

PRACTICE SERIES

RICO

A Guide to Civil RICO Litigation in Federal Courts

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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 1970.¹ 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 broadlydrafted 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 86 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 88 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. 9(b) by stating the

¹ 18 U.S.C. §§ 1961 to 1968.

circumstances constituting fraud with particularity² by identifying the time, place, and content of the fraudulent communications, as well as the parties to the communications.³ The heightened pleading standards under *Bell Atlantic Corp. v. Twombly*⁴ and *Ashcroft v. Iqbal*⁵ are particularly important in RICO cases to protect defendants against baseless charges of racketeering that are serious, harmful, and expensive to defend.⁶

Section 87 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,

² *Perlman v. Zell*, 938 F. Supp. 1327, 1348 (N.D. Ill. 1996), *aff’d*, 185 F.3d 850, (7th Cir. 1999) (observing that, in RICO cases, Federal Rule of Civil Procedure 9(b) requires that “the complaint must, at a minimum, describe [fraud-based] predicate acts with some specificity and ‘state the time, place, and content of the alleged communications perpetuating the fraud’”). See *Sabrina Roppo v. Travelers Commercial Insurance Co.*, 2017 WL 3695205 (7th Cir. 2017) (insufficient fraud pleadings); *Northeast Revenue Services, LLC v. Maps Indeed, Inc.*, 685 Fed. Appx. 96 (3d Cir. 2017) (reiterating requirement of particularity in mail fraud pleading); *American BioCare Inc. v. Howard & Howard Attorneys Pllc*, 2017 WL 3530888 (6th Cir. 2017) (same); *Kostovetsky v. Ambit Energy Holdings, LLC*, 2017 WL 2573273 (N.D. Ill. 2017) (act of increasing customers’ rates did not constitute mail fraud).

³ As to issues relating to mail and wire fraud, see § 6.

⁴ *Bell Atlantic v. Twombly*, 550 U.S. 544, 555 (2007).

⁵ *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

⁶ *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)).

which most courts have agreed are not available under RICO. Even if compensatory damages are trebled on the RICO claim, they might very well be eclipsed by a punitive damages award on the common law claims.

Similarly, plaintiffs should think carefully before playing the RICO card 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.⁷ 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.

⁷ 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.¹ Congress described RICO as “an act designed to prevent ‘known mobsters’ from infiltrating legitimate businesses.”²

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

“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.⁷ RICO is not violated by a single, short-term episode of “racketeering.” Rather, there must be a “pattern” of racketeering activity—meaning long-term, organized conduct. Persons convicted of violating RICO’s criminal provisions are subject to imprisonment and forfeiture of certain assets.⁸

When it enacted RICO, Congress included a civil remedy provision that allows private parties to sue for injuries to their “business or property” caused “by reason of” a defendant’s

¹ 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”).

² 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)).

³ 18 U.S.C. § 1962(a).

⁴ *Id.* § 1962(b).

⁵ *Id.* § 1962(c).

⁶ *Id.* § 1962(d).

⁷ *Id.* § 1961(1).

⁸ *Id.* § 1963.

violation of RICO.⁹ The civil remedy provision requires a plaintiff to prove: (1) a violation of a § 1962 prohibited act; (2) injury to business or property; and (3) that the defendant’s violation caused the injury.¹⁰ 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.¹¹ Under the civil remedy 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 courts have rejected arguments that civil RICO must be limited to conduct traditionally associated with organized crime.¹² Nevertheless, because RICO applies only to organized long-term criminal activity, it should not apply to ordinary business disputes.¹³ Courts have found it to be an abuse of the RICO statute to attempt to shoehorn an ordinary business or contractual dispute into a civil RICO claim.¹⁴ Civil

⁹ *Id.*, § 1964(c).

¹⁰ *See RJR Nabisco, Inc. v. European Cmty.*, 136 S. Ct. 2090, 2096 (2016); *see also Chisolm v. TranSouth Fin. Corp.*, 95 F.3d 331, 336-37 (4th Cir. 1996); *Holmes v. Sec. Investor Prot. Corp.*, 503 U.S. 258, 268 (1992) (holding that, to prove an injury “by reason of” a defendant’s §1962 violation, a plaintiff must prove that the violation was the proximate cause of the plaintiff’s injury).

¹¹ *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).

¹² *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) (rejecting the argument that RICO requires the racketeering enterprise or predicate acts to be motivated by economic purpose). *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 meet the predicate act definition of extortion under the Hobbs Act because the protestors did not “obtain” property).

¹³ *See, e.g., Midwest Grinding Co. v. Spitz*, 976 F.2d 1016, 1025 (7th Cir. 1992) (“RICO has not federalized every state common-law cause of action available to remedy business deals gone sour.”); *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”).

¹⁴ *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”); *Watson v. Faris*, 139 F. Supp. 3d 456 (D.D.C. 2015) (concluding that the plaintiff came “nowhere close” to meeting the “pattern” requirement that intended to avoid transitioning ordinary business disputes into RICO actions); *Yesko v. Fell*, 2014 WL 4406849, *7-12 (D. Md. 2014) (dismissing RICO allegations with prejudice where plaintiff failed to plead facts beyond that of a common business dispute).

RICO abuse can have deleterious effects on a defendant because of the stigma of RICO claims and the charges of fraud often used to support them.¹⁵

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 § 17, 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 §§ 13-17 and in §§ 18-26, 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 “individual or entity capable of holding a legal or beneficial interest in property.”¹⁶ Unincorporated associations with statutory authority to hold an interest in property may qualify as a RICO “person.”¹⁷ Ironically, the Second Circuit has held

¹⁵ 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); *Cornetta v. Town of Highlands*, 434 F. Supp. 3d 171, 179 (S.D.N.Y. 2020) (collecting New York district court cases); *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” (quoting *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 741 (1975)); *Wagh v. Metris Direct Servs., Inc.*, 348 F.3d 1102, 1108 (9th Cir. 2003), *overruled on other grounds by Odom v. Microsoft Corp.*, 486 F.3d 541, 551 (9th Cir. 2007); *JST Distribution, LLC v. CNV.com, Inc.*, No. CV-17-6264-PSG, 2018 WL 6113092, at *8 (C.D. Cal. Mar. 7, 2018); *Sky Medical Supply Inc. v. SCS Support Claims Services, Inc.*, 17 F. Supp. 3d 207, 220 (E.D.N.Y. 2014) (noting that “plaintiffs wielding RICO almost always miss the mark” which has resulted in “skepticism” toward civil RICO claims).

¹⁶ 18 U.S.C. § 1961(3).

¹⁷ *Jund v. Town of Hempstead*, 941 F.2d 1271, 1281-82 (2d Cir. 1991) (holding that an unincorporated political association was a RICO “person” because New York election law expressly granted the association authority to hold interests in property); *United States v. Mongol Nation*, 370 F. Supp.3d 1090, 1127-29 (C.D. Cal. 2019) (agreeing with *Jund* that unincorporated associations can be held liable for RICO predicate acts); *Fort Lauderdale Food Not Bombs v. City of Fort Lauderdale*, No. 15-60185-CIV-ZLOCH, 2019 WL 10060265, at *5-6 (“An unincorporated association is a person for the purposes of § 1983.”). See also *Bank of N. Ill. v. Nugent*, 584 N.E.2d 948, 958-59 (Ill. App. Ct. 1991) (an estate, through its executor, may be a “person” under RICO). But see *Lippoldt v. Cole*, 468 F.3d 1204, 1211-

that an organized crime “family” is not a “person” subject to suit under subsections 1964(a) or (c) because the “strict hierarchical structure” of the family operated as an unincorporated association, not a partnership or joint-venture, but one without statutory authority to hold an interest in property.¹⁸ Moreover, the court concluded that illegal organizations, including partnerships, joint-ventures, and unincorporated associations, do not fall within the statutory definition of a culpable “person” because they are not capable of holding an interest in property.¹⁹ The family, however, could be an association-in-fact enterprise that is used by a culpable person to commit racketeering.²⁰

Courts have relied upon two theories to hold that government entities generally cannot be liable under RICO: (1) government entities are incapable of forming the requisite criminal intent; or (2) public policy prohibits imposing punitive damages, paid by taxpayers, on public entities. The two theories are not necessarily mutually exclusive.²¹ 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.”²² Alternatively, the Third Circuit has acknowledged that a

16 (10th Cir. 2006) (holding that unincorporated associations are not “persons” capable of bringing a claim under § 1983).

¹⁸ *United States v. Bonanno Organized Crime Family*, 879 F.2d 20, 28 (2d Cir. 1989); *United States v. Cutolo*, 861 F. Supp. 1142, 1145 (E.D.N.Y. 1994) (recognizing that Bonanno held that an organized crime family is not a RICO “person”).

¹⁹ *Id.* at 27-30.

²⁰ *Id.*

²¹ *See Lancaster Cmty. Hosp. v. Antelope Valley Hosp. Dist.*, 940 F.2d 397, 404 (9th Cir. 1991) (exempting a not-for-profit hospital district and hospital, both government entities under California law, from RICO liability under both theories); *Dammon v. Folse*, 846 F. Supp. 36, 37-39 (E.D. La. 1994) (refusing to impose RICO liability against a school board under both the criminal intent and public policy theories).

²² *Call v. Watts*, 142 F.3d 432 (6th Cir. 1998) (unpublished table decision) (internal quotes omitted); *Anderson v. Collins*, No. 96-CV-269, 1998 WL 1031496 (E.D. Ky. July 14, 1998) (governmental entities are “persons” because they can hold property, but they are not subject to liability under RICO because they cannot form the specific intent necessary to commit predicate offenses), *aff’d*, 191 F.3d 451 (6th Cir. 1999) (unpublished table decision). *See also Rogers v. City of New York*, 359 F.App’x. 201, 204 (2d Cir. 2009) (affirming dismissal of RICO claim against a city defendant and holding that “there is no municipal liability under RICO”); *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).

municipal corporation cannot be liable under RICO because the court concluded that RICO's "mandatory award" of treble damages serves a "punitive purpose" which does not apply to public bodies.²³ Courts have also used the inability to form intent reasoning to dismiss RICO claims against public school boards.²⁴ The Fifth Circuit has applied the Third Circuit's public policy theory to dismiss a RICO claim against a public school district.²⁵

The Second Circuit, however, departed from both the criminal intent and public policy theories to affirm the RICO liability of tribal officers of a wholly owned tribal lending company where the relief sought was injunctive, not punitive.²⁶ The Second Circuit reasoned that cases exempting municipalities from RICO liability had less to do with the inability of a public entity to form criminal intent but rather a public policy concern regarding imposing the burden of punitive damages on taxpayers for public official misconduct.²⁷ This public policy concern for innocent taxpayer burden, the Second Circuit concluded, is absent in the case of an injunctive remedy.

The Federal Circuits have similarly dismissed RICO claims against the federal government and federal entities. The Sixth Circuit 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

²³ *Tengood v. City of Philadelphia*, 529 F.App'x. 204, 209 (3d Cir. 2013) (citing *Genty v. Resolution Trust Corp.*, 937 F.2d 899, 914 (3d Cir. 1991)). See also *BEG Inv., LLC v. Alberti*, 85 F.Supp.3d 13, 28-30 (D.D.C. 2015); *Reyes v. City of Chicago*, 585 F. Supp.2d 1010, 1014 (N.D. Ill. 2008) (citing *Genty* and *Lancaster* to reject a city's RICO liability under both the criminal intent and public policy theories). Cf. *Pine Ridge Recycling, Inc. v. Butts County*, 855 F. Supp. 1264, 1272-74 (M.D. Ga. 1994) (county board and waste management authority are "persons" within meaning of RICO but are incapable of forming criminal intent); *In re CitiSource Inc. Sec. Litigation*, 694 F. Supp. 1069, 1079 (S.D.N.Y. 1988) ("[t]he term 'person' as defined by the RICO statute at 18 U.S.C. § 1961(3) is literally broad enough to include municipal corporations . . . [but] a municipal corporation is incapable of the criminal intent necessary to support the alleged predicate offenses[.]").

²⁴ 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). But see *Gingras v. Think Fin., Inc.*, 922 F.3d 112, 124-25 (2d Cir. 2019) (criticizing courts, including *Nu-Life*, for exempting municipalities from RICO liability based on inability to form intent)..

²⁵ *Gil Ramirez Grp., L.L.C. v. Houston Indep. Sch. Dist.*, 786 F.3d 400, 412 (5th Cir. 2015) ("a particularly good reason for rejecting governmental RICO liability stems from judicial reluctance to impose punitive damages on the public fisc").

²⁶ *Gingras*, 922 F.3d at 125.

²⁷ *Id.*

criminal prosecution.”²⁸ The Fifth Circuit adopted this reasoning to hold that the Federal Deposit Insurance Corporation cannot be sued under RICO.²⁹ The Federal Circuit followed suit in dismissing a RICO claim against the Patent and Trademark Office and the Food and Drug Administration.³⁰

Although a government entity may not be capable of violating RICO, a RICO claim may in some circumstances be appropriate against individual government employees who commit predicate acts.³¹ Courts, however, have broadly interpreted legislative immunity to protect individual government employees from RICO liability. Indeed, 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*.”³² 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

²⁸ *Berger v. Pierce*, 933 F.2d 393, 397 (6th Cir. 1991). See also *Hoffmeister v. Sec’y of U.S. Treasury*, No. 17-CV-00889-LTB-MEH, 2018 WL 6429925, at *5 (D. Co. March 27, 2018); *Braswell v. Unger*, No. CV-14-02574-TUC-JAC, 2015 WL 13810123, at *2 (D. Ariz. Aug. 11, 2015) (“There are no legally cognizable claims under RICO against the United States.”); *Taylor v. U.S. Patent and Trademark Office*, No. C 12-03851 WHA, 2012 WL 5873685, at *2 (N.D. Cal. Nov. 20, 2012) (Civil RICO is a general statute that does not mention, much less waive, sovereign immunity.”).

²⁹ *McNeily v. United States*, 6 F.3d 343, 350 (5th Cir. 1993). See also *Bloch v. Executive Office of the President*, 164 F. Supp. 3d 841, 856, 2016 I.E.R. Cas. (BNA) 36035 (E.D. Va. 2016) (“a federal agency cannot commit ‘racketeering activity’ as defined in RICO”).

³⁰ *Piecznik v. Domantis*, 120 F. App’x 317, 320 (Fed. Cir. 2005) *accord Hill v. Colvin*, 2016 WL 727177, at *9 (M.D. N.C. 2016).

³¹ *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).

³² *Empress Casino Joliet Corp. v. Blagojevich*, 638 F.3d 519, 523 (7th Cir.) (emphasis in original), *vacated in part sub nom. Empress Casino Joliet Corp. v. Balmoral Racing Club, Inc.*, 649 F.3d 799 (7th Cir.), *on reh’g*, 651 F.3d 722 (7th Cir. 2011).

motive.”³³ The Ninth Circuit has similarly held that legislative immunity protected a state senator from civil RICO liability even where the senator admitted to taking bribes.³⁴

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.

§ 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.³⁵ 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.³⁶ A defendant’s genuine,

³³ *Empress Casino*, 638 F.3d at 528-29 (citing *Tenney v. Brandhove*, 341 U.S. 367 (1951)).

³⁴ *Chappell v. Robbins*, 73 F.3d 918, 920-22 (9th Cir. 1996) (“[i]n passing RICO, Congress did not evince a ‘clear legislative intent’ to displace common-law immunities. Legislative immunity may therefore be raised as a defense to a civil RICO suit”).

³⁵ *See Walters v. McMahan*, 684 F.3d 435, 440-43 (4th Cir. 2012) (affirming dismissal of complaint for failure to plead sufficient facts that showed employer had actual 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 plaintiffs alleged facts sufficient for a finding that defendants’ failure to provide refund certificates might have been negligent but not sufficient for a finding of 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) (agreeing with the district court that plaintiffs failed to 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 and instructing the plaintiffs to replead on remand); *236 Cannon Realty, LLC v. Ziss*, No. 02-CV-6683, 2005 WL 289752, at *5-9 (S.D.N.Y. Feb. 8, 2005) (dismissing RICO claims 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).

³⁶ *See, e.g.*, Third Circuit Model Criminal Jury Instructions §§ 6.18.1341, 6.18.1343 (2018); Fifth Circuit Pattern Jury Instructions—Civil § 8.1 (2009); The William J. Bauer Pattern Criminal Jury Instructions of the Seventh Circuit, p. 538 (2020).

good faith belief that it provided or sent true information is a complete defense to mail or wire fraud.³⁷

The extent to which reckless conduct will suffice is more complicated.³⁸ The Sixth Circuit has ruled that recklessness may suffice where the plaintiff shows that the danger of misleading others was “so obvious that the actor must have been aware of it.”³⁹ 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.⁴⁰

Although courts have granted summary judgment to defendants on the question of intent,⁴¹ summary judgment may be difficult to obtain because intent may be inferred from circumstantial

³⁷ *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).

³⁸ *Compare Landry v. Air Line Pilots Ass’n Int’l AFL-CIO*, 901 F.2d 404, 429 n. 87 (5th Cir. 1990) (“[T]he intent to defraud is imputed to civil RICO defendants who act with reckless indifference to the truth or falsity of their representations.”); *McPeters v. Edwards*, 806 F. Supp.2d 978, 989 (S.D. Tex. 2011), with *Lu v. Lezell*, 45 F.Supp.3d 86, 95-96 (D.D.C. 2014) (listing differences in judicial opinion on the intent required); *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 the required criminal intent); *Innovative Metal Design, Inc. v. U.S. Bank Nat’l Ass’n*, No. 3:15-cv-00560-SB, 2015 WL 9434779, at *4 (D. Or. Nov. 18, 2015).

³⁹ *United States v. DeSantis*, 134 F.3d 760, 764 (6th Cir. 1998); accord *In re ClassicStar Mare Leasing Litig.*, 727 F.3d 473, 484-87 (6th Cir. 2013); *Heinrich v. Waiting Angels Adoption Servs., Inc.*, 668 F.3d 393, 404 (6th Cir. 2012).

⁴⁰ The William J. Bauer Pattern Criminal Jury Instructions of the Seventh Circuit, Committee Comment to § 4.10 (Knowingly); Third Circuit Model Criminal Jury Instructions §§ 5.06 (Willful Blindness) (2018).

⁴¹ *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); *Zolfaghari v. Sheikholeslami*, 943 F.2d 451, 453-54 (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, 251-53 (7th Cir. 1995) (affirming summary judgment where plaintiffs’ allegations at best showed that defendants engaged in negligent or “sloppy business practices” but failed to establish defendants’ intent to engage in a scheme to defraud); *Peterson v. H & R Block Tax Services, Inc.*, 22 F. Supp. 2d 795, 803-05, (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).

(and usually disputed) evidence showing that the defendant facilitated the fraud or gained money or advantage at the expense of the plaintiff.⁴²

§ 5 Racketeering Activity

Section 1961 defines “racketeering activity” broadly to encompass any of the state and federal predicate offenses listed in § 1961(1).⁴³ RICO claims must be based on actual racketeering conduct.⁴⁴ Conduct that amounts to garden-variety state-law crimes, torts, and contract breaches does not qualify as “racketeering activity” under RICO.⁴⁵

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 RICO claim based on that

⁴² See, e.g., *Crowe v. Henry*, 115 F.3d 294, 297-98 (5th Cir. 1997) (reversing summary judgment in favor of defendant based on circumstantial evidence that the defendant gained control and reorganized ownership of plaintiff’s properties in a manner susceptible to the commission of fraud, 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 which created a genuine issue of material fact); *Webster v. Omnitrifit Int’l, Inc.*, 79 F.3d 776, 786 (9th Cir. 1996) (finding that facts showed the creation and operation of pyramid scheme gave rise to an inference of intent to defraud, and noting that “[s]pecific intent to defraud may be proven circumstantially, and is ill-suited for adjudication on summary judgment”).

⁴³ 18 U.S.C. § 1961(1). In the wake of the terrorist attacks of September 11, 2001, Congress passed the “USA Patriot Act,” which, among other things, expanded the predicate 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, 238-40 (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). In the absence of corruption, litigation activity (such as the filing of supposedly baseless complaints) does not supply the basis to allege RICO predicate acts. *Kim v. Kimm*, 884 F.3d 98, 104-05 (2d Cir. 2018).

⁴⁴ See, e.g., *Doug Grant, Inc. v. Greate Bay Casino Corp.*, 232 F.3d 173, 185-87 (3d Cir. 2000) (affirming dismissal of suit by casino card counters who complained about casino countermeasures like frequent deck shuffling because such actions did not qualify as RICO predicate acts).

⁴⁵ *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), *abrogated on other grounds by Rotella v. Wood*, 528 U.S. 549, 120 S. Ct. 1075, 145 L.Ed. 2d 1047 (2000); *Stangel v. A-1 Freeman N. Am., Inc.*, No. 01-CV-2198, 2001WL 1669387, at *1 (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”).

predicate act.⁴⁶ In addition, 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.⁴⁷

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 “[t]he 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.”⁴⁸

§ 6 Issues Relating to Mail and Wire Fraud as Predicate Acts

Mail fraud (18 U.S.C. § 1341) and wire fraud (18 U.S.C. § 1343) are included as racketeering activities and are alleged as predicate acts in a “high percentage” of civil RICO claims.⁴⁹

Criminal mail and wire fraud involves: (1) a scheme based on an intent to defraud; and (2) the use of the mails or wires to further that scheme.⁵⁰ A scheme to defraud encompasses “acts of artifice or deceit which are intended to deprive an owner of his property or money.”⁵¹ The specific elements of mail or wire are:

⁴⁶ *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 488-93 (1985) (“[R]acketeering activity consists not of acts for which the defendant has been convicted, but of acts for which he could be.”). *See also Grynberg v. BP, P.L.C.*, 527 Fed.Appx. 278, 282-83 (5th Cir. 2013); *S. Snow Mfg. Co., Inc. v. SnoWizard Holdings, Inc.*, 912 F. Supp.2d 404, 420 (E.D. La. 2012).

⁴⁷ *See id.* 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).

⁴⁸ *Craig Outdoor Adver., Inc. v. Viacom Outdoor, Inc.*, 528 F.3d 1001, 1027-28 (8th Cir. 2008), *cert denied*, 129 S.Ct. 1000, 173 L. Ed. 2d 292 (2009) (quoting *United States v. Persico*, 832 F.2d 705, 714 (2d Cir. 1987)).

⁴⁹ *Klehr v. A.O. Smith Corp.*, 521 U.S. 179, 191 (1997).

⁵⁰ *United States v. Weaver*, 860 F.3d 90, 94 (2d Cir. 2017); *United States v. Whitfield*, 590 F.3d 325, 355 (5th Cir. 2009); *Bible v. United Student Aid Funds, Inc.*, 799 F.3d 633, 657 (7th Cir. 2015); *Bui v. Nguyen*, 712 Fed. Appx. 606, 609 (9th Cir. 2017); *In re Sumitomo Copper Litig.*, 995 F. Supp. 451, 455 (S.D.N.Y. 1998).

⁵¹ *Vicom, Inc. v. Harbridge Merch. Servs., Inc.*, No. 92-CV-2808, 1993 WL 8340, at *4 (N.D. Ill. Jan. 8, 1993), *judgment aff'd*, 20 F.3d 771 (7th Cir. 1994).

- (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.⁵²

Mailings or wirings sent or delivered through the use of “any private or commercial interstate carrier” may violate the mail fraud statute.⁵³ The object of the fraud must be property in the victim’s hands.⁵⁴ As in any fraud case, a mail fraud scheme cannot be based on statements of opinion.⁵⁵ Moreover, a fraud scheme cannot be based on proposed or anticipated fraudulent conduct.⁵⁶

Mail and wire fraud claims based on fraudulent omissions must establish that the defendant had a duty to disclose the omitted facts.⁵⁷ 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.⁵⁸

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.⁵⁹ This is because the crux of mail and wire fraud is a scheme to

⁵² See *Wisdom v. First Midwest Bank, of Poplar Bluff*, 167 F.3d 402, 406 (8th Cir. 1999). See also *In re Sumitomo Copper Litig.*, 995 F. Supp. 451, 455 (S.D.N.Y. 1998) (noting that the elements of mail and wire fraud are more broadly defined than the elements of common law fraud).

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

⁵⁴ See *Kelly v. United States*, 140 S. Ct. 1565, 1572-74, 206 L. Ed. 2d 882 (2020); see also *Cleveland v. United States*, 531 U.S. 12, 15 (2000). See *infra* § 29 for a discussion of what constitutes “business or property” under RICO.

⁵⁵ *Miller v. Yokohama Tire Corp.*, 358 F.3d 616, 620-22 (9th Cir. 2004).

⁵⁶ *Giuliano v. Fulton*, 399 F.3d 381, 389 (1st Cir. 2005).

⁵⁷ *Eller v. EquiTrust Life Ins. Co.*, 778 F.3d 1089, 1092 (9th Cir. 2015); *American United Life Ins. Co. v. Martinez*, 480 F.3d 1043, 1065 (11th Cir. 2007).

⁵⁸ *Langford v. Rite Aid of Ala., Inc.*, 231 F.3d 1308, 1314 (11th Cir. 2000); see also *Ayres v. General Motors Corp.*, 234 F.3d 514, 520-25 (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).

⁵⁹ *Schmuck v. United States*, 489 U.S. 705 (1989) (holding “innocent” mailings sufficient for purposes of mail fraud statute). See also *United States v. Arledge*, 533 F.3d 881, 891 (5th Cir. 2008); *United States v. Turner*, 551 F.3d 657,

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.⁶⁰

In *Bridge v. Phoenix Bond & Indemnity Co.*, the Supreme Court held that where a RICO claim is predicated on alleged mail or wire fraud, a plaintiff need not show that it relied on the defendant's alleged misrepresentations to establish the RICO claim or to establish proximate cause.⁶¹ Several courts have held that while innocent mailings may be used to further a mail fraud scheme, and therefore satisfy the elements of mail fraud, they might not establish a RICO "pattern" of "racketeering activity" unless they contain misrepresentations.⁶² 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.⁶³

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

666-69, (7th Cir. 2008); *Kehr Packages, Inc. v. Fidelcor, Inc.*, 926 F.2d 1406, 1415 (3d Cir. 1991); *Dana Corp. v. Blue Cross & Blue Shield Mut. of No. Ohio*, 900 F.2d 882, 886 (6th Cir. 1990); *Abels v. Farmers Commodities Corp.*, 259 F.3d 910, 918 (8th Cir. 2001); *Spira v. Nick*, 876 F. Supp. 553, 558-59 (S.D.N.Y. 1995). *But see Williams v. Affinion Grp., LLC*, 889 F.3d 116, 124-26 (2d Cir. 2018) (upholding dismissal of plaintiff's RICO claims because, while the mail or wire communications themselves do not need to contain a false statement, plaintiff failed to sufficiently allege any material misrepresentations as part of the alleged scheme to defraud).

⁶⁰ *Nakahata v. New York-Presbyterian Healthcare Sys., Inc.*, 723 F.3d 192, 204-05 (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).

⁶¹ *Bridge v. Phoenix Bond & Indem. Co.*, 553 U.S. 639, 647-61 (2008) (rejecting RICO defendants' arguments that Congress intended mail fraud under RICO to incorporate the common law fraud requirement of first-party reliance).

⁶² *See Wisdom v. First Midwest Bank, of Poplar Bluff*, 167 F.3d 402, 407 (8th Cir. 1999); *see also Kehr Packages*, 926 F.2d at 1414 ("[a]lthough the mailing is the actual criminal act, the instances of deceit constituting the underlying fraudulent scheme are more relevant to the continuity analysis"); *Ozbakir v. Scotti*, 764 F. Supp.2d 556, 569 (W.D.N.Y. 2011) ("[a] number of courts have held that the continuity requirement generally should not be evaluated in terms of otherwise 'innocent' mailings or wire transmissions, but that the focus should instead be on actual instances of fraudulent behavior"). *See also Stonebridge Collection, Inc. v. Carmichael*, 791 F.3d 811, 823 (8th Cir. 2015) (finding that solicitation postcards were not sufficient predicate acts when they contained no misrepresentations).

⁶³ *See Pizzo v. Bekin Van Lines Co.*, 258 F.3d 629, 632-33 (7th Cir. 2001) (affirming dismissal); *Edmonson & Gallagher v. Alban Towers Tenants Ass'n*, 48 F.3d 1260, 1265 (D.C. Cir. 1995) (suggesting that if a RICO plaintiff alleges a single scheme, single injury, and few victims, that it is "virtually impossible" to meet RICO's pattern requirement); *but see United States v. Indelicato*, 865 F.2d 1370, 1383 (2d Cir. 1989) ("[w]e doubt that Congress meant to exclude from the reach of RICO multiple acts of racketeering simply because they achieve their objective quickly or because they further but a single scheme"). *See also* discussion of the pattern requirement in § 13.

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.⁶⁴ 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.⁶⁵

§ 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.⁶⁶ 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.⁶⁷

When Congress enacted the Reform Act in 1995, Congress did not expressly state the temporal scope of the Reform Act’s amendment of RICO securities fraud claims. Therefore, much

⁶⁴ See, e.g., *Williams v. Affinion Grp., LLC*, 889 F.3d at 124-26; *Lundy v. Catholic Health Sys. of Long Island Inc.*, 711 F.3d 106, 119 (2d Cir. 2013); *Lum v. Bank of Am.*, 361 F.3d 217, 223-26 (3d Cir. 2004); *Tel-Phonic Serv’s, Inc. v. TBS Int’l, Inc.*, 975 F.2d 1134, 1138-39 (5th Cir. 1992); *Goren v. New Vision Int’l, Inc.*, 156 F.3d 721, 729 (7th Cir. 1998); *Jepson, Inc. v. Makita Corp.*, 34 F.3d 1321, 1327-28 (7th Cir. 1994); *Abels v. Farmers Commodities Corp.*, 259 F.3d 910, 919 (8th Cir. 2001); *Mostowfi v. 12 Telecom Int’l, Inc.*, 269 F. App’x 621, 623-35 (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, 1291-93 (11th Cir. 2010).

⁶⁵ *Giuliano v. Fulton*, 399 F.3d at 387-89; *Menzies v. Seyfarth Shaw LLP*, 943 F.3d 328, 338-43 (7th Cir. 2019), *reh’g en banc denied* (7th Cir. 2019), *cert denied*, 140 S.Ct. 2674, 206 L. Ed. 2d 825 (2020); *Tal v. Hogan*, 453 F.3d 1244, 1263-70 (10th Cir. 2006).

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

⁶⁷ 18 U.S.C. § 1964(c).

of the initial case law focused on whether the Reform Act applied retroactively to bar RICO claims based on securities fraud that occurred before the effective date of the Act.⁶⁸

Under the Reform Act, courts have rejected securities-based RICO claims regardless of the label attached or the validity of the underlying securities claim.⁶⁹ If the defendant did not make a misrepresentation or omission in connection with the sale of securities, but merely aided and abetted those who did, courts diverge on whether or not the Reform Act applies because securities fraud cannot be based on aiding and abetting. Some courts, most notably the Second and Ninth

⁶⁸ Compare *Scott v. Boos*, 215 F.3d 940, 944-47 (9th Cir. 2000); *Mathews v. Kidder, Peabody & Co.*, 161 F.3d 156, 161-71 (3d Cir. 1998); *In re MTC Elec. Techs. S'holder Litig.*, 74 F. Supp. 2d 276, 280-81 (E.D.N.Y. 1999); *Gubitosi v. Zegeye*, 28 F. Supp. 2d 298 (E.D. Pa. 1998); *In re Prudential Sec. Inc. Ltd. P'ships Litig.*, 930 F. Supp. 68, 77-81 (S.D.N.Y. 1996); *Dist. 65 Retirement Trust for Members of the Bureau of Wholesale Sales Representatives v. Prudential Sec., Inc.*, 925 F. Supp. 1551, 1566-70 (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, 1072-74 (E.D. Mich. 1997); *Rowe v. Marietta Corp.*, 955 F. Supp. 836, 843-48 (W.D. Tenn. 1997); *Reading Wireless Cable Television 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, 1352-54 (S.D. Fla. 1999); *Scott v. Steingold*, No. 97-CV-7871, 1998 WL 704287 (N.D. Ill. Sept. 30, 1998) (all holding that Reform Act applied retroactively to bar securities-based RICO claims filed after the Reform Act's effective date even where the alleged misconduct occurred before the effective date).

⁶⁹ 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, at *2-3 (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, 759-60 (10th Cir. 2010) (affirming dismissal of minority shareholders' RICO claim as barred by the Reform Act because the predicate acts of mail and wire fraud, extortion, and obstruction of justice pled in connection with an allegedly fraudulent merger constituted fraud in connection with the purchase or sale of a security); *Cyber Media Group, Inc. v. Island Mortgage Network, Inc.*, 183 F. Supp. 2d 559, 578-80 (E.D.N.Y. 2002) (misrepresentations to inflate stock price and induce stock purchase agreement could not support RICO claim because the misrepresentations were 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 Co.*, 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).

Circuits, 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.⁷⁰ The Seventh Circuit, however, has rejected this broad reading of the Reform Act’s securities fraud bar and has held that the Reform Act only bars RICO actions a plaintiff themselves could bring under the securities laws.⁷¹ But if the conduct does not amount to securities fraud at all, the Reform Act bar does not apply.⁷² On the other hand, bank fraud can be a predicate act of racketeering.⁷³

§ 8 Extortion as a Predicate Act

Extortion (in violation of the Hobbs Act) is more commonly a RICO predicate act in criminal RICO cases than civil RICO cases. Yet RICO plaintiffs have alleged extortion as a predicate act in civil cases,⁷⁴ most notably in abortion cases based on the theory that anti-abortion

⁷⁰ See *MLSMK Inv. Co. v. JP Morgan Chase & Co.*, 651 F.3d 268, 274-80 (2d Cir. 2011) (holding that Reform Act precluded RICO claim based on securities fraud “even where a plaintiff cannot itself pursue a securities fraud action against the defendant”); *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); *Cohain v. Klimely*, No. 08-CV-5047, 2010 WL 3701362, at *8-10 (S.D.N.Y. Sep. 20, 2010) (“the [Reform Act] bars all RICO claims based on any conduct that could be actionable under the securities laws, including conduct that constitutes aiding and abetting securities fraud”); *Fezzani v. Bear, Stearns & Co.*, No. 99-CV-0793, 2005 WL 500377, at *5-6 (S.D.N.Y. Mar. 2, 2005) (agreeing with courts that the Reform Act’s bar “does not require a particular plaintiff to have an actionable securities-fraud claim, but rather bars reliance on any conduct actionable as securities fraud”); *In re Enron Corp. Sec., Derivative & ERISA Litig.*, 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. Sec. Litig.*, 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).

⁷¹ See *Menzies v. Seyfarth Shaw LLP*, 197 F. Supp. 3d 1076, 1105-14 (N.D. Ill. 2016), *aff’d in part*, 943 F.3d 328, 333-36 (7th Cir. 2019) (affirming the district court’s holding that the Reform Act’s “actionable” securities fraud bar did not apply to plaintiff).

⁷² See, e.g., *Ouwinga v. Benistar 419 Plan Services, Inc.*, 694 F.3d 783, 791 (6th Cir. 2012) (Reform Act did not bar RICO claim where the tax consequences at issue were “merely incidental” to policies that happened to be securities and did not relate to the purchase of the policies); *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”). 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).

⁷³ *Liberty Bell Bank v. Rogers*, 726 Fed. Appx. 147, 154 (3d Cir. 2018), petition for certiorari filed (U.S. June 20, 2018).

⁷⁴ See, e.g., *Westways World Travel, Inc. v. AMR Corp.*, 265 F. App’x 472, 474 (9th Cir. 2008) (stating that extortion is “racketeering activity” for purposes of RICO but holding that defendants failed to establish any acts constituting extortion).

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*,⁷⁵ 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.⁷⁶ It is not enough if the defendant merely deprived the plaintiff of the plaintiff's property.⁷⁷ After another round of appeals, the Supreme Court determined that acts of violence unrelated to the furtherance of the plan or purpose of robbery or extortion are insufficient to support a violation of the Hobbs Act.⁷⁸

In *Wilkie v. Robbins*,⁷⁹ 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.⁸⁰

⁷⁵ *Scheidler v. Nat'l Org. for Women, Inc.*, 537 U.S. 393 (2003).

⁷⁶ *Id.* at 404. *Accord Sckhar v. United States*, 133 S. Ct. 2720, 2725 (2013) (holding that obtainable property must be transferable from one person to another).

⁷⁷ *Id.*, 537 U.S. at 404-05. 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 RICO. *Id.* at 411. *See also* § 65 for discussion of equitable relief available under RICO.

⁷⁸ *Scheidler v. Nat'l Org. for Women, Inc.*, 547 U.S. 9, 23 (2006).

⁷⁹ *Wilkie v. Robbins*, 551 U.S. 537 (2007).

⁸⁰ *Id.* at 563-68. *See also Gillmor v. Thomas*, 490 F.3d 791, 799 (10th Cir. 2007) (rejecting property owner's extortion claim based on county defendants' application of zoning ordinances because such conduct did not rise to an effort to obtain property by "inherently wrongful means").

§ 9 Controlled Substances Act as a Predicate Act

After the November 2020 Election, fifteen states have approved recreational marijuana. In several states, including California and Illinois, the growth and sale of recreational marijuana is already operational. The purchase, sale, cultivation, use, and possession of marijuana, however, remains a federal crime, and marijuana is a Schedule I drug under the Controlled Substances Act (“CSA”).⁸¹ RICO defines as “racketeering activity” both “dealing in a controlled substance or listed chemical,” as defined in the CSA,⁸² and the “felonious manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in a controlled substance or listed chemical” as defined in the CSA.⁸³

In *Safe Streets Alliance v. Hickenlooper*,⁸⁴ the Tenth Circuit addressed the application of a civil RICO action predicated upon the CSA. *Safe Streets* combined two district court cases, one of which involved two Colorado landowners and a non-profit organization that asserted civil RICO claims against multiple individual and entity defendants affiliated with a marijuana grow house that bordered the landowner plaintiffs’ property.⁸⁵ The court reversed the district court’s dismissals of plaintiffs’ claims and concluded that plaintiffs “plausibly alleged” a civil RICO claim against each defendant.⁸⁶ Notably, the court stated that, because the marijuana grower defendants admitted they agreed to engage in recreational cultivation and sales, plaintiffs adequately alleged defendants engaged in “racketeering activity” because marijuana cultivation “necessarily would involve some racketeering activity” in violation of the CSA.⁸⁷ The court also concluded that

⁸¹ See 21 U.S.C. §§ 802, 812.

⁸² 18 U.S.C. § 1961(1)(A).

⁸³ § 1961(1)(D).

⁸⁴ 859 F.3d 865 (10th Cir. 2017).

⁸⁵ *Id.* at 879-80.

⁸⁶ *Id.* at 877.

⁸⁷ *Id.* at 882. See also *Horn v. Medical Marijuana, Inc.*, 383 F. Supp. 3d 114, 132 (W.D.N.Y. 2019) (dismissing defendants’ motion for summary judgment and holding that plaintiffs’ evidence defendants’ 2012 sale of a hemp-

plaintiffs adequately alleged that RICO defendants were an association-in-fact enterprise, and that the defendant growers' admitted agreement to cultivate marijuana sufficiently showed a threat of continuing criminal activity.⁸⁸

The majority of the court's focus centered on whether or not the plaintiff landowners could plausibly allege injury and causation, as required by Section 1964. The court held that the plaintiffs could recover for three types of property injuries: (1) interference with the use and enjoyment of their land caused by odors from the marijuana growth operation; (2) diminution in their land's value caused by the odors; and (3) diminution in their land's value caused by proximity to a "publicly disclosed, ongoing criminal enterprise."⁸⁹ The court rejected the district court's heightened pleading standard, which required evidence of "concrete financial loss," to prove injury.⁹⁰ Finally, the Tenth Circuit concluded that plaintiffs' claims satisfied both the but for and proximate cause requirements of § 1964(c).⁹¹

§ 10 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.⁹² A violation of § 2314 occurs when anyone "transports, transmits, or transfers in interstate or foreign commerce any goods, wares, merchandise, securities, or money" worth more than \$5,000, knowing that they have been "stolen, converted or taken by fraud."⁹³ To violate § 2314, the defendant need not participate in the

derived CBD oil was "sufficient to show a pattern of racketeering activity"). *But see* Agriculture Improvement Act of 108, Pub. L. 115-334, § 10113, 132 Stat. 4490 (2018) (removing hemp from the CSA definition of marijuana).

⁸⁸ *Safe Streets Alliance*, 859 F.3d at 882-85.

⁸⁹ *Id.* at 889. *But see Ainsworth v. Owenby*, 326 F. Supp. 3d 1111, 1121-26 (D. Or. 2018) (dismissing, and distinguishing from *Safe Streets Alliance*, residential property owner plaintiffs' civil RICO claims against defendant landowner and participants in a marijuana growth operation for failure to adequately plead injury to property); *Bookie v. Green Earth Coffee LLC*, Case No. 18-cv-05244, 2018 WL 6813212, at *5-6 (C.D. Cal. Dec. 27, 2018) (same).

⁹⁰ *Safe Streets Alliance*, 859 F.3d at 885.

⁹¹ *Id.* at 889-91.

⁹² 18 U.S.C. § 2314.

⁹³ *Id.*

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.⁹⁴ The flip-side of § 2314 is § 2315, which applies to those who receive the goods or funds, knowing they were procured by fraud.⁹⁵ 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).⁹⁶

§ 11 Interstate or Foreign Commerce

A RICO claim cannot exist without some nexus to interstate commerce.⁹⁷ 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.”⁹⁸ 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.⁹⁹

Courts have held that the required interstate commerce nexus is “minimal.”¹⁰⁰ It is sufficient to show the use of interstate commerce through the use of mail, interstate wires, or other instrumentalities of interstate commerce.¹⁰¹ Although minimal, some nexus with interstate

⁹⁴ See, e.g., *United States v. Quintanilla*, 2 F.3d 1469, 1474 (7th Cir. 1993); *United States v. Wallach*, 935 F.2d 445, 466 (2d Cir. 1991); *United States v. Schwab*, 88 F. Supp. 2d 1275, 1280 (D. Wyo. 2000).

⁹⁵ 18 U.S.C. § 2315.

⁹⁶ *Perlman v. Zell*, 938 F. Supp. 1327, 1348 (N.D. Ill. 1996) (holding that only the allegations of fraudulent acquisition must comply with Rule 9(b): the non-fraud elements of § 2314 or § 2315, for example, interstate transportation, are still subject to the lower pleading standards of Rule 8(a)), *aff'd*, 185 F.3d 850 (7th Cir. 1999).

⁹⁷ 18 U.S.C. § 1962(a), (b), (c); *RJR Nabisco, Inc.*, 136 S. Ct. at 2105; *H.J. Inc. v. Northwestern Bell Tel. Co.*, 492 U.S. 229, 232-33 (1989).

⁹⁸ *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)).

⁹⁹ 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).

¹⁰⁰ *DeFalco*, 244 F.3d at 309; *United States v. Farmer*, 924 F.2d 647, 651 (7th Cir. 1991); *Cowan v. Corley*, 814 F.2d 223, 227 (5th Cir. 1987); *United States v. Gardiner*, 463 F.3d 445, 458-59 (6th Cir. 2006); *United States v. Fernandez*, 388 F.3d 1199, 1218 (9th Cir. 2004).

¹⁰¹ 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-

commerce must be alleged, and courts will dismiss RICO claims that do not adequately plead this requirement.¹⁰² Note that federal wire fraud requires an interstate use of a wire. Intrastate telephone calls are generally insufficient to establish federal wire fraud.¹⁰³

§ 12 Economic Motive

In *National Organization for Women, Inc. v. Scheidler*,¹⁰⁴ 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.¹⁰⁵

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*

3985DGT, 2005 WL 1667852, at *9-10 (E.D.N.Y. July 18, 2005) (use of household cleaning products in domestic employment, which were "moved in or produced for interstate commerce," and alleged use of the telephone to make kickback demands); *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).

¹⁰² See, e.g., *Robertson*, 514 U.S. at 670-72; *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).

¹⁰³ 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, 108-09 (E.D.N.Y. 1995) (holding that where only 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).

¹⁰⁴ *Nat'l Org. for Women, Inc. v. Scheidler*, 510 U.S. 249, 256-61 (1994); Oral Argument, *Nat'l Org. for Women*, 510 U.S. 249, available at 1993 WL 757635.

¹⁰⁵ 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, 59-66 (2d Cir. 1983).

States v. Ivic,¹⁰⁶ the Seventh Circuit stated that the term “enterprise” in § 1962(a) and (b) refers to an “organized, profit-seeking venture.”¹⁰⁷ 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).¹⁰⁸

In a unanimous decision, the Supreme Court reversed the Seventh Circuit and held that RICO does not require proof of an economic motive.¹⁰⁹ 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 demonstrated 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.”¹¹⁰

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.”¹¹¹

¹⁰⁶ *Ivic*, 700 F.2d at 59-65.

¹⁰⁷ *Nat’l Org. for Women, Inc. v. Scheidler*, 968 F.2d at 627.

¹⁰⁸ *Id.* at 627.

¹⁰⁹ *Nat’l Org. for Women, Inc. v. Scheidler*, 510 U.S. at 256-62.

¹¹⁰ *Id.* at 258.

¹¹¹ *Id.* at 258-59.

The Court declined to address arguments that the application of RICO to anti-abortion protestors could chill First Amendment expression.¹¹² In concurrence, then-Justice Souter (joined by then-Justice Kennedy) suggested that the Court’s opinion “[did] not bar First Amendment challenges to RICO’s application in particular cases” and cautioned “courts applying RICO to bear in mind the First Amendment interests that could be at stake.”¹¹³ After the case was remanded, tried, and appealed again, the Seventh Circuit acknowledged that “the First Amendment might well shield” expressive conduct from “being used as the basis for RICO liability.”¹¹⁴ But the Seventh Circuit held that, based on the facts of the current case, there was ample evidence of unprotected, illegal conduct that the government could regulate because of the important government interest in protecting plaintiffs’ right to seek and provide medical care.¹¹⁵

¹¹² *Id.* at 262 n.6.

¹¹³ *Id.* at 262-65 (Souter, J., concurring).

¹¹⁴ *Nat’l Org. for Women, Inc. v. Scheidler*, 267 F.3d 687, 702 (7th Cir. 2001), *rev’d*, 537 U.S. 393 (2003).

