint ventures, corporations, and governmental entity suing for their own injuries. See § 19, Person.

5. Defendant [Name] is a _____ corporation with its principal place of business in __________. [Consider inserting a brief description of the defendant’s business. Also note that the defendant must be a “culpable person.” The RICO statute defines “person” as an “entity capable of holding a legal or beneficial interest in property”; however, the meaning of “person” has been the source of some debate. See §§ 10, Interstate or Foreign Commerce, and 3, The Culpable “Person.”]

FACTUAL ALLEGATIONS COMMON TO ALL RICO COUNTS

6. Use this section of the complaint to describe the necessary elements that are common to all RICO violations. These include: (a) a culpable
person, who (b) conducts (or acquires) an “enterprise” (c) affecting interstate commerce (c) through a “pattern” (d) of “racketeering activity.” In addition, a civil RICO plaintiff must show injury “by reason of” the RICO violation.

**Culpable Person.** RICO defines a “person” as an “entity capable of holding a legal or beneficial interest in property.” This definition has been the source of some debate. See § 3, The Culpable “Person.”

**Enterprise.** RICO defines an enterprise 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.” Courts have interpreted the term “enterprise” very broadly, and since most litigation involves some business entity or organization, the enterprise requirement poses little difficulty to the plaintiff who wishes to assert a RICO violation. See Part IV, The RICO Enterprise.

**Interstate or Foreign Commerce.** The interstate commerce requirement is satisfied if either the activity of the enterprise or the predicate acts of racketeering affect interstate commerce. While courts have described the nexus with interstate commerce required by RICO to be “minimal,” it must be alleged, and courts will dismiss RICO claims that do not adequately plead this requirement. See § 10, Interstate or Foreign Commerce.

**Pattern of Racketeering.** Section 1961(5) defines a “pattern of racketeering” as “at least two acts of racketeering activity . . . the last of which occurred within ten years after the commission of a prior act of racketeering activity.” The acts must be related and continuous to form a “pattern of
“Related” is defined as “acts that have the same or similar purposes, results, participants, victims, methods of commission, or otherwise interrelated by distinguishing characteristics and are not isolated events.” Continuity can be shown by alleging a closed-ended scheme, consisting of a series of related predicate acts extending over a substantial period of time, or an open-ended scheme. In order to properly allege an open-ended scheme, the plaintiff must establish the “threat of continuity.” The two most important factors in alleging and establishing “continuity” are (1) the duration of the alleged misconduct; and (2) a threat of continuing criminal conduct. See Part III, Pattern of Racketeering.

**Racketeering Activity.** Most civil RICO cases are based upon allegations of a racketeering activity. “Racketeering activity” is defined as any number of state and federal offenses which are enumerated in Section 1961(1). Most civil RICO cases involve allegations of mail or wire fraud. As with any fraud allegation, the particularity requirements of Rule 9(b) of the Federal Rules of Civil Procedure apply. A Plaintiff must therefore specifically allege the time, place, and content of the mail and wire communication and must identify the parties to the communications. See § 6, Issues Relating to Mail and Wire Fraud.

**Injury.** Make sure the Plaintiff meets RICO’s standing requirements. To establish standing for a civil RICO claim, four factors must be satisfied: the Plaintiff must be (1) a “person” (2) who sustains injury (3) to his or her “business or property” (4) “by reason of” defendant’s violation of
Section 1962. Keep in mind that because standing depends on injury from the “conduct constituting the violation,” each section of RICO has a different injury requirement. Injury under Section 1962(c) must stem from the predicate acts; injury under Section 1962(a) must stem from the investment of racketeering income; injury under Section 1962(b) must stem from the acquisition of an interest on or control over an enterprise; and injury under Section 1962(d) generally stems from the overt acts committed in furtherance of the conspiracy. See Parts V-VIII: Standing under Section 1962(a); Section 1962(a): Investment of Racketeering Income; Section 1962(b): Acquisition of Control of Enterprise; and Section 1962(d): RICO Conspiracy.

Statute of Limitations. A plaintiff facing the risk that its claim might be barred by the four-year statute of limitations should attempt to determine whether it can plead facts to support the equitable tolling of the limitations period. This would require the plaintiff to plead facts showing that the defendant fraudulently concealed information needed to bring a RICO claim, and the plaintiff could not have discovered those facts despite its exercise of reasonable diligence.

COUNT I

RICO Section 1962(c)

7. The allegations of paragraphs ___ through ___ are incorporated herein by reference.

8. This Count is against Defendant(s) _____________ (the “Count I Defendant(s)”).
9. ____________ is an enterprise engaged in and whose activities affect interstate commerce. The Count I Defendant(s) are employed by or associated with the enterprise.

10. The Count I Defendant(s) agreed to and did conduct and participate in the conduct of the enterprise’s affairs through a pattern of racketeering activity and for the unlawful purpose of intentionally defrauding Plaintiff. Specifically: [Consider summarizing each instance where the defendant conducted and participated in the conduct of the affairs of the enterprise through a pattern of racketeering activity.]

11. Pursuant to and in furtherance of their fraudulent scheme, Defendant(s) committed multiple related acts of [indicate the specific racketeering activity that forms the basis of the RICO claim].


13. The Count I Defendant(s) have directly and indirectly conducted and participated in the conduct of the enterprise’s affairs through the pattern of racketeering and activity described above, in violation of 18 U.S.C. § 1962(c).

14. As a direct and proximate result of the Count I Defendants’ racketeering activities and violations of 18 U.S.C. § 1962(c), Plaintiffs have been injured in their business and property in that: [Specifically enumerate injuries.]
15. WHEREFORE, Plaintiff requests that this Court enter judgment against the Count I Defendant(s) as follows: [Specifically list prayers for relief, including actual damages, treble damages and attorneys’ fees. See Part X, Relief.]

COUNT II

RICO Section 1962(a)

16. The allegations of paragraphs ___ through ___ are incorporated herein by reference.

17. This Count is against Defendant(s) ____________ (the “Count II Defendant(s)”).

18. ____________ is an enterprise engaged in and whose activities affect interstate commerce.

19. The Count II Defendant(s) used and invested income that was derived from a pattern of racketeering activity in an interstate enterprise. Specifically: [Consider summarizing the manner in which the defendant used and invested income that was derived from a pattern of racketeering activity in an interstate enterprise.]


21. As a direct and proximate result of the Count II Defendant(s)’ racketeering activities and violations of 18 U.S.C. § 1962(a), Plaintiffs have been injured in their business and property in that: [Specifically enumerate injuries stemming from the investment of the racketeering income.
that are separate from any injuries from the conduct of the enterprise through a pattern of racketeering. See Part VI, Section 1962(a): Investment of Racketeering Income.

22. WHEREFORE, Plaintiff requests that this Court enter judgment against the Count II Defendant(s) as follows: [Specifically list prayers for relief, including actual damages, treble damages and attorneys’ fees. See Part X, Relief.]

COUNT III

RICO Section 1962(b)

23. The allegations of paragraphs ___ through ___ are incorporated herein by reference.

24. This Count is against Defendant(s) _____________ (the “Count III Defendant(s)”).

25. _____________ is an enterprise engaged in and whose activities affect interstate commerce.

26. The Count III Defendant(s) acquired and maintained interests in and control of the enterprise through a pattern of racketeering activity. Specifically: [Consider summarizing the manner in which the defendant acquired and maintained interests in the enterprise through a pattern of racketeering activity.]

28. The Count III Defendant(s) have directly and indirectly acquired and maintained interests in and control of the enterprise through the pattern of racketeering activity described above, in violation of 18 U.S.C. § 1962(b).

29. As a direct and proximate result of the Count III Defendant(s)’ racketeering activities and violations of 18 U.S.C. § 1962(b), Plaintiffs have been injured in their business and property in that: [Specifically enumerate injuries caused by the acquisition of control over the enterprise that are separate from any injuries from the conduct of the enterprise through a pattern of racketeering. See Part VII, Section 1962(b): Acquisition of Control of an Enterprise.]

