CHAPTER 1

The Fundamentals of RICO

by

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Chapter Contents

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* Judge Rakoff oversaw a general updating of this chapter in 1999 but does not otherwise participate in the updating of this book.

§ 1.01 The Background of RICO

Since its enactment in 1970, the Racketeer Influenced and Corrupt Organizations Act ("RICO")[1] has been one of the most controversial of federal statutes. Its criminal provisions are both novel and stringent, and apply to a greater range of conduct than any other criminal law. Its private civil provisions not only expand the scope of federal civil jurisdiction to cover most business torts but also materially alter the balance of power between plaintiffs and defendants. And under RICO's so-called "government civil" provisions, the state can assert control over entire businesses and organizations.

During the 1990s many of the fundamental questions regarding RICO's scope and power were resolved. Nevertheless, the statute remains difficult to apply because its terms are artificial and not easily correlated with everyday experiences. The main purpose of this chapter is to facilitate a basic understanding of RICO by describing its fundamentals.

To appreciate what RICO has become, one must first understand its derivation. RICO's origins were rather modest. RICO was simply one title, Title IX, of the Organized Crime Control Act of 1970,[2] a broad-based statute intended to combat the influence of organized crime in interstate and foreign commerce. Although the entire Organized Crime Control Act was controversial, most of the public debate centered on its expanded wiretap provisions[3] and its simplification of the granting of immunity.[4] As a result, the particularized legislative history of many of RICO's provisions is sparse.

Generally, however, Congress enacted RICO in response to a fear of infiltration of legitimate commercial enterprises by traditional

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[1] Pub. L. No. 91-452, 84 Stat. 941 (1970) (codified at 18 U.S.C. §§ 1961-1968 (1982), as amended by the Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, §§ 302, 901, 1020, 2301, 98 Stat. 1837, 2040-2044, 2136, 2143, 2192).

[2] Pub. L. No. 91-452, 84 Stat. 922 (1970) (codified as amended in scattered sections of 18 U.S.C.).

[3] Now largely codified at 18 U.S.C. §§ 2510-2522.

[4] See 18 U.S.C. §§ 6001 *et seq.*

"organized crime" associations, a concern that dates back at least to the time of the Kefauver Committee hearings in the early 1950s.[5] During the early 1960s, hearings before the McClellan Committee—and especially the testimony of Joseph Valachi regarding "La Cosa Nostra"—increased public concern about the impact of organized crime on ordinary commercial activities. In 1967, the Senate responded by proposing two bills that would enhance the penalties for certain organized crime activities in commercial ventures.[6] Although Congress did not act on either bill, the hearings regarding the bills eventually spawned the first real version of RICO,[7] which the Senate considered in 1969: an act designed to prevent "known mobsters" from infiltrating legitimate businesses.[8] To avoid any constitutional prohibition against a crime of status, however, the proposal focused on whether the infiltration of a legitimate enterprise was derived from or implemented by a "pattern of racketeering activity,"[9] rather than on the status of the person infiltrating the business. To assure nonetheless that the statute covered every kind of "mob" infiltration of legitimate business, Congress defined "racketeering activity" broadly to include a long list of state and federal predicate crimes commonly committed by mobsters and other career criminals.[10]

This approach caused some of those following the development of the statute to worry that it might be constitutionally defective because it was overbroad. Original drafts of the legislation sought to minimize such concerns by vesting enforcement of both the statute's criminal and civil provisions exclusively with the government.[11] When the bill reached the House of Representatives, however, that chamber offered a number of amendments, including a private, civil, treble-damage provision "similar to the private damage remedy found in the antitrust-laws."[12] The House passed the amendment with little debate, and without seriously considering whether it meshed with the rest of the bill.[13]

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[5] See generally, Lynch, "RICO: The Crime of Being a Criminal, Parts I and II," 87 Columbia L. Rev. 661, 661-713 (1987) (discussing the origins and development of RICO).

[6] S. 2048 and S. 2049, 90th Cong., 1st Sess. (1967).

[7] S. 30, 91st Cong., 1st Sess. (1969).

[8] S. Rep. 91-617, at 76 (1969).

[9] 18 U.S.C. § 1961(5).

[10] 18 U.S.C. § 1961(1).

[11] See Blakey and Gettings, "Racketeer and Corrupt Organizations (RICO): Basic Concepts—Criminal and Civil Remedies," 53 Temple L. Q. 1009, 1017-1019 (1980).