¹¹⁵ *Id.*

III. PATTERN OF RACKETEERING

§ 13 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.”¹ The pattern requirement is important because in providing a remedy of treble damages, “Congress contemplated that only a party engaging in widespread fraud would be subject to such serious consequences.”² For this reason, the pattern requirement acts to ensure that RICO’s “extraordinary remedy does not threaten the ordinary run of commercial transactions.”³ Moreover, 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.”⁴ For litigants, the “pattern” element is often a heavily disputed issue of pleading and proof.⁵ Federal courts have revealed some difficulty articulating exactly what type of proof is sufficient to meet the “pattern” element.⁶

Section 1961(5) of the RICO statute defines “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.”⁷ 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

¹ 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); see also *European Cmty. v. RJR Nabisco, Inc.*, 783 F.3d 123, 124 (2d Cir. 2015) (emphasizing that RICO applies when the evidence shows a pattern of “racketeering activity.”).

² *Foster v. Wintergreen Real Estate Co.*, 363 F. App’x 269, 273 (4th Cir. 2010) (internal quotations omitted).

³ *ePlus Tech., Inc. v. Aboud*, 313 F.3d 166, 181 (4th Cir. 2002) (internal quotations omitted).

⁴ See *United States v. O’Connor*, 910 F.2d 1466, 1468 (7th Cir. 1990); see also *Foster v. Wintergreen Real Estate Co.*, 363 F. App’x 269, 273 (4th Cir. 2010).

⁵ Gregory Joseph, *Civil RICO: A Definitive Guide* 106 (3d ed. 2010) (“[T]he pattern element has . . . generated voluminous litigation, and . . . produced inconsistent results.”).

⁶ 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.”).

⁷ 18 U.S.C. § 1961(5).

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.”⁸

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.*⁹ 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.*¹⁰ 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.”¹¹

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.¹² Sedima filed several claims in federal court against Imrex, including a civil RICO claim based on predicate acts of mail and wire fraud.¹³ 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.’”¹⁴ 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.”¹⁵

⁸ 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).

⁹ *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479 (1985).

¹⁰ *H.J. Inc. v. Northwestern Bell Tel. Co.*, 492 U.S. 229 (1989).

¹¹ *Uniroyal Goodrich Tire Co. v. Mutual Trading Co.*, 63 F.3d 516, 522, 523 (7th Cir. 1995).

¹² *Sedima*, 473 U.S. at 483-84.

¹³ *Id.* at 484.

¹⁴ *Id.* at 485.

¹⁵ *Id.*

The Supreme Court rejected both reasons and reversed the dismissal of *Sedima*'s civil RICO claims.¹⁶ 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.¹⁷ 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."¹⁸ 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.¹⁹

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),²⁰ 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."²¹

Sedima's footnote 14 unleashed a wave of conflicting federal court interpretations of the "pattern" requirement. Some federal courts interpreted *Sedima* as a signal to use the "pattern" element to narrow the scope of civil RICO claims.²² Although *Sedima* introduced the concepts of

¹⁶ *Sedima, S.P.R.L. v. Imrex Co., Inc.*, 473 U.S. 479, 496 n.14 (1985).

¹⁷ 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).

¹⁸ *Sedima*, 473 U.S. at 496 n.14.

¹⁹ *Id.*, quoting S. Rep. No. 91-617, at 158 (1969) [alteration and emphasis in original].

²⁰ 18 U.S.C. § 3575(e) (repealed 1984).

²¹ *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).

²² 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.'").

“continuity” and “relationship,” one commentator noted that those concepts “did little to advance a coherent vision of a RICO pattern.”²³ 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.²⁴

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.²⁵ 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,”²⁶ 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.”²⁷ Although the Eighth Circuit was the only federal appeals court to interpret the “continuity” aspect of the “pattern” element as requiring more than one criminal scheme, the Fourth Circuit perhaps best articulated the pragmatic basis for such a requirement:

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

²³ Gregory Joseph, *Civil RICO: A Definitive Guide* 104 (3d ed. 2010).

²⁴ *Morgan v. Bank of Waukegan*, 804 F.2d 970, 975 (7th Cir. 1986).

²⁵ 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.”).

²⁶ See *H.J. Inc.*, 829 F.2d at 650.

²⁷ *Id.*; see also *Deviries v. Prudential-Bache Sec., Inc.*, 805 F.2d 326, 329 (8th Cir. 1986).

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.²⁸

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 § 13.²⁹

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*,³⁰ 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.³¹ 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.³² Despite the language in *Sedima* stating that “while two acts are necessary, they may not be sufficient,” the Fifth Circuit held that *Sedima* was referring to “isolated” acts, whereas the two instances of alleged mail fraud in its case were “related.”³³ More recent decisions have continued to interpret the “pattern” element as requiring only proof of two or more predicate acts. In *American Dental Association v. Cigna Corporation*,³⁴ the Eleventh Circuit held that a

²⁸ See *International Data Bank, Ltd. v. Zepkin*, 812 F.2d 149, 154-55 (4th Cir. 1987).

²⁹ *Id.* at 155, quoting *Lipin Enters. v. Lee*, 803 F.2d 322, 324 (7th Cir. 1986).

³⁰ See *R.A.G.S. Couture, Inc. v. Hyatt*, 774 F.2d 1350 (5th Cir. 1985).

³¹ *Id.* at 1352.

³² *Id.*

³³ *Id.* at 1355.

³⁴ *American Dental Association v. Cigna Corporation*, 605 F.3d 1283, 1293 (11th Cir. 2010).

plaintiff can establish a RICO conspiracy in one of two ways: (1) by showing that the defendant agreed to the overall objective of the conspiracy; or (2) by showing that the defendant agreed to commit two predicate acts.³⁵

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*,³⁶ 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.³⁷

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.³⁸ 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*.”³⁹

³⁵ See also *Amos v. Franklin Fin. Servs. Corp.*, 509 F. App'x 165, 168 (3d Cir. 2013) (holding that a pattern of racketeering activity is established by showing that the defendants engaged in at least two predicate acts within ten years of each other); *Crest Const. II, Inc. v. Doe*, 660 F.3d 346, 358 (8th Cir. 2011) (citations omitted) (dismissing the plaintiff’s complaint because their allegations failed to meet the “requirement of identifying two specific predicate acts for each [d]efendant” in a case where the purchasers of third-party automobile sales contracts brought an action against the dealership alleging RICO violations).

³⁶ See *Morgan v. Bank of Waukegan*, 804 F.2d 970 (7th Cir. 1986); see also *Menzies v. Seyfarth Shaw LLP*, 943 F.3d 328, 337 (7th Cir. 2019) (citations omitted), cert. denied, 140 S. Ct. 2674, 206 L. Ed. 2d 825 (2020) (emphasizing that the focus, therefore, is on “the number and variety of predicate acts and the length of time over which they were committed, the number of victims, the presence of separate schemes and the occurrence of distinct injuries.”).

³⁷ *Id.* at 975.

³⁸ *Morgan*, 804 F.2d at 977.

³⁹ *Id.*

Several other circuits adopted similar tests.⁴⁰ For example, the Fourth Circuit adopted a contextual test that emphasized the “criminal dimension and degree” of the alleged misconduct.⁴¹

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

The existence of a pattern thus depends on context, particularly on the nature of the underlying offenses. Attention to the nature of the underlying offenses is necessary because of the heightened civil and criminal penalties of RICO are reserved for schemes whose scope and persistence set them above the routine.⁴²

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.”⁴³ Thus, the significance of a relatively large number of “predicate acts” arising from a single transaction would be diminished.

The Second Circuit also adopted a multi-factor test. In *United States v. Pizzonia*, the Second Circuit explained that it had identified a “five-factor” test looking at the “totality of the circumstances,” to determine whether two RICO counts charge “distinct patterns of racketeering activity.”⁴⁴ The Second Circuit’s “totality of the circumstances” test looks at the following factors:

(1) the time of the various activities charged as parts of separate patterns; (2) the identity of the persons involved in the activities under each charge; (3) the statutory offenses charged as racketeering activities in each charge; (4) the nature and scope of the activity the government seeks to punish under each charge; and (5) the places where the corrupt activity took place under each charge.⁴⁵

⁴⁰ 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. Felner*, 879 F.2d 1290, 1297-98 (6th Cir. 1989).

⁴¹ See *International Data Bank, Ltd. v. Zepkin*, 812 F.2d 149, 155 (4th Cir. 1987).

⁴² *HMK Corp. v. Walsey*, 828 F.2d 1071, 1074 (4th Cir. 1987).

⁴³ *Id.*

⁴⁴ *United States v. Pizzonia*, 577 F.3d 455, 464 (2d Cir. 2009).

⁴⁵ *Id.*

The court notes that this multi-factor test was in “accord” with the rationale underlying RICO’s pattern requirement, which is to “ensure that a defendant’s criminal participation in an enterprise is not merely isolated or sporadic, but indicative of the sort of continuity of criminal activity—or the threat of continuity—that is the hallmark of racketeering.”⁴⁶ Other courts such as the Third Circuit and the First Circuit also adopted similar holistic approaches.⁴⁷

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

In *H.J. Inc. v. Northwestern Bell Telephone Co.*,⁴⁸ 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,⁴⁹ 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.⁵⁰ The Eighth Circuit applied its “multiple schemes” requirement and affirmed the dismissal of the complaint,

⁴⁶ *Id.* at 465 (internal quotations omitted).

⁴⁷ *E.g.*, *United States v. Wheeler*, 535 F.3d 446, 449–50 (6th Cir.2008) (applying the same “totality of circumstances” factors as the Second Circuit in *Pizzonia*, 577 F.3d at 464, to conclude that successive prosecutions involved the same pattern of racketeering despite some differences in predicate acts); *United States v. DeCologero*, 530 F.3d 36, 71 (1st Cir.2008) (“In comparing the charged patterns of racketeering, we consider the totality of the circumstances, including the similarities of the time, the place, the people, and the nature and scope of the activities involved in each indictment.”) (internal quotation marks deleted)

⁴⁸ *H.J. Inc. v. Northwestern Bell Telephone Co.*, 492 U.S. 229 (1989).

⁴⁹ *Id.* at 238.

⁵⁰ *H.J. Inc. v. Northwestern Bell Telephone Co.*, 492 U.S. 229, 233 (1989).

holding that the plaintiffs' allegation of a single fraudulent scheme was insufficient to establish a pattern of racketeering activity.⁵¹

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."⁵² The Court determined that neither the language of the statute nor its legislative history supported the Eighth Circuit's requirement of separate illegal schemes.⁵³ The Court acknowledged that it is "difficult to formulate in the abstract any general test for continuity."⁵⁴ 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,"⁵⁵ 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."⁵⁶ 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.⁵⁷

The Supreme Court's holding in *H.J. Inc.* was limited to striking down the Eighth Circuit's rigid "multiple schemes" requirement. The Court did not attempt to determine whether the plaintiffs had sufficiently alleged a "pattern of racketeering activity" under its new analysis. The

⁵¹ *H.J. Inc. v. Northwestern Bell Telephone Co.*, 829 F.2d 648, 650 (8th Cir. 1987), *rev'd*, 492 U.S. 220 (1989).

⁵² *H.J. Inc. v. Northwestern Telephone Co.*, 492 U.S. 229, 241 n. 3 (1989).

⁵³ *Id.* at 240-41.

⁵⁴ *Id.* at 241.

⁵⁵ *Id.* at 242.

⁵⁶ *Id.* at 241.

⁵⁷ *Id.* at 242.

Court instead remanded the case, stating that the plaintiffs’ allegations over a six-year period “*may be sufficient to satisfy the continuity requirement.*”⁵⁸

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.”⁵⁹ 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.’”⁶⁰ 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,”⁶¹ 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.”⁶²

§ 15 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.” The Sixth Circuit, for instance, emphasized that “[b]eyond setting forth the minimum number of predicate acts required to establish a pattern, the statute assumes that there is something to a RICO pattern *beyond* simply

⁵⁸ *H.J. Inc. v. Northwestern Bell Telephone Co.*, 492 U.S. 229, 250 (1989) (emphasis added).

⁵⁹ *Id.* at 255.

⁶⁰ *Id.* at 252.

⁶¹ *Id.* at 254-55.

⁶² *Id.* at 256.

the number of predicate acts involved.”⁶³ The court held that to establish a pattern, a plaintiff must prove two elements: (1) that the racketeering predicates are related; and (2) that they amount to, or pose a threat of continued criminal activity.⁶⁴ This approach is referred to as the “Continuity Plus” test.⁶⁵

Both prongs of the pattern test are described below.

Relatedness. The conventional wisdom is that the “relatedness” aspect of a “pattern” is not difficult to meet, and as a result, the issue is seldom litigated.⁶⁶ To establish “related” predicate acts, a RICO plaintiff must show that the predicate crimes are related both to each other (“horizontal relatedness”) and to the enterprise as a whole (“vertical relatedness”).⁶⁷ To show vertical relatedness, a RICO plaintiff must show that the defendant “was enabled to commit the offense solely because of his position in the enterprise or his involvement in or control over the enterprise’s affairs, or because the offense related to the activities of the enterprise.”⁶⁸

To prove horizontal relatedness, a plaintiff need only show that the predicate acts have similarities regarding the following characteristics: purposes, results, participants, victims,

⁶³ *Kalitta Air, LLC v. GSBD & Assocs.*, 591 F. App’x 338, 343 (6th Cir. 2014) (emphasis in the original) (internal quotations omitted) (citations omitted); see also *Liang v. Home Reno Concepts, LLC*, 803 F. App’x 444, 447 (2d Cir. 2020) (stating that to allege a pattern of racketeering under RICO, a plaintiff “must plead at least two predicate acts and must show that the predicate acts are related and that they amount to, or pose a threat of, continuing criminal activity) (internal quotations omitted); *Bachi-Reffitt v. Reffitt*, 802 F. App’x 913, 918 (6th Cir. 2020) (to satisfy the “pattern” requirement, a plaintiff must plead a relationship between the predicates and the threat of continuing activity).

⁶⁴ *Kalitta Air*, 591 F. App’x at 344.

⁶⁵ *Bachi-Reffitt v. Reffitt*, 802 F. App’x 913, 918 (6th Cir. 2020); see also *Empress Casino Joliet Corp. v. Balmoral Racing Club, Inc.*, 831 F.3d 815, 828 (7th Cir. 2016) (stating that to establish a pattern of racketeering activity under RICO, the predicate acts must exhibit a continuity plus relationship); *Sabrina Roppo v. Travelers Commercial Ins. Co.*, 869 F.3d 568, 589 (7th Cir. 2017) (endorsing the “continuity plus” test); *United States v. Pinson*, 860 F.3d 152, 174 (4th Cir. 2017) (endorsing the “continuity plus” test).

⁶⁶ See *Medallion Television Enters. Inc. v. SelectTV 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).

⁶⁷ *Reich v. Lopez*, 858 F.3d 55, 60-61 (2d Cir. 2017) (citing *United States v. Cain*, 671 F.3d 271, 284 (2d Cir. 2012)); see also *Rajaratnam v. Motley Rice, LLC*, 449 F. Supp. 3d 45, 64 (E.D.N.Y. 2020).

⁶⁸ *Reich*, 858 F.3d at 61.

methods of commission, or other distinguishing characteristics.⁶⁹ In instances where there are multiple predicate acts, the Second Circuit has stated that only two predicate acts must be horizontally related to each other to warrant a conviction for RICO violations.⁷⁰

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.⁷¹

Defendants have occasionally defeated civil RICO claims because the alleged predicate acts are not sufficiently related. In *Reich v. Lopez*, the plaintiffs alleged that a Venezuelan energy company bribed Venezuelan officials in order to secure energy contracts at inflated rates without public bidding, and that it then subcontracted out the actual work while keeping a substantial profit.⁷² Specifically, the plaintiff alleged that the defendants had engaged in wire fraud arising from false phone calls, and violations of the Travel Act arising from the bribery of Venezuelan officials, which are predicated crimes covered by RICO.⁷³ The Second Circuit held that the purported actions were not sufficiently related to support the the alleged RICO violation because there was no horizontal link between the predicate crimes.⁷⁴ Specifically, the court emphasized that where an enterprise is not “primarily in the business [of] racketeering activity, predicate acts

⁶⁹ *H.J. Inc. v. Northwestern Bell Telephone Co.*, 492 U.S. 229, 240 (1989) (quoting former 18 U.S.C. § 3575(e)); *Reich*, 858 F.3d 55 at 61.

⁷⁰ *United States v. Scott*, 681 F. App'x 89, 95 (2d Cir. 2017).

⁷¹ Gregory P. Joseph, *Civil RICO: A Definitive Guide*, 107 (3d ed. 2010).

⁷² *Reich*, 858 F.3d 55 at 58.

⁷³ *Id.* at 59.

⁷⁴ *Id.* at 62.

must be related to each other in kind for a RICO case to proceed.⁷⁵ The court used the factors identified in *H.J. Inc.*: similar “purposes, results, participants, victims, and methods of commission,” to find that the purported wire fraud was not sufficiently related to the alleged Travel Act violations.⁷⁶

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. Gramco Computer Sales, Inc.*, the Fifth Circuit held that an alleged bribery scheme designed to secure computer leasing business from a customer was insufficiently related to an alleged mail and wire fraud scheme to secure favorable loan terms from a bank, even though the bribery-induced lease was the collateral for the loan.⁷⁷ The Fifth Circuit rejected the bank’s argument that the purpose of the second scheme against the bank was to effect an immediate “reaping” of the stream of excess profits arising from the first bribery scheme., The Fifth Circuit dismissed this theory, holding that the “relationship” prong required “more than an articulable factual nexus.”⁷⁸ The court concluded that the bank was “paint[ing] with too broad a stroke” because the economics of lease financing

⁷⁵ *Id.* at 62-63 (internal quotations omitted).

⁷⁶ *Id.* at 63; *see also Rajaratnam*, 449 F. Supp. 3d 45 at 66 (holding that the plaintiff failed to allege a plausible connection between alleged predicate acts so as to establish horizontal relatedness required to demonstrate a pattern of racketeering activity); *Aces High Coal Sales, Inc. v. Cmty. Bank & Tr. of W. Georgia*, 768 F. App’x 446, 454-55 (6th Cir. 2019) (finding that defendants’ initial, allegedly fraudulent coal transaction was not related to subsequent allegedly fraudulent transactions, and thus predicate acts involved in initial fraud were properly disregarded in determining whether pattern had been sufficiently alleged to state civil Racketeer Influenced and Corrupt Organizations Act violations, despite contention that failure of initial fraudulent scheme led to financial stress and an association that proceeded to commit different frauds on other parties); *Attia v. Google LLC*, No. 19-15771, 2020 WL 7380256, at *5 (9th Cir. Dec. 16, 2020) (holding that an inventor of new architecture technology failed to identify two sufficiently related predicate acts, as required to establish the “pattern” element for racketeering claim against the technology company, despite contention that company’s modus operandi was to induce inventors to reveal their proprietary information through non-disclosure agreements then wrongfully use or publish the proprietary information to the exclusion of the inventors; one case cited by inventor did not present similar modus operandi and did not mention non-disclosure agreement, and other case’s alleged conduct did not embrace criminal acts that had similar purposes, results, participants, victims, or methods of commission); *Martinek v. Diaz*, No. 11 C 7190, 2012 WL 2953183, at *8–9 (N.D. Ill. July 18, 2012) (finding that predicate acts in RICO scheme were not sufficiently related because the schemes had different purposes, different victims, and were accomplished using different means).

⁷⁷ *Heller Fin., Inc. v. Gramco Computer Sales, Inc.*, 71 F.3d 518, 524 (5th Cir. 1996).

⁷⁸ *Id.* at 525.

loans by definition involved an immediate “reaping of the profits” of a future stream of rent payments.⁷⁹ 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.⁸⁰

District courts have followed a similar approach. In *Polar Express Sch. Bus, Inc. v. Navistar, Inc.*, the United States District Court for the Northern District of Illinois held that a mere statement from the plaintiff that the defendants profited from a continued scheme was insufficient to establish a successful RICO claim.⁸¹ The plaintiffs in *Polar Express*, an Illinois bus company, alleged that the defendants manufactured and sold buses to the plaintiff knowing that the buses contained defective parts.⁸² The plaintiffs claimed that the defendants’ actions amounted to RICO violations perpetrated through acts of mail and wire fraud, whereby the defendants committed the fraud through an enterprise that included the defendants’ authorized dealers, who sold defective vehicles, and the defendants’ authorized repair facilities, who serviced the vehicles.⁸³ The plaintiffs alleged in the complaint that when it sent its buses to be serviced, the service centers knew the engines were defective but never revealed the fact, and therefore profited from the continued and “fruitless” repairs.⁸⁴ The court however, held that the plaintiffs’ statement alone does not suggest the existence of a RICO violation.⁸⁵ It held that the plaintiffs must show a stronger factual nexus by pointing to any facts suggesting coordination between the defendants—

⁷⁹ *Id.*

⁸⁰ *Id.* at 524.

⁸¹ *Polar Express Sch. Bus, Inc. v. Navistar, Inc.*, No. 16 C 5769, 2016 WL 7324589, at *3 (N.D. Ill. Dec. 16, 2016).

⁸² *Id.* at *1.

⁸³ *Id.*

⁸⁴ *Id.* at *3.

⁸⁵ *Id.*

such as claims of meetings and conversations between the defendants, suggesting that the defendants conspired to defraud the plaintiff.⁸⁶ Citing to a lack of factual support for their RICO claims, the court then granted the defendants’ motion to dismiss.⁸⁷

In *DeGuelle v. Camilli*, 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.⁸⁸ 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.⁸⁹ In *United States v. Baker*, the Fourth Circuit followed a similar approach.⁹⁰ In *Baker* the government charged twenty individuals belonging to a motorcycle gang with RICO violations including conspiracy to possess, with intent to distribute, and money laundering.⁹¹ The members of the motorcycle gang argued that their membership in the gang was incidental to any criminal activity.⁹² The court, however, found that the government’s evidence demonstrated that the gang “served as a central force in the conspiracy.”⁹³ In finding that the defendants’ membership in the motorcycle gang was related to the criminal activity, the court considered myriad factors such as: (1) the fact that the the organization received proceeds from the illicit activity; (2) the presidents of the organization received kickbacks to solicit new participants to the criminal activities; and (3) that the defendants all used a common drug supplier and other common connections.⁹⁴

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *DeGuelle v. Camilli*, 664 F.3d 192, 204 (7th Cir. 2011).

⁸⁹ *Id.* at 201.

⁹⁰ *United States v. Baker*, 598 F. App’x 165, 173 (4th Cir. 2015)

⁹¹ *Id.* at 166.

⁹² *Id.* at 173.

⁹³ *Id.*

⁹⁴ *Id.*

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*,⁹⁵ a real estate promoter sued the owner-developer of certain parcels of real estate, alleging that the parcels were unmarketable and that the promoter had been induced to agree to market the parcels through fraud and extortion. The promoter alleged other predicate acts arising from the owner-developer’s efforts to market the parcels to the general public through technical violations of direct mail solicitation and marketing regulations.⁹⁶ 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.”⁹⁷ 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].”⁹⁸

Similarly, in *Schlaifer Nance & Co. v. Estate of Warhol*, 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.⁹⁹

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

⁹⁵ *Vild v. Visconsi*, 956 F.2d 560 (6th Cir. 1992).

⁹⁶ *Id.* at 566.

⁹⁷ *Id.*

⁹⁸ *Id.* at 567.

⁹⁹ *Schlaifer Nance & Co. v. Estate of Warhol*, 119 F.3d 91, 97 (2d Cir. 1997).

with a threat of repetition.”¹⁰⁰ The Court emphasized that the concept of continuity, in either its closed or open-ended forms, is “centrally a temporal concept.”¹⁰¹

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.”¹⁰² 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.¹⁰³

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.¹⁰⁴ The Second Circuit also has recognized that, aside from temporal

¹⁰⁰ *H.J. Inc. v. Northwestern Bell Telephone Co.*, 492 U.S. 229, 241 (1989).

¹⁰¹ *Id.* at 241-42.

¹⁰² *H.J. Inc. v. Northwestern Bell Telephone Co.*, 492 U.S. 229, 242 (1989).

¹⁰³ *Id.* In his concurring opinion, Justice Scalia stated his fear that an undue focus on temporal continuity could unwittingly create a “safe harbor for racketeering activity that does not last too long, no matter how many different crimes and different schemes are involved, so long as it does not otherwise ‘establish a threat of continued racketeering activity.’” *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.

¹⁰⁴ See *Grace Int’l Assembly of God v. Festa*, 797 F. App’x 603, 605 (2d Cir. 2019), cert. denied sub nom. *Grace Int’l Assembly of God v. Festa, Gennaro, et al.*, No. 20-33, 2020 WL 5883302 (U.S. Oct. 5, 2020) (stating that “[s]ince the Supreme Court decided *H.J. Inc.*, we have never found predicate acts spanning less than two years to be sufficient to constitute close-ended continuity,” and explaining that while two years is the minimum duration necessary for finding close-ended continuity, the mere fact that predicate acts span two years is insufficient, without more, to support a finding of a close-ended pattern); *Halvorssen v. Simpson*, 807 F. App’x 26, 31 (2d Cir. 2020) (finding that an eleven month period between predicate acts was an insufficient time period to establish close-ended continuity); *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*

concerns, “other factors such as the number and variety of predicate acts, the number of both participants and victims, and the presence of separate schemes are also relevant in determining whether closed-ended continuity exists.”¹⁰⁵ 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.”¹⁰⁶ Yet, the fact the court has not held a period of less than two years to be sufficient does not mean that such a period is insufficient as a matter of law.¹⁰⁷ In fact, the Second Circuit recently reiterated that, while such cases are rare, a substantial period of time could constitute a few weeks or months.¹⁰⁸

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.”¹⁰⁹ The Third Circuit considers duration as the “sine qua non of

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’”).

¹⁰⁵ *DeFalco v. Bernas*, 244 F.3d 286, 321 (2d Cir. 2001); *Berman, Tr. For Estate of Michael S. Golberg, LLC v. LaBonte*, 622 B.R. 503, 536-37 (D. Conn. 2020); *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).

¹⁰⁶ *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.”); *see also Grace Int’l Assembly of God v. Festa*, 797 F. App’x 603, 605-606 (2d Cir. 2019) (finding that plaintiff had not established closed-ended continuity simply by alleging that conduct lasted longer than two years).

¹⁰⁷ *United States v. Veliz*, 623 Fed. Appx. 538, 543 (2d Cir. 2015), *cert. denied*, 136 S. Ct. 848, 193 L. Ed. 2d 750 (2016).

¹⁰⁸ *Id.*

¹⁰⁹ *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.”); *see also Germinaro v. Fidelity Nat’l Title Ins. Co.*, 737 F. App’x 96, 103-04 (3d Cir. 2018) (citing *Tabas*, 47 F.3d at 1293, and affirming district court conclusion that nine-and-a-half month scheme was not substantial enough to establish closed-ended continuity); *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).

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.”¹¹⁰

The First, Eighth, and Tenth Circuits also generally follow the two-step approach of the Second and Third Circuits, requiring RICO plaintiffs to establish “closed-ended continuity” by pleading or proving a series of predicate acts of sufficient duration, and also to meet the additional requirements of the multi-factored analysis.¹¹¹ 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.¹¹²

Courts in the Seventh Circuit have continued to balance the six factors identified in *Morgan v. Bank of Waukegan*¹¹³ without giving any one factor dispositive weight.¹¹⁴ 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.¹¹⁵ 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

¹¹⁰ *Tabas*, 47 F.3d at 1296 n. 21.

¹¹¹ *See, e.g., Fleet Credit Corp. v. Sion*, 893 F.2d 441, 445-46 (1st Cir. 1990); *United States v. Stepanets*, No. 19-1471, No. 19-1595, No. 19-1600, 2021 WL 748385, at **13-15 (1st Cir. Feb. 26, 2021) (evaluating multiple relatedness factors and finding closed-ended continuity where defendant committed ten acts of mail fraud, targeting eight customers, over the course of 21 months); *Atlas Pile Driving Co. v. DiCon Fin. Co.*, 886 F.2d 986, 994-95 (8th Cir. 1989); *United States v. Hively*, 437 F. 3d 752, 761-62 (8th Cir. 2006) (finding that there was sufficient evidence to support a finding of closed-ended continuity and relatedness); *Resolution Trust Corp. v. Stone*, 998 F.2d 1534, 1543-44 (10th Cir. 1993).

¹¹² *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”).

¹¹³ *Morgan v. Bank of Waukegan*, 804 F.2d 970, 975 (7th Cir. 1986).

¹¹⁴ *See Kaye v. D’Amato*, 357 F. App’x 706, 715-16 (7th Cir. 2009) (“[N]o one factor is dispositive and we should seek to achieve the natural and commonsense result, consistent with Congress’ intent to eradicate long-term criminal conduct.”) (quotation marks omitted); *see also, e.g., Sciarrone v. Amrich*, 2020 WL 2900938, at *6 (N.D. Ill. June 3, 2020) (noting that no one factor is dispositive); *Triumph Packaging Group v. Ward*, 2014 WL 949011, at *4 (N.D. Ill. Mar. 11, 2014) (noting that an analysis of the *Morgan* factors is fact-specific and undertaken with the goal of achieving a natural and commonsense result); *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).

¹¹⁵ *See Uniroyal Goodrich Tire Co. v. Mut. Trading Corp.*, 63 F.3d 516, 524 (7th Cir. 1995); *see also Nw. Mut. Life Ins. Co. v. Policyowner Prot. Servs., Inc.*, 2005 WL 8177463, at *6 (S.D. Ind. Oct. 20, 2005).

separate transactions.”¹¹⁶ Still, the Seventh Circuit has recognized that “the most important element of RICO continuity is its temporal aspect.”¹¹⁷

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.¹¹⁸ 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.¹¹⁹

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.¹²⁰ For example:

- In a 2017 decision, the Second Circuit affirmed the dismissal of a complaint alleging a civil RICO violation arising out of an allegation from the former Ambassador to Venezuela and his consulting firm, that two companies and their officers had secured high-valued energy-sector contracts from the Venezuelan government, through corruption and racketeering.¹²¹ The court emphasized that close-ended continuity is “primarily a temporal concept,” and requires that the predicate crimes extend “over a substantial period of time.” It noted that predicate acts “separated by only a few months will not do,” and that the Second Circuit generally required that the crimes extend over at least two years.¹²² The plaintiff argued that the defendants engaged in RICO violations by forwarding two theories: (1) that the defendants engaged making two false phone calls amounting to two acts of wire fraud; or (2) that the two acts of wire fraud combined with Travel Act violations amounted to RICO violations.¹²³ However, the court found that plaintiffs’ first theory failed because the predicate acts lacked close-ended, or open-ended continuity. Specifically, it found that the two fraudulent phone calls were separated by only a few months— “too short a time for close-ended continuity,” and that there were no future threats of repetition, which foreclosed open-ended continuity.¹²⁴ While the court held that plaintiff’s second theory (wire fraud

¹¹⁶ See *Morgan*, 804 F.2d at 975.

¹¹⁷ See *Roger Whitmore’s Auto. Servs., Inc. v. Lake Cnty.*, 424 F.3d 659, 673 (7th Cir. 2005).

¹¹⁸ 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).

¹¹⁹ *Columbia Natural Resources, Inc.*, 58 F.3d at 1110.

¹²⁰ *H.J. Inc. v. Northwestern Bell Telephone Co.*, 492 U.S. 229, 240-41 (1989).

¹²¹ *Reich v. Lopez*, 858 F.3d at 58 (2d Cir. 2017).

¹²² *Id.* at 60.

¹²³ *Id.* at 59.

¹²⁴ *Id.* at 60.

coupled with Travel Act violations) amounted to close-ended continuity, it emphasized that the predicate acts were not sufficiently related to amount to RICO violations.¹²⁵

- In a 2015 decision, the Eleventh Circuit affirmed the district court’s order granting partial summary judgment on RICO violation claims, where an investment firm alleged that a corporation’s (in which the investment firm had invested) former chief executive officer, a former employee, a subsidiary, and its employees engaged in fraudulent activity including diverting business proceeds from the corporation to the subsidiary.¹²⁶ The court found that the appellants could not establish either close-ended or open-ended continuity.¹²⁷ The court held that the appellants could not show close-ended continuity because there was only one victim, the corporation, and because there was “only a single scheme with a discrete goal” connecting the predicate acts—i.e., defendants’ alleged scheme to divert business proceeds from the corporation to the subsidiary and themselves.”¹²⁸ The court reasoned that “[W]here the RICO allegations concern only a single scheme with a discrete goal, the courts have refused to find a closed-ended pattern of racketeering even when the scheme took place over longer periods of time.”¹²⁹ The court also found that the plaintiffs could not show open-ended continuity because there was no threat of “continuing criminal activity.”¹³⁰
- In a 2006 decision, the Sixth Circuit affirmed the dismissal of a complaint alleging a civil RICO violation arising out of an allegation from an injured worker that his employer, his employer’s worker’s compensation insurer, and others conspired to deny his rightful worker’s compensation benefits.¹³¹ 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.”¹³² 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.¹³³ 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.”¹³⁴

¹²⁵ *Id.* at 60-61.

¹²⁶ *Daedalus Capital LLC v. Vinecombe*, 625 F. App’x 973, 975 (11th Cir. 2015).

¹²⁷ *Id.* at 976.

¹²⁸ *Id.*

¹²⁹ *Id.* (internal quotations and citations omitted).

¹³⁰ *Id.* at 976-977.

¹³¹ *Moon v. Harrison Piping Supply*, 465 F.3d 719 (6th Cir. 2006).

¹³² *Id.* at 725.

¹³³ *GE Inv. Private Placement Partners II v. Parker*, 247 F.3d 543 (4th Cir. 2001).

¹³⁴ *Id.* at 549. *See also Al-Abood ex rel. Al-Abood v. El-Shamari*, 217 F.3d 225, 238 (4th Cir. 2000) (refusing to find pattern based on multiple acts of mail fraud in connection with three separate schemes spanning several years

- In a 2015 decision, the D.C. Circuit Court of Appeals affirmed the dismissal of a complaint alleging a civil RICO violation, based on defendants’ attempts to control a single piece of property and diminish the value of the plaintiff’s interest in the property.¹³⁵ The court found that dismissal of the RICO claim was appropriate because it involved a single scheme, with a single injury, and at most three victims.¹³⁶ In response to plaintiff’s argument that a pattern existed “because the dispute ha[d] persisted for a number of years and involve[d] multiple alleged predicate acts,” the court noted that “these two factors are insufficient to show a pattern of racketeering where the plaintiff alleges a single scheme, involving one injury, to at most a few victims.”¹³⁷
- In a 1992 decision, then-Chief Judge 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 the ordinary non-technical sense of the word)” even if “separate parts may themselves constitute separate criminal acts.”¹³⁸

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.”¹³⁹ “Open-ended continuity” refers to “past conduct that by its

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).

¹³⁵ *E. Savs. Bank FSB v. Papageorge*, 629 F. App’x 1, 2 (D.C. Cir. 2015).

¹³⁶ *Id.*

¹³⁷ *Id.* (citing *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. P’ship v. Market Square Assocs.*, 235 F.3d 629, 633-34 (D.C. Cir. 2001) (holding that four separate predicate acts that affected only one plaintiff did not constitute a pattern of racketeering).

¹³⁸ *Apparel Art Int’l, Inc. v. Jacobson*, 967 F.2d 720, 722 (1st Cir. 1992). See also *Home Orthopedics Corp. v. Rodriguez*, 781 F.3d 521, 529-30 (1st Cir. 2015) (finding that a specific, narrow mission stemming from a single discernable event, cut against finding closed-ended continuity); *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.”).

¹³⁹ *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.”).

nature projects into the future with a threat of repetition.”¹⁴⁰ 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.”¹⁴¹

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.”¹⁴² Also, courts may be reluctant to find a threat of continuity where the acts are part of a discrete scheme aimed at only a few individuals.¹⁴³ Courts also have rejected open-ended continuity based on a finite set of actions

¹⁴⁰ *H.J. Inc. v. Northwestern Bell Telephone Co.*, 492 U.S. 229, 241 (1989).

¹⁴¹ *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); *State v. Da Zhong Wang*, No. CV N16C-05-138 AML, 2018 WL 2202274, at *6 (Del. Super. Ct. May 11, 2018) (finding open-ended continuity where the RICO predicates had become the defendant’s regular way of conducting business and denying the defendant’s motion for summary judgment in which he alleged that the case be dismissed because the state was unable to satisfy the open-ended continuity requirement).

¹⁴² *Edmondson*, 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.”); see also *Menzies v. Seyfarth Shaw LLP*, 943 F.3d 328, 343 (7th Cir. 2019), cert. denied, 140 S. Ct. 2674, 206 L. Ed. 2d 825 (2020) (noting that a threat of continuity “cannot be found from bald assertions,” and that the law requires courts to examine the complaint for allegations of predicate acts which pose a “threat of repetition extending indefinitely into the future,” or are part of an “ongoing entity’s regular way of doing business.”) (internal quotations and citation omitted).

¹⁴³ See, e.g., *Grubbs v. Sheakley Grp., Inc.*, 807 F.3d 785, 805 (6th Cir. 2015) (finding that a single eight-month scheme cannot meet the standard for open-ended or close-ended continuity because the scheme was only aimed at a single victim and was a short-term, terminable scheme); *Zastrow v. Houston Auto Imports Greenway Ltd.*, 789 F.3d 553, 561 (5th Cir. 2015) (witness intimidation and retaliation against XX did not constitute open-ended continuity because the alleged acts were committed within one week and were directed towards, at most, two discrete events); *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”); *Antonacci v. City of Chicago*, 640 Fed. Appx. 553 (7th Cir. 2016), cert. denied, 2016 WL 3406012 (U.S. 2016); *Gamboia 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

that are not likely to be repeated.¹⁴⁴ 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.¹⁴⁵ 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.¹⁴⁶

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").

¹⁴⁴ See, e.g., *Empress Casino Joliet Corp. v. Balmoral Racing Club, Inc.*, 831 F.3d 815, 830 (7th Cir. 2016) (affirming dismissal for failure to allege open-ended continuity because the scheme had a "natural ending point."); *Home Orthopedics Corp.*, 781 F.3d at 531 (1st Cir. 2015) (affirming the district court's ruling that the plaintiff's allegations failed to satisfy RICO's continuity requirements because there was no indication that alleged scheme consisting of extorting payments from the plaintiff pursuant to a misleading sales agreement would continue into the indefinite future if the supplier paid commission fees due under the agreement, and because filing of "frivolous lawsuits" against the plaintiff did not demonstrate indefiniteness); *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).

¹⁴⁵ See, e.g., *Malvino v. Delluniversita*, 840 F.3d 223, 233 (5th Cir. 2016) (internal quotation marks and citations omitted) (finding that when the defendant had "terminated any allegedly fraudulent scheme" prior to suit, there was no open-ended continuity); *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).

¹⁴⁶ 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*¹⁴⁷ and *Ashcroft v. Iqbal*¹⁴⁸ RICO plaintiffs must allege enough facts to meet the “plausibility” requirements of federal pleading.¹⁴⁹

§ 16 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.¹⁵⁰

Since *H.J. Inc.*, practitioners have raised constitutional challenges to RICO, focusing mainly on RICO’s pattern requirement, courts have generally rejected these challenges, often finding that RICO is constitutional on its face and constitutional as applied to case specific facts.¹⁵¹

¹⁴⁷ 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).

¹⁴⁸ 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).

¹⁴⁹ 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”).

¹⁵⁰ *H.J. Inc. v. Northwestern Bell Telephone Co.*, 492 U.S. 229, 255-56 (1989) (Scalia, J., concurring).

¹⁵¹ See, e.g., *United States v. Bazemore*, CRIM. NO. JKB-14-0479, CIVIL NO. JKB-19-2866, 2020 WL 5653364, at **2-3 (D. Md. Sept. 23, 2020) (finding that RICO was not unconstitutionally vague as applied to defendant because defendant had sufficient notice that participation in the enterprise would violate RICO); *United States v. Burden*, 600 F.3d 204, 228 (2d Cir. 2010) (finding that, “on the facts of this case,” defendant had sufficient notice that his conduct subjected him to the penalties associated with the RICO statute); *CSX Transp., Inc. v. Gilkison*, Civil Action No. 5:05CV202, 2012 WL 1598081, at *15 (N.D.W. Va. May 3, 2012) (finding that pattern requirement, as applied in this case, was not vague because defendants had notice that their fraudulent scheme fell within the acts contemplated by RICO and would subject them to RICO liability); *United States v. Stevens*, 778 F. Supp. 2d 683, 694-95 (W.D. La. 2011) (finding that based on the facts before the court, defendants had adequate notice that their alleged conduct would violate RICO’s pattern requirement). See also *United States v. Angiulo*, 897 F.2d 1169, 1179-80 (1st Cir. 1990)

But in an action alleging that a decedent's husband fraudulently obtained control over the decedent's investments, one judge found RICO's pattern requirement unconstitutional as written and as applied.¹⁵²

§ 17 Collection of Unlawful Debt

A defendant can violate any subsection of section 1962 if it collects or conspires to collect “an unlawful debt.”¹⁵³ Section 1961(6) defines “unlawful debt” to include debt arising in connection with illegal gambling activity or illegal gambling business, or debts that violate state or federal usury laws with interest rates at least twice the enforceable rate and that are incurred in connection with the business of lending money at a usurious rate.¹⁵⁴ If the debt is usurious, the

(finding that vagueness challenges to RICO must be examined in light of a case's particular facts, and rejecting argument that RICO statute was void for vagueness because “[a] person of ordinary intelligence could not help but realize that illegal activities of an organized crime family fall within the ambit (or gambit?) of RICO's pattern of racketeering activity”); *United States v. Coiro*, 922 F.2d 1008, 1016-17 (2d Cir. 1991) (vagueness challenges must be considered in light of the facts of a particular case); *United States v. Pungitore*, 910 F.2d 1084, 1103-05 (3d Cir. 1990) (rejecting vagueness challenge to pattern requirement and finding that RICO was perfectly clear as applied to appellants' conduct); *Columbia Natural Res., Inc. v. Tatum*, 58 F.3d 1101, 1104, 1108-09 (6th Cir. 1995) (noting that “[t]he issue . . . is whether a person of ordinary intelligence would know that committing dozens if not hundreds of [predicate] acts . . . over the course of almost a decade against the same victim, might constitute a pattern of racketeering activity” and reversing district court order holding that RICO pattern requirement was void for vagueness); *United States v. Masters*, 924 F.2d 1362, 1367 (7th Cir. 1991) (pattern requirement not unconstitutionally vague as applied to defendants); *United States v. Lobue*, 751 F. Supp. 748, 754 (N.D. Ill. 1990) (pattern requirement not unconstitutionally vague as applied to defendants); *United States v. Andrews*, 749 F. Supp. 1520, 1522-24 (N.D. Ill. 1990) (finding that, on its face, RICO does not implicate the First Amendment and that RICO pattern requirement was not vague as applied to the defendants); *Starks v. Rent-A-Center*, No. 89-CV-0786, 1994 WL 577974, at *8 (D. Minn. May 16, 1990) (RICO was sufficiently clear in this case to withstand constitutional challenge); *United States v. Paccione*, 738 F. Supp. 691, 698-99 (S.D.N.Y. 1990) (RICO was constitutional as applied to defendants); *Beck v. Edward D. Jones & Co.*, 735 F. Supp. 903, 906-907 (C.D. Ill. 1990) (finding that RICO was constitutional on its face and as applied to facts in the case).

¹⁵² See *Firestone v. Galbreath*, 747 F. Supp. 1556, 1581 (S.D. Ohio 1990) (finding that pattern requirement was unconstitutionally vague as applied to the defendants because “persons of ordinary intelligence would not have had adequate notice that the . . . [underlying] offenses constituted a ‘pattern of racketeering activity’ under RICO.”), *aff'd in part*, 976 F.2d 279, 285-86 (6th Cir. 1992) (affirming dismissal but declining to address constitutionality of RICO pattern requirement). 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).

¹⁵³ 18 U.S.C. § 1962.

¹⁵⁴ 18 U.S.C. § 1961(6); see also *Durante Bros. & Sons, Inc. v. Flushing Nat'l Bank*, 755 F.2d 239, 247-48 (2d Cir. 1985) (establishing civil RICO standard for claims based on the collection of an unlawful debt); *Dae Hyuk Kwon v. Santander Consumer USA*, 742 F. App'x 537, 539-40 (2d Cir. 2018) (citing *Durante Bros.*, 755 F.2d at 248) (affirming dismissal where plaintiff failed to allege that fees were significant enough to effectively raise interest rate to more than twice the enforceable rate); *Bryant v. U.S. Bank*, Case No. 1:16-CV-1688-AWI-SKO, 2017 WL 2546607, at **2-3 (E.D. Ca. June 13, 2017) (dismissing RICO claim where plaintiff did not allege that related to or incurred in connection

plaintiff need not establish any criminal activity to establish RICO liability for the collections of an unlawful debt.¹⁵⁵ In other words, the collection of an unlawful debt itself violates RICO even without a “pattern” of “racketeering activity.”¹⁵⁶

The RICO proscription against the collection of an unlawful debt is directed at the efforts to collect gambling debts and “loan-sharking” operations that charge usurious interest rates.¹⁵⁷ Administrative fees or late fees, such as those charged under rental or service agreements, have

with illegal gambling or usury). *Sundance Land Corp. v. Cmty. First Fed. Sav. & Loan Ass’n*, 840 F.2d 653, 666-67 (9th Cir. 1988) (identifying elements of unlawful debt collection); *Robidoux v. Conti*, 741 F. Supp. 1019, 1021-22 (D.R.I. 1990) (exploring “business of lending money” requirement of “unlawful debt” definition and finding that there was no RICO violation where the questionable loans were isolated and the defendant did not hold himself out as a lender of money).

¹⁵⁵ See *Durante Bros.*, 755 F.2d at 247-48 (noting that loans in some states can be usurious and unenforceable without necessarily violating state criminal usury laws and concluding that the *Sedima* ruling that a civil RICO claim based upon racketeering activity requires proof of a prior conviction does not apply to a civil RICO claim based upon the collection of a debt characterized as unlawful because it is usurious); *United States v. Grote*, 961 F.3d 105, 119 (2d Cir. 2020) (citations omitted) (observing that “the criminal RICO offense of participating in the conduct of an enterprise’s affairs through collection of unlawful debt may arguably be predicated on a violation of only civil usury laws.”).

¹⁵⁶ See, e.g., *Day v. DB Capital Grp., LLC*, Civil Action No. DKC 10-1658, 2011 WL 887554, at *12 (D. Md. Mar. 11, 2011) (collecting cases) (“For RICO claims based on the collection of unlawful debt, the prevailing view is that the plaintiff need not show a pattern of such activity—one act of collection is sufficient.”); see also *Grote*, 961 F.3d at 119 (“RICO offenses may be predicated on a single instance of collection of unlawful debt . . .”).