30. WHEREFORE, Plaintiff requests that this Court enter judgment against the Count III Defendant(s) as follows: [Specifically list prayers for relief, including request for actual damages, treble damages, and attorneys’ fees. See Part X, Relief.]

COUNT IV

RICO Section 1962(d)

31. The allegations of paragraphs ___ through ___ are incorporated herein by reference.

32. This count is against Defendant(s) _____________ (the “Count IV Defendant(s)”).

33. As set forth above, the Count IV Defendants agreed and conspired to violate 18 U.S.C. §§ 1962(a) (b) and (c). Specifically: [Consider
summarizing the manner in which the defendant conspired to (1) use or invest income that is derived from a pattern of racketeering activity in an interstate enterprise (Section 1962(a)), (2) acquire or maintain interests in the enterprise through a pattern of racketeering activity (Section 1962(b)), or (3) conduct and participate in the conduct of the affairs of the enterprise through a pattern of racketeering activity (Section 1962(c)).

34. The Count IV Defendants have intentionally conspired and agreed to directly and indirectly use or invest income that is derived from a pattern of racketeering activity in an interstate enterprise, acquire or maintain interests in the enterprise through a pattern of racketeering activity, and conduct and participate in the conduct of the affairs of the enterprise through a pattern of racketeering activity. The Count IV Defendants knew that their predicate acts were part of a pattern of racketeering activity and agreed to the commission of those acts to further the schemes described above. That conduct constitutes a conspiracy to violate 18 U.S.C. §§ 1962(a), (b) and (c), in violation of 18 U.S.C. § 1962(d).

35. As a direct and proximate result of the Count IV Defendant(s)’ conspiracy, the overt acts taken in furtherance of that conspiracy, and violations of 18 U.S.C. § 1962(d), Plaintiffs have been injured in their business and property in that: [Specifically enumerate injuries, including any that were caused by non-predicate overt acts committed to further the conspiracy.]
36. WHEREFORE, Plaintiff requests that this Court enter judgment against the Count IV Defendant(s) as follows: [Specifically list prayers for relief, including request for actual damages, treble damages and attorneys’ fees. See Part X, Relief.]

PLAINTIFFS DEMAND TRIAL BY JURY.

§ 94 RICO Jury Instructions

Various federal courts of appeals have approved pattern civil RICO jury instructions. In addition, several secondary sources include model instructions accompanied by case notes and commentary. In particular, the O’Malley treatise provides a comprehensive discussion of RICO jury instructions, giving verbatim pattern circuit instructions where available, model instructions, copious case notes, and commentary of use by the various circuit courts. Also, Judge William G. Young has assembled examples of

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complete civil jury instructions used in actual cases. Please keep in mind that sample instructions may become outdated as RICO jurisprudence continues to develop.

Jury instructions should be tailored to the specific pleadings and evidence in each case. O’Malley offers the following practical advice for customizing pattern RICO jury instructions.

- Focus the attention of the jury on the precise issue or issues to be resolved by removing all unnecessary concepts and terms.
- Exclude from any instruction conduct alleged in the complaint that is not supported by the evidence at trial.
- Exclude from any instruction concepts and theories broached by the defense that are unsupported by the evidence presented, or irrelevant under the law.
- Personalize each jury instruction to the greatest extent possible.
- Use concrete statements and proper names rather than abstract concepts or impersonal titles.
- Review the most important and recent decisions on the issue of RICO jury instructions and analyze the precise language used by the courts to convey particular concepts.

Set forth below are sample RICO jury instructions that were prepared in 1994 by the Civil RICO Subcommittee of the American Bar Association’s Section of Antitrust Law. To obtain a set, complete with commentary and notes, contact the American Bar Association, Publications Planning &

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Marketing, at 1-800/285-2221 or www.abanet.org. Other earlier sample civil RICO jury instructions are available from various sources.¹⁰

Any jury instructions will need to be updated and modified to conform to the needs of the particular case and the current case law in the applicable jurisdiction.

1.0 Introductory Instructions

Racketeering

Plaintiffs bring one claim in this civil action under the Racketeer Influenced and Corrupt Organizations Act, more commonly known as “RICO” or “the RICO Act.” Before going any further, let me explain that the word “racketeering” may have a negative social meaning and may tend to cause prejudice. You should understand that the use of that term by me or by the lawyers for either side in this case should not be regarded as having any bearing on the defendant’s liability for the plaintiff’s claimed losses or the plaintiff’s right to recover for those losses. You should consider the term “racketeering” only in the precise way that I will define it for you in these instructions. You should not confuse that definition with, or in any way be influenced by, any prior understandings which you may have of the term “racketeering.”

The words “Racketeer Influenced and Corrupt Organizations Act” are those used by Congress in 1970, when the law was enacted, to describe this particular statute. By using the word “racketeer” in the title of the statute, Congress did not mean that the plaintiff must prove that any one of the defendants is a “racketeer” or a member of what is commonly referred to as

¹⁰ See, e.g., Criminal Justice Section, RICO Cases Committee, American Bar Association, Jury Instructions for Civil and Criminal RICO Cases, reprinted in 7 RICO L. Rptr. 376 (1988); Section of Litigation, Business Torts Litigation Committee, Subcommittee on Jury Instructions, American Bar Association, Model Jury Instructions for Business Tort Litigation, §§ 5.01-5.12 (2d ed. 1988); 2 Sand, Siffert, Loughlin & Ross, Modern Federal Jury Instructions, §§ 52.01 et seq. (1985). Model civil RICO jury instructions may also be found in 3 E. Devitt, C. Blackmar & M. Wolff, Federal Jury Practice and Instructions: Civil, §§ 100.01-100.12 (4th ed. 1987). Also, several federal courts of appeals have approved pattern RICO instructions. See, e.g., Fifth Circuit Pattern Jury Instructions (Civil) § 1.1 (1997). Model criminal RICO jury instructions may be found in 2 E. Devitt, C. Blackmar & K. O’Malley, Federal Jury Practice and Instructions: Criminal, §§ 48.01-48.11 (4th ed. 1990); Westlaw also now offers complete civil RICO jury instructions for the 5th, 9th and 11th Circuits. These can be found under the federal jury practice and instruction database (FED-JI).
“organized crime” in order to recover damages. Moreover, you should not assume that the defendants or their employees are “racketeers” because the defendants have been sued under the RICO Act. Those conceptions do not have any application in this case.

You are further instructed that mere violations of the law are not sufficient to establish a violation of RICO for purposes of this civil action. Plaintiff must prove each element of a RICO violation, as those elements will be explained to you in these instructions.

2.0 Section 1962(c)

The Allegations of the Complaint

The complaint filed by the plaintiff in this case alleges, among other things, that the defendants violated Title 18, Section 1962(c), of RICO. The statute provides that any person whose business or property has been injured by reason of a violation of the statute may recover damages from each person who caused the injury. Section 1962(c) of RICO reads as follows:

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.

[An allegation of injury to business or property should also be set forth in the proposed jury instructions submitted to the Court. Appropriate language is provided in Section 1964(c) of RICO, 18 U.S.C. § 1964(c). See 6.3 below.]

In this case, the plaintiff alleges that Section 1962(c) was violated by defendant in the following respect: [describe defendant’s alleged violation of the statute as set forth in the plaintiff’s complaint].

Elements of a Section 1962(c) Violation

Section 1962(c) of RICO prohibits the conduct of an enterprise through a pattern of racketeering activity. To prove liability under Section 1962(c), the plaintiff must establish each of the following elements by a preponderance of the evidence:

First, the existence of an enterprise which affected interstate or foreign commerce;
Second, that the defendant was employed by or associated with the enterprise;

Third, that the defendant conducted or participated, directly or indirectly, in the conduct of the enterprise’s affairs; and

Fourth, that the participation was through a pattern of racketeering activity.

These elements will now be explained to you in greater detail.

Burden of Proof

Although RICO refers to the term “racketeering activity,” I instruct you that this is a civil case, not a criminal case, and the plaintiff’s RICO allegations do not have to be proved “beyond a reasonable doubt,” but only by a “preponderance of the evidence.”

The Enterprise

The term “enterprise,” as used in RICO, includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals or corporations associated in fact, although not a legal entity, engaged in interstate commerce, or whose activities affect interstate commerce.

