

# **Practice Series**

## **RICO**

### *A Guide to Civil RICO Litigation in Federal Courts*

**JOHN J. HAMILL**

**BRIAN H. ROWE**

**KAIJA K. HUPILA**

**EMILY BURKE BUCKLEY**

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**A Guide to Civil RICO Litigation in Federal Courts**

John J. Hamill  
Brian H. Rowe  
Kaija K. Hupila  
Emily Burke Buckley

Special thanks to former partner R. Douglas Rees

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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.<sup>1</sup> The full text of the key sections of the RICO statute are included in Appendix A.

With its charge of “racketeering” and its threat of treble damages and attorney’s fees, RICO may seem like 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 seem complex and mystifying. Adding to the perception of complexity are some historical disagreements among courts on how to interpret several key provisions of the broadly drafted RICO statute. Our goal with this treatise is to demystify RICO by discussing the prevailing law on the elements common to all civil RICO claims and also by addressing specific issues that have most perplexed the courts and practitioners.

We have found this treatise to be a valuable resource in representing RICO plaintiffs and defendants. Section 93 below contains a checklist of essential allegations for all civil RICO claims. Counsel 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 95 contains bare-bone allegations that should help counsel draft a RICO complaint. As with any civil complaint, a RICO complaint should tell a clear and compelling story. Fed. R. Civ. P. 8 requires the complaint to contain “a short and plain statement of the claim,” but RICO claims that are based on mail or wire fraud also must satisfy Fed. R. Civ. P.

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<sup>1</sup> 18 U.S.C.A. §§ 1961 to 1968.

9(b) by stating the circumstances constituting fraud with particularity by identifying the time, place, and content of the fraudulent communications, as well as the parties to the communications.<sup>2</sup> The heightened pleading standards under *Bell Atlantic Corp. v. Twombly*<sup>3</sup> and *Ashcroft v. Iqbal*<sup>4</sup> are particularly important in RICO cases to protect defendants against baseless charges of racketeering that are serious, harmful, and expensive to defend.<sup>5</sup>

Section 94 contains a sample RICO Case Statement. Many federal courts or 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.

We offer 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 significant 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.

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<sup>2</sup> As to issues relating to mail and wire fraud, *see* § 6.

<sup>3</sup> *Bell Atlantic v. Twombly*, 550 U.S. 544, 555 (2007).

<sup>4</sup> *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

<sup>5</sup> *Limestone Dev. Corp. v. Vill. of Lemont*, 520 F.3d 797, 803 (7th Cir. 2008) (affirming dismissal of RICO claim and warning against permitting a plaintiff “with a largely groundless claim to simply take up the time of a number of other people, with the right to do so representing an in terrorem increment of the settlement value, rather than a reasonably founded hope that the [discovery] process will reveal relevant evidence.”); *Crest Constr. II, Inc. v. Doe*, 660 F.3d 346, 353 (8th Cir. 2011) (affirming dismissal of RICO claim where “the complaint has alleged—but it has not ‘shown’—‘that the pleader is entitled to relief’” (quoting *Iqbal*, 556 U.S. at 678)).

Similarly, plaintiffs should think carefully before playing the RICO card when the plaintiff has other common law claims arising from the same conduct. A judgment against the common law claim might very well undermine the RICO claim.

Plaintiffs also should determine whether a state RICO statute is available and should be aware that federal RICO claims themselves may be brought in state court.<sup>6</sup> Unlike antitrust claims, there is not exclusive federal subject matter jurisdiction for RICO claims. Although state RICO laws are not discussed in this treatise, Appendix B lists state RICO laws.

Finally, a word about the cases cited in this treatise. 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 certainly may have omitted decisions that may be pertinent to your case. This treatise 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.

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<sup>6</sup> See *Tafflin v. Levitt*, 493 U.S. 455 (1990).

## 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.<sup>1</sup> When it was introduced, RICO was described as “an act designed to prevent ‘known mobsters’ from infiltrating legitimate businesses.”<sup>2</sup>

RICO 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;<sup>3</sup>
- (2) Section 1962(b) prohibits a person from using a pattern of racketeering activity to acquire or maintain control over an enterprise;<sup>4</sup>
- (3) Section 1962(c) prohibits a person from conducting the affairs of an enterprise through a pattern of racketeering;<sup>5</sup> and
- (4) Section 1962(d) prohibits a person from conspiring to violate §§ 1962(a), (b), or (c).<sup>6</sup>

“Racketeering activity” is an element common to all of RICO’s prohibitions. Congress defined “racketeering” activity to include a variety of state and federal predicate crimes.<sup>7</sup> RICO is not violated by a short-term episode of “racketeering.” There must be a “pattern” of

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<sup>1</sup> 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”).

<sup>2</sup> Jed S. Rakoff & Howard W. Goldstein, *RICO Civil and Criminal Law and Strategy*, § 1.01, at 1-4 (2000 ed.) (quoting S. Rep. 91-617, at 76 (1969)).

<sup>3</sup> 18 U.S.C.A. § 1962(a).

<sup>4</sup> *Id.* § 1962(b).

<sup>5</sup> *Id.* § 1962(c).

<sup>6</sup> *Id.* § 1962(d).

<sup>7</sup> *Id.* § 1961(1).

racketeering activity—meaning long-term, organized conduct. Persons convicted of violating RICO’s criminal provisions are subject to imprisonment and forfeiture of certain assets.<sup>8</sup>

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.<sup>9</sup> Under this provision, a private plaintiff may sue in state or federal court to recover treble damages and attorney’s fees caused by a RICO violation.

Plaintiffs and their attorneys have invoked civil RICO in a variety of situations 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.<sup>10</sup>

Most courts have rejected arguments that civil RICO must be limited to conduct traditionally associated with organized crime.<sup>11</sup> Nevertheless, because RICO applies only to organized long-term criminal activity, it should not apply to ordinary business disputes.<sup>12</sup> Courts have found that it to be an abuse of the RICO statute to attempt to shoehorn an ordinary business or contractual dispute into a civil RICO claim.<sup>13</sup> Such abuse can have deleterious effects on a

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<sup>8</sup> *Id.* § 1963.

<sup>9</sup> *Id.* § 1964(c).

<sup>10</sup> *See Klehr v. A.O. Smith Corp.*, 521 U.S. 179, 191 (1997) (noting that mail and wire fraud are alleged as predicate acts in a “high percentage” of civil RICO claims).

<sup>11</sup> *See H.J. Inc. v. Northwestern Bell Tel. Co.*, 492 U.S. 229, 243-49 (1989); *Nat’l Org. for Women, Inc. v. Scheidler*, 510 U.S. 249, 260 (1994). *But see Scheidler v. Nat’l Org. for Women, Inc.*, 537 U.S. 393, 401-08 (2003) (holding that disruptive activities of anti-abortion protesters did not rise to predicate act of extortion under the Hobbs Act).

<sup>12</sup> *See, e.g., Midwest Grinding Co. v. Spitz*, 976 F.2d 1016, 1025-1026 (7th Cir. 1992) (“RICO has not federalized every state common-law cause of action available to remedy business deals gone sour.”); *Calcasieu Marine Nat. Bank v. Grant*, 943 F.2d 1453, 1463 (5th Cir. 1991) (“although Congress wrote RICO in broad, sweeping terms, it did not intend to extend RICO to every fraudulent commercial transaction”).

<sup>13</sup> *See, e.g., McDonald v. Schencker*, 18 F.3d 491, 499 (7th Cir. 1994); *Midwest Grinding*, 976 F.2d at 1025 (“civil RICO plaintiffs persist in trying to fit a square peg in a round hole by squeezing garden-variety business disputes into civil RICO actions”).

defendant because of the stigmatizing effect of RICO claims and the charges of fraud often used to support them.<sup>14</sup>

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,” and (f) an effect on interstate or foreign commerce. As discussed in § 16, the “collection of an unlawful debt” is itself a RICO violation even without a “pattern” of “racketeering activity.” The “pattern” and “enterprise” requirements are discussed separately in §§ 12–16 and in §§ 17–25, respectively.

### **§ 3 The Culpable “Person”**

RICO requires “a person” who violated or conspired to violate § 1962(a), (b), or (c). Section 1961(3) defines a culpable “person” as an “entity capable of holding a legal or beneficial interest in property.”<sup>15</sup> 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).<sup>16</sup> The court concluded that an illegal organization does not fall within the statutory definition of a

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<sup>14</sup> 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 *Figueroa*), *judgment aff’d*, 113 F.3d 1229 (2d Cir. 1997) (unpublished table decision); *In re Burlington Coat Factory Sec. Litig.*, 114 F.3d 1410, 1418 (3d Cir. 1997) (recognizing that fraud claims pose threat to business’ reputation); *Limestone Dev. Corp. v. Vill. of Lemont*, 520 F.3d 797, 803 (7th Cir. 2008) (affirming dismissal of RICO claim and warning against permitting a plaintiff “with a largely groundless claim to simply take up the time of a number of other people, with the right to do so representing an in terrorem increment of the settlement value, rather than a reasonably founded hope that the [discovery] process will reveal relevant evidence”).

<sup>15</sup> 18 U.S.C.A. § 1961(3).

<sup>16</sup> *United States v. Bonanno Organized Crime Family*, 879 F.2d 20, 29-30 (2d Cir. 1989), *abrogated by Cleveland v. United States*, 531 U.S. 12 (2000).

culpable “person” because it is not capable of holding an interest in property.<sup>17</sup> The Second Circuit otherwise has held that an unincorporated association may be a RICO “person.”<sup>18</sup>

Government entities generally cannot be liable under RICO because they are incapable of forming the requisite criminal intent to violate the statute.<sup>19</sup> 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.”<sup>20</sup> Similarly, the Third Circuit has acknowledged that a 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.<sup>21</sup> Courts have used the same reasoning to dismiss RICO claims against public school boards.<sup>22</sup> Although a government entity may not be capable of formulating

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<sup>17</sup> *Id.*

<sup>18</sup> *Jund v. Town of Hempstead*, 941 F.2d 1271, 1282 (2d Cir. 1991) (unincorporated political associations); *Bank of N. Ill. v. Nugent*, 584 N.E.2d 948 (Ill. App. Ct. 1991) (an estate, through its executor, may be a “person” under RICO).

<sup>19</sup> *Lancaster Cmty. Hosp. v. Antelope Valley Hosp. Dist.*, 940 F.2d 397, 404 (9th Cir. 1991); *see Rogers v. City of New York*, 359 F. App’x 201 (2d Cir. 2009) (affirming dismissal of RICO claim against a city defendant and holding that “there is no municipal liability under RICO”); *Andrade v. Chojnacki*, 65 F. Supp. 2d 431, 449 (W.D. Tex. 1999) (“government entities are not capable of forming the criminal intent necessary to support the predicate RICO offenses”); *Anderson v. Collins*, No. 96-CV-269, 1998 WL 1031496 (E.D. Ky. July 14, 1998) (governmental entities are “persons” but that they cannot form the specific intent to commit predicate offenses), *aff’d*, 191 F.3d 451 (6th Cir. 1999) (unpublished table decision).

<sup>20</sup> *Call v. Watts*, 142 F.3d 432 (6th Cir. 1998) (unpublished table decision) (internal quotes omitted). *See also, Pine Ridge Recycling, Inc. v. Butts County*, 855 F. Supp. 1264, 1272-73 (M.D. Ga. 1994) (county board and waste management authority are “persons” within meaning of RICO but are incapable of forming malicious intent).

<sup>21</sup> *Genty v. Resolution Trust Corp.*, 937 F.2d 899, 914 (3d Cir. 1991). *See also, McGee v. City of Warrensville Heights*, 16 F. Supp. 2d 837, 848 (N.D. Ohio 1998) (municipality is incapable of forming specific intent); *County of Oakland ex rel. Kuhn v. City of Detroit*, 784 F. Supp. 1275, 1283 (E.D. Mich. 1992) (city cannot formulate the requisite criminal intent to engage in a pattern of racketeering activity and therefore is immune from civil RICO liability).

<sup>22</sup> *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).

the specific intent to violate RICO, a RICO claim may in some circumstances be appropriate against individual government employees who perpetrate predicate acts.<sup>23</sup>

The Seventh Circuit has dismissed a civil RICO claim brought against a former state governor because “state and local officials are absolutely immune from federal suits filed against them in their personal capacities for actions taken in connection with legitimate legislative activity.”<sup>24</sup> The Seventh Circuit noted that such legislative immunity applies “for the performance of acts that are legislative in character or function,” regardless of whether “the official is accused of misconduct or other improper motive.”<sup>25</sup>

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.”<sup>26</sup> The Fifth Circuit adopted this reasoning in holding that the Federal Deposit Insurance Corporation may not be sued under RICO.<sup>27</sup> The Federal Circuit followed suit in dismissing a RICO claim against the Patent and Trademark Office and the Food and Drug Administration.<sup>28</sup>

As discussed in Part IV, in cases arising under § 1962(c), the culpable person must be separate from the enterprise. If the defendant does not manage or operate a separate enterprise, a § 1962(c) claim will fail.

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<sup>23</sup> *LaFlamboy v. Landek*, 587 F. Supp. 2d 914, 937-38 (N.D. Ill. 2008); *Bonsall Vill., Inc. v. Patterson*, No. 90-0457, 1990 WL 139383, at \*4-6 (E.D. Pa. Sept. 19, 1990).

<sup>24</sup> *Empress Casino Joliet Corp. v. Blagojevich*, 638 F.3d 519, 523 (7th Cir.) (emphasis in original), *vacated in part*, 649 F.3d 799 (7th Cir.), *on reh’g*, 651 F.3d 722 (7th Cir. 2011).

<sup>25</sup> *Empress Casino*, 638 F.3d at 528-29 (citing *Tenney v. Brandhove*, 341 U.S. 367 (1951)).

<sup>26</sup> *Berger v. Pierce*, 933 F.2d 393, 397 (6th Cir. 1991).

<sup>27</sup> *McNeily v. United States*, 6 F.3d 343, 350 (5th Cir. 1993).

<sup>28</sup> *Pieczenik v. Domantis*, 120 F. App’x 317, 320 (Fed. Cir. 2005).

#### § 4 Mental State

Because RICO is predicated on criminal conduct, plaintiffs must plead and establish that each defendant intended to engage in the conduct with actual knowledge of the illegal activities.<sup>29</sup> For example, mail and wire fraud require an intent to defraud. Most pattern jury instructions require a showing that the defendant intended to obtain (or cause the loss of) money or property by means of materially false or fraudulent pretenses or representations.<sup>30</sup> A defendant's genuine, good faith belief that it provided or sent true information is a complete defense to mail or wire fraud.<sup>31</sup>

The extent to which reckless conduct will suffice is more complicated.<sup>32</sup> The Sixth Circuit has ruled that recklessness may suffice where the plaintiff shows that the danger of

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<sup>29</sup> See *Walters v. McMahan*, 684 F.3d 435, 440-43 (4th Cir. 2012) (affirming dismissal of complaint for failure to allege knowledge that aliens were “brought into United States” for predicate act of illegal hiring); *Richards v. Combined Ins. Co. of Am.*, 55 F.3d 247, 251-53 (7th Cir. 1995) (affirming summary judgment where defendants’ failure to provide refund certificates 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, 487 (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-CV-6683, 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. Trustees 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).

<sup>30</sup> See, e.g., Third Circuit Model Criminal Jury Instructions §§ 6.18.1341, 6.18.1343 (2012); Fifth Circuit Pattern Jury Instructions—Civil § 8.1 (2009); Seventh Circuit Pattern Criminal Jury Instructions, p. 393 (2012).

<sup>31</sup> *S. Atl. Ltd. P’ship of Tenn., L.P. v. Riese*, 284 F.3d 518, 531-32 (4th Cir. 2002); *United States v. Chavis*, 461 F.3d 1201, 1208 (10th Cir. 2006).

<sup>32</sup> Compare *United States v. Puente*, 982 F.2d 156, 159 (5th Cir. 1993) (allowing reckless disregard or reckless indifference to satisfy the scienter element where the defendant makes a false statement of a material fact and consciously avoids learning the truth), with *First City Nat’l Bank and Trust Co. v. FDIC*, 730 F. Supp. 501, 509 (E.D.N.Y. 1990) (ruling that RICO does not apply to unwitting participants and recklessness is not sufficient to establish criminal intent).

misleading others was “so obvious that the actor must have been aware of it.”<sup>33</sup> If a defendant pleads lack of knowledge, it may be appropriate to give the jury an “ostrich” instruction to inform the jury that a defendant cannot escape liability by pleading ignorance if the evidence shows he knows or strongly suspects he is involved in criminal dealings but deliberately avoids learning more.<sup>34</sup>

Although courts have granted summary judgment to defendants on the question of intent,<sup>35</sup> summary judgment may be difficult to obtain because intent may be inferred from circumstantial (and usually disputed) evidence showing that the defendant facilitated the fraud or gained money or advantage at the expense of the plaintiff.<sup>36</sup>

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<sup>33</sup> *United States v. DeSantis*, 134 F.3d 760, 764 (6th Cir. 1998); accord *In re ClassicStar Mare Leasing Litig.*, 727 F.3d 473 (6th Cir. 2013); *Heinrich v. Waiting Angels Adoption Servs., Inc.*, 668 F.3d 393, 404 (6th Cir. 2012).

<sup>34</sup> Seventh Circuit Pattern Criminal Jury Instructions, Committee Comment to § 4.10 (Knowingly); Third Circuit Model Criminal Jury Instructions §§ 5.06 (Willful Blindness), 6.18.1341-1 (2012).

<sup>35</sup> *See, e.g., Perez v. Volvo Car Corp.*, 247 F.3d 303, 320 (1st Cir. 2001) (affirming summary judgment because the evidence presented was insufficient to show defendant knew of or intentionally participated in the scheme to defraud); *Schultz v. R. I. Hosp. Trust Nat'l Bank, N.A.*, 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); *In re ClassicStar Mare Leasing Litig.*, 727 F.3d 473 (6th Cir. 2013); *Zolfaghari v. Sheikholeslami*, 943 F.2d 451, 454 (4th Cir. 1991) (affirming summary judgment where ‘fair minded’ jury could not find criminal intent), *aff’d in part, rev’d in part on reh’g*, 947 F.2d 942 (4th Cir. 1991); *Richards v. Combined Ins. Co. of Am.*, 55 F.3d 247 (7th Cir. 1995) (affirming summary judgment where defendants’ failure to provide refund certificates might have been negligence, but not intentional fraud); *Peterson v. H & R Block Tax Services, 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. Jan. 30, 2002) (granting summary judgment where the plaintiff failed to present evidence giving rise to a reasonable inference of intent to defraud).

<sup>36</sup> *See, e.g., Crowe v. Henry*, 115 F.3d 294 (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) (rejected on other grounds by, *Sadighi v. Daghighfekr*, 36 F. Supp. 2d 279 (D.S.C. 1999) (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”).

## § 5 Racketeering Activity

Section 1961 defines “racketeering activity” broadly to encompass any of the state and federal offenses that are listed in § 1961(1).<sup>37</sup> RICO claims must be based on actual racketeering conduct.<sup>38</sup> Conduct that amounts to garden-variety state-law crimes, torts, and contract breaches does not qualify as “racketeering activity” under RICO.<sup>39</sup>

The offenses listed in § 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.<sup>40</sup> Also, while a plaintiff may use predicate acts targeting other victims to show evidence of a “pattern” of racketeering, the plaintiff needs only to be injured by a single predicate act committed in furtherance of the scheme.<sup>41</sup>

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<sup>37</sup> 18 U.S.C.A. § 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 offense of money laundering to include money laundering in connection with crimes committed against allies of the United States. See Pub. L. No. 107-56, 115 Stat. 272; see also *European Cmty. v. Japan Tobacco, Inc.*, 186 F. Supp. 2d 231 (E.D.N.Y. 2002), judgment amended, 2002 WL 1022114 (E.D.N.Y. 2002), judgment *aff’d in part, vacated in part on other grounds*, 355 F.3d 123 (2d Cir. 2004), judgment vacated on other grounds, 544 U.S. 1012 (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).

<sup>38</sup> See, e.g., *Doug Grant, Inc. v. Greate Bay Casino Corp.*, 232 F.3d 173 (3d Cir. 2000) (affirming dismissal of suit by casino card counters who complained about casino countermeasures like frequent deck shuffling, that did not qualify as RICO predicate acts).

<sup>39</sup> *Annulli v. Panikkar*, 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 (3d Cir. 2000); *Stangel v. A-1 Freeman N. Am., Inc.*, No. 01-CV-2198, 2001WL 1669387 (N.D. Tex. Dec. 27, 2001) (holding that wrongful acts allegedly committed by defendants, including breach of a settlement agreement, did not constitute racketeering activity); *Holland v. Cole Nat’l Corp.*, No. Civ. A. 7:04CV00246, 2005 WL 1799540, at \*3 (W.D. Va. July 28, 2005) (finding that the defendant’s activities “do not threaten the social well-being such that RICO treatment is warranted”).

<sup>40</sup> *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 488-93 (1985).

<sup>41</sup> See *Sedima, S.P.R.L.*, 473 U.S. at 488-93; *Deppe v. Tripp*, 863 F.2d 1356, 1366-67 (7th Cir. 1988); *Marshall & Ilsley Trust Co. v. Pate*, 819 F.2d 806, 809-10 (7th Cir. 1987); *Corley v. Rosewood Care Ctr., Inc.*, 388 F.3d 990, 1004 (7th Cir. 2004).

For a claim under § 1962(c), a plaintiff must show how each defendant committed the racketeering activity. As confirmed by the Eighth Circuit, “[t]he requirements of § 1962(c) must be established as to each individual defendant,” and the focus of § 1962(c) is on the individual patterns of racketeering engaged in by a defendant, rather than the collective activities of the members of the enterprise.”<sup>42</sup>

## § 6 Racketeering Activity—Issues Relating to Mail and Wire Fraud

Mail fraud (18 U.S.C.A. § 1341) and wire fraud (18 U.S.C.A. § 1343) are included as racketeering activities and are alleged as predicate acts in a “high percentage” of civil RICO claims.<sup>43</sup>

Criminal mail fraud involves (1) a scheme based on an intent to defraud; and (2) the use of the mails to further that scheme.<sup>44</sup> A scheme to defraud encompasses “acts of artifice or deceit which are intended to deprive an owner of his property or money.”<sup>45</sup> 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.<sup>46</sup>

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<sup>42</sup> *Craig Outdoor Adver., Inc. v. Viacom Outdoor, Inc.*, 528 F.3d 1001, 1027-28 (8th Cir. 2008) (quoting *United States v. Persico*, 832 F.2d 705, 714 (2d Cir. 1987)).

<sup>43</sup> *Klehr v. A.O. Smith Corp.*, 521 U.S. 179, 190 (1997) (noting that fraud is alleged as a predicate act in a “high percentage” of civil RICO claims).

<sup>44</sup> *In re Sumitomo Copper Litig.*, 995 F. Supp. 451, 455 (S.D.N.Y. 1998).

<sup>45</sup> *Vicom, Inc. v. Harbridge Merch. Servs., Inc.*, No. 92-CV-2808, 1993 WL 8340 (N.D. Ill. Jan. 8, 1993), *judgment aff'd*, 20 F.3d 771 (7th Cir. 1994).

<sup>46</sup> *See Wisdom v. First Midwest Bank, of Poplar Bluff*, 167 F.3d 402 (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).

Mailings or wirings sent or delivered through the use of “any private or commercial interstate carrier” may violate the mail fraud statute.<sup>47</sup> Also, the object of the fraud must be property in the victim’s hands.<sup>48</sup> As in any fraud case, a mail fraud scheme cannot be based on statements of opinion.<sup>49</sup> Also, a fraud scheme cannot be based on proposed or anticipated fraudulent conduct.<sup>50</sup>

Mail and wire fraud claims based on fraudulent omissions must establish that the defendant has a duty to disclose the omitted facts.<sup>51</sup> For example, the Eleventh Circuit 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.<sup>52</sup>

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.<sup>53</sup> This is because the crux of mail and wire fraud is a scheme to

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<sup>47</sup> 18 U.S.C.A. § 1341 . See also *Florida Software Sys., Inc. v. Columbia/HCA Healthcare Corp*, 46 F. Supp. 2d 1276, 1281 (M.D. Fla. 1999).

<sup>48</sup> *Cleveland v. United States*, 531 U.S. 12, 15 (2000). See § 28 for a discussion of what constitutes “business or property” under RICO.

<sup>49</sup> *Miller v. Yokohama Tire Corp.*, 358 F.3d 616, 620-22 (9th Cir. 2004).

<sup>50</sup> *Giuliano v. Fulton*, 399 F.3d 381, 389 (1st Cir. 2005).

<sup>51</sup> *American United Life Ins. Co. v. Martinez*, 480 F.3d 1043, 1065 (11th Cir. 2007).

<sup>52</sup> *Langford v. Rite Aid of Ala., Inc.*, 231 F.3d 1308, 1314 (11th Cir. 2000); see *Ayres v. General Motors Corp.*, 234 F.3d 514 (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).

<sup>53</sup> *Tabas v. Tabas*, 47 F.3d 1280, 1294 n.18 (3d Cir. 1995); *Kehr Packages, Inc. v. Fidelcor, Inc.*, 926 F.2d 1406, 1415 (3d Cir. 1991); *Smith v. Our Lady of the Lake Hosp., Inc.*, 960 F.2d 439, 445 (5th Cir. 1992); *Dana Corp. v. Blue Cross & Blue Shield Mut. of No. Ohio*, 900 F.2d 882, 886 (6th Cir. 1990); *Jepson, Inc. v. Makita Corp.*, 34 F.3d 1321, 1330 (7th Cir. 1994); *Abels v. Farmers Commodities Corp.*, 259 F.3d 910, 918 (8th Cir. 2001); *Plater-Zyberk v. Abraham*, No. 97-CV-3322, 1998 WL 67545 (E.D. Pa. Feb. 17, 1998), *judgment aff’d*, 203 F.3d 817 (3d Cir. 1999); *Spira v. Nick*, 876 F. Supp. 553, 558-559 (S.D.N.Y. 1995). See also *Schmuck v. United States*, 489 U.S. 705 (1989) (holding “innocent” mailings sufficient for purposes of mail fraud statute).

defraud. The mails or wires need only be used to carry out the scheme. Communications will not support a RICO claim if they reveal sufficient facts to allow the scheme to be detected.<sup>54</sup>

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 show that it relied on the mailings or wirings asserted as predicate acts.<sup>55</sup> 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.<sup>56</sup> 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.<sup>57</sup>

Federal Rule of Civil Procedure 9(b), requiring that fraud allegations be pleaded with particularity, applies to civil claims under RICO where fraud is the predicate act. Thus, 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.<sup>58</sup> 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.<sup>59</sup>

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<sup>54</sup> *Nakahata v. New York-Presbyterian Healthcare Sys., Inc.*, 723 F.3d 192 (2d Cir. 2013) (affirming dismissal of RICO claims based on alleged underpayment of wages); *Lundy v. Catholic Health Sys. of Long Island Inc.*, 711 F.3d 106, 119 (2d Cir. 2013) (same).

<sup>55</sup> *Bridge v. Phoenix Bond & Indem. Co.*, 553 U.S. 639, 659-61 (2008).

<sup>56</sup> *See Wisdom v. First Midwest Bank, of Poplar Bluff*, 167 F.3d 402, 407 (8th Cir. 1999).

<sup>57</sup> *See Pizzo v. Bekin Van Lines Co.*, 258 F.3d 629, 632-33 (7th Cir. 2001) (affirming dismissal). *See also* discussion of the pattern requirement in § 14.

<sup>58</sup> *See, e.g., Lundy v. Catholic Health Sys. of Long Island Inc.*, 711 F.3d 106, 119 (2d Cir. 2013); *Knoll v. Schectman*, 275 F. App'x 50 (2d Cir. 2008); *Lum v. Bank of Am.*, 361 F.3d 217, 223-26 (3d Cir. 2004); *Chisolm v. TranSouth Fin. Corp.*, 95 F.3d 331, 336-37 (4th Cir. 1996); *Tel-Phonic Serv's, Inc. v. TBS Int'l, Inc.*, 975 F.2d 1134, 1138-39 (5th Cir. 1992); *Lachmund v. ADM Investor Servs., Inc.*, 191 F.3d 777 (7th Cir. 1999); *Goren v. New Vision Int'l, Inc.*, 156 F.3d 721, 729 (7th Cir. 1998); *Emery, Inc. v. Am. Gen. Fin.*, 71 F.3d 1343, 1348 (7th Cir. 1995); *Jepson, Inc. v. Makita Corp.*, 34 F.3d 1321, 1328 (7th Cir. 1994); *Abels v. Farmers Commodities Corp.*, 259 F.3d

## § 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 where the defendant has been criminally convicted of the securities fraud.<sup>60</sup> Amended § 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.<sup>61</sup>

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.<sup>62</sup>

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910, 919 (8th Cir. 2001); *Mostowfi v. i2 Telecom Int’l, Inc.*, 269 F. App’x 621 (9th Cir. 2008); *Cayman Exploration Corp. v. United Gas Pipe Line Co.*, 873 F.2d 1357, 1362 (10th Cir. 1989) (collecting cases); *American Dental Ass’n v. Cigna Corp.*, 605 F.3d 1283 (11th Cir. 2010).

<sup>59</sup> *Giuliano v. Fulton*, 399 F.3d at 387-89; *Tal v. Hogan*, 453 F.3d 1244 (10th Cir. 2006).

<sup>60</sup> 18 U.S.C.A. § 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).

<sup>61</sup> 18 U.S.C.A. § 1964(c).

<sup>62</sup> *Compare Scott v. Boos*, 215 F.3d 940 (9th Cir. 2000); *Mathews v. Kidder, Peabody & Co.*, 947 F. Supp. 180 (W.D. Pa. 1996), *aff’d*, 161 F.3d 156 (3d Cir. 1998); *In re MTC Elec. Technologies Shareholder Litigation*, 74 F. Supp. 2d 276 (E.D.N.Y. 1999); *131 Main St. Assoc., Inc. v. Manko*, No. 93 CV 800, 1998 WL 811875 (S.D.N.Y. Nov. 19, 1998); *In re Prudential Sec. Inc. Ltd. P’ships Litig.*, 930 F. Supp. 68 (S.D.N.Y. 1996); *Gubitosi v. Zegeye*, 28 F. Supp. 2d 298 (E.D. Pa. 1998); *Dist. 65 Retirement Trust for Members of Bureau of Wholesale Sales Representatives v. Prudential Sec., Inc.*, 925 F. Supp. 1551 (N.D. Ga. 1996) (all refusing to apply Reform Act retroactively where doing so would have deprived plaintiff of a claim, *e.g.*, where the securities law claim was time-barred); *with Krear v. Malek*, 961 F. Supp. 1065 (E.D. Mich. 1997); *Rowev. Marietta Corp.*, 955 F. Supp. 836 (W.D. Tenn. 1997); *Reading Wireless CableTelevision P’ship v. Steingold*, No. 95-CV-785, 1996 WL 741432 (D. Nev. July 30, 1996) (all applying Act retroactively to bar securities-based RICO claims where plaintiff was still able to assert a securities claim). *See also Popp Telecom, Inc. v. Am. Sharecom, Inc.*, 361 F.3d 482, 488-489 (8th Cir. 2004); *Kolfenbach v. Mansour*, 36 F. Supp. 2d 1351, 1353 (S.D. Fla. 1999); *Scott v. Steingold*, No. 97-CV-7871, 1998 WL 704287 (N.D. Ill. Sept. 30, 1998); *Scott*, 215 F.3d 940 (all holding that Reform Act could not be applied retroactively to bar securities-based RICO claim where alleged misconduct occurred before the effective date of the Reform Act).

Under the Reform Act, courts have rejected securities-based RICO claims regardless of the label attached or the validity of the securities claim.<sup>63</sup> Courts have held that 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.<sup>64</sup>

If the conduct does not amount to securities fraud, the Reform Act bar does not apply.<sup>65</sup> Also, if the defendant did not make a misrepresentation or omission in connection with the sale

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<sup>63</sup> 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. 104-369, at 47 (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 (6th Cir. 1999) (unpublished table decision) (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) (barring RICO claim based on alleged Ponzi scheme, but allowing claim to proceed against defendant who had been convicted of securities fraud); *Bixler v. Foster*, 596 F.3d 751 (10th Cir. 2010) (affirming dismissal of RICO claim based on predicate acts such as mail and wire fraud, extortion, and obstruction of justice where the conduct was in connection with the purchase of a security); *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 School Dist. v. Mid-State Bank & Trust*, No. 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), *judgment aff’d*, 202 F.3d 255 (3d Cir. 1999) (unpublished table decision); *Renner v. Chase Manhattan Bank*, No. 98-CV-926, 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).

<sup>64</sup> See *MLSMK Inv. Co. v. JP Morgan Chase & Co.*, 651 F.3d 268, 280 (2d Cir. 2011) (holding that Reform Act precluded RICO claim based on securities fraud even though plaintiff investor could not bring a securities fraud claim based on aiding and abetting); *Howard v. America Online Inc.*, 208 F.3d 741, 749-50 (9th Cir. 2000) (rejecting RICO claim even though plaintiffs lacked standing to bring a securities fraud claim directly, because conduct was nevertheless actionable as securities fraud); *Fezzani v. Bear, Stearns & Co.*, No. 99-CV-0793, 2005 WL 500377, at \*5-6 (S.D.N.Y. Mar. 2, 2005) (following case in rejecting claims based on securities fraud even if not committed by defendants); *In re Enron Corp. Securities, Derivative & ERISA Litigation*, 284 F. Supp. 2d 511, 620 (S.D. Tex. 2003) (same); *Gatz v. Ponsoldt*, 297 F. Supp. 2d 719, 731-32 (D. Del. 2003) (Reform Act applies even if particular plaintiff lacks standing to sue for securities fraud); *In re Ikon Office Solutions, Inc. Securities Litigation*, 86 F. Supp. 2d 481, 486 (E.D. Pa. 2000) (same); see also *Hemispherx Biopharma, Inc. v. Asensio*, No. 98-CV-5204, 1999 WL 144109, at \*4-5 (E.D. Pa. Mar. 15, 1999) (noting that purpose of Reform Act was to eliminate securities fraud as a predicate act in general, without regard to whether a particular plaintiff can state a claim for securities fraud).

<sup>65</sup> See, e.g., *Rezner v. Bayerische Hypo-Und Vereinsbank AG*, 630 F.3d 866, 872 (9th Cir. 2010) (Reform Act did not bar RICO claim where “[t]he connection [] between the pledge of securities and the fraud” was “tenuous”);

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.<sup>66</sup>

### § 8 Extortion as Predicate Act

Extortion (in violation of the Hobbs Act) is more commonly a RICO predicate act in criminal RICO cases than civil RICO case. Yet RICO plaintiffs have alleged extortion as a predicate act in civil cases,<sup>67</sup> most notably in abortion cases based on the theory that anti-abortion protestors are members of a nationwide conspiracy to shut down abortion clinics through a pattern of racketeering activity, including extortion.

For example, in *Scheidler v. National Organization for Women*,<sup>68</sup> 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.<sup>69</sup> It is not enough if the defendant merely deprived the plaintiff of its property.<sup>70</sup> (Because the Court concluded that the disruptive acts by the anti-abortion protesters did not rise to the predicate act of extortion, the Court rejected the RICO claim without resolving the open question of whether injunctive relief is available under

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*Mezzonen, S.A. v. Wright*, No. 97-CV-9380, 1999 WL 1037866 (S.D.N.Y. Nov. 16, 1999) (mail fraud claims based on post-investment looting and its concealment are not actionable as securities fraud, and so are not barred by the Reform Act). See also *Heller v. Deutsche Bank AG*, No. 04-CV-3571, 2005 WL 525401, at \*4 (E.D. Pa. Mar. 3, 2005) (shares purchased in tax shelter scheme not “securities”; therefore, Reform Act did not apply).

<sup>66</sup> *OSRecovery, Inc. v. One Groupe Intern., Inc.*, 354 F. Supp. 2d 357, 368-370 (S.D.N.Y. 2005), *opinion adhered to on reconsideration*, No. 02-CV-8993, 2005 WL 309755 (S.D.N.Y. Feb. 9, 2005). But see *MLSMK Inv. Co. v. JP Morgan Chase & Co.*, 651 F.3d 268, 280 (2d Cir. 2011). See also § 24 on RICO liability for aiding and abetting.

<sup>67</sup> See, e.g., *Westways World Travel, Inc. v. AMR Corp.*, 265 F. App’x 472 (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 (10th Cir. 2006) (allowing RICO claim to proceed based on alleged extortion), *rev’d*, 551 U.S. 537 (2007).

<sup>68</sup> *Scheidler v. Nat’l Org. for Women, Inc.*, 537 U.S. 393 (2003).

<sup>69</sup> *Id.*, 537 U.S. at 407. *Accord Sckhar v. United States*, 133 S. Ct. 2720 (2013).

<sup>70</sup> *Id.*, 537 U.S. at 401-07.

RICO.)<sup>71</sup> After another round of appeals, the Supreme Court determined that acts of violence unrelated to robbery or extortion are insufficient to support a violation of the Hobbs Act.<sup>72</sup>

In *Wilkie v. Robbins*,<sup>73</sup> 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.<sup>74</sup>

## **§ 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 (18 U.S.C.A. § 2314). A violation of § 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.” To violate § 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.<sup>75</sup> The flip-side of § 2314 is § 2315, which applies to those who receive the goods or funds, knowing they were

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<sup>71</sup> *Id.*, 537 U.S. at 407. See also § 72 for discussion of equitable relief available under RICO.

<sup>72</sup> *Scheidler v. Nat’l Org. for Women, Inc.*, 547 U.S. 9, 23 (2006).

<sup>73</sup> *Wilkie v. Robbins*, 551 U.S. 537 (2007)

<sup>74</sup> *Id.* at 562-68. 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”).

<sup>75</sup> 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).

procured by fraud.<sup>76</sup> If the § 2314 (or § 2315) claim is based on a theory that the goods or funds were obtained through fraud, then the fraud must be pled with specificity to comply with Fed. R. Civ. P. 9(b).<sup>77</sup>

## § 10 Interstate or Foreign Commerce

A RICO claim cannot exist without some nexus to interstate commerce.<sup>78</sup> 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.”<sup>79</sup> 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 affects interstate commerce.<sup>80</sup>

Courts have held that the required interstate commerce nexus is “minimal.”<sup>81</sup> It is sufficient to show the use of interstate commerce through the use of mail, interstate wires, or other instrumentalities of interstate commerce.<sup>82</sup> Although minimal, some nexus with interstate commerce must be alleged, and courts will dismiss RICO claims that do not adequately plead

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<sup>76</sup> 18 U.S.C.A. § 2315.

<sup>77</sup> *Perlman v. Zell*, 938 F. Supp. 1327, 1348 (N.D. Ill. 1996), *aff'd*, 185 F.3d 850 (7th Cir. 1999).

<sup>78</sup> 18 U.S.C.A. § 1962(a) to (c); *H.J. Inc. v. Northwestern Bell Tel. Co.*, 492 U.S. 229, 232-33 (1989).

<sup>79</sup> *United States v. Garcia*, 143 F. Supp. 2d 791, 806 (E.D. Mich. 2000) (quoting *United States v. Robertson*, 514 U.S. 669, 672 (1995)).

<sup>80</sup> See *DeFalco v. Bernas*, 244 F.3d 286, 309 (2d Cir. 2001); *United States v. Delgado*, 401 F.3d 290, 297 (5th Cir. 2005) (quoting *R.A.G.S. Couture, Inc. v. Hyatt*, 774 F.2d 1350, 1353 (5th Cir. 1985)); *Bunker Ramo Corp. v. United Bus. Forms, Inc.*, 713 F.2d 1272, 1289 (7th Cir. 1983).

<sup>81</sup> *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).

<sup>82</sup> See, e.g., *Haggiag v. Brown*, 728 F. Supp. 286, 295 (S.D.N.Y. 1990) (transfer of funds to foreign corporation and unauthorized sale and purchase of securities); *Hall Am. Ctr. Assocs. Ltd. P'ship v. Dick*, 726 F. Supp. 1083, 1091-92 (E.D. Mich. 1989) (use of mail and interstate wires); *Godlewska v. Human Dev. Ass'n*, No. CIV A CV-03-3985DGT, 2005 WL 1667852, at \*9 (E.D.N.Y. July 18, 2005) (use of household cleaning products in domestic employment satisfies interstate commerce requirement, because products were “moved in or produced for interstate commerce”); *City of New York v. Cyco.Net, Inc.*, 383 F. Supp. 2d 526, 554 (S.D.N.Y. 2005) (use of mails and wires to advertise, sell, and deliver cigarettes without paying state taxes).

this requirement.<sup>83</sup> Note that federal wire fraud requires an interstate use of a wire. Intrastate telephone calls are generally insufficient to establish federal wire fraud.<sup>84</sup>

## § 11 Economic Motive

In *National Organization for Women, Inc. v. Scheidler*,<sup>85</sup> 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 least the predicate acts) must have an economic motive.<sup>86</sup>

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*,<sup>87</sup> the Seventh Circuit stated that the term "enterprise" in § 1962(a) and (b)

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<sup>83</sup> See, e.g., *Rose v. Bartle*, 692 F. Supp. 521, 534 (E.D. Pa. 1988) (dismissing Section 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), *aff'd in part, vacated in part, rev'd in 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 affected the American economy through their alleged racketeering activity).

<sup>84</sup> See, 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); *But see Protter v. Nathan's Famous Sys., Inc.*, 904 F. Supp. 101, 108-109 (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).

<sup>85</sup> *Nat'l Org. for Women, Inc. v. Scheidler*, 510 U.S. 249, 255-58 (1994); Oral Argument, *Nat'l Org. for Women*, 510 U.S. 249, available at 1993 WL 757635.

<sup>86</sup> See *Nat'l Org. for Women, Inc. v. Scheidler*, 968 F.2d 612, 625-30 (7th Cir. 1992), *rev'd*, 510 U.S. 249 (1994); see also *United States v. Flynn*, 852 F.2d 1045, 1052 (8th Cir. 1988), *abrogated by Nat'l Org. for Women, Inc. v. Scheidler*, 510 U.S. 249 (1994); *United States v. Ivic*, 700 F.2d 51, 59-65 (2d Cir. 1983).

<sup>87</sup> *United States v. Ivic*, 700 F.2d 51, 59-65 (2d Cir. 1983).

refers to an “organized, profit-seeking venture.”<sup>88</sup> It concluded that the same limitation applies to § 1962(c) because there is no indication that Congress intended that the same term mean something different in § 1962(c) than it does in §§ 1962(a) and (b).<sup>89</sup>

In a unanimous decision, the Supreme Court reversed the Seventh Circuit and held that no proof of economic motive is required.<sup>90</sup> The Court concluded that the plain language of § 1962(c) and the definition of “pattern of racketeering activity” in § 1961(1) provide no indication that an economic motive is required. The Court reasoned that Congress’s inclusion in § 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.”<sup>91</sup>

The Court rejected the Seventh Circuit’s conclusion that because the use of the term “enterprise” in § 1962(a) and (b) is tied to economic motivation, the same term should be applied to restrict the breadth of § 1962(c). The Court reasoned that because the “enterprise” in § 1962(c) is not being acquired and instead is the vehicle for the commission of the racketeering activity, “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.”<sup>92</sup>

The Court declined to address arguments that the application of RICO to anti-abortion protestors could chill First Amendment expression.<sup>93</sup> But then-Justice Souter issued a

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<sup>88</sup> *Nat’l Org. for Women, Inc. v. Scheidler*, 968 F.2d 612, 627 (7th Cir. 1992), *rev’d* 510 U.S. 249 (1994).