¹⁵⁷ 18 U.S.C. § 1961(6) (“unlawful debt” means a debt “incurred or contracted in gambling activity which was in violation of the law” and a debt “which was incurred in connection with the business of gambling in violation of the law . . .”; *Durante Bros.*, 755 F.2d at 250 (collection of unlawful debt as a predicate for RICO liability “seems to have been an explicit recognition of the evils of loan sharking” and requirement that loan must be incurred in connection with “the business of” making usurious loans excludes from the scope of the statute occasional usurious transactions by individuals or entities not in the business of loan sharking); see also *Saglioccolo v. Eagle Ins. Co.*, 112 F.3d 226, 229 n.1 (6th Cir. 1997) (finding that collection of debt was not unlawful as defined under RICO because it was not an illegal gambling debt and was not a debt unenforceable because of usury laws); *Malvar Egerique v. Chowaiki*, 19 Civ. 3110, 2020 WL 1974228, at * 19 (S.D.N.Y. Apr. 24, 2020) (finding that section 1961(6) does not encompass occasional usurious transactions and dismissing RICO claims where plaintiff only alleged a single usurious loan); *Blech v. Gantman*, Case No. 8:18-cv-02086-JLS-JDE, 2019 WL 3240111, at *7 (C.D. Cal. Apr. 24 2019) (denying a motion to dismiss RICO claims where plaintiff alleged that defendants operated an ongoing loan-shark enterprise where they offered extortionate loans to desperate borrowers); *Merrit v. JP Morgan*, Case No. 17-cv-06101-LHK, 2018 WL 1933478, at *13 (N.D. Cal. Apr. 24, 2018) (allegation about collection of debt did not fall within the meaning of section 1961(6) because plaintiff did not allege that debt was an unlawful gambling debt or the result of a usurious loan).

been found to be outside of RICO's scope.¹⁵⁸ Borrowing fees that constitute "disguised interest" will only support a RICO claim if they violate state usury laws.¹⁵⁹

¹⁵⁸ See *Nolen v. Nucentrix Broadband Networks Inc.*, 293 F.3d 926, 928-29 (5th Cir. 2002) (administrative late fees constituting up to 30% of monthly bill are not considered interest under Texas law); *Chambers v. Holsten Mgmt. Corp.*, No. 02 C 5154, 2004 WL 723655, at *5 (N.D. Ill. Mar. 25, 2004) (dismissing RICO claim challenging rental rates after concluding that high rates were not debts from gambling activity and extremely usurious loans, as required by section 1961(6)).

¹⁵⁹ See *Lovick v. Ritemoney Ltd.*, 378 F.3d 433, 439-444 (5th Cir. 2004) (applying Texas law, noting that whether a fee is "disguised interest" turns on the substance and nature of the transaction and applicable state laws).

IV. SECTION 1962(C): THE RICO ENTERPRISE

§ 18 Overview

RICO was designed to prevent the illicit infiltration of legitimate enterprises.¹ 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.²

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

¹ 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”).

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

³ 18 U.S.C. § 1961(4).

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

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

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

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

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

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

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

¹¹ *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).

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

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

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

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.

§ 19 Association-in-Fact Enterprise

Any group of entities or individuals that is “associated in fact” may be a RICO enterprise.¹⁶ 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*,¹⁷ 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 fable (?) structuredistinct from that

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

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

¹⁶ 18 U.S.C. § 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”).

¹⁷ *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)) (rejected by *Pavlov v. Bank of New York Co., Inc.*, 25 F. App’x 70 (2d Cir. 2002) (“Our circuit has rejected the Eighth Circuit’s restrictive approach to the enterprise element. The statute defines an ‘enterprise’ as including a ‘group of individuals associated in fact.’ The Supreme Court in *United States v. Turkette* ruled that this requirement is satisfied by a ‘group of persons associated together for a common purpose of engaging in a course of conduct.’ The enterprise need not necessarily have a continuity extending beyond the performance of the pattern of racketeering acts alleged, or a structural hierarchy, so long as it is in fact an enterprise as defined in the statute.”) (internal citations omitted).

inherent in the pattern of racketeering.¹⁸ Other courts, including the Fifth,¹⁹ Sixth,²⁰ and Seventh Circuits,²¹ 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.”²² 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.²³

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

¹⁸ Compare *Stephens, Inc. v. Geldermann, Inc.*, 962 F.2d 808, 815-16 (8th Cir. 1992) (reversing summary judgment for a RICO plaintiff because “[t]he only common factor that linked all these parties together and defined them as a distinct group was their direct or indirect participation in . . . [the] scheme to defraud . . .”) (rejected by *Pavlov*, 25 F. App’x at 70), with *Atlas Pile Driving Co. v. DiCon Fin. Co.*, 886 F.2d 986, 995-96 (8th Cir. 1989) (finding that association of two individuals and three construction companies was a RICO enterprise because the association, which constructed homes and sold real estate, engaged in activities apart from the fraudulent acts complained of by the plaintiff).

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

²⁰ *Walker v. Jackson Pub. 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).k

²¹ *Baker v. IBP, Inc.*, 357 F.3d 685, 691 (7th Cir. 2004) (inclusion of party that did not share common purpose defeated existence of association-in-fact) (disagreed with by *Williams v. Mohawk Industries, Inc.*, 465 F.3d 1277 (11th Cir. 2006).); *Phillips*, 239 F.3d at 844 (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) (called into question by *Jay E. Hayden Found. v. First Neighbor Bank, N.A.*, 610 F.3d 382, 388 (7th Cir. 2010)); *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, 965 (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”).

²² *Burdett v. Miller*, 957 F.2d 1375, 1379 (7th Cir. 1992) (called into doubt by *Riley v. Vilsack*, 665 F.Supp.2d 994, 1003 (W.D. Wis. 2009)). ; 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).

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

that an association-in-fact enterprise did not require any particular organizational structure.²⁴ For instance, in *Odom v. Microsoft Corporation*,²⁵ the Ninth Circuit offered a detailed analysis of what may constitute an “association-in-fact,” and applying language from *Turkette*,²⁶ 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.²⁷ 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.²⁸ 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.²⁹ In a later unpublished decision, the Second Circuit ruled that “[t]he

²⁴ See *Patrick*, 248 F.3d at 19 (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) (abrogated on other grounds by *Nat’l Organization for Women, Inc. v. Scheidler*, 510 U.S. 249, 260 (1994)); *State v. Haddix*, 638 N.E.2d 1096 (Ohio Ct. App. 1994)), abrogated by *National Organization for Women, Inc. v. 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) (declined to follow by *Limestone Dev. Corp. v. Vill. of Lemont*, 520 F.3d 797, 804-05 (7th Cir. 2008)); *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”)) (declined to follow by *Chang v. Chen*, 80 F.3d 1293, 1297-98 (9th Cir. 1996)); *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”) (declined to follow by *U.S. v. Feldman*, 853 F.2d 648, 662 (9th Cir. 1988)).

²⁵ *Odom*, 486 F.3d at 541.

²⁶ *Turkette*, 452 U.S. at 576.

²⁷ *Odom*, 486 F.3d at 552; accord *Mohawk* 465 F.3d at 1284 (11th Cir. 2006) (abrogation on other grounds recognized in *Ray v. Spirit Airlines, Inc.*, 836 F.3d 1340, 1348 (11th Cir. 2016)).

²⁸ *Mohawk*, 465 F.3d at 1284.

²⁹ *Moss v. Morgan Stanley Inc.*, 719 F.2d 5, 22 (2d Cir. 1983) (quoting *Turkette*, 452 U.S. at 583. 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

enterprise need not necessarily have a continuity extending beyond the performance of the pattern of racketeering acts alleged, or a structural hierarchy, so long as it is in fact an enterprise as defined in the statute.”³⁰

In 2009, the Supreme Court resolved the circuit split in *Boyle v. United States*.³¹ 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.”³² 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.”³³ 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.³⁴ 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.³⁵

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

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”).

³⁰ *Pavlov*, 25 F. App’x at 70 (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).

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

³² *Id.* at 940-941.

³³ *Id.* at 946-47.

³⁴ *Id.* at 947 (quoting *Turkette*, 452 U.S. at 583).

³⁵ *Id.* at 948.

boxes over the course of several years. The participants planned the robberies in advance, worked together to gather the necessary tools, and divvied up the proceeds.³⁶ By contrast, the Court noted that there would be no association-in-fact enterprise where individuals act “independently and without coordination.”³⁷ 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.³⁸ 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.³⁹ 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.”⁴⁰

In 2016, the Supreme Court addressed whether association-in-fact enterprises can be expanded to include extraterritorial enterprises in *RJR Nabisco, Inc. v. European Cmty.*⁴¹ The Court concluded that the “nerve center” test used to determine a corporation’s principal place of

³⁶ *Id.* at 941.

³⁷ *Id.* at 947 n.4.

³⁸ *Ins. Brokerage*, 618 F.3d at 300.

³⁹ *Id.* 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.

⁴⁰ *Ins. Brokerage*, 618 F.3d at 375-76.

⁴¹ *RJR Nabisco, Inc. v. European Cmty.*, 136 S.Ct. 2090 (2016).

business for jurisdiction purposes would be rendered meaningless if “a corporation with a foreign nerve center can, if necessary, be pruned into an association-in-fact enterprise with a domestic nerve center.”⁴² The Court also found that the nerve center test is not well-suited to deal with normal RICO association-in-fact enterprises in general, because *Boyle* held that there need not be a hierarchical structure to the enterprise, something necessary for determining the nerve center of a corporation.⁴³ Accordingly, the Court concluded that RICO’s extraterritorial effect should be “pegged to the extraterritoriality judgments Congress has made in the predicate statutes.”⁴⁴

The Second Circuit has heard multiple association-in-fact cases since the *Boyle* decision. In addition to *Boyle*’s holding that an association-in-fact enterprise need not have a hierarchical structure, the Second Circuit determined that there is no bright line rule as to the longevity of the necessary continuity in activity to be considered an enterprise.⁴⁵ In acknowledging the ambiguity of what may constitute an association-in-fact enterprise, the court also found that “the existence of an association-in-fact is oftentimes more readily proven by what it does, rather than by abstract analysis of its structure.”⁴⁶

Nevertheless, the Second Circuit has engaged in some analysis of the structure of an association-in-fact enterprise. In *Ulit4less, Inc. v. Fedex Corp.*, the court found, in determining that FedEx had not engaged in a RICO violation, that a corporate defendant can be implicated in an association-in-fact enterprise if “the enterprise is more than the defendant carrying out its ordinary business through a unified corporate structure unrelated to the racketeering activity.”⁴⁷

⁴² *Id.* at 2104.

⁴³ *Id.* at 2104.

⁴⁴ *Id.* at 2104.

⁴⁵ *U.S. v. Pierce*, 785 F.3d 832, 838 (2d Cir. 2015) (“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.”) (quoting *H.J., Inc. v. Nw. Bell Tel. Co.*, 492 U.S. 229, 241 (1989)) (internal quotation marks omitted).

⁴⁶ *U.S. v. Granton*, 704 F. App’x. 1, 6 (2d. Cir. 2017) (quoting *United States v. Burden*, 600 F.3d 204, 215 (2d Cir. 2010)) (internal quotation marks omitted).

⁴⁷ *Ulit4less, Inc. v. Fedex Corp.*, 871 F.3d 199, 207 (2d Cir. 2017).

In other words, this distinction did not turn on whether the plaintiff sued the entirety of the enterprise or only some of the members.⁴⁸ In *D’Addario v. D’Addario*, the Second Circuit rejected the concept of the “rimless hub-and-spoke” conspiracies as RICO association-in-fact enterprise.⁴⁹ The court concluded that “[s]uch a sweep would seem to run afoul of the principle adopted by the Supreme Court in *Boyle*.”⁵⁰ Therefore, the Second Circuit rejected the claim that members of a family who were separately defrauding an estate constituted an association-in-fact enterprise, because the group did not act with a sufficiently common purpose to satisfy *Boyle*.⁵¹

The Ninth Circuit has also had opportunities to discuss association-in-fact enterprises in light of the *Boyle* decision. The Ninth Circuit tends to hone its analysis around the association-in-fact having a common purpose and evidence regarding the continuity of the organization and that the members function as a unit.⁵² When assessing the required knowledge for participation in an association-in-fact enterprise, the Ninth Circuit has concluded that “[i]t is sufficient that the defendant know the general nature of the enterprise and know that the enterprise extends beyond his individual role.”⁵³ The court has also held that evidence of hierarchy, role differentiation, chain of command, membership dues, and more was sufficient to show that a gang was an association-in-fact enterprise.⁵⁴ Additionally, the court has held that RICO association-in-fact charges do not implicate due process concerns.⁵⁵

The Seventh Circuit has also heard association-in-fact enterprise cases. In 2015, the court found that a student loan borrower had sufficiently stated the existence of a RICO association-in-

⁴⁸ *Id.* at 207.

⁴⁹ *D’Addario v. D’Addario*, 901 F.3d 80, 101 (2nd Cir. 2018).

⁵⁰ *Id.* at 101.

⁵¹ *Id.* at 102.

⁵² *Doan v. Singh*, 617 F. App’x 684, 685 (9th Cir. 2015).

⁵³ *U.S. v. Christensen*, 828 F.3d 763, 780 (9th Cir. 2015) (quoting *U.S. v. Eufrazio*, 935 F.2d 553, 557 n.29 (3d Cir. 1991) (internal quotation marks omitted)).

⁵⁴ *U.S. v. Yepiz*, 673 F. App’x 691, 703 (9th Cir. 2016).

⁵⁵ *U.S. v. Brown*, 800 F. App’x 455, 461 (9th Cir. 2020).

fact enterprise with respect to a guaranty agency, debt collector, and parent company in *Bible v. United Student Aid Funds, Inc.*⁵⁶ The court acknowledged that the key distinction between a RICO association-in-fact enterprise and a “run-of-the-mill commercial relationship” is that the individual entities must be working “in concert with the others to pursue a common interest.”⁵⁷ The court looked to economic interdependence and intermingling of responsibilities during the loan rehabilitation process to conclude that there was a RICO association-in-fact enterprise.⁵⁸ The Seventh Circuit revisited this concept two years later in *Sabrina Roppo v. Travelers Commercial Insurance Co.*⁵⁹ Looking to the *Boyle* definition of association-in-fact enterprises, the court concluded that a RICO enterprise could encompass a corporation and its outside counsel.⁶⁰ Most recently, the court concluded that a plaintiff had not sufficiently alleged an association-in-fact enterprise comprised of an appraiser, bank, and law firm.⁶¹ Instead, the court found that the defendants were not acting together toward a common unlawful purpose but rather were acting in their individual self-interests, which did not constitute a RICO association-in-fact enterprise.⁶²

⁵⁶ *Bible v. United Student Aid Funds, Inc.*, 799 F.3d 633, 655 (7th Cir. 2015).

⁵⁷ *Id.* at 656.

⁵⁸ *Id.* at 656.

⁵⁹ *Sabrina Roppo v. Travelers Commercial Insurance Co.*, 869 F.3d 568 (7th Cir. 2017).

⁶⁰ *Id.* at 588.

⁶¹ *Sheikh v. Wheeler*, 790 F. App'x 793, 796 (7th Cir. 2019).

⁶² *Id.* at 796.

The First,⁶³ Third,⁶⁴ Fourth,⁶⁵ Fifth,⁶⁶ Sixth,⁶⁷ Eighth,⁶⁸ Tenth,⁶⁹ Eleventh,⁷⁰ and D.C. Circuits⁷¹ have all also heard RICO association-in-fact enterprise cases post-*Boyle*, with no major updates to the underlying association-in-fact caselaw.

§ 20 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.⁷² All courts of appeals have concluded that this language means that in a § 1962(c) case, a party cannot be both the defendant “person” and the enterprise.⁷³ As discussed in § 19 below, courts generally recognize

⁶³ See *United States v. Rodriguez-Torres*, 939 F.3d 16, 25 (1st Cir. 2019) (concluding that a street gang that had “business-like traits,” “a loose hierarchical structure,” and “rewarded good performance and loyalty” surpassed the *Boyle* requirements for an enterprise.); *U.S. v. Ramirez-Rivera*, 800 F.3d 1 (1st Cir. 2015).

⁶⁴ See *United States v. Fattah*, 914 F.3d 112 (3d Cir. 2019); *Liberty Bell Bank v. Rogers*, 726 F. App’x 147 (3d Cir. 2018); *The Knit With v. Knitting Fever, Inc.*, 625 F. App’x 27 (3d Cir. 2015).

⁶⁵ See *United States v. Mathis*, 932 F.3d 242 (4th Cir. 2019); *United States v. Pinson*, 860 F.3d 152 (4th Cir. 2017); *Taylor v. Bettis*, 693 F. App’x 190 (4th Cir. 2017); *United States v. Brown*, 742 F. App’x 742 (4th Cir. 2014).

⁶⁶ See *Walker v. Beaumont Indep. Sch. Dist.*, 938 F.3d 724 (5th Cir. 2019); *Diamond Consortium, Inc. v. Hammervold*, 733 F. App’x 151 (5th Cir. 2018); *United States v. Jones*, 873 F.3d 482 (5th Cir. 2017); *Allstate Ins. Co. v. Plambeck*, 802 F.3d 665 (5th Cir. 2015); *Zastrow v. Houston Auto Imports Greenway Ltd.*, 789 F.3d 553 (5th Cir. 2015).

⁶⁷ See *Wilson v. 5 Choices, LLC*, 776 F. App’x 320 (6th Cir. 2019); *Aces High Coal Sales, Inc. v. Community Bank & Trust of West Georgia*, 768 F. App’x 446 (6th Cir. 2019); *United States v. Odum*, 878 F.3d 508 (6th Cir. 2017), cert. granted, judgment vacated by *Frazier v. U.S.*, 139 S.Ct. 319 (2018); *United States v. Nicholson*, 716 F. App’x 400 (6th Cir. 2017); *United States v. Gills*, 702 F. App’x 367 (6th Cir. 2017).

⁶⁸ See *United States v. McArthur*, 850 F.3d 925 (8th Cir. 2017); *Nelson v. Nelson*, 833 F.3d 965 (8th Cir. 2016).

⁶⁹ See *Lynn v. Brown*, 803 F. App’x 156 (10th Cir. 2020); *Llacua v. Western Range Ass’n*, 930 F.3d 1161 (10th Cir. 2019); *Safe Streets Alliance v. Hickenlooper*, 869 F.3d 865 (10th Cir. 2017); *George v. Urban Settlement Services*, 833 F.3d 1242 (10th Cir. 2016).

⁷⁰ See *Al-Rayes v. Willingham*, 914 F.3d 1302, 1309 (11th Cir. 2019) (concluding that a husband and wife acting together to commit mail and wire fraud constituted an association-in-fact enterprise under *Boyle*); *Ray v. Spirit Airlines, Inc.*, 836 F.3d 1340 (11th Cir. 2016); *Almanza v. United Airlines, Inc.*, 851 F.3d 1060 (11th Cir. 2017); *United States v. Alvarado-Linares*, 698 F. App’x 969 (11th Cir. 2017).

⁷¹ See *U.S. v. McGill*, 815 F.3d 846 (D.C. Cir. 2016).

⁷² 18 U.S.C. § 1962(c).

⁷³ See *Doyle v. Hasbro, Inc.*, 103 F.3d 186, 190-91 (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); *Jaguar Cars, Inc. v. Royal Oaks Motor Car Co.*, 46 F.3d 258, 263 (3d Cir. 1995); *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); *Puckett v. Tennessee Eastman Co.*, 889 F.2d 1481, 1489 (6th Cir. 1989); *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.

that the defendant may be a member of a larger association-in-fact enterprise without violating the person/enterprise distinction, but as discussed in § 20 below, the defendant must conduct the *enterprise's* affairs, not merely its *own* affairs.⁷⁴

Because a corporation is included in the statutory definition of a “person,”⁷⁵ 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.”⁷⁶

In *Cedric Kushner Promotions v. King*,⁷⁷ 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

1987); *Llacua v. W. Range Ass'n*, 930 F.3d 1161, 1187 (10th Cir. 2019) (sheep rancher associations did not form distinct associations in fact with their members); *United States v. Goldin Indus., Inc.*, 219 F.3d 1268, 1271 (11th Cir. 2000); *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)

⁷⁴ *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”).

⁷⁵ See 18 U.S.C. § 1961(3).

⁷⁶ *In re ClassicStar Mare Leasing Litig.*, 727 F.3d 473, 491 (6th Cir. 2013); see also *Llacua v. W. Range Ass'n*, 930 F.3d 1161, 1182-1183 (10th Cir. 2019) (describing the statutory distinctness requirement as heavily litigated and generating disagreement among the circuits.).

⁷⁷ *Cedric Kushner Promotions v. King*, 533 U.S. 158 (2001).

the statute's purposes.⁷⁸ 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.⁷⁹

§ 21 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,⁸⁰ 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.⁸¹ In that circumstance, the

⁷⁸ *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); *Llacua v. W. Range Ass'n*, 930 F.3d 1161, 1184 (10th Cir. 2019) (finding the distinctiveness requirement satisfied where the defendant was the executive director, board member, and president of a rancher association, and the alleged RICO enterprise was the association). *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).

⁷⁹ *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).

⁸⁰ *See Cedric Kushner Promotions v. King*, 533 U.S. 158, 161 (2001).

⁸¹ *See id.* at 162 (citing cases in 12 circuits). The Supreme Court explained in its holding in *Kushner*, that an individual can operate his company as a separate enterprise, is a different case from where it is alleged that the corporation is the culpable "person" and the same corporation and its employees and agents are the enterprise. *Id.* at 164. *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); *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); *Gasoline Sales, Inc. v. Aero Oil Co.*, 39 F.3d 70, 72 (3d Cir. 1994); *Busby v. Crown Supply, Inc.*, 896 F.2d 833, 840 (4th Cir. 1990); *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); *Begala v. PNC Bank, Ohio, Nat. Ass'n*, 214 F.3d 776, 781 (6th Cir. 2000); *Emery v. Am. Gen. Fin., Inc.*, 134 F.3d 1321, 1325 (7th Cir. 1998) (individual defendants not distinct from corporation because individuals did not exercise control); *River City Markets, Inc. v. Fleming Foods W., Inc.*, 960 F.2d 1458, 1461 (9th Cir. 1992); *Brannon v. Boatmen's First Nat'l Bank of Okla.*, 153 F.3d 1144, 1149 (10th Cir. 1998) (corporate parent and subsidiary not distinct); *United States v. Goldin Indus., Inc.*, 219 F.3d 1268, 1271 (11th Cir. 2000); *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).

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.⁸² 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.”⁸³

As the Fifth Circuit explained, an association in fact consisting of “the defendant corporate entity functioning through its employees in the course of their employment” is functionally indistinguishable from the corporation and therefore runs afoul of the person/enterprise distinction.⁸⁴ 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.”⁸⁵ 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

⁸² *Riverwoods Chappaqua Corp. v. Marine Midland Bank, N.A.*, 30 F.3d 339 (2d Cir. 1994); see also *Uit4less, Inc. v. Fedex Corp.*, 871 F.3d 199, 206 (2d Cir. 2017) (although wholly-owned corporate subsidiaries were separately legally incorporated, they lacked a separate identity).

⁸³ *Id.* at 344.

⁸⁴ *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).

⁸⁵ *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).

enterprise.⁸⁶ Given how well-established the law is on this point, plaintiffs now rarely make the error of naming the corporate entity as both the enterprise and the RICO defendant.⁸⁷

Courts have allowed RICO complaints to proceed where the corporate defendants are among the members of a separate association-in-fact enterprise.⁸⁸ For example, the Eleventh Circuit has affirmed that corporate defendants can be both defendants (who may be indicted individually) and participants in an association-in-fact enterprise consisting of the same corporations and the individual defendants who ran them.⁸⁹ 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.”⁹⁰ In another case, the Sixth Circuit affirmed summary

⁸⁶ *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); *Ray v. Spirit Airlines, Inc.*, 836 F.3d 1340, 1355 (11th Cir. 2016) (“a defendant corporation cannot be distinct for RICO purposes from its own officers, agents, and employees when those individuals are operating in their official capacities for the corporation”).

⁸⁷ David B. Smith & Terrance G. Reed, Civil RICO ¶ 3.07 (Matthew Bender) (2020).

⁸⁸ *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); *Sabrina Roppo v. Travelers Commercial Ins. Co.*, 869 F.3d 568, 588 (7th Cir. 2017) (corporation and its outside counsel 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); *George v. Urban Settlement Servs.*, 833 F.3d 1242, 1250 (10th Cir. 2016) (parent and subsidiary were two separate legal entities that joined with others to form an enterprise).

⁸⁹ *Goldin Indus., Inc.*, 219 F.3d at 1275.

⁹⁰ *Id.* *Accord Williams v. Mohawk Indus., Inc.*, 411 F.3d 1252 (11th Cir. 2005), *vacated on other grounds*, 547 U.S. 516 (2006); *Ray v. Spirit Airlines, Inc.*, 836 F.3d 1340, 1357 (11th Cir. 2016).

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.⁹¹ 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.”⁹² 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.⁹³

On the other hand, the Second Circuit observes that there appears to be agreement among the majority of circuits that the existence of separately incorporated entities does not, without more facts, satisfy the distinctiveness requirement.⁹⁴ In *Ulit4less, Inc. v. Fedex Corp.*, two different FedEx subsidiaries and the FedEx parent corporation that were involved in an alleged scheme shared a unified corporate structure guided by a single corporate consciousness.⁹⁵ The Second Circuit affirmed summary judgment, holding that the entities were not sufficiently separate to form a distinct RICO enterprise. At most, the plaintiff could show that that FedEx had “corrupt[ed] itself.”⁹⁶

§ 22 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

⁹¹ *In re ClassicStar Mare Leasing Litig.*, 727 F.3d 473 (6th Cir. 2013).

⁹² *Id.* at 492.

⁹³ *Id.* at 493.

⁹⁴ *Ulit4less, Inc. v. Fedex Corp.*, 871 F.3d 199, 208 (2d Cir. 2017) (collecting cases).

⁹⁵ *Id.* at 207.

⁹⁶ *Id.*

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.

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.⁹⁷ 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.”⁹⁸ 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

⁹⁷ 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); *Landry v. Air Line Pilots Ass’n Int’l.*, 901 F.2d 404, 425 (5th Cir. 1990); *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); *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).

⁹⁸ *Schofield v. First Commodity Corp. of Boston*, 793 F.2d 28, 33 (1st Cir. 1986).

thus concluded that the concept of respondeat superior is “directly at odds” with Congress’s intent in enacting § 1962(c).⁹⁹

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.¹⁰⁰ In *Bloch v. Prudential-Bache*,¹⁰¹ 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.*¹⁰² 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.”¹⁰³

⁹⁹ *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).

¹⁰⁰ 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).

¹⁰¹ *Bloch v. Prudential-Bache Secs.*, 707 F. Supp. 189, 194 (W.D. Pa. 1989).

¹⁰² *Petro-Tech, Inc. v. Western Co. of N. Am.*, 824 F.2d 1349 (3d Cir. 1987).

¹⁰³ *Bloch*, 707 F. Supp. at 193, quoting *Petro-Tech, Inc.*, 824 F.2d at 1359 n.11.

In *Oki Semiconductor Co. v. Wells Fargo Bank*,¹⁰⁴ the Ninth Circuit held open the possibility that vicarious liability might be established but refused to hold a bank vicariously liable for the acts of its bank teller where the teller’s alleged money laundering was not the proximate cause of the plaintiff’s injury, 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.”¹⁰⁵ 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.¹⁰⁶

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.¹⁰⁷ 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.¹⁰⁸

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.¹⁰⁹ 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.”¹¹⁰ 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

¹⁰⁴ *Oki Semiconductor Co. v. Wells Fargo Bank*, 298 F.3d 768 (9th Cir. 2002).

¹⁰⁵ *Id.* at 776; see also *United Energy Trading, LLC v. Pac. Gas & Elec. Co.*, 177 F. Supp. 3d 1183, 1190 (N.D. Cal. 2016) (articulating a three-factor test for respondeat superior liability based on Ninth Circuit precedent).

¹⁰⁶ 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).

¹⁰⁷ *Petro-Tech, Inc.*, 824 F.2d at 1361.

¹⁰⁸ *Crowe v. Henry*, 43 F.3d 198, 206 (5th Cir. 1995).

¹⁰⁹ *Liquid Air Corp. v. Rogers*, 834 F.2d 1297, 1307 (7th Cir. 1987).

¹¹⁰ *D & S Auto Parts, Inc. v. Schwartz*, 838 F.2d 964, 968 (7th Cir. 1988).

employees' misconduct, as opposed to *Liquid Air*, in which the corporation stood by silently and benefited from the wrongdoing.¹¹¹

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.”¹¹² 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.¹¹³

§ 23 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.¹¹⁴ 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.¹¹⁵ 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.¹¹⁶

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

¹¹¹ *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).

¹¹² *Brady v. Dairy Fresh Products Co.*, 974 F.2d 1149, 1155 (9th Cir. 1992).

¹¹³ *Quick v. Peoples Bank of Cullman Cnty.*, 993 F.2d 793, 797 (11th Cir. 1993).

¹¹⁴ 18 U.S.C. § 1962(c).

¹¹⁵ *Reves v. Ernst & Young*, 507 U.S. 170, 178-79 (1993).

¹¹⁶ *Id.* at 178-84.

“enables” it to commit the predicate acts, or when the predicate acts are “related” to the affairs of the enterprise.¹¹⁷

Two held that liability under § 1962(c) requires “some participation in the operation or management of the enterprise itself”¹¹⁸ or “significant control” over an enterprise’s affairs.¹¹⁹

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.¹²⁰ 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.”¹²¹ 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.¹²²

Whether the “operation or management” test is in fact “easy to apply” may be debated. For example, in two similar cases brought by employees challenging their employers’ practices of hiring illegal workers, the Seventh Circuit and Eleventh Circuit reached different conclusions about the operation of the enterprise. In *Baker v. IBP, Inc.*, the Seventh Circuit concluded that the

¹¹⁷ 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).

¹¹⁸ *Bennett v. Berg*, 710 F.2d 1361, 1364 (8th Cir. 1983).

¹¹⁹ *Yellow Bus Lines, Inc. v. Drivers Local Union 639*, 913 F.2d 948, 954 (D.C. Cir. 1990).

¹²⁰ *Arthur Young & Co. v. Reves*, 856 F.2d 52, 53 (8th Cir. 1988), *judgment rev’d*, 494 U.S. 56 (1990).

¹²¹ *Reves v. Ernst & Young*, 507 U.S. 170, 177-78 (1993).

¹²² *Id.* at 179.

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).¹²³ The Eleventh Circuit disagreed in *Williams v. Mohawk Indus., Inc.*¹²⁴ 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.”¹²⁵

To violate § 1962(c), the defendant must operate or manage the *enterprise’s* affairs, not merely its *own* affairs.¹²⁶ The defendant must be aware of the enterprise’s conduct and play some role on behalf of the enterprise.¹²⁷ 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.¹²⁸ The level of cooperation, however, must arise above the level of cooperation inherent in normal commercial transactions.¹²⁹ 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 Walgreens purchased the drugs and filled the prescriptions. Without allegations that that

¹²³ *Baker v. IBP, Inc.*, 357 F.3d 685, 691 (7th Cir. 2004).

¹²⁴ *Williams v. Mohawk Indus., Inc.*, 465 F.3d 1277, 1286 (11th Cir. 2006).

¹²⁵ *Id.*

¹²⁶ *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”).

¹²⁷ *Cruz v. FXDirectDealer, LLC*, 720 F.3d 115, 120-21 (2d Cir. 2013).

¹²⁸ *In re Ins. Brokerage Antitrust Litig.*, 618 F.3d 300, 378 (3d Cir. 2010).

¹²⁹ *United Food*, 719 F.3d at 855-56.

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.¹³⁰

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.”¹³¹ 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.¹³² But as discussed in § 24 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.¹³³

¹³⁰ *Id.*

¹³¹ 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).

¹³² 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); *George v. Urban Settlement Servs.*, 833 F.3d 1242, 1251 (10th Cir. 2016) (reversing dismissal where administrator of mortgage modification program played some part in enterprise, even if bank directed some or all of its activities); *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); 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*).

¹³³ *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); *Safe Streets All. v. Hickenlooper*, 859 F.3d 865, 884 (10th Cir. 2017) (in dicta, noting that a contractor providing water to marijuana grower operation was not sufficiently involved in the enterprise); *Ray v. Spirit Airlines, Inc.*, 836 F.3d 1340, 1353 (11th Cir. 2016) (outside technology vendors and consultants supplied professional services without knowledge of scheme); *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).

§ 24 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,¹³⁴ 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”¹³⁵ 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.¹³⁶ 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.”¹³⁷

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.¹³⁸ Courts have regularly applied *Reves* to limit the use of § 1962(c) against corporate outsiders, particularly

¹³⁴ *Reves v. Ernst & Young*, 507 U.S. 170, 185 (1993).

¹³⁵ *Id.* at 178-79.

¹³⁶ *See, e.g., Sihler v. Fulfillment Lab, Inc.*, No. 3:20-CV-01528-H-MSB, 2020 WL 7226436, at *11 (S.D. Cal. Dec. 8, 2020) (noting that courts routinely reject claims based on routine commercial dealing or provision of services).

¹³⁷ *Id.* at 190-91.

¹³⁸ *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).

accountants, attorneys, bankers, and other outside professionals.¹³⁹ For example, in a post-*Reves* decision, *Baumer v. Pachl*, the Ninth Circuit affirmed the dismissal of RICO claims against a limited partnership's outside counsel.¹⁴⁰ 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."¹⁴¹

Similarly, in *University of Maryland v. Peat, Marwick, Main & Co.*,¹⁴² 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

¹³⁹ 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); *Ellis v. JPMorgan Chase & Co.*, 752 F. App'x 380, 382 (9th Cir. 2018) (unpublished) (mere existence of a services contract between bank and property inspector vendor was insufficient to plead 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). But see *Allstate Ins. Co. v. Plambeck*, 802 F.3d 665, 675 (5th Cir. 2015) (affirming jury verdict against defendant telemarketing companies, chiropractic clinics, and affiliated law offices in scheme to defraud insurance companies); *Sabrina Roppo v. Travelers Commercial Ins. Co.*, 869 F.3d 568, 588 (7th Cir. 2017) (plaintiff could plausibly allege scheme between corporation and its outside counsel).

¹⁴⁰ *Baumer v. Pachl*, 8 F.3d 1341 (9th Cir. 1993).

¹⁴¹ *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").

¹⁴² *University of Maryland v. Peat, Marwick, Main & Co.*, 996 F.2d 1534 (3d Cir. 1993).

Reves, the Third Circuit concluded that “not even action involving some degree of decision making constitutes participation in the affairs of an enterprise.”¹⁴³ 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.¹⁴⁴

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.¹⁴⁵ For example, in *Dayton Monetary Assocs. v. Donaldson, Lufkin & Jenrette*,¹⁴⁶ 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

¹⁴³ *Id.* at 1538-39.

¹⁴⁴ *Id.* at 1539-40.

¹⁴⁵ 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); *George v. Urban Settlement Servs.*, 833 F.3d 1242, 1252 (10th Cir. 2016) (reversing dismissal where complaint adequately alleged a lender’s mortgage program administrator participated in scheme for unlawful collection of debts); *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).

¹⁴⁶ 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).

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 in directing the affairs of the association-in-fact enterprise.¹⁴⁷ 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."¹⁴⁸

Allegations of coercion or bribery by an outsider may help the plaintiff meet its pleading burden. In *Edison Elec. Inst. v. Henwood*,¹⁴⁹ 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.¹⁵⁰

¹⁴⁷ *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).

¹⁴⁸ *First Capital Asset Mgmt., Inc. v. Satinwood, Inc.*, 385 F.3d 159, 176 (2d Cir. 2004) (citations omitted).

¹⁴⁹ *Edison Elec. Inst. v. Henwood*, 832 F. Supp. 413, 416-17 (D.D.C. 1993).

¹⁵⁰ *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).

§ 25 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.¹⁵¹ The Supreme Court’s decision in *Central Bank of Denver v. First Interstate Bank*,¹⁵² 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 1934.¹⁵³ 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.”¹⁵⁴ 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.”¹⁵⁵

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 action for secondary liability under other federal statutes such as RICO.¹⁵⁶ Like § 10(b), RICO contains no

¹⁵¹ 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 §1962(c) and fails to address whether aider and abettor liability is inconsistent with § 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 § 1962(c) but not in its analysis of aiding and abetting).

¹⁵² *Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164 (1994).

¹⁵³ 17 U.S.C. § 78j(b).

¹⁵⁴ *Central Bank of Denver*, 511 U.S. at 177-78.

¹⁵⁵ *Id.* at 176.

¹⁵⁶ 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”).

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.¹⁵⁷

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*,¹⁵⁸ 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 strong tradition of cases holding that aiding and abetting predicate acts is sufficient to support a RICO conviction.¹⁵⁹

¹⁵⁷ *Jed S. Rakoff, Aiding and Abetting Under Civil RICO*, 211 N.Y.L.J. 25 (May 12, 1994).

¹⁵⁸ *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).

¹⁵⁹ *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); *In re Trilegiant Corp., Inc.*, 11 F. Supp. 3d 132, 140 (D. Conn. 2014) (assuming without deciding that the RICO statute provides a private cause of action for aiding and abetting liability).

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.¹⁶⁰ 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.”¹⁶¹ The Third Circuit reviewed its prior discussion of aiding and abetting in *Jaguar Cars*,¹⁶² 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.”¹⁶³

Other courts also have concluded—either directly or in dicta—that there is no aiding and abetting liability under § 1962(c).¹⁶⁴ Plaintiffs sometimes rely instead on state law for aiding and abetting claims.¹⁶⁵

¹⁶⁰ *Rolo v. City Investing Co. Liquidating Trust*, 155 F.3d 644 (3d Cir. 1998); accord *Pennsylvania Ass’n of Edwards Heirs v. Rightenour*, 235 F.3d 839, 840-841 (3d Cir. 2000) (confirming that there is no aiding and abetting under RICO).

¹⁶¹ *Id.* at 657.

¹⁶² *Jaguar Cars, Inc. v. Royal Oaks Motor Car Co.*, 46 F.3d 258 (3d Cir. 1995).

¹⁶³ *Id.* at 657.

¹⁶⁴ 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 *Rightenour* 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); *In re Sunpoint Sec., Inc.*, 350 B.R. 741, 752 (Bankr. E.D. Tex. 2006); *Salas v. Int’l Union of Operating Engineers*, No. CV 12-10506 DDP VBKX, 2015 WL 728365, at *7 (C.D. Cal. Feb. 18, 2015) (same); *Ferrari v. Mercedes-Benz USA, LLC*, No. 15-CV-4379 YGR, 2016 WL 658966, at *2 (N.D. Cal. Feb. 18, 2016) (same); *In re Chrysler-Dodge-Jeep Ecodiesel Mktg., Sales Practices, & Prod. Liab. Litig.*, 295 F. Supp. 3d 927, 985 (N.D. Cal. 2018); see also *In re Am. Honda Motor Co., Inc. Dealerships Relations Litig.*, 958 F. Supp. 1045, 1058 (D. Md. 1997) (rejecting aiding and abetting liability under § 1962(c) but noting that aiding and abetting liability may be available for underlying federal offenses).

¹⁶⁵ See, e.g., *Laurel Gardens, LLC v. Mckenna*, 948 F.3d 105, 109 (3d Cir. 2020) (bringing claims for both pattern of racketeering under § 1962(c) and for aiding and abetting breach of fiduciary duty under Pennsylvania law).

§ 26 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.¹⁶⁶ 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.¹⁶⁷

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.¹⁶⁸ 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.*,¹⁶⁹ 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."¹⁷⁰ The Third Circuit has similarly held that a "defendant may be held liable for conspiracy to violate § 1962(c) if he knowingly agrees to facilitate a scheme which includes the operation or management of a RICO enterprise."¹⁷¹ The Ninth Circuit observes that all the circuits are now in

¹⁶⁶ See, e.g., *Riverwoods Chappaqua Corp. v. Marine Midland Bank, N.A.*, 30 F.3d 339, 345 (2d Cir. 1994); *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).

¹⁶⁷ See also § 22 for discussion of vicarious liability in cases under § 1962(a) and (b).

¹⁶⁸ 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 §§ 49-54 for a more detailed discussion of RICO conspiracy under § 1962(d).

¹⁶⁹ *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).

¹⁷⁰ *Brouwer*, 199 F.3d at 967.

¹⁷¹ *Smith v. Berg*, 247 F.3d 532, 538 (3d Cir. 2001).

accord that the *Reves* operation or management test does not apply to a § 1962(d) conspiracy claim.¹⁷²

¹⁷² *United States v. Fernandez*, 388 F.3d 1199, 1230 (9th Cir. 2004) (adopting the Third Circuit's rationale in *Smith v. Berg*, 247 F.3d 532, 538 (3d Cir. 2001)).

V. STANDING UNDER § 1962(C)

§ 27 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 § 1962.¹

In *Sedima, S.P.R.L. v. Imrex Co.*,² the Supreme Court rejected the view that standing should be limited to situations where the defendant had been convicted of a criminal offense that constituted a RICO predicate act, and further refused to require a RICO plaintiff to demonstrate a “racketeering injury” distinct from the harm caused by the RICO predicate acts. The Court 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.”³

As discussed in § 33, the Supreme Court, in *Holmes v. Secs. Investor Prot. Corp.*,⁴ *Anza v. Ideal Steel Supply Corp.*,⁵ and *Bridge v. Phoenix Bond & Indem. Co.*,⁶ 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,⁷ proximate cause is often examined as part of a court’s standing analysis, and courts generally limit “standing” to plaintiffs whose injuries were both factually and proximately caused by the alleged RICO violation.⁸

¹ 18 U.S.C. § 1964(c).

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

³ *Id.* at 496.

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

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

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

⁷ 18 U.S.C. § 1964(c).

⁸ 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.

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

§ 28 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 legal or beneficial interest in property.”¹⁴ This has been interpreted liberally to include natural persons, partnerships, joint ventures, corporations, state governmental units, and even foreign

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).

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

¹⁰ *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).

¹¹ *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.”).

¹² *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”).

¹³ *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”).

¹⁴ 18 U.S.C. § 1961(3).

governments.¹⁵ 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.¹⁶ Qui tam actions (where the plaintiff purports to sue on behalf of the government and himself) may not be asserted under RICO.¹⁷ Also, unincorporated associations do not have RICO standing unless they are permitted to hold an interest in property under state or federal law.¹⁸

The Second Circuit has held that the United States government is not a “person” capable of seeking civil remedies under § 1964(c).¹⁹ 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.²⁰ The court noted that § 7 of the Sherman Act,²¹ on which § 1964(c) is modeled, does not authorize actions by the government.²² The court concluded that the structure of RICO suggests a remedial scheme whereby the United States may pursue criminal

¹⁵ 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).

¹⁶ 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’”).

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

¹⁸ 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).

¹⁹ *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).

²⁰ *Id.* at 23.

²¹ *Id.*

²² *Id.*

actions, while private citizens may pursue civil actions for treble damages.²³ The court observed that while the United States cannot sue under § 1964(c), it can sue under § 1964(b), which does not provide for treble damages.²⁴

As a general proposition, foreign governments are considered “persons” within the meaning of § 1964(c) and thus have standing to bring RICO claims.²⁵ In *Attorney General of Canada v. R.J. Reynolds Tobacco Holdings, Inc.*,²⁶ 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.²⁷ 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.²⁸ The court also dismissed the claim based on increased law enforcement costs on the ground that governmental entities “cannot recover for injuries to their general economy or their ability to carry out their functions.”²⁹

²³ *Id.* at 24.

²⁴ *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)).

²⁵ *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).

²⁶ *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).

²⁷ *Id.* at 147-50; *see also European Cmty. v. R.J. 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 § 1964(c) and thus entitled to bring RICO claim).

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

²⁹ *Id.* at 153-55.

§ 29 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.³⁰ In other words, a plaintiff must show a concrete financial loss.³¹ The injury also must be “ascertainable and definable,” such as when a plaintiff is deprived of its ability to use or transfer property.³² Listed below are examples of cases where the alleged injury was sufficient³³ and insufficient.³⁴

³⁰ See, e.g., *Slorp v. Lerner, Sampson & Rothfuss*, 587 F. App'x 249, 262 (6th Cir. 2014); *Canyon Cty. v. Syngenta Seeds, Inc.*, 519 F.3d 969, 975 (9th Cir. 2008); *Diaz v. Gates*, 420 F.3d 897, 900 (9th Cir. 2005); *Doe v. Roe*, 958 F.2d 763, 767 (7th Cir. 1992); *Grogan v. Platt*, 835 F.2d 844, 848 (11th Cir. 1988).

³¹ See *Canyon Cty. v. Syngenta Seeds, Inc.*, 519 F.3d 969, 975 (9th Cir. 2008); *Regions Bank v. J.R. Oil Co., LLC*, 387 F.3d 721, 728 (8th Cir. 2004); *Patterson v. Mobil Oil Corp.*, 335 F.3d 476, 492 n.16 (5th Cir. 2003); *Maio v. Aetna, Inc.*, 221 F.3d 472, 483 (3d Cir. 2000); *Comm. to Protect our Agric. Water v. Occidental Oil & Gas Corp.*, 235 F. Supp. 3d 1132, 1169 (E.D. Cal. 2017); *Vazquez v. Cent. States Joint Bd.*, 547 F. Supp. 2d 833, 860 (N.D. Ill. 2008); *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).

³² See *D'Addario v. D'Addario*, 901 F.3d 80, 95 (2d Cir. 2018) (“[T]he RICO statute as construed in our Circuit simply does not provide a remedy before a plaintiff has suffered reasonably ascertainable damages. Nor may a RICO plaintiff, through predictions of a defendant’s future plans, artificially ripen a claim that is unripe under our jurisprudence.”); *Jackson v. Segwick Claims Mgmt. Servs., Inc.*, 699 F.3d 466, 477–79 (6th Cir. 2012), *rev'd on other grounds*, 731 F.3d 556 (6th Cir. 2013) (en banc) (holding that frustration of a state worker’s compensation claim was not a cognizable civil RICO injury); *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).

³³ See *BCS Servs., Inc. v. BG Invs., Inc.*, 728 F.3d 633, 638 (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”); *Williams v. Mohawk Indus., Inc.*, 465 F.3d 1277, 1287-88 (11th Cir. 2006) (same); *Robbins v. Wilkie*, 300 F.3d 1208, 1211 (10th Cir. 2002) (economic injury from interference with business and property damage); *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).