In this case, it is alleged by the plaintiff that [insert alleged enterprise] constituted an enterprise. [If applicable, see below for special enterprise issues.]

Individual or Sole Proprietorship

In this case, it is alleged that [insert alleged enterprise] as [an individual/sole proprietorship] was an enterprise. [An individual can be an enterprise.] [A sole proprietorship constitutes an enterprise only if the enterprise is separate and distinct from the defendant.]

Association-in-Fact

In the present case, it is alleged by the plaintiff that [insert composition of alleged association-in-fact] were associated in fact to form an enterprise. To find that an association-in-fact enterprise existed, you must find that [describe members of alleged enterprise] had an ongoing organization, formal or informal, and that the members of this enterprise functioned as a continuing unit for a common purpose. This means that while members of the association-in-fact may come and go, the enterprise must continue in an essentially unchanged form during substantially the entire period alleged by
the plaintiff. At the same time, the structure of the enterprise need not have been formal and its existence can be proved by the plaintiff with evidence of its activities.

The “enterprise” element is different from the “pattern of racketeering activity” element, which will be defined for you shortly. While the evidence or proof to establish each of these elements may overlap, proof of one element does not necessarily establish the other. Rather, the enterprise must be an entity or an association-in-fact separate and apart from the pattern of racketeering activity in which it engages.

A conspiracy can constitute an enterprise and, where an enterprise has been shown to exist, it makes no difference whether its purpose was legitimate or illegitimate. [The enterprise must, however, have an economic purpose of some kind, either directly or through its racketeering activity.]

**Person**

RICO defines the term “person” to include “any individual or entity capable of holding a legal or beneficial interest in property.”

**Association with the Enterprise**

Section 1962(c) of RICO requires that a person be “employed by or associated with” the enterprise; here [identify enterprise]. “Employed by or associated with” means that a person must have at least a minimal association with the enterprise. A defendant must know something about the enterprise’s activities, as they relate to the racketeering activity, but it is not necessary that the defendant be aware of all racketeering activities committed by each of the participants in the enterprise. One may be employed by or associated with an enterprise even though he holds no official position and has no formal connection with it.

In this case, it is alleged that [summarize complaint’s allegations of defendant’s employment by or association with the enterprise].

Section 1962(c) of RICO requires that a person be employed by or associated with” the enterprise; here [identify enterprise]. “Employed by” means that a person is hired and/or paid by the enterprise to perform a service. “Associated with” means that a person has a business relationship with the enterprise itself and not merely with one of the enterprise’s employees or agents. A defendant must know something about the enterprise’s activities, as they relate to the racketeering activity, but it is not necessary that the defendant be aware of all racketeering activities of each of the participants in the enterprise.
In the present case, it is alleged that [summarize complaint’s allegations of defendant’s employment by or association with the enterprise.]

It is necessary that you find the defendant had managerial or supervisory responsibilities for the enterprise’s activities.

Because of this required associational or employment relationship, I instruct you that before any defendant may be found liable, you must also find that [he/she/it] was a person separate and distinct from the alleged enterprise. This means that under Section 1962(c), a defendant may not be both a person and an enterprise.

Conduct of or Participation in the Enterprise’s Affairs

Section 1962(c) of RICO requires that a person have conducted or participated, directly or indirectly, in the conduct of the enterprise’s affairs through a pattern of racketeering activity [or collection of unlawful debt]. To participate, directly or indirectly, in the conduct of the enterprise’s affairs, the defendant must participate in the operation or management of the enterprise itself. While the plaintiff need not prove that the defendant had primary responsibility for the enterprise’s affairs, some part in directing or controlling the enterprise’s affairs is required. An enterprise is operated not just by upper management but also by lower-rung participants in the enterprise who are under the direction of upper management. An enterprise might also be operated or managed by others associated with the enterprise who exert some degree of control over it.

In the present case, it is alleged that [describe “conduct” or participation” offenses alleged in plaintiff’s complaint].

Racketeering Activity

“Racketeering activity” is the term used in the law to designate crimes that may constitute violations under the RICO statute. You are to draw no conclusion from the use of this term that is in any way detrimental to the defendant. You should also note that, on occasion, these instructions may alternatively refer to racketeering activity as a “racketeering act” or as a “predicate act.”

As it pertains to this case, the law defines racketeering activity to include [Insert appropriate language from 18 U.S.C. § 1961(l)]. Each alleged offense should be separately defined. To maintain the flow of the RICO instruction, this should be done separately from the charge.]
Pattern of Racketeering Activity

RICO defines the term “pattern of racketeering activity” to require at least two acts of racketeering activity, one of which occurred after October 15, 1970, and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of any prior act of racketeering activity. While the two acts need not be of the same kind, you must find by a preponderance of the evidence that the two acts occurred within the time specified.

In addition, the term “pattern of racketeering activity” requires that you find the predicate acts were (1) related to each other and (2) amounted to or posed a threat of continued racketeering activity. Predicate acts are related if they have the same or similar purposes, results, participants, victims, or methods of commission, or otherwise are interrelated by distinguishing characteristics and are not isolated events.

To demonstrate that the acts amounted to or posed a threat of continued racketeering activity, the plaintiff[s] must show a series of predicate acts by the defendant extending over a substantial period of time and involving more than a limited number of participants, victims, injuries and transactions. Acts extending over less than a substantial period and threatening no future racketeering activity do not satisfy the continuity requirement.

Collection of an Unlawful Debt (If Applicable)

“Unlawful debt” means a debt (1) incurred or contracted in gambling activity which was in violation of the law of the United States, a State or a political subdivision thereof, or which is unenforceable under State or Federal law in whole or in part as to principal or interest because of the laws relating to usury, and (2) which was incurred in connection with the business of gambling in violation of the law of the United States, a State or political subdivision thereof, or the business of lending money or a thing of value at a rate usurious under State or Federal law, where the usurious rate is at least twice the enforceable rate.

In this case the unlawful debt is alleged to be [describe offenses as alleged in the plaintiff’s complaint].

To find that the defendant(s) collected an unlawful debt, you must first find that the defendant(s), in any way, [insert scienter requirement] induced [or attempted to induce] payment of a debt [incurred or contracted] in violation of [the applicable gambling law] which is unenforceable in whole or in part as to principal or interest under [the applicable usury law]. [If applicable: Under the law, the maximum enforceable rate is [X]; therefore, in order to find that the debt collected by the defendant(s) was an “unlawful debt,” you must find that money was lent at a rate exceeding [X].]
Finally, to find that any defendant violated Section 1962(c), you must find that, through this pattern of racketeering activity [or collection of an unlawful debt], [he/she/it] conducted or participated in the conduct of the enterprise. The word “through” requires a connection among the defendants, the pattern of racketeering [or collection of an unlawful debt], and the enterprise.

**Instruction 2.11.1**

*Alternate No. 1*

To establish the necessary connection, the plaintiff must prove that the defendant’s pattern of racketeering activity was (1) facilitated by his position in, or relationship to, the enterprise, and (2) had some effect on the enterprise.

**Instruction 2.11.2**

*Alternate No. 2*

There are two different tests for determining whether the required connection exists. Both require that you consider the defendant’s alleged role in the enterprise and the pattern of racketeering activity itself. The evidence must meet only one of the tests, although it may meet both.

Under the first test, you may find that the defendant conducted or participated in the enterprise through a pattern of racketeering activity [or collection of unlawful debt] if you find that the defendant was able to commit the pattern of racketeering activity solely because of [his/her] position in the enterprise.

Under the second test, you may find the required connection if you find that the pattern of racketeering activity is related to the activities of the enterprise. This does not mean that the enterprise must have benefited or been harmed by the pattern of racketeering activity; indeed, the pattern of racketeering activity may have had no effect on the enterprise. However, you may consider whether the defendant intended to harm or benefit the enterprise.