<sup>89</sup> *Nat’l Org. for Women*, 968 F.2d at 627.

<sup>90</sup> *Nat’l Org. for Women, Inc. v. Scheidler*, 510 U.S. 249, 255-58 (1994).

<sup>91</sup> *Id.*, 510 U.S. at 258.

<sup>92</sup> *Id.*

<sup>93</sup> *Nat’l Org. for Women, Inc. v. Scheidler*, 510 U.S. 249, 262 n.6 (1994).

concurring opinion (joined by Justice Kennedy) stressing that the Court’s opinion “does not bar First Amendment challenges to RICO’s application in particular cases.”<sup>94</sup> 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 that was not the case where there was ample evidence of illegal conduct that could be regulated.<sup>95</sup>

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<sup>94</sup> *Id.*, 510 U.S. at 262-65 (Souter, J., concurring).

<sup>95</sup> *Nat’l Org. for Women, Inc. v. Scheidler*, 267 F.3d 687, 702 (7th Cir. 2001), *rev’d*, 537 U.S. 393 (2003).

### III. PATTERN OF RACKETEERING

#### § 12 Background

The RICO statute is intended to address repeat, rather than one-shot, criminal activity. For this reason, “the heart of any RICO complaint is the allegation of a pattern of racketeering.”<sup>1</sup> 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.”<sup>2</sup> For litigants, the “pattern” element is often a heavily disputed issue of pleading and proof.<sup>3</sup> Federal courts have revealed some difficulty articulating exactly what type of proof is sufficient to meet the “pattern” element.<sup>4</sup>

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.”<sup>5</sup> Notably, this definition 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 courts have been struggling since RICO’s passage to determine the content of the pattern element.”<sup>6</sup>

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<sup>1</sup> See *Agency Holding Corp. v. Malley-Duff & Assoc., Inc.*, 483 U.S. 143, 154 (1987). The RICO statute also proscribes activities involving the “collection of an unlawful debt” as a separate basis for a RICO claim. See 18 U.S.C. § 1962(a)-(c).

<sup>2</sup> See *United States v. O’Connor*, 910 F.2d 1466, 1468 (7th Cir. 1990).

<sup>3</sup> Gregory Joseph, *Civil RICO: A Definitive Guide* 106 (3d ed. 2010) (“[T]he pattern element has . . . generated voluminous litigation, and . . . produced inconsistent results.”).

<sup>4</sup> See *U.S. Textiles, Inc. v. Anheuser-Busch Cos.*, 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.”).

<sup>5</sup> 18 U.S.C. § 1961(5).

<sup>6</sup> Sandra Bower Ross, *The Pattern Element of RICO Before and After Sedima: A Look At Both Federal and Florida RICO*, 15 Fla. St. U. L. Rev. 321, 322 (1987).

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.*<sup>7</sup> 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.*<sup>8</sup> 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.”<sup>9</sup>

*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.<sup>10</sup> Sedima filed several claims in federal court against Imrex, including a civil RICO claim based on predicate acts of mail and wire fraud.<sup>11</sup> 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 predicate acts themselves, as opposed to “some sort of distinct ‘racketeering injury.’”<sup>12</sup> 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 a “pattern of racketeering activity.”<sup>13</sup>

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<sup>7</sup> *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479 (1985).

<sup>8</sup> *H.J., Inc. v. Northwestern Bell Tel. Co.*, 492 U.S. 229 (1989).

<sup>9</sup> *Uniroyal Goodrich Tire Co. v. Mutual Trading Co.*, 63 F.3d 516, 522, 523 (7th Cir. 1995).

<sup>10</sup> *Sedima*, 473 U.S. at 483-84.

<sup>11</sup> *Id.* at 484.

<sup>12</sup> *Id.* at 485.

<sup>13</sup> *Id.*

The Supreme Court rejected both reasons and reversed the dismissal of Sedima’s civil RICO claims.<sup>14</sup> 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.<sup>15</sup> The Supreme Court rejected this broad reading, noting in footnote 14 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.”<sup>16</sup> 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 *continuity plus relationship* which combines to produce a pattern.<sup>17</sup>

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),<sup>18</sup> 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.”<sup>19</sup>

*Sedima*’s footnote 14 unleashed a wave of conflicting federal court interpretations of the “pattern” requirement. Some federal courts interpreted *Sedima* as an to use the “pattern”

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<sup>14</sup> *Sedima, S.P.R.L. v. Imrex Co., Inc.*, 473 U.S. 479, 496 n.14 (1985).

<sup>15</sup> See, e.g., *United States v. Bascaro*, 742 F.2d 1335, 1360-62 (11th Cir. 1984), *abrogated 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), *abrogated on other grounds recognized by Ianniello v. United States*, 10 F.3d 59 (2d Cir. 1993).

<sup>16</sup> *Sedima*, 473 U.S. at 496 n.14.

<sup>17</sup> *Id.*, quoting S. Rep. No. 91-617, at 158 (1969) [alteration and emphasis in original].

<sup>18</sup> 18 U.S.C. § 3575(e) (repealed 1984).

<sup>19</sup> *Sedima, S.P.R.L. v. Imrex Co., Inc.*, 473 U.S. 479, 496 n.14 (1985), quoting 18 U.S.C. § 3575(e) (repealed 1984).

element to narrow the scope of civil RICO claims.<sup>20</sup> 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.”<sup>21</sup> As the Seventh Circuit later explained:

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 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.<sup>22</sup>

Three principal views of the “pattern” requirement emerged following *Sedima*:

***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.<sup>23</sup> 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,”<sup>24</sup> 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.”<sup>25</sup> Although the Eight Circuit was the only federal appeals court to interpret the

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<sup>20</sup> 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.’”).

<sup>21</sup> Gregory Joseph, *Civil RICO: A Definitive Guide* 104 (3d ed. 2010).

<sup>22</sup> *Morgan v. Bank of Waukegan*, 804 F.2d 970, 975 (7th Cir. 1986).

<sup>23</sup> 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), *abrogated by H.J. Inc. v. Northwestern Bell Tel. Co.*, 492 U.S. 229 (1989); 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.”).

<sup>24</sup> See *H.J. Inc.*, 829 F.2d at 650.

<sup>25</sup> *Id.*; see also *Deviries v. Prudential-Bache Sec., Inc.*, 805 F.2d 326, 329 (8th Cir. 1986).

“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:

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.<sup>26</sup>

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.” In 1989, the Supreme Court struck down the Eighth Circuit’s “multiple schemes” requirements in *H.J. Inc. v. Northwestern Bell Telephone, Co.*, as discussed in § 13.<sup>27</sup>

***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*,<sup>28</sup> 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.<sup>29</sup> 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.<sup>30</sup> Despite the language in *Sedima* stating that “while two acts are

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<sup>26</sup> See *International Data Bank, Ltd. v. Zepkin*, 812 F.2d 149, 154-55 (4th Cir. 1987).

<sup>27</sup> *Id.* at 155, quoting *Lipin Enters. v. Lee*, 803 F.2d 322, 324 (7th Cir. 1986).

<sup>28</sup> See *R.A.G.S. Couture, Inc. v. Hyatt*, 774 F.2d 1350 (5th Cir. 1985).

<sup>29</sup> *Id.* at 1352.

<sup>30</sup> *Id.*

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.”<sup>31</sup>

***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*,<sup>32</sup> 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.<sup>33</sup>

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.<sup>34</sup> 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*.”<sup>35</sup>

Several other circuits adopted similar tests.<sup>36</sup> For example, the Fourth Circuit adopted a contextual test that emphasized the “criminal dimension and degree” of the alleged misconduct.<sup>37</sup>

In *HMK Corporation v. Walsey*, the Fourth Circuit explained:

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<sup>31</sup> *Id.* at 1355.

<sup>32</sup> *See Morgan v. Bank of Waukegan*, 804 F.2d 970 (7th Cir. 1986).

<sup>33</sup> *Id.* at 975.

<sup>34</sup> *Morgan*, 804 F.2d at 977.

<sup>35</sup> *Id.*

<sup>36</sup> *See, e.g., Roeder v. Alpha Indus. Inc.*, 814 F.2d 22, 30-31 (1st Cir. 1987); *Barticheck v. Fidelity Union Bank/First Nat’l State*, 832 F.2d 36, 38-39 (3d Cir. 1987); *Brandenburg v. Seidel*, 859 F.2d 1179, 1185 (4th Cir. 1988); *Fleischhauer v. Feltner*, 879 F.2d 1290, 1297-98 (6th Cir. 1989).

<sup>37</sup> *See International Data Bank, Ltd. v. Zepkin*, 812 F.2d 149, 155 (4th Cir. 1987).

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.<sup>38</sup>

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.”<sup>39</sup> Thus, the significance of a relatively large number of “predicate acts” arising from a single transaction would be diminished.

### § 13 The H.J. Inc. “Pattern” Requirement—Relatedness and Continuity

In *H.J. Inc. v. Northwestern Bell Telephone Co.*,<sup>40</sup> the Supreme Court attempted to eliminate some of the confusion generated in the wake of *Sedima* by directly addressing the pattern requirement. But the *H.J. Inc.* decision, which endorsed a “flexible” approach to the pattern issue,<sup>41</sup> has been 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.<sup>42</sup> The Eighth Circuit applied its “multiple schemes” requirement and affirmed the dismissal of the

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<sup>38</sup> *HMK Corp. v. Walsey*, 828 F.2d 1071, 1074 (4th Cir. 1987).

<sup>39</sup> *Id.*

<sup>40</sup> *H.J. Inc. v. Northwestern Bell Telephone Co.*, 492 U.S. 229 (1989).

<sup>41</sup> *Id.* at 238.

<sup>42</sup> *H.J. Inc. v. Northwestern Bell Telephone Co.*, 492 U.S. 229, 233 (1989).

complaint, holding that the plaintiffs’ allegation of a single fraudulent scheme was insufficient to establish a pattern of racketeering activity.<sup>43</sup>

The Supreme Court reversed. Justice Brennan, writing for the majority, observed 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.”<sup>44</sup> The Court determined that neither the language of the statute nor its legislative history supported the Eighth Circuit’s requirement of separate illegal schemes.<sup>45</sup> The Court acknowledged that it is “difficult to formulate in the abstract any general test for continuity.”<sup>46</sup> 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,”<sup>47</sup> 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.”<sup>48</sup> 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.<sup>49</sup>

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.

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<sup>43</sup> *H.J. Inc. v. Northwestern Bell Telephone Co.*, 829 F.2d 648, 650 (8th Cir. 1987), *rev’d*, 492 U.S. 220 (1989).

<sup>44</sup> *H.J. Inc. v. Northwestern Bell Telephone Co.*, 492 U.S. 229, 241 n.3 (1989).

<sup>45</sup> *Id.* at 240-41.

<sup>46</sup> *Id.* at 241.

<sup>47</sup> *Id.* at 242.

<sup>48</sup> *Id.* at 241.

<sup>49</sup> *Id.* at 242.

The Court instead remanded the case, stating that the plaintiffs’ allegations over a six-year period “*may be sufficient to satisfy the continuity requirement.*”<sup>50</sup>

In a sharp concurrence, Justice Scalia, joined by three others, 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.”<sup>51</sup> The concurrence agreed with the majority that the Eighth Circuit’s multiple-schemes requirement lacked any support in the language or legislative history. But Justice Scalia wrote that the Supreme Court’s explanation of “continuity plus relationship” is “about as helpful . . . as ‘life is a fountain.’”<sup>52</sup> 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,”<sup>53</sup> 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.”<sup>54</sup>

#### **§ 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.

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<sup>50</sup> *H.J. Inc. v. Northwestern Bell Telephone Co.*, 492 U.S. 229, 250 (1989) (emphasis added).

<sup>51</sup> *Id.* at 255.

<sup>52</sup> *Id.* at 252.

<sup>53</sup> *Id.* at 254-55.

<sup>54</sup> *Id.* at 256.

**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 litigated.<sup>55</sup> 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.<sup>56</sup>

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—and any other similar “distinguishing characteristics” may be offered to prove that the offenses are related.<sup>57</sup>

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 general goal of maximizing profits or protecting a scheme from discovery. For instance, in *Heller Financial, Inc. v. Grammco Computer Sales, Inc.*,<sup>58</sup> 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 scheme to secure favorable loan terms from a bank, even though the bribery-induced lease was the collateral for the loan.<sup>59</sup> The Fifth Circuit rejected the bank’s argument that the purpose of the second scheme against the bank was to effect an immediate

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<sup>55</sup> See *Medallion Television Enters. Inc. v. SelecTV of California, 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).

<sup>56</sup> *H.J. Inc. v. Northwestern Bell Telephone Co.*, 492 U.S. 229, 240 (1989) (quoting former 18 U.S.C. § 3575(e)).

<sup>57</sup> Gregory P. Joseph, *Civil RICO: A Definitive Guide*, 107 (3d ed. 2010).

<sup>58</sup> *Heller Fin., Inc. v. Grammco Computer Sales, Inc.*, 71 F.3d 518 (5th Cir. 1996).

<sup>59</sup> *Id.* at 524.

“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.”<sup>60</sup> 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.<sup>61</sup> Perhaps dispositive for the court was testimony 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.<sup>62</sup>

In *DeGuelle v. Camilli*,<sup>63</sup> the Seventh Circuit determined that an allegation of retaliation against a whistleblower—a predicate act added by the Sarbanes-Oxley Act in 2002—was sufficiently related to an allegation of tax fraud.<sup>64</sup> The court noted that “[r]etaliatory acts are inherently connected to the underlying wrongdoing exposed by the whistleblower [; therefore,] in most cases retaliatory acts and the underlying scheme” will satisfy the relatedness requirement.<sup>65</sup>

Courts occasionally have found a lack of “relatedness” between two sets of predicate acts where the alleged schemes conflict with each other. In *Vild v. Visconsi*,<sup>66</sup> 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

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<sup>60</sup> *Id.* at 525.

<sup>61</sup> *Id.*

<sup>62</sup> *Id.* at 524.

<sup>63</sup> *DeGuelle v. Camilli*, 664 F.3d 192 (7th Cir. 2011).

<sup>64</sup> *Id.* at 204.

<sup>65</sup> *Id.* at 201.

<sup>66</sup> *Vild v. Visconsi*, 956 F.2d 560 (6th Cir. 1992).

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.<sup>67</sup> 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."<sup>68</sup> The court observed that the two underlying frauds were at counter-purposes with each other, in the sense that the first fraud alleged by the promoter was that he was not "allowed to benefit from the [second fraud against the general public]."<sup>69</sup>

Similarly, in *Schlaifer Nance & Co. v. Estate of Warhol*,<sup>70</sup> 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.<sup>71</sup>

***Closed-Ended Continuity.*** A key contribution of the Supreme Court's decision in *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."<sup>72</sup> The Court emphasized that the concept of continuity, in either its closed or open-ended forms, is "centrally a temporal concept."<sup>73</sup>

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<sup>67</sup> *Id.* at 566.

<sup>68</sup> *Id.*

<sup>69</sup> *Id.* at 567.

<sup>70</sup> *Schlaifer Nance & Co. v. Estate of Warhol*, 119 F.3d 91 (2d Cir. 1997).

<sup>71</sup> *Id.* at 97.

<sup>72</sup> *H.J. Inc. v. Northwestern Bell Telephone Co.*, 492 U.S. 229, 241 (1989).

<sup>73</sup> *Id.* at 241-42.

Where a plaintiff alleges injuries arising out of a closed set of discrete predicate acts that do not threaten to repeat in the future, a plaintiff must prove that this “series of related predicates extend[ed] over a substantial period of time.”<sup>74</sup> The Court did not define “substantial period of time” other than its statement that conduct occurring over “a few weeks or months and threatening no future criminal conduct” was not long enough.<sup>75</sup>

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.<sup>76</sup> The Second Circuit also 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

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<sup>74</sup> *H.J. Inc. v. Northwestern Bell Telephone Co.*, 492 U.S. 229, 242 (1989).

<sup>75</sup> *Id.* In his concurring opinion, Justice Scalia stated his fear that an undue focus on temporal continuity could unwittingly created 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.’” *H.J. Inc.*, 492 U.S. at 254. 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.

<sup>76</sup> *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 Mgmt., 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 Insurance Co. of America*, 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’”).

whether closed-ended continuity exists.”<sup>77</sup> The Second Circuit has 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.”<sup>78</sup>

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.”<sup>79</sup> The Third Circuit considers duration as the “sine qua non of continuity” but considers additional factors as “analytical tools available to courts when the issue of continuity cannot be clearly determined under either a closed- or open-ended analysis.”<sup>80</sup>

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.<sup>81</sup> 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.<sup>82</sup>

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<sup>77</sup> *DeFalco v. Bernas*, 244 F.3d 286, 321 (2d Cir. 2001); accord *Cofacredit, S.A.*, 187 F.3d at 242-44; *GICC Capital Corp. v. Technology Finance Group, Inc.*, 67 F.3d 463, 467-68 (2d Cir. 1995).

<sup>78</sup> *First Capital Asset Mgmt., Inc.*, 385 F.3d at 181 (“[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.”).

<sup>79</sup> 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.”) Accord *Battiste v. Arbors Mgmt., Inc.*, No. 12-1355, 2013 WL 2561229 (3d Cir. June 12, 2013) (affirming dismissal where scheme lasted only ten months). Cf. *Swistock v. Jones*, 884 F.2d 755, 759 (3d Cir. 1989) (14-month duration sufficient).

<sup>80</sup> *Tabas*, 47 F.3d at 1296.

<sup>81</sup> See, e.g., *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).

<sup>82</sup> 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”).

The Seventh Circuit has continued to balance the six factors identified in *Morgan v. Bank of Waukegan*<sup>83</sup> without giving any one factor dispositive weight.<sup>84</sup> 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.<sup>85</sup> 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.”<sup>86</sup> Still, the Seventh Circuit has recognized that “the most important element of RICO continuity is its temporal aspect.”<sup>87</sup>

Like the Seventh Circuit, the Sixth Circuit and the D.C. Circuit 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.<sup>88</sup> 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.<sup>89</sup>

Courts 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.<sup>90</sup> 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

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<sup>83</sup> *Morgan v. Bank of Waukegan*, 804 F.2d 970, 975 (7th Cir. 1986).

<sup>84</sup> See, e.g., *Corley v. Rosewood Care Ctr., Inc.*, 142 F.3d 1041, 1049 (7th Cir. 1998); *Vicom, Inc. v. Harbridge Merch. Servs., Inc.*, 20 F.3d 771, 780 (7th Cir. 1994); *Olive Can Co. v. Martin*, 906 F.2d 1147, 1151 (7th Cir. 1990).

<sup>85</sup> See *Uniroyal Goodrich Tire Co. v. Mut. Trading Corp.*, 63 F.3d 516, 524 (7th Cir. 1995).

<sup>86</sup> See *Morgan*, 804 F.2d at 975.

<sup>87</sup> See *Roger Whitmore’s Auto. Servs., Inc. v. Lake Cnty.*, 424 F.3d 659, 673 (7th Cir. 2005).

<sup>88</sup> See, e.g., *Columbia Natural Resources, 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).

<sup>89</sup> *Columbia Natural Resources, Inc.*, 58 F.3d at 1110.

<sup>90</sup> *H.J. Inc. v. Northwestern Bell Telephone Co.*, 492 U.S. 229, 240-41 (1989).

that his employer, his employer's worker's compensation insurer, and others conspired to deny his rightful worker's compensation benefits.<sup>91</sup> 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."<sup>92</sup> 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.<sup>93</sup> 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."<sup>94</sup>

- 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. The court ruled 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."<sup>95</sup>
- In a 1992 decision, then-Chief Justice Breyer of the First Circuit wrote an opinion affirming the dismissal of a complaint alleging civil RICO violations arising from the cancellation of a government contract. Despite allegations of acts ranging from late 1984 through 1986 and possibly 1989, the court rejected the RICO claim on the grounds that a "pattern of racketeering activity" could not "encompass a single criminal event, a single criminal episode, a single crime (in

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<sup>91</sup> *Moon v. Harrison Piping Supply*, 465 F.3d 719 (6th Cir. 2006).

<sup>92</sup> *Id.* at 725.

<sup>93</sup> *GE Inv. Private Placement Partners II v. Parker*, 247 F.3d 543 (4th Cir. 2001).

<sup>94</sup> *GE Inv. Private Placement Partners II*, 247 F.3d 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 Associates, Ltd., II ex rel. Callaway v. AJ & AJ Servicing, Inc.*, 36 F.3d 1094 (4th Cir. 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).

<sup>95</sup> *Edmondson & Gallagher v. Alban Towers Tenants Ass'n*, 48 F.3d 1260, 1265 (D.C. Cir. 1995). *See also Western Associates Ltd. Partnership, ex rel. Ave. Associates Ltd. Partnership v. Market Square Associates*, 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).

the ordinary non-technical sense of the word)” even if “separate parts may themselves constitute separate criminal acts.”<sup>96</sup>

**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 a shorter period of time “so long as there is a threat that conduct will recur in the future.”<sup>97</sup> “Open-ended continuity” refers to “past conduct that by its nature projects into the future with a threat of repetition.”<sup>98</sup> Such a threat exists when “(1) a specific threat of repetition exists, (2) the predicates are a 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.”<sup>99</sup>

Courts are quick to dismiss allegations of “open-ended continuity” that are insufficiently pled, such as where a complaint alleges only a “hypothetical possibility of further predicate acts” based on the theory that “once a RICO violator, always a RICO violator.”<sup>100</sup> Also, courts may be reluctant to find a threat of continuity where the acts are part of a discrete scheme aimed at only

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<sup>96</sup> *Apparel Art Int’l, 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.”).

<sup>97</sup> *Corley v. Rosewood Care Ctr., Inc.*, 142 F.3d 1041, 1049 (7th Cir. 1998); *see also Vicom, Inc. v. Harbridge Merch. Servs., Inc.*, 20 F.3d 771, 782 (7th Cir. 1994) (“[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.”).

<sup>98</sup> *H.J. Inc. v. Northwestern Bell Telephone Co.*, 492 U.S. 229, 241 (1989).

<sup>99</sup> *Vicom, Inc.*, 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); *CVLR Performance Horses, Inc. v. Wynne*, 524 F. App’x 924 (4th Cir. 2013) (reversing dismissal where the alleged conduct projected into the future with threat of repetition); *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.”); *Allwaste, Inc. v. Hecht*, 65 F.3d 1523, 1528-29 (9th Cir. 1995) (finding open-ended continuity where the RICO predicates had become defendants’ regular way of conducting business).

<sup>100</sup> *Edmondson & Gallagher v. Alban Towers Tenants Ass’n*, 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.”).

a few individuals.<sup>101</sup> Courts also have rejected open-ended continuity based on a finite set of actions that are not likely to be repeated.<sup>102</sup> Some courts 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.<sup>103</sup> 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.<sup>104</sup>

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<sup>101</sup> See, e.g., *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); *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., Inc. v. Lake Cnty.*, 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 accomplish a discrete goal . . . directed at a finite group of individuals").

<sup>102</sup> See, e.g., *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. & Emp't of Am. Indians*, 155 F.3d 500, 506 (4th Cir. 1998) (affirming dismissal for failure to allege closed or open-ended pattern of racketeering); *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); *Turner v. Cook*, 362 F.3d 1219, 1230 (9th Cir. 2004) (affirming dismissal where alleged actions "were finite in nature" and the alleged enterprise had ceased activity).

<sup>103</sup> 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 Resources Corp. v. Lacrad Int'l Corp.*, No. 01-CV-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. 96-CV-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"), *judgment aff'd*, 124 F.3d 187 (3d Cir. 1997) (unpublished table decision).

<sup>104</sup> See, e.g., *CVLR Performance Horses, Inc. v. Wynne*, 524 F. App'x 924 (4th Cir. 2013) (whether there is open-ended continuity should be based on nature of threat posed when the racketeering activity occurred); *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."); *Heinman v. Waiting Angels Adoption Services, Inc.*, 668 F.3d 393, 410-11 (6th Cir. 2012) (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, Detroit Mailers Union Local 2040 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 opinions in *Bell Atlantic Corp. v. Twombly*<sup>105</sup> and *Ashcroft v. Iqbal*<sup>106</sup> RICO plaintiffs must allege enough facts to meet the “plausibility” requirements of federal pleading.<sup>107</sup>

## § 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.<sup>108</sup>

Although practitioners wasted little time in raising constitutional challenges to RICO, those efforts have been rejected.<sup>109</sup> But in an action alleging that a decedent’s husband

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<sup>105</sup> See *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007) (discussing a plaintiff’s pleading obligation within the context of antitrust law; holding that to state a claim under § 1 of the Sherman Act “requires enough factual matter (taken as true) to suggest that an agreement was made”; and citing the high cost of discovery in antitrust cases).

<sup>106</sup> See *Ashcroft v. Iqbal*, 556 U.S. 662, 684 (2009) (holding that the pleading requirements of *Twombly* apply to all civil actions under Fed. R. Civ. P. 8).

<sup>107</sup> See *Limestone Dev. Corp. v. Vill. of Lemont*, 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 Prods., 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); *American Dental Ass’n v. Cigna Corp.*, 605 F.3d 1283 (11th Cir. 2010) (same); *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”).

<sup>108</sup> *H.J. Inc. v. Northwestern Bell Telephone Co.*, 492 U.S. 229, 255-56 (1989).

<sup>109</sup> See, e.g., *United States v. Angiulo*, 897 F.2d 1169 (1st Cir. 1990); *United States v. Coiro*, 922 F.2d 1008 (2d Cir. 1991); *United States v. Pungitore*, 910 F.2d 1084 (3d Cir. 1990); *Columbia Natural Resources, Inc. v. Tatum*, 58 F.3d 1101 (6th Cir. 1995); *United States v. Masters*, 924 F.2d 1362 (7th Cir. 1991); *United States v. Local 295 of Int’l Bhd. of Teamsters*, No. 90-CV-0970, 1991 WL 35497 (E.D.N.Y. Mar. 8, 1991), modified, 1991 WL 128563 (E.D.N.Y. June 28, 1991); *United States v. Lobue*, 751 F. Supp. 748 (N.D. Ill. 1990); *United States v. Andrews*, 749 F. Supp. 1520 (N.D. Ill. 1990); *In re Adelphi Institute, Inc.*, 112 B.R. 534 (S.D.N.Y. 1990); *Starks v. Rent-A-Center*, No. 89-CV-0786, 1994 WL 577974 (D. Minn. May 16, 1990); *United States v. Paccione*, 738 F. Supp. 691 (S.D.N.Y. 1990); *Beck v. Edward D. Jones & Co.*, 735 F. Supp. 903 (C.D. Ill. 1990); *Wellington Int’l Commerce Corp. v. Retelny*, 727 F. Supp. 843 (S.D.N.Y. 1989).

fraudulently obtained control over the decedent's investments, one judge found RICO's pattern requirement unconstitutional as written and as applied.<sup>110</sup>

### § 16 Collection of Unlawful Debt

A defendant can violate any subsection of § 1962 if it collects or conspires to collect "an unlawful debt."<sup>111</sup> 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.<sup>112</sup> 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.<sup>113</sup> 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 "[a]lthough this case involves the collection of an alleged debt, it does not

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<sup>110</sup> See *Firestone v. Galbreath*, 747 F. Supp. 1556, 1581 (S.D. Ohio 1990), *aff'd in part*, 976 F.2d 279 (6th Cir. 1992), *certified question answered*, 67 Ohio St. 3d 87 (1993) and *aff'd in part, rev'd in part on other grounds*, 25 F.3d 323 (6th Cir. 1994). See also *Kenty v. Bank One Columbus, N.A.*, No. 90-CV-0709, 1992 WL 170605, at \*7-8 (S.D. Ohio Apr. 23, 1992) (finding RICO's "pattern of racketeering requirement" to be unconstitutionally vague in an action alleging fraudulent insurance activity).

<sup>111</sup> 18 U.S.C.A. § 1962.

<sup>112</sup> See *Durante Bros. & Sons, Inc. v. Flushing Nat'l Bank*, 755 F.2d 239, 247-48 (2d Cir. 1985); *Sundance Land Corp. v. Cmty. First Fed. Sav. & Loan Ass'n*, 840 F.2d 653, 666-667 (9th Cir. 1988); see also *United States v. Eufrazio*, 935 F.2d 553, 576 (3d Cir. 1991); *Wright v. Sheppard*, 919 F.2d 665, 673 (11th Cir. 1990); *Robidoux v. Conti*, 741 F. Supp. 1019, 1021-22 (D.R.I. 1990).

<sup>113</sup> See *Durante Bros. & Sons, Inc.*, 755 F.2d at 247.

involve the ‘collection of an unlawful debt’ . . . [because the debt is not an] illegal debt or debt unenforceable because of usury laws.”<sup>114</sup>

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.<sup>115</sup> 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.<sup>116</sup>

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<sup>114</sup> *Saglioccolo v. Eagle Ins. Co.*, 112 F.3d 226, 229 n.1 (6th Cir. 1997).

<sup>115</sup> *See Nolen v. Nucentrix Broadband Networks Inc.*, 293 F.3d 926 (5th Cir. 2002).

<sup>116</sup> *See Lovick v. Ritemoney Ltd.*, 378 F.3d 433, 439-444 (5th Cir. 2004).

#### IV. SECTION 1962(c): THE RICO ENTERPRISE

##### § 17 Overview

RICO was designed to prevent the illicit infiltration of legitimate enterprises.<sup>1</sup> This explains why the conduct prohibited in § 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.<sup>2</sup>

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.”<sup>3</sup> Courts have interpreted this definition broadly. RICO enterprises have included an investment corporation and individual investors,<sup>4</sup> relevant markets in United States Treasury notes,<sup>5</sup> an estate,<sup>6</sup> a bankruptcy estate,<sup>7</sup> a retirement community,<sup>8</sup> a labor union,<sup>9</sup> a sole proprietorship,<sup>10</sup> a government entity,<sup>11</sup> a mortgage pool,<sup>12</sup> and a federal district court.<sup>13</sup>

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<sup>1</sup> 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”).

<sup>2</sup> *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).

<sup>3</sup> 18 U.S.C.A. § 1961(4).

<sup>4</sup> *Rhoades v. Powell*, 644 F. Supp. 645, 673 (E.D. Cal. 1986), *aff’d*, 961 F.2d 217 (9th Cir. 1992) (unpublished table decision).

<sup>5</sup> *Three Crown Ltd. P’ship v. Caxton Corp.*, 817 F. Supp. 1033, 1045 (S.D.N.Y. 1993).

<sup>6</sup> *Gunther v. Dinger*, 547 F. Supp. 25, 27 (S.D.N.Y. 1982).

<sup>7</sup> *Handeen v. Lemaire*, 112 F.3d 1339, 1353 (8th Cir. 1997).

<sup>8</sup> *Bennett v. Berg*, 685 F.2d 1053, 1060 (8th Cir. 1982), *on reh’g*, 710 F.2d 1361 (8th Cir. 1983).

<sup>9</sup> *United States v. Scotto*, 641 F.2d 47, 54 (2d Cir. 1980).

<sup>10</sup> *McCullough v. Suter*, 757 F.2d 142, 143 (7th Cir. 1985).

<sup>11</sup> *DeFalco 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).

<sup>12</sup> *Heller v. First Town Mortg. Corp.*, No. 97-CV-8575, 1998 WL 614197 (S.D.N.Y. Sept. 14, 1998).

On the other hand, inanimate entities, such as bank accounts and securities, cannot be enterprises.<sup>14</sup> 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.”<sup>15</sup>

Because most RICO litigation involves claims under § 1962(c), which prohibits a person from using an enterprise to conduct a pattern of racketeering, 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.

### § 18 Association-in-Fact Enterprise

Any group of entities or individuals that is “associated in fact” may be a RICO enterprise.<sup>16</sup> Historically, many courts required the association-in-fact enterprise to have some structure or hierarchy and an ongoing legitimate purpose that was different from a group that is joined solely to violate RICO. In *United States v. Bledsoe*,<sup>17</sup> the Eighth Circuit held that an association-in-fact enterprise 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.<sup>18</sup> Other courts, including the

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<sup>13</sup> *Averbach v. Rival Mfg. Co.*, 809 F.2d 1016, 1018 (3d Cir. 1987).

<sup>14</sup> *Guidry v. Bank of LaPlace*, 954 F.2d 278, 283 (5th Cir. 1992).

<sup>15</sup> *Bonner v. Henderson*, 147 F.3d 457, 459 (5th Cir. 1998).

<sup>16</sup> 18 U.S.C.A. § 1961(4); *see also United States v. Philip Morris USA Inc.*, 566 F.3d 1095, 1111 (D.C. Cir. 2009) (holding that “a group of individuals, corporations, and partnerships associated in fact can qualify as a RICO ‘enterprise,’ even though section 1961(4) nowhere expressly mentions this type of association”).

<sup>17</sup> *United States v. Bledsoe*, 674 F.2d 647, 664-65 (8th Cir. 1982) (rejected by *United States v. Patrick*, 248 F.3d 11 (1st Cir. 2001)).

<sup>18</sup> *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).

Fifth,<sup>19</sup> Sixth,<sup>20</sup> and Seventh Circuits,<sup>21</sup> reached similar conclusions. As the Seventh Circuit stated, “there must be some structure, to distinguish an enterprise from a mere conspiracy, but there need not be much.”<sup>22</sup> This requirement was derived from the Supreme Court’s ruling in *United States v. Turkette*, 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.<sup>23</sup>

Several courts, however, disagreed with this structure requirement for association-in-fact enterprises, resulting in a circuit split. The First, Second, Ninth, Eleventh, and D.C. Circuits held that an association-in-fact enterprise did not require any particular organizational structure.<sup>24</sup> For

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<sup>19</sup> *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).

<sup>20</sup> *Walker v. Jackson Pub. Schools*, 42 F. App’x 735 (6th Cir. 2002) (affirming district court’s dismissal of case because there was no evidence of chain of command or hierarchy); *VanDenBroeck v. CommonPoint Mortg. 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), *abrogated on other grounds by Bridge v. Phoenix Bond & Indem. Co.*, 553 U.S. 639 (2008).

<sup>21</sup> *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 to establish the existence of a RICO enterprise); *Bachman v. Bear, Stearns & Co.*, 178 F.3d 930, 932 (7th Cir. 1999) (mere conspiracy to commit racketeering not sufficient to establish association-in-fact enterprise; need some formal or informal organizational structure apart from the alleged conspiracy to defraud), *holding modified by, Brouwer v. Raffensperger, Hughes & Co.*, 199 F.3d 961 (7th Cir. 2000); *Jennings v. Emry*, 910 F.2d 1434, 1440 (7th Cir. 1990) (“whether legal or extra-legal, each enterprise is an ongoing ‘structure’ of persons associated through time, joined in purpose and organized in a manner amenable to hierarchical or consensual decision making”).

<sup>22</sup> *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*, 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).

<sup>23</sup> *United States v. Turkette*, 452 U.S. 576, 583 (1981).

<sup>24</sup> *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”) (rejected by, *In re Nat’l Mortg. Equity Corp. Mortg. Pool Certificates Secs. Litig.*, 636 F. Supp. 1138 (C.D. Cal. 1986); *State v. Haddix*, 638 N.E.2d 1096 (Ohio Ct. App. 1994)), *abrogated by National Organization for Women, Inc. v.*

instance, in *Odom v. Microsoft Corporation*,<sup>25</sup> the Ninth Circuit offered a detailed analysis of what may constitute an “association-in-fact,” and applying language from *Turkette*,<sup>26</sup> 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.<sup>27</sup> 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.<sup>28</sup> This put the Ninth Circuit at odds with various circuits—including the Third, Fourth, Seventh, Eighth, and Tenth—that required the association-in-fact to have some structure or purpose that is separate from a conspiracy to commit racketeering.

Other circuits, principally the Second Circuit, ruled that although the enterprise and the racketeering activity are analytically distinct elements, the same evidence may be used to prove both elements. In one such case, the Second Circuit noted that in *Turkette*, the Supreme Court had acknowledged that proof of the pattern of racketeering “may in particular cases coalesce” with proof of the enterprise.<sup>29</sup> In a later unpublished decision, the Second Circuit ruled that “[t]he enterprise need not necessarily have a continuity extending beyond the performance of the

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*Scheidler*, 510 U.S. 249 (1994) and *rejected by, Odom v. Microsoft Corp.*, 486 F.3d 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) (rejected by, *In re National Mortg. Equity Corp. Mortg. Pool Certificates Secs. Litig.*, 636 F. Supp. 1138 (C.D. Cal. 1986) (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”).

<sup>25</sup> *Odom v. Microsoft Corp.*, 486 F.3d 541.

<sup>26</sup> *United States v. Turkette*, 452 U.S. 576 (1981).

<sup>27</sup> *Odom v. Microsoft Corp.*, 486 F.3d at 552; accord *Williams v. Mohawk Indus., Inc.*, 465 F.3d 1277, 1284 (11th Cir. 2006).

<sup>28</sup> *Williams v. Mohawk Indus., Inc.*, 465 F.3d 1277, 1284 (11th Cir. 2006).

<sup>29</sup> *Moss v. Morgan Stanley Inc.*, 719 F.2d 5, 22 (2d Cir. 1983) (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”).

pattern of racketeering acts alleged, or a structural hierarchy, so long as it is in fact an enterprise as defined in the statute.”<sup>30</sup>

In 2009, the Supreme Court resolved the circuit split in *Boyle v. United States*.<sup>31</sup> The Court addressed whether an association-in-fact enterprise must possess an “ascertainable structure beyond that inherent in the pattern of racketeering activity in which it engages.”<sup>32</sup> The Court held that an association-in-fact enterprise under RICO must have some structure but, relying on both *United States v. Turkette* and the plain language of the RICO statute, identified only three required structural features: (1) “a purpose”; (2) “relationships among those associated with the enterprise”; and (3) “longevity sufficient to permit those associates to pursue the enterprise’s purpose.”<sup>33</sup> Further, although the Court recognized that enterprise and pattern are distinct elements and that “proof of one does not necessarily establish the other,” the Court held that the existence of the enterprise may be inferred from the same evidence establishing the pattern.<sup>34</sup> The Court also specifically rejected the notion that other structural attributes, such as “hierarchy,” “role differentiation,” a “unique modus operandi,” and a “chain of command,” are required for an association-in-fact enterprise.<sup>35</sup>

The facts in *Boyle* demonstrate what type of evidence could show an ongoing enterprise. The enterprise there included a “core group” of individuals who robbed over 30 night-deposit boxes over the course of several years. The participants planned the robberies in advance,

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<sup>30</sup> *Pavlov v. Bank of New York Co.*, 25 F. App’x 70 (2d Cir. 2002) (vacating dismissal and holding that association-in-fact of bank officials and Russian organized crime figures was sufficiently associated for common purpose to establish enterprise, even without structural hierarchy or extended continuity).

<sup>31</sup> *Boyle v. United States*, 556 U.S. 938, 941 (2009).

<sup>32</sup> *Boyle v. United States*, 556 U.S. at 940-941.

<sup>33</sup> *Boyle v. United States*, 556 U.S. at 946-47.

<sup>34</sup> *Id.* at 947 (quoting *United States v. Turkette*, 452 U.S. 576, 583 (1981)).

<sup>35</sup> *Id.* at 948.

worked together to gather the necessary tools, and divvied up the proceeds.<sup>36</sup> By contrast, the Court noted that there would be no association-in-fact enterprise where individuals act “independently and without coordination.”<sup>37</sup> Overall, the *Boyle* decision represents a broad interpretation of the enterprise element of RICO that could make it easier for civil RICO plaintiffs to prove the existence of an association-in-fact enterprise.

In *In re Ins. Brokerage Antitrust Litig.*, the Third Circuit addressed whether the plaintiffs adequately identified RICO enterprises in connection with alleged insurance bid-rigging schemes.<sup>38</sup> As to one group of alleged enterprises—the “broker-centered enterprises”—the court concluded that the allegations failed to show that the defendant brokers at the “hub” of the enterprises and the various insurance companies that constituted the “spokes” functioned together as a coherent group. Without a unifying “rim” to join the spokes, the complaint merely alleged parallel conduct by the insurers, which was insufficient to establish a cohesive enterprise.<sup>39</sup> On the other hand, the court ruled that the complaint adequately alleged a “Marsh-centered enterprise” based on facts alleging that Marsh led a bid-rigging scheme with a group of insurers who shared a common interest to submit fixed or sham bids in accordance with Marsh’s “broking plans.”<sup>40</sup>

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<sup>36</sup> *Id.* at 941.

<sup>37</sup> *Id.* at 947 n.4.

<sup>38</sup> *In re Ins. Brokerage Antitrust Litig.*, 618 F.3d 300 (3d Cir. 2010).

<sup>39</sup> 618 F.3d at 374. Similarly, in *Rao v. BP Prods. N. Am., Inc.*, 589 F.3d 389, 400 (7th Cir. 2009) the Seventh Circuit affirmed dismissal of a RICO claim for failure to allege an association-in-fact enterprise consisting of different actors involved in different events without suggesting how the group acted together with a common purpose or through a common course of conduct.

<sup>40</sup> *In re Ins. Brokerage Antitrust Litig.*, 618 F.3d 300, 375-76 (3d Cir. 2010).

## § 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.<sup>41</sup> All courts of appeals have concluded that this language means that a § 1962(c) case, a party cannot be both the defendant “person” and the enterprise.<sup>42</sup> 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, but as discussed in § 22 below, the defendant must conduct the *enterprise’s* affairs, not merely its *own* affairs.<sup>43</sup>

Because a corporation is included in the statutory definition of a “person,”<sup>44</sup> there has been much debate in § 1962(c) cases about whether the corporate person is separate and distinct from the individuals who operate the corporation. As the Sixth Circuit put it: “The number of different approaches to the distinctiveness analysis roughly mirrors the number of cases that have addressed it.”<sup>45</sup>

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<sup>41</sup> 18 U.S.C.A. § 1962(c).

<sup>42</sup> 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. U.S. Trust Co. of New York*, 770 F.2d 308, 315 (2d Cir. 1985); *New Beckley Mining Corp. v. Int’l Union, United Mine Workers of Am.*, 18 F.3d 1161, 1163-1164 (4th Cir. 1994); *Busby v. Crown Supply, Inc.*, 896 F.2d 833, 840 (4th Cir. 1990); *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. Mut. Life Ins. Co. of New York*, 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 (6th Cir. 1991) (unpublished table decision); *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), *on reh’g*, 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 Local Union 639*, 883 F.2d 132, 139 (D.C. Cir. 1989), *on reh’g in part*, 913 F.2d 948 (D.C. Cir. 1990); *United States v. Goldin Indus., Inc.*, 219 F.3d 1268, 1271 (11th Cir. 2000).