³⁴ See *Oygar v. Town of Coventry*, 166 F.3d 1201, *1 (2d Cir. 1998) (unpublished table decision) (no standing where plaintiff failed to allege any “concrete financial loss” in property value from actions taken on defendant’s property); *First Nationwide Bank v. Gelt Funding Corp.*, 27 F.3d 763, 768-70 (2d Cir. 1994) (“risk of loss” is not injury ripe for RICO claim); *In re Taxable Mun. Bond Sec. Litig.*, 51 F.3d at 521-22 (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

Because RICO injury and RICO violation are independent requirements for private plaintiff recovery, a court need not consider whether there has been sufficient injury where a plaintiff fails to show that a predicate act has been committed.³⁵ Conversely, a court may dispose of a civil RICO claim solely on the basis of the plaintiff's failure to show cognizable injury.³⁶

§ 30 Injuries to Intangible Assets

Section 1962(c)'s requirement of an "injury to business or property" raises the question of whether injuries to intangible property interests might qualify—such as the "intangible right of honest services" now protected by the federal mail fraud statute.

Plaintiffs have been allowed to bring RICO actions for acts of public corruption that resulted in pecuniary injury to them.³⁷ However, injuries to "expectancy interests" and "intangible

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, 594 (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, at *2 (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); *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).

³⁵ See, e.g., *Am. Dental Ass'n v. Cigna Corp.*, 605 F.3d 1283, 1293 (11th Cir. 2010); *Son Ly v. Solin, Inc.*, 910 F. Supp. 2d 22, 26-28 (D.D.C. 2012); *Semiconductor Energy Lab. Co. v. Samsung Elecs. Co.*, 204 F.3d 1368, 1380 (Fed. Cir. 2000); *Doug Grant, Inc. v. Greate Bay Casino Corp.*, 232 F.3d 173, 185, 187-88 (3d Cir. 2000).

³⁶ E.g. *Doe v. Roe*, 958 F.2d 763, 770 (7th Cir. 1992); *Geiss v. Weinstein Co. Holdings LLC*, 383 F. Supp. 3d 156, 171 (S.D.N.Y. 2019); *Aston v. Johnson & Johnson*, 248 F. Supp. 3d 43, 49-50 (D.D.C. 2017).

³⁷ See *Waste Mgmt. of Louisiana, L.L.C. v. River Birch, Inc.*, 920 F.3d 958, 964-73 (5th Cir. 2019), *cert. denied*, 140 S. Ct. 628, 205 L. Ed. 2d 390 (2019); *Empress Casino Joliet Corp. v. Balmoral Racing Club, Inc.*, 831 F.3d 815, 827 (7th Cir. 2016); *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); *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); *Chappell v. Robbins*, 73 F.3d 918, 925 (9th Cir. 1996) (affirming dismissal of complaint because, in part, legislative immunity may be raised as a defense to a civil RICO suit).

property” interests do not confer RICO standing.³⁸ For example, in *Price v. Pinnacle Brands, Inc.*,³⁹ 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 insufficient to confer RICO standing.⁴⁰ 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.⁴¹

In *Cleveland v. United States*, the Supreme Court held that licenses fraudulently obtained from state regulators do not qualify as “property” under the mail fraud statute.⁴² Although *Cleveland* addressed the meaning of “property” in a different statutory context, *Cleveland* suggests that the loss of a license (without loss of other money or property) is not an “injury to business or property” for purposes of RICO, either.

Several courts have held that injuries to intangible business assets (such as lost customers or business relationships) are cognizable.⁴³

³⁸ *Gil Ramirez Grp., L.L.C. v. Houston Indep. Sch. Dist.*, 786 F.3d 400, 408-09 (5th Cir. 2015); *Evans v. City of Chicago*, 434 F.3d 916, 932 (7th Cir. 2006), *overruled by Hill v. Tangherlini*, 724 F.3d 965 (7th Cir. 2013); *Regions Bank v. J.R. Oil Co., LLC*, 387 F.3d 721, 730 (8th Cir. 2004); *Chaset v. Fleer/Skybox Int'l, LP*, 300 F.3d 1083, 1087 (9th Cir. 2002); *Sols. Shared Servs. v. Jimenez*, 452 F. Supp. 3d 541, 546 (W.D. Tex. 2020).

³⁹ *Price v. Pinnacle Brands, Inc.*, 138 F.3d 602, 606-07 (5th Cir. 1998).

⁴⁰ *Id.*; *Gil Ramirez Grp., L.L.C. v. Houston Indep. Sch. Dist.*, 786 F.3d 400, 409-10 (5th Cir. 2015) (interpreting *Price v. Pinnacle Brands, Inc.* as holding that a “plaintiff’s subjective expectations cannot form the basis of a RICO claim,” which is another way of stating that “a RICO plaintiff must demonstrate harm.”).

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

⁴² *Cleveland v. United States*, 531 U.S. 12, 15 (2000) (abrogating *United States v. Bucuvalas*, 970 F.2d 937, 945 (1st Cir. 1992); *United States v. Martinez*, 905 F.2d 709, 713-15 (3d Cir. 1990); *United States v. Salvatore*, 110 F.3d 1131, 1143 (5th Cir. 1997)).

⁴³ *See, e.g., Diaz v. Gates*, 420 F.3d 897, 899-900 (9th Cir. 2005) (complaint alleged that employers depressed laborers’ wages by illegally hiring undocumented workers at below-market wages); *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, 542 (5th Cir. 2001) (reversing dismissal of RICO claims based on defendant’s alleged spreading of rumor to lure plaintiff’s customers away), abrogated on other grounds by *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 134 S. Ct. 1377, 188 L. Ed. 2d 392 (2014); *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

§ 31 Personal Injuries

Courts consistently have held that personal injury and wrongful death actions cannot provide the basis for a RICO claim.⁴⁴ Further, pecuniary losses that are derivative of personal injuries generally do not count as “injury to business or property.” Some cases present close calls.

In *Diaz v. Gates*,⁴⁵ the divided en banc Ninth Circuit held that a plaintiff’s pecuniary loss due to false imprisonment was a discrete “injury to business or property” that was not derivative of personal injuries suffered due to wrongful detention. The court rejected the defendant’s argument that a RICO cause of action is only available to remedy injuries to business or property interests that are the direct target of the predicate acts.⁴⁶

The Sixth Circuit took a more restrictive view of “injury to business or property” in *Jackson v. Sedgwick Claims Management Services, Inc.*⁴⁷ 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

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); *Israel Travel Advisory Serv., Inc. v. Israel Identity Tours, Inc.*, 61 F.3d 1250, 1257-58 (7th Cir. 1995); *Spiegel v. Cont'l Illinois Nat. Bank*, 790 F.2d 638, 649 (7th Cir. 1986).

⁴⁴ See, e.g., *Jackson v. Sedgwick Claims Mgmt. Servs., Inc.*, 731 F.3d 556, 565 (6th Cir. 2013) (“Although courts have used various terms to describe the distinction between non-redressable personal injury and redressable injury to property, the concept is clear: both personal injuries and pecuniary losses flowing from those personal injuries fail to confer relief under § 1964(c).”); *Evans v. City of Chicago*, 434 F.3d 916, 925-27 (7th Cir. 2006) (“this court has determined that the terms ‘business or property’ are, of course, words of limitation which preclude recovery for personal injuries and the pecuniary losses incurred therefrom.”); *Magnum v. Archdiocese of Philadelphia*, 253 F. App’x 224, 227 (3d Cir. 2007); *Fisher v. Halliburton*, 2009 WL 5170280, at *4 (S.D. Tex. Dec. 17, 2009) (“federal courts have uniformly held that ‘business or property’ language of 18 U.S.C. § 1964 precludes personal injury and wrongful death actions from the ambit of the RICO act.”); *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); *Burnett v. Al Baraka Inv. and Dev. Corp.*, 274 F. Supp. 2d 86, 100-102 (D.D.C. 2003) (victims of September 11, 2001 terrorist attack suffered personal injuries, not injuries to business or property sufficient to confer RICO standing).

⁴⁵ *Diaz v. Gates*, 420 F.3d 897 (9th Cir. 2005).

⁴⁶ *Id.* at 898-903.

⁴⁷ *Jackson v. Sedgwick Claims Management Services, Inc.*, 731 F.3d 556 (6th Cir. 2013).

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.⁴⁸ The dissent criticized the majority for failing to recognize that the RICO claim was based on the alleged deprivation of a statutory entitlement, which is a recognized property interest under state and federal law.⁴⁹

The Seventh Circuit took a similar approach to *Jackson* in *Evans v. City of Chicago*.⁵⁰ The plaintiff in *Evans* claimed he was harassed by Chicago police after giving a news interview about an incident of police brutality, including being arrested and jailed on false criminal charges.⁵¹ Plaintiff argued that he suffered RICO injury because he lost income from being jailed and spent money on attorneys to defend himself, but the the Seventh Circuit disagreed, holding that any pecuniary losses stemmed from personal injury and thus could not give rise to a RICO claim.⁵² The *Evans* court expressly disagreed with the Ninth Circuit’s reasoning in *Diaz*, stating that *Diaz* (1) blurs the distinction between whether an alleged injury satisfies the statutory definition of “business or property” and whether a “business or property” injury was proximately caused by a predicate RICO act; and (2) depends on the *Diaz* court’s understanding of what constitutes a “property interest” pursuant to California law, which is materially different than under Illinois law.⁵³

⁴⁸ *Id.* at 566.

⁴⁹ *Id.* at 575 (Moore, J., dissenting).

⁵⁰ 434 F.3d 916, 931, n.26 (7th Cir. 2006).

⁵¹ 434 F.3d at 918-19.

⁵² *Id.* at 924-33. Subsequent district court decisions interpreting *Evans* have noted that *Evans* does not foreclose the ability of a plaintiff to establish RICO standing by demonstrating that he has been “unlawfully deprived of a property right in promised or contracted for wages,” like through showing he had a job waiting for him that he was unable to start due to false imprisonment. *See, e.g., Hill v. City of Chicago*, 2014 WL 1978407, at *4 (N.D. Ill. May 14, 2014).

⁵³ *Id.* *Diaz* has also been criticized by other courts. *Aston v. Johnson & Johnson*, 248 F. Supp. 3d 43, 50, n.4 (D.D.C. 2017); *Bougopoulos v. Altria Grp., Inc.*, 954 F. Supp. 2d 54, 66 (D.N.H. 2013).

§ 32 Predominance of the Injury to Business or Property

A RICO claim may go forward even if the plaintiff's "injury to business or property" is minor and does not predominate over other injuries. In *Northeast Women's Ctr., Inc. v. McMonagle*,⁵⁴ the Third Circuit affirmed a RICO judgment against anti-abortion activists who entered an abortion clinic four times to picket the premises and harass employees. The RICO injury was tangible damage to medical equipment during one of the incidents (for which defendants were assessed \$887).⁵⁵ *McMonagle* remains good law,⁵⁶ and the authors of this treatise are unaware of any cases reaching an opposite holding on this point.

§ 33 Causation: "By Reason Of"

As noted above, a cognizable RICO injury is one that is "by reason of" a RICO violation. The phrase "by reason of" means both factual causation and proximate causation.⁵⁷ Thus, inability to show "but for" causation is fatal to a RICO claim,⁵⁸ but a plaintiff also must establish legal or proximate causation.⁵⁹

⁵⁴ *Northeast Women's Ctr., Inc. v. McMonagle*, 868 F.2d 1342, 1357 (3d Cir. 1989).

⁵⁵ *Id.* at 1349.

⁵⁶ *Maio v. Aetna, Inc.*, 221 F.3d 472, 488 (3d Cir. 2000) (favorably citing *McMonagle* as holding that "plaintiff satisfied economic injury element of RICO where it established that defendants entered plaintiff's premises and destroyed and damaged certain of its medical equipment."); *Walker v. Gates*, 2002 WL 1065618, at *10 n.15 (C.D. Cal. May 28, 2002) (citing *McMonagle* as holding that the destruction of medical equipment was a sufficient injury to business or property under RICO).

⁵⁷ *Holmes v. Secs. Investor Prot. Corp.*, 503 U.S. at 267-74.

⁵⁸ 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) (no but-for causation where alleged fraud occurred after the plaintiff suffered losses); *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); *Ray v. Spirit Airlines, Inc.*, 836 F.3d 1340, 1350 (11th Cir. 2016) ("Plaintiff's amended complaint did not allege a direct link – or indeed any link at all – between Defendant's presentation of its Passage Usage fee and Plaintiff's decision to purchase tickets on Defendant's website").

⁵⁹ See *Bridge v. Phoenix Bond & Indem. Co.*, 553 U.S. 639, 653-54 (2008); *In re Celaxa and Lexapro Mktg. and Sales Practices Litig.*, 915 F.3d 1, 12 (1st Cir. 2019) (District Court's grant of summary judgment to Defendant on Plaintiffs' RICO claims reversed where a triable issue existed as to whether Defendant's allegedly wrongful conduct caused Plaintiff's economic losses); *Empire Merch., LLC v. Reliable Churchill LLLP*, 902 F.3d 132, 141-46 (2d Cir. 2018) (Plaintiff did not adequately allege proximate cause for its RICO claim where State of New York was a more direct victim of Defendant's smuggling operation and adjudicating New York's claims would be more

The U.S. Supreme Court has sharpened the contours of RICO's proximate cause requirement in a series of decisions over the past 30 years.

In *Holmes v. Secs. Investor Prot. Corp.*,⁶⁰ an investment firm's clients lost money when the firm failed as a result of a securities fraud, and a receiver brought a RICO claim against the fraudster, on behalf of the clients to recover their losses. The Supreme Court held that proximate cause in the RICO context requires "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."⁶¹ The Court identified three policy concerns that supported focusing on the "directness" of the injury in the RICO context: (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

"straightforward" than adjudicating Plaintiff's); *St. Luke's Health Network, Inc. v. Lancaster Gen. Hosp.*, 967 F.3d 295, 301 (3d Cir. 2020) (Plaintiffs adequately stated that Defendants' alleged RICO violation proximately caused their injury where Defendants' alleged manipulation of fixed asset pool to increase their share of limited funds necessarily resulted in Plaintiffs receiving a decreased proportion of those assets); *Slay's Restoration, LLC v. Wright National Flood Ins. Co.*, 884 F.3d 489, 492-95 (4th Cir. 2018) (Because Plaintiff's claimed injury was not the *direct* result of Defendant's fraudulent conduct, it was not *proximately* caused by that conduct) (emphasis in original); *Waste Mgmt. of Louisiana, L.L.C. v. River Birch, Inc.*, 920 F.3d 958, 965 (5th Cir. 2019) ("to satisfy the causation element of RICO. . . [P]laintiff has the burden of establishing that [the predicate offense] was the but for cause and the proximate cause" of the alleged harm); *Torres v. Vitale*, 954 F.3d 866, 877 (6th Cir. 2020) (Plaintiff's claim that Defendant engaged in a worker's compensation insurance scheme by requiring Plaintiff to maintain a separate timecard for hours worked in excess of forty failed to identify any way in which *he* was injured in his business or property as required by the RICO statute and, therefore, the claim was properly dismissed by the district court) (emphasis in original); *Empress Casino Joliet Corp. v. Johnston*, 763 F.3d 723, 729-35 (7th Cir. 2014) (Plaintiff failed to point to evidence that would allow a factfinder to conclude that Defendants' alleged bribery scheme caused the Illinois legislature to pass [Public Act 94-804] or Governor Blagojevich to sign the Act into law, however, Plaintiff's allegation that Defendants agreed to pay Governor Blagojevich \$100,000 in exchange for his signature on [Public Act 095-1008], if correct, was a direct and immediate cause of Plaintiff's economic injury); *Hamm v. Rhone-Poulenc Rorer Pharm.*, 187 F.3d at 953-54 (Plaintiffs failed to establish proximate cause under RICO where Plaintiffs were not the intended target of Defendant's fraudulent scheme); *Harmoni Int'l Spice, Inc. v. Hume*, 914 F.3d 648, 651 (9th Cir. 2019) (District Court properly dismissed Plaintiff's RICO claim where the relationship between Defendant's unlawful conduct and Plaintiff's alleged injury was too attenuated to support a finding of proximate cause); *Bixler v. Foster*, 596 F.3d at 758 (Plaintiffs/shareholders alleging injuries based on the diminution of the value of their shares did not have standing to sue under the RICO statute for injuries to the corporation); *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).

⁶⁰ *Holmes v. Secs. Investor Prot. Corp.*, 503 U.S. 258, 268-69 (1992).

⁶¹ *Id.* at 271.

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.⁶² Applying these standards, the Court concluded that the clients' injury was indirect and attenuated, and thus could not be redressed by RICO.

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.⁶³ Ideal Steel accused its competitor of gaining market share at its expense by failing to pay New York sales taxes. Ideal alleged that the tax fraud allowed its competitor to charge lower prices, which in turn caused Ideal to lose business. The Second Circuit would have allowed the suit to proceed on the ground that Ideal was an intended "target" of the scheme, even though the State of New York, and not Ideal, was the direct victim.⁶⁴ The Supreme Court reversed, holding that Ideal's alleged injury was too indirect to establish proximate cause.⁶⁵ The Court noted that "the central question it must ask is whether the alleged violation led directly to the plaintiff's injuries."⁶⁶ If the answer is no, the plaintiff will not be able to establish proximate cause. In dissent, Justice Thomas argued that the emerging proximate cause standard would allow "a defendant to evade liability for harms that are not only foreseeable, but the intended consequences of the defendant's unlawful behavior."⁶⁷

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.⁶⁸ In *Hemi Group*, the plaintiff, New

⁶² *Id.* at 269.

⁶³ *Anza v. Ideal Steel Supply Co.*, 547 U.S. 451 (2006).

⁶⁴ *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).

⁶⁵ *Anza*, 547 U.S. at 456-60.

⁶⁶ *Id.* at 460.

⁶⁷ *Id.* at 470 (emphasis in original).

⁶⁸ *Hemi Group, LLC v. City of New York*, 559 U.S. 1 (2010).

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.⁶⁹ 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.⁷⁰ 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 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.⁷¹

§ 34 The Question of Reliance

Plaintiffs may seek to use RICO to recover for injuries due to frauds against third parties. Such cases present particular RICO standing questions. In *Bridge v. Phoenix Bond & Indem. Co.*,⁷² the Supreme Court addressed whether a plaintiff asserting a RICO claim predicated on mail fraud can satisfy RICO's proximate cause requirement if the plaintiff did not personally rely on the defendant's fraudulent misrepresentation.⁷³ The Court resolved a long-running judicial debate by holding that such a suit may proceed.

In *Bridge*, one competitor sued a second competitor, alleging that the second competitor's false statements to county officials 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

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.* See also *In re Neurontin Mktg. and Sales Practices Litig.*, 712 F.3d at 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).

⁷² *Bridge v. Phoenix Bond & Indem. Co.*, 553 U.S. 639 (2008).

⁷³ *Id.* at 654.

competitor was the only party injured. The Seventh Circuit held that the “direct victim may recover through RICO whether or not it is the direct recipient of the false statements.”⁷⁴

The Supreme Court affirmed, 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.”⁷⁵ 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*.”⁷⁶ Addressing the facts, 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.⁷⁷ Further, “no more immediate victim is better situated to sue” because “respondents and other losing bidders were the *only* parties injured by petitioners’ misrepresentations.”⁷⁸

Importantly, the Court did not hold that causation can be established in a fraud-based RICO suit without either the plaintiff or a pivotal third party relying on the defendant’s misrepresentations.⁷⁹ *Bridge* thus stands for the limited proposition that a plaintiff *may* be able to establish that it was directly injured without having relied on the alleged fraud scheme.⁸⁰ In most

⁷⁴ *Phoenix Bond & Indem. Co. v. Bridge*, 477 F.3d 928, 932 (7th Cir. 2007) (emphasis in original), *aff’d*, 553 U.S. 639 (2008).

⁷⁵ *Bridge*, 553 U.S. 639 at 661.

⁷⁶ *Id.* at 657-58.

⁷⁷ *Id.* at 658.

⁷⁸ *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.*

⁷⁹ *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”).

⁸⁰ See *In re Neurtontin Mktg. and Sales Practices Litig.*, 712 F.3d at 38 n.13 (1st Cir. 2013) (first-party reliance not needed); *In re Avandia Mktg. and Sales Practices Litig.*, 804 F.3d 633, 645 (3d Cir. 2015) (presence of doctor and patient intermediaries did not destroy proximate causation for Third Party Payor plaintiffs; although intermediaries were the ones who ultimately decided to rely on defendant’s misrepresentations, Third Party Payor plaintiffs were the primary and intended victim of defendants’ scheme to defraud and their injury was a natural and intended consequence of defendant’s scheme); *Biggs v. Eaglewood Mortgage LLC*, 353 Fed Appx. 864, 867 (4th Cir. 2009) (finding that

fraud-based RICO cases, a plaintiff that cannot show its own detrimental reliance will have difficulty demonstrating it was directly injured “by reason of” that fraudulent act.⁸¹

§ 35 Standing for Predicate Acts

In *Holmes v. Secs. Investor Prot. Corp.*,⁸² the Supreme Court addressed whether a RICO plaintiff must additionally satisfy any additional standing requirements that would apply in a suit based directly on the predicate offenses.

In *Holmes*, the Securities Investor Protection Corp. (“SIPC”) brought a RICO claim based upon predicate violations of the securities laws and the mail and wire fraud statutes. The district court rejected the RICO claims because the SIPC was not a “purchaser or seller” of the securities—and thus could not have brought a direct securities fraud suit under § 10(b) of the 1934 Act. On appeal, the Ninth Circuit reversed, holding that RICO’s standing requirement did not incorporate the § 10(b) requirement that a plaintiff be a purchaser or seller to bring suit.⁸³

“*Bridge*’s holding eliminates the requirement that a plaintiff prove reliance in order to prove a violation of RICO predicated on mail fraud.”); *Torres v. S.G.E. Mgmt., L.L.C.*, 838 F.3d 629, 638 (5th Cir. 2016) (“fraud-based RICO claims...unlike most common law fraud claims, do not require proof of first-party reliance.”); *In re ClassicStar Mare Leasing Litig.*, 727 F.3d 473, 489 (6th Cir. 2013) (Plaintiffs’ “limited knowledge about various aspects of Defendants’ fraudulent scheme was largely irrelevant to their decisions to do business with Defendants. Rather, those decisions were proximately caused by numerous and repeated misrepresentations by Defendants and others in which the key pieces of information. . .were never disclosed”); *Empress Casino Joliet Corp. v. Johnston*, 763 F.3d at 734 (finding no barrier to plaintiffs-casinos’ RICO claim against horseracing tracks and executives defendants where defendants’ alleged agreement to bribe Governor Blagojevich may have induced Blagojevich’s signature renewing Racing Act legislation. The Court found “[t]here was no more directly injured party standing between the Casinos and the alleged wrongdoer, and thus no one else to whom they could look for relief; their injuries were not derivative.”); *Harmoni Intern Spice, Inc. v. Hume*, 914 F.3d at 654 (district court should have allowed plaintiff leave to amend complaint to allege “circumstances under which its customers learned of the defendants’ false accusations and, in reliance on that false information, canceled purchases they were otherwise planning to make” in order to satisfy proximate cause element under RICO).

⁸¹ *Sergeants Benevolent Ass’n Health and Welfare Fund, v. Sanofi-Aventis U.S. LLP*, 806 F.3d 71, 87 (2d Cir. 2015) (“Although reliance on the defendant’s alleged misrepresentation is not an element of a RICO mail-fraud claim, the plaintiffs’ theory of injury in most RICO mail-fraud cases will nevertheless depend on establishing that someone—whether the plaintiffs themselves or third parties—relied on the defendant’s misrepresentation”).

⁸² *Holmes v. Secs. Investor Prot. Corp.*, 503 U.S. 258 (1992).

⁸³ *Sec. Investor Prot. Corp. v. Vigman*, 908 F.2d 1461, 1466 (9th Cir. 1990), *rev’d*, 503 U.S. 258 (1992).

The Supreme Court vacated the Ninth Circuit's opinion on the basis of the plaintiff's failure to establish proximate cause, and expressly declined to address the § 10(b) standing issue.⁸⁴ In separate concurring opinions, however, 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.

After *Holmes*, the specific issue of § 10(b)'s purchaser-seller requirement was mooted 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."⁸⁵ However, the analytic framework of the lower courts and the Supreme Court concurrences in *Holmes* may be instructive should similar issues arise in the the context of predicate offenses.

§ 36 Specific Standing/Causation Issues and Applications

The following sections discuss how the courts have applied RICO standing rules in cases brought by specific types of plaintiffs, e.g. 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. The overall principle is that a party directly injured by the offense conduct may sue under RICO, but an indirectly injured party or a party who was directly injured through conduct that was not a RICO offense generally may not sue under RICO.

§ 37 Whistle-Blowers

Prior to the 2002 Sarbanes-Oxley Act, courts held that terminated whistleblowers who reported RICO predicate violations lacked standing to sue under RICO because wrongful

⁸⁴ *Holmes v. Secs. Investor Prot. Corp.*, 503 U.S. at 274-77.

⁸⁵ See § 2.1.3, Predicates Based on Securities Violations Now Generally Prohibited.

termination was not itself a predicate act. This line of reasoning reached its apex in *Beck v. Prupis*, 529 U.S. 494 (2000).⁸⁶

Two years after *Beck*, the Sarbanes-Oxley Act modified 18 U.S.C. § 1513, one of the statutes containing RICO predicate acts, to add as a predicate act:

“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.”⁸⁷

In *DeGuelle v. Camilli*,⁸⁸ the Seventh Circuit addressed the effect of this statutory change. The District Court had dismissed the terminated plaintiff’s RICO claim on the basis that her alleged retaliatory termination was unrelated to an alleged tax fraud scheme.⁸⁹ But the Seventh Circuit reversed, explaining 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.”⁹⁰ Courts since have followed suit.⁹¹

§ 38 “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.*,⁹² investors in oil and gas partnerships

⁸⁶ 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).

⁸⁷ 18 U.S.C. § 1513(e).

⁸⁸ *DeGuelle v. Camilli*, 664 F.3d 192 (7th Cir. 2011).

⁸⁹ *Id.* at 204.

⁹⁰ *Id.* at 201; see generally, Gregory G. Sarno, *Liability, under Racketeer Influenced and Corrupt Organizations Act (RICO) (18 U.S.C. §§ 1961-1968), for retaliation against employee for disclosing or refusing to commit wrongful act*, 100 A.L.R. Fed. 667 (Originally published in 1990).

⁹¹ *E.g. Sciarrone v. Amrich*, No. 19 C 4584, 2020 WL 2900938, at *4 (N.D. Ill. June 3, 2020).

⁹² *Bastian v. Petren Res. Corp.*, 892 F.2d 680 (7th Cir. 1990).

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 of the RICO statute caused the investment loss that the plaintiffs seek by this lawsuit to recoup.”⁹³ 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.”⁹⁴ The “Seventh Circuit has identified several ways in which a plaintiff might prove loss causation,” including (1) the “‘materialization of risk’ standard, which requires the plaintiff to prove that it was the very facts about which the defendant lied which caused its injuries,” (2) the “fraud-on-the-market” standard, in which “[m]isleading statements will therefore defraud purchasers of stock even if the purchasers do not directly rely on the misstatements,” and (3) where “a broker falsely assures the plaintiff that a particular investment is ‘risk-free.’”⁹⁵

In *First Nationwide Bank v. Gelt Funding Corp.*,⁹⁶ 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.⁹⁷

⁹³ *Id.* at 686.

⁹⁴ *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”).

⁹⁵ *Meyer v. Ward*, No. 13 C 3303, 2016 WL 5390953, at *5 n.5 (N.D. Ill. Sept. 27, 2016) (internal quotations omitted); *In re Key Energy Servs., Inc. Sec. Litig.*, 166 F. Supp. 3d 822, 835 (S.D. Tex. 2016).

⁹⁶ *First Nationwide Bank v. Gelt Funding Corp.*, 27 F.3d 763 (2d Cir. 1994).

⁹⁷ *Id.* at 772.

§ 39 Shareholders

The ability of shareholders to bring a civil RICO action based on securities fraud has been severely curtailed by the Private Securities Litigation Reform Act of 1995.⁹⁸

Where other misconduct is concerned, 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.⁹⁹ These decisions are based on the common law principle that shareholders generally cannot assert on their own behalf claims that belong to the corporation,¹⁰⁰ which applies equally to closely-held corporations.¹⁰¹ Shareholders also do not have standing to sue derivatively on behalf of corporations where the

⁹⁸ See § 7 (predicates based on securities violations now generally prohibited).

⁹⁹ See *Willis v. Lipton*, 947 F.2d 998, 1000 (1st Cir. 1991); *Roeder v. Alpha Indus., Inc.*, 814 F.2d 22, 29 (1st Cir. 1987) (shareholder lacked standing to bring RICO action based on the payment of a bribe that injured corporation); *Rand v. Anaconda-Ericsson, Inc.*, 794 F.2d 843, 849 (2d Cir. 1986) (shareholders in a bankrupt corporation lacked standing to bring a non-derivative RICO action against the corporation's principal creditor because "[t]he legal injury, if any, was to the firm. Any decrease in value of plaintiffs' shares merely reflects the decrease in the value of firm"); *NCNB Nat'l Bank 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); *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 §§ 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).

¹⁰⁰ See *Ocean Energy II, Inc. v. Alexander & Alexander, Inc.*, 868 F.2d 740, 744-45 (5th Cir. 1989); *Uthe Tech. Corp. v. Aetrium Inc.*, 739 F. App'x 903, 905 (9th Cir. 2018) ("In the RICO context, we have held that a plaintiff may not use the civil RICO statute to recover for derivative injuries because the plaintiff has no standing to assert a claim for injuries inflicted on a different legal entity (in the case of a shareholder, the corporation in which he owns shares) that affect him only indirectly.") Charles F. Krause, *American Law of Torts, Parties—Standing*, 11 *American Law of Torts* § 32:222 ("Shareholders cannot maintain an action under the Racketeer Influenced and Corrupt Organizations Act for injury to their corporation.")

¹⁰¹ *Barry v. Curtin*, 993 F. Supp. 2d 347 (E.D. N.Y. 2014) (Minority shareholder could not individually bring a RICO claim that belonged to the corporation "even where ... the corporation is closely held with only two shareholders and the majority shareholder is alleged to have participated in the wrongdoing.").

victim of the alleged RICO scheme was not the corporation, but a third party.¹⁰² But shareholders do have standing to sue for personal, nonderivative injuries.¹⁰³

§ 40 Competitors

The U.S. Supreme Court's decisions in *Anza*¹⁰⁴ and *Bridge*¹⁰⁵ resolved disagreements in the lower courts as to whether competitors who are commercially disadvantaged by their competitors' crimes may sue under RICO.¹⁰⁶ 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.¹⁰⁷ Conversely, the Seventh Circuit held that a business competitor harmed by alleged slanderous statements made to its customers did not

¹⁰² 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).

¹⁰³ 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").

¹⁰⁴ *Anza v. Ideal Steel Supply Corp.*, 547 U.S. 451 (2006).

¹⁰⁵ *Bridge v. Phoenix Bond & Indem. Co.*, 553 U.S. 639 (2008).

¹⁰⁶ *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).

¹⁰⁷ *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.

have standing to assert a RICO claim based on mail fraud because such “derivative” injuries were not protected under the mail fraud statute.¹⁰⁸

In *Ideal Steel Supply Corp. v. Anza*,¹⁰⁹ 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 claim on the ground that the plaintiff’s injuries were not proximately caused by the defendant’s alleged fraud.¹¹⁰ The Second Circuit reversed, reasoning 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.”¹¹¹

But the Supreme Court overruled the Second Circuit and its “target theory” of causation.¹¹² The Court held that under *Holmes*, the competitive injury alleged in *Anza* was too indirect to establish proximate cause for the private plaintiff’s injury.¹¹³ 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*.¹¹⁴ 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

¹⁰⁸ *Israel Travel Advisory Serv., Inc.*, 61 F.3d at 1258.

¹⁰⁹ *Ideal Steel Supply Corp.*, 373 F.3d 251 (2d Cir. 2004).

¹¹⁰ *Id.*

¹¹¹ *Id.* at 263.

¹¹² *Anza v. Ideal Steel Supply Co.*, 547 U.S. 451, 456-57 (2006).

¹¹³ *Id.*

¹¹⁴ *Id.* at 458.

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.”¹¹⁵

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.”¹¹⁶ 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.”¹¹⁷ 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.¹¹⁸

As discussed in § 34, the Supreme Court sharpened this analysis in *Bridge*, where it held that a plaintiff asserting a RICO claim predicated on mail fraud need not establish that it relied on defendant’s alleged misrepresentations.¹¹⁹ 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*.”¹²⁰

The Court in *Bridge* ruled that the plaintiff-competitor sufficiently pled RICO standing because: (1) the plaintiff-competitor’s alleged injury (the loss of valuable liens) was a “direct” result of the defendant-competitor’s fraud; (2) the injury was a “foreseeable and natural consequence” of defendant’s fraudulent scheme; (3) there were no “independent factors that

¹¹⁵ *Id.*

¹¹⁶ *Id.* at 460-61.

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ *Bridge v. Phoenix Bond & Indem. Co.*, 553 U.S. 639, 657-58 (2008).

¹²⁰ *Id.*

account for [defendant's] injury; (4) there was no "risk of duplicative recoveries"; and (5) "no more immediate victim is better situated to sue."¹²¹

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."¹²² Other courts have since 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.¹²³

§ 41 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.¹²⁴ 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.¹²⁵ 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.¹²⁶

¹²¹ *Id.* at 658.

¹²² *Id.* at 659.

¹²³ *Israel Travel Advisory Serv., Inc. v. Israel Identity Tours, Inc.*, 61 F.3d 1250, 1257-58 (7th Cir. 1995); *but see Procter & Gamble Co. v. Amway Corp.*, 242 F.3d 539, 565 (5th Cir. 2001) (household products manufacturer had standing to assert RICO claims based on allegations that a competitor spread rumors through fraudulent mailings to customers linking the manufacturer to Satanism in order to lure away the customers; proximate causation could be established if the customers relied upon the rumors in refusing to buy the plaintiff's products); *see also Johnson Electric North America 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).

¹²⁴ *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).

¹²⁵ *Taffet v. Southern Co.*, 967 F.2d at 1488-90.

¹²⁶ *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).

However, a Court in Puerto Rico¹²⁷ recently ratepayers to bring their putative class action against a public company with an alleged monopoly on power generation and distribution. The ratepayers alleged the company engaged in a RICO conspiracy to defraud ratepayers by procuring and burning substandard fuel oils, but charged customers for the cost of compliant fuel.¹²⁸ The Court dismissed the defendant's motion to dismiss, finding the plaintiffs had standing because they alleged (1) a concrete injury (the overcharge for fuel was passed directly to customers via a line item on their bills) and (2) proximate cause (they were the first payers of inflated prices outside of the alleged conspiracy).¹²⁹

§ 42 Union Members

Courts have dismissed RICO claims brought by individual union members alleging misconduct by union leaders where the Court has found that the injury resulting from such misconduct is suffered by the union itself, not by the members bringing suit.¹³⁰ However, union members who are directly injured by reason of the alleged RICO scheme may have standing to pursue the claim, so long as they can satisfy all of the requirements including proximate causation.¹³¹

¹²⁷ *Marrero-Rolon v. Autoridad de Energia Electrica de P.R.*, 2015 WL 5719801 (D.P.R. 2015).

¹²⁸ *Id.* at *1.

¹²⁹ *Id.* at *8-10.

¹³⁰ 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); *Mayer v. Local*, 106, No. 93-CV-0716, 1999 WL 60135 at *3-4 (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); *Steamfitters Local Union No. 420 Welfare Fund v. Philip Lorris, Inc.*, 171 F.3d 912, 928 (3d Cir. 1999) (rejecting plaintiffs indirect and direct theories of injury).

¹³¹ *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).

§ 43 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.¹³²

§ 44 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.¹³³ On the other hand, government entities that lose tax revenue because of a RICO scheme may have standing to recover those losses-so long as the loss of tax revenue is a direct injury that meets the proximate causation test.¹³⁴

VI. SECTION 1962(A): INVESTMENT OF RACKETEERING INCOME

§ 45 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

¹³² 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 to 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) *overruled on other grounds by Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706 (1996); *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).

¹³³ 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).

¹³⁴ See, e.g., *Hemi Grp., LLC v. City of New York, N.Y.*, 559 U.S. 1, 9 (2010); *Ill. Dep't of Revenue v. Phillips*, 771 F.2d 312, 314-17 (7th Cir. 1985); *City of New York v. Cyco.Net, Inc.*, 383 F. Supp. 2d 526, 555-56 (S.D.N.Y. 2005).

in, or the activities of which affect, interstate or foreign commerce.”¹³⁵ 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.”¹³⁶

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).¹³⁷

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 § 1962(a) to charge that a buyer financed its stock purchases with income derived from prior acts of securities fraud.¹³⁸ Plaintiffs have asserted § 1962(a) against an enterprise that invested fraudulently-obtained funds in itself.¹³⁹ 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 enterprises.¹⁴⁰ 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.¹⁴¹

¹³⁵ 18 U.S.C. § 1962(a).

¹³⁶ *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).

¹³⁷ See related discussion in §§ 20 and 23.

¹³⁸ *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).

¹³⁹ *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 § 1962(a)); *Schiller & Schmidt, Inc. v. Wallace Comput. Servs., Inc.*, No. 85 C 4415, 1986 WL 6256, at *1-3 (ND. Ill. May 27, 1986).

¹⁴⁰ *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).

¹⁴¹ *Crowe v. Henry*, 43 F.3d 198, 205 (5th Cir. 1995).

Notwithstanding those examples, viable § 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.

§ 46 Standing Under § 1962(a)

Civil RICO claims under § 1962(a) present particular standing issues. Most courts have concluded that to establish standing to assert a § 1962(a) claim a plaintiff must demonstrate injury that occurred 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.¹⁴² 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.¹⁴³ Although the Supreme Court has yet to resolve this issue definitively, it did note in *Beck v. Prupis*¹⁴⁴ that most courts have adopted the "investment injury" rule and that

¹⁴² See, e.g., *Compagnie De Reassurance D'ile de France v. New Eng. Reinsurance Corp.*, 57 F.3d 56, 91-92 (1st Cir. 1995); *Ideal Steel Supply Corp. v. Anza*, 652 F.3d 310, 321 (2d Cir. 2011) (citing *Ouaknine v. MacFarlane*, 897 F.2d 75, 83 (2d Cir. 1990)); *Kolar v. Preferred Real Estate Invs, Inc.*, 361 F. App'x 354, 361 (3d Cir. 2010) (citing *Glessner v. Kenny*, 952 F.2d 702, 708-09 (3d Cir. 1991), *overruled on other grounds by Jaguar Cars, Inc. v. Royal Oak Motor Car Co.*, 46 F.3d 258 (3d Cir. 1995)); *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 § 1962(a) but allowing claim to proceed under § 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); *De L.A. Gomez v. Bank of Am.*, 642 F. App'x 670, 675 (9th Cir. 2016) (citing *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).

¹⁴³ *Kane v. Bank of Am.*, No. 13 C 8053, 2015 WL 3798142, at *5 (N.D. Ill. June 17, 2015) (quoting *Brittingham v. Mobil Corp.*, 943 F.2d 297, 303 (3d Cir. 1991), *overruled on other grounds by Jaguar Cars, Inc. v. Royal Oak Motor Car Co.*, 46 F.3d 258 (3d Cir. 1995)). See §§ 46, 48 below for additional discussion of standing under §§1962(a) and (b).

¹⁴⁴ *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.”¹⁴⁵

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.¹⁴⁶ In *Vicom, Inc. v. Harbridge Merchant Services, Inc.*,¹⁴⁷ 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.

Most district courts have held that a plaintiff must show injury from the use or investment of racketeering income.¹⁴⁸ A minority of courts, relying upon RICO’s broad remedial purpose,

¹⁴⁵ *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 § 1962(d), they needed only to allege agreement to violate § 1962(a), not injury suffered as a result of investment of racketeering income).

¹⁴⁶ *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).

¹⁴⁷ *Vicom, Inc. v. Harbridge Merchant Servs., Inc.*, 20 F.3d 771, 779 n.6 (7th Cir. 1994).

¹⁴⁸ *See, e.g., Oriska Ins. Co. v. Avalon Gardens Rehab. & Health Care Ctr.*, No. 6:18-CV-1030, 2019 WL 4195267, at *12 (N.D.N.Y. Sept. 4, 2019) (dismissing plaintiff’s § 1962(a) claim because the injury arose “from the alleged predicate acts of racketeering, not the investment of any racketeering income”); *Cox v. Community Loans of America, Inc.*, 2014 WL 1216511 (M.D. Ga. 2014) (Following the majority rule while noting that “[t]he Eleventh Circuit has not addressed what a plaintiff must prove to establish a civil RICO claim under § 1962(a).”); *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 § 1962(a) claim by alleging injury “stemming from the predicate acts of racketeering activity and no distinct injury flowing from the investment of the 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 Cty.*, 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 must be alleged to state a claim under § 1962(a)); *Slater v. Jokelson*, No. 96-CV-672, 1997 WL 164236, at *2 (E.D. Pa. Mar. 26, 1997).

have allowed § 1962(a) actions based upon injury from predicate acts.¹⁴⁹ District courts within circuits that have not resolved this issue have reached differing conclusions as well.¹⁵⁰

In jurisdictions that apply the “investment injury” rule, some plaintiffs have had success bringing § 1962(a) claims.¹⁵¹ For example, in *Ideal Steel Supply Corp. v. Anza*,¹⁵² 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 open a new outlet that directly undercut the plaintiff’s business.¹⁵³ 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.¹⁵⁴

Some plaintiffs have also succeeded under the “investment injury” rule by alleging that the defendant’s investment of income made it more difficult for the victims to uncover the racketeering

¹⁴⁹ 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 § 1962(a) by alleging that defendants used racketeering proceeds to support the predicate acts); *Lee v. Gen. Nutrition Cos., Inc.*, No. CV 00-13550, 2001 WL 34032651, at *12-13 (C.D. Cal. Nov. 26, 2001) (recognizing that a plaintiff may show injury by pleading that “racketeering income was reinvested in a way that hurt the plaintiff” and holding that the plaintiff here had done so here by pleading that the defendants’ investment of racketeering income allowed them to sustain the predicate acts).

¹⁵⁰ See, e.g., *Cont’l 332 Fund, LLC v. Albertelli*, 317 F.Supp.3d 1124, 1143 (M.D. Fla. 2018) (following the investment injury rule and holding that the plaintiff’s allegations that the defendants established new entities with racketeering income successfully stated a claim under § 1962(a)); *Frederick v. Serv. Experts Heating & Air Conditioning, LLC*, No. 2:14-cv-01647, 2015 WL 6746781, at *5-6 (N.D. Ala. Nov. 5, 2015) (dismissing the plaintiff’s claim because it did not allege anything more than reinvestment of racketeering income and noting that the Eleventh Circuit has not yet addressed the issue); *Early v. K-Tel Int’l, Inc.*, No. 97 C 2318, 1999 WL 181994, at *5-6 (N.D. Ill. Mar. 24, 1999) (holding that allegations of reinvestment of racketeering income are not sufficient to state a claim under § 1962(a)); *Goold Elecs. Corp. v. Galaxy Elecs., Inc.*, No. 92 C 8023, 1993 WL 427727, at *2 (N.D. Ill. Oct. 20, 1993) (taking the minority view and holding that a plaintiff can have standing to bring a § 1962(a) claim as long as it has been injured by a predicate act); *In re Sahlen & Assocs., Inc. Sec. Litig.*, 773 F. Supp. 342, 367 (S.D. Fla. 1991).

¹⁵¹ See, e.g., *St. Paul Mercury Ins. Co. v. Williamson*, 224 F.3d 425, 444-45 (5th Cir. 2000) (determining that there was a viable § 1962(a) claim where the plaintiff alleged that the defendant engaged in two separate patterns of racketeering activity and the proceeds of the first pattern were invested into the second pattern to create an investment injury); *Newmyer v. Philatelic Leasing, Ltd.*, 888 F.2d 385, 396 (6th Cir. 1989) (ruling that the plaintiffs had stated a § 1962(a) claim where the plaintiffs bought into a scam operated with income derived from the defendant’s prior mail and wire fraud perpetrated against other victims); *Kelco Constr., Inc. v. Spray in Place Sols., LLC*, No. 18-CV-5925, 2019 WL 4467916, at *7-8 (E.D.N.Y. Sept. 18, 2019) (holding that the plaintiff stated a § 1962(a) claim by alleging that the defendant used racketeering income to establish a competing business).

¹⁵² *Ideal Steel Supply Corp. v. Anza*, 652 F.3d 310 (2d Cir. 2011).

¹⁵³ *Id.* at 314.

¹⁵⁴ *Id.* at 327-28.

or effectively prosecute the defendant. District courts have held that plaintiffs stated § 1962(a) claims where defendants have worked to conceal their racketeering by investing the income in offshore corporations,¹⁵⁵ utilizing a circular loan structure to conceal the actual value of interests,¹⁵⁶ and bribing government officials, attorneys, and the defendant’s employees to cover up the fraudulent activity and deter victims from seeking assistance.¹⁵⁷

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).¹⁵⁸ In *Vemco, Inc. v. Camardella*,¹⁵⁹ 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 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.”¹⁶⁰

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

¹⁵⁵ *Kmart Corp. v. Areeva, Inc.*, No. 04-40342, 2006 WL 2828572, at *5 (E.D. Mich. Sept. 29, 2006).

¹⁵⁶ *In re ClassicStar Mare Lease Litig.*, 361 F.Supp.3d 677, 686 (E.D. Ky. 2019).

¹⁵⁷ *Doe I v. Reddy*, No. C 02-05570, 2003 WL 23893010, at *5-6 (N.D. Cal. Aug. 4, 2003).

¹⁵⁸ See, e.g., *De L.A. Gomez v. Bank of Am.*, 642 F. App’x 670, 675 (9th Cir. 2016); *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); *Vemco, Inc. v. Camardella*, 23 F.3d 129, 132-33 (6th Cir. 1994); *Brittingham v. Mobil Corp.*, 943 F.2d 297, 303-04 (3d Cir. 1991), *overruled on other grounds by Jaguar Cars, Inc. v. Royal Oak Motor Car Co.*, 46 F.3d 258 (3d Cir. 1995).

¹⁵⁹ *Vemco*, 23 F.3d at 132-33.

¹⁶⁰ *Brittingham*, 943 F.2d at 305.

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.¹⁶¹ 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.¹⁶²

¹⁶¹ *Grider v. Tex. Oil & Gas Corp.*, 868 F.2d 1147, 1150 (10th Cir. 1989).

¹⁶² *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

§ 47 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.¹

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

¹ 18 U.S.C. § 1962(b).