**Interstate or Foreign Commerce**

For RICO to apply, the enterprise must either engage in interstate or foreign commerce or carry out activities affecting such commerce. [Alternatively, it is sufficient if the pattern of racketeering activity affects interstate commerce.] In this case it is alleged that [describe interstate commerce allegations in the plaintiff’s complaint].
Interstate commerce means commerce between any two states (or the District of Columbia, or a United States territory or possession) and any foreign state or nation. It is not necessary to show that any racketeering acts affected interstate or foreign commerce (except as to those racketeering acts specifically requiring such an impact as an element of the offense). Only the enterprise must have such a connection. It is also sufficient if the pattern of racketeering activity has such an effect on interstate or foreign commerce. Finally, all that is required is some minimal effect on interstate or foreign commerce.

3.0 Section 1962(b)

The Allegations of the Complaint

The complaint in this case alleges that the defendant violated Section 1962(b) of RICO, which reads as follows:

It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

[An allegation of injury to business or property should also be set forth. Appropriate language is provided in the Section 1964(c) instruction. See 6.3.]

In this case, the plaintiff alleges that the defendant violated Section 1962(b) by [describe Section 1962(b) offense as alleged in the plaintiff's complaint].

Elements of a Section 1962(b) Violation

Section 1962(b) has been violated if the following elements are proven:

First, the existence of an enterprise;

Second, that the enterprise was engaged in, or its activities affected, interstate or foreign commerce;

Third, that the defendant was a person who acquired or maintained, directly or indirectly, any interest in or control of said enterprise; and

Fourth, that the defendant did so [insert scintener requirement] through a pattern of racketeering activity [or collection of an unlawful debt].

Enterprise

See definition contained in 2.0 above.
Person

See definition contained in 2.0 above.

Acquire or Maintain an Interest in or Control of an Enterprise

Section 1962(b) provides that the defendant must be a person who [acquired or maintained] [an interest in/control of], the enterprise. The terms used in this requirement may be explained as follows:

First, acquire. To “acquire” means to obtain, receive, or gain in whatever manner.

Second, maintain. To “maintain” means to support, preserve, keep effective, continue, or sustain.

Third, interest. The term “interest in” means a right, claim, title, or legal share in some form of property.

Fourth, control. The term “control of” means to regulate, direct, govern, or manage.

In the present case, it is alleged that [describe Section 1962(b) offense as alleged in the plaintiff's complaint].

Thus, to “acquire or maintain” an interest in an enterprise, the defendant must obtain or preserve some form of property rights in the enterprise. To “acquire or maintain” control of an enterprise, the defendant must obtain or preserve some right to manage or direct the enterprise.

Simply having a business relationship with an enterprise does not amount to an “interest in or control of” that enterprise. Similarly, the fact that a defendant may have received funds from an enterprise does not, standing alone, constitute an “interest in or control of” that enterprise.

Through

It is not enough that the defendant acquired or maintained an interest in, or control of, the alleged enterprise. Section 1962(b) is violated only if the interest or control was acquired or maintained through [a pattern of racketeering activity/collection of an unlawful debt]. This means that the plaintiff must show that the pattern of racketeering activity resulted in the defendant acquiring or maintaining an interest in or control of the enterprise.

In the present case, it is alleged that the defendant [acquired/maintained] [an interest in/control of] [insert alleged enterprise] through [a pattern of racketeering activity/collection of an unlawful debt].
Instruction 3.6.1

Racketeering Activity

See definition contained in 2.0 above.

Instruction 3.6.2

Pattern of Racketeering Activity/Collection of Unlawful Debt

See definition contained in 2.0 above.

Instruction 3.6.3

Through

In the present context, the term “through” means that the defendant’s participation in the pattern of [racketeering/collection of an unlawful debt] must have facilitated, promoted, or aided in the [acquisition/maintenance] of [an interest in/control of] the alleged enterprise.

Interstate or Foreign Commerce

See definition contained in Instruction 2.11.2 above.

4.0 Section 1962(a)

The Plaintiff’s Allegations

The plaintiff alleges that the defendant violated Section 1962(a) of RICO, which reads in pertinent part as follows:

It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in which such person has participated as a principal . . . to use or invest, directly or indirectly, any part of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

[The reference in the statute to the exception for the purchase of securities on the open market has been deleted, see 18 U.S.C. Section 1962(a), and should not be read unless applicable to the facts of the particular case.]

[An allegation of injury to business or property should also be set forth. Appropriate language is provided in 6.0 below.]
In this case, plaintiff alleges that Section 1962(a) was violated in the following respect: [describe offense per the plaintiff’s complaint].

Elements of a Section 1962(a) Violation

A violation of Section 1962(a) requires proof of the following elements:

First, the existence of an enterprise;

Second, that the enterprise was engaged in, or its activities affected, interstate or foreign commerce;

Third, that the defendant was a person who derived income directly or indirectly from a pattern of racketeering activity in which [he/she/it] participated as a principal; and

Fourth, that the defendant used some part of that income, directly or indirectly, to acquire an interest in, or to establish or operate the enterprise.

Enterprise

See definitions contained in 2.0 above.

Person

See definitions contained in 2.0 above. [Note that the law does not require that the person using racketeering proceeds to acquire an interest in, establish, or operate an enterprise must be separate and distinct from the alleged enterprise. A defendant may be both a person and an enterprise under Section 1962(a). If the defendant is both a person and an enterprise, it is illegal to invest racketeering proceeds in oneself.]

Derivation of Income from a Pattern of Racketeering Activity

Section 1962(a) requires that the defendant must be a person who derived income directly or indirectly from the pattern of racketeering activity charged in the complaint in which [he/she/it] participated as a principal. The term “Income” is defined to include money or its equivalent received directly or indirectly by the defendant by engaging in a pattern of racketeering activity.

A person is liable as a principal if [he/she/it] personally commits an act or aids or abets one who does. A person aids or abets another in the commission of an act if [he/she/it] knowingly helped commit the act, intended to do so, and took some steps to assist in the commission of the act before it was complete. It is not enough that the defendant simply associated with the person who committed the act, was present at the time the act took place, or even did things helpful to the person or persons who committed the act. The
evidence must show that the defendant acted with the purpose of helping to commit a pattern of racketeering activity, or was reckless in disregarding the existence of the fraud.

In this case, it is alleged that the defendant participated as a principal in the pattern of racketeering activity through [describe Section 1962(a) offense as alleged in the plaintiff’s complaint].

**Instruction 4.5.1**

*Racketeering Activity*

See definition contained in 2.0 above.

**Instruction 4.5.2**

*Pattern of Racketeering Activity*

See definition contained in 2.0 above.

*Acquire an Interest in, Establish, or Operate an Enterprise*

Finally, the law requires that the defendant “use[d] or invest[ed], directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of” the enterprise.

To “acquire an interest in” means to obtain, receive, or gain in whatever manner a right, claim, title, or legal share in something. To “establish” means to found or create. To “operate” means to conduct the affairs of or to manage.

The defendant must do more than simply acquire an interest in, establish, or operate the enterprise. Section 1962(a) is violated only if these acts were accomplished through the use or investment, directly or indirectly, of income obtained from the pattern of racketeering activity or the proceeds of such income. Thus, Section 1962(a) is not violated if the defendant used income obtained from sources other than the pattern of racketeering activity to acquire an interest in, or to establish or operate, the enterprise.

In the present case it is alleged [describe offense as alleged in the plaintiff’s complaint].
5.0 Section 1962(d)

Introduction

[The sample jury instructions for Section 1962(d) claims do not attempt to redefine general conspiracy law; rather, they address conspiracy issues that are specific to RICO. Additionally, the language of these instructions deals only with conspiracy to violate Section 1962(c); however, the language and concepts are adaptable to civil actions involving violations of Section 1962(a) or (b).]

Membership in the Conspiracy

The complaint alleges that the defendants violated Section 1962(d) of RICO, which reads as follows:

It shall be unlawful for any person to conspire to violate any of the provisions of subsections (a), (b), or (c) of this section.

[An allegation of injury to business or property should also be set forth. Appropriate language is provided in Section 1964(c). See 6.3 above.]