<sup>43</sup> *United Food & Commercial Workers Unions v. Walgreen Co.*, 719 F.3d 849, 853-56 (7th Cir. 2013); *Cruz v. FXDirectDealer, LLC*, 720 F.3d 115, 121 (noting that the required person/enterprise distinction “cannot be evaded by alleging that a corporation has violated the statute by conducting the enterprise that consists of itself plus all or some of its officers or employees”).

<sup>44</sup> See 18 U.S.C.A. § 1961(3).

<sup>45</sup> *In re ClassicStar Mare Leasing Litig.*, 727 F.3d 473, 491 (6th Cir. 2013).

In *Cedric Kushner Promotions v. King*,<sup>46</sup> 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.<sup>47</sup> The holding allows RICO to reach defendants who, acting either within or outside the scope of corporate authority, use their company to conduct racketeering activity.<sup>48</sup>

## § 20 Intracorporate 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.

Generally, courts have rejected such attempts to avoid the person/enterprise distinction. Although an individual can be liable for operating the affairs of a corporation,<sup>49</sup> 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.<sup>50</sup> In that circumstance, the

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<sup>46</sup> *Cedric Kushner Promotions v. King*, 533 U.S. 158 (2001).

<sup>47</sup> *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 (S.D.N.Y. 2002) (finding that named partners and members of law firm were distinct entities from the law firm).

<sup>48</sup> 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. PaineWebber 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), *order aff'd*, 79 F.3d 1138 (3d Cir. 1996) (unpublished table decision).

<sup>49</sup> See *Cedric Kushner Promotions v. King*, 533 U.S. 158, 161 (2001).

<sup>50</sup> 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

corporation would be accused of operating itself, not a separate enterprise as required under § 1962(c).

For example, the Second Circuit has held that a RICO plaintiff cannot circumvent the distinctiveness requirement by alleging a RICO enterprise consisting merely of a corporate defendant associating with its own employees or agents in the regular affairs of the corporation.<sup>51</sup>

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.”<sup>52</sup>

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

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its employees and agents are the enterprise). *See also Libertad v. Welch*, 53 F.3d 428 (1st Cir. 1995) (noting need for separate enterprise that functions as continuing unit apart from the pattern of racketeering); *Cruz v. FXDirectDealer, LLC*, 720 F.3d 115, 121 (2d Cir. 2013) (noting that the required person/enterprise distinction “cannot be evaded by alleging that a corporation has violated the statute by conducting the enterprise that consists of itself plus all or some of its officers or employees”); *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”), *judgment vacated by* 525 U.S. 128 (1998); *Riverwoods Chappaqua Corp. v. Marine Midland Bank, N.A.*, 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 & 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. Am. Gen. Fin., Inc.*, 134 F.3d 1321 (7th Cir. 1998) (corporate parent and subsidiary not distinct); *Fitzgerald v. Chrysler*, 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 at 646-47 (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); *Bd. of Cnty. Comm’rs of San Juan Cnty. v. Liberty Grp.*, 965 F.2d 879, 885 (10th Cir. 1992); *Yellow Bus Lines, Inc. v. Drivers Local Union 639*, 883 F.2d 132, 141 (D.C. Cir. 1989), *on reh’g in part*, 913 F.2d 948 (D.C. Cir. 1990). *But see Dornberger v. Metro. Life Ins. Co.*, 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).

<sup>51</sup> *Riverwoods Chappaqua Corp. v. Marine Midland Bank, N.A.*, 30 F.3d 339 (2d Cir. 1994).

<sup>52</sup> *Id.* at 344.

person/enterprise distinction.<sup>53</sup> Similarly, in *Bd. of Cnty. Comm'rs 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."<sup>54</sup> The Eleventh Circuit has explained that the crucial factor is whether each member of the alleged association-in-fact enterprise "is free to act independently and advance its own interests contrary to those" of the other members of the enterprise.<sup>55</sup>

Courts have allowed RICO complaints to proceed where the defendants are among the members of a separate association-in-fact enterprise.<sup>56</sup> For example, the Eleventh Circuit has affirmed that corporate defendants can be both defendants (who may be indicted individually)

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<sup>53</sup> *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).

<sup>54</sup> *Bd. Of Cnty. Comm'rs of San Juan Cnty v. Liberty Group*, 965 F.2d 879, 885-86 (10th Cir. 1992). See also *Yellow Bus Lines, Inc. v. Drivers Local Union 639*, 883 F.2d 132, 140-41 (D.C. Cir. 1989), *on reh'g in part*, 913 F.2d 948 (D.C. Cir. 1990) (rejecting enterprise consisting of a labor union and one of its officers).

<sup>55</sup> *United States v. Goldin Indus., Inc.*, 219 F.3d 1268, 1271, 1277 (11th Cir. 2000), discussed and applied in, *Lockheed Martin Corp. v. Boeing Co.*, 357 F. Supp. 2d 1350, 1365-66 (M.D. Fla. 2005).

<sup>56</sup> 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 subgroups that "depended on one another both financially and structurally"); *Securitron Magnalock Corp. v. Schnabolk*, 65 F.3d 256, 263-264 (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); *Console*, 13 F.3d at 652 (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 Cnty. v. U.S. Interstate Supplies, Inc.*, 731 F.2d 1160, 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), *abrogated by United States v. Cooper*, 135 F.3d 960 (5th Cir. 1998); *Davis v. Mut. Life Ins. Co. of New York*, 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., Ltd.*, 107 F.3d 30 (Fed. Cir. 1997) (unpublished table decision) (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 & 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).

and participants in an association-in-fact enterprise consisting of the same corporations and the individual defendants who ran them.<sup>57</sup> The court noted that a defendant can be both a culpable person and a part of an enterprise; “[t]he prohibition against 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.”<sup>58</sup> In another case, the Sixth Circuit affirmed summary judgment in a case against a group of defendants that included a parent company that was part of an enterprise along with certain of its affiliates and employees, and at least one other entity that was not owned by the parent company.<sup>59</sup> The court concluded that the corporate parent could be distinct from its affiliates if the parent and affiliates “perform different roles within the enterprise or use their separate legal incorporation to facilitate racketeering activity.”<sup>60</sup> The court also ruled that even if the parent and its affiliates were not sufficiently distinct, the parent was still distinct from the alleged enterprise because the enterprise included at least one key player that was not owned by the parent company or operating as its agent.<sup>61</sup>

## § 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 that was manipulated by others.

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<sup>57</sup> *Goldin Indus., Inc.*, 219 F.3d at 1275.

<sup>58</sup> *Id.* *Accord Williams v. Mohawk Indus., Inc.*, 411 F.3d 1252 (11th Cir. 2005), *vacated on other grounds*, 547 U.S. 516 (2006).

<sup>59</sup> *In re ClassicStar Mare Leasing Litig.*, 727 F.3d 473 (6th Cir. 2013).

<sup>60</sup> *Id.* at 492.

<sup>61</sup> *Id.* at 493.

Most courts of appeals have held that a corporation cannot be held vicariously liable for violations of § 1962(c) committed by its employees—at least where the corporation is alleged to be the vicariously liable defendant and the enterprise.<sup>62</sup> These courts have concluded that the imposition of vicarious liability would defeat the purpose of RICO, which is to reach those who profit from racketeering, not those who are victimized by it. These courts have reasoned that because § 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.”<sup>63</sup> The District of Columbia Circuit explained, in dicta, that respondeat superior liability is inappropriate because liability under § 1962(c) is aimed at punishing the person who exploits an enterprise, rather than the enterprise which is merely a passive victim. The court thus concluded that the concept of respondeat superior is “directly at odds” with Congress’s intent in enacting § 1962(c).<sup>64</sup>

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<sup>62</sup> See, e.g., *Schofield v. First Commodity Corp. of Boston*, 793 F.2d 28, 32 (1st Cir. 1986); *Petro-Tech, Inc. v. Western Co. of N. Am.*, 824 F.2d 1349, 1360 (3d Cir. 1987); *Davis v. Mut. Life Ins. Co. of New York*, 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 Products Co.*, 974 F.2d 1149, 1153-54 (9th Cir. 1992); *Landry v. Air Line Pilots Ass’n Int’l.*, 901 F.2d 404, 425 (5th Cir. 1990); *Yellow Bus Lines, Inc. v. Drivers Local Union 639*, 883 F.2d 132, 140 (D.C. Cir. 1989), *on reh’g in part*, 913 F.2d 948 (D.C. Cir. 1990); Cf. *Harrah v. J.C. Bradford & Co.*, 37 F.3d 1493 (4th Cir. 1994) (unpublished table decision) (noting that application of respondeat superior under Section 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 U.S. 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 Section 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).

<sup>63</sup> *Schofield v. First Commodity Corp. of Boston*, 793 F.2d 28, 33 (1st Cir. 1986).

<sup>64</sup> *Yellow Bus Lines, Inc. v. Drivers Local Union 639*, 883 F.2d 132, 140 (D.C. Cir. 1989), *on reh’g in part*, 913 F.2d 948 (D.C. Cir. 1990).

On the other hand, several courts of appeals and district courts have ruled that respondeat superior is appropriate under § 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.<sup>65</sup> In *Bloch v. Prudential-Bache*,<sup>66</sup> 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.*<sup>67</sup> 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."<sup>68</sup>

In *Oki Semiconductor Co. v. Wells Fargo Bank*,<sup>69</sup> 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

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<sup>65</sup> See, e.g., *Davis v. Mutual Life Ins. Co. of New York*, 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 Products Co.*, 974 F.2d 1149, 1154-55 (9th Cir. 1992); *Cox v. Adm'r U.S. Steel & Carnegie*, 17 F.3d 1386, 1406-1407 (11th Cir. 1994) (holding that respondeat superior liability may be assessed under Section 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), *opinion modified on other grounds on reh'g*, 30 F.3d 1347 (11th Cir. 1994).

<sup>66</sup> *Bloch v. Prudential-Bache Secs.*, 707 F. Supp. 189, 194 (W.D. Pa. 1989).

<sup>67</sup> *Petro-Tech, Inc. v. Western Co. of N. Am.*, 824 F.2d 1349 (3d Cir. 1987).

<sup>68</sup> *Bloch*, 707 F. Supp. at 193, quoting *Petro-Tech, Inc.*, 824 F.2d at 1359 n.11.

<sup>69</sup> *Oki Semiconductor Co. v. Wells Fargo Bank*, 298 F.3d 768 (9th Cir. 2002).

proximate cause of the plaintiff's injury, 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."<sup>70</sup> As noted above, however, the Ninth Circuit has rejected RICO claims against employers based on vicarious liability where the employer is also the alleged enterprise.<sup>71</sup>

The Third Circuit held that an enterprise may be held vicariously liable for a violation of § 1962(a) because that subsection of RICO does not require a distinction between the person and the enterprise.<sup>72</sup> Similarly, the Fifth Circuit has found no barrier to vicarious liability under § 1962(a) and (b) when the principal has derived some benefit from the agent's wrongful acts.<sup>73</sup>

Similarly, 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.<sup>74</sup> But in a subsequent decision, *D & S Auto Parts, Inc. v. Schwartz*, the Seventh Circuit "reject[ed] the doctrine of respondeat superior in civil RICO cases."<sup>75</sup> A subsequent district court decision sought to reconcile the two decisions by construing *Schwartz* as a narrow holding limited to cases in which the corporation was unaware of its employees' misconduct, as opposed to *Liquid Air*, in which the corporation stood by silently and benefited from the wrongdoing.<sup>76</sup>

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<sup>70</sup> *Id.* at 776.

<sup>71</sup> 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).

<sup>72</sup> *Petro-Tech, Inc.*, 824 F.2d at 1361.

<sup>73</sup> *Crowe v. Henry*, 43 F.3d 198, 206 (5th Cir. 1995).

<sup>74</sup> *Liquid Air Corp. v. Rogers*, 834 F.2d 1297, 1307 (7th Cir. 1987).

<sup>75</sup> *D & S Auto Parts, Inc. v. Schwartz*, 838 F.2d 964, 968 (7th Cir. 1988).

<sup>76</sup> *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, 711-712 (N.D. Ill. 1991) (allowing Section 1962(a) and (b) claims against employer based on vicarious liability where the employer knowingly benefited from the RICO violation).

The Ninth Circuit has adopted the reasoning of *Petro-Tech* and *Liquid Air*, holding that liability may arise under § 1962(a) under respondeat superior principles “when the individual or entity is benefited by its employee or agent’s RICO violations.”<sup>77</sup> The Eleventh Circuit has held that respondeat superior liability may be imposed under § 1962(b), but only on those enterprises that derive some benefit from the RICO violation.<sup>78</sup>

## § 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.<sup>79</sup> In *Reves v. Ernst & Young*, the Supreme Court significantly limited the reach of § 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.<sup>80</sup> This holding significantly limited the application of § 1962(c) to outside professionals by holding that liability for “conducting” or “participating in the conduct of” the affairs of an enterprise requires a showing that the defendant directed the enterprise’s affairs.<sup>81</sup>

Prior to *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

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<sup>77</sup> *Brady v. Dairy Fresh Products Co.*, 974 F.2d 1149, 1155 (9th Cir. 1992).

<sup>78</sup> *Quick v. Peoples Bank of Cullman Cnty.*, 993 F.2d 793, 797 (11th Cir. 1993).

<sup>79</sup> 18 U.S.C.A. § 1962(c).

<sup>80</sup> *Reves v. Ernst & Young*, 507 U.S. 170, 178-79 (1993).

<sup>81</sup> *Id.* at 178-84.

“enables” it to commit the predicate acts, or when the predicate acts are “related” to the affairs of the enterprise.<sup>82</sup>

Two held that liability under § 1962(c) requires “some participation in the operation or management of the enterprise itself,”<sup>83</sup> or “significant control” over an enterprise’s affairs.<sup>84</sup>

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 noteholders about the co-op’s insolvency.<sup>85</sup> 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.”<sup>86</sup> As the Court wrote:

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 Section 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.<sup>87</sup>

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

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<sup>82</sup> See *United States v. Scotto*, 641 F.2d 47, 54 (2d Cir. 1980); *Overnite Transp. Co. v. Truck Drivers, Union Local No. 705*, 904 F.2d 391, 394 (7th Cir. 1990); *Bank of America Nat’l Trust & Sav. Ass’n v. Touche Ross & Co.*, 782 F.2d 966, 970 (11th Cir. 1986), *abrogated by Reves v. Ernst & Young*, 507 U.S. 170 (1993).

<sup>83</sup> *Bennett v. Berg*, 710 F.2d 1361, 1364 (8th Cir. 1983).

<sup>84</sup> *Yellow Bus Lines, Inc. v. Drivers Local Union 639*, 913 F.2d 948, 954 (D.C. Cir. 1990).

<sup>85</sup> *Arthur Young & Co. v. Reves*, 856 F.2d 52, 53 (8th Cir. 1988), *judgment rev’d*, 494 U.S. 56 (1990).

<sup>86</sup> *Reves v. Ernst & Young*, 507 U.S. 170, 177-78 (1993).

<sup>87</sup> *Id.* at 179.

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).<sup>88</sup> The Eleventh Circuit disagreed in *Williams v. Mohawk Indus., Inc.*<sup>89</sup> Noting that “the Supreme Court has yet to delineate the exact boundaries of the operation or management test,” the 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.”<sup>90</sup>

To violate § 1962(c), the defendant must operate or manage the *enterprise’s* affairs, not merely its *own* affairs.<sup>91</sup> The defendant must be aware of the enterprise’s conduct and play some role on behalf of the enterprise.<sup>92</sup> This may be shown, for example, if a group bands together to commit a pattern of racketeering that they could not accomplish on their own.<sup>93</sup> The level of cooperation, however, must arise above the level of cooperation inherent in normal commercial transactions.<sup>94</sup> In a case where Walgreens was accused of defrauding insurers by overcharging for certain prescriptions using drugs manufactured by Par Pharmaceutical, the Seventh Circuit concluded that the allegations showed that Walgreens and Par were engaging in their own businesses rather than the business of a joint enterprise. Par manufactured the drugs while

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<sup>88</sup> *Baker v. IBP, Inc.*, 357 F.3d 685, 691 (7th Cir. 2004).

<sup>89</sup> *Williams v. Mohawk Indus., Inc.*, 465 F.3d 1277, 1286 (11th Cir. 2006).

<sup>90</sup> *Id.*

<sup>91</sup> *United Food & Commercial Workers Unions v. Walgreen Co.*, 719 F.3d 849, 853-56 (7th Cir. 2013); *Cruz v. FXDirectDealer, LLC*, 720 F.3d 115, 121 (2d Cir. 2013) (noting that the required person/enterprise distinction “cannot be evaded by alleging that a corporation has violated the statute by conducting the enterprise that consists of itself plus all or some of its officers or employees”).

<sup>92</sup> *Cruz v. FXDirectDealer, LLC*, 720 F.3d 115, 120-21 (2d Cir. 2013).

<sup>93</sup> *In re Ins. Brokerage Antitrust Litig.*, 618 F.3d 300, 378 (3d Cir. 2010).

<sup>94</sup> *United Food*, 719 F.3d at 855-56.

Walgreens purchased the drugs and filled the prescriptions. Without allegations that that Walgreens and Par involved themselves in the each other's businesses beyond their usual commercial relationship, the allegations failed to show how they operated a separate enterprise.<sup>95</sup>

The “operation or management” test applies to any defendant in a § 1962(c) action, whether or not the defendant is an employee or an “outsider.”<sup>96</sup> 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.<sup>97</sup> But as discussed in § 23 below, simply performing services for the enterprise, even with knowledge of an illicit activity, is not enough to establish liability under § 1962(c). The defendant must have actually participated in the operation or management of the enterprise.<sup>98</sup>

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<sup>95</sup> *Id.*

<sup>96</sup> 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).

<sup>97</sup> Compare *Ouwinga v. Benistar 419 Plan Services, Inc.*, 694 F.3d 783, 791-93 (6th Cir. 2012) (overturning dismissal where plaintiffs alleged that lawyers participated in “operation or management” by preparing tax opinion letters to promote fraudulent scheme); *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. Posada-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.*, 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 (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*).

<sup>98</sup> *Dongelewicz v. PNC Bank Nat'l Ass'n*, 104 F. App'x 811 (3d Cir. 2004); *Crichton v. Golden Rule Ins. Co.*, 576 F.3d 392 (7th Cir. 2009); *Goren v. New Vision Int'l, Inc.*, 156 F.3d 721, 727-728 (7th Cir. 1998); *In re Terrorist Attacks on Sept. 11, 2001*, 349 F. Supp. 2d 765, 827-28 (S.D.N.Y. 2005), *aff'd*, 538 F.3d 71 (2d Cir. 2008); *Jubelirer v. MasterCard Int'l, Inc.*, 68 F. Supp. 2d 1049, 1053 (W.D. Wis. 1999); Cf. *Beard v. Worldwide Mortg. Corp.*, 354 F. Supp. 2d 789, 806-808 (W.D. Tenn. 2005) (finding sufficient participation in scheme to establish operation or management element).

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

Although the Supreme Court in *Reves* ruled that § 1962(c) does not reach “complete outsiders” who manage their own affairs rather than the affairs of the enterprise,<sup>99</sup> the Court also made clear that status as an outsider is not an automatic bar to liability under § 1962(c): “[T]he phrase ‘directly or indirectly’ makes clear that RICO liability is not limited to those with a formal position in the enterprise . . . .”<sup>100</sup> 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 § 1962(c) claim. The question is where to draw the line. Justice Souter dissented 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. 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.”<sup>101</sup>

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.<sup>102</sup> Courts have regularly applied *Reves* to limit the use of § 1962(c) against corporate outsiders,

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<sup>99</sup> *Reves v. Ernst & Young*, 507 U.S. 170, 185 (1993).

<sup>100</sup> *Id.* at 178-79.

<sup>101</sup> *Id.* at 190-91.

<sup>102</sup> See, e.g., Ralph A. Pitts, Michael R. Smith & 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 & Arthur F. Mathews, *Long Term Impact of Reves on Civil RICO Litigation Is Uncertain*, 7 Inside Litigation, No. 6, at 18 (June 1993) (same).

particularly accountants, attorneys, bankers, and other outside professionals.<sup>103</sup> For example, in a post-*Reves* decision, *Baumer v. Pacht*, the Ninth Circuit affirmed the dismissal of RICO claims against a limited partnership's outside counsel.<sup>104</sup> The plaintiffs in *Baumer* alleged that the attorney had knowingly prepared a partnership agreement containing false statements, and had actively engaged 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."<sup>105</sup>

Similarly, in *University of Maryland v. Peat, Marwick, Main & Co.*,<sup>106</sup> 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

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<sup>103</sup> See, e.g., *Azrielli v. Cohen Law Offices*, 21 F.3d 512, 521-522 (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 F.3d 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*, 156 F.3d 721 (7th Cir. 1998) (holding modified by, *Brouwer v. Raffensperger, Hughes & Co.*, 199 F.3d 961 (7th Cir. 2000) (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 (9th Cir. 1993) (unpublished table decision) (affirming dismissal of RICO claims against outside auditors and consultants who performed routine professional services for the limited partnership enterprise).

<sup>104</sup> *Baumer v. Pacht*, 8 F.3d 1341 (9th Cir. 1993).

<sup>105</sup> *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").

<sup>106</sup> *University of Maryland v. Peat, Marwick, Main & Co.*, 996 F.2d 1534 (3d Cir. 1993).

decision making constitutes participation in the affairs of an enterprise.”<sup>107</sup> 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.<sup>108</sup>

The operation or management test is often a fact-intensive inquiry that may be difficult to resolve on a motion to dismiss or for summary judgment.<sup>109</sup> For example, in *Dayton Monetary Assocs. v. Donaldson, Lufkin & Jenrette*,<sup>110</sup> investors in 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 the defendants played a significant role

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<sup>107</sup> *Id.* at 1538-39.

<sup>108</sup> *Id.* at 1539-40.

<sup>109</sup> 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. of New York*, 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 (8th 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.*, 453 F.3d 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).

<sup>110</sup> See, e.g., *Dayton Monetary Assocs. v. Donaldson, Lufkin, & Jenrette Secs. Corp.*, No. 91-CV-2050, 1993 WL 410503, at \*3 (S.D.N.Y. Oct. 14, 1993).

in directing the affairs of the association-in-fact enterprise.<sup>111</sup> In another case, the Second Circuit confirmed that the operation or management test poses “a relatively low hurdle for plaintiffs to clear, especially at the pleading stage.”<sup>112</sup>

Allegations of coercion or bribery by an outsider may help the plaintiff meet its pleading burden. In *Edison Elec. Inst. v. Henwood*,<sup>113</sup> 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.<sup>114</sup>

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<sup>111</sup> *Id.*; see also *Brown v. LaSalle Northwest Nat’l Bank*, 820 F. Supp. 1078, 1082 (N.D. Ill. 1993) (borrower sufficiently alleged that defendant bank, which purportedly devised and implemented scheme to deprive borrowers of right to notice of defenses to loan repayment, controlled association-in-fact enterprise consisting of a group of corporations); *United Nat’l Ins. Co. v. Equipment Ins. Managers, Inc.*, No. 95-CV-0116, 1995 WL 631709, at \*4-5 (E.D. Pa. Oct. 27, 1995) (plaintiff insurance companies properly alleged that defendants operated or managed association-in-fact enterprise consisting of defendants and plaintiffs through alleged scheme in which defendants collected audit premiums from insureds, and through fraudulent means, failed to account for premiums and remit moneys to plaintiffs); *Mathon v. Marine Midland Bank, N.A.*, 875 F. Supp. 986, 994-95 (E.D.N.Y. 1995) (declining to grant law firms’ motions to dismiss because attorneys or law firms could have maintained an operational or managerial position in association-in-fact enterprise between creditors, law firms retained by creditors, and employees of law firms).

<sup>112</sup> *First Capital Asset Mgmt., Inc. v. Satinwood, Inc.*, 385 F.3d 159, 176 (2d Cir. 2004) (citations omitted).

<sup>113</sup> *Edison Elec. Inst. v. Henwood*, 832 F. Supp. 413, 416-17 (D.D.C. 1993).

<sup>114</sup> *Id.* Cf. *Shuttlesworth v. Housing Opportunities Made Equal*, 873 F. Supp. 1069, 1075-76 (S.D. Ohio 1994) (plaintiff sufficiently alleged attorney defendants’ role in the operation or 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-CV-1779, 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).

## § 24 Liability for Aiding and Abetting

In the wake of *Reves*, some courts held that *Reves* was not dispositive of whether an outside defendant may be charged with “aiding and abetting” a § 1962(c) violation by another defendant.<sup>115</sup> The Supreme Court’s decision in *Central Bank of Denver v. First Interstate Bank*,<sup>116</sup> however, undermines the viability of an implied cause of action for aiding and abetting in RICO cases. The Court held that a private plaintiff may not maintain a suit for aiding and abetting under § 10(b) of the Securities Exchange Act of 1934.<sup>117</sup> The Court reasoned that the language of the statute does not mention aiding and abetting and that it is “inconsistent with settled methodology in § 10(b) cases to extend liability beyond the scope of conduct prohibited by the statutory text.”<sup>118</sup> Stating that “Congress knew how to impose aiding and abetting liability when it chose to do so,” the Court further reasoned that Congress’s choice 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.”<sup>119</sup>

Although the Supreme Court’s decision in *Central Bank* only addresses aiding and abetting liability under § 10(b), its rationale calls into question the existence of implied causes of

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<sup>115</sup> See, e.g., *Standard Chlorine of Delaware, Inc. v. Sinibaldi*, No. 91-CV-0188, 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 Section 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 Section 1962(c) and fails to address whether aider and abettor liability is inconsistent with Section 1962(c) liability); see also *Charamac Props., Inc. v. Pike*, No. 86-CV-7919, 1993 WL 427137, at \*3-4 (S.D.N.Y. Oct. 19, 1993) (discussing *Reves* in its analysis of primary liability under Section 1962(c) but not in its analysis of aiding and abetting).

<sup>116</sup> *Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164 (1994).

<sup>117</sup> 17 U.S.C.A. § 78j(b).

<sup>118</sup> *Central Bank of Denver*, 511 U.S. at 177-78.

<sup>119</sup> *Id.* at 176.

action for secondary liability under other federal statutes such as RICO.<sup>120</sup> Like § 10(b), RICO contains no 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 § 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 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.<sup>121</sup>

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*,<sup>122</sup> the district court noted that although *Central Bank* “contains sweeping language which arguably could apply to RICO,” *Central Bank* was based on judicial interpretation, congressional intent, and public policies specific to § 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

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<sup>120</sup> See *id.* 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”).

<sup>121</sup> Jed S. Rakoff, *Aiding and Abetting Under Civil RICO*, 211 N.Y.L.J. 25 (May 12, 1994).

<sup>122</sup> *Succession of Wardlaw ex rel. Owen v. Whitney Nat’l Bank*, No. 94-CV-2026, 1994 WL 577442, at \*6 (E.D. La. Oct. 17, 1994).

strong tradition of cases holding that aiding and abetting predicate acts is sufficient to support a RICO conviction.<sup>123</sup>

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 RICO violation.<sup>124</sup> 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.”<sup>125</sup> The Third Circuit reviewed its prior discussion of aiding and abetting in *Jaguar Cars*,<sup>126</sup> 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.”<sup>127</sup>

Other courts also have concluded—either directly or in dicta—that there is no aiding and abetting liability under § 1962(c).<sup>128</sup>

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<sup>123</sup> *Id.* at \*6. See also Jed S. Rakoff, *Aiding and Abetting Under Civil RICO*, 211 N.Y.L.J. 25 (May 12, 1994); *Dayton Monetary Assocs. v. Donaldson, Lufkin & Jenrette Sec. Corp.*, No. 91-CV-2050, 1995 WL 43669, at \*4-5 (S.D.N.Y. 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).

<sup>124</sup> *Rolo v. City Investing Co. Liquidating Trust*, 155 F.3d 644 (3d Cir. 1998); accord *Pennsylvania Ass’n of Edwards Heirs v. Righenour*, 235 F.3d 839, 840-841 (3d Cir. 2000) (confirming that there is no aiding and abetting under RICO).

<sup>125</sup> *Id.* at 657.

<sup>126</sup> *Jaguar Cars, Inc. v. Royal Oaks Motor Car Co.*, 46 F.3d 258 (3d Cir. 1995).

<sup>127</sup> *Id.* at 657.

<sup>128</sup> See, e.g., *Schultz v. Rhode Island Hosp. Trust Nat’l Bank, N.A.*, 94 F.3d 721, 731 (1st Cir. 1996) (approving dismissal of aiding and abetting claim, but affirming dismissal on other grounds); *DeFalco v. Bernas*, 244 F.3d 286, 329-30 (2d Cir. 2001) (affirming district court’s dismissal of aiding and abetting claim); *Heller v. Deutsche Bank AG*, No. 04-CV-3571, 2005 WL 525401 (E.D. Pa. Mar. 3, 2005) (following *Righenour* and *Rolo* in holding there is no claim for aiding and abetting); *In re Am. Honda Motor Co., Inc. Dealerships Relations Litig.*, 965 F. Supp. 716, 723 (D. Md. 1997) (finding allegation of aiding and abetting allegation of conduct of enterprise insufficient in light of *Reves* and *Central Bank*); *Ross v. Patrusky, Mintz & Semel*, No. 90-CV-1356, 1997 WL 214957, at \*11 (S.D.N.Y. Apr. 29, 1997) (concluding that there is no aiding and abetting liability for civil RICO violations); *Hayden v. Paul, Weiss, Rifkind, Wharton & Garrison*, 955 F. Supp. 248, 256 (S.D.N.Y. 1997) (same); *Amalgamated Bank of New York v. Marsh*, 823 F. Supp. 209, 220 (S.D.N.Y. 1993) (same).

## § 25 The Enterprise Under §§ 1962(a), (b), and (d)

Because § 1962(a) and § 1962(b) do not deal with the notion of conducting a separate enterprise, most courts have concluded that the person/enterprise distinction does not apply to violations of those sections.<sup>129</sup> This approach permits a corporate enterprise to be held liable 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.<sup>130</sup>

For a § 1962(d) conspiracy claim based on an agreement to violate § 1962(c), the defendant need not agree to operate or manage the enterprise.<sup>131</sup> Rather, the defendant may be liable if it knowingly agrees to facilitate others who operate or manage the enterprise. For example, in *Brouwer v. Raffensperger, Hughes & Co.*,<sup>132</sup> the Seventh Circuit reconciled a perceived conflict between the Supreme Court's opinions in *Salinas* and *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."<sup>133</sup> The Third Circuit has similarly held that a "defendant may be held liable

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<sup>129</sup> 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), *abrogated by Beck v. Prupis*, 529 U.S. 494 (2000); *Petro-Tech, Inc. v. Western Co. of N. Am.*, 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 at 743; *Landry*, 901 F.2d at 425; *Masi v. Ford City Bank & Trust Co.*, 779 F.2d 397, 401 (7th Cir. 1985); *Haroco, Inc. v. Am. Nat'l Bank and Trust Co. of Chicago*, 747 F.2d 384, 402 (7th Cir. 1984), *aff'd*, 473 U.S. 606 (1985); *Schreiber Distrib. Co. v. Serv-Well Furniture Co.*, 806 F.2d 1393, 1398 (9th Cir. 1986).

<sup>130</sup> See also § 21 for discussion of vicarious liability in cases under Section 1962(a) and (b).

<sup>131</sup> See *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 §§ 56-61 for a more detailed discussion of RICO conspiracy under Section 1962(d).

<sup>132</sup> *Brouwer v. Raffensperger, Hughes & Co.*, 199 F.3d 961 (7th Cir. 2000). See also *MCM Partners, Inc.*, 62 F.3d 967; *United States v. Quintanilla*, 2 F.3d 1469, 1485 (7th Cir. 1993); *United States v. Starrett*, 55 F.3d 1525, 1547-48 (11th Cir. 1995); *Tonnemacher v. Sasak*, 859 F. Supp. 1273, 1277-78 (D. Ariz. 1994); *Fid. Fed. Sav. & Loan Ass'n*, 830 F. Supp. at 261; *Jones v. Meridian Towers Apartments, Inc.*, 816 F. Supp. 762, 772-73 (D.D.C. 1993).

<sup>133</sup> *Brouwer*, 199 F.3d at 967.

for conspiracy to violate § 1962(c) if he knowingly agrees to facilitate a scheme which includes the operation or management of a RICO enterprise.”<sup>134</sup>

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<sup>134</sup> *Smith v. Berg*, 247 F.3d 532, 538 (3d Cir. 2001).

## V. STANDING UNDER § 1962(c)

### § 26 Background

Section 1964(c) identifies four factors that must be satisfied to establish standing for 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 § 1962.<sup>1</sup>

*In Sedima, S.P.R.L. v. Imrex Co.,<sup>2</sup> 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 held 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 only 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.”<sup>3</sup>*

As discussed in § 32, the Supreme Court, in *Holmes v. Secs. Investor Prot. Corp.*,<sup>4</sup> *Anza v. Ideal Steel Supply Corp.*,<sup>5</sup> and *Bridge v. Phoenix Bond & Indem. Co.*,<sup>6</sup> 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,<sup>7</sup> proximate cause is often

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<sup>1</sup> 18 U.S.C.A. § 1964(c).

<sup>2</sup> *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 493-99 (1985).

<sup>3</sup> *Id.* at 496.

<sup>4</sup> *Holmes v. Secs. Investor Prot. Corp.*, 503 U.S. 258, 268-69 (1992).

<sup>5</sup> *Anza v. Ideal Steel Supply Corp.*, 547 U.S. 451 (2006).

<sup>6</sup> *Bridge v. Phoenix Bond & Indem. Co.*, 553 U.S. 639 (2008).

<sup>7</sup> 18 U.S.C. § 1964(c).

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.<sup>8</sup>

Following *Holmes* and *Anza*, courts generally treat standing and proximate cause as interrelated concepts. For example, in *Trollinger v. Tyson Foods, Inc.*,<sup>9</sup> the Sixth Circuit instructed that standing traditionally addresses who can sue, and focuses on whether the plaintiff is directly injured in fact.<sup>10</sup> Proximate cause, on the other hand, addresses whether a defendant may be held legally responsible for the plaintiff’s injury.<sup>11</sup> Thus 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.<sup>12</sup> 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.<sup>13</sup>

## § 27 Person

Section 1964(c) creates a private cause of action for any “person” who has suffered a compensable injury. The term “person” refers to “any individual or entity capable of holding a

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<sup>8</sup> 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; 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).

<sup>9</sup> 370 F.3d 602, 612-13 (6th Cir. 2004).

<sup>10</sup> *Id.* at 612. *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 (1979).

<sup>11</sup> *Id.* at 612; see also *Bridge v. Phoenix Bond & Indem. Co.*, 553 U.S. 639, 654 (2008) (proximate cause is a generic label “for the tools used to limit a person’s responsibility for the consequences of that person’s own acts, with a particular emphasis on the demand for some direct relation between the injury asserted and the injurious conduct alleged.”).

<sup>12</sup> *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”).

<sup>13</sup> *Id.* at 612-13; see also *Joffroin v. Tufaro*, 606 F.3d 235 (5th Cir. 2010) (holding that the members of a homeowners association did not have RICO standing where the members’ alleged injury merely derived from the injury to the association); *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”).

legal or beneficial interest in property.”<sup>14</sup> This has been interpreted liberally to include natural persons, partnerships, joint ventures, corporations, state governmental units, and even foreign governments.<sup>15</sup> 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.<sup>16</sup> *Qui tam* actions (where the plaintiff purports to sue on behalf of the government and himself) may not be asserted under RICO.<sup>17</sup> Also, unincorporated associations do not have RICO standing unless they are permitted to hold an interest in property under state or federal law.<sup>18</sup>

The Second Circuit has held that the United States government is not a “person” capable of seeking civil remedies under § 1964(c).<sup>19</sup> In *Bonanno*, the Second Circuit expressed concern that if the federal government were a person entitled to bring suit under § 1964(c), it could also be subject to civil suits under the statute.<sup>20</sup> The court noted that § 7 of the Sherman Act,<sup>21</sup> on

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<sup>14</sup> 18 U.S.C.A. § 1961(3).

<sup>15</sup> See, e.g., *Alcorn Cnty. 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 (6th Cir. 1989) (permitting county to bring RICO action against city for overcharges for sewage services); *Ill. 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 the Phil. v. Marcos*, 862 F.2d 1355 (9th Cir. 1988) (permitting foreign government to assert RICO claim against former president and others for transferring assets out of country); *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).

<sup>16</sup> See *New York ex rel. 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) (“RICO does not authorize a state to obtain relief on account of a fraud practiced against its residents”); *Illinois v. Life of Mid-America Ins. Co.*, 805 F.2d 763, 766-67 (7th Cir. 1986) (holding that state lacked RICO standing where insurance fraud allegedly injured elderly state residents, rather than the state itself); *City of Milwaukee v. Universal Mortg. Corp.*, 692 F. Supp. 992, 998-99 (E.D. Wis. 1988) (noting that “ripples formed by the splash of a RICO crime inevitably touch the workings of governmental bodies and the well-being of its citizens; courts should be particularly wary of RICO claims based on damages to a government’s ‘policy’”).

<sup>17</sup> See *United States ex rel. Kalish v. Desnick*, No. 91-CV-2288, 1992 WL 32185 (N.D. Ill. Feb. 18, 1992).

<sup>18</sup> Compare *Fleischhauer v. Feltner*, 879 F.2d 1290 (6th Cir. 1989) (denying standing to entity where corporate charter was never filed), with *Jund v. Town of Hempstead*, 941 F.2d 1271 (2d Cir. 1991) (recognizing standing of local political committees because state law permitted such committees to hold property).

<sup>19</sup> *United States v. Bonanno Organized Crime Family*, 879 F.2d 20 (2d Cir. 1989), *abrogated by Cleveland v. United States*, 531 U.S. 12 (2000).

<sup>20</sup> *Id.* at 23.

which § 1964(c) is modeled, does not authorize actions by the government.<sup>22</sup> The court concluded that the structure of RICO suggests a remedial scheme whereby the United States may pursue criminal actions, while private citizens may pursue civil actions for treble damages.<sup>23</sup> The court observed that while the United States cannot sue under Section 1964(c), it can sue under § 1964(b), which does not provide for treble damages.<sup>24</sup>

As a general proposition, foreign governments are considered “persons” within the meaning of § 1964(c) and thus have standing to bring RICO claims.<sup>25</sup> In *Attorney General of Canada v. RJ Reynolds Tobacco Holdings, Inc.*,<sup>26</sup> 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. The court noted that as a foreign sovereign, the government of Canada had standing to bring a RICO claim.<sup>27</sup> The court nevertheless dismissed the claim based on alleged lost revenue, because to assess these damages the court would have to pass on the validity and application of Canadian revenue laws, in violation of the “revenue” rule abstention doctrine.<sup>28</sup> The court also dismissed the claim based on increased law enforcement

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<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> *Id.* at 24.

<sup>24</sup> *Id.* at 22-23. 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)).

<sup>25</sup> See, e.g., *Republic of the Phil. 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).

<sup>26</sup> *Attorney General of Canada v. R.J. Reynolds Tobacco Holdings, Inc.*, 103 F. Supp. 2d 134 (N.D.N.Y. 2000), judgment *aff’d*, 268 F.3d 103 (2d Cir. 2001).

<sup>27</sup> *Id.* at 147-50; see also *European Cmty. v. RJR Nabisco, Inc.*, 150 F. Supp. 2d 456, 487 (E.D.N.Y. 2001) (although denying standing to bring RICO claim on the basis that foreign sovereign had failed to allege cognizable injury to its business or property, court noted that foreign sovereign is a “person” within the meaning of Section 1964(c) and thus entitled to bring RICO claim).

<sup>28</sup> *Attorney General of Canada v. R.J. Reynolds Tobacco Holdings, Inc.*, 103 F. Supp. 2d at 143.

costs on the ground that governmental entities “cannot recover for injuries to their general economy or their ability to carry out their functions.”<sup>29</sup>

## § 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 mean pecuniary injury to a proprietary interest.<sup>30</sup> In other words, a plaintiff must show a concrete financial loss.<sup>31</sup> The injury also must be “ascertainable and definable,” such as when a plaintiff is deprived of its ability to use or transfer property.<sup>32</sup> Listed below are examples of cases where the alleged injury was sufficient<sup>33</sup> and insufficient.<sup>34</sup> In general, courts will not reach the issue of whether there has been sufficient injury where a plaintiff fails to show that a predicate act has been committed.<sup>35</sup>

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<sup>29</sup> *Id.* at 153-55.

<sup>30</sup> *See, e.g., Grogan v. Platt*, 835 F.2d 844, 848 (11th Cir. 1988).

<sup>31</sup> *See In re Taxable Mun. Bond Secs. Litig.*, 51 F.3d 518, 523 (5th Cir. 1995); *Fleischhauer v. Feltner*, 879 F.2d 1290, 1299 (6th Cir. 1989); *Imagineering, Inc. v. Kiewit Pac. Co.*, 976 F.2d 1303, 1310 (9th Cir. 1992); *Berg v. First State Ins. Co.*, 915 F.2d 460, 464 (9th Cir. 1990); *In re Bridgestone/Firestone, Inc. Tires Prods. Liab. Litig.*, 155 F. Supp. 2d 1069, 1090 (S.D. Ind. 2001) (dismissing RICO claim against car and tire manufacturers in defective tire class action because threat of future harm and diminished value of cars and tires was insufficient to establish concrete monetary loss), *rev'd on other grounds*, 288 F.3d 1012 (7th Cir. 2002); *Jersevic v. Kuhl*, No. 00-CV-10113, 2002 WL 84624, at \*5 (E.D. Mich. Jan. 4, 2002) (dismissing RICO claim based on alleged extortion where plaintiff refused to pay any extortion money).

<sup>32</sup> *See Isaak v. Trumbull Sav. & 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).

<sup>33</sup> *See Brandenburg v. Seidel*, 859 F.2d 1179, 1187 (4th Cir. 1988), rejected on other grounds by *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706 (1996); *BCS Servs., Inc. v. BG Invs., Inc.*, 728 F.3d 633 (7th Cir. 2013) (lost profits from not being awarded tax liens); *Haroco, Inc. v. Am. Nat'l Bank & Trust Co. of Chicago*, 747 F.2d 384, 398 (7th Cir. 1984), *decision aff'd*, 473 U.S. 606 (1985) (excessive interest charges); *Miller v. Glen & Helen Aircraft, Inc.*, 777 F.2d 496, 498-99 (9th Cir. 1985) (depletion of settlement amount of pending lawsuit); *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”); *Robbins v. Wilkie*, 300 F.3d 1208, 1211 (10th Cir. 2002) (economic injury from interference with business and property damage); *Williams v. Mohawk Indus., Inc.*, 465 F.3d 1277 (workers alleging reduced wages from hiring illegal workers sufficiently alleged injury to their “business interests”). *Planned Parenthood of Columbia/Willamette, Inc. v. Am. Coal. of Life Activists*, 945 F. Supp. 1355, 1383 (D. Or. 1996) (abortion providers’ decreased business or increased cost of doing business sufficient financial loss to confer standing); *Rodonich v. House Wreckers Union, Local 95*, 627 F. Supp. 176, 180 (S.D.N.Y. 1985) (lost wages).