² *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 § 1962(b) where it had voting rights and was directly involved in management. *Ikuno*, 912 F.2d at 310. 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 *Attia v. Google LLC*, No. 17-CV-06037-BLF, 2018 WL 2971049, at *17 (N.D. Cal. June 13, 2018) (dismissing § 1962(b) claim where theory of acquisition or maintenance of interest in enterprise was that defendants gained an interest in enterprise by acquiring control of plaintiffs’ trade secrets); *Siddique v. Anwar*, No. 15CV4278DLIRML, 2017 WL 8776968, at *3 (E.D.N.Y. Dec. 8, 2017) (holding that an attempt to sell black-market goods through plaintiff’s pharmacy did not constitute acquisition or maintenance of interest in enterprise); *Cooper Industries v. Lagrand Tire Chains*, 205 F. Supp. 2d 1157, 1165-67 (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, 148 (W.D. Pa. 1990) (holding that “normal contractual incidents of a typical distributorship agreement” do not constitute interest in or control over the enterprise); *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 interest in or control over enterprise).

³ *Lightning Lube, Inc. v. Witco Corp.*, 4 F.3d 1153, 1190 (3d Cir. 1993) (“[T]he plaintiff must establish that the interest or control of the RICO enterprise by the person is as a result of racketeering.”); *Abraham v. Singh*, 480 F.3d 351, 357 (5th Cir. 2007) (“[P]laintiffs 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.’” (quoting *Crowe v. Henry*, 43 F.3d 198, 205 (5th Cir. 1995)); *Advoc. Org. for Patients & Providers v. Auto Club Ins. Ass’n*, 176 F.3d 315, 329 (6th Cir. 1999) (noting that RICO pleadings must allege specific nexus between control of any enterprise and alleged racketeering activity); *Fabian v. Guild Mortg. Co.*, No. 13-00585 LEK-KSC, 2014 WL 12573004, at *10 (D. Haw. Feb. 11, 2014) (noting that “specific nexus” between control of enterprise and racketeering conduct is required); *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 Am. Honda Motor Co. Dealerships Rel. Litig.*, 965 F. Supp. 716, 722-23 (D. Md. 1997) (same).

⁴ See §§ 20, 23.

an adequately pleaded § 1962(b) claim is *Constellation Bank, N.A. v. C.L.A. Mgmt. Co.*,⁵ where a lender stated a claim by alleging that the defendants had fraudulently obtained loans that they then used to acquire control over their real estate enterprise. More recently, in *D'Addario v. D'Addario*, the Second Circuit reinstated a § 1962(b) claim where the plaintiff alleged that her brother, who served as an executor of their father's estate, mismanaged that estate so that she would not be able to collect her inheritance.⁶ The Second Circuit determined that the plaintiff had sufficiently alleged that her inability to collect her inheritance could be traced to her brother's control over the estate and that his control was maintained through racketeering.⁷ For example, the plaintiff alleged that her brother directed his friend to create a limited liability company to repurchase at a steep discount debt that the estate owed to creditors who were seeking the brother's removal as an executor.⁸ This limited liability company and the estate then entered into a forbearance agreement whereby the company would have the immediate right to foreclose on the estate's assets should the brother be removed as the executor.⁹ This rendered it virtually impossible to remove the brother as the executor, since doing so would cause the company to immediately foreclose on the estate's assets, thus essentially destroying the estate.¹⁰ The Second Circuit observed that, "[b]y replacing those creditors with an entity that he is alleged to control, [the brother] neutralized a threat that could have led to his removal as an Executor and fortified his position through the Forbearance Agreement, purportedly making his position impervious to attack."¹¹ The Second Circuit noted that the plaintiff had alleged that the brother had conducted other schemes thereafter, which

⁵ *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).

⁶ 901 F.3d 80, 85 (2d Cir. 2018), *cert. denied*, 139 S. Ct. 1331 (2019).

⁷ *Id.* at 98.

⁸ *Id.* at 89, 98.

⁹ *Id.* at 89.

¹⁰ *Id.*

¹¹ *Id.* at 98.

“directly removed assets from the Estate,” and the plaintiff’s lost inheritance could thus reasonably be attributed to her brother’s maintenance of control over the estate.¹²

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.

§ 48 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.¹³ The Second Circuit recently clarified that “damages arising from the

¹² *Id.*

¹³ 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 § 1962(b) claim for failure to allege injury separate from fraud that constituted predicate acts); *Discon, Inc. v. NYNEX Corp.*, 93 F.3d 1055, 1062-63 (2d Cir. 1996) (affirming dismissal of § 1962(b) claim for failure to allege injury from the “acquisition or maintenance” of an enterprise separate from the predicate acts), *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 predicate acts); *Abraham v. Singh*, 480 F.3d 351, 357 (5th Cir. 2007) (rejecting claim under § 1962(b) but allowing claim to proceed under § 1962(c) because the alleged injury stemmed from commission of predicate acts rather than from acquisition or maintenance of control over 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 damages claimed); *Advocacy Org. for Patients & Providers v. Auto Club Ins. Ass’n*, 176 F.3d 315, 330-31 (6th Cir. 1999) (affirming dismissal of § 1962(b) claim because plaintiffs had “alleged only injury resulting from the ‘scheme to defraud’ or ‘scheme to extort’ (*i.e.*, the racketeering activity), rather than from the acquisition of an interest in or control of the alleged enterprise”); *Danielsen v. Burnside-Ott Aviation Training Ctr., Inc.*, 941 F.2d 1220, 1231 (D.C. Cir. 1991) (holding that § 1962(b) requires proof of injury from acquisition or maintenance of interest in or control over enterprise). *Accord MH Pillars Ltd. v. Realini*, No. 15-CV-01383-PJH, 2018 WL 1184847, at *8 (N.D. Cal. Mar. 7, 2018) (granting motion to dismiss where claimants did “not allege injury from plaintiffs’ § 1962(b) violations that is distinct from the injury caused by plaintiffs’ racketeering activities”); *Wood v. Gen. Motors Corp.*, No. 08 CV 5224 PKC AKT, 2015 WL 1396437, at *9 (E.D.N.Y. Mar. 25, 2015) (dismissing § 1962(b) claim where plaintiffs alleged defendants maintained control of jobs and corporate entities through racketeering to continue to sell cars and had banned plaintiffs from dealership, thus failing to allege injury distinct from that caused by predicate acts); *Mai Ngoc Bui v. Lan Bich Nguyen*, No. SACV140757DOCRNBX, 2014 WL 12775081, at *9 (C.D. Cal. Oct. 14, 2014) (recognizing that plaintiff must allege injury stemming from defendant’s acquisition or control of enterprise separate from injury stemming racketeering activity itself); *OSRecovery, Inc. v. One Groupe Int’l, Inc.*, 354 F. Supp. 2d 357, 372 (S.D.N.Y. 2005) (dismissing claims under § 1961(a) and (b)); *Andrews Farms v. Calcot, Ltd.*, 527 F. Supp. 2d 1239, 1256 (E.D. Cal. 2007) (recognizing that to state § 1962(b) claim, plaintiff must allege that (1) defendant’s activity led to its control of RICO enterprise, and (2) control resulted in injury to plaintiff); *In re Motel 6 Secs. Litig.*, 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); *Dornberger v. Metro. Life Ins. Co.*, 961 F. Supp. 506, 524-25 (S.D.N.Y. 1997) (recognizing that § 1962(b) Plaintiff must allege “a distinct injury caused not by predicate acts but by the defendant’s acquisition or maintenance of an interest in or control of an enterprise”); *Slater v. Jokelson*, No. 96-CV-672, 1997 WL

acquisition or maintenance of control of the enterprise . . . must be different from the damages that flow from the predicate acts themselves.”¹⁴ The Second Circuit explained:

For example, a racketeer might use a pattern of physical threats and violence, including an act of arson against the plaintiff’s property, to extort an interest in the plaintiff’s business. The cost of replacing or repairing property damaged in the fire is a loss caused by the predicate act, the arson, not by the ultimate acquisition of an interest in the plaintiff’s business. The “separate and distinct” damages caused by the RICO violation, as opposed to by the predicate acts, is the value of the share of the plaintiff’s business that the owner turned over to the defendant.¹⁵

In *D’Addario v. D’Addario*, while the district court had found that the plaintiff’s injuries from the brother’s maintenance of control over the estate were not sufficiently distinct from the injuries resulting from the predicate acts, the Second Circuit held that, though the plaintiff had alleged losses specifically attributable to acts of fraud, such as through the forbearance agreement scheme described above, that scheme also made her brother’s control over the estate “impregnable” and this “entrenchment of control contributed to [the plaintiff’s] collection damages, because [the brother’s] enhanced position meaningfully complicated her efforts to unseat him.”¹⁶ The Second Circuit thus determined that the plaintiff had sufficiently alleged a “separate and distinct ‘acquisition or maintenance’ injury.”¹⁷

164236, at *2-3 (E.D. Pa. Mar. 26, 1997) (“To recover under § 1962(b), plaintiffs must show that they suffered an injury from the defendant’s acquisition or control of an interest in a RICO enterprise, in addition to injury from the predicate acts.”); *Helman v. Murry’s Steaks, Inc.*, 742 F. Supp. 860, 882-83 (D. Del. 1990) (dismissing § 1962(b) claim where “at most the Plaintiff allege[d] injury stemming from the predicate acts themselves”); *Physicians Weight Loss Ctrs. of Am. v. Creighton*, No. 90-CV-2066, 1992 WL 176992, at *5 (N.D. Ohio Mar. 30, 1992) (noting that “[i]f the evidence indicates at most that the injuries were caused only by the alleged predicate acts” rather than defendants’ acquisition or maintenance of interest in enterprise, then judgment must be entered in favor of defendants); *U.S. Concord, Inc. v. Harris Graphics Corp.*, 757 F. Supp. 1053, 1060 (N.D. Cal. 1991) (using reasoning applied in § 1962(a) cases to require plaintiff to show injury from defendant’s acquisition or control of interest in RICO enterprise); *Midwest Grinding Co. v. Spitz*, 716 F. Supp. 1087, 1090-91 (N.D. Ill. 1989) (“[I]n order to allege injury ‘by reason of’ § 1962(b), a RICO plaintiff must demonstrate that the defendants’ acquisition or control of an interstate enterprise injured the plaintiff.”), *aff’d*, 976 F.2d 1016 (7th Cir. 1992).

¹⁴ *D’Addario*, 901 F.3d at 98.

¹⁵ *Id.*

¹⁶ *Id.* at 98-99.

¹⁷ *Id.* at 99.

On the other hand, 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 maintained an interest or control).¹⁸ In *National Mortgage*, a California district court reasoned that, because the Supreme Court in *Sedima S.P.R.L. v. Imrex Co.*¹⁹ 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.²⁰ While *National Mortgage* has been criticized,²¹ 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.²² 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” 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.²³ 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.²⁴

¹⁸ 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 § 1962(a), which requires “additional causation,” Section 1962(b) requires injury only from pattern of racketeering that was used to obtain control of 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).

¹⁹ *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479 (1985).

²⁰ *Nat'l Mortg.*, 682 F. Supp. at 1081-82.

²¹ 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).

²² *Reddy v. Litton Indus., Inc.*, 912 F.2d 291, 295-96 & n.6 (9th Cir. 1990).

²³ *Id.* at 296 n.6.

²⁴ *Id.* at 296.

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

The remedial provisions in § 1964(c) provide the primary rationale for the requirement that a plaintiff's injuries arise from conduct independent of the predicate acts.²⁵ 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.²⁶

A second rationale is that RICO is aimed at preventing the infiltration of legitimate businesses through racketeering activity.²⁷ 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

²⁵ See *U.S. Concord, Inc. v. Harris Graphics*, 757 F. Supp. 1053, 1060 (N.D. Cal. 1991) (“§ 1964(c) provides a civil remedy for plaintiffs injured ‘by reason of’ a violation of § 1962. A violation of § 1962(b) itself hinges on whether a defendant acquired or maintained an interest in or control of an enterprise. Therefore, to state a claim under §§ 1962(b) and 1964(c), a plaintiff must allege injury from the defendant’s acquisition or control of an interest in a RICO enterprise.”).

²⁶ *Id.* at 1058-60.

²⁷ *Brittingham v. Mobil Corp.*, 943 F.2d 297, 303-04 (3d Cir. 1991) (noting that § 1962(a) “was primarily directed at halting the investment of racketeering proceeds into legitimate businesses, including the practice of money laundering”), *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). See also *Siddique v. Anwar*, No. 15CV4278DLIRML, 2017 WL 8776968, at *2 (E.D.N.Y. Dec. 8, 2017) (stating that purpose of § 1962(b) is to prevent takeover of legitimate business through racketeering conduct, such as extortion or loansharking); *Tooker v. Guerrero*, No. 15-CV-2430(JS)(ARL), 2016 WL 4367956, at *7 (E.D.N.Y. Aug. 15, 2016) (stating that “enterprise” in question for § 1962(b) liability must be a separate, legitimate entity acquired through racketeering rather than vehicle through which racketeering is undertaken).

its racketeering income so it can continue to commit predicate acts itself (which only supports a § 1962(c) claim).²⁸

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 racketeering injury’ requirement.”²⁹ 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.³⁰

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.³¹

²⁸ *Vemco*, 23 F.3d at 132-33 (6th Cir. 1994) (distinguishing *Newmyer v. Philatelic Leasing, Ltd.*, 888 F.2d 385 (6th Cir. 1989)).

²⁹ *In re Nat'l Mortg. Equity Corp. Mortg. Pool Certificates Sec. Litig.*, 682 F. Supp. 1073, 1081 (C.D. Cal. 1987).

³⁰ *U.S. Concord, Inc. v. Harris Graphics*, 757 F. Supp. 1053, 1060 (N.D. Cal. 1991) (noting that Supreme Court in *Sedima* “expressly recognized that a RICO plaintiff has standing only if he has been injured in his business or property ‘by the conduct constituting the violation’ but “the conduct constituting the violation of § 1962(a) is the use or investment of racketeering proceeds, not the racketeering activity itself” (quoting *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 495 (1985))).

³¹ *P.M.F. Services, Inc. v. Grady*, 681 F. Supp. 549, 555-56 (N.D. Ill. 1988) (“It should not be forgotten that civil RICO (§ 1964) was a late addition, spot-welded to an already fully-structured criminal statute with defined goals.”).

VIII. SECTION 1962(D): RICO CONSPIRACY

§ 49 Basic Elements

Section 1962(d) makes it unlawful to conspire to violate subsections (a), (b), or (c) of § 1962.¹ The crux of a § 1962(d) violation is the agreement to violate one of the substantive provisions of § 1962.² 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. . . .”³

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.⁴ 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.⁵ The Ninth Circuit has ruled that the test is disjunctive.⁶ After the Supreme Court’s decision in *Bell Atlantic Corp. v. Twombly*,⁷ allegations of parallel conduct that could just as easily suggest

¹ 18 U.S.C. § 1962(d).

² *U.S. v. Sessa*, 125 F.3d 68, 71 (2d Cir. 1997); *Verrees v. Davis*, No. 1:16-cv-01392-LJO-SKO, 2018 WL 1919824, at *9 (E.D. Cal. Apr. 24, 2018) (quoting *Oki Semiconductor Co. v. Wells Fargo Bank, Nat’l Ass’n*, 298 F.3d 768, 774-75 (9th Cir. 2002)) (“It is the mere agreement to violate RICO that § 1962(d) forbids; it is not necessary to prove any substantive RICO violations ever occurred as a result of the conspiracy.”).

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

⁴ *United Food & Com. Workers Unions & Emps. Midwest Health Benefits Fund v. Walgreen Co.*, 719 F.3d 849, 856 (7th Cir. 2013); *In re Ins. Brokerage Antitrust Litig.*, 618 F.3d 300, 373 (3d Cir. 2010); *Flores v. United Airlines*, 426 F. Supp. 3d 520, 537 (N.D. Ill. 2019) (quoting *Goren v. New Vision Int’l, Inc.*, 156 F.3d 721, 732 (7th Cir. 1998)).

⁵ *DeGuelle v. Camilli*, 664 F.3d 192, 204 (7th Cir. 2011); *Brouwer v. Raffensperger, Hughes & Co.*, 199 F.3d 961, 967 (7th Cir. 2000); *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, 1074 (N.D. Ill. 2007); *In re Managed Care Litig.*, 150 F. Supp. 2d 1330, 1349-50 (S.D. Fla. 2001); *Ross v. Patrusky, Mintz & Semel*, No. 90-CV-1356, 1997 WL 214957, at *12 (S.D.N.Y. Apr. 29, 1997); *In re Motel 6 Sec. Litig.*, No. 93-CV-2183, 1997 WL 154011, at *5 (S.D.N.Y. Apr. 2, 1997) (outlining elements).

⁶ *See Howard v. Am. Online Inc.*, 208 F.3d 741, 751 (9th Cir. 2000) (holding that to establish a violation of § 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).

⁷ *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556-57 (2007).

independent, legitimate action, accompanied by nothing more than conclusory assertions of conspiracy, are insufficient to state a RICO conspiracy claim.⁸ To survive a motion to dismiss, a plaintiff alleging a RICO conspiracy claim must also plausibly allege a “meeting of the minds.”⁹

§ 50 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.¹⁰ The Supreme Court finally settled the issue in 1997 in *Salinas v. United States*.¹¹ 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.”¹² The Court went on to state: “The interplay between subsections (c) and (d) [of RICO] does not permit us to

⁸ See, e.g., *Am. Dental Ass’n v. Cigna Corp.*, 605 F.3d 1283, 1293-95 (11th Cir. 2010) (citing *Bell Atl. Corp.*, 550 U.S. at 544); see also *Rao v. BP Products N. Am., Inc.*, 589 F.3d 389, 400-01 (7th Cir. 2009) (affirming dismissal of RICO conspiracy claim that contained only boilerplate allegations of RICO conspiracy). See also *The Knit With v. Knitting Fever, Inc.*, 625 Fed. Appx. 27, 36 (3d Cir. 2015) (stating that a § 1962(d) conspiracy claim requires plaintiff to enumerate allegations as to “the period of the conspiracy, the objective of the conspiracy, and the certain actions of the alleged conspirators taken to achieve that purpose”).

⁹ *Am. Dental Ass’n*, 605 F.3d at 1293-95 (quoting *Bell Atl. Corp.*, 550 U.S. at 557); *Meyer v. Pfeifle*, No. 4:18-CV-04048-KES, 2019 WL 1209776, at *4-5 (D.S.D. Mar. 14, 2019) (dismissing case and holding that “a plaintiff bringing a . . . RICO conspiracy claim must allege ‘specific facts tending to show’ that the defendants reached an agreement to deprive the plaintiff of a constitutional right or meeting of the minds.”) (citing *Murray v. Lene*, 595 F.3d 868, 870 (8th Cir. 2010)); *Bruce v. Polk Cnty. Att’y’s Off.*, No. 4:18-cv-00040-RGE-CFB, 2018 WL 10075604, at *8 (S.D. Iowa Sept. 21, 2018) (dismissing case where plaintiffs merely “use[d] the words ‘conspiracy,’ and ‘meeting of the minds’ broadly . . . without more” detail). See *North Cypress Medical Center Operating Co., Ltd. v. Cigna Healthcare*, 781 F.3d 182, 203, 59 Employee Benefits Cas. (BNA) 1905 (5th Cir. 2015) (“To prevail on a RICO conspiracy claim,” a plaintiff must plead “(1) that two or more people agreed to commit a substantive RICO offense and (2) that [the defendants] knew of and agreed to the overall objective of the RICO offense.”).

¹⁰ *U.S. v. Quintanilla*, 2 F.3d 1469, 1484-85 (7th Cir. 1993); *U.S. v. Blinder*, 10 F.3d 1468, 1477 (9th Cir. 1993); *U.S. v. Pryba*, 900 F.2d 748, 759-60 (4th Cir. 1990); *U.S. v. Joseph*, 835 F.2d 1149, 1152 (6th Cir. 1987); *U.S. v. Kragness*, 830 F.2d 842, 860 (8th Cir. 1987); *U.S. v. Neapolitan*, 791 F.2d 489, 498 (7th Cir. 1986); *U.S. v. Adams*, 759 F.2d 1099, 1116 (3d Cir. 1985); see also *Jones v. Meridian Towers Apartments, Inc.*, 816 F. Supp. 762, 772-73 (D.D.C. 1993) (adopting the majority view).

¹¹ *Salinas*, 522 U.S. at 63.

¹² *Id.* at 63-64 (quoting Justice Holmes, “plainly a person may conspire for the commission of a crime by a third person”).

excuse from the reach of the conspiracy provision an actor who does not himself commit or agree to commit the two or more predicate acts requisite to the underlying offense.”¹³

The Third Circuit applied *Salinas* to hold that § 1962(d) extends beyond those who conspired to personally operate or manage a corrupt enterprise.¹⁴ 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.¹⁵ 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.”¹⁶ 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.¹⁷ The Second Circuit, also looking to *Salinas*, concluded that proof that an enterprise was actually established is not necessary for a conspiracy.¹⁸

The Seventh Circuit agreed in *Brouwer v. Raffensperger, Hughes & Co.*¹⁹ and reconciled a perceived conflict between *Salinas* and *Reves v. Ernst & Young*,²⁰ which held that only those who operate or manage the enterprise could be liable under § 1962(c).²¹ The Seventh Circuit had long held that conspiracy involves two agreements: an agreement to conduct or participate in the affairs of the enterprise and an agreement to the commission of at least two predicate acts.²² The

¹³ *Id.* at 65; *see also Albers v. Mercedes-Benz USA, LLC*, No. 16-881(KM)(ESK), 2020 WL 1466359, at *8-9 (D.N.J. Mar. 25, 2020) (“A RICO conspiracy theory requires only that a defendant agreed to further the goals of the conspiracy, not that the defendant affirmatively engaged in a predicate act[.]”).

¹⁴ *Smith v. Berg*, 247 F.3d 532, 534 (3d Cir. 2001).

¹⁵ *Id.*

¹⁶ *Id.* at 537; *see also Conn. Gen. Life Ins. Co. v. New Images of Beverly Hills*, 257 F. App'x 49, 51 (9th Cir. 2007).

¹⁷ *Smith*, 247 F.3d at 538. *But see Shams v. Fisher*, 107 F. Supp. 2d 266, 277 (S.D.N.Y. 2000) (finding wife's voluntary presence answering phones and typing documents for the family-owned business insufficient to show she agreed to further the objectives of the enterprise).

¹⁸ *United States v. Applins*, 637 F.3d 59, 75 (2d Cir. 2011).

¹⁹ 199 F.3d 961 (7th Cir. 2000).

²⁰ 507 U.S. 170 (1993).

²¹ *Id.* at 179.

²² *Neapolitan*, 791 F.2d at 499.

court in *Brouwer* clarified that the level of personal participation required by the first agreement is to “knowingly facilitate the activities of the operators or managers to whom subsection (c) applies . . . It is an agreement, not to operate or manage the enterprise, but personally to facilitate the activities of those who do.”²³ The majority of federal appellate courts have declined to apply the *Reves* “operate or manage” test to RICO conspiracy claims under § 1962(d).²⁴

§ 51 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 the defendant knew about and agreed to facilitate the scheme.²⁵ 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.²⁶ 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.”²⁷ It is “not necessary to prove that

²³ *Brouwer*, 199 F.3d at 967; accord *U.S. v. Patrick*, 248 F.3d 11, 20 (1st Cir. 2001).

²⁴ *United States v. Rosenthal*, 805 F.3d 523, 532 (5th Cir. 2015) (“[T]he *Reves* ‘operation or management’ test does not apply to conspiracy to commit a RICO offense under § 1962(d).”); *United States v. Mouzone*, 687 F.3d 207, 218 (4th Cir. 2012) (“[W]e today join all our sister circuits that have considered this issue and hold that § 1962(d) liability does not require that a defendant have a role in directing an enterprise.”); *United States v. Wilson*, 605 F.3d 985, 1019 (D.C. Cir. 2010) (“Following *Salinas*, every court of appeals to consider the question has held that the *Reves* operation or management test does not apply to conspiracy under § 1962(d).”); *United States v. Fernandez*, 388 F.3d 1199, 1230 (9th Cir. 2004), modified, 425 F.3d 1248 (9th Cir. 2005) (“We adopt the Third Circuit’s *Smith* test, which retains *Reves*’ operation or management test in its definition of the underlying substantive § 1962(c) violation, but removes any requirement that the defendant have actually conspired to operate or manage the enterprise herself.”); *United States v. Zichettello*, 208 F.3d 72, 99 (2d Cir. 2000) (“*Reves* ruled only that for a defendant to be convicted of a substantive RICO violation under Section 1962(c), the defendant must have taken some part in directing the enterprise’s affairs. No such requirement exists under Section 1962(d), however.”) (internal citations omitted); *United States v. Starrett*, 55 F.3d 1525, 1547 (11th Cir. 1995) (“Furthermore, we agree with the Second and Seventh Circuits that the Supreme Court’s *Reves* test does not apply to a conviction for RICO conspiracy.”).

²⁵ *United States v. Zemlyansky*, 908 F.3d 1, 9-12 (2d Cir. 2018) (affirming RICO conspiracy conviction and explaining knowledge only requires the defendant “knew about and agreed to facilitate [a racketeering] scheme.”) (quoting *Salinas*, 522 U.S. at 66); *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”).

²⁶ *Domanus v. Locke Lord LLP*, 847 F.3d 469, 479-482 (7th Cir. 2017) (affirming dismissal of RICO conspiracy complaint for failure to satisfy knowledge requirement).

²⁷ *United States v. Hinojosa*, 463 Fed. App’x 432, 446-47 (5th Cir. 2012); *U.S. v. Tillett*, 763 F.2d 628, 632 (4th Cir. 1985).

the defendant knew all of the details of the unlawful enterprise or the number or identities of all the co-conspirators.”²⁸

§ 52 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.²⁹ Other courts, however, have concluded that § 1962(d) claims cannot stand alone.³⁰ For example, the Ninth Circuit has held 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.³¹ The key is that the conspiracy must relate to conduct that, if completed, would constitute a violation of

²⁸ *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)).

²⁹ See *City of New York v. Bello*, 579 Fed. Appx. 15, 17 (2d Cir. 2014) (“A party ‘may be liable for [RICO] conspiracy even though he was incapable of committing the substantive offense.’”); *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 § 1962(a), (b), or (c)); *Fernandez*, 388 F.3d at 1228-30 (affirming standalone 1962(d) conspiracy conviction); *Smith v. Berg*, 247 F.3d 532, 534 (3d Cir. 2001); *Gagan v. Am. Cablevision, Inc.*, 77 F.3d 951, 964-65 (7th Cir. 1996); *Rose v. Bartle*, 871 F.2d 331, 366 (3d Cir. 1989); *In re Motel 6 Sec. Litig.*, 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 Fed. Sav. & Loan Ass’n v. Felicetti*, 830 F. Supp. 257, 261 (E.D. Pa. 1993); *T.I. Const. Co. v. Kiewit E. Co.*, No. 91-CV-2638, 1992 WL 195425, at n.12 (E.D. Pa. Aug. 5, 1992); *Penn v. Alamo Rent-A-Car, Inc.*, 725 F. Supp. 1339, 1348 (E.D. Pa. 1989).

³⁰ See, e.g., *Grubbs v. Sheakley Group, Inc.*, 807 F.3d 785, 805-06 (6th Cir. 2016) (affirming dismissal of RICO conspiracy claim where plaintiffs failed to allege a substantive RICO violation); *Magnum v. Archdiocese of Phila.*, 253 F. App’x 224, 229 (3d Cir. 2007) (affirming dismissal of RICO conspiracy claim where substantive RICO claim was deficient) (citing *Lightning Lube, Inc. v. Witco Corp.*, 4 F.3d 1153, 1192 (3d Cir. 1993)); *Am. United Life Ins. Co. v. Martinez*, 480 F.3d 1043, 1068 (11th Cir. 2007); *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”); *Howard v. Am. Online Inc.*, 208 F.3d 741, 751 (9th Cir. 2000), *cert. denied*, 531 U.S. 828 (2000) (a claim under section 1962(d) may not stand unless the plaintiffs can sustain a viable claim under another subsection of section 1962); *Discon, Inc. v. NYNEX Corp.*, 93 F.3d 1055, 1064 (2d Cir. 1996), *judgment vacated on other grounds*, 525 U.S. 128 (1998); *Langan v. Smith*, 312 F. Supp. 3d 201, 208-09 (D. Mass. 2018) (granting motion to dismiss RICO conspiracy claim for failure to allege viable substantive RICO violation); *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.”); *Cardenas v. RIA Telecomms., Inc.*, No. 00-CV-6393, 2001 WL 536043, at *4 (N.D. Ill. May 18, 2001).

³¹ *Simon v. Value Behav. 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).

§ 1962(a), (b), or (c).³² If the alleged conspiracy is based on conduct that has already occurred (as opposed to an agreement concerning future illegal conduct), that completed conduct should not support a § 1962(d) claim if it does not support a § 1962(a), (b), or (c) claim.

In *Beck v. Prupis*,³³ 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.”³⁴ The Court did not decide whether the § 1962(d) claim must be based on an *actionable* violation of §§ 1962(a)-(c).³⁵ 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.”³⁶ 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.”³⁷ 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.

§ 53 Conspiracy Among Corporate Agents

Courts are split as to whether a corporation can conspire with its own subsidiary or agents.³⁸ The Fourth and Eighth Circuits have said no, based primarily on the antitrust principle that a

³² *Salinas*, 522 U.S. at 65.

³³ *Beck v. Prupis*, 529 U.S. 494 (2000).

³⁴ *Id.* at 507.

³⁵ *Id.* at 506 n.10.

³⁶ *Id.*

³⁷ *Id.* at 506-07.

³⁸ See *United States v. Gurry*, 427 F. Supp. 3d 166, 190 (D. Mass. 2019) (discussing circuit split). See also *Copperweld Corp. v. Indep. Tube Corp.*, 467 U.S. 752, 770-71 (1984); *Chi. Pro. Sports Ltd. P’ship v. Nat’l Basketball*

corporation cannot conspire with itself because it must act through its agents.³⁹ 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.’”⁴⁰ 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.⁴¹

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.⁴²

§ 54 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

Ass’n, 95 F.3d 593, 598 (7th Cir. 1996); *Century Oil Tool, Inc. v. Prod. Specialties, Inc.*, 737 F.2d 1316, 1316-17 (5th Cir. 1984); *Fraser v. Major League Soccer, L.L.C.*, 97 F. Supp. 2d 130, 135 (D. Mass. 2000).

³⁹ *Am. Chiropractic Ass’n v. Trigon Healthcare, Inc.*, 367 F.3d 212, 223-34 (4th Cir. 2004); *Fogie v. THORN Ams., Inc.*, 190 F.3d 889, 898-99 (8th Cir. 1999) (affirming summary judgment for defendants on 1962(d) claim where defendants were a company and its wholly owned subsidiaries); *Bailey v. Atl. Auto. Corp.*, 992 F. Supp. 2d 560, 567-68 (D. Md. 2014) (explaining intracorporate conspiracy doctrine in civil RICO context).

⁴⁰ *Siegel Transfer, Inc. v. Carrier Exp., Inc.*, 54 F.3d 1125, 1127 (3d Cir. 1995); *Dist. 1199P Health & Welfare Plan v. Janssen, L.P.*, No. 06-CV-3044, 2008 WL 5413105, at *15 (D.N.J. Dec. 23, 2008) (citing *Copperweld*, 467 U.S. at 777).

⁴¹ *Dist. 1199P Health & Welfare Plan*, 2008 WL 5413105, at *15.

⁴² *See Sun Life Assurance Co. of Can. v. Imperial Premium Fin., LLC*, 904 F.3d 1197, 1213 (11th Cir. 2018) (concluding “intracorporate conspiracy doctrine” does not apply to civil RICO conspiracy claims); *Webster v. Omnitrition Int’l, Inc.*, 79 F.3d 776, 787 (9th Cir. 1996) (holding that, for purposes of the RICO statute, a corporation may conspire with its officers), *rejected by Sadighi v. Daghighfekr*, 36 F. Supp. 2d 279, 297-98 (D.S.C. 1999); *Ashland Oil, Inc. v. Arnett*, 875 F.2d 1271, 1281 (7th Cir. 1989) (finding intracorporate conspiracies threaten RICO’s goals of preventing the infiltration of legitimate businesses by racketeers and separating racketeers from their profits).

act in furtherance of the conspiracy.⁴³ In *Beck v. Prupis*,⁴⁴ the Supreme Court ruled that this overt act must be a predicate act of racketeering. In *Beck*, the Supreme Court rejected decisions from the Third,⁴⁵ Fifth,⁴⁶ and Seventh Circuits⁴⁷ 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.⁴⁸ 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.”⁴⁹

The Sixth Circuit further articulated the standing requirements under § 1962(d) in *Grange Mutual Casualty Co. v. Mack*.⁵⁰ 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.⁵¹ 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].”⁵² In reaching its decision, the Sixth Circuit considered the Supreme Court case *Bridge v. Phoenix Bond &*

⁴³ See *Anderson v. Ayling*, 396 F.3d 265, 269-70 (3d Cir. 2005) (reasoning that “it is possible that a predicate act of racketeering that directly caused a plaintiff to lose his job could create civil RICO standing.”); *Hecht v. Com. Clearing House, Inc.*, 897 F.2d 21, 25 (2d Cir.1990) (“[I]njury-causing overt acts [are] the basis of civil standing to recover for RICO conspiracy violations.”); see also *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); *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 activity was indirect and directed towards others).

⁴⁴ *Beck*, 529 U.S. at 494.

⁴⁵ See *Shearin v. E.F. Hutton Grp., Inc.*, 885 F.2d 1162, 1168-69 (3d Cir. 1989), *abrogated by Beck v. Prupis*, 529 U.S. 494 (2000).

⁴⁶ See *Khurana v. Innovative Health Care Sys., 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).

⁴⁷ See *Schiffels v. Kemper Fin. Servs., Inc.*, 978 F.2d 344, 348-49 (7th Cir. 1992), *abrogated by Beck v. Prupis*, 529 U.S. 494 (2000).

⁴⁸ Note, however, that the wrongful termination of a whistleblower in violation of the Sarbanes-Oxley Act is now a RICO predicate act. See § 37.

⁴⁹ *Beck*, 529 U.S. at 505-06.

⁵⁰ *Grange Mut. Cas. Co. v. Mack*, 290 F. App’x 832, 835-36 (6th Cir. 2008).

⁵¹ *Id.* at 835.

⁵² *Id.* (emphasis in original).

*Indemnity Co.*⁵³ In *Bridge*, the Supreme Court ruled that a plaintiff who alleges a RICO violation based on mail fraud does not have to demonstrate reliance on the defendant's misrepresentations to show proximate causation.⁵⁴ Based on this precedent, the Sixth Circuit ruled that plaintiffs do not have to demonstrate reliance to have standing under § 1962(d).⁵⁵

⁵³ *Bridge v. Phoenix Bond & Indem. Co.*, 553 U.S. 639 (2008).

⁵⁴ *Id.* at 661.

⁵⁵ *Grange Mut. Cas. Co.*, 290 F. App'x at 835-36.

IX. STATUTE OF LIMITATIONS

§ 55 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.¹ The Court concluded that a uniform federal limitations period is necessary and borrowed the limitations period from the Clayton Act,² 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.”³

Because the statute of limitations is an affirmative defense, it generally will not be resolved on a motion to dismiss unless the plaintiff “plead[s] itself out of court” by alleging facts that establish the defense.⁴ 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.

§ 56 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 act

¹ *Agency Holding Corp. v. Malley-Duff & Assocs., Inc.*, 483 U.S. 143, 156 (1987).

² 15 U.S.C. § 15(b).

³ *Agency Holding Corp.*, 483 U.S. at 150.

⁴ *Barry Aviation Inc. v. Land O'Lakes Mun. Airport Comm'n*, 377 F.3d 682, 688 (7th Cir. 2004).

that injures a plaintiff's business.”⁵ This “injury occurrence” rule does not depend on a plaintiff's discovery of relevant facts.⁶ 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 complexities underlying a RICO wrongful act—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, used by a majority of states, 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 § 59, 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.*,⁷ the Court rejected the last predicate act rule⁸ on grounds it is unduly solicitous of delay in raising

⁵ *Zenith Radio Corp. v. Hazeltine Rsch., Inc.*, 401 U.S. 321, 338 (1971) (collecting cases).

⁶ *Rotella v. Wood*, 528 U.S. 549, 554 n.2 (2000) (citing *Klehr v. A. O. Smith Corp.*, 521 U.S. 179, 198 (1997) (Scalia, J., concurring in part and concurring in the judgment)); *see also* § 56 (The Clayton Act rule).

⁷ *Klehr v. A.O. Smith Corp.*, 521 U.S. 179 (1997).

⁸ Under the last predicate act rule, a civil RICO cause of action begins to accrue when the plaintiff knew or should have known of the injury and the pattern of racketeering activity, but begins to run anew upon each predicate act forming part of the same pattern. *See Klehr*, 521 U.S. at 186-87 (internal citations omitted).

RICO claims and inconsistent with the Clayton Act model that Congress used in enacting RICO.⁹ 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.¹⁰ 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 “[t]he legal questions involved may be subtle and difficult[,]” and that, under any of those rules, the *Klehrs*’ claim would have been barred.¹¹

In *Rotella v. Wood*,¹² a unanimous Supreme Court revisited the RICO accrual question and this time eliminated the injury-and-pattern discovery rule,¹³ 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.¹⁴ While it affirmed the Fifth Circuit’s application of the injury discovery rule, the Court left open the possibility that another accrual rule would apply, including the Clayton Act rule previously espoused by Justice Scalia.¹⁵ The Court also left for another day the resolution of the tension between the “cardinal

⁹ *Id.* at 187-91.

¹⁰ *Id.* at 191-93.

¹¹ *Id.* at 192.

¹² *Rotella v. Wood*, 528 U.S. 549, 555 (2000).

¹³ Under the injury and pattern discovery rule, a civil RICO cause of action begins to accrue when the plaintiff discovers, or reasonably should have discovered, both the existence and source of his injury and that the injury is part of a pattern. *See Rotella*, 528 U.S. at 553.

¹⁴ *Id.* at 556-59.

¹⁵ *Id.* at 554 n.2.

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.¹⁶

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.

§ 57 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.¹⁷ Under this rule, a RICO cause of action accrues upon the discovery of the injury even if the plaintiff is unaware that the injury stems from a pattern of racketeering.¹⁸ Thus,

¹⁶ *Id.* at 558 n.4.

¹⁷ First Circuit: *Álvarez-Maurás v. Banco Popular of P.R.*, 919 F.3d 617, 625-28 (1st Cir. 2019); *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: *Burrowes v. Combs*, 124 F. App'x 70, 71 (2d Cir. 2005) (citing *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. Grp., Inc.*, 460 F.3d 494, 507 (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: *CVLR Performance Horses, Inc. v. Wynne*, 792 F.3d 469, 476 (4th Cir. 2015) (citing *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: *Hardy v. Gonzalez*, 551 F. App'x 253, 254 (5th Cir. 2014) (citing *Rotella v. Wood*, 528 U.S. 549, 552-55 (2000)); *Rotella v. Wood*, 147 F.3d 438, 439-40 (5th Cir. 1998), *judgment aff'd*, 528 U.S. 549 (2000); *Boulmay v. Rampart 920, Inc.*, 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) (citing *McCool v. Strata Oil Co.*, 972 F.2d 1452 (7th Cir. 1992)); Eighth Circuit: *Hope v. Klabal*, 457 F.3d 784, 790 (8th Cir. 2006) (internal citations omitted); Ninth Circuit: *Evans v. Ariz. Cardinals Football Club, LLC*, 761 F. App'x 701, 703 (9th Cir. 2019) (internal citations omitted); *Pincay v. Andrews*, 238 F.3d 1106, 1109 (9th Cir. 2001); *Grimmett v. Brown*, 75 F.3d 506, 511 (9th Cir. 1996); Eleventh Circuit: *Pac. Harbor Cap. 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).

¹⁸ *See, e.g., Rotella*, 528 U.S. at 555 (“[W]e 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” (citing *McCool*, 972 F.2d at 1465)).

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.¹⁹

Under the injury discovery rule, a RICO claim that is filed within four years from when the plaintiff discovers its injury may still be time-barred if a reasonable person exercising due diligence would have discovered the injury more than four years before the suit was filed.²⁰ Borrowing a term from the securities fraud milieu, some courts applying the rule have gone so far as to hold that the clock starts to run when the plaintiff is put on “inquiry notice” of underlying fraud by facts that would arouse suspicion in a reasonable person.²¹ The doctrine of inquiry notice is said to trigger the limitations period once there are “storm warnings” sufficient to alert a reasonable investor of possible fraud.²² For that reason, the concept of “inquiry notice” is an

¹⁹ See *Eno Farms Co-op. Ass'n, Inc. v. Corp. for Indep. Living*, No. 06-CV-1983, 2007 WL 3308016, at *1, *8-9 (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).

²⁰ See, e.g., *Cetel v. Kirwan Fin. Grp., 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, 235-36 (3d Cir. 2004) (plaintiff's constructive knowledge of existence of asbestos-containing materials in its buildings, as well as tenant complaints and government information, placed plaintiff on inquiry notice regarding the potential hazards of asbestos-containing materials more than four years before suit was filed); *Mathews v. Kidder, Peabody & Co., Inc.*, 260 F.3d 239, 251-55 (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 a 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).

²¹ 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” (quoting *Wolin v. Smith Barney Inc.*, 83 F.3d 847 (7th Cir. 1996)).

²² *World Wrestling Ent., Inc. v. Jakks Pac., Inc.*, 328 F. App'x 695, 697 (2d Cir. 2009); *Mathews*, 260 F.3d at 252; *Isaak v. Trumbull Sav. & Loan Co.*, 169 F.3d 390, 399-400 (6th Cir. 1999).

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.²³

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.²⁴ The Supreme Court acknowledged this hypothetical "quandary" in *Rotella*, remarking that it was nonetheless an insufficient justification for a general pattern discovery rule.²⁵ 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.²⁶ Under the traditional federal accrual principle, a statute of limitation period does not begin to run until the cause of action is complete.²⁷ 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.²⁸

²³ *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, 1249-50 (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*).

²⁴ 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).

²⁵ *Rotella*, 528 U.S. at 558 n.4.

²⁶ *Id.*

²⁷ See, e.g., *Rawlings v. Ray*, 312 U.S. 96, 98 (1941); *Clark v. Iowa City*, 87 U.S. 583, 589 (1874).

²⁸ See, e.g., *Limestone Dev. Corp. v. Vill. of Lemont, Ill.*, 520 F.3d 797, 801-02 (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 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").

§ 58 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.”²⁹ Though neither Justice Scalia nor the majority explained exactly how the Clayton Act rule would be applied in RICO cases, the majority suggested that in RICO cases involving a “continuing violation,” such as multiple predicate acts committed over a period of years, each predicate act in furtherance of the RICO violation would start the limitations period running again.³⁰ As in antitrust cases, the defendant’s commission of separate predicate acts in furtherance of a common scheme would not permit the plaintiff to recover for injuries caused by predicate acts committed outside the limitations period.³¹

Though the *Klehr* majority noted that the Clayton Act rule did not provide “all the answers,”³² the *Rotella* case restored some confidence in the rule as a legitimate alternative to the injury discovery rule. In abrogating the “injury and pattern discovery” rule, the Court rebuffed the argument that the pattern requirement or prevalence of fraud in the civil RICO context are adequate reasons to depart from the Clayton Act analogy, and pointed out that “[b]y eliminating the complication of anything like an antitrust injury element we have, to that extent, recognized a simpler RICO cause of action than its Clayton Act counterpart, and RICO’s comparative simplicity in this respect surely does not support the adoption of a more protracted basic limitations period.”³³ No circuit has endorsed the pure Clayton Act rule as the rule of accrual for RICO claims.

²⁹ *Klehr v. A.O. Smith Corp.*, 521 U.S. 179, 198 (1997) (Scalia, J., concurring in part and concurring in the judgment) (citing *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 338 (1971)).

³⁰ *Klehr*, 521 U.S. at 189 (internal quotation omitted).

³¹ *See id.* (collecting cases).

³² *Id.* at 193.

³³ *Rotella v. Wood*, 528 U.S. 549, 555-60 (2000).

§ 59 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.³⁴ 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.³⁵ 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.³⁶ The separate accrual rule is generally limited, however, to situations where there is a new injury from new wrongful conduct; different injuries from the same conduct do not usually permit a separate suit, unless there is a late developing injury that cannot be proven in the first

³⁴ *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); *Joseph v. Bach & Wasserman, L.L.C.*, 487 F. App’x 173, 176-78 (5th Cir. 2012) (“In *Love*, this Court also adopted the ‘separate accrual rule,’ stating that ‘[w]hen a pattern of RICO activity causes a continuing series of separate injuries, the ‘separate accrual’ rule allows a civil RICO claim to accrue for each injury when the plaintiff discovers, or should have discovered, that injury.”) (citing *Love v. Nat’l Med. Enters.*, 230 F.3d 765, 773 (5th Cir. 2000)) (declining to apply the separate accrual rule, finding “no new injury”); *Love*, 230 F.3d at 775 (“Each time [plaintiff] became obligated to pay a fraudulent . . . insurance claim submitted by [defendant], [plaintiff] suffered an injury to its business or property, within the meaning of 18 U.S.C. § 1964(c).”); *Demes v. ABN Amro Servs. Co., Inc.*, 59 F. App’x 151, 153 (7th Cir. 2003) (citing *McCool v. Strata Oil Co.*, 972 F.2d 1452, 1465-66 (7th Cir. 1992) (acknowledging the “separate accrual” rule but declining to apply it because the plaintiffs did not argue for its application); *McCool*, 972 F.2d at 1464-66 (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, 1402-03 (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) *overruled on other grounds by Rotella v. Wood*, 528 U.S. 549, 555-60 (2000); *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); *Lehman v. Lucom*, 727 F.3d 1326, 1328, 1330-33 (11th Cir. 2013) (holding the factual circumstances did not warrant applying “the separate accrual rule” but noting the Eleventh Circuit “adopt[ed] . . . the separate accrual rule” in a previous case).

³⁵ See, e.g., *Bankers Trust Co. v. Rhoades*, 859 F.2d 1096, 1103-05 (2d Cir. 1988).

³⁶ *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.”).

suit.³⁷ Therefore, a “plaintiff cannot use an independent, new act as a bootstrap to recover for injuries caused by other predicate acts that took place outside the limitations period.”³⁸ Also, a plaintiff may not be able to obtain separate accrual based on wrongful acts that are not RICO predicate acts.³⁹

§ 60 Equitable Tolling, Equitable Estoppel, and Fraudulent Concealment

While the discovery rule discussed in § 56 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.⁴⁰

The Supreme Court recognizes equitable tolling, equitable estoppel, and fraudulent concealment as distinct equitable doctrines.⁴¹ In practice, however, their similarities have caused

³⁷ See, e.g., *Klehr v. A.O. Smith Corp.*, 521 U.S. 179, 190 (1997) (plaintiff must point to a “separable, new predicate act within” the limitations period to take advantage of the separate accrual rule); *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*, 972 F.2d at 1465 n.10 (explaining that “a new cause of action accrues only when there is a new instance of wrongful conduct *and* a new injury”); *Sasser v. Amen*, No. C 99-3604 SI, 2001 WL 764953, at *7 (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).