The plaintiff must prove that the defendant [insert scienter requirement] became a member of the conspiracy alleged in the complaint. This means that the plaintiff must prove that the defendant joined with the other members of the conspiracy in an agreement to conduct or participate in the affairs of the enterprise through a pattern of racketeering activity. Thus, the plaintiff must prove the following:

First, that the defendant knew that the object of the alleged conspiracy was conducted in violation of Section 1962. To do this, the plaintiff must prove that the defendant understood the [nature/unlawful character] of the conspiratorial plan.

Second, that the defendant agreed to join with others to achieve the objective of the conspiracy. To conspire to conduct the affairs of an enterprise, the defendant must be aware of the existence and purpose of the enterprise.

Third, that the defendant agreed:

Instruction 5.2.1

Alternate A

[that the enterprise would be conducted through a pattern of racketeering activity. This means that the commission of at least two predicate crimes by the conspiracy was contemplated.]
Instruction 5.2.2

Alternate B

[to commit, or to aid and abet someone else to commit, at least two of the predicate crimes necessary to demonstrate a pattern of racketeering activity.]

If you find that the defendant agreed [to personally commit/that the conspiracy would commit] two or more of the racketeering acts alleged, you need not find that any of the racketeering acts were actually committed. It is enough that the defendant agreed [to commit/that the conspiracy would commit] two or more of the acts.

It is not enough, however, that the defendant agreed [to commit/that the conspiracy would commit] two or more crimes. The plaintiff must also show an agreement that this would be done by conducting the enterprise’s affairs through a pattern of racketeering activity.

Instruction 5.2.3

Enterprise

See definition in 2.0 above.

Instruction 5.2.4

Person

See definition in 2.0 above.

Instruction 5.2.5

Interstate or Foreign Commerce

See definition in 2.11.2 above.

Overt Act

It [is/is not] necessary that the plaintiff prove that the defendant committed an overt act in furtherance of the object of the conspiracy. An overt act is any transaction or event, which may be entirely innocent when considered alone, but which is committed by a conspirator in an effort to accomplish some object of the conspiracy.
6.0 Section 1964(c)

Civil Relief

If you find that the defendant committed a violation of [insert RICO provisions alleged in the complaint], you must next consider whether the plaintiff was injured in [his/her/it] business or property by reason of the violation of Section 1962. For the plaintiff to recover, you must find that the following elements were established:

First, that the defendant violated Section 1962;

Second, that the plaintiff sustained injury to [his/her/its] business or property;

Third, that such injury was sustained by reason of the defendant's Section 1962 violation;

Fourth, should you find that such an injury occurred, you will have to determine the extent of the plaintiff's damages.

Violations of Section 1962

I have already instructed you on the elements of [insert pertinent Section 1962 provision(s)]. Each element of the alleged violation must be established to your satisfaction by a preponderance of the evidence.

Injury to Plaintiff's Business or Property

Under Section 1964(c), the plaintiff may recover only for injury to [his/her/its] business or property. Injury to business may include [lost profits/expenses] incurred in connection with the defendant’s Section 1962 violation, and diminution in the value or worth of the business or property itself. Injury to property includes the value of any personal or real property that has been diminished in value by the defendant’s actions.

Because Section 1964(c) limits the plaintiff’s recovery to business or property injuries, you may not compensate the plaintiff for other losses, such as personal injuries or emotional harm. [You may, however, compensate for costs incurred in connection with such non-property injuries.]

Thus, the plaintiff must establish: (1) an injury with reasonable certainty (2) to business or property and (3) caused by the conduct constituting the RICO violation and not by other circumstances.
By Reason of

It is not enough for the plaintiff to establish a Section 1962 violation and the occurrence of business or property injuries. You must also find that such injuries occurred by reason of the alleged violation. This requires two determinations on your part.

First, you must be satisfied that the defendant’s conduct actually caused the plaintiff’s loss. By actually caused, I mean that you must find that the defendant’s Section 1962 violation was a material cause or a substantial factor in bringing about the plaintiff’s loss.

To find that the defendant’s Section 1962 violation caused the plaintiff’s injury, you need not find that the plaintiff was injured by each predicate act or by the pattern of racketeering activity. It is sufficient if the plaintiff has proven that the defendant engaged in a pattern of racketeering activity and that the plaintiff was injured by reason of at least one of the acts constituting the pattern.

Second, you must find that the defendant’s violation was a proximate cause of the plaintiff’s injury. In other words, you must be satisfied that the injury was reasonably foreseeable.

[The following language may also be appropriate for cases involving Section 1962(a) violations:]

This means that the plaintiff must have proven that [his/her/its] injury was proximately caused by the defendant’s having invested income (or proceeds of income) derived, directly or indirectly, [from a pattern of racketeering activity/through collection of unlawful debt] to acquire an interest in, or establish or operate, any enterprise as defined in these instructions. Thus, injury stemming from the racketeering acts alone is not compensable.

Instruction 6.4.1

Alternate B

[The following language may also be appropriate for cases involving Section 1962(b) violations:]

This means that the plaintiff must have proven that [his/her/its] injury was proximately caused by the defendant’s having acquired or maintained, directly or indirectly, an interest in or control of an enterprise (as that term has previously been defined) [through a pattern of racketeering activity/through collection of unlawful debt]. Thus, injury stemming from the racketeering acts alone is not compensable.
**Damages**

Should you find that the plaintiff was injured in [his/her/its] business or property by reason of the defendant’s violation of Section 1962, you should proceed to determine the extent of [his/her/its] compensable damages. The damages recoverable for a violation of RICO is that amount reasonably necessary to compensate plaintiff for injury to [his/her/its] business or property proximately and directly caused by the defendant’s violation of the RICO statutes.

In this respect, your task is to assess compensatory damages in an amount you find to be justified by the evidence as full, just, and reasonable for the plaintiff’s business [and/or] property injuries. You are not permitted to speculate concerning the extent of damages. Rather, your determination must be based on the evidence.

You are also instructed as to the plaintiff’s duty to mitigate [his/her/its] damages. At the point where a reasonable plaintiff would have realized that [he/she/it] was suffering losses as a result of a defendant’s conduct, a plaintiff is required to take reasonable steps to limit the losses and protect [himself/herself/itself] from further injury. The plaintiff cannot recover for losses suffered after the point at which those losses could have been prevented.

**7.0 Predicate Act**

**Mail Fraud**

To establish a violation of the federal mail fraud statute, the plaintiff must prove that the defendant committed the following elements:

First, that the defendant willfully and knowingly devised a scheme or artifice to defraud, or to obtain money or property by means of false pretenses, representations, or promises, and

Second, that the defendant used the United States Postal Service by mailing, or by causing to be mailed, some matter or thing for the purpose of executing the scheme or plan to defraud.

The use of the United States mails is an essential element of the predicate act of mail fraud. Each separate use of the mails in furtherance of a scheme or plan to defraud constitutes a separate predicate act of mail fraud.
**Wire Fraud**

To establish a violation of the federal wire fraud statute, the plaintiff must prove that the defendant committed the following elements:

First, that the defendant willfully and knowingly devised a scheme or artifice to defraud, or to obtain money or property by means of false pretenses, representations, or promises; and

Second, that the defendant made interstate telephone calls or used radio communications for the purpose of executing the scheme or plan to defraud.

Interstate telephone calls or radio communications are an essential element of the predicate act of wire fraud. Each separate use of such facilities in furtherance of a scheme or plan to defraud constitutes a separate predicate act of wire fraud.

**Scheme or Artifice**

For purposes of the mail and wire fraud statutes, to establish fraudulent intent on the part of any person, it must be established that such person knowingly and intentionally attempted to deceive another. One who knowingly and intentionally deceives another is chargeable with fraudulent intent, notwithstanding the manner and form in which the deception was attempted. To act with an “intent to defraud” means to act knowingly and with specific intent to deceive, ordinarily for the purpose of causing some financial loss to another, or to bring about some financial gain to one’s self. An intent to defraud may be inferred from a defendant’s statements or conduct.

The words “scheme” and “artifice,” as used in the mail and wire fraud statutes, include any plan or course of action intended to deceive another, or to obtain, by false or fraudulent pretenses, representations, or promises, money, or property from persons so deceived.