<sup>34</sup> *See Oygard v. Town of Coventry*, 166 F.3d 1201 (2d Cir. 1998) (unpublished table decision) (no standing where plaintiff failed to allege any “concrete financial loss” in property value from removal of radio tower from

## § 29 Injuries to Intangible Assets

In *McNally v. United States*,<sup>36</sup> 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 held that the mail fraud statute protects traditional property rights, “but does not refer to the intangible right of the citizenry to good government.”<sup>37</sup>

In 1988, Congress voided the *McNally* “intangible rights” limitation by amending the mail fraud

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defendant’s property); *First Nationwide Bank v. Gelt Funding Corp.*, 27 F.3d 763, 769-70 (2d Cir. 1994) (“risk of loss” is not injury ripe for RICO claim); *In re Taxable Mun. Bond Sec. Litig.*, 51 F.3d at 522 (farmer’s “lost opportunity” to obtain loan insufficient to constitute injury for RICO standing); *Grantham & Mann, Inc. v. Am. Safety Prods., Inc.*, 831 F.2d 596, 604-06 (6th Cir. 1987) (plaintiff failed to show actual lost profits); *Illinois ex rel. Ryan v. Brown*, 227 F.3d 1042, 1045 (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, 472 (7th Cir. 1997) (because plaintiffs failed to show economic loss, they were without standing to recover civil damages under RICO); *Avalos v. Baca*, 596 F.3d 583 (9th Cir. 2010) (holding that, even if the right to file a cause of action is a property right under California law, the plaintiff suffered no injury to that property right because he was not denied access to the courts); *Guerrero v. Gates*, 357 F.3d 911, 920-21 (9th Cir. 2004) (lost earnings from wrongful incarceration treated as personal injury rather than concrete injury to business or property), *opinion withdrawn and superseded on denial of reh’g*, 442 F.3d 697 (9th Cir. 2006); *Diaz v. Gates*, 354 F.3d 1169, 1171-74 (9th Cir. 2004), *opinion amended and superseded*, 380 F.3d 480 (9th Cir. 2004), *on reh’g*, 420 F.3d 897 (9th Cir. 2005) (*en banc*) (same); *Allum v. BankAmerica Corp.*, 156 F.3d 1235 (9th Cir. 1998) (unpublished table decision) (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 (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); *Kaiser Cement Corp. v. Fischbach & Moore, Inc.*, 793 F.2d 1100, 1104-05 (9th Cir. 1986) (plaintiff failed to show pecuniary injury from bid-rigging); *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).

<sup>35</sup> See, e.g., *Semiconductor Energy Lab. Co. v. Samsung Elecs. Co.*, 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 [could not] 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); *Doug Grant, Inc. v. Greate Bay Casino Corp.*, 232 F.3d 173, 185, 187-88 (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 where players could have avoided injury altogether by walking away from the blackjack table).

<sup>36</sup> *McNally v. United States*, 483 U.S. 350 (1987).

<sup>37</sup> *Id.* at 356.

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.”<sup>38</sup>

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 § 1964(c). In *Skilling v. United States*, the Supreme Court ruled that in enacting § 1346, Congress intended to reinstate the body of pre-*McNally* honest services law, but held that § 1346 only proscribes bribes and kickbacks and nothing more.<sup>39</sup>

Plaintiffs have been allowed to bring RICO actions for acts of public corruption that resulted in pecuniary injury to them.<sup>40</sup> In contrast, injuries to “expectancy interests” and “intangible property” interests do not confer RICO standing. For example, in *Price v. Pinnacle Brands, Inc.*,<sup>41</sup> the Fifth Circuit stated that buyers of sports trading cards who had hoped to receive card packages containing “chase” or valuable cards may have suffered injury to “expectancy interests” or to an “intangible property interest,” but that kind of injury is

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<sup>38</sup> 18 U.S.C.A. § 1346. After Congress ratified “honest services” mail fraud, a three-way circuit split 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). In the 2010 case of *Skilling v. United States*, the Supreme Court resolved this long-standing confusion by holding that 18 U.S.C. § 1346 criminalizes only schemes to defraud that involve bribery or kickbacks. 130 S. Ct. 2896, 2931 (2010). The Court acknowledged that reading the statute to proscribe a wider range of offensive conduct “would raise the due process concerns underlying the vagueness doctrine.” *Id.*

<sup>39</sup> *Skilling v. United States*, 130 S. Ct. 2896, 2931-32 (2010).

<sup>40</sup> See *Env'tl. Tectonics v. W.S. Kirkpatrick, Inc.*, 847 F.2d 1052, 1067 (3d Cir. 1988) (business competitor had standing to challenge defendant’s alleged use of bribery of foreign government officials to obtain contracts), *judgment aff’d*, 493 U.S. 400 (1990); *Town of Kearny v. Hudson Meadows Urban Renewal Corp.*, 829 F.2d 1263, 1268 (3d Cir. 1987) (land developer allowed to bring RICO action for injuries sustained from defendants’ bribery of town officials); *Bieter Co. v. Blomquist*, 987 F.2d 1319, 1327 (8th Cir. 1993) (permitting builder to pursue RICO claim where alleged bribery of public officials raised issue of fact concerning proximate cause of builder’s injury from failure to obtain rezoning). But see *Anderson v. Ayling*, 396 F.3d at 271 (union members’ asserted injury from alleged corruption of local union did not create concrete financial loss).

<sup>41</sup> *Price v. Pinnacle Brands, Inc.*, 138 F.3d 602, 606-07 (5th Cir. 1998).

insufficient to confer RICO standing.<sup>42</sup> The court 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.<sup>43</sup>

In *Cleveland v. United States*,<sup>44</sup> 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,<sup>45</sup> Third,<sup>46</sup> and Fifth<sup>47</sup> 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 § 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 (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,<sup>48</sup> and although the Seventh Circuit has ruled that a business competitor’s lost customers may give

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<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> *Cleveland v. United States*, 531 U.S. 12, 15 (2000).

<sup>45</sup> *United States v. Bucuvalas*, 970 F.2d 937, 945 (1st Cir. 1992), *abrogated by Cleveland v. United States*, 531 U.S. 12 (2000).

<sup>46</sup> *United States v. Martinez*, 905 F.2d 709, 713-15 (3d Cir. 1990), *abrogated by Cleveland v. United States*, 531 U.S. 12 (2000).

<sup>47</sup> *United States v. Salvatore*, 110 F.3d 1131, 1143 (5th Cir. 1997), *abrogated by Cleveland v. United States*, 531 U.S. 12 (2000).

<sup>48</sup> *Oscar v. Univ. Students Co-op. Ass’n*, 965 F.2d 783, 785 (9th Cir. 1992); *Lancaster Cmty. Hosp. v. Antelope Valley Hosp. Dist.*, 940 F.2d 397, 406 (9th Cir. 1991). Accord *Kimm v. Lee*, No. 04 Civ 5724, 2005 WL 89386 (S.D.N.Y. Jan. 13, 2005) (harm to reputation and resulting inability to secure employment deemed personal injury rather than injury to business or property). Cf. *Living Designs, Inc. v. E.I. Dupont de Nemours & Co.*, 431 F.3d 353, 364 (9th Cir. 2005) (holding that alleged fraudulently induced “deflated settlement” was sufficient financial loss to constitute cognizable injury under RICO).

rise to compensable injury, the competitor cannot sue under RICO unless it was the party deceived by the scheme to defraud.<sup>49</sup> Other courts, however, have permitted business plaintiffs to recover for pecuniary injuries to intangible business assets.<sup>50</sup>

### § 30 Personal Injuries

Courts consistently have held that personal injury and wrongful death actions cannot provide the basis for a RICO claim.<sup>51</sup> Courts have applied the same analysis to bar RICO claims based on other nonproprietary injuries.<sup>52</sup>

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<sup>49</sup> *Israel Travel Advisory Serv., Inc. v. Israel Identity Tours, Inc.*, 61 F.3d 1250, 1257-58 (7th Cir. 1995); accord *Lancaster Cmty. Hosp.*, 940 F.2d 397.

<sup>50</sup> See, e.g., *Commercial Cleaning Servs., L.L.C. v. Colin Serv. Sys., Inc.*, 271 F.3d 374, 380-84 (2d Cir. 2001) (company had standing to assert RICO claims for lost profits against its direct competitor whose hiring of illegal immigrants allowed it to submit lower bids); *Procter & Gamble Co. v. Amway Corp.*, 242 F.3d 539, 565 (5th Cir. 2001) (reversing dismissal of RICO claims based on defendant's alleged spreading of rumor to lure plaintiff's customers away); *Alexander Grant & Co. v. Tiffany Indus., Inc.*, 770 F.2d 717, 719 (8th Cir. 1985) (injury to reputation as national accounting firm compensable under RICO); *Lewis v. Lhu*, 696 F. Supp. 723, 727 (D.D.C. 1988) (damages for reputation of telecommunications consultant caused by "smear campaign" recoverable under RICO); *Formax, Inc. v. Hostert*, 841 F.2d 388, 389-390 (Fed. Cir. 1988) (plaintiff may bring RICO action for misappropriation of trade secrets).

<sup>51</sup> See, e.g., *Genty v. Resolution Trust Corp.*, 937 F.2d 899, 918 (3d Cir. 1991) (no recovery under RICO for physical and emotional injuries due to harmful exposure to toxic waste); *Hughes v. Tobacco Inst., Inc.*, 278 F.3d 417, 422 (5th Cir. 2001) (damages from smoking-related illnesses were personal injuries, not injuries to business or property sufficient to provide basis for RICO claim); *Drake v. B.F. Goodrich Co.*, 782 F.2d 638, 644 (6th Cir. 1986) (same for damages from illness and poisoning); *Pilkington v. United Airlines*, 112 F.3d 1532, 1536 (11th Cir. 1997) (RICO plaintiffs may recover damages for harm to business and property only, not for emotional and mental distress suffered by alleged harassment following an airline pilots' strike); *Grogan v. Platt*, 835 F.2d 844, 848 (11th Cir. 1988) (monetary damages arising from personal injuries not recoverable under RICO); *Burnett v. Al Baraka Inv. and Dev. Corp.*, 274 F. Supp. 2d 86, 100-102 (D.D.C. 2003) (victims of September 11 terrorist attack suffered personal injuries, not injuries to business or property sufficient to confer RICO standing); *Dymits v. Am. Brands, Inc.*, No. 96-CV-1897, 1996 WL 751111 (N.D. Cal. Dec. 31, 1996) (damages arising from alleged physical and verbal abuse due to reminding smokers not to smoke in certain areas and injuries from second-hand smoke not recoverable under RICO); *James v. Lan-O-Tone Prods., Inc.*, No. 88-CV-7716, 1989 WL 61852 (S.D.N.Y. June 7, 1989) (same for personal injuries caused by use of defendant's product); *Raye v. Medtronic Corp.*, 696 F. Supp. 1273, 1274 (D. Minn. 1988) (same for damages from injuries caused by malfunctioning pacemaker); *McMurtry v. Brasfield*, 654 F. Supp. 1222, 1225 (E.D. Va. 1987) (same for personal injuries arising from domestic relations dispute); *Pohlot v. Pohlot*, 664 F. Supp. 112, 116 (S.D.N.Y. 1987) (same for victim of failed murder-for-hire scheme); *Campbell v. A.H. Robins Co.*, 615 F. Supp. 496, 501 (W.D. Wis. 1985) (same for injuries caused by birth control device).

<sup>52</sup> See, e.g., *Guerrero v. Gates*, 357 F.3d 911, 920-21 (9th Cir. 2004) (lost earnings from wrongful incarceration treated as personal injury rather than concrete injury to business or property), *opinion withdrawn and superseded on denial of reh'g*, 442 F.3d 697 (9th Cir. 2006); *Diaz v. Gates*, 354 F.3d 1169, 1171-74 (9th Cir. 2004) (same), *opinion amended and superseded*, 380 F.3d 480 (9th Cir. 2004), *on reh'g*, 420 F.3d 897 (9th Cir. 2005) (*en banc*) (same); *Berg v. First States Insurance*, 915 F.2d 460, 464 (9th Cir. 1990) (emotional distress not recoverable under RICO as a matter of law); *Zimmerman v. HBO Affiliate Group*, 834 F.2d 1163, 1169-70 (3d Cir. 1987) (same); *Drake v. B.F. Goodrich Co.*, 782 F.2d 638, 644 (6th Cir. 1986) (same); *Evans v. City of Chicago*, 434 F.3d 916,

In *Diaz v. Gates*,<sup>53</sup> 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.<sup>54</sup>

The Sixth Circuit applied a more restrictive reading of injury to "business or property" in *Jackson v. Sedgwick Claims Management Services, Inc.*<sup>55</sup> The court reviewed en banc whether an alleged scheme that prevented plaintiffs from pursuing claims for worker's compensation benefits for personal injuries involved an injury to their "business or property." The majority opinion held that because the plaintiffs' alleged losses from their inability to bring worker's compensation claims flowed from their personal injuries and were the same losses the plaintiffs sought for their personal injuries, they did not suffer injury to "business or property" under RICO.<sup>56</sup> The dissent criticized the majority for failing to recognize that the RICO claim was

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925-31 (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), *overruled by Hill v. Tangherlini*, 724 F.3d 965 (7th Cir. 2013); *Santana v. Cook Cnty. Bd. of Review*, 679 F.3d 614 (7th Cir. 2012) (alleged injury to tax consultant's reputation was personal and not an injury to business or property under RICO); *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). But see *Northeast Women's Ctr. v. McMonagle*, 889 F.2d 466, 471-74 (3d Cir. 1989) (damage to medical equipment caused by anti-abortion activists was sufficient injury to business or property to support RICO judgment); *Brown v. Cassens Transp. Co.*, 675 F.3d 946 (6th Cir. 2012) (alleged loss of workers' compensation benefits was a sufficient injury to property to support RICO claim); *Wooten v. Loshbough*, 649 F. Supp. 531, 534 (N.D. Ind. 1986) (RICO claim could be maintained against defendant who prevented plaintiff from collecting judgment on personal injury claim), *on reconsideration*, 738 F. Supp. 314 (N.D. Ind. 1990), *aff'd*, 951 F.2d 768 (7th Cir. 1991).

<sup>53</sup> *Diaz v. Gates*, 420 F.3d 897 (9th Cir. 2005).

<sup>54</sup> *Id.* at 900-03.

<sup>55</sup> *Jackson v. Sedgwick Claims Management Services, Inc.*, 731 F.3d 556 (6th Cir. 2013).

<sup>56</sup> *Id.* at 566.

based on the alleged deprivation of a statutory entitlement, which is a recognized property interest under state and federal law.<sup>57</sup>

### **§ 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 a significant decision, *Northeast Women’s Ctr., Inc. v. McMonagle*,<sup>58</sup> 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 medical equipment during one of the incidents (for which defendants were assessed \$887) was sufficient to establish injury to “business or property.”<sup>59</sup> 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.<sup>60</sup>

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.<sup>61</sup>

### **§ 32 Causation: “By Reason Of”**

The plaintiff’s injury must be both factually and proximately caused by the defendant’s violation of § 1962.<sup>62</sup> While the inability to show “but for” causation is fatal to a RICO claim,<sup>63</sup>

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<sup>57</sup> *Id.* at 575 (Moore, J., dissenting).

<sup>58</sup> *Northeast Women’s Ctr., Inc. v. McMonagle*, 868 F.2d 1342 (3d Cir. 1989).

<sup>59</sup> *Id.* at 1349.

<sup>60</sup> *Id.* at 1350.

<sup>61</sup> *Town of West Hartford v. Operation Rescue*, 915 F.2d 92, 103-04 (2d Cir. 1990).

<sup>62</sup> *Holmes v. Secs. Investor Prot. Corp.*, 503 U.S. at 267-74.

<sup>63</sup> See, e.g., *Walters v. McMahan*, 684 F.3d 435, 444 (4th Cir. 2012) (affirming dismissal of complaint where “the alleged injury suffered by the plaintiffs would be the same” even without the fraudulent documentation at issue); *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 table decision) (noting

factual causation is essential but not sufficient to state a RICO claim: the plaintiff also must establish legal or proximate causation.<sup>64</sup>

In *Holmes v. Secs. Investor Prot. Corp.*,<sup>65</sup> 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 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

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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).

<sup>64</sup> See *Bridge v. Phoenix Bond & Indem. Co.*, 553 U.S. 639, 653-54 (2008); *Platten v. HG Bermuda 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) (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); *Ass’n of Washington Public 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).

<sup>65</sup> *Holmes v. Secs. Investor Prot. Corp.*, 503 U.S. at 268-69.

injury was too attenuated because it arose out of the firm’s “intervening insolvency.”<sup>66</sup> 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.”<sup>67</sup> The Court cautioned that its use of the term “direct” stands for the entire common law proximate cause test.<sup>68</sup>

Recognizing that the issue of proximate cause is not always cut and dry,<sup>69</sup> 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 relied on to use RICO to deter harmful conduct, reducing the need to extend RICO recovery to those indirectly injured.<sup>70</sup>

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.<sup>71</sup> 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

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<sup>66</sup> *Id.* at 271. See also § 39 below for a discussion of the continued viability of the “target theory” of causation.

<sup>67</sup> *Holmes v. Secs. Investor Prot. Corp.*, 503 U.S. at 271.

<sup>68</sup> *Id.* at 274.

<sup>69</sup> *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 v. Phoenix Bond & Indem. Co.*, 553 U.S. 639, 654 (2008) (same).

<sup>70</sup> *Holmes v. Secs. Investor Prot. Corp.*, 503 U.S. at 269.

<sup>71</sup> *Anza v. Ideal Steel Supply Co.*, 547 U.S. 451 (2006).

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.<sup>72</sup> The Supreme Court reversed, holding that Ideal’s alleged injury was too indirect to establish proximate cause.<sup>73</sup> The Court noted that “the central question it must ask is whether the alleged violation led directly to the plaintiff’s injuries.”<sup>74</sup> 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.”<sup>75</sup>

In the 2010 case of *Hemi Group, LLC v. City of New York*, the Supreme Court reemphasized *Anza*’s “direct relationship” theory of proximate cause and definitively foreclosed a foreseeability-based RICO proximate cause requirement.<sup>76</sup> In *Hemi Group*, the plaintiff, New York City, alleged that an online cigarette merchant committed mail and wire fraud by failing to file customer information with New York State as required by law.<sup>77</sup> The City alleged that this fraud caused the loss of tens of millions of dollars in cigarette taxes that the City was unable to recover from City residents.<sup>78</sup> In a 4-1-3 opinion, the Supreme Court, relying on *Anza*, held that the City could not state a RICO claim because the conduct directly responsible for the City’s

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<sup>72</sup> *Ideal Steel Supply Corp. v. Anza*, 373 F.3d 251, 260 (2d Cir. 2004), *rev’d in part, vacated in part*, 547 U.S. 451 (2006).

<sup>73</sup> *Anza*, 547 U.S. at 456-60.

<sup>74</sup> *Id.* at 460.

<sup>75</sup> *Id.* at 470 (emphasis in original).

<sup>76</sup> *Hemi Group, LLC v. City of New York*, 559 U.S. 1 (2010).

<sup>77</sup> *Id.*

<sup>78</sup> *Id.*

harm was the customers' failure to pay taxes, not the alleged fraud, and thus the City could not show that the alleged fraud proximately caused the loss of tax revenue.<sup>79</sup>

### § 33 The Question of Reliance

In *Bridge v. Phoenix Bond & Indem. Co.*,<sup>80</sup> 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.<sup>81</sup> The Court resolved a long-running judicial debate by holding that such a plaintiff need not show that it relied on the defendant's alleged misrepresentations.

In *Bridge*, one competitor sued a second competitor, alleging that the second competitor's 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 first competitor was the only party injured, and therefore it was the party best positioned to bring a claim. The Court 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."<sup>82</sup>

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. The confusion

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<sup>79</sup> *Id.* at 18-19 (Ginsburg, J., concurring in part and concurring in the judgment) ("Without subscribing to the broader range of the Court's proximate cause analysis, I join the Court's opinion."). See also *In re Neurontin Marketing and Sales Practices Litigation*, 712 F.3d 21, 38 n.12 (1st Cir. 2013) (noting that *Hemi* "produced a 4-1-3 decision with no majority on the proximate cause question, and upholding finding that drug manufacturer's fraudulent marketing proximate caused injury to third-party payor).

<sup>80</sup> *Bridge v. Phoenix Bond & Indem. Co.*, 553 U.S. 639 (2008).

<sup>81</sup> *Id.* at 654.

<sup>82</sup> *Phoenix Bond & Indem. Co. v. Bridge*, 477 F.3d 928, 932 (7th Cir. 2007) (emphasis in original), *aff'd*, 553 U.S. 639 (2008).

arose in part because in criminal RICO cases, to which different standards apply,<sup>83</sup> the government need not show that the intended victims were actually deceived or injured.<sup>84</sup>

In *Bridge*, the Supreme Court resolved the issue, holding 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.”<sup>85</sup> 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*.”<sup>86</sup>

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.<sup>87</sup> 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.”<sup>88</sup>

The Court observed that proof of a plaintiff’s reliance on the defendant’s misrepresentations “may in some cases be sufficient to establish proximate cause . . . [however]

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<sup>83</sup> See *Midwest Grinding Co. v. Spitz*, 716 F. Supp. 1087, 1091 (N.D. Ill. 1989) (noting that “[t]he criminal sanctions of RICO, unlike the civil sanctions, do not require identification of a victim”), *aff’d*, 976 F.2d 1016 (7th Cir. 1992).

<sup>84</sup> *United States v. Stewart*, 872 F.2d 957, 960-61 (10th Cir. 1989).

<sup>85</sup> *Bridge v. Phoenix Bond & Indem. Co.*, 553 U.S. 639, 661 (2008).

<sup>86</sup> *Id.* at 657-58.

<sup>87</sup> *Id.* at 658.

<sup>88</sup> *Id.* (emphasis in original). The Court rejected the petitioners’ assertion that the county would be injured “if the taint of fraud deterred potential bidders from participating in the auction” because “that eventuality, in contrast to respondents’ direct financial injury, seems speculative and remote.” *Id.*

there is no sound reason to conclude that such proof is always necessary.”<sup>89</sup> According to the Court, “[a] contrary holding would ignore *Holmes*’ instruction that proximate cause is generally not amenable to bright-line rules.”<sup>90</sup>

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.<sup>91</sup> The Court noted that a plaintiff generally will not be able to establish the required “but-for” causation if no one relied on the misrepresentation.<sup>92</sup> Furthermore, the complete lack of reliance by someone else also may prevent the plaintiff from establish 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.”<sup>93</sup>

Thus, although in limited circumstances a plaintiff may be able to establish that it was directly injured without having relied on the alleged fraud scheme,<sup>94</sup> in most fraud-based RICO cases, a plaintiff that cannot show detrimental reliance on a fraudulent act will have difficulty demonstrating it was directly injured “by reason of” that fraudulent act.<sup>95</sup>

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<sup>89</sup> *Id.* at 659 (“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”).

<sup>90</sup> *Id.*

<sup>91</sup> *Id.* (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”).

<sup>92</sup> *Id.*

<sup>93</sup> *Id.*

<sup>94</sup> *In re ClassicStar Mare Leasing Litig.*, 727 F.3d 473 (6th Cir. 2013).

<sup>95</sup> *See, e.g., In re Actimmune Mktg. Litig.*, 614 F. Supp. 2d 1037, 1052 (N.D. Cal. 2009) (granting motion to dismiss class action RICO claim, citing *Bridge*, and stating that “[p]laintiffs have not put forth any specific allegations that anyone . . . relied on defendants’ purportedly fraudulent misrepresentations to cause the injury”), *aff’d*, 464 F. App’x 651 (9th Cir. 2011).

### § 34 Standing for Predicate Acts

In *Holmes v. Secs. Investor Prot. Corp.*,<sup>96</sup> 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 § 10(b) of the securities laws requires that a plaintiff be a purchaser or seller to bring suit, RICO does not impose the same standing limitation.<sup>97</sup>

The Supreme Court reversed, but expressly declined to address the § 10(b) standing issue.<sup>98</sup> Instead, it based its holding on principles of proximate cause.<sup>99</sup> 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 § 10(b)’s purchaser-seller requirement.<sup>100</sup>

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’s purpose of bringing “the pressure of ‘private

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<sup>96</sup> *Holmes v. Secs. Investor Prot. Corp.*, 503 U.S. 258 (1992).

<sup>97</sup> *Sec. Investor Prot. Corp. v. Vigman*, 908 F.2d 1461, 1466 (9th Cir. 1990), *rev’d*, 503 U.S. 258 (1992).

<sup>98</sup> *Holmes v. Secs. Investor Prot. Corp.*, 503 U.S. at 274-77.

<sup>99</sup> See discussion in § 32 (Causation: “by reason of”).

<sup>100</sup> 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 § 2.1.3, Predicates Based on Securities Violations Now Generally Prohibited.

attorneys general’ on a serious national problem for which public prosecutorial resources” are inadequate.<sup>101</sup> 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.<sup>102</sup>

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.<sup>103</sup> In *Israel Travel*, a business sued its competitor for making 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.<sup>104</sup> 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.<sup>105</sup> Following the Supreme Court’s decision in *Anza*, the Seventh Circuit abandoned the “zone of interests” test, finding that it no longer served an independent role.<sup>106</sup>

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<sup>101</sup> *Holmes v. Secs. Investor Prot. Corp.*, 503 U.S. 258, 283 (1992).

<sup>102</sup> *Id.* at 287-90.

<sup>103</sup> *Israel Travel Advisory Serv., Inc. v. Israel Identity Tours*, 61 F.3d 1250, 1257-58 (7th Cir. 1995); *see also Newton v. Tyson Foods, Inc.*, 207 F.3d 444, 447 (8th Cir. 2000) (holding 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 were “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).

<sup>104</sup> *Phoenix Bond & Indem. Co. v. Bridge*, 477 F.3d 928, 933 (7th Cir. 2007).

<sup>105</sup> *Israel Travel Advisory Serv., Inc.*, 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), *abrogated by Douglas Asphalt Co. v. QORE, Inc.*, 657 F.3d 1146 (11th Cir. 2011).

<sup>106</sup> *Phoenix Bond & Indem. Co.*, 477 F.3d at 933 (“Because a zone-of-interests approach so closely overlaps the law as developed in *Holmes* and *Anza*, it serves no independent role”).

### § 35 Specific Standing/Causation Issues and Applications

The following Sections 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 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.<sup>107</sup> 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

Before the Sarbanes-Oxley Act's addition of retaliation against whistleblowers as a RICO predicate act, whistleblowers lacked standing to sue under RICO because their injury stemmed from the termination of their employment, which until 2002 was not a predicate act of racketeering. For example, in *Beck v. Prupis*,<sup>108</sup> the Supreme Court held that a whistleblower 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 because the overt act in furtherance of the conspiracy—the wrongful termination—was not a RICO predicate act.<sup>109</sup>

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<sup>107</sup> *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.").

<sup>108</sup> *Beck v. Prupis*, 529 U.S. 494 (2000).

<sup>109</sup> *Beck*, 529 U.S. 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); *Burton v. Ken-Crest Servs., Inc.*, 127 F. Supp. 2d 673, 678 n.5 (E.D. Pa. 2001) (holding that an employee whose sole injury was being fired lacked standing because "termination from employment is an insufficient basis for either a 1962(c) or 1962(d) claim"); *Keady v. Nike, Inc.*, 116 F. Supp. 2d 428, 440 (S.D.N.Y. 2000) (holding that a former university employee claiming that he was forced to resign after publicly opposing alleged racketeering activity of the university's athletic apparel

The Sarbanes-Oxley Act added subsection (e) to 18 U.S.C. § 1513, one of the statutes containing RICO predicate acts:

“Whoever knowingly, with the intent to retaliate, takes any action harmful to any person, including interference with the lawful employment or livelihood of any person, for providing to a law enforcement officer any truthful information relating to the commission or possible commission of any Federal offense, shall be fined under this title or imprisoned not more than 10 years, or both.”<sup>110</sup>

In *DeGuelle v. Camilli*,<sup>111</sup> the Seventh Circuit addressed for the first time at the appellate level the effect of the Sarbanes-Oxley Act’s addition of retaliation against whistleblowers as a RICO predicate act. The Seventh Circuit reversed the district court’s finding that a former tax employee’s alleged retaliatory termination was unrelated to an alleged tax fraud scheme.<sup>112</sup> The Seventh Circuit held that “a relationship can exist between § 1513(e) predicate acts and predicate acts involving the underlying cause for such retaliation,” and although “a predicate act of retaliation will [not] always be related to the underlying wrongdoing,” it will be related “in most cases.”<sup>113</sup>

### § 37 “Loss Causation” and RICO Claims by Investors

A RICO plaintiff must show that its loss was caused by the defendants’ RICO violations rather than market factors. In *Bastian v. Petren Res. Corp.*,<sup>114</sup> 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 rejected the RICO claim because the investors did not allege that “defendants’ violations

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manufacturer lacked standing because his injury stemmed from his “constructive discharge ... an act that itself is not independently wrongful under RICO”), *judgment aff’d in part, vacated in part*, 23 F. App’x 29 (2d Cir. 2001)

<sup>110</sup> 18 U.S.C. § 1513(e).

<sup>111</sup> *DeGuelle v. Camilli*, 664 F.3d 192 (7th Cir. 2011).

<sup>112</sup> *Id.* at 204.

<sup>113</sup> *Id.* at 201.

<sup>114</sup> *Bastian v. Petren Res. Corp.*, 892 F.2d 680 (7th Cir. 1990).

of the RICO statute caused the investment loss that the plaintiffs seek by this lawsuit to recoup.”<sup>115</sup> The panel reasoned that “if 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.”<sup>116</sup>

In *First Nationwide Bank v. Gelt Funding Corp.*,<sup>117</sup> the Second Circuit reaffirmed the need for a RICO plaintiff to show both “transactional” (but for) and “loss” (proximate) causation with particularity. In *Gelt Funding*, the Second Circuit 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.<sup>118</sup>

### § 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.<sup>119</sup> Before the passage of the Reform Act, several courts of appeals held that shareholders lack standing to bring a RICO suit for diminution in the value of their stock because they cannot allege a direct personal injury distinct from that suffered by the corporation.<sup>120</sup> These decisions are based on the common law

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<sup>115</sup> *Id.* at 686.

<sup>116</sup> *Id.*; see also *Cont’l Assurance Co. v. Geothermal Res. Int’l, Inc.*, No. 89-CV-8858, 1991 WL 202378 (N.D. Ill. Sept. 30, 1991) (dismissing RICO claim based on misleading prospectus that induced investors to purchase stock—“showing that others motivated you to make a bad investment is not the same thing as showing they caused the investment to go sour”).

<sup>117</sup> *First Nationwide Bank v. Gelt Funding Corp.*, 27 F.3d 763 (2d Cir. 1994).

<sup>118</sup> *Id.* at 772.

<sup>119</sup> See § 7 (predicates based on securities violations now generally prohibited).

<sup>120</sup> 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

principle that shareholders generally cannot assert on their own behalf claims that belong to the corporation.<sup>121</sup> 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.<sup>122</sup> But shareholders do have standing to sue for personal, nonderivative injuries.<sup>123</sup>

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firm”); *NCNB Nat’l Bank of North Carolina v. Tiller*, 814 F.2d 931, 937 (4th Cir. 1987), *overruled on other grounds by*, *Busby v. Crown Supply, Inc.*, 896 F.2d 833 (4th Cir. 1990); *Whalen v. Carter*, 954 F.2d 1087, 1091-92 (5th Cir. 1992); *Warren v. Mfrs. Nat’l Bank of Detroit*, 759 F.2d 542, 544 (6th Cir. 1994); *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., Inc. 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); *see also Lakonia Mgmt. Ltd. v. Meriwether*, 106 F. Supp. 2d 540, 551-52 (S.D.N.Y. 2000) (dismissing claims under Sections 1962(b) and (d) and holding that a shareholder lacked standing to assert RICO claims for decreased value of corporation’s equity interest in hedge fund because his injury was derivative to that of the corporation); *Esposito v. Soskin*, 11 F. Supp. 2d 976, 978-79 (N.D. Ill. 1998) (holding that plaintiffs suing in their individual capacities did not have RICO standing because alleged injuries from the firm’s being undercapitalized and from misrepresentations to tax authorities were injuries to the firm, not to plaintiffs individually).

<sup>121</sup> *See Ocean Energy II, Inc. v. Alexander & Alexander, Inc.*, 868 F.2d 740, 744-45 (5th Cir. 1989).

<sup>122</sup> *See In re Am. Express Co. S’holder Litig.*, 39 F.3d 395 (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 (7th Cir. 1994) (corporation does not have standing to sue for damages allegedly accruing from actions of its directors and officers against third parties).

<sup>123</sup> *See, e.g., Stooksbury v. Ross*, 528 F. App’x 547 (6th Cir. 2013) (where the defendant operated LLC as his alter ego and induced the plaintiff to invest, the corporate form was a nullity and the plaintiff could sue to recover his injuries); *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); *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., L.P. 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 company’s 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, 412 (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); *Klapper v. Commonwealth Realty Trust*, 657 F. Supp. 948, 953-54 (D. Del. 1987) (shareholders in a real estate investment trust may bring a RICO action seeking recovery of diminution in share price because shareholders of trust have greater tax liability and more direct access to income than corporate shareholders).

### § 39 Competitors

Prior to *Anza*<sup>124</sup> and *Bridge*,<sup>125</sup> courts disagreed as to whether competitors who are commercially disadvantaged by reason of the criminal operations of their competitors may sue under RICO.<sup>126</sup>

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.<sup>127</sup> 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.<sup>128</sup>

In *Ideal Steel Supply Corp. v. Anza*,<sup>129</sup> 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

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<sup>124</sup> *Anza v. Ideal Steel Supply Corp.*, 547 U.S. 451 (2006).

<sup>125</sup> *Bridge v. Phoenix Bond & Indem. Co.*, 553 U.S. 639 (2008).

<sup>126</sup> *Commercial Cleaning Servs., L.L.C. v. Colin Serv. Sys.*, 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 Atlantic 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 & Indem. Co. v. Bridge*, 477 F.3d at 933 (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*, 61 F.3d 1250, 1258 (7th Cir. 1995).

<sup>127</sup> *Ideal Steel Supply Corp. v. Anza*, 373 F.3d 251, 261 (2d Cir. 2004), *rev'd in part, vacated in part*, 547 U.S. 451 (2006); *Baisch v. Gallina*, 346 F.3d at 372.

<sup>128</sup> *Israel Travel Advisory Serv., Inc.*, 61 F.3d at 1258.

<sup>129</sup> *Ideal Steel Supply Corp.*, 373 F.3d 251.

since plaintiff did not rely on defendant's misrepresentations.<sup>130</sup> The Second Circuit reversed and held that the plaintiff in that case had standing. The Second Circuit reasoned that the defendant's 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."<sup>131</sup> 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.<sup>132</sup>

But the Supreme Court reversed the Second Circuit's decision in *Anza*, putting into question the viability of the "target theory" of causation.<sup>133</sup> The Court held that under *Holmes*, the competitive injury alleged in *Anza* was too indirect to establish proximate cause.<sup>134</sup> 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 which would be easier to ascertain than the lost profits alleged by the plaintiff, *Ideal*.<sup>135</sup> The Court concluded 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."<sup>136</sup>

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<sup>130</sup>

*Id.*

<sup>131</sup>

*Id.* at 263.

<sup>132</sup>

*Id.* at 262-63.

<sup>133</sup>

*Anza v. Ideal Steel Supply Co.*, 547 U.S. 451, 456-57 (2006).

<sup>134</sup>

*Id.*

<sup>135</sup>

*Id.* at 458.

<sup>136</sup>

*Id.*

With respect to the Second Circuit’s reliance on a “target theory” of causation, the Supreme Court instructed in *Anza* that “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.”<sup>137</sup> 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.”<sup>138</sup> Because the Court held that Ideal failed to allege a sufficiently direct injury to establish proximate cause, it did not address whether reliance is required to establish proximate cause in RICO cases predicated on mail or wire fraud.<sup>139</sup>

As discussed in § 33, the Supreme Court later resolved this issue in *Bridge* by holding that a plaintiff asserting a RICO claim predicated on mail fraud need not establish that it relied on defendant’s alleged misrepresentations.<sup>140</sup> 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 *Holmes and Anza*.”<sup>141</sup>

The Court ruled 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

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<sup>137</sup> *Id.* at 460-61.

<sup>138</sup> *Id.*

<sup>139</sup> *Id.*

<sup>140</sup> *Bridge v. Phoenix Bond & Indem. Co.*, 553 U.S. 639, 657-58 (2008).

<sup>141</sup> *Id.*

“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.”<sup>142</sup>

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 § 1964(c)’s proximate-cause requirement.”<sup>143</sup> 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.<sup>144</sup>

#### § 40 Creditors

Some courts, including the United States Supreme Court, have held that third parties, such as creditors, do not have standing to bring individual RICO claims against corporate officers and directors for acts that dissipated the corporation’s assets.<sup>145</sup> In *Bankers Trust Co. v. Rhoades*, however, the Second Circuit held that a creditor of a corporation may assert RICO

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<sup>142</sup> *Id.* at 658.

<sup>143</sup> *Id.* at 659.

<sup>144</sup> *Israel Travel Advisory Serv., Inc. v. Israel Identity Tours*, 61 F.3d 1250, 1257-58 (7th Cir. 1995); but see *Procter & Gamble Co. v. Amway*, 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); see also *Johnson Elec. N. Am. Inc. v. Mabuchi Motor Am. Corp.*, 98 F. Supp. 2d 480 (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).

<sup>145</sup> See, e.g., *Holmes v. Secs. Investor Prot. Corp.*, 503 U.S. 258, 270-74 (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) (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); *Dana Molded Products Inc. v. Brodner*, 58 B.R. 576, 580-581 (N.D. Ill. 1986) (judgment creditor could not bring RICO claim against debtor corporation because it suffered no injury separate from that of the bankruptcy estate). See also *Mid-State Fertilizer Co. v. Exch. Nat’l Bank of Chicago*, 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 Case Numbered SPR 02211*, 443 F.3d 1172, 1177 (9th Cir. 2006) (creditor of estate in bankruptcy proceedings did not have standing to bring RICO claim on behalf of estate).

claims against its officers for dissipation of assets, a cause of action that ordinarily could only be asserted by the debtor corporation.<sup>146</sup> Some courts have distinguished *Rhodes* on the ground that the misrepresentations at issue in that case were made directly to the creditor to procure forgiveness of additional debt in a Chapter 11 proceeding.<sup>147</sup> Similarly, in *L'Europeenne de Banque v. La Republica de Venezuela*,<sup>148</sup> which relied on *Rhoades*, creditors claimed that an officer's fraud induced them to forego judicial remedies.

The Second Circuit also recognized the standing of a creditor to assert a RICO claim in *GICC Capital Corp. v. Tech. Fin. Group, Inc.*<sup>149</sup> In *GICC*, the defendant corporation settled unrelated litigation with GICC by issuing GICC a \$500,000 promissory note. The creditor alleged that when 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 ruled that the timing of the note (issued just after the alleged looting began), the size 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.<sup>150</sup>

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<sup>146</sup> *Bankers Trust Co. v. Rhoades*, 859 F.2d 1096, 1101 (2d Cir. 1988). See also *BRS Assocs., L.P.*, 246 B.R. at 769 (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).

<sup>147</sup> See *Ocean Energy II, Inc. v. Alexander & Alexander, Inc.*, 868 F.2d 740, 746 (5th Cir. 1989).

<sup>148</sup> *L'Europeenne de Banque v. La Republica de Venezuela*, 700 F. Supp. 114, 118 (S.D.N.Y. 1988).

<sup>149</sup> *GICC Capital Corp. v. Tech. Fin. Group, Inc.*, 30 F.3d 289 (2d Cir. 1994).

<sup>150</sup> *Id.* at 292-93.

## § 41 Limited Partners

Courts have consistently held that limited partners have no standing to sue for injuries to the limited partnership.<sup>151</sup> Courts have fashioned two narrow exceptions to the general rule. First, a limited partner has standing to recover for direct personal distributions it would have received.<sup>152</sup> 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.<sup>153</sup>

## § 42 Bankruptcy Trustees

Consistent 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.<sup>154</sup> A bankruptcy trustee may allow the debtor to pursue a RICO claim, but only if the trustee effectively abandons its interest in the claim.<sup>155</sup>

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<sup>151</sup> 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) (unpublished table decision); *Toto v. McMahan, Brafman, Morgan & Co.*, No. 93-CV-5894, 1997 WL 458764 at \*4 (S.D.N.Y. Aug. 11, 1997); *Levine v. Prudential Bache Props., Inc.*, 855 F. Supp. 924, 939 (N.D. Ill. 1994); *Attick v. Valeria Assocs., L.P.*, 835 F. Supp. 103, 110 (S.D.N.Y. 1992); *Ball v. Field*, No. 90 C 4383, 1992 WL 57187 at \*11 (N.D. Ill. Mar. 19, 1992). Cf. *Efron v. Embassy Suites (Puerto Rico), Inc.*, 223 F.3d 12, 17 (1st Cir. 2000) (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).

<sup>152</sup> See *Lincoln Nat'l Life Ins. Co.*, 966 F.Supp. at 619 (permitting suit for direct injury, but not for indirect injury to partnership).

<sup>153</sup> *Gagan v. Am. Cablevision, Inc.*, 77 F.3d 951 (7th Cir. 1996); *Stooksbury v. Ross*, 528 F. App'x 547 (6th Cir. 2013) (member of LLC had standing to sue where the defendant operated the LLC as his alter ego, making it a legal nullity).

<sup>154</sup> See *Detrick v. Panalpina, Inc.*, 108 F.3d 529, 535-36 (4th Cir. 1997) (holding that because once plaintiffs filed for bankruptcy, standing belonged solely to the bankruptcy trustees); *In re Ahead by a Length, Inc.*, 100 B.R. 157, 172 (Bankr. S.D.N.Y. 1989); *Zimmerman v. Duggan*, 86 B.R. 47, 50 (E.D. Pa. 1988); *Dana Molded Prods. v. Brodner*, 58 B.R. 576, 580 (N.D. Ill. 1986); see also *In re Tri-Star Techs. Co.*, 257 B.R. 629, 640 (Bankr. D. Mass. 2001) (holding that trustee of debtor corporation's Chapter 7 estate had standing to bring a RICO claim "if, and only if, the Debtor was injured by the conduct constituting the violation").

<sup>155</sup> *Turner v. Cook*, 362 F.3d 1219, 1225-26 (9th Cir. 2004).

### § 43 Insurance Policy Holders

Insureds who have been personally defrauded into buying insurance from an insolvent insurer may sue under § 1962(c).<sup>156</sup>

### § 44 Utility Customers

Generally, utility customers lack standing to sue the utility for money that the customers lost as the result of fraudulent utility rates. If the customer is challenging the reasonableness of the utility rate, the “filed rate” doctrine usually applies to preclude litigation.<sup>157</sup> Under the filed rate doctrine, the customer has no legal right to be charged a lower utility rate than what has been defined by the legislative scheme.<sup>158</sup> However, when the customer attempts to *enforce* rather than *attack* a filed rate, courts may allow the customer to sue on the ground that utilities are not exempt from RICO claims.<sup>159</sup>

### § 45 Union Members

Courts have dismissed RICO claims brought by individual union members alleging misconduct by union leaders on the ground that any injury resulting from such misconduct is suffered by the union, not by the individual members bringing suit.<sup>160</sup> However, union members

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<sup>156</sup> 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).