³⁸ *Klehr*, 521 U.S. at 190, accord *Grimmett*, 75 F.3d at 512-14; *McCool*, 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).

³⁹ *Apollon Waterproofing & Restoration, Inc. v. Bergassi*, No. 01 Civ. 8388, 2003 WL 1397394, at *3-*4 (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).

⁴⁰ 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); *Aversano v. Santander Bank, N.A.*, 828 F. App’x 109, 112 (3d Cir. 2020) (“[Plaintiff] must show that he ‘could not, by the exercise of reasonable diligence, have discovered essential information’ about the alleged violation.” (quoting *Oshiver v. Levin, Fishbein, Sedran & Berman*, 38 F.3d 1380, 1390 (3d Cir. 1994), *overruled* on other grounds by *Rotkiske v. Klemm*, 890 F.3d 422, 428 (3d Cir. 2018) (en banc), *aff’d*, 140 S. Ct. 355 (2019))).

⁴¹ 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.⁴² Since *Agency Holding*, the federal courts have uniformly upheld the application of federal equitable tolling and equitable estoppel principles in the context of civil RICO.⁴³ These principles include tolling during periods of mental incapacity or disability.⁴⁴ 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.⁴⁵ 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.⁴⁶ In *Klehr*, the Supreme Court

⁴² Judge Posner has written a series of opinions examining the courts' overlapping applications of these doctrines. See, e.g., *Flight Attendants Against UAL Offset (FAAUO) v. Commissioner of Internal Revenue*, 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) (disapproved of by *Klehr v. A.O. Smith Corp.*, 521 U.S. 179 (1997)); *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)). See also *Obiefunu v. Hypotec, Inc.*, 451 F. Supp. 3d 928, 942 (S.D. Ind. 2020) ("It is true that equitable tolling is frequently confused with fraudulent concealment, but the Seventh Circuit has made clear the fact that these are two separate doctrines.")

⁴³ See, e.g., *Rotella v. Wood*, 528 U.S. 549, 560-61 (2000) ("In rejecting pattern discovery as a basic rule, we do not unsettle the understanding that federal statutes of limitations are generally subject to equitable principles of tolling" (internal citation omitted)); *Evans v. Ariz. Cardinals Football Club, LLC*, 761 F. App'x 701, 703-04 (9th Cir. 2019) (holding "equitable tolling [was] not warranted" because "plaintiffs failed to allege any facts" to support it, but noting "[t]o establish equitable tolling, a plaintiff must plead with particularity that the defendant actively misled her, and that she had neither actual nor constructive knowledge of the facts constituting her RICO claim despite her due diligence in trying to uncover those facts." (citing *Grimmett v. Brown*, 75 F.3d 506, 514 (9th Cir. 1996)); *Crowe v. Servin*, 723 F. App'x 595, 597 (10th Cir. 2018) (holding the district court did not "abuse its discretion in refusing to equitably toll the statute of limitations[,]") but noting "[a] litigant seeking equitable tolling must show '(1) that [s]he has been pursuing [her] rights diligently, and (2) that some extraordinary circumstances stood in [her] way.'" (quoting *Barnes v. United States*, 776 F.3d 1134, 1150 (10th Cir. 2015)); *Farmer v. D & O Contractors, Inc.*, 640 F. App'x 302, 303, 305 (5th Cir. 2016) (holding no abuse of discretion by district court in denying equitable tolling, but noting "civil RICO claims may also be 'subject to equitable principles of tolling.'" (quoting *Rotella*, 528 U.S. at 560)).

⁴⁴ E.g., *Mandarino v. Mandarino*, 180 F. App'x 258, 261 (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 "conclusory and vague" allegations of the incapacity must be established (internal citation omitted)).

⁴⁵ E.g., *Forbes v. Eagleson*, 228 F.3d 471, 486-87 (3d Cir. 2000) ("[P]laintiff has the burden of proving fraudulent concealment. . . . The plaintiff must show *active misleading* by the defendant . . . and must further show that he exercised reasonable diligence in attempting to uncover the relevant facts." (internal citations omitted)); *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).

⁴⁶ 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

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.’”⁴⁷

The *Klehr* court was silent as to whether a plaintiff must also establish due diligence when asserting equitable estoppel on the grounds of non-fraudulent acts (e.g., false imprisonment).

In addition to due diligence, plaintiffs arguing fraudulent concealment must establish that “(1) the defendant wrongfully concealed material facts relating to the defendant’s wrongdoing; [and] (2) the concealment prevented plaintiff’s ‘discovery of the nature of the claim within the limitations period’; and (3) the plaintiff exercised due diligence in pursuing the discovery of the claim during the period plaintiff seeks to have tolled.”⁴⁸ The courts employ varying language to describe the requirements these elements impose.⁴⁹ 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.⁵⁰ Other courts describe frauds as “self-concealing,” allowing

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.” (internal citation omitted), *disapproved of by Klehr v. A.O. Smith Corp.*, 521 U.S. 179 (1997); *see also Farmer v. D & O Contractors, Inc.*, 640 F. App’x. 302, 306-07 (5th Cir. 2016) (Court rejected plaintiffs’ argument that while they were not actively misled about their rights by defendants, they relied on the FBI’s advice to not file suit which qualified as an “extraordinary circumstance” such as to invoke equitable tolling. The Court found that such advice was not “an ‘external obstacl[e]’ to timely filing, i.e., that ‘the circumstances that caused a litigant’s delay must have been beyond its control.’” (quoting *Menominee Indian Tribe of Wisc. v. United States*, 136 S.Ct. 750, 756 (2016)).

⁴⁷ *Klehr*, 521 U.S. at 194.

⁴⁸ *Tho Dinh Tran v. Alphonse Hotel Corp.*, 281 F.3d 23, 36 (2d Cir. 2002) (internal citation omitted), *overruled on other grounds by Slayton v. American Exp. Co.*, 460 F.3d 215 (2d Cir. 2006).

⁴⁹ *See Supermarket of Marlinton, Inc. v. Meadow Gold Dairies, Inc.*, 71 F.3d 119, 122 (4th Cir. 1995) (comparing the “affirmative acts[.]” “self-concealing[.]” and “separate and apart” standards for establishing fraudulent concealment).

⁵⁰ *See, e.g., Prudential Ins. Co. of Am. v. U.S. Gypsum Co.*, 359 F.3d 226, 237-38 (3d Cir. 2004); *Detrick v. Panalpina, Inc.*, 108 F.3d 529, 542-43 (4th Cir. 1997); *Barry Aviation Inc. v. Land O’Lakes Mun. Airport Comm’n*, 377 F.3d 682, 689 (7th Cir. 2004) (“affirmative steps”); *Pincay v. Andrews*, 238 F.3d 1106, 1110 (9th Cir. 2001) (“affirmative conduct” (internal citations omitted)); *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).

plaintiffs to prove fraudulent concealment without such affirmative acts when the fraud that concealed the claim was part of the underlying offense.⁵¹

Prior to *Klehr*, the distinction between actively misleading and self-concealing fraud mirrored the distinction between equitable estoppel and equitable tolling, the latter distinguished by its due diligence requirement.⁵² *Klehr* rejected this distinction when it held that civil RICO plaintiffs must always establish due diligence when pleading fraudulent concealment.⁵³ 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.⁵⁴

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.⁵⁵ The plaintiff must also plead fraudulent

⁵¹ 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)); *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); *Nat'l Grp. for Commc'ns & Computs. Ltd. v. Lucent Techs. Inc.*, 420 F. Supp. 2d 253, 267 n.20 (S.D.N.Y. 2006) ("However, recent RICO decisions by district courts continue to suggest that the first element may be satisfied where the 'nature of the wrong itself' was self-concealing." (collecting cases)); *Weil v. Long Island Sav. Bank, FSB*, 200 F.R.D. 164, 175 (E.D.N.Y. 2001); *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 both that their bids for copper contracts were not commercial and that the resulting prices were inflated.'" (internal citations omitted)). *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).

⁵² See *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).

⁵³ See *Klehr v. A.O. Smith*, 521 U.S. 179, 195-96 (1997). See e.g., *Koch v. Christie's Int'l PLC*, 699 F.3d 141, 157 (2d Cir. 2012) (in dismissing plaintiff's RICO claim, the court cited *Klehr* for the proposition that "[r]easonable diligence is a prerequisite" for establishing equitable tolling.")

⁵⁴ See *National Grp. for Commc'ns & Computs. Ltd. v. Lucent Techs., Inc.*, 420 F. Supp. 2d 253, 266 (S.D.N.Y. 2006) ("[R]ecent RICO decisions by 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." (internal citations omitted)). *Cf. In re Consol. "Non-Filing Ins." Fee Litig.*, 195 F.R.D. 684, 693 n.7 (M.D. Ala. 2000) (recognizing federal courts of appeals' universal acceptance of equitable tolling for "self-concealing" TILA claims), *vacated*, *Christ v. Beneficial Corp.*, 547 F.3d 1292 (11th Cir. 2008).

⁵⁵ See, e.g., *Sidney Hillman Health Ctr. of Rochester v. Abbott Lab'ys, Inc.*, 782 F.3d 922, 930-31 (7th Cir. 2015) ("[A] plaintiff who invokes equitable tolling to suspend the statute of limitations must bring suit within a reasonable

concealment with particularity as required by Rule 9(b) of the Federal Rules of Civil Procedure.⁵⁶ 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 racketeering.⁵⁷ 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.⁵⁸

time after he has obtained, or by due diligence could have obtained, the necessary information.”) quoting *Cada*, 920 F.2d at 451. Similarly, equitable estoppel, also called fraudulent concealment, applies only when plaintiffs act with reasonable diligence to discover and file their claims. See *Klehr*, 521 U.S. at 194-95, 117 S.Ct. 1984 (“[A] plaintiff who is not reasonably diligent may not assert ‘fraudulent concealment.’”); *Jay E. Hayden Found.*, 610 F.3d at 388 (“[I]n a RICO case, the plaintiff must both use due diligence to discover that he has been injured and by whom even if the defendant is engaged in fraudulent concealment, and diligently endeavor to sue within the statutory limitations period or as soon thereafter as feasible.”); *Forbes v. Eagleson*, 228 F.3d 471, 486-87 (3d Cir. 2000) (in considering a summary judgment appeal, the court summarized “[w]e have indicated that the plaintiff has the burden of proving fraudulent concealment. . . . The plaintiff must show *active misleading* by the defendant, . . . and must further show that he exercised reasonable diligence in attempting to uncover the relevant facts.” (internal citations omitted)); *In re Merrill Lynch Ltd. P’ships Litig.*, 154 F.3d 56, 60 (2d Cir. 1998); *Bontkowski v. First Nat’l Bank of Cicero*, 998 F.2d 459, 462 (7th Cir. 1993); *Pocahontas Supreme Coal Co. Inc. v. Bethlehem Steel Corp.*, 828 F.2d 211, 218, 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).

⁵⁶ See *Evans v. Ariz. Cardinals Football Club LLC*, 761 F. Appx. 701, 703-04 (9th Cir. 2019) (court dismissed equitable tolling claim where “plaintiffs failed to allege any facts, let alone with particularity, that they exercised due diligence in trying to uncover the facts giving rise to their RICO claim. Plaintiffs’ argument that defendants’ doctors and trainers engaged in ‘passive conduct,’ namely the failure to disclose the consequences of taking various medications, which concealed from plaintiffs the existence of their RICO claim, likewise fails. Plaintiffs’ amended complaint is replete with allegations demonstrating plaintiffs’ knowledge of the facts on which their RICO claim is based, such as the receipt of pills on airplanes, in unmarked containers, and without prescriptions”); *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 634-35; *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, 808-09 (N.D. Ohio 1998) (RICO plaintiff that failed to plead due diligence with specificity could not invoke fraudulent concealment).

⁵⁷ 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 RICO limitations period while a victim diligently investigates the possible existence and extent of a pattern of racketeering”).

⁵⁸ See *Prudential Ins. Co. of Am. v. U.S. Gypsum Co.*, 359 F.3d 226, 238 (3d Cir. 2004).

It is also possible that pending parallel criminal proceedings may work to toll a civil RICO claim based on the same conduct.⁵⁹ Class action tolling also is available although tolling while actively participating as a plaintiff in a parallel Canadian proceeding is not available.⁶⁰

§ 61 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.⁶¹

⁵⁹ See *Pension Fund-Mid-Jersey Trucking Indus. v. Omni Funding Grp.*, 687 F. Supp. 962, 963 (D.N.J. 1988). *But see Farmer v. D & O Contractors, Inc.*, 640 F. App'x 302, 308 (5th Cir. 2016) (declining to rule on this principle, distinguishing “only a criminal investigation that failed to result in any indictments.”)

⁶⁰ 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”); *Prieto v. John Hancock Mut. Life Ins. Co.*, 132 F. Supp. 2d 506, 518 (N.D. Tex. 2001) (holding that class action tolling is available for civil RICO claims both when a “class is decertified” and when putative class members “opt out of a class action settlement”), *aff'd*, 35 F. App'x 390 (5th Cir. 2002), *abrogated by Newby v. Enron Corp.*, 542 F.3d 463 (5th Cir. 2008). RICO class actions are discussed in §§ 83 through 85. On the availability of equitable tolling not being available when being a plaintiff in a corresponding proceeding in Canada see *Noland v. Chua*, 816 F. App'x 202, 203 (Mem) (9th Cir. 2020).

⁶¹ See, e.g., *Hoxworth v. Blinder, Robinson & Co.*, 980 F.2d 912, 924-25 (3d Cir. 1992); *Fiorillo v. LBM Fin. LLC*, 494 B.R. 119, 150-51 (D. Mass. 2013); *Flores v. Emerich & Fike*, No. 1:05-CV-0291, 2008 WL 2489900, at *26 (E.D. Cal. June 18, 2008) (holding that “[a]n act may serve as a predicate act if it falls within ten years of another predicate act even if the act does not fall within the statute of limitations.”); *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. 24, 1992) (“In any event, however, time-barred securities fraud violations suffice as predicate acts under RICO, as long as the statute of limitations has not yet run on the RICO claim. See *Bankers Trust Co. v. Rhoades*, 859 F.2d 1096, 1105 (2d Cir.1988), *cert. denied sub nom. Soifer v. Bankers Trust Co.*, 490 U.S. 1007 (1989) (four-year statute of limitations begins to run when plaintiff discovers or should have discovered his RICO injury ‘regardless of when the actual violation occurred’); see also *Phelps v. Wichita–Eagle Beacon*, 886 F.2d 1262, 1273 n. 12 (10th Cir.1989) (expiration of statute of limitations for predicate fraud acts moot because RICO limitations is four years); *Jensen v. Smellings*, 841 F.2d 600, 605 (5th Cir.1988) (same); *Halperin v. Jasper*, 723 F. Supp. 1091, 1096-97 (E.D. Pa. 1989).

X. RELIEF

§ 62 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.¹ 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.² Since *Sedima*, every court of appeals that has addressed the issue has held that the preponderance standard applies in civil RICO actions.³

§ 63 Punitive Damages

Courts have been nearly unanimous in holding that punitive damages are not available under RICO. Courts have reasoned that punitive damages are precluded under RICO because “civil remedy provisions of RICO . . . provide treble damages which are themselves punitive in character.”⁴

¹ *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 491 (1985).

² *Id.*

³ 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).

⁴ *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

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.⁵ 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.⁶ The Court did not address to what extent, if any, it considers RICO treble damages to be punitive.

§ 64 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.⁷ 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.⁸ Additionally, the Ninth Circuit has held that § 1964(c) permits only prevailing plaintiffs to recover attorney’s fees, although prevailing defendants are not precluded from recovering attorney’s fees when authorized elsewhere.⁹ Fees that exceed the damages ultimately awarded may be upheld as reasonable if the fees were necessarily incurred at the time.¹⁰

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).

⁵ *PacifiCare Health Sys., Inc. v. Book*, 538 U.S. 401, 405-06 (2003).

⁶ *Id.* at 406.

⁷ 18 U.S.C. § 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).

⁸ *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).

⁹ *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).

¹⁰ *BCS Servs., Inc. v. BG Invs., Inc.*, 728 F.3d 633 (7th Cir. 2013) (upholding fees that were almost twice the damages awarded).

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.¹¹ The Sixth Circuit rejected use of a multiplier based on the Supreme Court’s ruling in *City of Burlington v. Dague*,¹² in which the Court ruled “that enhancement for contingency is not permitted under the [typical federal] fee shifting statutes.”¹³ Other courts, however, have looked favorably upon multipliers under RICO.¹⁴

§ 65 Availability of Equitable Relief

Section 1964(a) of RICO provides that federal district courts may issue orders to “prevent and restrain” violations of Section 1962.¹⁵ Section 1964(b) expressly authorizes the Attorney General to institute proceedings “under this section.”¹⁶ And Section 1964(c) expressly authorizes any “person injured in his business or property . . . [to] sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the costs of the suit, including a reasonable attorney’s fee”¹⁷

¹¹ *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); *Miltland Raleigh-Durham v. Myers*, 840 F. Supp. 235, 238-40 (S.D.N.Y. 1993) (same).

¹² *City of Burlington v. Dague*, 505 U.S. 557 (1992).

¹³ *Davis v. Mutual Life Ins. Co. of New York*, 6 F.3d 367, 380-82 (6th Cir. 1993).

¹⁴ *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).

¹⁵ 18 U.S.C. § 1964(a).

¹⁶ 18 U.S.C. § 1964(b).

¹⁷ 18 U.S.C. § 1964(c).

While there is no question that the government may seek injunctive relief,¹⁸ the question of whether the RICO statute provides for injunctive relief in private suits continues to be the subject of a circuit split, with only the Second, Seventh, and Ninth Circuits reaching the question to date. In 1986, the Ninth Circuit held that injunctive relief is not available to private plaintiffs in civil RICO actions.¹⁹ 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.²⁰ 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.²¹ Most recently, in 2016, the Second Circuit largely adopted the Seventh Circuit’s reasoning and concluded that “a federal court is authorized to grant equitable relief to a private plaintiff who has proven injury to its business or property by reason of a defendant’s violation of § 1962”²²

Central to the reasoning of both the Second and Seventh Circuits is the “expansive[]” language “authorizing federal courts to exercise their traditional equity powers” in 18 U.S.C. § 1964(a).²³ Both courts conclude that subsection (a) “is not simply a jurisdictional section but rather is a section that ‘grant[s] district courts authority to hear RICO claims and then . . . spell[s] out a non-exhaustive list of the remedies district courts are empowered to provide in such cases.’”²⁴

¹⁸ See, e.g., *United States v. Philip Morris USA Inc.*, 566 F.3d 1095 (D.C. Cir. 2009).

¹⁹ *Religious Tech. Ctr. v. Wollersheim*, 796 F.2d 1076 (9th Cir. 1986).

²⁰ *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).

²¹ *Scheidler v. National Org. for Women, Inc.*, 547 U.S. 9, 23 (2006).

²² *Chevron Corp. v. Donziger*, 833 F.3d 74, 137 (2d Cir. 2016); see also *Gingras v. Think Fin., Inc.*, 922 F.3d 112, 124 (2d Cir. 2019) (reaffirming *Chevron*).

²³ *Id.* (quoting 18 U.S.C. § 1964(a) (“The district courts of the United States shall have jurisdiction to prevent and restrain violations of § 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; [or] imposing reasonable restrictions on the future activities . . . of any person, . . . making due provision for the rights of innocent persons.”) (modification in original).

²⁴ *Chevron*, 833 F.3d at 138 (quoting *Nat’l Org. for Women*, 267 F.3d at 697) (modification in original).

Because subsection (a) does not expressly exclude any category of persons from seeking the remedies set forth therein in a district court, the Second and Seventh Circuits reason that “Congress did not intend to limit the court’s subsection (a) authority by reference to the identity or nature of the plaintiff.”²⁵

No other federal courts of appeals have addressed the issue. 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.²⁶ The Fifth Circuit has expressed similar doubts.²⁷ The Third Circuit has acknowledged the controversy surrounding this issue, but has yet to express an opinion.²⁸ The same is true as to the First Circuit.²⁹ And as discussed below, the Tenth Circuit most recently appears to have sidestepped the question.

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.³⁰

²⁵ *Chevron*, 833 F.3d at 138.

²⁶ 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 substantial doubt on this issue and assuming without deciding that equitable relief is not available under RICO for private parties).

²⁷ *Bolin v. Sears Roebuck & Co.*, 231 F.3d 970, 977 n.42 (5th Cir. 2000) (“There is considerable doubt that injunctive relief is available to private plaintiffs under RICO.”).

²⁸ *Northeast Women’s Ctr., Inc. v. McMonagle*, 868 F.2d 1342, 1355 (3d Cir. 1989) (noting controversy but expressing no opinion); see also *Jackson v. Rohm & Haas Co.*, No. 05-cv-4988, 2009 WL 948741, at *4 (E.D. Pa. Mar. 20, 2009), *aff’d*, 366 F. App’x 342 (3d Cir. 2010) (denying request for preliminary injunctive relief to private plaintiff in connection with RICO claim for failure to satisfy “traditional preliminary injunction standards” and not addressing availability of injunctive relief generally); *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).

²⁹ *Lincoln House, Inc. v. Dupre*, 903 F.2d 845, 848 (1st Cir. 1990) (“it is not clear whether injunctive or other equitable relief is available at all in private civil RICO actions.”).

³⁰ 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 § 1964(a), at most, permits courts to enter orders “to prevent and restrain” violations of § 1962, and therefore an order prohibiting disposition or transfer of assets pendente lite to secure execution of a judgment is beyond the scope of § 1964(a)).

Other district courts found, with varying amounts of discussion, that such relief is available.³¹ But since *Scheidler* and *Chevron*, district courts are divided, with some following their reasoning,³² and others expressly rejecting or expressing doubt as to it.³³ Some have gone so far as to implicitly defendants to raise the issue as a defense.³⁴

Most recently, the Tenth Circuit vacated a District of Colorado ruling in *CGC Holding* imposing a constructive trust, which is an equitable remedy, after a jury found in favor of the plaintiffs in a civil RICO action.³⁵ However, the Tenth Circuit’s ruling was based on the “district court misappl[ying] the constructive trust remedy,” and the court did not comment on the availability of that equitable remedy to private RICO plaintiffs; thus, the question remains unresolved in the Tenth Circuit.³⁶ The D.C. Circuit ruled that disgorgement is not an available

³¹ *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, 814-16 (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).

³² *In re Nat’l Prescription Opiate Litig.*, No. 17-MD-2804, 2019 WL 4194296, at *6 (N.D. Ohio Sept. 4, 2019); *CGC Holding Co., LLC v. Hutchens*, No. 11-cv-1012, 2017 WL 4621094, at *3-*6 (D. Colo. Sept. 26, 2017), *aff’d in part, vacated in part, remanded*, 974 F.3d 1201 (10th Cir. 2020); *Yaffa v. SunSouth Bank*, No. 12-CV-288, 2016 WL 10536038, at *10 (N.D. Fla. Sept. 15, 2016); *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).

³³ *Minnesota by Ellison v. Sanofi-Aventis U.S. LLC*, No. 18-cv-14999, 2020 WL 2394155, at *12 (D.N.J. Mar. 31, 2020); *In re Insulin Pricing Litig.*, No. 17-cv-699, 2020 WL 831552, at *3 (D.N.J. Feb. 20, 2020); *Hengle v. Asner*, 433 F. Supp. 3d 825, 886 (E.D. Va. 2020), *motion to certify appeal granted*, No. 19-cv-250, 2020 WL 855970 (E.D. Va. Feb. 20, 2020); *B2Gold Corp. v. Christopher*, No. 18-cv-1202, 2019 WL 4934969, at *16 (E.D. Va. July 10, 2019), *report and recommendation adopted in part, rejected in part*, 2019 WL 4015890 (E.D. Va. Aug. 26, 2019); *Galaxy Distrib. of W. Virginia, Inc. v. Standard Distrib., Inc.*, No. 15-cv-04273, 2015 WL 4366158, at *5 (S.D.W. Va. July 16, 2015); *Minter v. Wells Fargo Bank, N.A.*, 593 F. Supp. 2d 788, 795 (D. Md. 2009); *see also Haley v. Merial, Ltd.*, 292 F.R.D. 339, 351 (N.D. Miss. 2013) (“[I]t is unlikely that injunctive relief is even available to the Plaintiffs in this RICO action.”).

³⁴ *Crimson Galeria Ltd. P’ship v. Healthy Pharms, Inc.*, 337 F. Supp. 3d 20, 41 n.10 (D. Mass. 2018) (in denying motion to dismiss, stating that defendants in renewing their motion “may raise their argument that civil RICO does not provide an avenue for injunctive relief if the amended complaint presents the issue”).

³⁵ 974 F.3d at 1217.

³⁶ *Id.* at 1216.

remedy under § 1964(a).³⁷ The court reasoned that the statutory language offers three alternatives to protect against future violations: divestment, injunction, and dissolution. Disgorgement, on the other hand, is aimed at separating the wrongdoer from prior ill-gotten gains. As such, it is not a forward-looking remedy designed to “prevent or restrain.”³⁸ 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.³⁹

§ 66 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.”⁴⁰ 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.”⁴¹ Because of RICO’s complexity, it is a prime candidate for reliance on this provision of the Rules. Any practitioner considering requesting sanctions should take care to observe the procedural requirements of Rule 11; no matter how egregious and arguably sanctionable the adversary’s conduct may be, courts do deny procedurally deficient sanctions requests in RICO cases just as in any other.⁴² Courts similarly must articulate their reasoning for

³⁷ *United States v. Philip Morris USA, Inc.*, 396 F.3d 1190, 1201 (D.C. Cir. 2005).

³⁸ *Id.* at 1198.

³⁹ *United States v. Carson*, 52 F.3d 1173, 1181-82 (2d Cir. 1995).

⁴⁰ Fed. R. Civ. P. 11(b) (2) to (3).

⁴¹ Fed. R. Civ. P. 11(b) (3).

⁴² *Curtis & Assocs., P.C. v. Law Offices of David M. Bushman, Esq.*, 758 F. Supp. 2d 153, 182 (E.D.N.Y. 2010), *aff’d sub nom. Curtis v. Law Offices of David M. Bushman, Esq.*, 443 F. App’x 582 (2d Cir. 2011) (denying request for sanctions where moving parties “failed to comply with Rule 11’s procedural requirements,” while noting “serious concerns with the apparent motivations for [the] plaintiffs’ initiation of [the] action”).

imposing or declining to impose sanctions, as a failure to do so can be deemed an abuse of discretion.⁴³

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.”⁴⁴ 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 claims, plaintiffs must stop and think before filing them[,]”⁴⁵ as “civil RICO claims can have a stigmatizing effect upon defendants, particularly in a business context.”⁴⁶ 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.”⁴⁷ Indeed, as RICO became a more familiar part of civil practice, awards of sanctions also became increasingly common.⁴⁸ The sanctions can take a variety of forms, both

⁴³ *Brice v. Bauer*, 689 F. App’x 122, 123 (3d Cir. 2017) (holding that the “District Court’s refusal to reach the merits of the Rule 11 motion was in error” and “remand[ing] for the District Court to address the merits of [the defendant’s] Rule 11 motion in the first instance”); *Cervantes Orchards & Vineyards, LLC v. Deere & Co.*, 731 F. App’x 570, 574 (9th Cir. 2017) (vacating district court’s award of attorney’s fees as sanctions and remanding “for further explanation regarding the basis, amount, and reasonableness of the attorney’s fees”).

⁴⁴ *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).

⁴⁵ *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.

⁴⁶ *Doria v. Class Action Servs., LLC*, 261 F.R.D. 678, 686 (S.D. Fla. 2009); *see also Ghandi v. Ehrlich*, No. 19-cv-03511, 2020 WL 5633416, at *10 (N.D. Ga. Sept. 21, 2020) (awarding monetary sanctions where plaintiff’s filed action “without any support for their fraud allegations or any viable theory of relief” in connection with RICO claim, noting “damage done to [the] [d]efendants’ reputation”).

⁴⁷ *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).

⁴⁸ *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.

monetary and nonmonetary, including even ordering the sanctioned counsel to attend legal education programs in fields of RICO and federal civil practice and procedure.⁴⁹ In one case, for example, the Seventh Circuit reversed a district court's denial of 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.⁵⁰ 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."⁵¹

However, courts are cautious regarding the imposition of sanctions so as to avoid chilling counsel's enthusiasm and stifling creativity in pursuing novel factual or legal theories.⁵² Courts still are less likely to impose sanctions in cases involving elements of RICO that are unsettled, for example. In one case, a district court declined to impose Rule 11 sanctions, even though the plaintiffs' RICO allegations failed to conform to the Fourth Circuit's clear definition of a RICO enterprise, because other circuits had decided the issue differently.⁵³ The court reasoned: "[t]he

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"); *Rowe v. Gary*, 773 F. App'x 500, 502-03 (11th Cir. 2019) (affirming grant of sanctions where district court concluded that "viewing the facts and law objectively, [the] plaintiff's claims were frivolous"); *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).

⁴⁹ *Edmonds v. Seavey*, No. 08-cv-5646, 2009 WL 4404815, at *5 (S.D.N.Y. Dec. 2, 2009) (ordering plaintiff's counsel to attend eight hours of continuing legal education, further ordering that the attendance "shall not count towards and shall be in excess of that required to be completed by members of the New York State Bar").

⁵⁰ *Fred A. Smith Lumber Co. v. Edidin*, 845 F.2d 750, 752-54 (7th Cir. 1988).

⁵¹ *Id.* at 754.

⁵² *Snow Ingredients, Inc. v. SnoWizard, Inc.*, 833 F.3d 512, 529 (5th Cir. 2016) (citing *CJC Holdings, Inc. v. Wright & Lato, Inc.*, 989 F.2d 791, 794 (5th Cir. 1993)).

⁵³ *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).

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.’”⁵⁴ Similarly, courts are being reluctant to impose sanctions where the pleadings purportedly are based on a significant amount of legal and factual research, even if that legal and factual research ultimately results in a deficient claim.⁵⁵

⁵⁴ *Id. Accord Smith v. Our Lady of the Lake Hosp., Inc.*, 960 F.2d 439, 445 (5th Cir. 1992).

⁵⁵ *Snow Ingredients, Inc. v. SnowWizard, Inc.*, 833 F.3d 512, 529 (5th Cir. 2016) (affirming denial of request for sanctions where “claims [were] not so obviously foreclosed by precedent as to make them legally indefensible”); *Fiala v. B & B Enterprises*, 738 F.3d 847, 853 (7th Cir. 2013) (affirming denial of sanctions where plaintiff’s counsel “claim[ed] without contradiction to have devoted 170 hours to factual and legal research before filing the suit”); *see also Lu v. Menino*, 98 F. Supp. 3d 85, 109 (D. Mass. 2015) (declining to impose sanctions where “issue [was] close,” but plaintiff “did not act in bad faith”); *Doria*, 261 F.R.D. at 686 (denying request for sanctions despite finding claims “flimsy and poorly articulated,” and finding the behavior by plaintiffs’ counsel “bellicose and at times unprofessional,” because the conduct “was negligent in developing the case,” but not “‘objectively frivolous’ as to warrant the imposition of Rule 11 sanctions”).

XI. JURISDICTION, VENUE, AND PREEMPTION

§ 67 Subject Matter Jurisdiction

Federal courts have subject matter jurisdiction over RICO claims pursuant to 28 U.S.C. § 1331 and 18 U.S.C. § 1964(c). If, however, a plaintiff fails to plead sufficient facts to support a RICO claim, a federal court may find the claim does not present a federal question and there is thus no subject matter jurisdiction. For example, in *Oak Park Trust & Savings Bank v. C.G. Therkildsen*,¹ the district court dismissed a RICO counterclaim on procedural grounds because the defendant had not answered the complaint. On appeal, the Seventh Circuit upheld the district court's dismissal of the counterclaim, but found that the district court should have dismissed the counterclaim for lack of subject matter jurisdiction rather than for other procedural reasons.² While acknowledging that a plaintiff's failure to prove its case does not normally deprive a court of jurisdiction, the Seventh Circuit noted that in this case the plaintiff's counterclaim alleged no more than a breach of contract or simple fraud claim, and that the RICO claim was patently frivolous.³ In particular, the Seventh Circuit 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."⁴ Indeed, in the Seventh Circuit, a plaintiff who files a bogus RICO claim to invoke federal jurisdiction may face sanctions.⁵

¹ *Oak Park Trust & Sav. Bank v. Therkildsen*, 209 F.3d 648 (7th Cir. 2000).

² *Id.* at 650.

³ *Id.* at 651.

⁴ *Id.*

⁵ *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).

§ 68 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.”⁶ Section 1965(d) allows process to be served “in any judicial district in which such person resides, is found, has an agent, or transacts his affairs.”⁷ Accordingly, courts have approved nationwide service of process under both § 1965(b) and § 1965(d).⁸

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.”⁹ 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).¹⁰ 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.¹¹

Courts have recognized that Section 1965(b) requires two distinct but related inquiries. The first, concerning whether the district in which the RICO claim is lodged is a proper venue for

⁶ 18 U.S.C. § 1965(b).

⁷ 18 U.S.C. § 1965(d).

⁸ Compare *ESAB Grp., 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 by *Cent. States, Se. & Sw. Areas Pension Fund v. Reiner Express World Corp.*, 230 F.3d 934 (7th Cir. 2000).

⁹ *Cory v. Aztec Steel Bldg., Inc.*, 468 F.3d 1226, 1231 (10th Cir. 2006).

¹⁰ *Id.* at 1232.

¹¹ *Id.*

all alleged co-conspirators, involves a three-part test set.¹² Venue is proper where: (1) the court possesses personal jurisdiction over at least one co-conspirator based on a traditional minimum contacts analysis with the forum state, (2) there is no other district in which a court would have personal jurisdiction over all of the alleged co-conspirators, and (3) the facts show a single nationwide RICO conspiracy exists.¹³

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.¹⁴ In *Lisak v. Mercantile Bancorp, Inc.*,¹⁵ the Seventh Circuit reversed the district court’s dismissal of a RICO claim for lack of personal jurisdiction, concluding that minimum contacts with the forum state are unnecessary in federal question cases—such as those arising under RICO—because the court is exercising the judicial power of the United States, rather than that of an individual state.¹⁶ Other courts have taken the opposite view, holding

¹² *Gilbert v. Bank of America*, 2014 WL 4748494, at *4 (N.D. Cal. 2014).

¹³ *Id.*

¹⁴ *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 Assocs. Ltd. P’ship*, 817 F. Supp. 896, 898 (D. 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).

¹⁵ *Lisak v. Mercantile Bancorp, Inc.*, 834 F.2d 668 (7th Cir. 1987).

¹⁶ *Id.* at 671-72. *See also Dornberger v. Metro. 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); *Nat’l 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

that RICO provides a basis for nationwide jurisdiction only when one of the defendants has minimum contacts with the forum.¹⁷

In *Heller v. Deutsche Bank*, the United States District Court for the Eastern District of Pennsylvania found that in a civil RICO claim personal jurisdiction can be based either on general (continuous and systematic) or claim-specific contacts with the forum.¹⁸ 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.¹⁹

§ 69 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

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).

¹⁷ See *PT United Can Co. Ltd. v. Crown Cork & Seal Co.*, No. 96-CV-3669, 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. Grp. LC v. IFX Mkts., 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 are 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).

¹⁸ *Heller v. Deutsche Bank AG*, No. 04-CV-3571, 2005 WL 281181, at *2-3 (E.D. Pa. Feb. 3, 2005).

¹⁹ *Id.* at *3; see also *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472-77 (1985) (“where a defendant who purposefully has directed his activities at forum residents seeks to defeat jurisdiction, he must present a compelling case that the presence of some other considerations would render jurisdiction unreasonable”).

States depends upon whether Congress intended the statute to apply to such conduct, not on a choice of law analysis.²⁰

Canons of statutory construction provide that in the absence of clear legislative intent to the contrary, there is a presumption against extraterritorial application of United States law.²¹ Nevertheless, prior to 2010, some courts inferred that in enacting RICO, Congress intended to eliminate wrongful conduct wherever it occurs.²² Drawing from 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.²³

In 2010, the Supreme Court embraced the presumption against extraterritoriality and explicitly rejected the “conduct” and “effects” test in a securities fraud case.²⁴ The Court noted that Section 10(b) of the 1934 Securities Exchange Act contains no affirmative indication that

²⁰ *Orion Tire Corp. v. Goodyear Tire & Rubber Co.*, 268 F.3d 1133, 1137 (9th Cir. 2001) (“Where a federal statute is involved, . . . a choice of law analysis does not apply in the first instance. The initial question, rather, is whether Congress intended the statute in question to apply to conduct occurring outside the United States.”); *Liquidation Com’n of Banco Intercontinental, S.A. v. Renta*, 530 F.3d 1339, 1351 (11th Cir. 2008) (same).

²¹ *Foley Bros. v. Filardo*, 336 U.S. 281, 285 (1949) (“The canon of construction . . . teaches that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States”); *Morrison v. National Austl. Bank Ltd.*, 561 U.S. 247, 255 (2010) (“It is a longstanding principle of American law that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States”) (internal quotations omitted).

²² *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).

²³ *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 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).

²⁴ *Morrison v. National Aust. Bank Ltd.*, 130 S. Ct. 2869, 2883 (2010).

Congress intended extraterritorial application, and therefore declined to apply the Act to extraterritorial conduct.²⁵

Within six months, the Second Circuit applied *Morrison* in a RICO context, holding that the RICO statute had no extraterritorial application.²⁶ In *Norex Petroleum Ltd. v. Access Industries 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.²⁷ Although much of the alleged misconduct occurred in Russia, the complaint alleged that the defendants committed numerous predicate acts in the United States.²⁸ Citing *Morrison*, the Second Circuit declined to apply the conduct and effects test, noting 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.²⁹ But the Second Circuit has since held that RICO could apply extraterritorially to the extent that “liability or guilt could attach to extraterritorial conduct under the relevant RICO predicate.”³⁰

Since *Morrison*, courts have held, consistent with the Second Circuit, that extraterritorial application of RICO follows the similar application of the alleged underlying predicate acts.³¹

²⁵ *Id.* at 2878.

²⁶ *Norex Petroleum Ltd. v. Access Indus. Ltd.*, 631 F.3d 29 (2d Cir. 2010).

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.*

³⁰ *European Community v. RJR Nabisco, Inc.*, 2014 WL 1613878, *4 (2d Cir. 2014) (concluding that RICO could apply extraterritorially to alleged pattern based on predicate acts of money laundering and material support of terrorism); *see also Petroleos Mexicanos v. SK Engineering & Const. Co. Ltd.*, 572 Fed. Appx. 60, 61 (2d Cir. 2014) (“[T]he extraterritorial application of RICO [is] coextensive with the extraterritorial application of the relevant predicate statutes.”).

³¹ *European Community v. RJR Nabisco, Inc.*, 2014 WL 1613878, *4 (2d Cir. 2014) (concluding that RICO could apply extraterritorially to alleged pattern based on predicate acts of money laundering and material support of terrorism); *see also Petroleos Mexicanos v. SK Engineering & Const. Co. Ltd.*, 572 Fed. Appx. 60, 61 (2d Cir. 2014) (“[T]he extraterritorial application of RICO [is] coextensive with the extraterritorial application of the relevant predicate statutes.”); *U.S. v. Chao Fan Xu*, 706 F.3d 965, 978 (9th Cir. 2013), *as amended on denial of reh’g*, (Mar. 14, 2013) (“Given this express legislative intent to punish patterns of organized criminal activity in the United States, it is highly unlikely that Congress was unconcerned with the actions of foreign enterprises where those actions violated the laws of this country while the defendants were in this country. Thus, to determine whether Defendants’ count one convictions are within RICO’s ambit, we look at the pattern of Defendants’ racketeering activity taken as a whole.”).

Others have simply rejected extraterritorial application of the statute.³² Courts have also considered whether the plaintiff must have suffered an injury that occurred domestically or whether the predicate acts must have occurred domestically.³³ This continues to be an open question.³⁴ But these extraterritorial questions are not jurisdictional in nature and go to the merits of the case.³⁵

§ 70 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.³⁶ In contrast, the Sixth Circuit has held that a foreign sovereign cannot be sued for civil RICO claims because a foreign sovereign is not indictable.³⁷ The court stated that the

³² See *Mitsui O.S.K. Lines, Ltd. v. SeaMaster Logistics, Inc.*, 2015 WL 5782349, at *5 (N.D. Cal. 2015); *Republic of Iraq v. ABB AG*, 920 F. Supp. 2d 517, 543 (S.D.N.Y. 2013), *aff’d*, 768 F.3d 145 (2d Cir. 2014), cert. denied, 135 S. Ct. 2836, 192 L. Ed. 2d 887 (2015) (“The RICO statutes do not apply extraterritorially ... Accordingly, peripheral contacts with the United States—up to and including the use of a domestic bank account—do not bring an otherwise foreign scheme within the reach of the RICO statutes.” (internal quotation marks, alterations, and citations omitted)); *Sorota v. Sosa*, 842 F. Supp. 2d 1345, 1349 (S.D. Fla. 2012) (“[T]he Court concludes that Renta’s holding that RICO may apply extraterritorially has been undermined to the point of abrogation by the Supreme Court’s subsequent decision in *Morrison*. Furthermore, the Court agrees with the post-*Morrison* decisions cited above uniformly holding that RICO does not apply extraterritorially.”); *CGC Holding Co., LLC v. Hutchens*, 824 F. Supp. 2d 1193, 1210 (D. Colo. 2011).

³³ *Elsevier, Inc. v. Grossman*, 199 F. Supp. 3d 768 (S.D.N.Y. 2016), order clarified, 2016 WL 7077037 (S.D.N.Y. 2016); *he Technology Corp v. Harry Allen and Aetrium, Inc.*, 2016 WL 4492580 (N.D. Cal. 2016); *Exeed Industries, LLC v. Younis*, 2016 WL 6599949 (N.D. Ill. 2016); *Tatung Company, Ltd. v. Shu Tze Hsu*, 217 F. Supp. 3d 1138, (C.D. Cal. 2016); *Akisher v. Kapustin*, 2016 WL 7165714 (D.N.J. 2016); *City of Almaty, Kazakhstan v. Ablyazov*, 226 F. Supp. 3d 272 (S.D.N.Y. 2016), *motion to certify appeal denied*, 2017 WL 1424326 (S.D.N.Y. 2017); *Absolute Activist Value Master Fund Limited v. Devine*, 233 F. Supp. 3d 1297, (M.D. Fla. 2017); *Cevdet Aksüt Oğulları Koll. Sti v. Cavusoglu*, 2017 WL 1157862 (D.N.J. 2017).

³⁴ See *Armada (Singapore) Pte Limited v. Amcol International Corporation*, 2017 WL 1862836 (N.D. Ill. 2017) (certifying question of domestic injury for appellate review).

³⁵ See *CGC Holding Co., LLC v. Broad and Cassel*, 773 F.3d 1076, 1096 (10th Cir. 2014) (“Courts addressing the issue since the Supreme Court’s decision in *Morrison* have evenly determined that the extraterritoriality of RICO is a question of whether the plaintiffs have stated a claim, not whether the court properly has subject matter jurisdiction.”); see also *U.S. v. Chao Fan Xu*, 706 F.3d 965, 977 (9th Cir. 2013), as amended on denial of reh’g, (Mar. 14, 2013); *Norex Petroleum Ltd. v. Access Industries, Inc.*, 631 F.3d 29, 31 (2d Cir. 2010).

³⁶ *Southway v. Cent. Bank of Nigeria*, 198 F.3d 1210, 1216 (10th Cir. 1999).

³⁷ *Keller v. Cent. Bank of Nigeria*, 277 F.3d 811, 821 (6th Cir. 2002), *abrogated by Samantar v. Yousuf*, 560 U.S. 305 (2010).

conclusion may not be the same for individuals who commit criminal acts when acting outside the scope of the authority of the sovereign.³⁸

§ 71 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.”³⁹ In *Tafflin v. Levitt*,⁴⁰ the plaintiffs were nonresidents of the state of Maryland who held unpaid certificates of deposit issued by a savings and loan institution. After the savings and loan institution failed, the plaintiffs brought suit in the United States district court and alleged various state causes of action, a claim under the Securities Exchange Act of 1934, and civil claims under 18 U.S.C. §§ 1961-1968 of RICO.⁴¹ The district court granted the defendants’ motion to dismiss.⁴² The district court held that because state courts have concurrent jurisdiction over RICO claims, it was appropriate for federal court to abstain from adjudicating the matter, as the other causes of action had been raised in state court in pending litigation.⁴³ Both the Fourth Circuit Court of Appeals and the Supreme Court affirmed, holding that state courts have concurrent jurisdiction over RICO suits.⁴⁴ The Supreme Court concluded that state courts have not been divested of jurisdiction to hear civil RICO claims “by an explicit statutory directive, by unmistakable implication from legislative history, or by a clear incompatibility between state-court jurisdiction and federal interests.”⁴⁵ Specifically, the Court stated that there was “no evidence that Congress even considered the question of concurrent state court jurisdiction over RICO claims,

³⁸ *Id.*

³⁹ 18 U.S.C. § 1964(c).

⁴⁰ *Tafflin v. Levitt*, 493 U.S. 455 (1990).

⁴¹ *Id.* at 457.

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.* at 457-58.

⁴⁵ *Id.* at 460 (quoting *Gulf Offshore Co. v. Mobil Oil Corp.*, 453 U.S. 473, 478 (1981)).

much less any suggestion that Congress affirmatively intended to confer exclusive jurisdiction over such claims on the federal courts,”⁴⁶ and that there was “no ‘clear incompatibility’ between state court jurisdiction over civil RICO actions and federal interests.”⁴⁷ The Court further held that it had “full faith in the ability of state courts to handle the complexities of civil RICO actions, particularly since many RICO cases involve asserted violations of state law . . . over which state courts presumably have greater expertise.”⁴⁸ Finally, the Court noted that “far from disabling or frustrating federal interests, [p]ermitting state courts to entertain federal causes of action facilitates the enforcement of federal rights.”⁴⁹

Similarly, in *Villagordoa Bernal v. Rodriguez*,⁵⁰ the plaintiff alleged that the defendants fraudulently induced him and his mother into investing in a hair salon. The plaintiff asserted RICO claims under 18 U.S.C. § 1962 (c)-(d) and state law claims for intentional misrepresentation, intentional infliction of emotional distress, breach of fiduciary duty and concealment. The plaintiff also filed a largely parallel suit in state Superior Court. Defendants moved to dismiss for lack of venue, based on the existence of the parallel state court action. In finding that a remand to the Superior Court was appropriate, the United States district court noted that despite the fact that it had original jurisdiction over the Superior Court action based on the civil RICO claims in the first amended complaint, “state courts ‘have concurrent jurisdiction over [such] federal civil RICO claims.’”⁵¹

⁴⁶ *Id.* at 461.