A statement or representation is “false” or “fraudulent,” within the meaning of the mail and wire fraud statutes, if it relates to a material fact and is known to be untrue, or if it is made with reckless indifference as to its truth or falsity, and is made or caused to be made with intent to defraud. A statement or representation may also be “false” or “fraudulent” when it constitutes a half truth, or effectively conceals a material fact, with intent to defraud.

It is not necessary that the plaintiff prove all of the details concerning the precise nature and purpose of the scheme or plan; or that the material mailed was itself false or fraudulent; or that the alleged scheme actually succeeded in defrauding anyone; or that the use of the mail, the telephone, or the radio was intended as the specific or exclusive means of accomplishing the alleged fraud.
8.0 Miscellaneous Instructions

Intentionally, Willfully, Knowingly, and Recklessly

You have heard throughout these instructions references to [intentionally/willfully/ knowingly/recklessly] in relation to various elements of the offenses or predicate acts charged. These terms refer to the state of mind of the defendant. You are called upon to decide whether various acts were committed by the defendant with a certain state of mind.

You may infer a defendant’s state of mind from both [his/her/its] words and [his/her/its] actions. The commission of an act may more clearly show the defendant’s state of mind than [his/her/its] words or explanation uttered long after the act’s occurrence. You may determine the defendant’s state of mind based upon the facts and circumstances surrounding the act and any reasonable inferences drawn therefrom.

An act is done intentionally if the defendant has a conscious objective or desire either to engage in the conduct or to cause the result.

An act is done willfully if it is committed voluntarily by the defendant with a specific intent or purpose to do something that the law forbids; that is, with a bad purpose to disobey or disregard the law.

An act is done knowingly if it is performed voluntarily by the defendant and not because of mistake or accident.

[As to each of the elements to which the state of mind “knowingly” applies, a defendant may be held responsible if [he/she/it] consciously avoided knowledge or deliberately refused to act or investigate where [he/she/it] had an affirmative duty to do so. To be found responsible under this theory, the defendant must have been aware that there was a substantial risk that a certain circumstance existed or that a certain result would occur but [he/she/it] nevertheless disregarded the risk. A substantial risk means a risk that is of such a nature and degree that to disregard it constitutes a gross deviation from the standard of care that a reasonable person would exercise in such a situation.] [Under certain circumstances, which I will describe for you more fully as they apply, a defendant’s conscious avoidance of knowledge or deliberate refusal to investigate may supply the necessary mental element. To be held responsible for conscious avoidance or failure to investigate, the defendant must either be under a duty to investigate or have consciously avoided knowledge knowing the consequences of such avoidance. A defendant may not be held responsible for conscious avoidance or failure to investigate unless [he/she/it] had some interest in the successful accomplishment of the crime being committed.]
An act is done recklessly if the defendant is aware of a substantial risk that a surrounding circumstance exists or that a result will occur, but disregards the risk. [A substantial risk means a risk that is of such a nature and degree that to disregard it constitutes a gross deviation from the standard of care that a reasonable person would exercise in such a situation.]

_Aiding and Abetting_

Any person who aids, abets, counsels, commands, induces, or procures the commission of a crime is guilty of that crime. To be found so guilty a person must associate [himself/herself] with the criminal or fraudulent venture, participate in it and try to make it succeed. The plaintiff must prove that the substantive crime or predicate act was committed and that the defendant charged with aiding and abetting that crime or predicate act knew of the commission of the substantive offense and acted to facilitate it.

**9.0 Sample Verdict Form**

**FORM NO.**

Do you find that [insert individuals or entities] constituted an enterprise?

Yes  
No

**FORM NO.**

Do you find that the enterprise was one engaged in or whose activities affected interstate commerce?

Yes  
No

**FORM NO.**

Do you find that the defendant engaged in or aided and abetted a pattern of racketeering activity?

Yes  
No
FORM NO.

Do you find that the defendant engaged in a pattern of racketeering activity in violation of [insert relevant subsection(s) of Section 1962]?

Yes

No

FORM NO.

Do you find that the plaintiff was injured in its business or property by reason of the defendant’s violation of [insert relevant subsections of Section 1962]?

Yes

No

FORM NO.

If your answer to questions [insert question numbers] was yes, in dollars and cents, if any, what do you find to be the damages that would fairly and reasonably compensate the plaintiff for injuries proximately caused by the defendant’s violation of [insert relevant subsections of Section 1962]?

$_____________________

XV-43
APPENDIX A
STATUTORY LANGUAGE

Section 1961. Definitions

As used in this chapter [18 USCS §§ 1961 et seq.] --

(1) “racketeering activity” means (A) any act or threat involving murder, kidnapping, gambling, arson, robbery, bribery, extortion, dealing in obscene matter, or dealing in a controlled substance or listed chemical (as defined in section 102 of the Controlled Substances Act [21 U.S.C. § 802]), which is chargeable under State law and punishable by imprisonment for more than one year; (B) any act which is indictable under any of the following provisions of title 18, United States Code: Section 201 (relating to bribery), section 224 (relating to sports bribery), sections 471, 472, and 473 (relating to counterfeiting), section 659 (relating to theft from interstate shipment) if the act indictable under section 659 is felonious, section 664 (relating to embezzlement from pension and welfare funds), sections 891-894 (relating to extortionate credit transactions), section 1028 (relating to fraud and related activity in connection with identification documents), section 1029 (relating to fraud and related activity in connection with access devices), section 1084 (relating to the transmission of gambling information), section 1341 (relating to mail fraud), section 1343 (relating to wire fraud), section 1344 (relating to financial institution fraud), section 1425 (relating to the procurement of citizenship or nationalization unlawfully), section 1426 (relating to the reproduction of naturalization or citizenship papers), section 1427 (relating to the sale of naturalization or citizenship papers), sections 1461-1465 (relating to obscene matter), section 1503 (relating to obstruction of justice), section 1510 (relating to obstruction of criminal investigations), section 1511 (relating to the obstruction of State or local law enforcement), section 1512 (relating to tampering with a witness, victim, or an informant), section 1513 (relating to retaliating against a witness, victim, or an informant), section 1542 (relating to false statement in application and use of passport), section 1543 (relating to forgery or false use of passport), section 1544 (relating to misuse of passport), section 1546 (relating to fraud and misuse of visas, permits, and other documents), sections 1581-1592 (relating to peonage, slavery, and trafficking in persons), section 1951 (relating to interference with commerce, robbery, or extortion), section 1952 (relating to racketeering), section 1953 (relating to interstate transportation of wagering paraphernalia), section 1954 (relating to unlawful welfare fund payments), section 1955 (relating to the prohibition of illegal gambling businesses), section 1956 (relating to the laundering of monetary instruments), section 1957 (relating to engaging in monetary transactions in property derived from specified unlawful activity), section
1958 (relating to use of interstate commerce facilities in the commission of murder-for-hire), section 1960 (relating to illegal money transmitters), sections 2251, 2251A, 2252, and 2260 (relating to sexual exploitation of children), sections 2312 and 2313 (relating to interstate transportation of stolen motor vehicles), sections 2314 and 2315 (relating to interstate transportation of stolen property), section 2318 (relating to trafficking in counterfeit labels for phonorecords, computer programs or computer program documentation or packaging and copies of motion pictures or other audiovisual works), section 2319 (relating to criminal infringement of a copyright), section 2319A (relating to unauthorized fixation of and trafficking in sound recordings and music videos of live musical performances), section 2320 (relating to trafficking in goods or services bearing counterfeit marks), section 2321 (relating to trafficking in certain motor vehicles or motor vehicle parts), sections 2341-2346 (relating to trafficking in contraband cigarettes), sections 2421-24 (relating to white slave traffic), sections 175-178 (relating to biological weapons), sections 229-229F (relating to chemical weapons), section 831 (relating to nuclear materials), (C) any act which is indictable under title 29, United States Code, section 186 (dealing with restrictions on payments and loans to labor organizations) or section 501(c) (relating to embezzlement from union funds), (D) any offense involving fraud connected with a case under title 11 (except a case under section 157 of this title), fraud in the sale of securities, or the felonious manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in a controlled substance or listed chemical (as defined in section 102 of the Controlled Substances Act [21 U.S.C. § 802]), punishable under any law of the United States, (E) any act which is indictable under the Currency and Foreign Transactions Reporting Act, (F) any act which is indictable under the Immigration and Nationality Act, section 274 [8 U.S.C. § 1324] (relating to bringing in and harboring certain aliens), section 277 [8 U.S.C. § 1327] (relating to aiding or assisting certain aliens to enter the United States), or section 278 [8 U.S.C. § 1328] (relating to importation of alien for immoral purpose) if the act indictable under such section of such Act was committed for the purpose of financial gain, or (G) any act that is indictable under any provision listed in section 2332b(g)(5)(B);