<sup>157</sup> See *Taffet v. Southern Co.*, 967 F.2d 1483, 1488 (11th Cir. 1992); *Black Radio Network, Inc. v. NYNEX Corp.*, 44 F. Supp. 2d 565, 573 (S.D.N.Y. 1999).

<sup>158</sup> *Id.* at 1488-90.

<sup>159</sup> *Black Radio Network, Inc.*, 44 F. Supp. 2d at 574-75; *Drew v. MCI Worldcom Mgmt. Co.*, No. 99-CV-1355, 1999 WL 1087470 at \*1 (N.D. Tex. Dec. 1, 1999).

<sup>160</sup> See *Bass v. Campagnone*, 838 F.2d 10, 13 (1st Cir. 1988); *Adams-Lundy v. Ass’n of Prof’l Flight Attendants*, 844 F.2d 245, 250 (5th Cir. 1988); *Mayes v. Local*, 106, No. 93-CV-0716, 1999 WL 60135 (N.D.N.Y. Feb. 5, 1999) (holding that plaintiff lacks RICO standing when injuries such as pension fund overpayments for selected officers did not injure him alone, but are of the type suffered by the union as a whole), *aff’d*, 201 F.3d 431 (2d Cir. 1999) (unpublished table decision); *N.J. Carpenters Health Fund v. Philip Morris, Inc.*, 17 F. Supp. 2d 324, 336-339 (D.N.J. 1998) (holding that multiple-employer health and welfare funds cannot recover damages from tobacco firms for fraud directed at the fund participants, though funds can recover for injury to their own business or property),

who are directly injured by reason of the alleged RICO scheme may have standing to pursue the claim.<sup>161</sup>

#### **§ 46 Thrift Depositors**

Because damages to a failed savings and loan are assets of the institution, thrift depositors generally do not have standing to assert RICO claims for such damages.<sup>162</sup>

#### **§ 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.<sup>163</sup> On the other hand, government entities that lose tax revenue because of a RICO scheme may have standing to recover those losses.<sup>164</sup>

#### **§ 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, to be

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*overruled on other grounds by Steamfitters Local Union No. 420 Welfare Fund v. Philip Lorris, Inc.*, 171 F.3d 912, 928 (3d Cir. 1999).

<sup>161</sup> *Trollinger v. Tyson Foods, Inc.*, 370 F.3d 602, 612-18 (6th Cir. 2004) (adding that union members had standing to sue for depressed wages caused by hiring of illegal aliens).

<sup>162</sup> *See In re Sunrise Secs. 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 and dependent" on the injury to the savings and loan); *Brandenburg v. Seidel*, 859 F.2d 1179, 1191 (4th Cir. 1988) (depositors in savings and loan lacked standing to bring RICO claim against management personnel because any cause of action belonged to the savings and loan's receiver); *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) (comparing depositors to creditors and shareholders pursuing derivative claims).

<sup>163</sup> *See Ill. 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"); *Carter v. Berger*, 777 F.2d 1173, 1174 (7th Cir. 1985); *Robinson v. Pac. Ret. Servs., Inc.*, No. 04-CV-3080, 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 taxpayers suffered direct tax losses, they have standing to sue as the real parties in interest).

<sup>164</sup> *See, e.g., Ill. Dep't of Revenue v. Phillips*, 771 F.2d 312 (7th Cir. 1985); *City of New York v. Cyco.Net, Inc.*, 383 F. Supp. 2d 526, 555-56 (S.D.N.Y. 2005); *European Cmty. v. RJR Nabisco, Inc.*, 150 F. Supp. 2d at 493-500.

remedied by the trustee or other fiduciary.<sup>165</sup> 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.<sup>166</sup>

#### § 49 HMO Enrollees

In *Maio v. Aetna, Inc.*, the Third Circuit rejected efforts by patients to sue their HMO under theories that the HMO engaged in a fraudulent scheme by failing to deliver the promised “health care product,” by failing to disclose physician incentives, and causing patients to overpay for inferior health care.<sup>167</sup> 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.<sup>168</sup> The court ruled that the alleged injury to business or property was too abstract because it was “predicated exclusively on the possibility that future events might occur.”<sup>169</sup> To establish injury, the patients would have to show that they paid for and actually failed to receive the promised medical care.<sup>170</sup>

In a similar case, however, a district court in the Southern District of Florida held that patients had standing to sue their managed care insurance companies (“MCOs”) for alleged

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<sup>165</sup> See *Firestone v. Galbreath*, 747 F. Supp. 1556 (S.D. Ohio 1990), *aff’d in part*, 976 F.2d 279 (6th Cir. 1992), *certified question answered*, 67 Ohio St. 3d 87 (1993) and *aff’d in part, rev’d in part*, 25 F.3d 323 (6th Cir. 1994).

<sup>166</sup> See *Turkish v. Kasenez*, 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”).

<sup>167</sup> *Maio v. Aetna, Inc.*, 221 F.3d 472, 495 (3d Cir. 2000).

<sup>168</sup> *Id.* at 489-90.

<sup>169</sup> *Id.* at 495.

<sup>170</sup> *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”).

misrepresentations and omissions that allegedly caused them to overpay for coverage.<sup>171</sup> The patients asserted that they were “fraudulently induced to subscribe to managed care coverage that had a market value less than what [they] bargained for, namely, a policy which would not be subject to Defendants’ undisclosed fiscal policies.”<sup>172</sup> Those policies included incentives allegedly paid to doctors to limit healthcare costs.<sup>173</sup> Finding that the *Maio* court had drawn “a dichotomy between property interests and contracts and concluding that the subscriber plaintiffs in that case possessed only contractual rights rather than a property interest in their insurance coverage,”<sup>174</sup> the court determined that the court’s approach in *Maio* was “overly restrictive.”<sup>175</sup> 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.<sup>176</sup>

## § 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 standing because their injuries have been deemed to be too remote from those suffered by individuals who were more directly injured by the health risks posed by

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<sup>171</sup> *In re Managed Care Litig.*, 150 F. Supp. 2d 1330, 1339 (S.D. Fla. 2001).

<sup>172</sup> *Id.* at 1338.

<sup>173</sup> *Id.*

<sup>174</sup> *Id.*

<sup>175</sup> *Id.*

<sup>176</sup> *In Re Managed Care Litig.*, 185 F. Supp. 2d 1310 (S.D. Fla. 2002), *amended by* No. MDL 1334, 2002 WL 1359736 (S.D. Fla. Mar. 25, 2002). *See* §§ 82-85 dealing with statutory preemption of RICO claims.

tobacco consumption.<sup>177</sup> Additionally, tobacco consumers generally lack standing to pursue RICO claims because they have not been injured in their business or property.<sup>178</sup>

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<sup>177</sup> See *Allegheny Gen. Hosp. v. Philip Morris, Inc.*, 228 F.3d 429, 444 (3d Cir. 2000) (hospital lacked standing); *Tex. Carpenters Health Benefit Fund v. Philip Morris Inc.*, 199 F.3d 788, 789-790 (5th Cir. 2000) (labor union health funds lacked standing); *Int'l Bhd. of Teamsters, Local 734 Health & 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 Washington Public Hosp. Districts*, 241 F.3d at 702-03 (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 & Commercial Workers Unions, Emp’rs Health and Welfare Fund v. Philip Morris, Inc.*, 223 F.3d 1271, 1274 (11th Cir. 2000) (labor union health funds lacked standing); *Serv. Emps. Int’l Union Health & Welfare Fund v. Philip Morris Inc.*, 249 F.3d 1068, 1073-76 (D.C. Cir. 2001) (labor union health and welfare trust fund lacked standing to bring RICO claim because alleged injuries resulting from costs of treating plan members’ smoking-related illnesses were too remote to have been proximately caused by the tobacco companies); *but see N.J. 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).

<sup>178</sup> 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.”<sup>1</sup> To state a claim under § 1962(a), the plaintiff must allege sufficient facts—not merely “boilerplate” allegations—showing that the “money was used or invested in the operation of the enterprise” and that the plaintiff “suffered an injury caused by the use or investment of the racketeering income.”<sup>2</sup>

Because § 1962(a) deals with the investment in, rather than operation of, an enterprise, most courts have ruled that the “person/enterprise” distinction required under § 1962(c) does not apply to cases under § 1962(a).<sup>3</sup>

To plead a § 1962(a) claim, a plaintiff must trace its injuries to the investment of racketeering proceeds. For example, a target company has invoked Section 1962(a) to charge that an a buyer financed its stock purchases with income derived from prior acts of securities fraud.<sup>4</sup> Plaintiffs have asserted Section 1962(a) against an enterprise that invested fraudulently obtained funds in itself.<sup>5</sup> A lender stated a claim under § 1962(a) when it alleged that the defendants fraudulently obtained loans that they used to invest in their various real estate

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<sup>1</sup> 18 U.S.C.A. § 1962(a).

<sup>2</sup> *Rao v. BP Prods. N. Am., Inc.*, 589 F.3d 389, 399 (7th Cir. 2009) (affirming dismissal for failure to assert more than “boilerplate” allegations).

<sup>3</sup> See related discussion in §§ 21 and 25.

<sup>4</sup> *Spencer Cos., v. Agency Rent-A-Car, Inc.*, No. 81-CV-2097, 1981 WL 1707, at \*3 (D. Mass. Nov. 17, 1981) (note, however, that securities fraud is no longer a viable predicate act).

<sup>5</sup> *Cook v. Easy Money of Kentucky, Inc.*, 196 F. Supp. 2d 508, 514 (W.D. Ky. 2001) (holding that plaintiffs’ allegations that defendants financed fraudulent check-cashing business through the collection of prior unlawful debts adequately stated claim under Section 1962(a)); *Schiller & Schmidt, Inc. v. Wallace Computer Servs., Inc.*, 1986 WL 6256, at \*1-3 (ND. Ill. May 27, 1986).

enterprises.<sup>6</sup> Similarly, a client stated a § 1962(a) claim against an attorney who used misappropriated client funds to take control of the client's real property.<sup>7</sup>

Notwithstanding those examples, viable Section 1962(a) claims are relatively 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 § 1962(c) claim.

## § 52 Standing Under § 1962(a)

Civil RICO claims under § 1962(a) present particular standing issues. Most courts have concluded that establish standing to assert a § 1962(a) claim, 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.<sup>8</sup> The rationale underlying the majority rule is that § 1962(a) is intended to prevent the investment of racketeering income (through money laundering and similar activities) into legitimate businesses.<sup>9</sup> Although the Supreme Court has yet to resolve this issue definitively, it did note in *Beck v. Prupis*<sup>10</sup> that most courts have adopted the "investment injury" rule and that

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<sup>6</sup> *Constellation Bank, N.A. v. C.L.A. Mgmt. Co.*, No. 94-CV-0989, 1995 WL 42285, at \*3 (S.D.N.Y. Feb. 1, 1995).

<sup>7</sup> *Crowe v. Henry*, 43 F.3d 198, 205 (5th Cir. 1995).

<sup>8</sup> See, e.g., *Ouaknine 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); *Davis-Lynch, Inc. v. Moreno*, 667 F.3d 539, 550 (5th Cir. 2012); *Abraham v. Singh*, 480 F.3d 351, 356-57 (5th Cir. 2007) (rejecting claim under Section 1962(a) but allowing claim to proceed under Section 1962(c) because the alleged injury stemmed from the commission of predicate acts rather than the investment of racketeering income); *Nolen v. Nucentrix Broadband Networks, Inc.*, 293 F.3d 926, 929-30 (5th Cir. 2002); *St. Paul Mercury Ins. Co. v. Williamson*, 224 F.3d 425, 441-45 (5th Cir. 2000); *Crowe*, 43 F.3d at 205; *Vemco, Inc. v. Camardella*, 23 F.3d 129, 132 (6th Cir. 1994); *Fogie v. THORN Ams., Inc.*, 190 F.3d 889, 894-96 (8th Cir. 1999); *Wagh v. Metris Direct, Inc.*, 363 F.3d 821, 829 (9th Cir. 2003), *overruled on other grounds* by *Odom v. Microsoft Corp.*, 486 F.3d 541, 551 (9th Cir. 2007); *Nugget Hydroelectric, L.P. v. Pac. Gas & Elec. Co.*, 981 F.2d 429, 437 (9th Cir. 1992); *Grider v. Tex. Oil & Gas Corp.*, 868 F.2d 1147, 1149-52 (10th Cir. 1989); *Danielsen v. Burnside-Ott Aviation Training Ctr., Inc.*, 941 F.2d 1220, 1229-30 (D.C. Cir. 1991).

<sup>9</sup> *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).

<sup>10</sup> *Beck v. Prupis*, 529 U.S. 494 (2000).

“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.”<sup>11</sup>

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 § 1962(a) to hold that a plaintiff need not allege injury from the use or investment of racketeering proceeds.<sup>12</sup> In *Vicom, Inc. v. Harbridge Merchant Servs., Inc.*,<sup>13</sup> 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.<sup>14</sup> Most district courts have held that a plaintiff must show injury from the use or investment of racketeering income.<sup>15</sup> A minority of courts, relying upon RICO’s broad remedial purpose, have allowed § 1962(a) actions based upon injury from predicate acts.<sup>16</sup>

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<sup>11</sup> *Beck*, 529 U.S. at 506 n.9 (2000). *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 Section 1962(d), they needed only to allege agreement to violate Section 1962(a), not injury suffered as a result of investment of racketeering income).

<sup>12</sup> *Potomac Elec. Power Co. v. Elec. Motor & Supply, Inc.*, 262 F.3d 260, 264 n.2 (4th Cir. 2001); *Busby v. Crown Supply, Inc.*, 896 F.2d 833, 836-40 (4th Cir. 1990).

<sup>13</sup> *Vicom, Inc. v. Harbridge Merchant Servs., Inc.*, 20 F.3d 771, 779 n.6 (7th Cir. 1994).

<sup>14</sup> *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 Section 1962(a), but noting that some district courts within the Seventh Circuit have found that such allegations were sufficient to state a claim).

<sup>15</sup> *See, e.g., In re Terrorist Attacks on September 11, 2001*, 349 F. Supp. 2d 765, 827 (S.D.N.Y. 2005) (injuries from September 11 terrorist attacks were not caused by investment of racketeering income), *aff’d*, 714 F.3d 118 (2d Cir. 2013); *Allstate Ins. Co. v. Siegel*, 312 F. Supp. 2d 260, 271-72 (D. Conn. 2004) (explaining that plaintiff does not state Section 1962(a) by alleging injury “stemming from the predicate acts of racketeering activity and no distinct injury flowing from the investment of ill-gotten gains”); *Charleswell v. Chase Manhattan Bank, N.A.*, 308 F. Supp. 2d 545, 575 (D.V.I. 2004) (dismissing complaint that failed to distinguish injury from “defendants’ reinvestment of proceeds” from defendants’ “alleged fraudulent activities”); *Roger Whitmore’s Auto. Servs., Inc. v. Lake County*, No. 99 C 2504, 2002 WL 959587, at \*7-8 (N.D. Ill. May 9, 2002) (explaining that plaintiff’s injury must stem from investment of racketeering proceeds rather than the alleged predicate acts of racketeering); *Eby v. Producers Co-op, Inc.*, 959 F. Supp. 428, 432-33 (W.D. Mich. 1997) (injury from use or investment of racketeering

In jurisdictions that apply the “investment injury” rule, some plaintiffs have had success bringing § 1962(a) claims. For example, in *Ideal Steel Supply Corp. v. Anza*,<sup>17</sup> the Second Circuit concluded that the plaintiff stated a § 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.<sup>18</sup> There, the Second Circuit concluded that the plaintiff stated a § 1962(a) claim because the investment of racketeering income in the outlet was the direct cause of the plaintiff’s injuries.<sup>19</sup>

Generally, however, the “investment injury” rule is a substantial hurdle for plaintiffs seeking to assert § 1962(a) claims. Most courts have held that the 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 § 1962(a).<sup>20</sup> In *Vemco, Inc. v. Camardella*,<sup>21</sup> the Sixth Circuit distinguished the situation where racketeering income is invested into a separate enterprise that harms others (which may support a § 1962(a) claim) from one where the wrongdoer reinvests its racketeering proceeds so that it can continue committing predicate acts (which cannot support a § 1962(a) claim). As the Third Circuit noted in *Brittingham v. Mobil Corp.*, “If [reinvestment] were to suffice, the use-or-investment injury requirement would be

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must be alleged to state a claim under Section 1962(a)); *Slater v. Jokelson*, No. 96-CV-672, 1997 WL 164236, at \*2 (E.D. Pa. Mar. 26, 1997); *Livingston v. ITT Consumer Fin. Corp.*, 795 F. Supp. 921, 925-26 (D. Minn. 1992); *In re Sahlen & Assocs., Inc. Sec. Litig.*, 773 F. Supp. 342, 367 (S.D. Fla. 1991); *Early v. K-Tel Int’l, Inc.*, 1999 WL 181994, at \*5-6.

<sup>16</sup> See, e.g., *Larsen v. Lauriel Invs., Inc.*, 161 F. Supp. 2d 1029, 1045-46 (D. Ariz. 2001) (holding that plaintiffs adequately stated a claim under Section 1962(a) by alleging that defendants used racketeering proceeds to support the predicate acts); *Goold Elecs. Corp. v. Galaxy Elecs., Inc.*, No. 92 C 8023, 1993 WL 427727, at \*2 (N.D. Ill. Oct. 20, 1993); *Starks v. Rent-A-Center*, Civ. No. 3-89-0786, 1994 WL 577974, at \*8 (D. Minn. May 16, 1990).

<sup>17</sup> *Ideal Steel Supply Corp. v. Anza*, 652 F.3d 310 (2d Cir. 2011).

<sup>18</sup> *Id.* at 314.

<sup>19</sup> *Id.* at 327-28.

<sup>20</sup> 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. 2003), *overruled on other grounds by Odom v. Microsoft Corp.*, 486 F.3d 541 (9th Cir. 2007).

<sup>21</sup> *Vemco, Inc. v. Camardella*, 23 F.3d 129, 132-33 (6th Cir. 1994).

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.”<sup>22</sup>

The principal criticism of the “investment injury” rule is that it renders § 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 § 1962(c), and in any event, courts must defer to the clear statutory language.<sup>23</sup> Another court attributed the problem to poor drafting of § 1962(a), which was adapted from RICO’s criminal provisions in which standing considerations are not relevant.<sup>24</sup>

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<sup>22</sup> *Brittingham v. Mobil Corp.*, 943 F.2d 297, 305 (3d Cir. 1991).

<sup>23</sup> *Grider v. Tex. Oil & Gas Corp.*, 868 F.2d 1147, 1150 (10th Cir. 1989).

<sup>24</sup> *Midwest Grinding Co. v. Spitz*, 716 F. Supp. 1087, 1091 (N.D. Ill. 1989), *aff’d*, 976 F.2d 1016 (7th Cir. 1992)

## 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.<sup>1</sup> 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.’”<sup>2</sup> Still, the control or interest must be illegitimately obtained through racketeering activity.<sup>3</sup> As with § 1962(a), most courts have ruled that § 1962(b) does not require the defendant to be separate from the enterprise.<sup>4</sup>

An example of a successful Section 1962(b) claim is *Constellation Bank, N.A. v. C.L.A. Mgmt. Co.*,<sup>5</sup> where a lender stated a claim by alleging that the defendants had fraudulently

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<sup>1</sup> 18 U.S.C.A. § 1962(b).

<sup>2</sup> *Ikuno v. Yip*, 912 F.2d 306, 310 (9th Cir. 1990) (quoting *Sutliff, Inc. v. Donovan Co.*, 727 F.2d 648, 653 (7th Cir. 1984)). In *Ikuno*, the Ninth Circuit also relied on *Cincinnati Gas & Elec. Co. v. General Elec. Co.*, 656 F. Supp. 49, 85 (S.D. Ohio 1986), a case where a party was found to have control under Section 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 Section 1962(b)). But see *Cooper Industries 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 Section 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) (ruling that selling stock short does not constitute an interest in or control over an enterprise).

<sup>3</sup> *Lightning Lube, Inc. v. Witco Corp.*, 4 F.3d 1153, 1190 (3d Cir. 1993) (citing cases); *Abraham v. Singh*, 480 F.3d 351, 357 (5th Cir. 2007) (recognizing that to satisfy Section 1962(b), plaintiffs must show that 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 Organization 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), *order rev’d on other grounds*, 967 F.2d 742 (2d Cir. 1992); *In re American Honda Motor Co. Dealerships Relations Litig.*, 965 F. Supp. 716, 722-23 (D. Md. 1997) (same).

<sup>4</sup> See §§ 21, 25.

<sup>5</sup> *Constellation Bank, N.A. v. C.L.A. Mgmt. Co.*, No. 94-CV-0989, 1995 WL 42285, at \*4 (S.D.N.Y. Feb. 1, 1995).

obtained loans that they then used to acquire control over their real estate enterprise. As discussed in § 54 below, however, successful § 1962(b) claims are rare because they are subject to the same standing limitations that apply to § 1962(a) claims.

#### § 54 Standing under § 1962(b)

To have standing to assert a claim under the majority view, the plaintiff must allege that his or her injury stems not from the defendant's predicate acts (which is the basis for a § 1962(c) claim), but from the defendant's acquisition or maintenance of an interest in, or control over, the pertinent enterprise.<sup>6</sup>

The minority view is that a plaintiff may state a claim by alleging injury from the operation of the enterprise in which the defendant used or invested his racketeering proceeds (or

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<sup>6</sup> See, e.g., *Compagnie De Reassurance D'Ile de France v. New England Reinsurance Corp.*, 57 F.3d 56, 92 (1st Cir. 1995) (affirming dismissal of Section 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 Section 1962(b) claim for failure to allege injury from the "acquisition or maintenance" of an enterprise separate from the predicate acts), *judgment 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 367, 357 (5th Cir. 2007) (rejecting claim under Section 1962(b) but allowing claim to proceed under Section 1962(c) because the alleged injury stemmed from the commission of predicate acts rather than from acquisition or maintenance of control over the enterprise); *Old Time Enters., Inc. v. Int'l Coffee Corp.*, 862 F.2d 1213, 1219 (5th Cir. 1989) (plaintiff failed to show "proximate causal relationship" between acquisition of an interest in an enterprise and the damages claimed); *Advocacy Org. for Patients & Providers v. Auto Club Ins. Ass'n*, 176 F.3d 315 (6th Cir. 1999) (affirming dismissal of Section 1962(b) claim because plaintiffs failed to allege an injury resulting from the "acquisition or maintenance of an interest in or control of the alleged enterprise"); *Danielsen v. Burnside-Ott Aviation Training Center, Inc.*, 941 F.2d 1220, 1231 (D.C. Cir. 1991) (holding that Section 1962(b) requires proof of an injury from the acquisition or maintenance of an interest in or control over an enterprise). Accord *OSRecovery, Inc. v. One Groupe Int'l, Inc.*, 354 F. Supp. 2d 357, 372 (S.D.N.Y. 2005) (dismissing claims under Section 1961(a) and (b)); *Andrews Farms v. Calcot, Ltd.*, 527 F. Supp. 2d 1239 (E.D. Cal. 2007) (recognizing that to state a Section 1962(b) claim, a plaintiff must allege that (1) the defendant's activity led to its control of a RICO enterprise, and (2) the control resulted in an injury to plaintiff); *In re Motel 6 Securities Litigation*, 161 F. Supp. 2d 227, 236 (S.D.N.Y. 2001) (granting summary judgment for defendant because plaintiffs were unable to show any direct injury resulting from defendant's ownership interest in economy motel chain); *National Council of Young Israel v. Wolf*, 963 F. Supp. 276, 280 (S.D.N.Y. 1997); *Dornberger v. Metro. Life Ins. Co.*, 961 F. Supp. 506, 524-25 (S.D.N.Y. 1997); *Litton Indus., Inc. v. Lehman Bros. Kuhn Loeb Inc.*, 709 F. Supp. 438, 452 (S.D.N.Y. 1989); *Slater v. Jokelson*, No. 96-CV-672, 1997 WL 164236, at \*2-3 (E.D. Pa. Mar. 26, 1997); *Helman v. Murry's Steaks, Inc.*, 742 F. Supp. 860, 882 (D. Del. 1990); *Physicians Weight Loss Centers of America v. Creighton*, No. 90-CV-2066, 1992 WL 176992, at \*5 (N.D. Ohio Mar. 30, 1992); *U.S. Concord, Inc. v. Harris Graphics Corp.*, 757 F. Supp. 1053, 1060 (N.D. Cal. 1991) (using reasoning applied in Section 1962(a) cases to require plaintiff to show injury from defendant's acquisition or control of an interest in a RICO enterprise); *Midwest Grinding Co. v. Spitz*, 716 F. Supp. 1087, 1090-1091 (N.D. Ill. 1989), *aff'd*, 976 F.2d 1016 (7th Cir. 1992).

maintained an interest or control).<sup>7</sup> In *National Mortgage*, a California district court reasoned that, because the Supreme Court in *Sedima S.P.R.L. v. Imrex Co.*<sup>8</sup> rejected the concept of “distinct racketeering injury” in a § 1962(c) case, it should not impose the concept of specialized injury in § 1962(a) and (b) cases.<sup>9</sup>

While *National Mortgage* has been criticized,<sup>10</sup> it has not been overruled. In *Reddy v. Litton Industries*, a case arising under § 1962(a), the Ninth Circuit acknowledged the split of authority but did not decide which approach to follow.<sup>11</sup> It noted that the *National Mortgage* case, which allowed claims under §§ 1962(a) and (b) where injury stemmed from predicate acts, was decided “years before” the several appellate decisions that required a § 1962(a) plaintiff to allege an injury from the investment of racketeering income apart from any injury caused by the predicate acts.<sup>12</sup> The Ninth Circuit nevertheless did not decide the standing issue or overrule *National Mortgage* because in the case before it, the plaintiff did not show injury either from the investment of racketeering income or from predicate acts.<sup>13</sup>

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<sup>7</sup> See *In re Nat'l Mortg. Equity Corp. Mortg. 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 Section 1962(a), which requires “additional causation,” Section 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).

<sup>8</sup> *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479 (1985).

<sup>9</sup> *Nat'l Mortg.*, 682 F. Supp. at 1081-82.

<sup>10</sup> 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).

<sup>11</sup> *Reddy v. Litton Indus., Inc.*, 912 F.2d 291, 295-96 (9th Cir. 1990).

<sup>12</sup> *Id.* at 295-96.

<sup>13</sup> *Id.* at 296.

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

The remedial provisions in Section 1964(c) provide the primary rationale for the requirement that a plaintiff's injuries arise from conduct independent of the predicate acts.<sup>14</sup> Section 1964 provides that a plaintiff may recover for an injury to its business or property by reason of the violation specified in § 1962. While § 1962(c) focuses on predicate acts committed through the operation of an enterprise, §§ 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 § 1962(c) must stem from the predicate acts, injury under § 1962(a) must stem from the investment of racketeering income, and injury under § 1962(b) must stem from the acquisition of an interest in or control over an enterprise.<sup>15</sup>

A second rationale is that RICO is aimed at preventing the infiltration of legitimate businesses through racketeering activity.<sup>16</sup> 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 § 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 § 1962(c) claim).<sup>17</sup>

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 *Sedima* rejected “a ‘distinct

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<sup>14</sup> See *U.S. Concord, Inc. v. Harris Graphics*, 757 F. Supp. 1053, 1058-60 (N.D. Cal. 1991).

<sup>15</sup> *Id.*

<sup>16</sup> *Brittingham v. Mobil Corp.*, 943 F.2d 297, 303-04 (3d Cir. 1991), *overruled on other grounds by Jaguar Cars, Inc. v. Royal Oaks Motor Car Co.*, 46 F.3d 258 (3d Cir. 1995); *Vemco, Inc. v. Camardella*, 23 F.3d 129, 131-33 (6th Cir. 1994).

<sup>17</sup> *Vemco, Inc. v. Camardella*, 23 F.3d 129, 132-33 (6th Cir. 1994) (distinguishing *Newmyer v. Philatelic Leasing, Ltd.*, 888 F.2d 385 (6th Cir. 1989)).

racketeering injury’ requirement.”<sup>18</sup> This reasoning has itself been rejected because *Sedima* was a § 1962(c) case (where predicate acts are the wrongful conduct), and not a case under § 1962(a) or (b), where predicate acts are ancillary to the primary misconduct.<sup>19</sup>

The dearth of successful claims under § 1962(a) and (b) is not surprising given the nature of the civil RICO statute, which was “spot-welded” to a criminal statute where a criminal violation may exist without any identification of a victim.<sup>20</sup>

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<sup>18</sup> *In re Nat’l Mortg. Equity Corp. Mortg. Pool Certificates Sec. Litig.*, 682 F. Supp. 1073, 1081 (C.D. Cal. 1987).  
<sup>19</sup> *U.S. Concord, Inc. v. Harris Graphics*, 757 F. Supp. 1053, 1060 (N.D. Cal. 1991).  
<sup>20</sup> *P.M.F. Services, 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 § 1962.<sup>1</sup> The crux of a § 1962(d) violation is the agreement to violate the substantive portions of § 1962.<sup>2</sup> 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 . . . .”<sup>3</sup>

To state a claim under § 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.<sup>4</sup> 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.<sup>5</sup> The Ninth Circuit has ruled that the test is disjunctive.<sup>6</sup>

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<sup>1</sup> 18 U.S.C.A. § 1962(d).

<sup>2</sup> *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).

<sup>3</sup> *Salinas v. United States*, 522 U.S. 52, 65 (1997).

<sup>4</sup> *Workers Unions and Employers Midwest Health Benefits Fund v. Walgreen Co.*, 719 F.3d 849, 856 (7th Cir. 2013) (quoting *Goren v. New Vision Int’l, Inc.*, 156 F.3d 721, 732 (7th Cir. 1998)); *In re Insurance Brokerage Antitrust Litig.*, 618 F.3d 300, 373 (3d Cir. 2010).

<sup>5</sup> *Brouwer v. Raffensperger, Hughes & Co.*, 199 F.3d 961, 967 (7th Cir. 2000); *DeGuelle v. Camilli*, 664 F.3d 192, 204 (7th Cir. 2011). *Accord Crowe v. Henry*, 43 F.3d 198, 206 (5th Cir. 1995); *Rose v. Bartle*, 871 F.2d 331, 366 (3d Cir. 1989); *Gas Tech. Inst. v. Rehmat*, 524 F. Supp. 2d 1058 (N.D. Ill. 2007) (same); *Ross v. Patrusky, Mintz & Semel*, No. 90-CV-1356, 1997 WL 214957 (S.D.N.Y. Apr. 29, 1997) (same); *In re Motel 6 Secs. Litig.*, No. 93-CV-2183, 1997 WL 154011 (S.D.N.Y. Apr. 2, 1997) (outlining elements); *In re Managed Care Litig.*, 150 F. Supp. 2d 1330 (S.D. Fla. 2001).

<sup>6</sup> *See Howard v. America Online Inc.*, 208 F.3d 741, 775 (9th Cir. 2000) (holding that to establish a violation of Section 1962(d), the plaintiffs must allege either an agreement that is a substantive violation of RICO or that the defendants agreed committed, or participated in, a violation of two predicate offenses).

After the Supreme Court’s decision in *Bell Atlantic Corp v. Twombly*,<sup>7</sup> allegations of parallel conduct that could just as easily suggest independent, legitimate action, accompanied by nothing more than conclusory assertions of conspiracy, are insufficient to state a RICO conspiracy claim.<sup>8</sup> To survive a motion to dismiss, a plaintiff alleging a RICO conspiracy claim also must plausibly allege a “meeting of the minds.”<sup>9</sup>

### § 57 Agreement Concerning the Conspiracy

Before 1997, there was a split of authority as to whether each defendant in a § 1962(d) claim had to agree to personally commit at least two predicate acts. The majority view was that to violate § 1962(d), a defendant needed only to agree to join a conspiracy that had the commission of the predicate acts as its goal.<sup>10</sup> The Supreme Court finally settled the issue in 1997 in *Salinas v. United States*.<sup>11</sup> The Supreme 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.”<sup>12</sup> The Court went on to state: “The interplay between subsections (c) and (d) [of RICO] does not permit us to excuse from the reach of the conspiracy provision an actor who

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<sup>7</sup> *Bell Atl. Corp v. Twombly*, 550 U.S. 544 (2007).

<sup>8</sup> See, e.g., *American Dental Ass’n v. Cigna Corp.*, 605 F.3d 1283 (11th Cir. 2010) (citing *Bell Atlantic Corp.*, 550 U.S. 544; see also *Rao v. BP Products N. Am., Inc.*, 589 F.3d 389 (7th Cir. 2009) (affirming dismissal of RICO conspiracy claim that contained only boilerplate allegations of RICO conspiracy).

<sup>9</sup> *American Dental Ass’n*, 605 F.3d 1283 (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 557 (2007)).

<sup>10</sup> *United States v. Adams*, 759 F.2d 1099, 1116 (3d Cir. 1985); *United States v. Pryba*, 900 F.2d 748, 759-60 (4th Cir. 1990); *United States v. Joseph*, 835 F.2d 1149, 1152 (6th Cir. 1987); *United States v. Quintanilla*, 2 F.3d 1469, 1484-85 (7th Cir. 1993); *United States v. Neapolitan*, 791 F.2d 489, 498 (7th Cir. 1986); *United States v. Kragness*, 830 F.2d 842, 860 (8th Cir. 1987); *United States v. Blinder*, 10 F.3d 1468, 1477 (9th Cir. 1993); see also *Jones v. Meridian Towers Apartments, Inc.*, 816 F. Supp. 762, 772-73 (D.D.C. 1993) (adopting the majority view).

<sup>11</sup> *Salinas v. United States*, 522 U.S. 52, 63 (1997).

<sup>12</sup> *Salinas*, 522 U.S. at 63-64 (quoting Justice Holmes: “[P]lainly a person may conspire for the commission of a crime by a third person”).

does not himself commit or agree to commit the two or more predicate acts requisite to the underlying offense.”<sup>13</sup>

The Third Circuit applied *Salinas* to hold that § 1962(d) extends beyond those who have conspired to have themselves operate or manage a corrupt enterprise.<sup>14</sup> It also held that conspiracy liability is not limited only to those who are liable for a substantive violation under § 1962 upon successful completion of the scheme.<sup>15</sup> 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.”<sup>16</sup> 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.<sup>17</sup> The Second Circuit, also looking to *Salinas*, concluded that proof that an enterprise was actually established is not necessary for a conspiracy.<sup>18</sup>

The Seventh Circuit agreed in *Brouwer v. Raffensperger, Hughes & Co.*<sup>19</sup> and reconciled a perceived conflict between *Salinas* and *Reves v. Ernst & Young*,<sup>20</sup> which held that only those who operate or manage the enterprise could be liable under § 1962(c).<sup>21</sup> The Seventh Circuit had long held that conspiracy involves two agreements: an agreement to conduct or participate in the

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<sup>13</sup> *Id.* at 65.

<sup>14</sup> *Smith v. Berg*, 247 F.3d 532, 534 (3d Cir. 2001).

<sup>15</sup> *Id.*

<sup>16</sup> *Id.* at 537, *see also Connecticut General Life Ins. Co. v. New Images of Beverly Hills*, 257 F. App'x 49 (9th Cir. 2007).

<sup>17</sup> *Smith v. Berg*, 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).

<sup>18</sup> *United States v. Applins*, 637 F.3d 59, 75 (2d Cir. 2011).

<sup>19</sup> *Brouwer v. Raffensperger, Hughes & Co.*, 199 F.3d 961 (7th Cir. 2000).

<sup>20</sup> *Reves v. Ernst & Young*, 507 U.S. 170 (1993).

<sup>21</sup> *Id.* at 179.

affairs of the enterprise and an agreement to the commission of at least two predicate acts.<sup>22</sup> 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 to facilitate the activities of those who do.”<sup>23</sup>

### § 58 The Knowledge Requirement

Courts are divided over how much knowledge a defendant must have of the criminal enterprise to be a conspirator under § 1962(d). The District of Columbia Circuit and the Second Circuit have held that the plaintiff must allege that the defendant knew about and agreed to facilitate the scheme.<sup>24</sup> 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.”<sup>25</sup> 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.”<sup>26</sup> 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.”<sup>27</sup>

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<sup>22</sup> *United States v. Neapolitan*, 791 F.2d 489, 499 (7th Cir. 1986).

<sup>23</sup> *Brouwer*, 199 F.3d at 967. *See also United States v. Patrick*, 248 F.3d 11, 20 (1st Cir. 2001).

<sup>24</sup> *RSM Prod. Corp. v. Freshfields Bruckhaus Deringer U.S. LLP*, 682 F.3d 1043, 1052 (D.C. Cir. 2012) (upholding dismissal of RICO conspiracy claim because “RSM failed to allege facts sufficient to support a plausible inference that Freshfields knew of and agreed to further the bribery-racketeering conspiracy”); *Baisch v. Gallina*, 346 F.3d 366, 377 (2d Cir. 2003) (quoting *Salinas v. United States*, 522 U.S. 52, 66 (1997)).

<sup>25</sup> *Frost Nat’l Bank v. Midwest Autohaus, Inc.*, 241 F.3d 862, 869-70 (7th Cir. 2001); *see also Brouwer v. Raffensperger, Hughes & Co.*, 199F.3d 961 (7th Cir. 2000).

<sup>26</sup> *United States v. Tillet*, 763 F.2d 628, 632 (4th Cir. 1985); *United States v. Elliott*, 571 F.2d 880, 903-04 (5th Cir. 1978).

<sup>27</sup> *Dale v. Frankel*, 131 F. Supp. 2d 852, 860 (S.D. Miss. 2001) (quoting *United States v. Posada-Rios*, 158 F.3d 832, 858 (5th Cir. 1998)).

## § 59 The Need For a Violation of § 1962(a), (b), or (c)

Courts are divided over whether a plaintiff can assert a § 1962(d) claim absent a viable claim for a substantive violation of § 1962(a), (b), or (c). A number of courts have concluded that, so long as the plaintiff alleges the elements necessary for a § 1962(d) claim, the conspiracy claim can stand whether or not companion claims under another subsection of § 1962 are dismissed.<sup>28</sup> Other courts, however, have concluded that § 1962(d) claims cannot stand alone.<sup>29</sup> For example, the Ninth Circuit has held that the failure to plead the requisite elements of § 1962(a) or 1962(c) implicitly means that a plaintiff cannot plead a conspiracy to violate either section.<sup>30</sup> The key is that the conspiracy must relate to conduct that, if completed, would constitute a violation of § 1962(a), (b), or (c).<sup>31</sup> If the alleged conspiracy is based on conduct that has already occurred (as opposed to an agreement concerning future illegal conduct), that

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<sup>28</sup> See *Rose v. Bartle*, 871 F.2d 331, 366 (3d Cir. 1989); *Shearin v. E.F. Hutton Group, Inc.*, 885 F.2d 1162, 1169 (3d Cir. 1989); *Gagan v. American Cablevision, Inc.*, 77 F.3d 951, 964-65 (7th Cir. 1996); *Neibel v. Trans World Assur. Co.*, 108 F.3d 1123, 1127 (9th Cir. 1997) (Section 1962(d) claim may proceed to the jury despite a directed verdict on the Section 1962(c) claim); *United States v. Browne*, 505 F.3d 1229, 1264 (11th Cir. 2007) (recognizing that a defendant can be guilty of conspiracy even if he did not commit the substantive acts that would constitute violations of Sections 1962(a), (b), or (c)); *In re Motel 6 Securities Litigation*, 161 F. Supp. 2d 227, 237 (S.D.N.Y. 2001) (“It is not necessary that plaintiffs allege a substantive RICO violation in order to prove liability for conspiracy.”); *Fidelity Federal Sav. & Loan Ass’n v. Felicetti*, 830 F. Supp. 257, 261 (E.D. Pa. 1993); *T.I. Const. Co. v. Kiewit Eastern Co.*, No. 91-CV-2638, 1992 WL 195425 n.12 (E.D. Pa. Aug. 5, 1992); *Penn v. Alamo Rent-A-Car, Inc.*, 725 F. Supp. 1339, 1348 (E.D. Pa. 1989).

<sup>29</sup> See *Efron v. Embassy Suites (Puerto Rico), Inc.*, 223 F.3d 12, 21 (1st Cir. 2000) (ruling that if pleadings do not state a substantive RICO claim, then the conspiracy claim must fail); *Discon, Inc. v. NYNEX Corp.*, 93 F.3d 1055, 1064 (2d Cir. 1996), *judgment vacated on other grounds*, 525 U.S. 128 (1998); *Magnum v. Archdiocese of Philadelphia*, 253 F. App’x 224 (3d Cir. 2007); *Lightning Lube, Inc. v. Witco Corp.*, 4 F.3d 1153, 1191 (3d Cir. 1993); *Tal v. Hogan*, 453 F.3d 1244, 1270 (10th Cir. 2006) (“If a plaintiff has no viable claim under § 1962(a), (b) or (c), then its subsection (d) conspiracy claim fails as a matter of law”); *American United Life Ins. Co. v. Martinez*, 480 F.3d 1043, 1068 (11th Cir. 2007); *Allen v. New World Coffee, Inc.*, No. 00-CV-2610, 2002 WL 432685, at \*6 (S.D.N.Y. Mar. 19, 2002) (“The dismissal of all of plaintiffs’ RICO claims leaves the conspiracy cause of action without a leg to stand on.”); *Wagh v. Metris Direct, Inc.*, No. 01-CV-1711, 2002 WL 257846 (N.D. Cal. Feb. 20, 2002), *aff’d*, 363 F.3d 821 (9th Cir. 2003); *Cardenas v. RIA Telecommunications, Inc.*, No. 00-CV-6393, 2001 WL 536043 (N.D. Ill. May 18, 2001); *Blue Cross & Blue Shield of New Jersey, Inc. v. Philip Morris, Inc.*, 113 F. Supp. 2d 345, 385 (E.D.N.Y. 2000) (same); *In re Ikon Office Solutions, Inc. Sec. Litig.*, 86 F. Supp. 2d 481, 487 (E.D. Pa. 2000) (same); *BancOklahoma Mortg. Corp. v. Capital Title Co.*, 194 F.3d 1089, 1103 (10th Cir. 1999).

<sup>30</sup> *Simon v. Value Behavioral Health, Inc.*, 208 F.3d 1073, 1084 (9th Cir. 2000), *opinion amended*, 234 F.3d 428 (9th Cir. 2000), *overruled by Odom v. Microsoft Corp.*, 486 F.3d 541 (9th Cir. 2007).

<sup>31</sup> *Salinas v. United States*, 522 U.S. 52, 65 (1997).

completed conduct should not support a § 1962(d) claim if it does not support a § 1962(a), (b), or (c) claim.