⁴⁷ *Id.* at 464.

⁴⁸ *Id.* at 465.

⁴⁹ *Id.* at 466 (citing *Gulf Offshore Co.*, 453 U.S., at 478, n. 4).

⁵⁰ *Villagordoa Bernal v. Rodriguez*, No. 16-CV-00152, 2016 WL 3360951 (C.D. Cal. June 10, 2016).

⁵¹ *Id.* at *4 (citing *Tafflin*, 493 U.S. at 455, 460). *See also McGhee v. High Mountain Health LLC*, No. CV-19-08145, 2020 WL 1929186, at *4 (D. Ariz. Apr. 21, 2020) (state court found to have had concurrent jurisdiction over civil RICO and state medical marijuana claims (citing *Tafflin*, *supra*, 493 U.S. at 458; *Feminist Women’s Health Ctr. v. Codispoti*, 63 F.3d 863 (9th Cir. 1995))); *Gummere v. Smith*, No. CV-14-02105, 2015 WL 13759955, at *14 (D. Ariz. Aug. 4, 2015) (existence of a federal RICO claim did not weigh against a stay given that state courts have concurrent jurisdiction over federal RICO claims); *Horowitz v. Sull*, No. 15-00186 2015 WL 5439227, at *8 (D.

Removal. Despite the existence of concurrent jurisdiction, RICO claims filed in state court may be removed to federal court.⁵² 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.⁵³

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.”⁵⁴ 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

Haw. Sept. 11, 2015) (stay of federal court action justified because federal and state claims, including RICO claim, are addressable in state court (citing *Tafflin*, 493 U.S. at 458)); *Reed v. E. End Props., Inc.*, No. CV 17-955, 2018 WL 6131211, at *15, n. 11 (C.D. Cal. Mar. 15, 2018) (federal claims, including civil RICO, alleged in the first amended complaint, could be brought in state court (citing *Tafflin*, 493 U.S. at 458)).

⁵² See 28 U.S.C. § 1441(a)-(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. § 1441(a)-(b), notwithstanding removal bar contained in federal securities statute), *adhered to and aff’d 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). Also compare *Lavin v. Practice Protection Fund*, No. 2:19-11348, 2020 WL 416360, at *2 (E.D. La. Jan. 27, 2020) (federal and state courts have concurrent jurisdiction over RICO claims) with *Hoggatt v. Allstate Ins.*, No. 1:19-cv-14, 2019 WL 8112888, at *2 (N.D. Miss. Mar. 13, 2019) (federal court had original jurisdiction because plaintiffs’ RICO claims “ar[is]e under the laws of the United States”).

⁵³ 28 U.S.C. § 1441(c); *Metro Ford Truck Sales, Inc. v. Ford Motor Co.*, 145 F.3d 320, 327-28 (5th Cir. 1998) (remanding RICO claim to state court because RICO claims were “so intertwined” with state law fraud and misrepresentation claims); *Holland v. World Omni Leasing, Inc.*, 764 F. Supp. 1442, 1443-44 (N.D. Ala. 1991) (remanding an action involving state law claims of fraud, misrepresentation, and breach of contract, as well as RICO claims, because the alleged predicate acts of racketeering were “so intertwined with, and so indistinguishable from, [the] state law claims”). But see *K&F Rest. Holdings Ltd. v. Rouse*, No. 16-293, 2016 WL 6901375, at *7 (M.D. La. Sept. 22, 2016) (federal court could exercise supplemental jurisdiction over plaintiffs’ state law claims, which derived from a common nucleus of operative facts); *Inge v. Walker*, No. 3:16-CV-0042, 2016 WL 4920288, at *3 (N.D. Tex. Sept. 15, 2016) (district court retained jurisdiction over case involving RICO and state law claims, based on ruling that claims were derived from the same common nucleus of operative fact); *Marrical v. Allstate Ins. Co.*, 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).

⁵⁴ *New Beckley Min. Corp. v. Int’l Union, United Mine Workers of Am.*, 946 F.2d 1072, 1074 (4th Cir. 1991).

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.⁵⁵

In *Al-Abood ex rel. Al-Abood v. El-Shamari*,⁵⁶ the Fourth Circuit considered an appeal of a case filed by the plaintiff in June 1998, in a United States district court involving allegations of fraud, breaches of fiduciary duty, and conversion, as well as RICO violations.⁵⁷ The district court granted judgment to the defendants as a matter of law on four RICO claims, with the remaining claims going to the jury, which returned a verdict for the plaintiff on several counts.⁵⁸ In January, 1998, the defendants sued the plaintiff in a court in Monaco, alleging the claim of a looted trust, the merits of which were not resolved by the Monacan court at the time when the Fourth Circuit wrote its opinion.⁵⁹ Defendants appealed the district court ruling, claiming in part that pursuant to the *Colorado River* doctrine, “the district court abused its discretion in declining to defer the proceedings previously instituted in Monaco.”⁶⁰ In discussing the fact that there was a parallel proceeding in a Monacan court, the Fourth Circuit relied on its ruling in *New Beckley* in upholding the district court’s decision not to abstain on the basis of the *Colorado River* doctrine. The court

⁵⁵ *Id.* See also *Brooks v. Field*, No. 6:14-CV-02267, 2015 WL 13734242, at *6 (D.S.C. Sept. 14, 2015) (*Colorado River* abstention in civil RICO action found improper, as there was no finding that federal action was parallel to a state action); *State Farm Mut. Auto. Ins. Co. v. Vital Community Ctr., P.C.*, No. 17-11721, 2018 WL 2194019, at *4-5 (E.D. Mich. May 14, 2018) (*Colorado River* abstention inappropriate in civil RICO action when no specific parallel state action identified); *Eitel v. PNC Bank, N.A.*, No. 3:20-cv-12, 2020 WL 6929564, at *5 (W.D. Ky. Nov. 24, 2020) (no justification for *Colorado River* abstention in federal civil RICO action that was not parallel to state probate matters); *Cohen v. Reed*, 868 F. Supp. 489, 499 (E.D.N.Y. 1994) (presence of a federal statutory cause of action is a factor that points against abstention). *But see Lawrence v. Cohn*, 778 F. Supp. 678, 683-86 (S.D.N.Y. 1991) (district court should abstain from hearing plaintiffs’ civil RICO claim when the claim could be heard in a pending state court action), *order vacated*, 816 F. Supp. 191 (S.D.N.Y. 1993).

⁵⁶ *Al-Abood ex rel. Al-Abood v. El-Shamari*, 217 F.3d 225 (4th Cir. 2000).

⁵⁷ *Id.* at 229.

⁵⁸ *Id.* at 231.

⁵⁹ See *id.*

⁶⁰ See *id.* (citing *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 817-20 (1976)).

found that the issues in the parallel proceedings were not the same, noting its observation in *New Beckley* that “some factual overlap does not dictate that the proceedings are parallel.”⁶¹

By contrast, in *Blocho v. Rothbard*,⁶² the plaintiff, who was the defendant in an unlawful detainer action filed in California state court, alleged violations of civil RICO, defamation and abuse of process in a United States district court against the defendant lawyer in the California state action, his law firm, and the plaintiff in the state action, along with another party whose connection to the case was not clear to the district court.⁶³ A magistrate judge cited the *Colorado River* doctrine in ruling that the district court should abstain from adjudicating the matter, and ordered that the case be assigned to a district court judge, with the recommendation to dismiss the plaintiff’s first amended complaint without leave to amend, as the problems with the first amended complaint could not be resolved with further amendment of the complaint. The judge based this finding on the fact that the case raised the issue of “alleged attorney misconduct in an earlier-filed action, and state law provides the appropriate legal and procedural framework for resolving that issue.”⁶⁴

⁶¹ *Id.* at 232-233 (citing *New Beckley Mining*, 946 F.2d at 1074). *See also Sterling v. Deutsche Bank Nat’l Trust Co. as Trustee for Femit Trust 2006-FF6, Mortgage Pass Through Certificates, Series 2006-F6*, No. 19-civ-205, 2019 WL 4686549, at *3 (S.D.N.Y. Sept 26, 2019) (federal civil RICO action ran parallel to state foreclosure action, and *Colorado River* abstention was considered unwarranted, as “[a]ny doubt regarding the parallel nature of a federal and state action should be resolved in favor of the exercise of federal jurisdiction” (citing *Shields v. Murdoch*, 891 F. Supp. 2d 567, 577 (S.D.N.Y. 2012))); *Maxwell v. Kaylor*, No. 19-CV-07832, 2020 WL 4732340 (N.D. Cal. Aug. 14, 2020) (prior federal lawsuit, pending appeal, did not assert federal claims, while instant lawsuit asserted civil RICO claim, making *Colorado River* abstention unwarranted).

⁶² *Blocho v. Rothbard*, No. 18-cv-03750, 2018 WL 5099286 (N.D. Cal. Aug. 10, 2018).

⁶³ *Id.* at 2.

⁶⁴ *Id.* at *3. *See also XPO GF Am., Inc. v. Qiuheng Liao*, No. CV 19-4173, 2019 WL 8226077, at *5 (C.D. Cal. Sept. 27, 2019) (case involving allegations of civil RICO violations and conspiracy to violate the civil RICO statute stayed per *Colorado River*, given parallel state action involving allegations of breach of contract, breach of implied covenant of good faith and fair dealing, and breach of fiduciary duty); *Vaghashia Family Ltd. P’ship v. Vaghashia*, No. CV 19-01876, 2019 WL 6974307 at *8 (C.D. Cal. Nov. 1, 2019) (*Colorado River* abstention appropriate and action stayed, notwithstanding the fact that the RICO statute permits nationwide service of process, simplified multistate discovery, and enforcement of judgments, and that there were out-of-state defendants in the action).

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 Assocs., Inc. v. Bally's Louisiana, Inc.*,⁶⁵ 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.⁶⁶

In contrast, in *In re Managed Care Litigation*,⁶⁷ 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.⁶⁸

In *State Farm Mutual Automotive Insurance Co. v. Warren Chiropractic & Rehab Clinic P.C.*,⁶⁹ the district court entertained arguments that *Burford* abstention in a civil RICO case was appropriate because the no-fault insurance scheme of the state of Michigan was a “unique” regime, and that “intervention by [the c]ourt risk[ed] both thwarting the state’s attempt to manage its own

⁶⁵ *Metro Riverboat Associates, Inc. v. Bally's Louisiana, Inc.*, 142 F. Supp. 2d 765, 775 (E.D. La. 2001). See also *Peterson v. Peterson*, No. 4:18-CV-4837, 2019 WL 8017862 (S.D. Tex. Oct. 30, 2019) (abstaining from hearing civil RICO case in light of pending state court divorce and division of property proceedings that implicated important state interests).

⁶⁶ *Metro Riverboat Assocs., Ltd.*, 142 F. Supp. 2d at 775.

⁶⁷ *In re Managed Care Litig.*, 135 F. Supp. 2d 1253, 1260 (S.D. Fla. 2001).

⁶⁸ *Id.*

⁶⁹ *State Farm Mut. Auto. Ins. Co. v. Warren Chiropractic & Rehab Clinic P.C.*, No. 4:14-CV-11521, 2015 WL 4724829 (E.D. Mich. Aug. 10, 2015).

affairs and inconsistent decisions on how the scheme applies.”⁷⁰ The court concluded that *Burford* abstention was inappropriate, stating that “federal courts regularly decide issues concerning Michigan’s no-fault scheme without raising the conflict issues *Burford* abstention is intended to address.”⁷¹ Furthermore, the court decided that *Burford* abstention also did not apply because there was no challenge issued to the no-fault scheme, “or any state decision—administrative or otherwise—based on those statutory decisions.”⁷² Instead, there was a challenge based on RICO, and because there was a challenge of purportedly fraudulent conduct under the RICO statute, *Burford* abstention did not apply.⁷³

By contrast, in *Harmon v. Borough of Belmar*,⁷⁴ a different United States district court held that *Burford* abstention was justified in a case alleging violations of due process and equal protection under the Fourteenth Amendment, tortious interference with a contractual relationship, intentional interference with prospective economic advantages, intentional infliction of emotional distress, civil RICO violations, and New Jersey state RICO violations. The court based its ruling on the fact that plaintiff challenged the state regulatory scheme relating to alcohol distribution and licensure, and a ruling from the federal district court would have interfered with a pending administrative appeal.⁷⁵ Similarly, in *Evans v. Hepworth*,⁷⁶ the district court ruled that *Burford* abstention was justified because the same property at issue in the federal action, involving civil

⁷⁰ *Id.* at *17.

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.* See also *Crimson Galeria Ltd. P’ship v. Healthy Pharms, Inc.*, 337 F. Supp. 3d 20, 35-36 (D. Mass. 2018) (*Burford* abstention unwarranted in a case involving RICO counts against private defendants “that do not directly challenge any state law or require this Court to review an order of a state or local government body”).

⁷⁴ *Harmon v. Borough of Belmar*, No. 17-cv-2437, 2017 WL 4782808 (D.N.J. Oct. 23, 2017).

⁷⁵ *Id.* at *4-5.

⁷⁶ *Evans v. Hepworth*, 433 F. Supp. 3d 1171 (D. Idaho 2020).

RICO claims, was also at issue in an ongoing state divorce action. Thus, judgment from the court in the federal case would interfere with the divorce court’s judgments relating to that property.⁷⁷

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 rejection of those judgments.”⁷⁸ 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.⁷⁹

Res Judicata. A federal civil RICO claim will be barred by res judicata if the RICO claim could and should have been brought in an earlier state court action.⁸⁰

⁷⁷ *Id.* at 1182.

⁷⁸ *Figueroa v. Merscorp, Inc.*, 477 F. App’x 558 (11th Cir. 2012) (citing *Casale v. Tillman*, 558 F.3d 1258, 1261 (11th Cir. 2009)). *But see Nero, Sr. v. Mayan Mainstreet Inv 1 LLC*, No. 14-cv-1363, 2014 WL 12610668, at *10 (M.D. Fla. Nov. 13, 2014) (declining to apply *Figueroa* in ruling that “*Rooker-Feldman* does not apply simply because the plaintiff’s federal claim ‘denies a legal conclusion’ reached by the state court”); *Nivia v. Nation Star Mortg., LLC*, 620 Fed. App’x 822, 824-825 (11th Cir. 2015) (*Rooker-Feldman* doctrine does not bar claims brought under the Troubled Asset Relief Program or the Home Affordable Modification Program); *Molina v. Aurora Loan Servs., LLC*, 635 Fed. App’x 618, 622 (11th Cir. 2015) (*Rooker-Feldman* does not apply when a party did not have a “reasonable opportunity to raise his federal claim in state proceedings” (citing *Powell v. Powell*, 80 F.3d 464, 467 (11th Cir. 1996))).

⁷⁹ *Id.* See also *Blocho v. Rothbard*, No. 18-cv-03750, 2018 WL 5099286, at *2 (N.D. Cal. Aug. 10, 2018) (district court held that abstention from entertaining appeal of a state court order or judgment was proper under *Rooker-Feldman* doctrine).

⁸⁰ 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 Emps. & Rest. Emps. 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); *Bartlett v. Bartlett*, No. 17-cv-00037, 2018 WL 1211818 (S.D. Ill. Mar. 8, 2018) (res judicata barred civil RICO claim because plaintiff already litigated the dispute in New Mexico before splitting off RICO claim and re-filing it in Illinois); *Ayot v. DuPage State’s Attorney*, No. 17 C 7801, 2017 WL 5478299 (N.D. Ill. Nov. 15, 2017) (labeling claims as RICO violations does not change the fact that the claims are duplicative of previously filed cases, and thus barred by res judicata); *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. Grp., 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).

§ 72 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.⁸¹ 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.⁸² The court concluded that to allow such a result would frustrate the fundamental federal policies embodied by RICO.⁸³

By contrast, in *Midamines SPRL Ltd. v. KBC Bank NV*,⁸⁴ a plaintiff filed suit against banks for wrongfully dishonoring checks, unjust enrichment, fraud and conspiracy to commit fraud, money laundering and RICO violations.⁸⁵ Defendants argued that any dispute was subject to a forum selection clause requiring that litigation take place in Belgium. Finding that the forum selection clause was valid, the court stated that it was aware of no “proposition that an otherwise enforceable forum-selection clause may be ignored simply because an alternative forum would allow additional causes of action.”⁸⁶ The court added to this statement in a footnote which noted that the court was “also skeptical that [p]laintiffs could in fact bring RICO and New York claims

⁸¹ *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).

⁸² *Govett Am. Endeavor Fund Ltd.*, 112 F.3d at 1021.

⁸³ *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). *But see Goodwin v. Bruggeman-Hatch*, No. 13-cv-02973, 2014 WL 3057090, at *2 (D. Colo. May 28, 2014) (plaintiff agreed to Twitter’s terms of service when registering an account, thus making plaintiff bound by Twitter’s forum selection clause), *report and recommendation accepted in relevant part*, 2014 WL 3057198 (D. Colo. July 7, 2014).

⁸⁴ *Midamines SPRL Ltd. v. KBC Bank NV*, No. 12 Civ. 8089, 2014 WL 1116875 (S.D.N.Y. Mar. 18, 2014), *judgment aff’d*, 601 Fed. App’x 43 (2d Cir. 2015).

⁸⁵ *Id.* at *1.

⁸⁶ *Id.* at *6.

even if this were deemed to be a proper forum, given that [the forum selection clause] contains a choice-of-law provision selecting Belgian law.”⁸⁷

In *Elite Advantage, LLC v. Trivest Fund, I.V., LP*,⁸⁸ defendants argued that the district court should transfer the action to another district court, based in part upon a forum selection clause in franchise agreements stating that all legal claims be brought in the second district court.⁸⁹ The court noted that the plaintiffs in the case “recognized the direct relationship between the franchise agreements and their claims in this suit when they noted a breach of those agreements was an element of the RICO claims.”⁹⁰ This observation, along with the court’s multi-part finding that the action might have been brought in the second district court, and that both public and private interest factors supported a transfer, led the court to rule that the proceeding should indeed be transferred to the second district court.⁹¹

§ 73 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.⁹² As discussed in more detail

⁸⁷ *Id.* at *6, n. 12. See also *Lazare Kaplan Int’l Inc. v. KBC Bank N.V.*, 337 F. Supp. 3d 274, 303 (S.D.N.Y. 2018) (the fact that alleged conduct may trigger the application of RICO does not mean that the United States has “a strong public interest in pursuing this particular case in this forum,” and Belgium shares an interest in determining whether its citizens committed alleged RICO violations).

⁸⁸ *Elite Advantage, LLC v. Trivest Fund, I.V., LP*, No. 15-22146-CIV, 2015 WL 4982997 (S.D. Fla. Aug. 21, 2015).

⁸⁹ *Id.* at *2.

⁹⁰ *Id.* at *8.

⁹¹ *Id.* at *9-14.

⁹² *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”); *Valverde v. Xclusive Staffing, Inc.*, No. 16-cv-00671, 2017 WL 3866769, at *4-5 (D. Colo. Sept. 5, 2017) (notwithstanding the principle that one federal statute cannot preempt another, RICO claim was deemed unsustainable in light of the comprehensive statutory scheme of the

below, a preemption defense will fail where the RICO action would not interfere with state regulatory authority.

In *Snyder v. Acord Co.*,⁹³ appellants argued that a Colorado state statute governing the awarding of attorneys' fees was preempted by RICO and antitrust cases, and that the lower court erred in awarding attorneys' fees under the state statute. The Tenth Circuit disagreed, holding that the attorneys' fee provision of the RICO statute did not preempt state law, and that while the state statute requires fees only for the prevailing defendants, both RICO and the relevant federal antitrust statute govern fees only for prevailing plaintiffs.⁹⁴ Further, the Tenth Circuit found no legislative history in favor of the proposition that there should be any kind of heightened standard for awarding fees to defendants in RICO and antitrust cases.⁹⁵ Finally, the Tenth Circuit noted that “[c]ourts . . . have never construed [RICO’s attorneys’ fee] provision as precluding a prevailing defendant from recovering attorneys’ fees when authorized elsewhere.”⁹⁶

Fair Labor Standards Act); *Palmer v. Trump Model Mgmt., LLC*, 175 F. Supp. 3d 103, 108 (S.D.N.Y. 2016) (RICO claim brought by a foreign model with an H-1B visa, claiming to have been cheated out of wages, preempted by Immigration and Nationality Act, which “sets forth the specific administrative remedies available to an H-1B worker”). *But see Torres v. Vitale*, 954 F.3d 866, 869 (6th Cir. 2020) (Fair Labor Standards Act does not preclude RICO claims “when a defendant commits a RICO-predicate offense giving rise to damages distinct from the lost wages available under the FLSA”); *Bible v. United Student Aid Funds, Inc.*, 799 F.3d 633, 639 (2d Cir. 2015) (as a federal statute, RICO is not preempted by another federal statute, and there is no conflict between RICO and the Higher Education Act); *Ray v. Spirit Airlines, Inc.*, 767 F.3d 1220, 1221 (11th Cir. 2014) (federal laws do not preempt other federal laws, and subsequent federal legislation can only preclude plaintiffs’ civil RICO claims if Congress had repealed RICO provisions that authorized plaintiffs’ actions); *Simpson v. Sanderson Farms, Inc.*, 744 F.3d 702, 715 (11th Cir. 2014) (declining to rely on case citing *Trollinger* since case relied on abrogated standard regarding dismissal of a complaint); *Varela v. Gonzales*, 773 F.3d 704, 709 (5th Cir. 2014) (no need to decide whether a civil RICO claim based on allegations of depressed wages caused by the hiring of undocumented workers need ever proceed, as allegations were insufficient to state a claim); *CivCon Servs., Inc. v. Accesso Servs., LLC*, No. 20 C 1821, 2020 WL 6075869, at *5 (E.D. Ill. Oct. 15, 2020) (RICO claim not preempted by the National Labor Relations Act, as the NLRA was not the predicate claim under RICO); *Walker v. Beaumont Independent School Dist.*, No. 1:15-CV-379, 2016 WL 6666831, at *6 (E.D. Tex. June 17, 2016) (RICO claims not preempted by the National Labor Relations Act when predicate acts “constitute RICO predicate acts independently of whether they also violate labor law”).

⁹³ *Snyder v. Acord Corporation*, 811 Fed. App’x 447 (10th Cir. 2020).

⁹⁴ *Id.* at 463.

⁹⁵ *See id.*

⁹⁶ *Id.* at 464 (citing *Chang v. Chen*, 95 F.3d 27, 28 (9th Cir. 1996)).

In *Poretsky v. Hirise Engineering*,⁹⁷ the district court found that RICO claims brought in an action alleging a fraudulent denial of flood insurance claims were preempted by the National Flood Insurance Act, as the NFIA is “the more ‘precisely drawn [and] detailed statute,’”⁹⁸ and that “[p]ermitting duplicative RICO claims to proceed would be incompatible with Congress’s intent that the Act ‘reduce fiscal pressure on federal flood relief efforts.’”⁹⁹

§ 74 Implied Preemption Under Filed Rate Doctrine

In *Taffett v. Southern Co. (Taffett I)*,¹⁰⁰ 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.¹⁰¹ The Eleventh Circuit vacated the panel’s decision in *Taffett I* and granted rehearing.¹⁰²

On rehearing the Eleventh Circuit, en banc (*Taffett II*), held that the filed rate doctrine precluded the utility customers’ RICO claim.¹⁰³ The *Taffett II* court noted that under Alabama and

⁹⁷ *Poretsky v. Hirise Engineering*, No. 15-CV-4012, 2016 WL 5678880 (E.D.N.Y. Sept. 30, 2016).

⁹⁸ *Id.* at *3 (citing *Brown v. GSA*, 425 U.S. 820, 834 (1976)).

⁹⁹ *See id.* (citing *Campo v. Allstate Ins. Co.*, 562 F.3d 751, 754 (5th Cir. 2009)). *See also Melanson v. U.S. Forensic, LLC*, 183 F. Supp. 3d 376, 390 (E.D. N.Y. 2016) (RICO claim “precluded by the provisions of the National Flood Insurance Program, which provides the exclusive remedy for all claims arising from a [‘write your own’ insurance] carrier’s handling of claims” under a standard flood insurance policy); *Slay’s Restoration, LLC v. Wright Nat’l Flood Ins. Co.*, 226 F. Supp. 3d 589, 596 (E.D. Va. 2017) (RICO claims that have National Flood Insurance Program at the core of their suit are preempted by the National Flood Insurance Act).

¹⁰⁰ *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).

¹⁰¹ *Id.* at 856.

¹⁰² *Id.*

¹⁰³ *Taffett v. Southern Co.*, 967 F.2d 1483 (11th Cir. 1992).

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.¹⁰⁴ 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.”¹⁰⁵ 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.¹⁰⁶ 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.¹⁰⁷ 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.¹⁰⁸

The Eighth Circuit similarly held that the filed rate doctrine barred telephone customers’ civil RICO claim.¹⁰⁹ 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 measured by comparing the difference between the rates the commission originally approved and the rates it would have approved absent the fraudulent conduct.¹¹⁰

¹⁰⁴ *Id.* at 1490-91.

¹⁰⁵ *Id.* at 1491.

¹⁰⁶ *Id.* at 1492.

¹⁰⁷ *Id.* at 1493.

¹⁰⁸ *Id.* at 1494-95.

¹⁰⁹ *H.J. Inc. v. Nw. Bell Tel. Co.*, 954 F.2d 485 (8th Cir. 1992).

¹¹⁰ *Id.* at 492-94.

The Second Circuit reached a similar conclusion in *Wegoland, Ltd. v. NYNEX Corp.*¹¹¹ 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 fixed rate doctrine in actions for fraud committed on the regulatory agency, and that the fixed rate doctrine mandated dismissal of plaintiffs' RICO claims.¹¹²

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 fixed rate doctrine. In *Gelb v. American Telephone & Telegraph Co.*,¹¹³ 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 fixed rate doctrine. The court examined in detail the history and purpose of the fixed rate doctrine and concluded that, notwithstanding other courts' decisions to the contrary, the fixed rate doctrine would not preempt a RICO claim based on fraud which was only indirectly related to the tariff at issue.¹¹⁴ The court noted that it was "entirely consistent" with *Wegoland* to allow the plaintiffs' RICO cause of action to survive the fixed rate doctrine, and found "no reason to employ the doctrine in a manner that in effect extends a regulated entity's immunity from suit."¹¹⁵

¹¹¹ *Wegoland Ltd. v. NYNEX Corp.*, 27 F.3d 17 (2d Cir. 1994) accord *Rothstein v. Balboa Ins. Co.*, 794 F.3d 256, 262-63 (2d Cir. 2015).

¹¹² *Id.* See also *Sun City Taxpayers' Ass'n v. Citizens Util. Co.*, 45 F.3d 58, 62 (2d Cir. 1995) (applying *Wegoland* to affirm dismissal of the plaintiff's complaint and noting that "the filed rate doctrine applies whether or not the plaintiffs are suing for a class and regardless of the plaintiff's motivations in maintaining the litigation") (internal citations and quotations omitted); *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. Nw. 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).

¹¹³ *Gelb v. American Tel. & Tel. Co.*, 813 F. Supp. 1022 (S.D.N.Y. 1993).

¹¹⁴ *Id.* at 1029.

¹¹⁵ *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).

Another district court within the Second Circuit has relied on *Wegoland* to allow RICO claims to proceed against a utility.¹¹⁶ There, the plaintiffs brought a RICO claim alleging that the defendant telephone company failed to comply with the terms of its fixed tariff. The court held that the fixed rate doctrine did not bar plaintiffs' RICO claims because:

- (1) plaintiffs were attempting to enforce a tariff, not challenge the reasonableness of a fixed 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.¹¹⁷

A court in the Northern District of California concluded that the filed rate doctrine did not preclude a RICO claim where the regulatory authority at issue (the California Insurance Commissioner) "specifically disclaimed any authority to regulate the conduct challenged in the complaint."¹¹⁸ The decision was fact-specific and based on where "another court already attempted to defer to the Insurance Commissioner on exactly the type of claim before this court, and the Commissioner refused to accept the offered deference."¹¹⁹ Other courts have allowed RICO claims to proceed against a utility when the suit challenges the defendant's allegedly unlawful or fraudulent conduct, not the reasonableness of the defendant's rates.¹²⁰

¹¹⁶ See *Black Radio Network, Inc. v. NYNEX Corp.*, 44 F. Supp. 2d 565 (S.D.N.Y. 1999).

¹¹⁷ *Id.* at 574.

¹¹⁸ *Perryman v. Litton Loan Servicing, LP*, 2014 WL 4954674, at *8 (N.D. Cal. 2014).

¹¹⁹ *Id.* at *9.

¹²⁰ See, e.g., *Weiss v. Bank of America Corporation*, 153 F. Supp. 3d 831, 844 (W.D. Pa. 2015) ("Plaintiffs allege that Defendants engaged in a conspiracy to defraud home mortgage borrowers into funding sham captive reinsurance arrangements through illegal kickbacks. Simply put, '[t]he filed rate doctrine cannot offer any protection against such a charge.'" (internal citation omitted)); *Santos v. Carrington Mortg. Services, LLC*, 2015 WL 4162443, at *2-4 (D.N.J. 2015), motion to certify appeal granted, 2015 WL 11071479 (D.N.J. 2015) (in context of alleged "kickback scheme," concluding that filed rate doctrine did not bar plaintiff's claims for, inter alia, violations of RICO); *DiGiacomo v. Statebridge Co., LLC*, 2015 WL 3904594, at *6-7 (D.N.J. 2015). But see *Decambaliza v. QBE Holdings, Inc.*, 2013 WL 5777294, at *4-5 (W.D. Wis. 2013).

§ 75 Statutory Preemption

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

§ 76 Statutory Preemption—McCarran-Ferguson Act

RICO claims involving insurance fraud may be preempted by the McCarran-Ferguson Act,¹²¹ which provides that “the business of insurance”¹²² is a matter of state, not federal, control.

The McCarran-Ferguson Act precludes the application of a federal statute (like RICO) if:

- (1) the statute (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.¹²³

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

¹²¹ 15 U.S.C. §§ 1011-14. 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. § 1012(b).

¹²² In determining if a practice constitutes the “business of insurance,” a court must consider (1) whether the practice has the effect of transferring or spreading a policyholder’s risk; (2) whether the practice is an integral part of the policy relationship between the insurer and insured; and (3) whether it is limited to entities within the insurance industry. *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”).

¹²³ *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) (discussing the application of the McCarran-Ferguson Act to the the Truth in Lending Act). Other courts, however, have interpreted the Supreme Court’s decision in *U.S. Dep’t of Treasury v. Fabe*, 508 U.S. 491 (1993), as mandating only a three-prong test. Accordingly, these courts eliminate the “acts challenged under the statute constitute the business of insurance” requirement. *See, e.g., Autry v. Nw. Premium Servs., Inc.*, 144 F.3d 1037, 1042 (7th Cir. 1998) (holding that the three-prong test is the appropriate test to employ in McCarran-Ferguson Act preemption analysis); *Doe v. Norwest Bank Minn., N.A.*, 107 F.3d 1297, 1305 n.8 (8th Cir. 1997) (same); *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) (same).

provisions.¹²⁴ 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.¹²⁵ A RICO action will not be allowed to proceed where “the intrusion of RICO’s substantial damages provisions into a state’s regulatory program” would impair state law.¹²⁶ Similarly, courts have held that where state law mandates a shorter limitations period, RICO’s inherent four-year limitations period is preempted.¹²⁷

On the other hand, the McCarran-Ferguson Act does not preempt RICO claims where the RICO claim supplements or complements state law.¹²⁸ For example, the Ninth Circuit found that a RICO claim was not preempted by the McCarran-Ferguson Act even though California law

¹²⁴ See, e.g., *Riverview Health Inst. LLC v. Med. 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 (“application of RICO would impair and supersede the SCC’s ability to enforce several specific provisions of Virginia’s insurance code”); *Ludwick v. Harbinger Group, Inc.*, 161 F. Supp. 3d 769, (W.D. Mo. 2016); *Everson v. Blue Cross & Blue Shield of Ohio*, 898 F. Supp. 532 (N.D. Ohio 1994) (application of RICO would impair Ohio insurance law because “[t]he Ohio legislature has chosen to have Ohio insurance regulatory law enforced solely by the Superintendent of Insurance”); *Wexco Inc. v. IMC, Inc.*, 820 F. Supp. 194, 204 (M.D. Pa. 1993) (“the availability of a federal private remedy which would reward successful business plaintiffs . . . with treble damages, costs and attorney fees cannot help but upset the balance of relationships between insurance entities and insureds which are established and regulated by PUIPA”); *Senich v. Transamerica Premier Ins. Co.*, 766 F. Supp. 339, 340-341 (W.D. Pa. 1990) (RICO claims dismissed because “the defendants’ underlying insurance practices [we]re subject to the comprehensive Pennsylvania regulatory scheme”).

¹²⁵ 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 (noting that Ohio insurance law does not provide for a private right of action and therefore application of RICO would be inappropriate); *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”).

¹²⁶ *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).

¹²⁷ See *Campanelli v. Allstate Ins. Co.*, 97 F. Supp. 2d 1211, 1215 (C.D. Cal. 2000) (“Applying the four-year RICO time-bar in the [plaintiffs’] case would result in the ‘invalidation’ and ‘impairment’ of California’s mandatory one-year limitations period for suing an insurer under an insurance policy.”), *judgment rev’d on other grounds*, 322 F.3d 1086 (9th Cir. 2003).

¹²⁸ 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).

provided only for administrative remedies.¹²⁹ The Ninth Circuit concluded that because RICO and California law prohibited the same acts, RICO did not impair, invalidate, or supersede California law.¹³⁰

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.¹³¹ In its discussion of whether a federal law directly conflicts with state law the Court held: "When federal law does not directly conflict with state regulation and when application of the federal law would not frustrate any declared state policy or interfere with a state's administrative regime, the [Act] does not preclude its application."¹³² 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.¹³³

¹²⁹ *Merchants Home Delivery Serv., Inc. v. Frank B. Hall & Co.*, 50 F.3d 1486, 1492 (9th Cir. 1995); see also *Sabo v. Metro. Life Ins. Co.*, 137 F.3d 185, 194-95 (3d Cir. 1998) (holding that RICO cause of action can be brought despite Pennsylvania insurance scheme which did not provide for a private cause of action) (citing *Merchants Home Delivery*, 50 F.3d 1486).

¹³⁰ *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); *State Farm Mut. Auto. Ins. Co. v. Pointe Physical Therapy, LLC*, 68 F. Supp. 3d 744, 753 (E.D. Mich. 2014); *In re Managed Care Litig.*, 135 F. Supp. 2d 1253, 1259-60 (S.D. Fla. 2001) (holding that RICO action was not barred by the McCarran-Ferguson Act because the defendants failed to demonstrate that application of the RICO statute would significantly impair rather than advance the interests of state insurance laws or that the court's action would disrupt a state administrative system); *Dornberger v. Metro. Life Ins. Co.*, 961 F. Supp. 506, 520 (S.D.N.Y. 1997) (finding no preemption where federal law can be used to punish the same substantive conduct as state insurance law, regardless of differences in procedures or remedies); *J.J. White, Inc. v. William A. Graham Co.*, No. 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).

¹³¹ *Humana Inc. v. Forsyth*, 525 U.S. 299, 313 (1999).

¹³² *Id.* at 310.

¹³³ *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).

Following *Humana*, the Fourth Circuit has held that RICO does not impair the administrative scheme under Virginia insurance statutes.¹³⁴ 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.¹³⁵

§ 77 Statutory Preemption—National Labor Relations Act

Several courts have held that RICO claims are preempted by the National Labor Relations Act (“NLRA”)¹³⁶ where the “underlying conduct of the plaintiff’s RICO claim is wrongful only by virtue of the labor laws.”¹³⁷ Applying this analysis, several courts of appeals have found RICO claims preempted where the predicate acts involved unfair labor practices in violation of §§ 7 and 8 of the NLRA.¹³⁸

For example, in *Talbot v. Robert Matthews Distributing 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.¹³⁹ 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

¹³⁴ *Am. Chiropractic Ass’n v. Trigon Healthcare, Inc.*, 367 F.3d 212, 230-32 (4th Cir. 2004).

¹³⁵ *Weiss v. First Unum Life Ins. Co.*, 482 F.3d 254 (3d Cir. 2007).

¹³⁶ 29 U.S.C. § 158.

¹³⁷ *Talbot v. Robert Matthews Distrib. Co.*, 961 F.2d 654, 662 (7th Cir. 1992).

¹³⁸ *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”).

¹³⁹ *Talbot v. Robert Matthews Distrib. Co.*, 961 F.2d 654, 662 (7th Cir. 1992).

union members who engaged in union activity.¹⁴⁰ 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.¹⁴¹ 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.¹⁴² Several district courts have ruled that RICO claims are preempted under similar circumstances.¹⁴³

On the other hand, the NLRA does not preempt RICO claims based on predicate acts that are illegal independent of the labor laws.¹⁴⁴ For example in *Teamsters Local 372 v. Detroit*

¹⁴⁰ *Brennan v. Chestnut*, 973 F.2d 644, 647 (8th Cir. 1992).

¹⁴¹ *Tamburello v. Comm-Tract Corp.*, 67 F.3d 973, 978 (1st Cir. 1995).

¹⁴² *Adkins v. Mireles*, 526 F.3d 531, 542 (9th Cir. 2008).

¹⁴³ 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. N. Cal. & N. 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 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).

¹⁴⁴ 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); *Raineri Const., LLC v. Taylor*, 63 F. Supp. 3d 1017, 1027-28, 201 L.R.R.M. (BNA) 3388 (E.D. Mo. 2014); *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

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.¹⁴⁵ 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 primary jurisdiction, even if labor relations turn out to be implicated in some fashion.”¹⁴⁶ 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.¹⁴⁷

RICO claims also may be preempted by § 301 of the Labor Management Relations Act (“LMRA”).¹⁴⁸ Preemption under the LMRA depends on whether the RICO claim involves rights and obligations that exist independent of the collective bargaining agreement.¹⁴⁹ 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

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).

¹⁴⁵ *Teamsters Local 372*, 956 F. Supp. at 761; see also *Buck Creek Coal, Inc. v. United Workers of Am.*, 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).

¹⁴⁶ *Baker v. IBP, Inc.*, 357 F.3d 685, 689 (7th Cir. 2004).

¹⁴⁷ See *Adkins v. Mireles*, 526 F.3d 531, 542 (9th Cir. 2008).

¹⁴⁸ 29 U.S.C. § 185.

¹⁴⁹ *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 Consol. Indus., 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).

therefore preempted.¹⁵⁰ Similarly, a RICO claim will be preempted by the Railway Labor Act (“RLA”)¹⁵¹ if the RICO claim depends on rights arising under a collective bargaining agreement.¹⁵² 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.¹⁵³

§ 78 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 1980,¹⁵⁴ the Employee Retirement Income Security Act (“ERISA”),¹⁵⁵ Section 210 of the Energy Reorganization Act of 1974,¹⁵⁶ § 405 of the Surface Transportation Assistance Act of 1982,¹⁵⁷ the Federal Insecticide, Fungicide, and Rodenticide Act (“FIFRA”),¹⁵⁸ as well as the Civil Service Reform Act (“CSRA”).¹⁵⁹ In contrast,

¹⁵⁰ See *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 213 (1985) (dismissing state law tort claims because they were inexplicably intertwined with the terms of a collective bargaining agreement).

¹⁵¹ 45 U.S.C. §§ 151 to 188.

¹⁵² See *Underwood v. Venango River Corp.*, 995 F.2d 677, 685 (7th Cir. 1993) (affirming dismissal of RICO claims because “the plaintiffs simply cannot overcome the fact that their RICO claim alleging generic wire and mail fraud depends solely upon an interpretation of the rights created in the collective-bargaining agreement”), *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) (affirming dismissal of RICO claims, noting that “[t]he predicate acts for [plaintiff’s] RICO claims would not be wrongful in the absence of the obligation contained in the collective-bargaining agreement”); *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).

¹⁵³ *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).

¹⁵⁴ 12 U.S.C. § 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). *But see Rosen v. Provident Life and Acc. Ins. Co.*, 2015 WL 260839 (N.D. Ala. 2015) (concluding based on facts presented that civil RICO claim might not be preempted by ERISA, and reserving decision on that issue).

¹⁵⁵ *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).

¹⁵⁶ 42 U.S.C. § 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).

¹⁵⁷ 49 U.S.C. § 31105; *Norman v. M.S. Carriers, Inc.*, 741 F. Supp. 148, 149 (W.D. Tenn. 1990) (dismissing RICO claim because § 405 provided exclusive remedy where plaintiff discharged for refusing to violate safety regulations).

¹⁵⁸ 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).

¹⁵⁹ Pub. L. No. 95-454, 92 Stat. 1111 (codified as amended in scattered sections of 5 U.S.C.); see *Abou-Hussein v. Mabus*, 2015 WL 5178460, at *2 (D.S.C. 2015), appeal dismissed, (4th Cir. 15-2156)(May 3, 2016) (holding that the CSRA preempts a civil RICO claim by a member of the civil service against unknown federal agents who allegedly

at least one court has expressly held that the Cigarette Labeling and Advertising Act did not preempt civil RICO claims,¹⁶⁰ while another held such claims are not preempted by the Higher Education Act.¹⁶¹

conspired to frame the plaintiff by making false reports to the General Counsel for the Navy); *Bloch v. Executive Office of the President*, 164 F. Supp. 3d 841, 2016 I.E.R. Cas. (BNA) 36035 (E.D. Va. 2016); *Ferris v. Am. Fed'n of Gov't Emps.*, 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).

¹⁶⁰ See *Falise v. Am. Tobacco Co.*, 94 F. Supp. 2d 316, 357 (E.D.N.Y. 2000) (concluding that the Cigarette Labeling and Advertising Act does not apply to deliberate acts of deception or misrepresentation).

¹⁶¹ *Bible v. United Student Aid Funds, Inc.*, 799 F.3d 633, 639 (7th Cir. 2015).

XII. THIRD-PARTY PRACTICE

§ 79 Contribution and Indemnification

RICO contains no express provisions concerning claims for contribution or indemnification.¹ Most district courts have acknowledged that common law contribution and indemnification are not available under RICO.²

No court of appeals has analyzed the issue of traditional third-party contribution and indemnification under RICO.³ However, in *United States v. Sasso*, the Second Circuit allowed “forward-looking” equitable contribution under § 1964(a).⁴ Following a criminal RICO prosecution, the government “sought equitable relief” under civil RICO in part to offset the effects

¹ See *Friedman v. Hartmann*, 787 F. Supp. 411, 416 (S.D.N.Y. 1992) (“RICO does not expressly provide for a right of contribution[.]”).

² See, e.g., *In re Platinum-Beechwood Litig.*, 427 F. Supp. 3d 395, 443 (S.D.N.Y. 2019) (“As a matter of law, there is no right to contribution under RICO.”) (collecting cases) (internal quotation omitted); *React Presents, Inc. v. Eagle Theater Ent., LLC*, No. 16-13288, 2018 WL 3859888, at *4 (E.D. Mich. Aug. 10, 2018) (“[C]ourts have held that there is not an express or implied right to indemnification or contribution in civil RICO cases.”) (collecting cases); *Paskenta Band of Nomlaki Indians v. Crosby*, No. 2:15-CV-00538-MCE-CMK, 2016 WL 3854237, at *3 (E.D. Cal. July 15, 2016) (dismissing third-party contribution claims because “[n]o rights of contribution are available to defendants under RICO.” (quoting *Nelson v. Bennett*, 662 F. Supp. 1324, 1339, n.23 (E.D. Cal. 1987))); *Prior v. Teamsters Loc. 101*, No. 3:14cv527, 2015 WL 500173, at *3 (E.D. Va. Feb. 4, 2015) (“The RICO statute does not provide either an express or implied right to contribution.”); *Sundance Servs., Inc. v. Roach*, No. 10-110 JP/CEG, 2011 WL 3608014, at *5 (D.N.M. July 7, 2011) (collecting cases); *Harmelin v. Man Fin., Inc.*, No. 06-1944, 2007 WL 2932866, at *4 (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 *6 (D.N.J. Sept. 13, 2007) (no right to contribution under RICO), *aff’d*, 351 F. App’x 662 (3d Cir. 2009); *Daniels v. Bursey*, 329 F. Supp. 2d 975, 982 (N.D. Ill. 2004) (“[D]efendants in civil RICO actions are not entitled to seek either contribution or indemnification from third parties.”); *Loc. 875 I.B.T. Pension Fund v. Pollack*, 49 F. Supp. 2d 130, 132 n.6 (E.D.N.Y. 1999); *First Am. Corp. v. Al-Nahyan*, 948 F. Supp. 1107, 1118 (D.D.C. 1996) (observing that “[c]ourts have uniformly denied contribution” and indemnification claims “under RICO”) (collecting cases); *Friedman v. Hartmann*, 787 F. Supp. 411, 417-18 (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); *Boone v. Beacon Bldg. Corp.*, 613 F. Supp. 1151, 1153-54 (D.N.J. 1985) (declining to acknowledge a right to contribution 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); *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” (emphasis omitted) (quoting *Texas Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 646 (1981))).

³ But see *Cnty. of Hudson v. Janiszewski*, 351 F. App’x 662, 666 (3d Cir. 2009) (summarizing the district court’s reasoning before affirming: “there is no right to indemnification or contribution under RICO.” (citing *Friedman*, 787 F. Supp. at 415)).

⁴ *United States v. Sasso*, 215 F.3d 283, 290-91 (2d Cir. 2000).

of “organized crime’s control, infiltration and corruption” of an organization afflicted by the defendants’ “pattern of racketeering activity[.]”⁵ The relief sought included “the establishment of a monitorship[.]” paid for by the defendants, “to oversee [the organization’s] activities and to eliminate corruption. . . .”⁶ The government later moved for contribution by one defendant, who argued the contribution sought was improper.⁷ The district court ordered the defendant to contribute to the fund, reasoning that contribution in this context “was not tantamount to an order for disgorgement of past ill-gotten gains but rather was relief that was forward-looking[.]”⁸ The defendant appealed, contesting the government’s standing, the amount of the contribution, and the court’s authority to order such contribution.⁹

On appeal, the Second Circuit rejected the defendant’s standing argument, remanded the “amount of contribution” issue, and held “a contribution order was a permissible exercise of the [district] court’s discretion” in light of the “broad” nature of the remedies that Congress intended Section 1964(a) to create.¹⁰ The court reasoned that though Section 1964(a) “does not expressly mention orders for contribution, it states that the types of relief authorized are ‘not limited to’ those listed.”¹¹ In so holding, the court distinguished *United States v. Carson*, where the Second Circuit rejected a “disgorge[ment]” order under Section 1964(a) and remanded for the lower court to discern how much of the order was meant “solely to prevent and restrain future RICO violations.”¹² Unlike in *Carson*, the Second Circuit in *Sasso* considered contribution to a monitorship fund to be sufficiently “forward-looking.”¹³ The court interpreted Section 1964(a) to

⁵ *Id.* at 284, 285 (internal citation omitted).