(2) “State” means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, any territory or possession of the United States, any political subdivision, or any department, agency, or instrumentality thereof;

(3) “person” includes any individual or entity capable of holding a legal or beneficial interest in property;
(4) “enterprise” includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity;

(5) “pattern of racketeering activity” requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity;

(6) “unlawful debt” means a debt (A) incurred or contracted in gambling activity which was in violation of the law of the United States, a State or political subdivision thereof, or which is unenforceable under State or Federal law in whole or in part as to principal or interest because of the laws relating to usury, and (B) which was incurred in connection with the business of gambling in violation of the law of the United States, a State or political subdivision thereof, or the business of lending money or a thing of value at a rate usurious under State or Federal law, where the usurious rate is at least twice the enforceable rate;

(7) “racketeering investigator” means any attorney or investigator so designated by the Attorney General and charged with the duty of enforcing or carrying into effect this chapter [18 U.S.C. §§ 1961 et. seq.];

(8) “racketeering investigation” means any inquiry conducted by any racketeering investigator for the purpose of ascertaining whether any person has been involved in any violation of this chapter [18 U.S.C. §§ 1961 et. seq.] or of any final order, judgment, or decree of any court of the United States, duly entered in any case or proceeding arising under this chapter [18 U.S.C. §§ 1961 et. seq.];

(9) “documentary material” includes any book, paper, document, record, recording, or other material; and

(10) “Attorney General” includes the Attorney General of the United States, the Deputy Attorney General of the United States, the Associate Attorney General of the United States, any Assistant Attorney General of the United States, or any employee of the Department of Justice or any employee of any department or agency of the United States so designated by the Attorney General to carry out the powers conferred on the Attorney General by this chapter [18 U.S.C. §§ 1961 et. seq.]. Any department or agency so designated may use in investigations authorized by this chapter [18 U.S.C. §§ 1961 et. seq.] either the investigative provisions of this chapter [18 U.S.C. §§ 1961 et. seq.] or the investigative power of such department or agency otherwise conferred by law.
Section 1962. Prohibited activities

(a) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in which such person has participated as a principal within the meaning of section 2, title 18, United States Code, to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce. A purchase of securities on the open market for purposes of investment, and without the intention of controlling or participating in the control of the issuer, or of assisting another to do so, shall not be unlawful under this subsection if the securities of the issuer held by the purchaser, the members of his immediate family, and his or their accomplices in any pattern or racketeering activity or the collection of an unlawful debt after such purchase do not amount in the aggregate to one percent of the outstanding securities of any one class, and do not confer, either in law or in fact, the power to elect one or more directors of the issuer.

(b) It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

(c) 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.

(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsection (a), (b), or (c) of this section.

Section 1963. Criminal penalties [section omitted]

Section 1964. Civil remedies

(a) The district courts of the United States shall have jurisdiction to prevent and restrain violations of section 1962 of this chapter by issuing appropriate orders, including, but not limited to: ordering any person to divest himself of any interest, direct or indirect, in any enterprise; imposing reasonable restrictions on the future activities or investments of any person, including, but not limited
to, prohibiting any person from engaging in the same type of endeavor as the enterprise engaged in, the activities of which affect interstate or foreign commerce; or ordering dissolution or reorganization of any enterprise, making due provision for the rights of innocent persons.

(b) The Attorney General may institute proceedings under this section. Pending final determination thereof, the court may at any time enter such restraining orders or prohibitions, or take such other actions, including the acceptance of satisfactory performance bonds, as it shall deem proper.

(c) Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee, except 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 section 1962. The exception contained in the preceding sentence does not apply to an action against any person that is criminally convicted in connection with the fraud, in which case the statute of limitations shall start to run on the date on which the conviction becomes final.

(d) A final judgment or decree rendered in favor of the United States in any criminal proceeding brought by the United States under this chapter [18 U.S.C. §§ 1961 et. seq.] shall estop the defendant from denying the essential allegations of the criminal offense in any subsequent civil proceeding brought by the United States.

Section 1965. Venue and process

(a) Any civil action or proceeding under this chapter [18 U.S.C. §§ 1961 et. seq.] against any person may be instituted in the district court of the United States for any district in which such person resides, is found, has an agent, or transacts his affairs.

(b) In any action under section 1964 of this chapter in any district court of the United States in which it is shown that the ends of justice require that other parties residing in any other district be brought before the court, the court may cause such parties to be summoned, and process for that purpose may be served in any judicial district of the United States by the marshal thereof.

(c) In any civil or criminal action or proceeding instituted by the United States under this chapter [18 U.S.C. §§ 1961 et. seq.] in the
district court of the United States for any judicial district, subpenas issued by such court to compel the attendance of witnesses may be served in any other judicial district, except that in any civil action or proceeding no such subpena shall be issued for service upon any individual who resides in another district at a place more than one hundred miles from the place at which such court is held without approval given by a judge of such court upon a showing of good cause.

(d) All other process in any action or proceeding under this chapter [18 U.S.C. §§ 1961 et. seq.] may be served on any person in any judicial district in which such person resides, is found, has an agent, or transacts his affairs.

Section 1966. Expedition of actions

In any civil action instituted under this chapter [18 U.S.C. §§ 1961 et. seq.] by the United States in any district court of the United States, the Attorney General may file with the clerk of such court a certificate stating that in his opinion the case is of general public importance. A copy of that certificate shall be furnished immediately by such clerk to the chief judge or in his absence to the presiding district judge of the district in which such action is pending. Upon receipt of such copy, such judge shall designate immediately a judge of that district to hear and determine action.

Section 1967. Evidence

In any proceeding ancillary to or in any civil action instituted by the United States under this chapter [18 U.S.C. §§ 1961 et. seq.] the proceedings may be open or closed to the public at the discretion of the court after consideration of the rights of affected persons.

Section 1968. Civil investigative demand

(a) Whenever the Attorney General has reason to believe that any person or enterprise may be in possession, custody, or control of any documentary materials relevant to a racketeering investigation, he may, prior to the institution of a civil or criminal proceeding thereon, issue in writing, and cause to be served upon such person, a civil investigative demand requiring such person to produce such material for examination.

(b) Each such demand shall--

(1) state the nature of the conduct constituting the alleged racketeering violation which is under investigation and the provision of law applicable thereto;
(2) describe the class or classes of documentary material produced thereunder with such definiteness and certainty as to permit such material to be fairly identified;

(3) state that the demand is returnable forthwith or prescribe a return date which will provide a reasonable period of time within which the material so demanded may be assembled and made available for inspection and copying or reproduction; and

(4) identify the custodian to whom such material shall be made available.

(c) No such demand shall--

(1) contain any requirement which would be held to be unreasonable if contained in a subpoena duces tecum issued by a court of the United States in aid of a grand jury investigation of such alleged racketeering violation; or

(2) require the production of any documentary evidence which would be privileged from disclosure if demanded by a subpoena duces tecum issued by a court of the United States in aid of a grand jury investigation of such alleged racketeering violation.

(d) Service of any such demand or any petition filed under this section may be made upon a person by--

(1) delivering a duly executed copy thereof to any partner, executive officer, managing agent, or general agent thereof, or to any agent thereof authorized by appointment or by law to receive service of process on behalf of such person, or upon any individual person;

(2) delivering a duly executed copy thereof to the principal office or place of business of the person to be served; or

(3) depositing such copy in the United States mail, by registered or certified mail duly addressed to such person at its principal office or place of business.