In *Beck v. Prupis*,<sup>32</sup> the Supreme Court considered addressing this issue but ultimately declined to do so. The Court held that to give rise to relief under § 1962(d), 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.”<sup>33</sup> The Court did not decide whether the § 1962(d) claim must be based on an *actionable* violation of §§ 1962(a)–(c).<sup>34</sup> 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.”<sup>35</sup> The Court did note, however, that a plaintiff might be able to recover for a violation of § 1962(d) against “co-conspirators who might not themselves have violated one of the substantive provisions of [§] 1962.”<sup>36</sup> In most cases, the alleged scheme has already occurred and the conduct in question is already completed. If the completed conduct does not violate RICO §§ 1962(a), (b), or (c), 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 Eighth Circuits have said no, based primarily on the antitrust principle

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<sup>32</sup> *Beck v. Prupis*, 529 U.S. 494 (2000).

<sup>33</sup> *Id.* at 507.

<sup>34</sup> *Id.* at 506 n.10.

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

that says a corporation cannot conspire with itself because it must act through its agents.<sup>37</sup> Courts within the Third Circuit are divided on the question, with the majority position being that “a parent corporation cannot conspire with its wholly owned subsidiary to violate § 1962(d) of RICO because the two entities always have a ‘unity of purpose or a common design.’”<sup>38</sup> 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, or where the parent creates the subsidiary to carry out the racketeering activity.<sup>39</sup>

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.<sup>40</sup>

### **§ 61 Standing Under § 1962(d)**

The existence of a conspiracy alone is insufficient to subject a defendant to civil liability under § 1962(d). Plaintiffs must also show that they were injured by the commission of an overt act in furtherance of the conspiracy.<sup>41</sup> In *Beck v. Prupis*,<sup>42</sup> the Supreme Court ruled that this

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<sup>37</sup> *Detrick v. Panalpina, Inc.*, 108 F.3d 529, 544 (4th Cir. 1997); *Fogie v. THORN Americas, Inc.*, 190 F.3d 889, 898-99 (8th Cir. 1999). See also *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 770-71 (1984); *Siegel Transfer, Inc. v. Carrier Exp., Inc.*, 54 F.3d 1125, 1127 (3d Cir. 1995); *Century Oil Tool, Inc. v. Production Specialties, Inc.*, 737 F.2d 1316, 1316-17 (5th Cir. 1984); *Chicago Professional Sports Ltd. P’ship v. National Basketball Ass’n*, 95 F.3d 593, 598 (7th Cir. 1996); *Fraser v. Major League Soccer, L.L.C.*, 97 F. Supp. 2d 130, 135 (D. Mass. 2000).

<sup>38</sup> *District 1199P Health & Welfare Plan v. Janssen, L.P.*, No. 06-CV-3044, 2008 WL 5413105, at \*15 (D.N.J. Dec. 23, 2008).

<sup>39</sup> *Id.*

<sup>40</sup> 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), *rejected by, Sadighi v. Daghhighfekr*, 36 F. Supp. 2d 279 (D.S.C. 1999); *Ashland Oil, Inc. v. Arnett*, 875 F.2d 1271, 1281 (7th Cir. 1989) (same).

<sup>41</sup> See *Anderson v. Ayling*, 396 F.3d 265, 269 (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) (“[I]njury-causing over 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, 954 (8th Cir. 1999) (plaintiffs had no standing to assert a claim where injury from company’s alleged racketeering

overt act must be a predicate act of racketeering. In *Beck*, the Supreme Court rejected decisions from the Third,<sup>43</sup> Fifth,<sup>44</sup> and Seventh Circuits<sup>45</sup> that had allowed plaintiffs to sue under § 1962(d) for injuries from overt acts that did not rise to the level of “racketeering activity,” such as wrongful termination.<sup>46</sup> 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.”<sup>47</sup>

The Sixth Circuit further articulated the standing requirements under § 1962(d) in *Grange Mutual Casualty Co. v. Mack*.<sup>48</sup> 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.<sup>49</sup> The court ruled that to demonstrate proximate cause under § 1962(d), the plaintiff must show that it was “injured by reason of a conspiracy to violate [one of RICO’s] substantive provision[s].”<sup>50</sup> In reaching its decision, the court considered the *Bridge v. Phoenix Bond & Indemnity Co.*<sup>51</sup> case in which the Supreme Court ruled that a plaintiff who alleges a RICO violation based on mail fraud does not

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

<sup>42</sup> *Beck v. Prupis*, 529 U.S. 494 (2000).

<sup>43</sup> *See Shearin v. E.F. Hutton Group, Inc.*, 885 F.2d 1162, 1168-69 (3d Cir. 1989).

<sup>44</sup> *See Khurana v. Innovative Health Care Systems, Inc.*, 130 F.3d 143, 153-54 (5th Cir. 1997), *vacated*, 525 U.S. 979 (1998), *abrogated by Beck v. Prupis*, 529 U.S. 494 (2000).

<sup>45</sup> *See Schiffels v. Kemper Financial Servs., Inc.*, 978 F.2d 344, 348-49 (7th Cir. 1992), *abrogated by Beck v. Prupis*, 529 U.S. 494 (2000).

<sup>46</sup> Note, however, that the wrongful termination of a whistleblower in violation of the Sarbanes-Oxley Act is now a RICO predicate act. *See* § 36.

<sup>47</sup> *Beck*, 529 U.S. at 505-06.

<sup>48</sup> *Grange Mut. Cas. Co. v. Mack*, 290 F. App’x 832 (6th Cir. 2008).

<sup>49</sup> *Id.*

<sup>50</sup> *Id.* (emphasis in original).

<sup>51</sup> *Bridge v. Phoenix Bond & Indem. Co.*, 553 U.S. 639 (2008).

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 § 1962(d).<sup>52</sup>

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<sup>52</sup> *Grange Mut. Cas. Co.*, 290 F. App'x 832.

## IX. STATUTE OF LIMITATIONS

### § 62 Overview

The RICO statute does not contain an express limitations period. In 1987, the Supreme Court held in *Agency Holding Corp. v. Malley-Drift Associates, Inc.*, that a four-year statute of limitations applies to all civil RICO actions.<sup>1</sup> The Court concluded that a uniform federal limitations period is necessary and borrowed the limitations period from the Clayton Act,<sup>2</sup> 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.”<sup>3</sup>

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.<sup>4</sup> 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

The Supreme Court in *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 accrual tests, known respectively as the “injury discovery rule” (First, Second, Fourth, 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

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<sup>1</sup> *Agency Holding Corp. v. Malley-Duff & Associates, Inc.*, 483 U.S. 143, 156 (1987).

<sup>2</sup> 15 U.S.C.A. § 15(b).

<sup>3</sup> *Agency Holding Corp.*, 483 U.S. at 150.

<sup>4</sup> *Barry Aviation Inc. v. Land O'Lakes Mun. Airport Comm'n*, 377 F.3d 682, 688 (7th Cir. 2004).

act that injures a plaintiff's business.”<sup>5</sup> This “injury occurrence” rule does not depend on any discovery by the plaintiff.<sup>6</sup> 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 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, addressing 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.*,<sup>7</sup> the Court rejected the last predicate act rule<sup>8</sup> on grounds it is unduly solicitous of delay in raising RICO claims and inconsistent with the Clayton Act model that Congress used in enacting

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<sup>5</sup> *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 338 (1971).

<sup>6</sup> *Rotella v. Wood*, 528 U.S. 549, 554 n.2 (2000). *See also* § 65 (The Clayton Act rule).

<sup>7</sup> *Klehr v. A.O. Smith Corp.*, 521 U.S. 179 (1997).

<sup>8</sup> 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.

RICO.<sup>9</sup> The Court did not, however, use the *Klehr* case to adopt either 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.<sup>10</sup> 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 subtle and difficult,” and that, under any of those rules, the *Klehrs*’ claim would have been barred.<sup>11</sup>

In *Rotella v. Wood*,<sup>12</sup> a unanimous Supreme Court revisited the RICO accrual question and this time eliminated the injury-and-pattern discovery rule,<sup>13</sup> while again declining to prescribe a single rule. Applying the reasoning used in *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.<sup>14</sup> 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

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<sup>9</sup> *Klehr*, 521 U.S. at 187-91.

<sup>10</sup> *Id.* at 191-93.

<sup>11</sup> *Id.* at 192.

<sup>12</sup> *Rotella v. Wood*, 528 U.S. 549, 555 (2000).

<sup>13</sup> 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.

<sup>14</sup> *Rotella*, 528 U.S. at 556-59.

Clayton Act rule previously espoused by Justice Scalia.<sup>15</sup> The Court also left for another day the 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 a second predicate offense is committed and the RICO cause of action comes into being.<sup>16</sup>

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

#### § 64 Accrual Under 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.<sup>17</sup> Under this rule, a RICO cause of action accrues upon the discovery

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<sup>15</sup> *Id.* at 554 n.2.

<sup>16</sup> *Id.* at 559 n.4.

<sup>17</sup> *First Circuit: Lares Group, II v. Tobin*, 221 F.3d 41, 43-44 (1st Cir.2000); *Rodriguez v. Banco Cent.*, 917 F.2d 664, 666 (1st Cir. 1990);  
*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);  
*Third Circuit: Cetel v. Kirwan Fin. Group, Inc.*, 460 F.3d 494 (3d Cir. 2006); *Prudential Ins. Co. of Am. v. U.S. Gypsum Co.*, 359 F.3d 226, 233-36 (3d Cir. 2004); *Forbes v. Eagleson*, 228 F.3d 471, 484 (3d Cir. 2000);  
*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);  
*Fifth Circuit: Rotella v. Wood*, 147 F.3d 438, 439 (5th Cir. 1998), *judgment aff'd*, 528 U.S. 549 (2000); *Boulmay v. Rampart*, 124 F. App'x 889, 891 (5th Cir. 2005);  
*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);  
*Eighth Circuit: Stewart v. Philip Morris, Inc.*, 205 F.3d 1054, 1056 (8th Cir. 2000);  
*Ninth Circuit: Pincay v. Andrews*, 238 F.3d 1106, 1109 (9th Cir. 2001); *Grimmett v. Brown*, 75 F.3d 506, 511 (9th Cir. 1996);  
*Eleventh Circuit: Pacific Harbor Capital, Inc. v. Barnett Bank, N.A.*, 252 F.3d 1246, 1251 (11th Cir. 2001); *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).

of the injury even if the plaintiff is unaware that the injury stems from a pattern of racketeering.<sup>18</sup>

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.<sup>19</sup>

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.<sup>20</sup> 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 underlying fraud by facts that would arouse suspicion in a reasonable person.<sup>21</sup> The doctrine of inquiry notice is said to trigger the limitations period once there are “storm warnings” sufficient

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<sup>18</sup> 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”).

<sup>19</sup> See *Eno Farms Co-op. Ass’n v. Corp. for Indep. Living*, No. 06-CV-1983, 2007 WL 3308016 (D. Conn. Nov. 5, 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).

<sup>20</sup> See, e.g., *Cetel v. Kirwan Financial 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 Ins. Co. of Am. v. U.S. Gypsum Co.*, 359 F.3d 226, 235 (3d Cir. 2006) (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.*, 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); *In re Merrill Lynch Ltd. P’ships Litig.*, 154 F.3d 56, 60 (2d Cir. 1998) (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); *Martinez Tapia v. Chase Manhattan Bank, N.A.*, 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).

<sup>21</sup> See *In re Merrill Lynch Ltd.*, 154 F.3d at 60 (RICO claim barred because investors were on “inquiry notice” of “fraudulent scheme”); *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”).

to alert a reasonable investor of possible fraud.<sup>22</sup> 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.<sup>23</sup>

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.<sup>24</sup> The Supreme Court acknowledged this hypothetical “quandary” in *Rotella*, remarking that it was nonetheless an insufficient justification for a general pattern discovery rule.<sup>25</sup> 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.<sup>26</sup> Under the traditional federal accrual principle, a statute of limitation period does not begin to run until the cause of action is complete.<sup>27</sup> 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.<sup>28</sup>

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<sup>22</sup> *World Wrestling Entertainment, Inc. v. Jakks Pacific, Inc.*, 328 F. App’x 695 (2d Cir. 2009); *Mathews*, 260 F.3d 239; *Isaak v. Trumbull Sav. & Loan Co.*, 169 F.3d 390, 399 (6th Cir. 1999).

<sup>23</sup> *Love v. Nat’l Med. Enters.*, 230 F.3d 765, 777 (5th Cir. 2000) (emphasizing that the statute of limitations runs when the plaintiff has reasonable notice of his injury, not the fraud); *Tanaka v. First Hawaiian Bank*, 104 F. Supp. 2d 1243, 1249 (D. Haw. 2000) (stating that under the injury discovery doctrine, the focus is on the plaintiff’s constructive notice of his injury, not on his 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*).

<sup>24</sup> See, e.g., *Keystone Ins. Co. v. Houghton*, 863 F.2d 1125, 1134 (3d Cir. 1988), abrogated by *Klehr v. A.O. Smith Corp.*, 521 U.S. 179 (1997); *Granite Falls Bank v. Henrikson*, 924 F.2d 150, 154 (8th Cir. 1991), abrogated by *Rotella v. Wood*, 528 U.S. 549 (2000).

<sup>25</sup> *Rotella v. Wood*, 528 U.S. 549, 559 n.4 (2000).

<sup>26</sup> *Id.*

<sup>27</sup> See, e.g., *Rawlings v. Ray*, 312 U.S. 96, 98 (1941); *Clark v. Iowa City*, 87 U.S. 583, 589 (1874).

<sup>28</sup> See, e.g., *Limestone Dev. Corp. v. Vill. of Lemont*, 520 F.3d 797, 802 (7th Cir. 2008); *Bygrave v. Van Reken*, 238 F.3d 419 (6th Cir. 2000) (unpublished table decision) (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

## § 65 Accrual Under The Clayton Act Rule

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 business.”<sup>29</sup> 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.<sup>30</sup> 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.<sup>31</sup>

Though the *Klehr* majority noted that the Clayton Act rule did not provide “all the answers,”<sup>32</sup> 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

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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”).

<sup>29</sup> *Klehr v. A.O. Smith Corp.*, 521 U.S. 179, 198 (1997) (citing *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 338 (1971)).

<sup>30</sup> *Klehr*, 521 U.S. at 189.

<sup>31</sup> *See id.*

<sup>32</sup> *Klehr v. A.O. Smith Corp.*, 521 U.S. 179, 193 (1997).

simplicity in this respect surely does not support the adoption of a more protracted basic limitations period.”<sup>33</sup> No circuit has endorsed the pure Clayton Act rule as the rule of accrual for RICO claims.

### § 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.<sup>34</sup> One rationale for the separate accrual rule is that because a plaintiff’s right to sue under the statute is triggered not by a RICO violation, but by the existence of an injury caused by the violation, each new injury triggers the accrual of a new cause of action.<sup>35</sup> Thus, a plaintiff may recover for an injury discovered within four years of the filing of the lawsuit, regardless of when the RICO violation or any of the underlying predicate acts occurred.<sup>36</sup> The separate accrual rule is generally limited, however, to situations where there is a new injury from new wrongful conduct; different injuries from the

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<sup>33</sup> *Rotella v. Wood*, 528 U.S. 549, 555-60 (2000).

<sup>34</sup> *Rodriguez v. Banco Cent.*, 917 F.2d 664, 666 (1st Cir. 1990), (adopting separate accrual rule and remanding case to district court to make the relevant factual determinations); *In re Merrill Lynch Ltd. P’ships Litig.*, 154 F.3d 56, 59-60 (2d 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”); *Bingham v. Zolt*, 66 F.3d 553, 559-561 (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); *Annulli 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”); *Love v. Nat’l Med. Enters.*, 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.A. § 1964(c).”); *McCool v. Strata Oil Co.*, 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”); *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); *Grimmett v. Brown*, 75 F.3d 506, 511 (9th Cir. 1996) (indicating that the Ninth Circuit has adopted the separate accrual rule); *State Farm Mut. Auto. Ins. Co. v. Ammann*, 828 F.2d 4, 5 (9th Cir. 1987) (Kennedy, J., concurring).

<sup>35</sup> *See, e.g., Bankers Trust Co. v. Rhoades*, 859 F.2d 1096, 1103-05 (2d Cir. 1988).

<sup>36</sup> *Id.* (“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.”).

same conduct do not usually permit a separate suit, unless there is a late developing injury that cannot be proven in the first suit.<sup>37</sup> 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.”<sup>38</sup> Also, a plaintiff may not be able to obtain separate accrual based on wrongful acts that are not RICO predicate acts.<sup>39</sup>

### **§ 67 Equitable Tolling, Equitable Estoppel, and Fraudulent Concealment**

While the discovery rule discussed in § 64 depends on the plaintiff’s knowledge or constructive knowledge of injury, doctrines of fraudulent concealment, equitable tolling, and equitable estoppel depend on the plaintiff’s knowledge or constructive knowledge of the facts supporting his cause of action.<sup>40</sup>

The Supreme Court recognizes equitable tolling, equitable estoppel, and fraudulent concealment as distinct equitable doctrines.<sup>41</sup> In practice, however, their similarities have caused

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<sup>37</sup> 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); *Lehman v. Lucom*, 727 F.3d 1326, 1333-34 (11th Cir. 2013) (holding that plaintiff’s injury was not new or independent where plaintiff had alleged similar injury in a separate complaint more than four years before his RICO complaint); *McCool v. Strata Oil Co.*, 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. 99-CV-3604, 2001 WL 764953 (N.D. Cal. July 21, 2001) (under separate accrual rule, RICO claims against cosmetics distributor 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), *aff’d*, 57 F. App’x 307 (9th Cir. 2003).

<sup>38</sup> *Klehr*, 521 U.S. at 190, accord *Grimmett*, 75 F.3d at 512-14; *McCool v. Strata Oil Co.*, 972 F.2d at 1465-66 n.10; see also *Limestone Dev. Corp. v. Vill. Of Lemont*, 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).

<sup>39</sup> *Apollon Waterproofing & Restoration, Inc. v. Bergassi*, No. 01-CV-8388, 2003 WL 1397394 (S.D.N.Y. Mar. 20, 2003), *aff’d*, 87 F. App’x 757 (2d Cir. 2004) (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).

<sup>40</sup> See, e.g., *Wolin v. Smith Barney Inc.*, 83 F.3d 847, 852 (7th Cir. 1996) (disapproved of by, *Klehr v. A.O. Smith Corp.*, 521 U.S. 179 (1997)); *Oshiver v. Levin, Fishbein, Sedran & Berman*, 38 F.3d 1380, 1390 (3d Cir. 1994).

<sup>41</sup> See *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.”).

confusion over which doctrine applies in a given case.<sup>42</sup> 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.<sup>43</sup> 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.<sup>44</sup> Other courts have argued that, like equitable 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.<sup>45</sup> 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.’”<sup>46</sup> 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).

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<sup>42</sup> Judge Posner has written a series of opinions examining the courts’ overlapping applications of these doctrines. *See, e.g., Flight Attendants Against UAL Offset (FAAUO) v. Commissioner*, 165 F.3d 572, 575-77 (7th Cir. 1999); *Currier v. Radio Free Europe/Radio Liberty, Inc.*, 159 F.3d 1363, 1367 (D.C. 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) (rejected by, *Socop-Gonzalez v. I.N.S.*, 272 F.3d 1176 (9th Cir. 2001)).

<sup>43</sup> *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).

<sup>44</sup> *E.g., J. Geils Band Employee Ben. Plan v. Smith Barney Shearson, Inc.*, 76 F.3d 1245, 1252-55 (1st Cir. 1996); *see also Klehr v. A.O. Smith*, 521 U.S. 179, 194 (1997) (collecting cases).

<sup>45</sup> *See, e.g., Wolin v. Smith Barney Inc.*, 83 F.3d 847, 852 (7th Cir. 1996) (“[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.”).

<sup>46</sup> *Klehr*, 521 U.S. at 194.

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.”<sup>47</sup> The courts employ varying language to describe the requirements these elements impose.<sup>48</sup> Most courts use the phrases “affirmative acts” or “active misleading” to require the plaintiff to show that the defendant took affirmative steps to conceal the claim through fraud.<sup>49</sup> 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.<sup>50</sup>

Prior to *Klehr*, the distinction between actively misleading and self-concealing fraud mirrored the distinction between equitable estoppel and equitable tolling, the latter distinguished

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<sup>47</sup> *Tho Dinh Tran v. Alphonse Hotel Corp.*, 281 F.3d 23, 36 (2d Cir. 2002).

<sup>48</sup> *See Supermarket of Marlinton, Inc. v. Meadow Gold Dairies, Inc.*, 71 F.3d 119, 122 (4th Cir. 1995) (comparing the affirmative acts, self-concealing, separate and apart, and intermediate standards for establishing fraudulent concealment).

<sup>49</sup> *See, e.g., Prudential Ins. Co. of Am. v. U.S. Gypsum Co.*, 359 F.3d 226, 237-38 (3d Cir. 2001); *Detrick v. Panalpina, Inc.*, 108 F.3d 529, 542-43 (4th Cir. 1991); *Barry Aviation Inc. v. Land O’Lakes Mun. Airport Comm’n*, 377 F.3d 682, 689 (7th Cir. 2004); *Pincay v. Andrews*, 238 F.3d 1106, 1110 (9th Cir. 2001); *Grimmett v. Brown*, 75 F.3d 506, 514 (9th Cir. 1996) (alternating use of “actively misled” with “affirmative conduct” in describing elements of fraudulent concealment).

<sup>50</sup> *See, e.g., 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. 1991); *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 Savings Bank, FSB*, 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 Main 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”), *judgment aff’d*, 54 F. App’x 507 (2d Cir. 2002).

by its due diligence requirement.<sup>51</sup> *Klehr* rejected this distinction when it held that civil RICO plaintiffs must always establish due diligence when pleading fraudulent concealment.<sup>52</sup> The varying language now merely reflects that a claim may be fraudulently concealed either through the same fraud that constitutes the underlying claim or by new, separate fraudulent activity.<sup>53</sup>

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

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<sup>51</sup> See *Wolin v. Smith Barney Inc.*, 83 F.3d 847, 852 (7th Cir. 1991).

<sup>52</sup> See *Klehr v. A.O. Smith*, 521 U.S. 179, 194 (1997).

<sup>53</sup> See *National Group for Commc'ns & Computers Ltd. v. Lucent Techs., Inc.*, 420 F. Supp. 2d 253, 266 (S.D.N.Y. 2006) (“[R]ecent RICO decisions by the district courts continue to suggest that the first element [of fraudulent concealment] may be satisfied where the ‘nature of the wrong itself’ was self concealing.”). Cf. *In re Consolidated Non-Filing Ins. Fee Litig.*, 195 F.R.D. 684, 694 n.7 (M.D. Ala. 2000) (recognizing federal courts of appeals’ universal acceptance of equitable tolling for “self-concealing” TILA claims), *vacated*, 547 F.3d 1292 (11th Cir. 2008).

<sup>54</sup> See, e.g., *In re Merrill Lynch Ltd. P’ships Litig.*, 154 F.3d 56, 60 (2d 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 v. First Nat’l Bank of Cicero*, 998 F.2d 459, 462 (7th Cir. 1993); *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 Cnty. 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).

<sup>55</sup> See *Ballen v. Prudential Bache Secs., Inc.*, 23 F.3d 335, 337 (10th Cir. 1994); *Lares Group, II v. Tobin*, 47 F. Supp. 2d 223, 232 n.4 (D.R.I. 1999), *aff’d*, 221 F.3d 41 (1st Cir. 2000); *Simpson*, 20 F. Supp. 2d at 634; *Butala v. Agashiwala*, 916 F. Supp. 314, 319 (S.D.N.Y. 1996); see also *Iron Workers Local Union No. 17 Ins. Fund & its Trustees v. Philip Morris Inc.*, 29 F. Supp. 2d 801, 809 (N.D. Ohio 1998) (RICO plaintiff that failed to plead due diligence with specificity could not invoke fraudulent concealment).

racketeering.<sup>56</sup> 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.<sup>57</sup>

It is also possible that pending parallel criminal proceedings may work to toll a civil RICO claim based on the same conduct.<sup>58</sup> Class action tolling also is available.<sup>59</sup>

### **§ 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.<sup>60</sup>

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<sup>56</sup> See, e.g., *McCool v. Strata Oil Co.*, 972 F.2d 1452, 1465 (7th Cir. 1992) (noting that equitable tolling may delay the running of the statute of limitations “while a victim diligently investigates the possible existence and extent of a pattern of racketeering”).

<sup>57</sup> See *Prudential Ins. Co. of Am. v. U.S. Gypsum Co.*, 359 F.3d 226, 238 (3d Cir. 2001).

<sup>58</sup> See *Pension Fund-Mid-Jersey Trucking Industry v. Omni Funding Group*, 687 F. Supp. 962, 963 (D.N.J. 1988).

<sup>59</sup> See, e.g., *Ballen v. Prudential Bache Secs., Inc.*, 23 F.3d 335, 337 (10th Cir. 1994) (incorrectly referring to class action tolling as “equitable tolling”); *Bankers Trust Co. v. Rhoades*, 859 F.2d 1096, 1105 (10th Cir. 1994) (rejected by, *Estes v. Dinzole*, 1989 WL 68392 (N.D. Ill. 1989)); *Prieto v. John Hancock Mut. Life Ins. Co.*, 132 F. Supp. 2d 506, 519 (N.D. Tex. 2001), *aff’d*, 35 F. App’x 390 (5th Cir. 2002) and *abrogated by*, *Newby v. Enron Corp.*, 542 F.3d 463 (5th Cir. 2008) (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 §§ 90 through 92.

<sup>60</sup> See, e.g., *Hoxworth v. Blinder, Robinson & Co.*, 980 F.2d 912, 924-25 (3d Cir. 1992); *Gunter v. Ridgewood Energy Corp.*, 32 F. Supp. 2d 166, 175 (D.N.J. 1998); *Leroy v. Paytel III Mgmt. Assocs., Inc.*, No. 91-CV-1933, 1992 WL 367090, at \*4 (S.D.N.Y. Nov. 27, 1992); *Halperin v. Jasper*, 723 F. Supp. 1091, 1096-97 (E.D. Pa. 1989).

## X. RELIEF

### § 69 Standard of Proof

In *Sedima, S.P.R.L. v. Imrex Co.*, the Supreme Court suggested, in dictum, that the criminal standard of proof does not apply to RICO's civil provisions.<sup>1</sup> Although the Court 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,” the Court expressly declined to decide the applicable standard of proof.<sup>2</sup> Since *Sedima*, every court of appeals that has addressed the issue has held that the preponderance standard applies in civil RICO actions.<sup>3</sup>

### § 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

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<sup>1</sup> *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 491 (1985).

<sup>2</sup> *Id.*

<sup>3</sup> See *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); *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)); *United States v. Local 560, Int’l Bhd. of Teamsters*, 780 F.2d 267, 279–80 n.12 (3d Cir. 1985); *S. Atl. Ltd. P’ship of Tenn., L.P. 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); *Armco Indus. Credit Corp. v. SLT Warehouse Co.*, 782 F.2d 475, 480–81 (5th Cir. 1986), *implied overruling on other grounds recognized by* 214 F.3d 556, 559 (5th Cir. 2000) (citing *Holmes v. Sec. Investor Prot. Corp.*, 503 U.S. 258 (1992); *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); *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); *Bieter Co. v. Blomquist*, 987 F.2d 1319, 1320 (8th Cir. 1993) (civil RICO provisions require findings by preponderance of the evidence); *Fireman’s Fund Ins. Co. v. Stites*, 258 F.3d 1016, 1023 (9th Cir. 2001); *Wilcox v. First Interstate Bank of Oregon, N.A.*, 815 F.2d 522, 531 (9th Cir. 1987); *A. Stucki Co. v. Worthington Indus., Inc.*, 849 F.2d 593, 597–98 (Fed. Cir. 1988).

“civil remedy provisions of RICO . . . provide treble damages which are themselves punitive in character.”<sup>4</sup>

Though treble damages appear to have a punitive component, the Supreme Court has noted that treble damages provisions fall on different points along the spectrum between purely compensatory and purely punitive.<sup>5</sup> In *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.<sup>6</sup> The Court did not address to what extent, if any, it considers RICO treble damages to be punitive.

#### § 71 Attorney’s Fees

Section 1964(c) expressly allows a party that has been injured by a RICO violation to recover reasonable attorney’s fees in a civil RICO case.<sup>7</sup> To recover attorney’s fees, a party must “prevail”; there is no statutory right to receive attorney’s fees in a case resulting in settlement.<sup>8</sup> Additionally, the Ninth Circuit has held that § 1964(c) permits only prevailing plaintiffs to

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<sup>4</sup> *Southwest Marine, Inc. v. Triple A Mach. Shop, Inc.*, 720 F. Supp. 805, 810 (N.D. Cal. 1989). See also *Iron Workers Local Union No. 17 Ins. Fund and its Trustees v. Philip Morris Inc.*, 29 F. Supp. 2d 801, 819 (N.D. Ohio 1998) (granting defendant’s summary judgment motion on punitive damages issue because federal RICO statute provides for treble damages not punitive damages); *New York Mercantile Exchange v. Verrone*, No. 96-CV-8988, 1998 WL 811791, at \*1-2 (S.D.N.Y. Nov. 19, 1998) (declining to adopt magistrate’s recommendation of punitive damages because damages were trebled under RICO); *Resolution Trust Corp. v. S & K Chevrolet*, 868 F. Supp. 1047, 1062 (C.D. Ill. 1994) (“Where treble damages are mandatory under civil RICO provisions, punitive damages are disfavored in the law.”); *Bingham v. Zolt*, 823 F. Supp. 1126, 1135 (S.D.N.Y. 1993), *aff’d*, 66 F.3d 553 (2d Cir. 1995); *Dammon v. Folse*, 846 F. Supp. 36, 38 (E.D. La. 1994); *Standard Chlorine of Delaware, Inc. v. Sinibaldi*, 821 F. Supp. 232, 252-253 (D. Del. 1992).

<sup>5</sup> *PacifiCare Health Sys., Inc. v. Book*, 538 U.S. 401, 405-06 (2003).

<sup>6</sup> *Id.* at 406.

<sup>7</sup> 18 U.S.C.A. § 1964(c); *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”); *Aetna Cas. Sur. Co. v. P & B Autobody*, 43 F.3d 1546, 1570 (1st Cir. 1994); *Uniroyal Goodrich Tire Co. v. Mutual Trading Corp.*, 63 F.3d 516, 525 (7th Cir. 1995).

<sup>8</sup> *Aetna Cas. & Sur. Co. v. Liebowitz*, 570 F. Supp. 908, 912 (E.D.N.Y. 1983), *judgment aff’d*, 730 F.2d 905 (2d Cir. 1984).

recover attorney's fees, although prevailing defendants are not precluded from recovering attorney's fees when authorized elsewhere.<sup>9</sup> Fees that exceed the damages ultimately awarded may be upheld as reasonable if the fees were necessarily incurred at the time.<sup>10</sup>

In awarding attorney's 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.<sup>11</sup> The Sixth Circuit rejected use of a multiplier based on the Supreme Court's ruling in *City of Burlington v. Dague*,<sup>12</sup> in which the Court ruled "that enhancement for contingency is not permitted under the [typical federal] fee shifting statutes."<sup>13</sup> Other courts, however, have looked favorably upon multipliers under RICO.<sup>14</sup>

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<sup>9</sup> *Chang v. Chen*, 95 F.3d 27, 28 (9th Cir. 1996); accord *Liberty Mut. Ins. Co. v. Employee Resource Management, Inc.*, 176 F. Supp. 2d 510, 542-43 (D.S.C. 2001).

<sup>10</sup> *BCS Servs., Inc. v. BG Invs., Inc.*, 728 F.3d 633 (7th Cir. 2013) (upholding fees that were almost twice the damages awarded).

<sup>11</sup> *Transition, Inc. v. Austin*, No. 01-CV-103, 2002 WL 1050240, at \*3-5 (E.D. Va. Mar. 15, 2002) (noting that the court would have applied a multiplier to the lodestar if the lodestar had not already been so high), *appeal dismissed*, 79 F. App'x 577 (4th Cir. 2003); *System Mgmt., Inc. v. Loiselle*, 154 F. Supp. 2d 195, 208-211 (D. Mass. 2001) (declining to apply multiplier to the lodestar figure because there was no reason to stray from the strong presumption that the figure is reasonable); *Abou-Khadra v. Bseirani*, 971 F. Supp. 710, 719-20 (N.D.N.Y. 1997) (noting that the burden is on the party seeking a multiplier to justify its application); *Brokerage Concepts, Inc. v. U.S. Healthcare, Inc.*, No. 95-CV-1698, 1996 WL 741885, at \*2-5, \*15-16 (E.D. Pa. Dec. 10, 1996) (court may adjust the lodestar upwards or downwards based on various factors but refusing to do so in this case); *Millland Raleigh-Durham v. Myers*, 840 F. Supp. 235, 238-40 (S.D.N.Y. 1993) (same).

<sup>12</sup> *City of Burlington v. Dague*, 505 U.S. 557 (1992).

<sup>13</sup> *Davis v. Mutual Life Ins. Co. of New York*, 6 F.3d 367, 380-82 (6th Cir. 1993).

<sup>14</sup> *Faircloth v. Certified Finance Inc.*, No. 99-CV-3097, 2001 WL 527489, at \*10-11 (E.D. La. May 16, 2001) (finding that various factors, including the "complexities of the RICO issues," 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).

## § 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.<sup>15</sup> Section 1964(b) authorizes the Attorney General to institute proceedings “under this section.”<sup>16</sup> While there is no question that the government may seek injunctive relief,<sup>17</sup> the question of whether the RICO statute provides for injunctive relief in private suits could be the subject of a circuit split. Only two circuits have directly ruled on this issue and those circuits have reached different results. In 1986, the Ninth Circuit held that injunctive relief is not available to private plaintiffs in civil RICO actions.<sup>18</sup> In the 2001 case of *National Organization of Women, Inc. v. Scheidler*, the Seventh Circuit disagreed with the Ninth Circuit’s reading of the statutory language as well as its application of legislative history, and held that injunctive relief is available to private plaintiffs in civil RICO actions.<sup>19</sup> 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.<sup>20</sup>

Of the other federal circuits, none have addressed the issue since the Seventh Circuit issued its opinion. The Fourth Circuit has not directly ruled on the issue, but has expressed doubt as to whether injunctive relief is available to private RICO plaintiffs.<sup>21</sup> The Third Circuit has acknowledged the controversy surrounding this issue, but has yet to express an opinion.<sup>22</sup>

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<sup>15</sup> 18 U.S.C.A. § 1964(a).

<sup>16</sup> 18 U.S.C.A. § 1964(b).

<sup>17</sup> See, e.g., *United States v. Philip Morris USA Inc.*, 566 F.3d 1095 (D.C. Cir. 2009).

<sup>18</sup> *Religious Tech. Ctr. v. Wollersheim*, 796 F.2d 1076 (9th Cir. 1986).

<sup>19</sup> *Nat’l Org. for Women, Inc. v. Scheidler*, 267 F.3d 687, 695-700 (7th Cir. 2001) (“We are persuaded [] that the text of the RICO statute, understood in the proper light, itself authorizes private parties to seek injunctive relief”), *rev’d on other grounds*, 537 U.S. 393 (2003).

<sup>20</sup> *Scheidler v. National Org. for Women, Inc.*, 547 U.S. 9, 23 (2006).

<sup>21</sup> See *Potomac Elec. Power Co. v. Elec. Motor & Supply, Inc.*, 262 F.3d 260, 268 n.4 (4th Cir. 2001) (noting controversy but expressing no opinion); *Dan River, Inc. v. Icahn*, 701 F.2d 278, 290 (4th Cir. 1983) (noting

Before *Scheidler*, district courts had reached different conclusions on the availability of equitable relief for private plaintiffs under RICO. The majority of district courts, in line with the Ninth Circuit, had held that equitable relief is not available to private plaintiffs under RICO.<sup>23</sup> Other district courts found, with varying amounts of discussion, that such relief is available.<sup>24</sup> Since *Scheidler*, district courts have tended to follow *Scheidler*,<sup>25</sup> though not without exception.<sup>26</sup>

The D.C. Circuit ruled that disgorgement is not an available remedy under Section 1964(a).<sup>27</sup> 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

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substantial doubt on this issue and assuming without deciding that equitable relief is not available under RICO for private parties).

<sup>22</sup> *Ne. Women's Ctr., Inc. v. McMonagle*, 868 F.2d 1342, 1355 (3d Cir. 1989) (noting controversy but expressing no opinion); see also *Hoxworth v. Blinder, Robinson & Co.*, 903 F.2d 186, 196-97 (3d Cir. 1990) (stating that entry of preliminary injunction freezing the assets of a corporation is appropriate in an action brought, in part, under RICO; however, the court did not directly address whether RICO authorizes such relief).

<sup>23</sup> See *P.R.F., Inc. v. Philips Credit Corp.*, No. Civ. 92-2266CCC, 1992 WL 385170, at \*2-3 (D.P.R. Dec. 21, 1992) (adopting the reasoning of the *Wollersheim* in holding that a RICO claim does not give a federal court authority to enjoin a state court foreclosure proceeding); *Ashland Oil, Inc. v. Gleave*, 540 F. Supp. 81, 84-86 (W.D.N.Y. 1982) (holding 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)).

<sup>24</sup> *Baldree v. Cargill, Inc.*, 758 F. Supp. 704, 706-07 (M.D. Fla. 1990), *aff'd*, 925 F.2d 1474 (11th Cir. 1991) (unpublished table decision); *Lynn Electronics v. Automation Machinery & Development Corp.*, No. 86-CV-2301, 1986 WL 11262, at \*5 (E.D. Pa. Oct. 6, 1986); *USACO Coal Co. v. Carbomin Energy, Inc.*, 539 F. Supp. 807, 814-816 (W.D. Ky. 1982), *order aff'd*, 689 F.2d 94 (6th Cir. 1982); *Marshall Field & Co. v. Icahn*, 537 F. Supp. 413, 420 (S.D.N.Y. 1982); *Vietnamese Fishermen's Ass'n v. Knights of Ku Klux Klan*, 518 F. Supp. 993, 1014 (S.D. Tex. 1981); *Chambers Dev. Co. v. Browning-Ferris Indus.*, 590 F. Supp. 1528, 1540-41 (W.D. Pa. 1984) (holding that "private claimants in RICO cases may seek equitable relief."); *Aetna Cas. & Sur. Co. v. Liebowitz*, 570 F. Supp. 908, 909-11 (E.D.N.Y. 1983) (finding award of injunctive relief under RICO to private litigants appropriate).

<sup>25</sup> *Huyer v. Wells Fargo & Co.*, Case No. 4:08-CV-00507, 2013 WL 5754885, at \*10 (S.D. Iowa Oct. 23, 2013); *In re Managed Care Litig.*, 298 F. Supp. 2d 1259, 1283 (S.D. Fla. 2003); *Motorola Credit Corp. v. Uzan*, 202 F. Supp. 2d 239, 243-44 (S.D.N.Y. 2002), *remanded on other grounds*, 322 F.3d 130 (2d Cir. 2003).

<sup>26</sup> *Minter v. Wells Fargo Bank, N.A.*, 593 F. Supp. 2d 788, 795 (D. Md. 2009).

<sup>27</sup> *United States v. Philip Morris USA, Inc.*, 396 F.3d 1190, 1201 (D.C. Cir. 2005).

forward-looking remedy designed to “prevent or restrain.”<sup>28</sup> 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.<sup>29</sup>

### § 73 Rule 11 Sanctions

As every federal practitioner is no doubt well aware, Fed. R. Civ. P. 11 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.”<sup>30</sup> On December 1, 1993, the Federal Rules of Civil Procedure were amended to allow for filing 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.”<sup>31</sup> Because of RICO’s complexity, it is a prime candidate for reliance on this provision of the Rules.

Courts initially were reluctant to impose Rule 11 sanctions in RICO cases. One court stated “we recognize that we are dealing in an area of the law which is at best nebulous and rapidly evolving.”<sup>32</sup> However, since many issues under RICO are now settled law, courts have imposed sanctions if a RICO claim is patently deficient: “Particularly with regard to civil RICO

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<sup>28</sup> *Id.* at 1198.

<sup>29</sup> *United States v. Carson*, 52 F.3d 1173, 1181-82 (2d Cir. 1995).

<sup>30</sup> Fed. R. Civ. P. 11(b) (2) to (3).

<sup>31</sup> Fed. R. Civ. P. 11(b) (3).

<sup>32</sup> *In re Gas Reclamation, Inc. Secs. Litig.*, 663 F. Supp. 1123, 1126 (S.D.N.Y. 1987) (denying motion for sanctions). Accord *California Architectural Bldg. Products, 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); *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.”), *judgment aff’d*, 838 F.2d 1203 (2d Cir. 1987) (unpublished table decision); *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).

claims, plaintiffs must stop and think before filing them.”<sup>33</sup> 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.”<sup>34</sup> Indeed, as RICO became a more familiar part of civil practice, awards of sanctions also became increasingly common.<sup>35</sup> 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 other defects, failed to allege a pattern of racketeering.<sup>36</sup> 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.”<sup>37</sup>

Courts still 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

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<sup>33</sup> *Pelletier v. Zweifel*, 921 F.2d 1465, 1522 (11th Cir. 1991), *abrogated on other grounds by Bridge v. Phoenix Bond & Indem. Co.*, 553 U.S. 639 (2008). The court went on to hold that the district court abused its discretion in refusing to impose sanctions for filing frivolous RICO claims.

<sup>34</sup> *Stagner v. Pitts*, 7 F.3d 1045 (10th Cir. 1993) (unpublished table decision) (sanctioning plaintiffs for baseless RICO claim and failure to notify court of prior release).

<sup>35</sup> *See, e.g., 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); *O’Malley v. New York City Transit Authority*, 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.”); *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); *SkidmoreEnergy, 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 (6th Cir. 2001), adopting *White v. Clay*, No. 00-CV-0430, 2001 WL 1793746 (W.D. Ky. Mar. 14, 2001) (ordering sanctions where, inter alia, plaintiff failed to investigate RICO claim), *judgment aff’d*, 23 F. App’x 407 (6th Cir. 2001); *Kaye v. D’Amato*, 357 F. App’x 706 (7th Cir. 2009) (affirming sanctions against plaintiff for “obviously deficient RICO claim”); *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); *Pioneer Lumber Treating, Inc. v. Cox*, 5 F.3d 539 (9th Cir. 1993) (unpublished table decision) (affirming sanctions where plaintiff’s “complaint was deficient in almost all requirements of pleading a RICO claim”); *Stone v. International Bhd. of Teamsters, Chauffeurs*, 865 F.2d 1330 (D.C. Cir. 1998) (unpublished table decision) (affirming sanctions order where it was apparent plaintiff had no standing to raise RICO claim).

<sup>36</sup> *Fred A. Smith Lumber Co. v. Edidin*, 845 F.2d 750, 752-54 (7th Cir. 1988).

<sup>37</sup> *Id.* at 754.

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.<sup>38</sup> 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.'"<sup>39</sup>

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<sup>38</sup> *Carlton v. Jolly*, 125 F.R.D. 423, 427 (4th Cir. 1990) (unpublished table decision), *judgment aff'd*, 911 F.2d 721 (4th Cir. 1990) (unpublished table decision).

<sup>39</sup> *Id.* Accord *Smith v. Our Lady of the Lake Hosp., Inc.*, 960 F.2d 439, 445 (5th Cir. 1992).