⁶ *Id.* at 286.

⁷ *Id.* at 287.

⁸ *Id.* at 288.

⁹ *Id.* at 289.

¹⁰ *Id.* at 289-290, 292.

¹¹ *Id.*

¹² *Id.* at 291 (citing *United States v. Carson*, 52 F.3d 1173, 1182 (2d Cir. 1995)).

¹³ *Id.*

require the district court “to ‘mak[e] due provision for the rights of innocent persons.’”¹⁴ As such, the court held the district court had the power “to conclude that the equities lie not with [the defendant] but with innocent members of the [organization] who did not participate in the criminal activities of [the defendant] and his coconspirators[.]” and to require the defendant to contribute to the fund.¹⁵

To illustrate the district court consensus that third-party contribution and indemnification claims are not available under civil RICO, in *Friedman v. Hartmann*,¹⁶ the United States District Court for the Southern District of New York applied the two-part test regarding the right to contribution articulated by the Supreme Court in an antitrust case, *Texas Industries, Inc. v. Radcliff Materials, Inc.*¹⁷ The Supreme Court 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.”¹⁸ In applying the *Texas Industries* test, the court concluded that RICO defendants could not bring a third-party action for contribution or indemnification against their attorneys.¹⁹ 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.”²⁰ The court

¹⁴ *Id.* at 292 (citing 18 U.S.C. § 1964(a)).

¹⁵ *Id.* at 291-92.

¹⁶ *Friedman v. Hartmann*, 787 F. Supp. 411 (S.D.N.Y. 1992).

¹⁷ *Texas Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 638 (1981).

¹⁸ *Id.* at 638 (citing *Nw. Airlines, Inc. v. Transp. Workers Union of Am., AFL-CIO*, 451 U.S. 77, 90-91 (1981)).

¹⁹ *Friedman*, 787 F. Supp. at 417-18. 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) (“RICO contains no affirmative creation (either by its express language or clear implication) of a right to contribution. Further, this Court is disinclined to fashion a common law of contribution.”), *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) (noting that “[Congress’s] refusal to expressly authorize a contribution provision in RICO is not without significance”; *Daniels v. Bursey*, 329 F. Supp. 2d 975, 981-82 (N.D. Ill. 2004) (determining that there is no right to indemnification under RICO).

²⁰ *Friedman*, 787 F. Supp. at 416-17.

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.’”²¹ Accordingly, the court concluded no right to contribution arises under RICO.²² The court applied the same reasoning to reject the claim for indemnification.²³

The *Friedman* court similarly held RICO preempted a third party contribution and indemnity claim sought under state malpractice law.²⁴ Even though the third-party plaintiffs argued negligent legal advice from third-party defendants as a defense, the original RICO claims against the third-party plaintiffs were for intentional conduct.²⁵ According to the court, to shift blame for such intentional conduct to “negligent third-party defendants” would be contrary to the policy of RICO.²⁶

In contrast, the United States District Court for the Northern District of Illinois permitted defendants to recover attorney fees from a plaintiff after the plaintiff “voluntarily dismissed” RICO claims.²⁷ In *Tsai v. Karlik*, the defendants sought attorney fees under an indemnification agreement with the plaintiff.²⁸ Though the court did not directly analyze the issue under RICO, because the RICO claims had been previously dismissed, the plaintiff argued it would be against state “public policy” to permit the indemnification claim, or “akin to ‘[an] agreement [] to indemnify against intentional misconduct[.]’”²⁹ The court rejected that contention, differentiating

²¹ *Id.* at 417 (citing *Texas Indus., Inc.*, 451 U.S. at 640).

²² *Id.*

²³ *Id.* at 418.

²⁴ *Id.* at 418-19.

²⁵ *Id.*

²⁶ *Id.* at 419.

²⁷ *Tsai v. Karlik*, No. 14 C 5709, 2016 WL 5373075, at *1 (N.D. Ill. Sept. 26, 2016), *appeal docketed*, No. 16-3763 (7th Cir. Oct. 26, 2016).

²⁸ *Id.* at *3.

²⁹ *Id.* at *4.

“liability indemnification” from “post-judgment fee shifting,” and distinguished that the defendants “do not seek to require [plaintiff] to indemnify them for allegedly wrongful acts” in part because the RICO claims were merely “unproven allegations.”³⁰

At least one district court has upheld a contract-based claim for contribution. In *Sikes v. American Telephone & Telegraph Co.*,³¹ the defendants were accused of violating RICO by marketing and operating a 900-number telephone game.³² Defendant Teleline, Inc. developed and operated the game, while defendant AT&T provided billing services.³³ Before the lawsuit was filed, Teleline had expressly agreed to indemnify AT&T for any legal liability arising from operation of the game.³⁴ The agreement also contained an express contribution provision.³⁵ 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.³⁶ However, the court permitted the contract-based claim for contribution to go forward.³⁷ The court reasoned that there is “no harm” in permitting parties that expressly agreed to share the penalties of the unlawful conduct in which they both engaged to fulfill that agreement.³⁸ Because liability would be shared between the parties, neither would “escape without punishment[,]” and RICO’s deterrent purposes would still be served.³⁹

At least one district court did not consider seeking contribution under RICO to be a frivolous argument worthy of sanctions. In *Vicki Roy Home Health Care, Inc. v. Villarreal*, third-

³⁰ *Id.* at *5.

³¹ *Sikes v. Am. Tel. & Tel. Co.*, 841 F. Supp. 1572 (S.D. Ga. 1993).

³² *Id.* at 1576.

³³ *Id.*

³⁴ *Id.* at 1581.

³⁵ *Id.*

³⁶ *Id.* at 1582.

³⁷ *Id.* at 1582-83.

³⁸ *Id.* at 1582.

³⁹ *Id.*

party defendants moved to dismiss the third-party complaint against them, and sought sanctions against the third-party plaintiff for seeking contribution or indemnification, arguing “a RICO defendant cannot bring a contribution claim.”⁴⁰ The United States District Court for the Southern District of Texas dismissed the underlying RICO action, and thus did not “reach the merits of [the third-party defendants’] motion to dismiss.”⁴¹ The court also denied the third-party defendants’ motion for sanctions.⁴² The court noted it was not bound by the many district court cases cited “reject[ing] the proposition that RICO provides defendants with a right of contribution or indemnity.”⁴³ The court reasoned “[c]ourts holding that RICO provides defendants with no right of contribution have nonetheless recognized that contribution, subrogation, or indemnification may be available under state law.”⁴⁴ Moreover, the court cited to *Sasso*, which acknowledged a court may have “equitable authority to order contribution” under civil RICO.⁴⁵ For these reasons, seeking contribution was “nonfrivolous.”⁴⁶

⁴⁰ *Vicki Roy Home Health Care, Inc. v. Villarreal*, No. CV B-10-59, 2011 WL 13269172, at *2 (S.D. Tex. June 16, 2011).

⁴¹ *Id.* at *1, *6.

⁴² *Id.* at *6.

⁴³ *Id.* at *6 (internal citations omitted).

⁴⁴ *Id.* at *7 (collecting cases).

⁴⁵ *Id.* at *6 (citing *United States v. Sasso*, 215 F.3d 283, 289-92 (2d Cir. 2000)).

⁴⁶ *Id.* at *7 (internal citation omitted).

XIII. SURVIVAL, ASSIGNMENT, AND ARBITRATION

§ 80 Survival

RICO contains no express provision regarding survival or abatement of civil claims. Accordingly, 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.”¹ As discussed below, the determination as to survival depends on whether RICO is considered more penal or remedial in nature.

In the absence of a specific statutory directive, federal common law governs the survival of a cause of action founded on federal law.² The general rule is that an action for a penalty does not survive the death of the plaintiff.³ 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.⁴

The Fourth and Fifth Circuits have held that RICO claims survive the death of a party.⁵ Although the Fourth Circuit acknowledged that RICO contains criminal penalties and that an action for a penalty does not survive, the court stated that the “primary purpose” of RICO is “remedial.”⁶ The Fourth Circuit observed that “civil RICO is a square peg, and squeeze it as we

¹ Fed. R. Civ. P. 25(a)(1).

² *Zatuchni v. Sec’y of Health & Human Servs.*, 516 F.3d 1312, 1329 n.8 (Fed. Cir. 2008) (collecting cases); *Smith v. No. 2 Galesburg Crown Fin. Corp.*, 615 F.2d 407, 413 (7th Cir. 1980), *overruled on other grounds by Pridegon v. Gates Credit Union*, 683 F.2d 182 (7th Cir. 1982); *Hilao v. Estate of Marcos*, 103 F.3d 767, 773-74 (9th Cir. 1996) (applying federal common law to determine whether an action for an intentional tort abates upon the death of either party); *Sullivan v. Associated Billposters & Distribs.*, 6 F.2d 1000, 1004 (2d Cir. 1925) (looking to federal common law to determine whether tort action abated upon a party’s death).

³ *Schreiber v. Sharpless (Ex parte Schreiber)*, 110 U.S. 76, 80 (1884) (“At common law, actions on penal statutes do not survive”); *Smith v. Dep’t of Human Servs.*, 876 F.2d 832, 834-35 (10th Cir. 1989).

⁴ *Smith*, 876 F.2d at 835 (applying the test to an action under the ADEA and finding that the action did not survive the death of the plaintiff); *Murphy v. Household Fin. Corp.*, 560 F.2d 206 (6th Cir. 1977) (examining the factors in the context of the Truth in Lending Act and concluding that the action survived the death of the plaintiff).

⁵ *Malvino v. Delluniversita*, 840 F.3d 223 (5th Cir. 2016); *Faircloth v. Finesod*, 938 F.2d 513, 517 (4th Cir. 1991).

⁶ *Faircloth*, 938 F.2d at 517-18.

may, it will never comfortably fit in the round holes of the remedy/penalty dichotomy.”⁷ Similarly, the Fifth Circuit has quoted *Faircloth’s* “square peg/round hole” analogy and stated that “in deciding the survivability question which turns on the primary nature of the statute, we follow the Supreme Court’s guidance that RICO’s remedial purpose predominates and holds that a claim under the statute survives the victim’s death.”⁸

Several district courts agree that civil RICO claims are remedial in nature and therefore survive.⁹ Other district courts have held that RICO claims are penal in nature and therefore do not survive the death of a party.¹⁰

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.¹¹ 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.¹²

⁷ *Id.* quoted in *Malvino*, 840 F.3d at 230.

⁸ *Malvino*, 840 F.3d at 230, citing *PacifiCare Health Sys. Inc v. Book*, 538 U.S. 401, 406 (2003).

⁹ *See Saleh v. Merchant*, No. 14-cv-09186, 2017 WL 1478000, at *5 (N.D. Ill. Apr. 25, 2017) (noting that “the Northern District of Illinois has become a pocket of dissent, with a number of cases finding RICO claims to be penal rather than remedial” in contrast to most other district courts); *Bradley v. Franklin Collection Serv., Inc.*, No. 5:10-cv-1537, 2012 WL 12895015, at *2-4 (N.D. Ala. Apr. 10, 2012) (RICO claims are remedial because “civil RICO recovery still primarily seeks to remedy wrongs suffered by plaintiffs”); *Allen ex rel. Allen v. Devine*, No. 09-cv-668, 2011 WL 5117619, at *3 (E.D.N.Y. Oct. 25, 2011) (noting that Congress viewed RICO recovery as a “victim’s remedy”); *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).

¹⁰ *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).

¹¹ *See Bank of N. Ill. v. Nugent*, 584 N.E.2d 948, 958-59 (Ill. App. Ct. 1991).

¹² *Id.*

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.¹³ 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.

§ 81 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.¹⁴ 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.”¹⁵ The court relied on precedent holding certain Clayton Act claims assignable only by express terms. Because the Clayton Act provision¹⁶ “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.¹⁷

The Ninth Circuit, in *Clymer v. Elder*, affirmed the dismissal of a RICO action brought by the transferee of a conveyance of land on the ground that the assignment transferred “one half of the interest in . . . property and any of [the assignor’s] rights, title and interest in said property” but did not convey a RICO cause of action.¹⁸ The court emphasized the phrase “in said property” and reasoned that the assignment conveyed claims for injury to the property, but not for fraud, which

¹³ *PacifiCare Health Sys. Inc. v. Book*, 538 U.S. 401, 406 (2003).

¹⁴ *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).

¹⁵ *Lerman*, 10 F.3d at 112.

¹⁶ 15 U.S.C. § 15.

¹⁷ *Lerman*, 10 F.3d at 112.

¹⁸ *Clymer v. Elder*, 671 F. App’x 500, 501 (9th Cir. 2016).

was the basis of the RICO claim. By implication the court, however, reasoned that a “proper assignment” could provide the basis for standing to assert a RICO claim.

The Seventh Circuit allowed the assignment of a RICO claim in *Perry v. Globe Auto Recycling, Inc.*¹⁹ There, the court held that an assignment for “all claims, demands, and causes of action of whatever kind and nature” arising out of a car seizure was sufficient to transfer the right to bring a RICO claim.²⁰

Most of the district courts that have addressed the issue have also concluded that RICO claims are assignable.²¹ Further, the assignment of a RICO claim carries with it the assignor’s rights, interests, and limitations in that claim to the assignee.²²

§ 82 Arbitrability of RICO Claims

The Supreme Court held in *Shearson/American Express, Inc. v. McMahon*²³ that RICO claims are arbitrable. In reaching its conclusion, the Court relied heavily on its prior decision in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*,²⁴ in which the Court held that antitrust claims are arbitrable.

¹⁹ 227 F.3d 950, 952-53 (7th Cir. 2000).

²⁰ *Id.*

²¹ *Zap Cellular, Inc. v. Kurland*, No. 15 Civ. 682, 2015 WL 8207315, at *6 (E.D.N.Y. Dec. 6, 2015) (assignment of “all . . . causes of action formerly attributed to [plaintiff’s assignor]” is sufficiently unambiguous to find that the assignment was express); *Brown v. Bank of Am.*, No. CV 12-02009, 2014 WL 12707378, at *1 (C.D. Cal. Feb. 24, 2014) (“A RICO claim can be assigned only through an express assignment”); *Mid-Town Surgical Ctr., L.L.P. v. Humana Health Plan of Tex., Inc.*, 16 F. Supp. 3d 767, 774 (S.D. Tex. 2014) (“numerous federal courts have concluded that a party may obtain derivative standing through assignment to assert the RICO claim of another party”) (collecting cases); *Resolution Trust Corp. v. S & K Chevrolet*, 868 F. Supp. 1047, 1054 (C.D. Ill. 1994); *Federal Ins. Co. v. Parellio*, 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).

²² See *Perry*, 227 F.3d at 953 (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).

²³ *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220 (1987).

²⁴ *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985).

The arbitrability of RICO claims raises strategic issues which for practitioners. For example, a party may waive its right to arbitration by failing to demand arbitration on a timely basis.²⁵ A determinative factor in deciding if a party has waived its right to arbitration is whether the delay prejudiced the opposing party.²⁶ A party who, following the district court's stay of litigation, fails or refuses to participate in arbitration faces dismissal as a potential result.²⁷

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.²⁸ Unless a stay of arbitration is entered, all proceedings pursuant to an

²⁵ See, e.g., *Tech. in P'ship, Inc. v. Rudin*, 538 F. App'x 38, 39 (2d Cir. 2013) (party waived the right to arbitrate after a fifteen-month delay, a motion to dismiss, and the deposition of a key witness); *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 Express 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); *cf. Sharif v. Wellness Int'l Network, Ltd.*, 376 F.3d 720, 726-27 (7th Cir. 2004) (defendant did not waive the right to arbitration after filing a motion to dismiss but not removing the case to federal court, beginning discovery, or setting a trial date). *But see Aqualucid Consultants, Inc. v. Zeta Corp.*, 721 F. App'x 414, 418 (6th Cir. 2017) (no waiver of right to arbitration because plaintiff could not show prejudice caused by defendant's two-year delay in raising the issue of arbitration); *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).

²⁶ 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).

²⁷ *Griggs v. S.G.E. Mgmt. L.L.C.*, 905 F.3d 835, 841 (5th Cir. 2018) (dismissing stayed action after party, who opposed the court's decision to compel arbitration, had not submitted the case to arbitration a year and a half after arbitration was compelled).

²⁸ 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).

arbitration agreement are enforceable, and unasserted contractual rights may be waived.²⁹ Additionally, a prior arbitration may have a preclusive effect on RICO claims to be litigated.³⁰ The circuits, however, are split as to whether the district court should stay or dismiss the non-arbitrable claims.³¹

In determining whether a RICO claim is within the intended scope of an arbitration agreement, courts are guided by the principle that they must analyze the arbitration provision with the goal of effectuating the intent of the parties to the contract,³² and any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration.³³ The Supreme Court

²⁹ *McMahon v. Shearson/American Express 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). *But see Physicians Indem. Risk Retention Grp. v. Risk Mgmt. Ctr., Inc.*, No. 2:09-cv-01544, 2010 WL 11579772, at *2 (D. Nev. Mar. 5, 2010) (period during which a party contesting an arbitration agreement must appoint an arbitrator is tolled until the court resolves the applicability of the agreement).

³⁰ *See V. Cars, LLC v. Chery Auto Co.*, 603 F. App'x 453, 458 (6th Cir. 2015) (plaintiff's RICO claims were precluded by a prior arbitration decision); *Grynberg v. BP, P.L.C.*, 527 F. App'x 278, 281-82 (5th Cir. 2013) (dismissing plaintiff's RICO claims because they were precluded by a final arbitration decision on the merits); *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); *ChampionsWorld, LLC v. U.S. Soccer Fed., Inc.*, 890 F.Supp.2d 912, 931-34 (N.D. Ill. 2012) (collateral estoppel applied to plaintiff's RICO claims following a binding arbitration decision). *But see Green Tree Financial Corp. v. Honeywood Dev. 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).

³¹ *See Katz v. Cellco P'ship*, 794 F.3d 341, 344-47 (2d Cir. 2015) (aligning Second Circuit with Third, Seventh, Tenth and Eleventh Circuits requiring the district court to enter a stay; departing from First, Fifth, and Ninth Circuits requiring dismissal of non-arbitrable claims); *but see Wells Fargo Advisors, L.L.C. v. Tucker*, No. 15-CV-7722, 2016 WL 6208566, at *3 (S.D.N.Y. Oct. 21, 2016) (reasoning – in a non-RICO case – that a stay is not required where no complaint but only a petition to compel arbitration has been filed).

³² *Brooks v. Field*, No. 6:14-cv-2267, 2016 WL 1165409, at *2-4 (D.S.C. Mar. 25, 2016) (denying motion to compel arbitration where agreement limited arbitration to “notes with a face value of less than \$50,000,” and with RICO trebling, the value of the claims involving on the average notes valued at \$30,000, exceeded the arbitration limitation); *see also Flagg v. First Premier Bank*, 644 F. App'x 893, 896 (11th Cir. 2016) (denying motion to compel arbitration, reasoning that the intent of the parties was to arbitrate only with a now-unavailable arbitrator).

³³ *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

compelled arbitration in *PacifiCare Health Systems, Inc. v. Book*,³⁴ 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 Technologies, Inc.*³⁵ 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 intended their “no punitive damages” language to mean “no treble damages” under RICO.³⁶ 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.³⁷

In some instances, parties to an agreement require arbitration of disputes and specify an exclusive arbitrator or arbitration forum. Issues arise when the arbitrator or arbitration forum is no longer able to conduct the arbitration and the agreement does not provide for a substitute arbitrator. In such cases, courts have permitted the RICO claims to proceed to trial where they determine that the selection of the arbitrator was integral to the agreement.³⁸ However, where the

action, subject to arbitration); *Gen. 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).

³⁴ *PacifiCare Health Sys. Inc. v. Book*, 538 U.S. 401 (2003).

³⁵ *Paladino v. Avnet Computer Techs., Inc.*, 134 F.3d 1054, 1062 (11th Cir. 1998) (mandatory arbitration clause in employment contract that provided that an arbitrator could only award damages for breach of contract claims denied employee ability to obtain meaningful relief under Title VII).

³⁶ *PacifiCare*, 538 U.S. at 406-07.

³⁷ *Id.* at 407 n.2.

³⁸ *See Moss v. First Premier Bank*, 835 F. 3d 260, 265-67 (2d Cir. 2016) (mandatory language, pervasive references to the specified forum, and lack of alternative in the arbitration agreement indicated that the selection of forum was integral to the agreement) (citing *In re Salomon Inc. S'holder's Derivative Litig.*, 68 F.3d 554, 557-58 (2d Cir. 1995)); *Flagg v. First Premier Bank*, 644 F. App'x 893, 896-97 (11th Cir. 2016) (choice of forum was integral to the agreement because the defendant continued to specify the forum in its arbitration agreements even though the forum was no longer available); *Ranzy v. Tijerina*, 393 F. App'x 174, 176 (5th Cir. 2010) (intent of the parties was clear that the choice of forum was integral to the agreement through the use of mandatory language). *But see Green v. U.S. Cash Advance Ill. LLC*, 724 F.3d 787, 793 (7th Cir. 2012) (district court should appoint an arbitrator when the one specified

agreement specifies several arbitrators, all of whom were unavailable, courts have evaluated whether the specified arbitrators were integral to the arbitration clause, and if not, required the appointment of a substitute arbitrator.³⁹

Non-parties to agreements containing arbitration clauses can invoke arbitration as the exclusive remedy to decide a claim involving a party to an arbitration clause where the non-signatory can establish that the dispute is “intertwined” with the arbitration agreement.⁴⁰ This issue of binding non-signatories to arbitration clauses is influenced by the doctrine of equitable estoppel, *i.e.*, whether the relationship between the signatory and the non-signatory is sufficiently “close” that the signatory cannot object to the dispute being governed by arbitration.⁴¹

in the agreement is not available); *Khan v. Dell, Inc.*, 669 F.3d 350, 356 (3d Cir. 2012) (ambiguity in arbitration agreement as to whether “exclusively” modified the use of arbitration or the selection of a specific arbitrator was resolved in favor of compelling arbitration).

³⁹ *Mounts v. Midland Funding LLC*, 257 F. Supp. 3d 930, 944 (D. Tenn. 2017) (arbitration agreement listed multiple arbitrators that could administer the claims and therefore the appointment of any one of them was not integral to the agreement); *see also Frazier v. Western Union Co.*, 377 F. Supp. 3d 1248, 1266-67 (D. Colo. 2019) (“Five federal circuit courts, the Third, Sixth, Seventh, Eighth, and Ninth Circuits, have upheld arbitration agreements despite their naming of an unavailable arbitrator . . . Conversely, the Second and Fifth Circuits have found circumstances where [a specific unavailable arbitrator] is integral to the arbitration agreement, invalidating the agreements”).

⁴⁰ *Frazier*, 377 F. Supp. at 1262-64 (plaintiffs could enforce arbitration clause against non-signatory defendants because the plaintiffs’ claims against all defendants were intertwined and all arose out of the same contract containing the arbitration clause); *Bankers Conseco Life Ins. Co. v. Feuer*, No. 16 Civ. 7546, 2018 WL 1353279, at *4-7 (S.D.N.Y. Mar. 15, 2018) (signatory and non-signatory defendants were significantly intertwined to apply equitable estoppel and compel arbitration); *Moss v. BMO Harris Bank, N.A.*, 24 F. Supp. 3d 281, 286-92 (E.D.N.Y. 2014) (compelling arbitration because all defendants were “linked textually” to the arbitration provisions); *Riley v. BMO Harris Bank, N.A.*, 61 F. Supp. 3d 92, 98-102 (D.D.C. 2014) (arbitration clause enforced against non-signatories because the claims rested “heavily on the existence of the underlying [] agreements” and the defendants had “a close relationship to the [] activities and a textual connection to the arbitration provisions”).

⁴¹ *Bankers Conseco Life Ins. Co.*, 2018 WL 1353279, at *7 (plaintiffs could not “make conspiracy allegations connecting signatories and non-signatories and then avoid arbitration by claiming those parties do not possess the requisite close relationship”); *Moss*, 24 F. Supp. at 286-92 (applying equitable estoppel because “the issues the non-signatory [was] seeking to resolve in arbitration [were] intertwined with the agreement that the estopped party [had] signed”) (quoting *Ross v. Am. Express Co.*, 547 F.3d 137, 144 (2d Cir. 2008)).

XIV. RICO CLASS ACTIONS

§ 83 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 a class action may be pursued if “the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy.”¹

Plaintiffs in RICO actions have had mixed results in attempting to have their RICO claims certified in a class action. Certification generally turns on whether the alleged injuries were caused

¹ FED. R. CIV. P. 23(b)(3).

by a common set of misrepresentations (usually written), as opposed to a variety of disparate misrepresentations (often oral). As discussed below, cases where the same or similar misrepresentations were made to the named plaintiffs and members of the proposed class are more likely to be certified.² On the other hand, courts have denied class certification where individual questions of causation predominate over common issues.³

² See, e.g., *Carnegie v. Household Int'l, Inc.*, 376 F.3d 656, 663 (7th Cir. 2004) (disagreeing with Fifth Circuit's presumption against class action certification in RICO cases in *Sandwich Chef Inc. v. Reliance Nat'l Indem. Ins. Co.*, 319 F.3d 205 (5th Cir. 2003) and noting ways to address RICO violations collectively but injury issues individually); *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 Litig.)*, 729 F.3d 108, 131 (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, 198-200 (E.D.N.Y. 2008) (holding that common issues predominated over individualized issues), *rev'd by* 620 F.3d 121 (2d Cir. 2010); *MacDonald v. Cashcall, Inc.*, 333 F.R.D. 331, 343 (D.N.J. 2019) (holding that the commonality requirement for class action certification was satisfied because the question of whether a lender and a nonparty together formed an enterprise sufficient for RICO liability represented a question of fact that was shared across the proposed class); *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. Metro. Life Ins. Co.*, 182 F.R.D. 72, 81 (S.D.N.Y. 1998) (uniform insurance sales manual used by Metropolitan agents in Europe constitutes a written device for the perpetration of fraud similar to the way a prospectus creates a unifying device in a securities fraud case); *Rohlfing v. Manor Care, Inc.*, 172 F.R.D. 330, 338 (N.D. Ill. 1997) (collecting cases illustrating that courts have adopted two different approaches to the reliance requirement in RICO class action suits based on fraud).

³ See, e.g., *Torres v. S.G.E. Mgmt., L.L.C.*, 838 F.3d 629, 638-40 (5th Cir. 2016) (reversing district court's certification of class where plaintiffs alleged RICO violations from defendants' multi-level energy marketing program, because individualized issues of causation did not predominate); *Sergeants Benevolent Ass'n Health & Welfare Fund v. Sanofi-Aventis U.S. LLP*, 806 F.3d 71, 91-92 (2d Cir. 2015) (affirming denial of class certification where plaintiffs alleged RICO violations against defendant drug manufacturers, because individual groups of plaintiffs lacked generalized class-wide causation); *McLaughlin v. Am. Tobacco Co.*, 522 F.3d 215, 222-30 (2d Cir. 2008) (reversing class certification and holding that individual issues of causation and injury predominated), *abrogated in part on other grounds by Bridge*, 553 U.S. 639; *Johnston v. HBO Film Mgmt., Inc.*, 265 F.3d 178, 186, 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); *Jackson v. Leaders in Cmty. Alternatives, Inc.*, No. C 18-04609 WHA, 2019 WL 2394428, at *4 (N.D. Cal. June 6, 2019) (denying class certification where "plaintiffs' own evidence demonstrate[d] that determining whether or not a 'threat' by [defendant] was, in fact, unlawful extortion . . . require[d] a fact-intensive inquiry into each . . . employee's relationship with the particular putative class member"); *Hughes v. The Ester C Co.*, 317 F.R.D. 333, 352 (E.D.N.Y. 2016) (denying class certification where "variations in the laws of the fifty states [render] Plaintiffs' claims incapable of class-wide resolution due to the lack of predominance"); *Tasion Commc'ns, Inc. v. Ubiquiti Networks, Inc.*, 308 F.R.D. 630, 638 (N.D. Cal. 2015) (denying class certification where the court found a "predominance/manageability problem that precludes [class] certification"); *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

Plaintiffs may argue that the Supreme Court decision in *Bridge v. Phoenix Bond & Indemnity Co.* (discussed in § 33 above)⁴ eases the requirements for certification of a RICO 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.⁵ 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.⁶

Although plaintiffs may cite *Bridge* to argue that individual issues of reliance should no longer predominate over other common issues,⁷ 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*⁸ and *Anza*,⁹ a RICO plaintiff must be the party directly harmed by the violation.¹⁰ This means that in most fraud-based RICO cases, the plaintiff is unlikely to be able to show it was directly injured

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.”).

⁴ *Bridge*, 553 U.S. 639.

⁵ *Id.* at 661.

⁶ *Id.*

⁷ See, e.g., *In re Countrywide Fin. Corp. Mortg. 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 Zyprexa Prods. Liab. Litig.*, 253 F.R.D. 69, 82 (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*, 620 F.3d 121 (2d Cir. 2010).

⁸ *Holmes v. Secs. Inv. Prot. Corp.*, 503 U.S. 258 (1992).

⁹ *Anza v. Ideal Steel Supply Corp.*, 547 U.S. 451 (2006).

¹⁰ See, e.g., *Empire Merchs., LLC v. Reliable Churchill LLP*, 902 F.3d 132, 146 (2d Cir. 2018) (affirming dismissal of RICO claims because plaintiff failed to show direct injury from defendants' alleged actions); *In re Volkswagen “Clean Diesel” Mktg.*, 467 F. Supp. 3d 849, 857 (N.D. Cal. 2020) (“Plaintiffs’ failure to adequately allege proximate cause is fatal to [their] RICO claims”); *Ironworkers Local Union No. 68 v. AstraZeneca Pharm. LP*, 585 F. Supp. 2d 1339, 1345 (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).

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.¹¹

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

§ 84 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.¹²

¹¹ 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).

¹² See, e.g., *Sergeants Benevolent Ass'n Health & Welfare Fund*, 806 F.3d at 91-92 (affirming denial of class certification where plaintiffs alleged RICO violations against defendant drug manufacturers, because individual groups of plaintiffs lacked generalized class-wide causation); *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*, 319 F.3d at 219 (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. Am. 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); *Singleton v. Fifth Generation, Inc.*, No. 515CV474BKSTWD, 2017 WL 5001444, at *19 (N.D.N.Y. Sept. 27, 2017) (denying class certification for failure to meet the predominance requirement where "showing reliance and causation would require individualized proof as to the purchasing decision of each class member"); *Blackburn v. Calhoun*, No. 207CV166, 2008 WL 850191, at *25 (N.D. Ala. Mar. 4, 2008) (finding individual issues predominate where claim of judicial preference were at issue), *aff'd*, 296 F. App'x 788 (11th Cir. 2008); *Fletcher v. ZLB Behring LLC*, 245 F.R.D. 328, 331-32 (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] involve[d] extensive individual factual inquiries for each proposed class member"); *In re Pharm. Indus. Average Wholesale Price Litig.*, 230 F.R.D. 61, 92-96 (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

Some courts have used “reliance” as shorthand for proximate cause.¹³ In *Sandwich Chef of Texas, Inc. v. Reliance Nat’l Indemnity Ins. Co.*, the Fifth Circuit went so far as to say that “the pervasive issues on individual reliance that generally exist in RICO fraud actions create a working presumption against class certification.”¹⁴

In *Sandwich Chef*, a class of workers’ compensation policyholders alleged that their insurers had committed mail and wire fraud by intentionally overcharging them over the course of fourteen years.¹⁵ 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.¹⁶ 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.¹⁷ The second theory was that certain plaintiffs were the intended target of misrepresentations made to third-party insurance regulators.¹⁸

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,¹⁹ which it equated with reliance.²⁰ By presuming reliance

predominate); *Hammitt v. Am. Bankers Ins. Co.*, 203 F.R.D. 690, 693-702 (S.D. Fla. 2001) (denying class certification where class representative sought individualized relief and issues of individual reliance predominated).

¹³ See, e.g., *Sandwich Chef*, 319 F.3d at 219.

¹⁴ *Id.*

¹⁵ *Id.* at 211.

¹⁶ *Id.* at 219-20.

¹⁷ *Id.*

¹⁸ *Id.* at 221.

¹⁹ *Id.* at 218-19.

²⁰ *Id.* at 222.

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 overcharges, the Fifth Circuit concluded that individualized issues of causation predominated under Rule 23(b)(3).

The Fifth Circuit 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*.²¹ 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.²² 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.²³

Several courts also have concluded that individual issues regarding calculation of damages may defeat class certification. For example, in *Lester v. Percudani*,²⁴ 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

²¹ *Holmes*, 503 U.S. 258.

²² *Sandwich Chef*, 319 F.3d at 220-24.

²³ *Id.* at 223-24.

²⁴ *Lester v. Percudani*, 217 F.R.D. 345 (M.D. Pa. 2003).

fraudulently manipulated monthly tax and mortgage estimates to appear lower than they were.²⁵ A little over a year after the plaintiffs purchased their homes, their properties were reassessed and their taxes increased substantially. This forced many plaintiffs to default on their loans and lose their homes. The plaintiffs sought damages under § 1964(c) for the increase in taxes and other injuries that occurred as a result of the defendants' alleged wire and mail fraud.²⁶

The United States District Court for the Middle District of Pennsylvania refused to certify the RICO class because individual issues predominated.²⁷ The court noted the § 1964(c) requirement that plaintiffs suffer injury to their business or property “by reason of” a violation of § 1962 implicates proximate cause concerns.²⁸ 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.”²⁹

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.³⁰ 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.³¹ Each plaintiff's damages instead

²⁵ *Id.* at 347.

²⁶ *Id.* at 348.

²⁷ *Id.* at 352-53.

²⁸ *Lester*, 217 F.R.D. at 352-53; *see also* *Brandenburg v. Seidel*, 859 F.2d 1179, 1187-88 (4th Cir. 1988) (to recover in a civil action for damages under RICO, private plaintiffs must establish: (1) a violation of Section 1962; (2) an injury to their business or property; and (3) the requisite causal connection between the injury and the violation of Section 1962), *overruled on other grounds by* *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706 (1996).

²⁹ *Lester*, 217 F.R.D. at 353.

³⁰ *Id.* at 352.

³¹ *Id.*

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 home.³² Proving such damages created “the prospect of holding hundreds or thousands of individual hearings” and illustrated that individual issues rather than common issues predominated.³³

Similarly, in *Sergeants Benevolent Ass'n Health and Welfare Fund v. Sanofi-Aventis U.S. LLP*, the United States District Court for the Eastern District of New York refused to certify the putative class in a RICO case involving multiple “independent actions of prescribing physicians[,]” where plaintiffs could not “use generalized proof to determine the injury to Plaintiffs caused by Defendants' misconduct” because individual issues predominated.³⁴

§ 85 Cases Granting Class Certification

In contrast to cases such as *Sandwich Chef* and *Lester*, discussed in § 84, 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.³⁵ For example, in *Klay v. Humana, Inc.*, a group of

³² *Id.*

³³ *Lester*, 217 F.R.D. at 352.

³⁴ *Sergeants Benevolent Ass'n Health & Welfare Fund v. Sanofi-Aventis U.S. LLP*, 20 F. Supp. 3d 305, 327-28 (E.D.N.Y. 2014), *aff'd*, 806 F.3d 71 (2d Cir. 2015).

³⁵ *See, e.g., Bell v. PNC Bank, Nat. Ass'n*, 800 F.3d 360, 375-76 (7th Cir. 2015) (affirming district court's class action certification where defendant bank had an unofficial policy that required employees to work unrecorded overtime hours); *Klay*, 382 F.3d at 1247-49, *abrogated in part on other grounds by Bridge*, 553 U.S. 639; *Stanich v. Travelers Indem. Co.*, 249 F.R.D. 506, 521 (N.D. Ohio 2008) (certifying class where alleged fraud arose from use of standardized form documents) *subsequent determination*, 259 F.R.D. 294, 306 (N.D. Ohio 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, at *2-3 (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), *distinguished on other grounds by In re LIBOR-Based Fin. Instruments Antitrust Litig.*, 299 F. Supp. 3d 430, 538 (S.D.N.Y. 2018) (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 Sav. Bank, FSB*, 200 F.R.D. 164, 174-76 (E.D.N.Y. 2001) (granting certification where plaintiffs' claim that defendant bank concealed fees

physicians alleged that various health maintenance organizations (“HMOs”) defrauded them by underpaying and unreasonably delaying payment for medical services rendered to HMO subscribers.³⁶ The United States District Court for the Southern District of Florida certified three classes, including a global class, to pursue the RICO claims.³⁷ On appeal, the defendants argued that the certification was improper under Rule 23(b)(3) because individual issues of reliance predominated.³⁸ 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.”³⁹ 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.”⁴⁰ 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*.”⁴¹

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

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”).

³⁶ *Klay*, 382 F.3d at 1247-49.

³⁷ *Id.* at 1250.

³⁸ *Id.* at 1258.

³⁹ *Id.*

⁴⁰ *Id.* at 1259.

⁴¹ *Id.* (referencing *Sikes v. Teleline, Inc.*, 281 F.3d 1350, 1354-58 (11th Cir. 2002), *abrogated by Bridge*, 553 U.S. 639 (rejecting district court’s use of presumption of reliance as improperly eliminating class-plaintiffs’ burden)).

invoices.⁴² 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.”⁴³

In *Carnegie v. Household Int’l, Inc.*, the Seventh Circuit, in affirming the United States District Court for the Northern District of Illinois’ grant of class certification for settlement purposes, rejected both the presumption against class certification applied in *Sandwich Chef* and the suggestion in *Lester* that fact-intensive damages inquiries defeat class certification.⁴⁴ 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 whether each particular plaintiff is entitled to relief.⁴⁵ 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.⁴⁶ 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.”⁴⁷

In *Waldrup v. Countrywide Fin. Corp.*, the Central District of California granted class certification in a RICO putative class action.⁴⁸ The court noted that many other courts have “found that class-wide circumstantial evidence of reliance is sufficient to allege RICO causation,” and that

⁴² *In re U.S. Foodservice Inc. Pricing Litig.*, 729 F.3d at 118-20.

⁴³ *Id.* at 120 (emphasis in original).

⁴⁴ *Carnegie*, 376 F.3d at 663.

⁴⁵ *Id.* at 661.

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ No. 213CV08833CASAGR, 2018 WL 799156, at *17 (C.D. Cal. Feb. 6, 2018).

“the issue of causation in this case is susceptible to class-wide proof such that individualized issues of reliance do not predominate,” because of class-wide evidence of a fraudulent scheme perpetrated by defendants, and an inference that “defendants’ uniform misrepresentations” directly caused injuries to class members.⁴⁹

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 courts⁵⁰ 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.

⁴⁹ *Id.* at *12-13.

⁵⁰ *See, e.g., Murphy v. Gospel for Asia, Inc.*, 327 F.R.D. 227, 244 (W.D. Ark. 2018) (certifying nationwide RICO class where reliance and causation supported a finding of class certification); *Bias v. Wells Fargo & Co.*, 312 F.R.D. 528, 544 (N.D. Cal. 2015) (denying in part and granting in part plaintiffs’ motion for class certifications, but certifying a limited “paid class” to bring a civil RICO claim).

XV. PRACTICE AIDS

§ 86 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. § 1341) or wire fraud (18 U.S.C. § 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 §§ 13-17, 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)

§ 87 Form: RICO Case Statement

Certain courts require plaintiffs to submit with any RICO complaint a “RICO Case Statement” that sets forth in specific detail the supporting facts and legal bases of their claims.¹ A

¹ 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,

district court may require a RICO Case Statement either by an individual judge's standing order or by local rule.²

Courts have stressed the importance of compliance with these orders.³ Failure to comply with an order requiring a RICO Case Statement may result in dismissal of the action or the imposition of sanctions.⁴ Even if your case is in a court that does not require a RICO Case

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).

² See, e.g., *Frank v. D'Ambrosi*, 4 F.3d 1378 (6th Cir. 1993) (case statement filed in district court pursuant to court's standing order); *Jae-Soo Yang Kim*, 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).

³ 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").

⁴ See, e.g., *Figueroa Ruiz v. Alegria*, 896 F.2d 645, 648-49 (1st Cir. 1990) (affirming dismissal of RICO claim with prejudice as a sanction for failure to comply with order requiring plaintiffs to file a detailed explanation of the facts supporting the claim); *Petrochem Insulation, Inc. v. Northern Cal. & 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").

Statement, you should take the time to fill one out whether you represent the plaintiff or the defendant. Doing so will help you identify any gaps that may exist in your case. An example of an order requiring a case statement is provided below.

SAMPLE ORDER REQUIRING RICO CASE STATEMENT

This order has been designed to establish a uniform and efficient procedure for deciding civil actions containing claims made pursuant to 18 U.S.C. §§ 1961 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.
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. § 1962(a), provide the following information:

(a) state who received the income derived from the pattern of racketeering activity or through the collection of an unlawful debt; and,

(b) describe the use or investment of such income.

12. If the complaint alleges a violation of 18 U.S.C. § 1962(b), provide the following information:

(a) describe in detail the acquisition or maintenance of any interest in or control of the alleged enterprise; and

(b) state whether the same entity is both the liable “person” and the “enterprise” under § 1962(b).

13. If the complaint alleges a violation of 18 U.S.C. § 1962(c), provide the following:

(a) state who is employed by or associated with the enterprise;
and

(b) state whether the same entity is both the liable “person” and the “enterprise” under § 1962(c).

14. If the complaint alleges a violation of 18 U.S.C. 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.

§ 88 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.⁵ In addition, the pleading standards under *Bell Atlantic Corp.*

⁵ As to issues relating to mail and wire fraud, see § 6.

*v. Twombly*⁶ and *Ashcroft v. Iqbal*⁷ are particularly applicable in RICO cases to protect defendants against baseless charges of racketeering that are serious, harmful, and expensive to defend.⁸

[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 States. See §§ 67–78 for a more detailed discussion of jurisdiction, concurrent jurisdiction, venue, service of process, removal, abstention, and preemption.]

⁶ *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007).

⁷ *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

⁸ *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)).

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 § 28, 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 § 11, 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 §§ 18-26, 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 § 11, 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 §§ 13-17, 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 §§ 27-44, Standing under § 1962(c); §§ 45, 46, § 1962(a): Investment of Racketeering Income; §§ 53-55, § 1962(b): Acquisition of Control of Enterprise; and §§ 49-54, § 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 §§ 62-66, 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 §§ 45, 46, § 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 §§ 62-66, 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 §§ 47, 48, § 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 §§ 62-66, 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. § 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 §§ 62-66, Relief.]

PLAINTIFFS DEMAND TRIAL BY JURY.

§ 89 RICO Jury Instructions

Various federal courts of appeals have approved pattern civil RICO jury instructions.⁹ In addition, several secondary sources include model instructions accompanied by case notes and commentary.¹⁰ 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 circuit courts.¹¹ Also, Judge William G. Young has assembled examples of complete civil jury instructions used in actual cases.¹² Please keep in mind that sample instructions may become outdated as RICO jurisprudence continues to develop.

⁹ 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).

¹⁰ 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).

¹¹ K. O'Malley, et al., *Federal Jury Practice and Instructions: Civil*, §§ 161.01-161.100 (5th ed. 2001).

¹² 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).

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.¹³

- 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.

¹³ 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 nationalization unlawfully), section 1426 (relating to the reproduction of naturalization or citizenship papers), section 1427 (relating to the sale of naturalization or citizenship papers), sections 1461-1465 (relating to obscene matter), section 1503 (relating to obstruction of justice), section 1510 (relating to obstruction of criminal investigations), section 1511 (relating to the obstruction of State or local law enforcement), section 1512 (relating to tampering with a witness, victim, or an informant), section 1513 (relating to retaliating against a witness, victim, or an informant), section 1542 (relating to false statement in application and use of passport), section 1543 (relating to forgery or false use of passport), section 1544 (relating to misuse of passport), section 1546 (relating to fraud and misuse of visas, permits, and other documents), sections 1581-1592 (relating to peonage, slavery, and trafficking in persons), [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, 922-23 (1970))

Statement of Findings and Purpose

The Congress finds that (1) organized crime in the United States is a highly sophisticated, diversified, and widespread activity that annually drains billions of dollars from America's economy by unlawful conduct and the illegal use of force, fraud, and corruption; (2) organized crime derives a major portion of its power through money obtained from such illegal

endeavors as syndicated gambling, loan sharking, the theft and fencing of property, the importation and distribution of narcotics and other dangerous drugs, and other forms of social exploitation; (3) this money and power are increasingly used to infiltrate and corrupt legitimate business and labor unions and to subvert and corrupt our democratic processes; (4) organized crime activities in the United States weaken the stability of the Nation's economic system, harm innocent investors and competing organizations, interfere with free competition, seriously burden interstate and foreign commerce, threaten the domestic security, and undermine the general welfare of the Nation and its citizens; and (5) organized crime continues to grow because of defects in the evidence-gathering process of the law inhibiting the development of the legally admissible evidence necessary to bring criminal and other sanctions or remedies to bear on the unlawful activities of those engaged in organized crime and because the sanctions and remedies available to the Government are unnecessarily limited in scope and impact.

It is the purpose of this Act to seek the eradication of organized crime in the United States by strengthening the legal tools in the evidence-gathering process, by establishing new penal prohibitions, and by providing enhanced sanctions and new remedies to deal with the unlawful activities of those engaged in organized crime.

Appendix B

APPENDIX B STATE RICO STATUTES

Although state RICO laws are not discussed in this outline, the practitioner should be aware that a majority of states currently have such laws.¹ Although states have used federal RICO as a model for their own statutes, most have not simply copied the federal model; in fact, most states now consider their RICO statutes to be broader than the federal version in scope, language, and intended criminal targets.²

Listed below are the state and U.S. territory RICO statutes that generally track the federal RICO statutes, followed by the four state statutes that restrict state RICO to cases involving organized crime.

States and U.S. Territories That Track Federal RICO And Have No Organized Crime Limitation

Arizona	Arizona Racketeering Act, Ariz. Rev. Stat. §§ 13-2301 to 13-2323.
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 53-403.
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.

¹ See 10 William Meade Fletcher, *Fletcher Cyclopedic 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).

² 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. § 911-911s (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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