(e) A verified return by the individual serving any such demand or petition setting forth the manner of such service shall be prima facie proof of such service. In the case of service by registered or certified mail, such return shall be accompanied by the return post office receipt of delivery of such demand.
(f) (1) The Attorney General shall designate a racketeering investigator to serve as racketeer document custodian, and such additional racketeering investigators as he shall determine from time to time to be necessary to serve as deputies to such officer.

(2) Any person upon whom any demand issued under this section has been duly served shall make such material available for inspection and copying or reproduction to the custodian designated therein at the principal place of business of such person, or at such other place as such custodian and such person thereafter may agree and prescribe in writing or as the court may direct, pursuant to this section on the return date specified in such demand, or on such later date as such custodian may prescribe in writing. Such person may upon written agreement between such person and the custodian substitute for copies of all or any part of such material originals thereof.

(3) The custodian to whom any documentary material is so delivered shall take physical possession thereof, and shall be responsible for the use made thereof and for the return thereof pursuant to this chapter [18 U.S.C. §§ 1961 et. seq.]. The custodian may cause the preparation of such copies of such documentary material as may be required for official use under regulations which shall be promulgated by the Attorney General. While in the possession of the custodian, no material so produced shall be available for examination, without the consent of the person who produced such material, by any individual other than the Attorney General. Under such reasonable terms and conditions as the Attorney General shall prescribe, documentary material while in the possession of the custodian shall be available for examination by the person who produced such material or any duly authorized representatives of such person.

(4) Whenever any attorney has been designated to appear on behalf of the United States before any court or grand jury in any case or proceeding involving any alleged violation of this chapter, the custodian may deliver to such attorney such documentary material in the possession of the custodian as such attorney determines to be required for use in the presentation of such case or proceeding on behalf of the United States. Upon the conclusion of any such case or proceeding, such attorney shall return to the custodian any documentary material so withdrawn which has not passed into the control of such court or grand jury through the
introduction thereof into the record of such case or proceeding.

(5) Upon the completion of--

(i) the racketeering investigation for which any documentary material was produced under this chapter [18 U.S.C. §§ 1961 et. seq.], and

(ii) any case or proceeding arising from such investigation, the custodian shall return to the person who produced such material all such material other than copies thereof made by the Attorney General pursuant to this subsection which has not passed into the control of any court or grand jury through the introduction thereof into the record of such case or proceeding.

(6) When any documentary material has been produced by any person under this section for use in any racketeering investigation, and no such case or proceeding arising therefrom has been instituted within a reasonable time after completion of the examination and analysis of all evidence assembled in the course of such investigation, such person shall be entitled, upon written demand made upon the Attorney General, to the return of all documentary material other than copies thereof made pursuant to this subsection so produced by such person.

(7) In the event of the death, disability, or separation from service of the custodian of any documentary material produced under any demand issued under this section or the official relief of such custodian from responsibility for the custody and control of such material, the Attorney General shall promptly--

(i) designate another racketeering investigator to serve as custodian thereof, and

(ii) transmit notice in writing to the person who produced such material as to the identity and address of the successor so designated.

Any successor so designated shall have with regard to such materials all duties and responsibilities imposed by this section upon his predecessor in office with regard thereto, except that he shall not be held responsible for any default
or dereliction which occurred before his designation as custodian.

(g) Whenever any person fails to comply with any civil investigative demand duly served upon him under this section or whenever satisfactory copying or reproduction of any such material cannot be done and such person refuses to surrender such material, the Attorney General may file, in the district court of the United States for any judicial district in which such person resides, is found, or transacts business, and serve upon such person a petition for an order of such court for the enforcement of this section, except that if such person transacts business in more than one such district such petition shall be filed in the district in which such person maintains his principal place of business, or in such other district in which such person transacts business as may be agreed upon by the parties to such petition.

(h) Within twenty days after the service of any such demand upon any person, or at any time before the return date specified in the demand, whichever period is shorter, such person may file, in the district court of the United States for the judicial district within which such person resides, is found, or transacts business, and serve upon such custodian a petition for an order of such court modifying or setting aside such demand. The time allowed for compliance with the demand in whole or in part as deemed proper and ordered by the court shall not run during the pendency of such petition in the court. Such petition shall specify each ground upon which the petitioner relies in seeking such relief, and may be based upon any failure of such demand to comply with the provisions of this section or upon any constitutional or other legal right or privilege of such person.

(i) At any time during which any custodian is in custody or control of any documentary material delivered by any person in compliance with any such demand, such person may file, in the district court of the United States for the judicial district within which the office of such custodian is situated, and serve upon such custodian a petition for an order of such court requiring the performance by such custodian of any duty imposed upon him by this section.

(j) Whenever any petition is filed in any district court of the United States under this section, such court shall have jurisdiction to hear and determine the matter so presented, and to enter such order or orders as may be required to carry into effect the provisions of this section.
RELATED PROVISIONS OF THE
ORGANIZED CRIME CONTROL ACT OF 1970


Statement of Findings and Purpose

The Congress finds that (1) organized crime in the United States is a highly sophisticated, diversified, and widespread activity that annually drains billions of dollars from America’s economy by unlawful conduct and the illegal use of force, fraud, and corruption; (2) organized crime derives a major portion of its power through money obtained from such illegal endeavors as syndicated gambling, loan sharking, the theft and fencing of property, the importation and distribution of narcotics and other dangerous drugs, and other forms of social exploitation; (3) this money and power are increasingly used to infiltrate and corrupt legitimate business and labor unions and to subvert and corrupt our democratic processes; (4) organized crime activities in the United States weaken the stability of the Nation’s economic system, harm innocent investors and competing organizations, interfere with free competition, seriously burden interstate and foreign commerce, threaten the domestic security, and undermine the general welfare of the Nation and its citizens; and (5) organized crime continues to grow because of defects in the evidence-gathering process of the law inhibiting the development of the legally admissible evidence necessary to bring criminal and other sanctions or remedies to bear on the unlawful activities of those engaged in organized crime and because the sanctions and remedies available to the Government are unnecessarily limited in scope and impact.

It is the purpose of this Act to seek the eradication of organized crime in the United States by strengthening the legal tools in the evidence-gathering process, by establishing new penal prohibitions, and by providing enhanced sanctions and new remedies to deal with the unlawful activities of those engaged in organized crime.
APPENDIX B
APPENDIX B
STATE RICO STATUTES

Although state RICO laws are not discussed in this outline, the practitioner should be aware that a majority of states currently have such laws.\(^1\) Although states have used federal RICO as a model for their own statutes, most have not simply copied the federal model; in fact, most states now consider their RICO statutes to be broader than the federal version in scope, language, and intended criminal targets.\(^2\)

Listed below are the state and U.S. territory RICO statutes that generally track the federal RICO statutes, followed by the four state statutes that restrict state RICO to cases involving organized crime.

States and U.S. Territories That Track Federal RICO and Have No Organized Crime Limitation

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<th>State</th>
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<td>State</td>
<td>Statute</td>
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<tr>
<td>Pennsylvania</td>
<td>Corrupt Organizations Act, 18 Pa. Cons. Stat. Ann. § 911 (although it contains an “organized crime” limitation, the term is defined broadly as “any person or combination of persons” engaging in the enumerated crimes).</td>
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<tr>
<td>Utah</td>
<td>Pattern of Unlawful Activity Act, Utah Code Ann. §§ 76-10-1601 to 76-10-1609.</td>
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**States Restricting RICO to Organized Crime**

The four states listed below have narrowed the scope of their RICO statutes to the prosecution of organized criminals (such as the mafia or criminal gangs). One of these four, Illinois, has further limited the scope of its RICO statute to activities involving drugs and drug trafficking.

California | California Control of Profits of Organized Crime Act, Cal. Penal Code §§ 186 to 186.8 (narrowing scope of RICO to punishing and deterring criminal activities of
organized criminals through the forfeiture of profits realized by such activities).

Illinois

New York
Organized Crime Control Act, N.Y. Penal Law §§ 460.00 to 460.80 (narrowing scope of RICO to prosecution of organized criminal enterprises).

Tennessee
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