## **XI. JURISDICTION, VENUE, AND PREEMPTION**

### **§ 74 Subject Matter Jurisdiction**

Federal courts have subject matter jurisdiction over RICO claims pursuant to 28 U.S.C.A. § 1331 and 18 U.S.C.A. § 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*,<sup>1</sup> 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.<sup>2</sup> 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.<sup>3</sup> 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 not arise under federal law at all."<sup>4</sup> Indeed, filing bogus RICO claims to invoke federal jurisdiction can invite sanctions.<sup>5</sup>

### **§ 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."<sup>6</sup> Section 1965(d) allows process to be served "in any judicial district in which such person resides, is found, has an agent, or transacts

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<sup>1</sup> *Oak Park Trust & Sav. Bank v. Therkildsen*, 209 F.3d 648 (7th Cir. 2000).

<sup>2</sup> *Id.* at 650.

<sup>3</sup> *Id.* at 651.

<sup>4</sup> *Id.*

<sup>5</sup> *Williams v. Aztar Ind. 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).

<sup>6</sup> 18 U.S.C.A. § 1965(b).

his affairs.”<sup>7</sup> Accordingly, courts have approved nationwide service of process under both § 1965(b) and § 1965(d).<sup>8</sup>

In *Cory v. Aztec Steel Bldg., Inc.*, the Tenth Circuit analyzed the cases addressing nationwide service of process under §§ 1965(b) and (d) and concluded that the better reasoned approach is to apply § 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.”<sup>9</sup> Noting that the “ends of 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 § 1965(b).<sup>10</sup> 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.<sup>11</sup>

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.<sup>12</sup> In *Lisak v. Mercantile Bancorp, Inc.*,<sup>13</sup> the Seventh

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<sup>7</sup> 18 U.S.C.A. § 1965(d).

<sup>8</sup> 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 (11th Cir. 1997) (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)), *superseded Central States, Se. & Sw. Areas Pension Fund v. Reiner Express World Corp.*, 230 F.3d 934 (7th Cir. 2000).

<sup>9</sup> *Cory v. Aztec Steel Bldg., Inc.*, 468 F.3d 1226, 1231 (10th Cir. 2006).

<sup>10</sup> *Id.* at 1232.

<sup>11</sup> *Id.*

<sup>12</sup> See, e.g., *City of New York v. Cyco.Net, Inc.*, 383 F. Supp. 2d 526, 541-43 (S.D.N.Y. 2005); *Doe v. Unocal Corp.*, 27 F. Supp. 2d 1174, 1182 (C.D. Cal. 1998) (“Where a defendant is properly served in the United States under RICO’s nationwide service provision, that defendant’s national contacts, rather than its minimum contacts with the forum state, determine whether the district court has personal jurisdiction over the defendant”), *aff’d*, 248 F.3d 915 (9th Cir. 2001); *BankAtlantic v. Coast to Coast Contractors, Inc.*, 947 F. Supp. 480, 489-90 (S.D. Fla. 1996); *Monarch Normandy Square Partners v. Normandy Square Associates Ltd. P’ship*, 817 F. Supp. 896, 898 (D.

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.<sup>14</sup>

Other courts have taken the opposite view, holding that the RICO statute provides a basis for nationwide jurisdiction only when one of the defendants has minimum contacts with the forum.<sup>15</sup>

In *Heller v. Deutsche Bank*, the district court discussed the concept of personal jurisdiction based either on general (continuous and systematic) or claim-specific contacts with

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Kan. 1993); *Dooley v. United Techs. Corp.*, 786 F. Supp. 65, 70-71 (D.D.C. 1992), *abrogated by FC Inv. Grp. LC v. IFX Markets, Ltd.*, 529 F.3d 1087 (D.C. Cir. 2008).

<sup>13</sup> *Lisak v. Mercantile Bancorp, Inc.*, 834 F.2d 668 (7th Cir. 1987).

<sup>14</sup> *Id.* at 671-72. *See also Dornberger v. Metropolitan Life Ins. Co.*, 961 F. Supp. 506, 549 (S.D.N.Y. 1997) (concluding that court had jurisdiction over defendants outside New York who were connected to fraudulent scheme emanating from defendants’ New York headquarters); *Kondrath v. Arum*, 881 F. Supp. 925, 929 (D. Del. 1995) (holding nationwide service of process obviates need to show minimum contacts with forum state); *Michaels v. Wildenstein & Co.*, No. 93-CV-8179, 1995 WL 326497, at \*3 (S.D.N.Y. May 31, 1995) (holding that complaint need not allege specific contacts by Los Angeles defendant with New York forum where complaint alleged a conspiracy with a New York entity). *But see Stauffacher v. Bennett*, 969 F.2d at 460-61 (holding RICO statute does not authorize international service of process, requiring a plaintiff to rely on the long-arm statute of the state in which he files for overseas service); *PT United Can Co. Ltd. v. Crown Cork & Seal Co.*, No. 96-CV-3669, 1997 WL 31194 (S.D.N.Y. Jan. 28, 1997) (interpreting “ends of justice requirement as allowing court to exercise personal jurisdiction over defendants only if all of alleged members of RICO conspiracy cannot otherwise be sued in one district), *aff’d*, 138 F.3d 65 (2d Cir. 1998). *But see National Asbestos Workers Med. Fund v. Philip Morris, Inc.*, 86 F. Supp. 2d 137 (E.D.N.Y. 2000) (holding that RICO does not provide for extraterritorial service on defendants outside the United States); *Doe v. Unocal Corp.*, 27 F. Supp. 2d 1174, 1184 (C.D. Cal. 1998) (holding that RICO’s national contacts test does not apply when the defendant is served outside of the United States, and requiring plaintiffs to rely on the long-arm statute of the state in which the suit is filed), *aff’d*, 248 F.3d 915 (9th Cir. 2001).

<sup>15</sup> *See PT United Can Co. Ltd. v. Crown Cork & Seal Co.*, 1997 WL 31194 (S.D.N.Y. Jan. 28, 1997), *aff’d* 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); *Cory v. Aztec Steel Bldg., Inc.*, 468 F.3d 1226, 1231 (10th Cir. 2006) (holding that the “ends of justice” do not require all defendants to be amenable to suit in a single jurisdiction); *FC Inv. Group LC v. IFX Markets, Ltd.*, 529 F.3d 1087 (D.C. Cir. 2008) (holding that personal jurisdiction based on minimum contacts must be established as to at least one defendant); *World Wide Minerals Ltd. v. Republic of Kazakhstan*, 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), *aff’d in part*, 296 F.3d 1154 (D.C. Cir. 2002); *800537 Ontario Inc. v. Auto Enters., 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).

the forum.<sup>16</sup> According to the court in *Heller*, even a single claim-specific contact is sufficient to confer personal jurisdiction under RICO when the 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.<sup>17</sup>

## § 76 Application of RICO to Extraterritorial Conduct

RICO is silent about its extraterritorial reach. Several courts have grappled with whether the statute permitted 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.<sup>18</sup>

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.<sup>19</sup> Nevertheless, prior to 2010, some courts inferred that in enacting RICO, Congress intended to eliminate wrongful conduct wherever it occurs.<sup>20</sup> Drawing from the securities and antitrust laws, those courts applied the “conduct” and “effects” test to find that RICO applies to extraterritorial conduct where the defendant commits sufficient conduct within the United States that affects U.S. citizens and commerce within the United States.<sup>21</sup>

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<sup>16</sup> *Heller v. Deutsche Bank AG*, No. 04-CV-3571, 2005 WL 281181, at \*2-3 (E.D. Pa. Feb. 3, 2005).

<sup>17</sup> *Id.* at \*3; see also *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472-77 (1985).

<sup>18</sup> *Orion Tire Corp. v. Goodyear Tire & Rubber Co.*, 268 F.3d 1133, 1137 (9th Cir. 2001); *Liquidation Com’n of Banco Intercontinental, S.A. v. Renta*, 530 F.3d 1339 (11th Cir. 2008).

<sup>19</sup> See, e.g., *Foley Bros. v. Filardo*, 336 U.S. 281, 285 (1949); see also *Morrison v. National Austl. Bank Ltd.*, 130 S. Ct. 2869 (2010).

<sup>20</sup> See *United States v. Noriega*, 746 F. Supp. 1506, 1517 (S.D. Fla. 1990) (“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.”), *aff’d*, 117 F.3d 1206 (11th Cir. 1997).

<sup>21</sup> *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 (11th Cir. 2008) (holding that RICO applied extraterritorially where

In 2010, the Supreme Court embraced the presumption against extraterritoriality and explicitly rejected the “conduct” and “effects” test in a securities fraud case.<sup>22</sup> The Court noted that Section 10(b) of the 1934 Securities Exchange Act contains no affirmative indication that Congress intended extraterritorial application, and therefore declined to apply the Act to extraterritorial conduct.<sup>23</sup>

Within six months, the Second Circuit applied *Morrison* in a RICO context, holding that the RICO statute had no extraterritorial application.<sup>24</sup> In *Norex Petroleum Ltd. v. Access Indus. Ltd.*, the Second Circuit affirmed the dismissal of a civil RICO claim involving a scheme to take over a substantial portion of the Russian oil industry.<sup>25</sup> Although much of the alleged misconduct occurred in Russia, the complaint alleged that the defendants committed numerous predicate acts in the United States.<sup>26</sup> Citing *Morrison*, the Second Circuit declined to apply the conduct and effects test, noted that RICO is silent as to its extraterritorial application, and held that the “slim contacts” with the United States were insufficient to support extraterritorial application of RICO.<sup>27</sup>

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conduct in furtherance of the RICO conspiracy occurred in the United States but the effects of the conspiracy were felt elsewhere); *Alfadda v. Fenn*, 935 F.2d 475 (2d Cir. 1991) (holding that the defendants’ commission of some predicate acts within the United States provided a basis for subject matter jurisdiction for the RICO claims, and noting 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”); *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), *opinion adhered to on reconsideration*, No. 02-CV-8993, 2005 WL 309755 (S.D.N.Y. Feb. 9, 2005).

<sup>22</sup> *Morrison v. National Aust. Bank Ltd.*, 130 S. Ct. 2869, 2883 (2010).

<sup>23</sup> *Id.* at 2878.

<sup>24</sup> *Norex Petroleum Ltd. v. Access Indus. Ltd.*, 631 F.3d 29 (2d Cir. 2010).

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

## § 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 the commercial activity exception, or another exception contained in the FSIA, applies.<sup>28</sup> 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.<sup>29</sup> The Sixth Circuit held, however, that a foreign sovereign cannot be sued for civil RICO claims because a foreign sovereign is not indictable.<sup>30</sup> 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.<sup>31</sup>

## § 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 § 1962 may sue therefore in any appropriate United States district court.”<sup>32</sup> In *Tafflin v. Levitt*,<sup>33</sup> the Supreme Court held that state courts have concurrent jurisdiction over RICO suits.

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<sup>28</sup> *Southway v. Central Bank of Nigeria*, 198 F.3d 1210, 1216 (10th Cir. 1999).

<sup>29</sup> *Keller v. Central Bank of Nigeria*, 277 F.3d 811, 816 (6th Cir. 2002), *abrogated by Samantar v. Yousuf*, 560 U.S. 305 (2010).

<sup>30</sup> *Id.* at 821.

<sup>31</sup> *Id.*

<sup>32</sup> 18 U.S.C.A. § 1964(c).

<sup>33</sup> *Tafflin v. Levitt*, 493 U.S. 455 (1990).

**Removal.** Despite the existence of concurrent jurisdiction, RICO claims filed in state court may be removed to federal court.<sup>34</sup> 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.<sup>35</sup>

**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 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.”<sup>36</sup> 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.<sup>37</sup>

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<sup>34</sup> See 28 U.S.C.A. § 1441(a) and (b); *Weisman v. Fribush*, 911 F.2d 726 (4th Cir. 1990) (unpublished table decision) (RICO and state claims were properly removed); *Gallagher v. Donald*, 803 F. Supp. 899, 903-904 (S.D.N.Y. 1992) (case which involved RICO, common law fraud, state law claims, and securities claims was removable under 28 U.S.C.A. § 1441(a), (b), notwithstanding removal bar contained in federal securities statute), *adhered to and affirmed on reconsideration*, 805 F. Supp. 221 (S.D.N.Y. 1992); *Lichtenberger v. Prudential-Bache Sec., Inc.*, 737 F.Supp. 43, 44 (S.D. Tex. 1990) (*Tafflin* does not prohibit removal of RICO actions).

<sup>35</sup> 28 U.S.C.A. § 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. A. 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).

<sup>36</sup> *New Beckley Min. Corp. v. Int’l Union, United Mine Workers of Am.*, 946 F.2d 1072, 1074 (4th Cir. 1991).

<sup>37</sup> *Id.* See also *Al-Abood ex rel. 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,

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.*,<sup>38</sup> 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 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.<sup>39</sup>

In contrast, in *In re Managed Care Litigation*,<sup>40</sup> 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.<sup>41</sup>

In an unpublished opinion, the Eleventh Circuit held that a federal court should abstain from hearing a civil RICO action under the *Rooker-Feldman* abstention doctrine where the claim was brought by a “state-court loser[] complaining of injuries caused by state-court judgments rendered before the district court proceedings commenced and inviting district court review and

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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), *order vacated*, 816 F. Supp. 191 (S.D.N.Y. 1993).

<sup>38</sup> *Metro Riverboat Associates, Inc. v. Bally's Louisiana, Inc.*, 142 F. Supp. 2d 765, 775 (E.D. La. 2001).

<sup>39</sup> *Id.*

<sup>40</sup> *In re Managed Care Litig.*, 135 F. Supp. 2d 1253, 1260 (S.D. Fla. 2001).

<sup>41</sup> *Id.*

rejection of those judgments.”<sup>42</sup> The court ruled that the plaintiff, a former property owner alleging a fraudulent foreclosure scheme, had lost in the state-court foreclosure proceedings and was effectively trying to have the federal court “review and reject” the state-court proceedings.<sup>43</sup>

**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.<sup>44</sup>

## § 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.<sup>45</sup> 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.<sup>46</sup> The court concluded that to allow such a result would frustrate the fundamental federal policies embodied by RICO.<sup>47</sup>

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<sup>42</sup> *Figueroa v. Merscorp, Inc.*, 477 F. App'x 558 (11th Cir. 2012) (citing *Casale v. Tillman*, 558 F.3d 1258, 1261 (11th Cir. 2009)).

<sup>43</sup> *Id.*

<sup>44</sup> *See, e.g., Carr v. Tillery*, 591 F.3d 909 (7th Cir. 2010) (holding that the fraud allegations supporting plaintiff's RICO claim were barred by res judicata, where they arose from the same events that gave rise to four prior state court lawsuits); *Monterey Plaza Hotel Ltd. P'ship v. Local 483 of Hotel Employees & 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. Southeastern Fin. Group, Inc.*, 980 F. Supp. 787, 794-95 (E.D. Pa. 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), *judgment aff'd*, 984 F.2d 182 (6th Cir. 1993).

<sup>45</sup> *Govett Am. Endeavor Fund Ltd. v. Trueger*, 112 F.3d 1017, 1021-22 (9th Cir. 1997), opinion withdrawn (May 29, 1998). *But see Richards v. Lloyd's of London*, 135 F.3d 1289, 1294 (9th Cir. 1998) (RICO claim does not void choice of law provision in contract requiring parties to litigate in England under English law).

<sup>46</sup> *Govett Am. Endeavor Fund Ltd.*, 112 F.3d at 1021.

<sup>47</sup> *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).

## § 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 be stayed rather than dismissed for lack of subject-matter jurisdiction.<sup>48</sup> As discussed in more detail below, a preemption defense will fail where the RICO action would not interfere with state regulatory authority.

## § 81 Implied Preemption Under Filed Rate Doctrine

In *Taffett v. Southern Co. (Taffett I)*,<sup>49</sup> 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.<sup>50</sup> The Eleventh Circuit vacated the panel’s decision in *Taffett I* and granted rehearing.<sup>51</sup>

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<sup>48</sup> *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”).

<sup>49</sup> *Taffett v. Southern Co.*, 930 F.2d 847 (11th Cir. 1991), *opinion vacated*, 958 F.2d 1514 (11th Cir. 1992), *on reh’g*, 967 F.2d 1483 (11th Cir. 1992) (per curiam).

<sup>50</sup> *Id.* at 856.

<sup>51</sup> *Taffett v. Southern Co.*, 958 F.2d 1514 (11th Cir. 1992), *on reh’g*, 967 F.2d 1483 (11th Cir. 1992) (per curiam).

On rehearing the Eleventh Circuit, en banc (*Taffett II*), held that the filed rate doctrine precluded the utility customers' RICO claim.<sup>52</sup> The *Taffett II* court noted that under Alabama and Georgia law a consumer does not have a 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.<sup>53</sup> 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."<sup>54</sup> 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.<sup>55</sup> 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.<sup>56</sup> 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.<sup>57</sup>

The Eighth Circuit similarly held that the filed rate doctrine barred telephone customers' civil RICO claim.<sup>58</sup> The Eighth Circuit concluded that the relief the class sought would disturb the state public utility commission's rate making decisions because RICO damages could only be

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<sup>52</sup> *Taffett v. Southern Co.*, 967 F.2d 1483 (11th Cir. 1992).

<sup>53</sup> *Id.* at 1490-91.

<sup>54</sup> *Id.* at 1491.

<sup>55</sup> *Id.* at 1492.

<sup>56</sup> *Id.* at 1493.

<sup>57</sup> *Id.* at 1494-95.

<sup>58</sup> *H.J. Inc. v. Northwestern Bell Tel. Co.*, 954 F.2d 485 (8th Cir. 1992).

measured by comparing the difference between the rates the commission originally approved and the rates it would have approved absent the fraudulent conduct.<sup>59</sup>

The Second Circuit reached a similar conclusion in *Wegoland, Ltd. v. NYNEX Corp.*<sup>60</sup> 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.<sup>61</sup>

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.*,<sup>62</sup> 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 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.<sup>63</sup> The court noted that it was "entirely consistent" with *Wegoland* to allow the plaintiffs' RICO cause of action to survive the filed rate

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<sup>59</sup> *Id.* at 492-94.

<sup>60</sup> *Wegoland Ltd. v. NYNEX Corp.*, 27 F.3d 17 (2d Cir. 1994).

<sup>61</sup> *Id.* See also *Sun City Taxpayers' Ass'n v. Citizens Util. Co.*, 45 F.3d 58, 62 (2d Cir. 1995); *Cullum v. Arkla, Inc.*, 797 F. Supp. 725, 728-729 (E.D. Ark. 1992) (facts presented were indistinguishable from those in *H.J. Inc. v. Northwestern Bell Tel. Co.*, 954 F.2d 485 (8th Cir. 1992) which was controlling), *decision aff'd*, 994 F.2d 842 (8th Cir. 1993) (unpublished table decision); *Feiner v. Orange & Rockland Util., Inc.*, 862 F. Supp. 1084, 1087 (S.D.N.Y. 1994).

<sup>62</sup> *Gelb v. American Tel. & Tel. Co.*, 813 F. Supp. 1022 (S.D.N.Y. 1993).

<sup>63</sup> *Id.* at 1029.

doctrine, and found “no reason to employ the doctrine in a manner that in effect extends a regulated entity’s immunity from suit.”<sup>64</sup>

Another district court within the Second Circuit has relied on *Wegoland* to allow RICO claims to proceed against a utility.<sup>65</sup> 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.<sup>66</sup>

## **§ 82 Statutory Preemption**

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

## **§ 83 Statutory Preemption—McCarran-Ferguson Act**

RICO claims involving insurance fraud may be preempted by the McCarran-Ferguson Act,<sup>67</sup> which provides that “the business of insurance”<sup>68</sup> is a matter of state, not federal, control.

The McCarran-Ferguson Act precludes the application of a federal statute (like RICO) if:

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<sup>64</sup> *Id.* at 1029-30. See also *Sun City Taxpayers’ Ass’n v. Citizens Util. Co.*, 847 F. Supp. 281, 290-291 (D. Conn. 1994) (no exception to filed rate doctrine for fraud on the regulatory agency), *order aff’d*, 45 F.3d 58 (2d Cir. 1995).

<sup>65</sup> See *Black Radio Network, Inc. v. NYNEX Corp.*, 44 F. Supp. 2d 565 (S.D.N.Y. 1999).

<sup>66</sup> *Id.* at 574.

<sup>67</sup> 15 U.S.C.A. §§ 1011 to 1014. Specifically, § 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.A. § 1012(b).

<sup>68</sup> 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

- (1) the statute (RICO) 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.<sup>69</sup>

Applying these factors, several courts have held that McCarran-Ferguson preempts RICO claims because application of RICO would impair, invalidate or supersede the state’s regulatory provisions.<sup>70</sup> 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.<sup>71</sup> A RICO action will not be allowed to proceed where “the intrusion of RICO’s substantial damages provisions into a state’s regulatory program”

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industry. *Union Labor 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 of Pa. v. Sedgwick James of Minn., Inc.*, 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”).

<sup>69</sup> *See, e.g., Cochran v. Paco, Inc.*, 606 F.2d 460, 464 (5th Cir. 1979); *Merchants Home Delivery Serv., Inc. v. Frank B. Hall & Co.*, 50 F.3d 1486, 1489 (9th Cir. 1995). Other courts, however, have interpreted the Supreme Court’s decision in *U.S. Dept. 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. Northwest 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 Minn., 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), *decision aff’d*, 95 F.3d 41 (4th Cir. 1996).

<sup>70</sup> *See, e.g., Riverview Health Inst. LLC v. Medical Mut. of Ohio*, 601 F.3d 505 (6th Cir. 2010) (holding that RICO “would impair Ohio’s insurance regulatory scheme”); *Kenty v. Bank One, Columbus, N.A.*, 92 F.3d 384, 392 (6th Cir. 1996) (holding that “RICO would impair the regulatory framework within which Ohio expects its insurance companies to do business”); *Doe*, 107 F.3d at 1308 (concluding that RICO would frustrate Minnesota’s carefully developed scheme of insurance regulation); *Ambrose*, 891 F. Supp. at 1168; *Everson v. Blue Cross & Blue Shield of Ohio*, 898 F. Supp. 532 (N.D. Ohio 1994); *Wexco Inc. v. IMC, Inc.*, 820 F. Supp. 194, 204 (M.D. Pa. 1993); *Senich v. Transamerica Premier Ins. Co.*, 766 F. Supp. 339, 340-341 (W.D. Pa. 1990).

<sup>71</sup> *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 Inc.*, 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”).

would impair state law.<sup>72</sup> Similarly, courts have held that where state law mandates a shorter limitations period, RICO's inherent four-year limitations period is preempted.<sup>73</sup>

On the other hand, the McCarran-Ferguson Act does not preempt RICO claims where the RICO claim supplements or complements state law.<sup>74</sup> For example, the Ninth Circuit found that a RICO claim was not preempted by the McCarran-Ferguson Act even though California law provided only for administrative remedies.<sup>75</sup> The Ninth Circuit concluded that because RICO and California law prohibited the same acts, RICO did not impair, invalidate, or supersede California law.<sup>76</sup>

In *Humana v. Forsyth*, 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.<sup>77</sup> In its discussion of whether a federal law directly conflicts with

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<sup>72</sup> *Doe*, 107 F.3d at 1307. See, e.g., *Riverview*, 601 F.3d 505 (holding that "permitting [the plaintiffs] to recover treble damages under the federal RICO statute would controvert Ohio's insurance regulatory scheme"); *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 Inc.*, 820 F. Supp. at 204 (availability of treble damages, costs and attorney's fees under RICO would impair Pennsylvania law).

<sup>73</sup> See *Campanelli v. Allstate Ins. Co.*, 97 F. Supp. 2d 1211, 1215 (C.D. Cal. 2000), *judgment rev'd on other grounds*, 322 F.3d 1086 (9th Cir. 2003).

<sup>74</sup> See, e.g., *Genord v. Blue Cross & Blue Shield of Mich.*, 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).

<sup>75</sup> *Merchants Home Delivery Serv., Inc. v. Frank B. Hall & Co.*, 50 F.3d 1486, 1492 (9th Cir. 1995); see also *Sabo v. Metropolitan 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*)).

<sup>76</sup> *Merchants Home Delivery Serv., Inc.*, 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), *judgment aff'd*, 525 U.S. 299 (1999), *overruled by Lacey v. Maricopa Cnty.*, 693 F.3d 896 (9th Cir. 2012); *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. Metropolitan 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. 96-CV-6131, 1997 WL 134896, at \*3 (E.D. Pa. Mar. 17, 1997) (concluding that RICO claim "would supplement, rather than supplant" Pennsylvania insurance law).

<sup>77</sup> *Humana Inc. v. Forsyth*, 525 U.S. 299, 313 (1999).

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.”<sup>78</sup> The Court allowed the RICO claim because RICO’s private right of action and treble damages provisions did not directly conflict with or impair state law, but complemented Nevada’s statutory and common law remedies.<sup>79</sup>

Following *Humana*, the Fourth Circuit has held that RICO does not impair the administrative scheme under Virginia insurance statutes.<sup>80</sup> 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.<sup>81</sup>

#### **§ 84 Statutory Preemption—National Labor Relations Act**

Several courts have held that RICO claims are preempted by the National Labor Relations Act (“NLRA”)<sup>82</sup> where the “underlying conduct of the plaintiff’s RICO claim is wrongful only by virtue of the labor laws.”<sup>83</sup> Applying this analysis, several courts of appeals

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<sup>78</sup> *Id.* at 310.

<sup>79</sup> *Id.* at 312. 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), *amended by* No. MDL 1334, 2002 WL 1359736 (S.D. Fla. Mar. 25, 2002).

<sup>80</sup> *American Chiropractic Ass’n v. Trigon Healthcare, Inc.*, 367 F.3d 212, 230-32 (4th Cir. 2004).

<sup>81</sup> *Weiss v. First Unum Life Ins. Co.*, 482 F.3d 254 (3d Cir. 2007).

<sup>82</sup> 29 U.S.C.A. § 158.

<sup>83</sup> *Talbot v. Robert Matthews Distributing Co.*, 961 F.2d 654, 662 (7th Cir. 1992).

have found RICO claims preempted where the predicate acts involved unfair labor practices in violation of §§ 7 and 8 of the NLRA.<sup>84</sup>

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.<sup>85</sup> 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.<sup>86</sup> 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.<sup>87</sup> 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—bargaining in bad faith.<sup>88</sup> Several district courts have ruled that RICO claims are preempted under similar circumstances.<sup>89</sup>

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<sup>84</sup> *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 conduct protected and prohibited by the NLRA"); *Adkins v. Mireles*, 526 F.3d 531, 542 (9th Cir. 2008). See also *San Diego Bldg. Trades Council, Millmen's Union, Local 2020 v. Garmon*, 359 U.S. 236, 245 (1959) (holding that "[w]hen an activity is arguably subject to § 7 or § 8 of the [NLRA], the States as well as the federal court, must defer to the exclusive competence of the National Labor Relations Board").

<sup>85</sup> *Talbot v. Robert Matthews Distributing Co.*, 961 F.2d 654, 662 (7th Cir. 1992).

<sup>86</sup> *Brennan v. Chestnut*, 973 F.2d 644, 647 (8th Cir. 1992).

<sup>87</sup> *Tamburello v. Comm-Tract Corp.*, 67 F.3d 973, 978 (1st Cir. 1995).

<sup>88</sup> *Adkins v. Mireles*, 526 F.3d 531, 542 (9th Cir. 2008).

<sup>89</sup> See *Buck Creek Coal, Inc. v. United Workers of Am.*, 917 F. Supp. 601, 610-11 (S.D. Ind. 1995) (finding RICO claims preempted where alleged predicate acts constituted arguable violations of Section 8 of NLRA); *Petrochem Insulation, Inc. v. Northern Cal. & Northern Nev. Pipe Trades Counsel*, No. 90-CV-3628, 1991 WL 158701, at \*7 (N.D. Cal. Apr. 30, 1991) (plaintiff's RICO claim preempted because it was predicated upon unfair labor practice); *McDonough v. Gencorp, Inc.*, 750 F. Supp. 368, 371 (S.D. Ill. 1990) (holding that RICO claim was preempted where it was based on alleged scheme to deprive the plaintiffs of democratic participation in the selection of a

On the other hand, the NLRA does not preempt RICO claims based on predicate acts that are illegal independent of the labor laws.<sup>90</sup> 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.<sup>91</sup> 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 falls within the Labor Board’s

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union); *Brown v. Keystone Consol. Indust., Inc.*, 680 F. Supp. 1212, 1224-225 (N.D. Ill. 1988); *Butchers’ Union, Local No. 498, United Food and Commercial Workers v. SDC Inv., Inc.*, 631 F. Supp. 1001, 1011 (E.D. Cal. 1986). *But see O’Rourke v. Crosley*, 847 F. Supp. 1208, 1213-214 (D.N.J. 1994) (holding that RICO claim, based on union official’s threats and intimidation when plaintiff refused to honor a sympathy strike, was not preempted by NLRA because union official’s conduct could also be interpreted as a violation of Labor Management Reporting and Disclosure Act).

<sup>90</sup> 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 973 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 N. Am.*, 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). *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-CV-0108, 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, Detroit Mailers Union Local 2040 v. Detroit Newspapers*, 956 F. Supp. 753, 759 (E.D. Mich. 1997).

<sup>91</sup> *Teamsters Local 372*, 956 F. Supp. at 761. *See also Buck Creek Coal, Inc. v. United Workers of America*, 917 F. Supp. 601, 610 (S.D. Ind. 1995) (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, Inc. v. Int’l Union, United Mine Workers of Am.*, 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).

primary jurisdiction, even if labor relations turn out to be implicated in some fashion.”<sup>92</sup> 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.<sup>93</sup>

RICO claims also may be preempted by § 301 of the Labor Management Relations Act (“LMRA”).<sup>94</sup> Preemption under the LMRA depends on whether the RICO claim involves rights and obligations that exist independent of the collective bargaining agreement.<sup>95</sup> 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.<sup>96</sup> Similarly, a RICO claim will be preempted by the Railway Labor Act (“RLA”)<sup>97</sup> if the RICO claim depends on rights arising under a collective bargaining agreement.<sup>98</sup> 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.<sup>99</sup>

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<sup>92</sup> *Baker v. IBP, Inc.*, 357 F.3d 685, 689 (7th Cir. 2004).

<sup>93</sup> *See Adkins v. Mireles*, 526 F.3d 531, 542 (9th Cir. 2008).

<sup>94</sup> 29 U.S.C.A. § 185.

<sup>95</sup> *Lopresti v. Merson*, No. 00-CV-4255, 2001 WL 1132051, at \*8-11 (S.D.N.Y. Sept. 21, 2001) (holding that alleged 20-month scheme to induce union to terminate collective bargaining agreement failed pattern requirement and was preempted by NLRA, but not LMRA). *Chicago Dist. Council of Carpenters Pension Fund v. Ceiling Wall Sys., Inc.*, 915 F. Supp. 939, 943-44 (N.D. Ill. 1996) (holding that LMRA preempted RICO because RICO claim could not be brought without construing terms of collective bargaining agreement); *Franks v. O’Connor Corp.*, No. 92-CV-0947, 1992 WL 301266, at \*3 (E.D. Pa. Oct. 16, 1992) (concluding that Section 301 of LMRA preempted majority of plaintiff’s RICO claims where the underlying conduct that formed the predicate acts was “unlawful only by virtue of federal labor law”); *Brown v. Keystone Consolidated Industries, Inc.*, 680 F. Supp. 1212, 1224-25 (N.D. Ill. 1988) (LMRA preempted RICO claim where resolution of claim required analysis of collective bargaining agreement, pension agreements, and shut down agreements).

<sup>96</sup> *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 213 (1985).

<sup>97</sup> 45 U.S.C.A. §§ 151 to 188.

<sup>98</sup> *See Underwood v. Venango River Corp.*, 995 F.2d 677, 685 (7th Cir. 1993), *overruling recognized*, *Westbrook v. Sky Chief, Inc.*, 35 F.2d 316 (7th Cir. 1994); *Hubbard v. United Airlines, Inc.*, 927 F.2d 1094, 1098-99 (9th Cir. 1991); *Mann v. Air Line Pilots Ass’n*, 848 F. Supp. 990, 994-95 (S.D. Fla. 1994) (concluding that breach of duty of fair representation cognizable only under RLA, and not under federal RICO law).

<sup>99</sup> *Mann v. Air Line Pilots Ass’n*, 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).

## § 85 Preemptive Effect of Other Statutes

Courts have ruled that RICO claims are preempted by § 501(a) of the Depository Institutions Deregulation and Monetary Control Act of 1980,<sup>100</sup> the Employee Retirement Income Security Act (“ERISA”),<sup>101</sup> Section 210 of the Energy Reorganization Act of 1974,<sup>102</sup> § 405 of the Surface Transportation Assistance Act of 1982,<sup>103</sup> the Federal Insecticide, Fungicide, and Rodenticide Act (“FIFRA”),<sup>104</sup> as well as the Civil Service Reform Act (“CSRA”).<sup>105</sup> In contrast, at least one court has expressly held that the Cigarette Labeling and Advertising Act did not preempt civil RICO claims.<sup>106</sup>

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<sup>100</sup> 12 U.S.C.A. § 1737f-7a(a) (exempting certain type of loans from application of state law). *Smith v. Fidelity Consumer Discount Co.*, 898 F.2d 907, 914 (3d Cir. 1990) (holding that Section 501(a) preempted RICO claims alleging violations of Pennsylvania usury laws and RICO).

<sup>101</sup> *Smith v. Sentry Ins.*, Civ. A. No. 1:91-CV-2537, 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).

<sup>102</sup> 42 U.S.C.A. § 5851; *Norman v. Niagara Mohawk Power Corp.*, 873 F.2d 634, 637-38 (2d Cir. 1989) (RICO action dismissed where Energy Reorganization Act provided the exclusive remedy for aggrieved plaintiffs).

<sup>103</sup> 49 U.S.C.A. § 31105; *Norman v. M.S. Carriers, Inc.*, 741 F. Supp. 148, 149 (W.D. Tenn. 1990) (dismissing RICO claim because Section 405 provided exclusive remedy where plaintiff discharged for refusing to violate safety regulations).

<sup>104</sup> 7 U.S.C. § 136v; *Jarman v. United Indus. Corp.*, 98 F. Supp. 2d 757, 766 (S.D. Miss. 2000) (holding that FIFRA preempted RICO claims against termiticide manufacturer premised on allegations that manufacturer intentionally misrepresented or failed to disclose pertinent information concerning its product).

<sup>105</sup> Pub. L. No. 95-454, 92 Stat. 1111 (codified as amended in scattered sections of 5 U.S.C.); see *Ferris v. American Fed’n of Government Employees*, 98 F. Supp. 2d 64, 69 (D. Me. 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).

<sup>106</sup> See *Falise v. American 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).

## XII. THIRD-PARTY PRACTICE

### § 86 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 uniformly have held that common law contribution and indemnification are not available.<sup>1</sup>

One federal district court decision is illustrative. In *Friedman v. Hartmann*,<sup>2</sup> the court applied the two-part test articulated by the Supreme Court in an antitrust case, *Texas Industries, Inc. v. Radcliff Materials, Inc.*,<sup>3</sup> and concluded that RICO defendants could not bring a third-party action for contribution or indemnification against their attorneys.<sup>4</sup> The Supreme Court in *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.”<sup>5</sup>

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<sup>1</sup> See, e.g., *Harmelin v. Man Fin., Inc.*, No. 06-1944, 2007 WL 2932866 (E.D. Pa. Oct. 2, 2007) (contribution and indemnification are not permitted under RICO); *Cnty. of Hudson v. Janiszewski*, No. 06-319 (JAP), 2007 WL 2688882, at \*5-6 (D.N.J. Sept. 13, 2007) (no right to contribution under RICO), *aff'd*, 351 F. App'x 662 (3d Cir. 2009); *Boone v. Beacon Bldg. Corp.*, 613 F. Supp. 1151, 1153-54 (D.N.J. 1985) (no right to contribution); *Daniels v. Bursey*, 329 F. Supp. 2d 975, 982 (N.D. Ill. 2004) (“defendants in civil RICO actions are not entitled to seek either contribution or indemnification from third parties”); *Local 875 I.B.T. Pension Fund v. Pollack*, 49 F. Supp. 2d 130, 133 n.6 (E.D.N.Y. 1999); *First Am. Corp. v. Al-Nahyan*, 948 F. Supp. 1107, 1118 (D.D.C. 1996) (observing that courts have uniformly denied contribution and indemnification claims under RICO); *Friedman v. Hartman*, 787 F. Supp. 411, 415 (S.D.N.Y. 1992) (no right to indemnification or contribution arises under RICO); *Andrews v. Fitzgerald*, No. C-89-649-G, 1992 WL 159766, at \*2 (M.D.N.C. Feb. 7, 1992) (same); *Nelson v. Bennett*, 662 F. Supp. 1324, 1338 n.23 (E.D. Cal. 1987) (“no rights of contribution are available to defendants under RICO”); *Jacobson v. W. Montana Prod. Credit Ass'n*, 643 F. Supp. 391, 396 (D. Mont. 1986) (holding that contribution and indemnification actions cannot be maintained under RICO); *Seminole Elec. Cooperative, Inc. v. Tanner*, 635 F. Supp. 582, 583 (M.D. Fla. 1986) (same); Cf. *Fleischhauer v. Feltner*, 879 F.2d 1290, 1301 (6th Cir. 1989) (civil RICO mandates joint and several liability); *Boone*, 613 F. Supp. at 1154-55 (a judicial determination of joint and several liability is not equivalent to a right of contribution; joint and several liability only “ensures that the plaintiffs will be able to recover the full amount of damages from some, if not all, participants”).

<sup>2</sup> *Friedman v. Hartmann*, 787 F. Supp. 411 (S.D.N.Y. 1992).

<sup>3</sup> *Texas Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 638 (1981).

<sup>4</sup> Other district courts have followed this analysis. See, e.g., *Cnty. of Hudson v. Janiszewski*, No. 06-319 (JAP), 2007 WL 2688882, at \*5-6 (D.N.J. Sept. 13, 2007), *aff'd*, 351 F. App'x 662 (3d Cir. 2009); *Boone v. Beacon Building Corp.*, 613 F. Supp. 1151, 1153-54 (D.N.J. 1985); *Daniels v. Bursey*, 329 F. Supp. 2d 975, 982 (N.D. Ill. 2004).

<sup>5</sup> *Texas Indus., Inc.*, 451 U.S. at 638.

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.<sup>6</sup> The court further held 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.”<sup>7</sup> Accordingly, the court concluded that there is no right to contribution under RICO.<sup>8</sup> The court applied the same reasoning to reject the claim for indemnification.<sup>9</sup>

At least one district court has upheld a contract-based claim for contribution. In *Sikes v. American Tel. & Tel. Co.*,<sup>10</sup> 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 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.<sup>11</sup> 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.<sup>12</sup> However, the court permitted the contract-based claim for contribution to go forward. The court reasoned that there is no harm in permitting two parties that expressly agreed to share the penalties of

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<sup>6</sup> *Friedman v. Hartmann*, 787 F. Supp. 411, 416 (S.D.N.Y. 1992).

<sup>7</sup> *Id.* at 417.

<sup>8</sup> *Id.* at 418.

<sup>9</sup> *Id.*

<sup>10</sup> *Sikes v. American Tel. and Tel. Co.*, 841 F. Supp. 1572 (S.D. Ga. 1993).

<sup>11</sup> *Id.* at 1581.

<sup>12</sup> *Id.*

unlawful conduct in which they both engaged to fulfill that agreement. Because neither party would escape liability entirely, RICO's deterrent purposes would still be served.<sup>13</sup>

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<sup>13</sup> *Id.* at 1583.

### XIII. SURVIVAL, ASSIGNMENT, AND ARBITRATION

#### § 87 Survival

Whether a RICO claim survives a plaintiff's death is governed by Fed. R. Civ. P. 25(a)(1), which provides that “[i]f a party dies and the claim is not extinguished, the court may order substitution of the proper party.”<sup>1</sup> As discussed below, the answer depends on whether RICO is considered 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.<sup>2</sup> The general rule is that an action for a penalty does not survive the death of the plaintiff.<sup>3</sup> 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.<sup>4</sup>

The Fourth Circuit has held that RICO claims survive the death of a party.<sup>5</sup> 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.”<sup>6</sup> The court acknowledged 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.”<sup>7</sup>

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<sup>1</sup> Fed. R. Civ. P. 25(a) (1).

<sup>2</sup> *Zatuchni v. Sec’y of Health & Human Servs.*, 516 F.3d 1312, 1329 n.8 (Fed. Cir. 2008).

<sup>3</sup> *Schreiber v. Sharpless (Ex parte Schreiber)*, 110 U.S. 76, 80 (1884); *Smith v. Dep’t of Human Servs.*, 876 F.2d 832, 834-35 (10th Cir. 1989).

<sup>4</sup> *Smith*, 876 F.2d at 835; *Murphy v. Household Fin. Corp.*, 560 F.2d 206 (6th Cir. 1977).

<sup>5</sup> *Faircloth v. Finesod*, 938 F.2d 513, 517 (4th Cir. 1991).

<sup>6</sup> *Id.* at 517-18.

<sup>7</sup> *Id.*

Several district courts agree that civil RICO claims are remedial in nature and therefore survive.<sup>8</sup> Other district courts have held that RICO claims are penal in nature and therefore do not survive the death of a party.<sup>9</sup>

One state appellate court has held that civil RICO claims against a defendant may survive and that an estate, through its administrator, is a “person” that has capacity to be sued on a RICO claim.<sup>10</sup> 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.<sup>11</sup>

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.<sup>12</sup> 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.

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<sup>8</sup> See *Epstein v. Epstein*, 966 F. Supp. 260, 263 (S.D.N.Y. 1997) (holding that since RICO is remedial such claims survive the death of either the plaintiff or defendant); *First Am. Corp. v. Al-Nahyan*, 948 F. Supp. 1107, 1122 (D.D.C. 1996); *County of Oakland ex rel. Kuhn v. City of Detroit*, 784 F. Supp. 1275, 1284-85 (E.D. Mich. 1992) (noting that the Supreme Court has stated in dicta that the civil RICO treble damages provision is remedial and only secondarily penal in nature); *State Farm Fire & Cas. Co. v. Estate of Caton*, 540 F. Supp. 673, 681-82 (N.D. Ind. 1982), *overruled on other grounds by Ashland Oil, Inc. v. Arnett*, 656 F. Supp. 950, 953 (N.D. Ind. 1987).

<sup>9</sup> 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 and barring assessment of treble damages against the FDIC).

<sup>10</sup> See *Bank of N. Ill. v. Nugent*, 584 N.E.2d 948, 958-59 (Ill. App. Ct. 1991).

<sup>11</sup> *Id.*

<sup>12</sup> *PacifiCare Health Sys. Inc. v. Book*, 538 U.S. 401, 406 (2003).

## § 88 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.<sup>13</sup> 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.”<sup>14</sup> The court relied on precedent holding certain Clayton Act claims assignable only by express terms. Because the Clayton Act provision<sup>15</sup> “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.<sup>16</sup> Most of the district courts that have addressed the issue have also concluded that RICO claims are assignable.<sup>17</sup> Further, the assignment of a RICO claim carries with it the assignor’s rights, interests, and limitations in that claim to the assignee.<sup>18</sup>

## § 89 Arbitrability of RICO Claims

The Supreme Court held in *Shearson/American Express, Inc. v. McMahon*<sup>19</sup> that RICO claims are arbitrable. In reaching its conclusion, the Court relied heavily on its prior decision in

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<sup>13</sup> *Lerman v. Joyce Int’l, Inc.*, 10 F.3d 106 (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).

<sup>14</sup> *Lerman*, 10 F.3d at 112.

<sup>15</sup> 15 U.S.C.A. § 15.

<sup>16</sup> *Lerman*, 10 F.3d at 112.

<sup>17</sup> *Resolution Trust Corp. v. S & K Chevrolet*, 868 F. Supp. 1047, 1054 (C.D. Ill. 1994); *Federal Ins. Co. v. Parello*, 767 F. Supp. 157, 163 (N.D. Ill. 1991); *Nicolls Pointing Coulson, Ltd. v. Transportation Underwriters of La., Inc.*, 777 F. Supp. 493, 494-96 (E.D. La. 1991); *Federal Ins. Co. v. Ayers*, 760 F. Supp. 1118, 1120 (E.D. Pa. 1990); *In re Nat’l Mortgage Equity Corp. Mortgage Pool Certificates Secs. Litig.*, 636 F. Supp. 1138, 1152-56 (C.D. Cal. 1986).

<sup>18</sup> *See 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).

<sup>19</sup> *Shearson/American Exp., Inc. v. McMahon*, 482 U.S. 220 (1987).

*Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*,<sup>20</sup> in which the Court held that antitrust claims are arbitrable.

The arbitrability of RICO claims raises strategic issues which for practioners. For example, a party may waive its right to arbitration by failing to demand arbitration on a timely basis.<sup>21</sup> A determinative factor in deciding if a party has waived its right to arbitration is whether the delay prejudiced the opposing party.<sup>22</sup>

A plaintiff whose complaint includes both arbitrable RICO claims and other nonarbitrable claims should consider whether to 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 nonarbitrable claims while awaiting arbitration.<sup>23</sup> Unless a stay of arbitration is entered, all proceedings pursuant to an arbitration agreement are enforceable, and unasserted contractual

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<sup>20</sup> *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985).

<sup>21</sup> See, e.g., *Restoration Preservation Masonry, Inc. v. Grove Europe Ltd.*, 325 F.3d 54, 61 (1st Cir. 2003) (four year delay from filing of action in state court to removal to federal court in order to compel arbitration, during which state court litigation was active, resulted in waiver); *Gilmore v. Shearson/American Exp. Inc.*, 811 F.2d 108, 112-13 (2d Cir. 1987) (withdrawal of motion to compel arbitration prevented defendant from subsequently pursuing arbitration), *overruled by McDonnell Douglas Fin. Grp. v. Pa. Power & Light Co.*, 849 F.2d 761 (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. of Oregon v. Active Erectors and 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); *Van Ness Townhouses v. Mar Indus. Corp.*, 862 F.2d 754, 758 (9th Cir. 1988) (party waived right to arbitration by actively litigating case for two years before moving to compel arbitration); *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); *Faircloth v. Jackie Fine Arts, Inc.*, 682 F. Supp. 837, 841 (D.S.C. 1988) (defendants waived right to arbitration by litigating for eighteen months before demanding arbitration), *judgment aff'd in part, rev'd in part on other grounds*, 938 F.2d 513 (4th Cir. 1991). But see *Nesslage v. York Sec., 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).

<sup>22</sup> See *Southern Sys., Inc. v. Torrid Oven Ltd.*, 105 F. Supp. 2d 848, 852 (W.D. Tenn. 2000) (identifying a split among federal circuit courts over whether a finding of prejudice is indispensable for finding waiver of an arbitration clause).

<sup>23</sup> See *Guyden v. Aetna, Inc.*, 544 F.3d 376, 382 (2d Cir. 2008) (four-part test for courts to determine whether to stay proceedings pending arbitration); *Bale v. Dean Witter Reynolds, Inc.*, 627 F. Supp. 650, 654-55 (D. Minn. 1986).

rights may be waived.<sup>24</sup> Additionally, a prior arbitration may have a preclusive effect on RICO claims to be litigated.<sup>25</sup>

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.<sup>26</sup> The Supreme Court compelled arbitration in *PacifiCare Health Systems, Inc. v. Book*,<sup>27</sup> where 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 able to provide “meaningful relief” under *Paladino v. Avnet Computer Techs., Inc.*<sup>28</sup> First, the Court noted that it has long treated treble damages under RICO as remedial in nature. Second, and partly in light of that precedent, the Court ruled that it was ambiguous whether the parties

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<sup>24</sup> *McMahon v. Shearson/American Exp. Inc.*, 709 F. Supp. 369, 371-73 (S.D.N.Y. 1989) (plaintiffs waived contractual right to select arbitration forum by failing to seek a stay of arbitration, instead relying upon their opposition to defendant’s motion to compel arbitration), *order rev’d on other grounds*, 896 F.2d 17 (2d Cir. 1990).

<sup>25</sup> *See Benjamin v. Traffic Exec. Ass’n Eastern R.R.*, 869 F.2d 107, 110 (2d 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 Financial Corp. v. Honeywood Development Corp.*, No. 98-CV-2332, 2001 WL 62603, at \*4 (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).

<sup>26</sup> *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); *Blau v. AT&T Mobility*, No. C 11-00541 CRB, 2012 WL 10546 at \*6 (N.D. Cal. Jan. 3, 2012) (compelling arbitration and rejecting argument that court may decline to enforce arbitration provision that is fraudulently induced as part of a RICO violation); *Grynberg v. BP P.L.C.*, 585 F. Supp. 2d 50 (D.D.C. 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 CV 510, 1998 WL 401530, at \*9-11 (S.D.N.Y. July 16, 1998) (arbitration provision covering “any dispute” included allegations of civil RICO violations).

<sup>27</sup> *PacifiCare Health Sys., Inc. v. Book*, 538 U.S. 401 (2003).

<sup>28</sup> *Paladino v. Avnet Computer Tech., Inc.*, 134 F.3d 1054, 1062 (11th Cir. 1998).

intended their “no punitive damages” language to mean “no treble damages” under RICO.<sup>29</sup> Noting the 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.<sup>30</sup>

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<sup>29</sup> *PacifiCare*, 538 U.S. at 406-07.

<sup>30</sup> *Id.* at 407 n.2.

## **XIV. RICO CLASS ACTIONS**

### **§ 90 Class Certification of RICO Claims**

Plaintiffs may pursue RICO claims as a class in certain circumstances. Proceeding as a class can be advantageous when each individual plaintiff's damages may be too small to warrant full-scale litigation. Defendants also may prefer the efficiencies afforded by class treatment. By aggregating claims, the parties and the court can avoid needless repetition of the same witnesses, evidence, and legal issues. Defendants can also avoid inconsistent results due to the 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.”<sup>1</sup>

Plaintiffs in RICO actions have had mixed results in attempting to have their RICO claims certified in a class action. Certification generally turns on whether the alleged injuries

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<sup>1</sup> Fed. R. Civ. P. 23(b) (3).

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.<sup>2</sup> On the other hand, courts have denied class certification where individual questions of causation predominate over common issues.<sup>3</sup>

Plaintiffs may argue that the Supreme Court decision in *Bridge v. Phoenix Bond & Indemnity Co.* (discussed in § 33 above)<sup>4</sup> eases the requirements for certification of a RICO

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<sup>2</sup> 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 Inc. v. Reliance Nat'l Indem. Ins. Co.*, 319 F.3d 205 (5th Cir. 2003) 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), *abrogated in part on other grounds by Bridge v. Phoenix Bond & Indem. Co.*, 553 U.S. 639 (2008); *Catholic Healthcare West, Tomas & King, Inc. v. U.S. Foodservice Inc. (In re U.S. Foodservice Inc. Pricing Litigation)*, 729 F.3d 108 (2d Cir. 2013) (affirming certification of class where common evidence showed that customers paid invoices that were allegedly inflated in the exact same manner); *In re Zyprexa Prods. Liab. Litig.*, 253 F.R.D. 69 (E.D.N.Y. 2008) (holding that common issues predominated over individualized issues), *rev'd* by 620 F.3d 121 (2d Cir. 2010); *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. Metropolitan 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).

<sup>3</sup> See, e.g., *McLaughlin v. American Tobacco Co.*, 522 F.3d 215, 222-30 (2d Cir. 2008) (reversing class certification and holding that individual issues of causation and injury predominated), *abrogated in part on other grounds by Bridge v. Phoenix Bond & Indem. Co.*, 553 U.S. 639 (2008); *Johnston v. HBO Film Mgmt., Inc.*, 265 F.3d 178, 190-94 (3d Cir. 2001) (class certification denied because alleged oral misrepresentation would require individual review and present "insurmountable manageability problems"); *Sandwich Chef*, 319 F.3d at 219 (applying presumption against class certification in case involving individual questions of reliance); *Szabo v. Bridgeport Mach., Inc.*, 249 F.3d 672, 675-76 (7th Cir. 2001) (remanding case because district court should have made "whatever factual and legal inquiries" were necessary to determine whether class should have been certified and should not have assumed that the plaintiff's account was true, especially as oral representations suggested that class should not be certified); *Poulos v. Caesars World, Inc.*, 379 F.3d 654, 664-67 (9th Cir. 2004) (affirming denial of class certification because of individualized issues of causation); *Moore v. Painewebber, Inc.*, No. 96-CV-6820, 2001 WL 228120, at \*4-5 (S.D.N.Y. Mar. 7, 2001) (declining to certify a class where plaintiffs alleged that oral misrepresentations by sales representatives were made using a written script, but where record showed that sales representatives used different phone scripts and solicitation letters), *aff'd*, 306 F.3d 1247, 1249 (2d Cir. 2002) ("We hold that class certification of fraud claims based on oral misrepresentations is appropriate only where the misrepresentations relied upon were materially uniform, allowing such misrepresentations to be demonstrated using generalized rather than individualized proof.")

<sup>4</sup> *Bridge v. Phoenix Bond & Indem. Co.*, 553 U.S. 639 (2008).

class. 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.<sup>5</sup> However, the circumstances of that case were unique because the plaintiff could show that it was directly injured by fraud on which third-party government officials relied.<sup>6</sup>

Although plaintiffs may cite *Bridge* to argue that individual issues of reliance should no longer predominate over other common issues,<sup>7</sup> individual questions of proximate cause may still defeat class certification, particularly where not all proposed class members were allegedly victimized by the same misrepresentations. Under the Supreme Court's decisions in *Holmes*<sup>8</sup> and *Anza*,<sup>9</sup> a RICO plaintiff must be the party directly harmed by the violation.<sup>10</sup> This means that in most fraud-based RICO cases, the plaintiff is not likely to show it was directly injured unless it relied to its detriment on the defendant's purported misrepresentations. If different representations are made to different members of the proposed class, individual questions of causation likely will predominate.<sup>11</sup>

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<sup>5</sup> *Id.* at 661.

<sup>6</sup> *Id.*

<sup>7</sup> See, e.g., *In re Countrywide Fin. Corp. Mortgage Mktg. & Sales Practices Litig.*, 277 F.R.D. 586, 603 (S.D. Cal. 2011) (noting that after *Bridge*, "reliance is not required to prove causation). *In re ZyprexaProds. 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), *rev'd by*, 620 F.3d 121 (2d Cir. 2010).

<sup>8</sup> *Holmes v. Securities Investor Prot. Corp.*, 503 U.S. 258 (1992).

<sup>9</sup> *Anza v. Ideal Steel Supply Corp.*, 547 U.S. 451 (2006).

<sup>10</sup> 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), *aff'd on other grounds*, 634 F.3d 1352 (11th Cir. 2011).

<sup>11</sup> See, e.g., *Badella v. Deniro Mktg., LLC*, No. C 10-03908 CRB, 2011 WL S5358400, at \*6-7 (N.D. Cal. Nov. 4, 2011) (rejecting application of *Bridge* where plaintiffs alleged actual reliance and refusing to certify class due to predominance of individual issues).

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

## § 91 Cases Denying Class Certification

Courts have refused to certify classes when the plaintiffs' RICO claims 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.<sup>12</sup>

Some courts have used "reliance" as short-hand for proximate cause.<sup>13</sup> In *Sandwich Chef of Texas, Inc. v. Reliance Nat'l Indemnity Ins. Co.*, the Fifth Circuit went so far as to say that

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<sup>12</sup> See, e.g., *McLaughlin*, 522 F.3d at 222-30 (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 v. Reliance National Indemnity Insurance Co.*, 319 F.3d 205, 219 (5th Cir. 2003) (applying presumption against class certification in case involving individual questions of reliance); *Patterson v. Mobil Oil Corp.*, 241 F.3d 417, 419 (5th Cir. 2001) (vacating class certification where plaintiff sought damages resulting from foregone negligence lawsuits, because individual questions of reliance would predominate); *Poulos v. Caesars World, Inc.*, 379 F.3d 654, 664-67 (9th Cir. 2004) (refusing to presume reliance and affirming denial of class certification to gamblers where individualized questions of causation predominated); *Moore v. American Fed. of Television & Radio Artists*, 216 F.3d 1236, 1242-43 (11th Cir. 2000) (predominance requirement not satisfied where putative class members seeking to recover contributions to health and retirement plans had different employment contracts with defendant, even though all members were covered under one collective bargaining agreement); *Blackburn v. Calhoun*, No. 207CV166, 2008 WL850191, at \*25 (N.D. Ala. Mar. 4, 2008) (finding individual issues predominate where claim of judicial preference), *aff'd*, 296 F. App'x 788 (11th Cir. 2008); *Fletcher v. ZLB Behring LLC*, 245 F.R.D. 328 (N.D. Ill. 2006) (denying class certification over the plaintiff's common law fraud claim where the defendant allegedly made oral representations; common issues did not predominate because the plaintiff's claim turned on the specific representations made to each class member and the class member's reliance on those representations); *Chaz Concrete Co., LLC v. Codell*, No. 03-CV-52, 2006 WL 2453302, at \*8 (E.D. Ky. Aug. 23, 2006) (denying certification where "because of the varied nature of the misrepresentations alleged and the varied nature of the recipients of the misrepresentations, the issues of reliance and causation would have involved extensive individual factual inquiries for each proposed class member"); *In re Pharm. Indus. Average Wholesale Price Litig.*, 230 F.R.D. 61 (D. Mass. 2005) (predominance requirement for class certification not satisfied with respect to several proposed classes), *subsequent determination*, 233 F.R.D. 229 (D. Mass. 2006); *Smith v. Berg*, No. CIV. A. 99-CV-2133, 2001 WL 1169106, at \*2-4 (E.D. Pa. Oct. 1, 2001) (certification denied in part because required proof of individual reliance, oral misrepresentations, and divergent written misrepresentations indicated that common questions did not predominate); *Hammett v. American Bankers Ins. Co.*, 203 F.R.D. 690 (S.D. Fla. 2001) (denying class certification where class representative sought individualized relief and issues of individual reliance predominated).

<sup>13</sup> See, e.g., *Sandwich Chef of Texas v. Reliance National Indemnity Insurance Co.*, 319 F.3d 205, 219 (5th Cir. 2003).

“the pervasive issues on individual reliance that generally exist in RICO-fraud actions create a working presumption against class certification.”<sup>14</sup>

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.<sup>15</sup> 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.<sup>16</sup> 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.<sup>17</sup> The second theory was that certain plaintiffs were the intended target of misrepresentations made to third-party insurance regulators.<sup>18</sup>

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 § 1964(c) only authorizes private suits by persons injured in their business or property “by reason of” a violation of § 1962. The court noted that the “by reason of” language imposes a proximate cause requirement on the plaintiffs,<sup>19</sup> which it equated with reliance.<sup>20</sup> By presuming reliance simply because the plaintiffs paid the invoices they received, 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

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<sup>14</sup> See, e.g., *id.*

<sup>15</sup> *Sandwich Chef of Texas, Inc. v. Reliance National Indemnity Insurance Co.*, 319 F.3d 205, 211 (5th Cir. 2003).

<sup>16</sup> *Id.* at 219-20.

<sup>17</sup> *Id.*

<sup>18</sup> *Id.* at 221.

<sup>19</sup> *Id.* at 218-19.

<sup>20</sup> *Id.* at 222.

overcharges, the Fifth Circuit 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 *Holmes*.<sup>21</sup> 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.<sup>22</sup> The court instead 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 each plaintiff had to prove that it relied to its detriment on the validity of the invoices.<sup>23</sup>

Several courts also have concluded that individual issues regarding calculation of damages may defeat class certification. For example, in *Lester v. Percudani*,<sup>24</sup> 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 advertised low monthly payments, but fraudulently manipulated monthly tax and mortgage estimates to appear lower than they were.<sup>25</sup> 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

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<sup>21</sup> *Holmes v. Securities Investor Prot. Corp.*, 503 U.S. 258 (1992).

<sup>22</sup> *Sandwich Chef of Texas v. Reliance National Indemnity Insurance Co.*, 319 F.3d 205, 220-24 (5th Cir. 2003).

<sup>23</sup> *Id.* at 223-24.

<sup>24</sup> *Id.* at 352.

<sup>25</sup> *Id.* at 347.

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.<sup>26</sup>

The court refused to certify the RICO class because individual issues predominated.<sup>27</sup> The court noted the § 1964(c) requirement that plaintiffs suffer injury to their business or property "by reason of" a violation of § 1962, which it interpreted as a proximate cause requirement.<sup>28</sup> 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."<sup>29</sup>

The court also noted that plaintiffs must prove their damages if class-wide injury cannot be presumed. The court rejected the plaintiffs' argument that the court could presume reliance based on a "fraud on the market" theory.<sup>30</sup> The court reasoned that the "fraud on the market" theory used in securities cases did not apply, because the defendants did not deceive the plaintiffs through one common event that affected the entire market.<sup>31</sup> Each plaintiff's damages instead depended on many different factors, including the increase in taxes that occurred after reassessment, and the difference between the actual and represented value of each plaintiff's

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<sup>26</sup> *Id.* at 348.

<sup>27</sup> *Lester v. Percudani*, 217 F.R.D. 345, 352 (M.D. Pa. 2003).

<sup>28</sup> *Id.* at 352-53; *see also* *Brandenburg v. Seidel*, 859 F.2d 1179, 1187-88 (4th Cir. 1988) (rejected on other grounds by, *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706 (1996)) (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).

<sup>29</sup> *Lester v. Percudani*, 217 F.R.D. 345, 353 (M.D. Pa. 2003).

<sup>30</sup> *Id.* at 352.

<sup>31</sup> *Id.*

home.<sup>32</sup> Proving such damages created “the prospect of holding hundreds or thousands of individual hearings” and illustrated that individual issues rather than common issues predominated.<sup>33</sup>

## § 92 Cases Granting Class Certification

In contrast to cases such as *Sandwich Chef* and *Lester*, discussed in § 91, some 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 class members’ reliance could be presumed.<sup>34</sup> For example, in *Klay v. Humana, Inc.*, a group of physicians alleged that various health maintenance organizations (“HMOs”) defrauded them by underpaying and unreasonably delaying payment for medical services rendered to HMO

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<sup>32</sup> *Id.*

<sup>33</sup> *Lester v. Percudani*, 217 F.R.D. 345, 352 (M.D. Pa. 2003).

<sup>34</sup> *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 Jan. 26, 2008) (certifying class where alleged fraud arose from use of standardized form documents) subsequent determination, No. 06-CV-962, 2009 WL 185943 (N.D. Ohio Jan. 26, 2009); *Marin v. Evans*, No. 06-CV-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. Jenkins & Gilchrist*, No. 03-CV-5460, 2004 WL 1197251 (S.D.N.Y. May 19, 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. Long Island Savings 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 West. Gov’t Sec., Inc.*, No. Civ. A. 83-1076, 1996 WL 153641, at \*11-12 (E.D. Pa. Dec. 21, 1995) (“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”).

subscribers.<sup>35</sup> The district court certified three classes, including a global class, to pursue the RICO claims.<sup>36</sup> On appeal, the defendants argued that the certification was improper under Rule 23(b)(3) because individual issues of reliance predominated.<sup>37</sup> 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.”<sup>38</sup> 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.”<sup>39</sup> The court observed 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*.”<sup>40</sup>

In *In re U.S. Foodservice Inc. Pricing Litigation*, the Second Circuit agreed with the court in *Klay* that reliance could be reasonably inferred where customers paid fraudulently inflated invoices.<sup>41</sup> The Second Circuit distinguished *Sandwich Chef* by noting that there was “no such individualized proof indicating knowledge or awareness of the fraud by any plaintiffs.”<sup>42</sup>

In *Carnegie v. Household Int’l, Inc.*, the Seventh Circuit rejected both the presumption against class certification applied in *Sandwich Chef* and the suggestion in *Lester* that fact-

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<sup>35</sup> *Klay*, 382 F.3d at 1247-49.

<sup>36</sup> *Id.* at 1250.

<sup>37</sup> *Id.* at 1258.

<sup>38</sup> *Id.*

<sup>39</sup> *Id.* at 1259.

<sup>40</sup> *Id.* (referencing *Sikes v. Teleline, Inc.*, 281 F.3d 1350, 1354-58 (11th Cir. 2002), *abrogated by*, *Bridge v. Phoenix Bond & Indem. Co.*, 553 U.S. 639 (2008) (rejecting district court’s use of presumption of reliance as improperly eliminating class-plaintiffs’ burden)).

<sup>41</sup> *Catholic Healthcare West, Tomas & King, Inc. v. U.S. Foodservice Inc. (In re U.S. Foodservice Inc. Pricing Litigation)*, 729 F.3d 108 118-20 (2d Cir. 2013).

<sup>42</sup> *Id.* at 120 (emphasis in original).

intensive damages inquiries defeat class certification.<sup>43</sup> The Seventh Circuit highlighted the difference between the liability and remedy phases of class action litigation, and concluded that the question of whether the defendants violated RICO is an issue distinct from the entitlement of each particular plaintiff to relief.<sup>44</sup> 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.<sup>45</sup> 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.”<sup>46</sup>

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 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.

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<sup>43</sup> *Carnegie v. Household International, Inc.*, 376 F.3d 656 (7th Cir. 2004).

<sup>44</sup> *Id.* at 661.

<sup>45</sup> *Id.*

<sup>46</sup> *Id.* at 661.

## XV. PRACTICE AIDS

### § 93 Checklist of Essential Allegations

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

- Has the plaintiff alleged a **racketeering** offense enumerated in § 1961(1)? (See § 5, Racketeering Activity.)
  - If the plaintiff has alleged mail fraud (18 U.S.C.A. § 1341) or wire fraud (18 U.S.C.A. § 1343) as predicate acts, has the plaintiff met the particularity requirements of Fed. R. Civ. P. 9(b) by properly alleging the time, place, content of the fraudulent communications, and the identity of the parties to the communications?
  - Has the plaintiff alleged that the defendant committed the alleged predicate acts willfully or with actual knowledge of the illegal activities?
  - Has the plaintiff alleged how its injury was proximately caused by the alleged racketeering activity?
- Has the plaintiff alleged that the defendant conducted the racketeering activity through a **pattern**? (See §§ 12–16, Pattern of Racketeering.)
  - Are the predicate acts **related** and **continuous**?
    - 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?
    - 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**?
    - 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?
- Has the plaintiff alleged that the racketeering activity affects an **enterprise** involved in interstate commerce? (See Part IV concerning the RICO Enterprise.)
  - Has the plaintiff alleged that the racketeering activity affects individuals, partnerships, corporations or some other group **associated in fact**, although not a legal entity?

- Is the enterprise directly engaged in the production, distribution, or acquisition of goods and services in interstate commerce?
  - Has the plaintiff improperly alleged an enterprise consisting of a corporation and its officers or agents?
  - Is the enterprise distinct from the culpable person?
  - Did the culpable person operate or manage the affairs of the enterprise?
- Does the defendant qualify as a **culpable person**? (See § 3)
- If the plaintiff is alleging a violation of § 1962(c), is the alleged culpable person properly distinct from the alleged enterprise?
  - Has the plaintiff improperly alleged that a government entity is the culpable person?
- Does the plaintiff meet the RICO **standing** requirements? (See Part V, Standing Under § 1962(c).)
- Is the plaintiff a “**person**” meaning an entity capable of holding a legal or beneficial interest in property?
  - Has the plaintiff alleged an injury to its business or property by the conduct constituting the violation?
    - Has the plaintiff alleged a concrete injury to a proprietary interest?
    - 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?
    - Has the plaintiff improperly alleged a personal injury?
    - 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.)

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

- Does your jurisdiction apply the **injury discovery** rule to decide when the statute of limitations begins to run?
- Should the running of the statute of limitations be equitably tolled?
  - Has plaintiff filed its RICO claim within four years after the plaintiff discovered or reasonably should have discovered its injury?
  - Has the plaintiff alleged it exercised **reasonable diligence** to discover the claim?
  - Has the plaintiff alleged sufficient facts under Fed. R. Civ. P. 9(b) to establish **fraudulent concealment**?
  - Has the plaintiff suffered new injuries from different conduct that would allow a separate accrual rule to apply?

□ Claims under § 1962(a), (b), and (d).

- If the plaintiff is alleging a violation of **§ 1962(a)**, has the plaintiff alleged that it was injured by the investment of racketeering income? (See Part VI, § 1962(a): Investment of Racketeering Income.)
- If the plaintiff is alleging a violation of **§ 1962(b)**, has the plaintiff alleged that it was injured by the acquisition of an interest or control over an enterprise? (See Part VII, § 1962(b): Acquisition of Control of Enterprise.)
- If the plaintiff is alleging a violation of **§ 1962(d)**, has the plaintiff alleged that it was injured by an overt predicate act of racketeering in furtherance of the conspiracy? (See Part XIII, § 1962(d): RICO Conspiracy.)
- Is the **§ 1962(d)** claim based on alleged violations of § 1962(a), (b), or (c) that already occurred? If so, does the alleged conduct sustain a violation of those sections?

□ Has the plaintiff complied with all applicable **pleading** rules?

- Has the plaintiff alleged fraud with particularity as required by Fed. R. Civ. P. 9(b)?
- Does your jurisdiction require the plaintiff to file a **RICO Case Statement**? (See § 94)

## § 94 Form: RICO Case Statement

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

Courts have stressed the importance of compliance with these orders.<sup>3</sup> Failure to comply with an order requiring a RICO Case Statement may result in dismissal of the action or the imposition of sanctions.<sup>4</sup> Even if your case is in a court that does not require a RICO Case

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<sup>1</sup> See, e.g., *Miranda v. Ponce Fed. Bank*, 948 F.2d 41, 44 n.3 (1st Cir. 1991); *McLaughlin v. Anderson*, 962 F.2d 187, 189 (2d Cir. 1992); *City of New York v. ESmokes, Inc.*, No. 03-CV-10091, 2005 WL 372044 (S.D.N.Y. Feb. 16, 2005); *Discon Inc. v. NYNEX Corp.*, No. 90-CV-546A, 1992 WL 193683 (W.D.N.Y. June 23, 1992); *Sun City Taxpayers’ Ass’n v. Citizens Utilities Co.*, 847 F. Supp. 281 (D. Conn. 1994), *order aff’d*, 45 F.3d 58 (2d Cir. 1995); *MAACO Enter., Inc. v. Wilbanks*, No. 92-CV-0079, 1992 WL 189485 (E.D. Pa. Aug. 3, 1992); *Mid-State Elec., Inc. v. H.L. Libby Corp.*, 141 F.R.D. 255, 257 (W.D. Pa. 1992); *Guidry v. Bank of LaPlace*, 954 F.2d 278, 281 (5th Cir. 1992); *Porter v. Shearson Lehman Bros. Inc.*, 802 F. Supp. 41, 52 (S.D. Tex. 1992); *Household Bank FSB v. Metro Assoc.*, No. 92-CV-0355, 1992 WL 350239 (E.D. La. July 1, 1992); *Jae-Soo Yang Kim v. Pereira Enters., Inc.*, 694 F. Supp. 200, 202 (E.D. La. 1988), *judgment aff’d*, 873 F.2d 295 (5th Cir. 1989) (unpublished table decision); *Marriott Bros. v. Gage*, 717 F. Supp. 458, 460 (N.D. Tex. 1989), *judgment aff’d*, 911 F.2d 1105 (5th Cir. 1990); *Davis v. A.G. Edwards & Sons, Inc.*, 687 F. Supp. 266, 267 (W.D. La. 1988); *McLemore v. Landry*, 668 F. Supp. 531, 533 (M.D. La. 1987); *Robinson v. Kidder, Peabody & Co.*, 674 F. Supp. 243, 246 (E.D. Mich. 1987); *Folz v. BancOhio Nat. Bank*, 88 B.R. 149, 151 (S.D. Ohio 1987); *Richmond v. Nationwide Cassel L.P.*, 847 F. Supp. 88 (N.D. Ill. 1994), *aff’d*, 52 F.3d 640 (7th Cir. 1995); *Chicago Housing Auth. v. First Nat’l. Retirement Servs., Inc.*, No. 92-CV-0991, 1992 WL 168814 (N.D. Ill. July 14, 1992); *Chartrand v. Chrysler Corp.*, 785 F. Supp. 666, 668 (E.D. Mich. 1992); *Norris v. Wirtz*, 703 F. Supp. 1322, 1328 (N.D. Ill. 1989); *VSA v. Von Weise Gear Co.*, 769 F. Supp. 1080, 1081 (E.D. Mo. 1991); *United Power Ass’n, Inc. v. L.K. Comstock & Co.*, No. 89-CV-766, 1990 WL 120674 (D. Minn. Mar. 16, 1990); *Wagh v. Metris Direct, Inc.*, 363 F.3d 821, 829 (9th Cir. 2003), *overruled on other grounds*, *Odom v. Microsoft Corp.*, 486 F.3d 541, 551 (9th Cir. 2007); *Lui Ciro, Inc. v. Ciro, Inc.*, 895 F. Supp. 1365 (D. Haw. 1995); *In re National Health Labs. Sec. Litig.*, No. 92-CV-1949, 1993 WL 331002 (S.D. Cal. July 2, 1993); *Kingston Square Tenants Ass’n v. Tuskegee Gardens, Ltd.*, 792 F. Supp. 1566, 1578 (S.D. Fla. 1992).

<sup>2</sup> 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*, 694 F. Supp. at 203 (noting district court’s standing order). 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).

<sup>3</sup> See, e.g., *Marriott Bros. v. Gage*, 911 F.2d 1105, 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”).

<sup>4</sup> 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

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.A. §§ 1961 to 1968 (“Civil RICO”).

The proponent of the civil RICO claim shall file and serve within [number] days of [filing of complaint] 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:

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.

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facts supporting the claim); *Petrochem Insulation, Inc. v. Northern Cal. & Northern Nevada Pipe Trades Council*, No. 90-CV-3628, 1992 WL 131162 (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. 85-CV-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., L.L.C. v. Colin Serv. Sys., Inc.*, 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”).

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,” Fed. R. Civ. P. 9(b). 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.A. § 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.A. § 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 § 1962(b).

13. If the complaint alleges a violation of 18 U.S.C.A. § 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 § 1962(c).

14. If the complaint alleges a violation of 18 U.S.C.A. Section 1962(d), describe in detail the alleged conspiracy.

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 § 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.

#### **§ 95 Form: 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 § 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 Fed. R. Civ. P. 8 requires the complaint to contain “a short and plain statement of the claim,” RICO claims that are based on fraud must satisfy Fed. R. Civ. P. 9(b) 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.<sup>5</sup> In addition, the pleading standards under *Bell Atlantic Corp. v. Twombly*<sup>6</sup> and *Ashcroft v. Iqbal*<sup>7</sup> are particularly applicable in RICO cases to protect defendants against baseless charges of racketeering that are serious, harmful, and expensive to defend.<sup>8</sup>

[Insert caption]

## **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 § 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

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<sup>5</sup> As to issues relating to mail and wire fraud, see § 6.

<sup>6</sup> *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007).

<sup>7</sup> *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

<sup>8</sup> *Limestone Dev. Corp. v. Vill. of Lemont*, 520 F.3d 797, 803 (7th Cir. 2008) (affirming dismissal of RICO claim and warning against permitting a plaintiff “with a largely groundless claim to simply take up the time of a number of other people, with the right to do so representing an in terrorem increment of the settlement value, rather than a reasonably founded hope that the [discovery] process will reveal relevant evidence.”); *Crest Constr. II, Inc. v. Doe*, 660 F.3d 346, 353 (8th Cir. 2011) (affirming dismissal of RICO claim where “the complaint has alleged—but it has not ‘shown’—‘that the pleader is entitled to relief’” (quoting *Iqbal*, 556 U.S. at 678)).

States. See §§ 74–85 for a more detailed discussion of jurisdiction, concurrent jurisdiction, venue, service of process, removal, abstention, and preemption.]

### **PARTIES**

4. Plaintiff [Name] is a [type] corporation with its principal place of business in [location]. [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 § 27, Person.

5. Defendant [Name] is a [type] corporation with its principal place of business in [location]. [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 §§ 17–25, 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 racketeering.” “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 close-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 §§ 12–16, 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 § 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 § 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 § 1962(c) must stem from the predicate acts; injury under § 1962(a) must stem from the investment of racketeering income; injury under § 1962(b) must stem from the acquisition of an interest on or control over an enterprise; and injury under § 1962(d) generally stems from the overt acts committed in furtherance of the conspiracy. See §§ 26–50, Standing under § 1962(c); §§ 51, 52, § 1962(a): Investment of Racketeering Income; §§ 53–55, § 1962(b): Acquisition of Control of Enterprise; and §§ 56–61, § 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 § 1962(c)**

7. The allegations of paragraphs [paragraph number] through [paragraph number] are incorporated herein by reference.

8. This Count is against Defendant(s) [name of defendant] (the “Count I Defendant(s)”).

9. [Name of enterprise] 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].

12. The acts [list individually] set forth above constitute a pattern of racketeering activity pursuant to 18 U.S.C. § 1961(5).

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 attorney's fees. See §§ 69–73, Relief.]

## **COUNT II**

### **RICO § 1962(a)**

16. The allegations of paragraphs [paragraph number] through [paragraph number] are incorporated herein by reference.

17. This Count is against Defendant(s) [name of defendant] (the "Count II Defendant(s)").

18. [Name of enterprise] 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.]

20. The [racketeering activity listed above] constitutes a pattern of racketeering activity pursuant to 18 U.S.C. § 1961(5).

21. As 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 §§ 51, 52, § 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 attorney’s fees. See §§ 69–73, Relief.]

**COUNT III**

**RICO § 1962(b)**

23. The allegations of paragraphs [paragraph number] through [paragraph number] are incorporated herein by reference.

24. This Count is against Defendant(s) [name of defendant] (the “Count III Defendant(s)”).

25. [Name of enterprise] 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.]

27. The [racketeering activity listed above] constitutes a pattern of racketeering activity pursuant to 18 U.S.C. § 1961(5).

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 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 §§ 53–55, § 1962(b): Acquisition of Control of 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 attorney’s fees. See §§ 69–73, Relief.]

**COUNT IV**

**RICO § 1962(d)**

31. The allegations of paragraphs [paragraph number] through [paragraph number] are incorporated herein by reference.

32. This count is against Defendant(s) [name of defendant] (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 (§ 1962(a)); (2) acquire or maintain interests in the enterprise through a pattern of racketeering activity (§ 1962(b)); or (3) conduct and participate in the conduct of the affairs of the enterprise through a pattern of racketeering activity (§ 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.A. § 1962(a), (b) and (c), in violation of 18 U.S.C. § 1962(d).

35. As 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 attorney's fees. See §§ 69–73, Relief.]

PLAINTIFFS DEMAND TRIAL BY JURY.

### **§ 96 RICO jury instructions**

Various federal courts of appeals have approved pattern civil RICO jury instructions.<sup>9</sup> In addition, several secondary sources include model instructions accompanied by case notes and commentary.<sup>10</sup> In particular, the treatise *Federal Practice and Instructions* 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

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<sup>9</sup> See Fifth Circuit Pattern Jury Instructions – Civil § 8.1 (2009); Ninth Circuit Manual of Model Jury Instructions Civil § 19 (2007); Eleventh Circuit Pattern Jury Instructions § 7 (2013).

<sup>10</sup> See, e.g., K. O'Malley, et al., *Federal Jury Practice and Instructions: Civil*, §§ 161.01-161.100 (5th ed. 2001) (including model instructions, sample interrogatories, verbatim pattern circuit instructions where available, copious case notes and commentary of use by individual circuit courts); 4 L. Sand, et al., *Modern Federal Jury Instructions: Civil*, §§ 84.01 et seq. (2001) (defining elements as currently interpreted by the federal courts, noting differences among the various circuit courts and citing relevant cases); Section of Litigation, Business Torts Litigation Committee, Subcommittee on Jury Instructions, American Bar Association, *Model Jury Instructions: Business Torts Litigation*, §§ 5.01-5.14 (3d ed. 1996) (providing model instructions, commentary and circuit court authority for 18 U.S.C. §§ 1962(c) and (d) only); Kevin P. Roddy, *Sample RICO Jury Instructions*, 2 RICO in Business and Commercial Litigation, app. G (1995) (providing sample instructions and special verdict forms for civil and criminal cases).

circuit courts.<sup>11</sup> Also, Judge William G. Young has assembled examples of complete civil jury instructions used in actual cases.<sup>12</sup> 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.<sup>13</sup>

- 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.

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<sup>11</sup> K. O'Malley, et al., *Federal Jury Practice and Instructions: Civil*, §§ 161.01-161.100 (5th ed. 2001).

<sup>12</sup> *See, e.g.*, Hon. William G. Young, *How to Try a Commercial Case in the 1990s: Sample Instructions to the Jury in a Civil RICO Case*, 502 *PLI/Lit* 87, 119+ (1994).

<sup>13</sup> K. O'Malley, et al., *Federal Jury Practice and Instructions: Civil*, Preface at III-IV (5th ed. 2001).

# Appendix A

**APPENDIX A**  
**STATUTORY LANGUAGE**

**Section 1961. Definitions**

As used in this chapter [18 USCA §§ 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 1351 (relating to fraud in foreign labor contracting), section 1425 (relating to the procurement of citizenship or naturalization 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), [sic] 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, subpoenas 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 subpoena 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**

**(Pub. L. No. 91-452, 84 Stat. 922, 941 (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.<sup>1</sup> 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.<sup>2</sup>

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**

Arizona	Arizona Racketeering Act, Ariz. Rev. Stat. §§ 13-2301 to 13-2321.
Colorado	Colorado Organized Crime Control Act, Colo. Rev. Stat. Ann. §§ 18-17-101 to 18-17-109.
Connecticut	Corrupt Organizations and Racketeering Activity Act (CORA), Conn. Gen. Stat. §§ 53-393 to 53-419.
Delaware	Delaware Racketeer Influenced and Corrupt Organizations Act, Del. Code Ann. tit. 11, §§ 1501 to 1511.
Florida	Florida RICO (Racketeer Influenced and Corrupt Organization) Act, Fla. Stat. Ann. §§ 895.01 to 895.09.
Georgia	Georgia RICO (Racketeer Influenced and Corrupt Organizations) Act, Ga. Code Ann. §§ 16-14-1 to 16-14-15.
Hawaii	Organized Crime Act, Haw. Rev. Stat. §§ 842-1 to 842-12.

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<sup>1</sup> See 10 William Meade Fletcher, *Fletcher Cyclopedia of the Law of Corporations* §4951.80 (2001 & cum. supp. 2008); A. Laxmidas Sawkar, Note, *From the Mafia to Milking Cows: State RICO Act Expansion*, 41 Ariz. L. Rev. 1133 (Winter 1999) (listing thirty state RICO statutes).

<sup>2</sup> See Jason D. Reichelt, Note, *Stalking the Enterprise Criminal: State RICO and the Liberal Interpretation of the Enterprise Element*, 81 Cornell L. Rev. 224, 237 (Nov. 1995); see, e.g., *Keesling v. Beegle*, 880 N.E.2d 1202, 1206-07 (Ind. 2008).

Idaho	Racketeering Act, Idaho Code §§ 18-7801 to 18-7805.
Indiana	Racketeer Influenced and Corrupt Organizations Act, Ind. Code Ann. §§ 35-45-6-1 to 35-45-6-2.
Louisiana	Louisiana Racketeering Act, La. Rev. Stat. Ann. §§ 15:1351 to 15:1356.
Michigan	Criminal Enterprises Act, Mich. Comp. Laws Ann. §§ 750.159f to 750.159x.
Minnesota	Racketeer Influenced and Corrupt Organizations (RICO) Act, Minn. Stat. Ann. §§ 609.901 to 609.912.
Mississippi	Racketeer Influenced and Corrupt Organization Act, Miss. Code Ann. §§ 97-43-1 to 97-43-11.
Nevada	Racketeering Act, Nev. Rev. Stat. Ann. §§ 207.350 to 207.520.
New Jersey	New Jersey RICO (Racketeer Influenced and Corrupt Organizations) Act, N.J. Stat. Ann. §§ 2C:41-1 to 2C:41-6.2.
New Mexico	Racketeering Act, N.M. Stat. Ann. §§ 30-42-1 to 30-42-6.
North Carolina	North Carolina Racketeer Influenced and Corrupt Organizations Act (RICO), N.C. Gen. Stat. §§ 75D-1 to 75D-14.
North Dakota	Racketeer Influenced and Corrupt Organizations Act, N.D. Cent. Code §§ 12.1-06.1-01 to 12.1-06.1.-08.
Ohio	Pattern of Corrupt Activities Act, Ohio Rev. Code Ann. §§ 2923.31 to 2923.36.
Oklahoma	Oklahoma Corrupt Organizations Prevention Act, Okla. Stat. Ann. tit. 22, §§ 1401 to 1419.
Oregon	Oregon Racketeer and Corrupt Organization Act, Or. Rev. Stat. §§ 166.715 to 166.735.
Pennsylvania	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).
Puerto Rico	Act Against Organized Crime and Money Laundering of the Commonwealth of Puerto Rico, P.R. Laws Ann. tit. 25, §§ 971-971s.

Rhode Island	Rhode Island Racketeer Influenced and Corrupt Organization (RICO) Statute, R.I. Gen. Laws §§ 7-15-1 to 7-15-11.
Utah	Pattern of Unlawful Activity Act, Utah Code Ann. §§ 76-10-1601 to 76-10-1609.
U.S. Virgin Islands	Criminally Influenced and Corrupt Organizations Act, V.I. Code Ann. Tit. 14, §§ 600 to 614.
Washington	Criminal Profiteering Act, Wash. Rev. Code Ann. §§ 9A.82.001 to 9A.82.904.
Wisconsin	Wisconsin Organized Crime Control Act, Wis. Stat. Ann. §§ 946.80 to 946.88.

### **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	Narcotics Profit Forfeiture Act, 725 Ill. Comp. Stat. Ann. 175/1 to 175/9 (narrowing scope of RICO to mandating forfeiture of money and other assets generated by narcotics racketeering).
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	Tennessee Racketeer Influenced and Corrupt Organization (RICO) Act of 1989, Tenn. Code Ann. §§ 39-12-201 to 39-12-210. (narrowing scope of RICO to punishing and deterring criminal activities of organized criminals through the forfeiture of profits realized by such activities).

# Appendix C

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