[12] *Hearings on S. 30, and Related Proposals, Before Subcomm. No. 5 of the House Comm. on the Judiciary,* 91st Cong., 2d Sess. 520 (1970) (statement of Rep. Steiger) (quoted in Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 487, 105 S.Ct. 3275, 87 L.Ed.2d 346 (1985)).

[13] See Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 487-488, 105 S.Ct. 3275, 87 L.Ed.2d 346 (1985).

After the House passed the amended bill, Congress did not send it to a conference because elections were approaching and the session was almost over. Instead, the bill was returned to the Senate, which passed the House-amended version without further debate.[14] On October 15, 1970 President Nixon signed RICO, Title IX of the Organized Crime Control Act, into law.

Although RICO's stated purpose was "the elimination of the infiltration of organized crime and racketeering into legitimate organizations operating in interstate commerce,"[15] its language was not limited accordingly, and as a result the courts have not thus limited its application but have applied RICO to a wide variety of persons[16] and situations[17] that the enacting Congress did not envision. RICO's evo-

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[14] Blakey and Gettings, N. 11 *supra*, Temple L. Q. at 1021.

[15] S. Rep. No. 91-617, 91st Cong., 1st Sess. 161, at 76 (1969). See, e.g., United States v. Boylan, 620 F.2d 359, 361 (2d Cir. 1980).

[16] See, e.g.:

First Circuit: Micro-Medical Industries v. Hatton, 607 F. Supp. 931, 938 (D.P.R. 1985).

Second Circuit: Moss v. Morgan Stanley, Inc., 719 F.2d 5, 21 (2d Cir. 1983).

Third Circuit: United States v. Vignola, 464 F. Supp. 1091, 1095-1096 (E.D. Pa. 1979), *aff'd* 605 F.2d 1199 (3d Cir. 1979).

Fourth Circuit: United States v. Mandel, 415 F. Supp. 997, 1018-1019 (D. Md. 1976).

Fifth Circuit: Owl Construction Co. v. Ronald Admas Contractor, Inc., 727 F.2d 540, 542 (5th Cir. 1984).

Sixth Circuit: Austin v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 570 F. Supp. 667, 669-670 (W.D. Mich. 1983).

Seventh Circuit: Bunker Ramo Corp. v. United Business Forms, Inc., 713 F.2d 1272, 1287 n.6 (7th Cir. 1983).

Eighth Circuit: Bennett v. Berg, 685 F.2d 1053, 1063-1064 (8th Cir. 1982), *aff'd in part, rev'd in part, and remanded on other grounds on reh'g en banc* 710 F.2d 1361 (8th Cir. 1983).

Ninth Circuit: United States v. Campanale, 518 F.2d 352, 363-364 (9th Cir. 1975). But see, Hokama v. E. F. Hutton & Co., 566 F. Supp. 636, 642-644 (C.D. Cal. 1983) (requiring plaintiff to allege a connection to organized crime in civil RICO cases).

Eleventh Circuit: United States v. Gottesman, 724 F.2d 1517, 1521 (11th Cir. 1984).

[17] See, e.g.:

Third Circuit: Perlberger v. Perlberger, 1998 U.S. Dist. LEXIS 1964 (E.D. Pa. Feb. 24, 1998) (refusing to dismiss, on policy grounds, a RICO claim arising out of a divorce proceeding and rejecting the argument that the racketeering activities embraced by the statute must include crimes traditionally associated with the transgressions of racketeers).

Sixth Circuit: Austin v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 570 F. Supp. 667, 668-670 (W.D. Mich. 1983) (applying RICO in commercial fraud context).

Seventh Circuit: Illinois Dep't of Revenue v. Phillips, 771 F.2d 312 (7th Cir. 1985) (applying RICO to mailing of fraudulent tax returns); United States v. Aleman, 609 F.2d 298 (7th Cir. 1979) (applying statute to burglaries in two states by defendants not affiliated with organized crime).

lution reflects a tension between the statute's often-praised use as an innovative weapon against large-scale criminal enterprises and its often-criticized employment as a springboard for dubious private actions.[18] Reflecting this tension, courts have usually construed the act more broadly when the government is the proponent than when the plaintiff is a private party. Moreover, the lower federal courts, where dockets are more directly affected, have sometimes attempted to erect barriers to the private use of RICO, only to have these limitations removed by higher federal courts applying the plain and very broad language of the statute.[19]

For example, in the late 1970s and early 1980s some lower courts reacted to the seeming overextension of civil RICO[20] by fashioning a number of judicially created standing requirements for its use, notably

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[18] See, e.g.:

Second Circuit: Schmidt v. Fleet Bank, 16 F. Supp.2d 340, 346 (S.D.N.Y. 1998) ("[C]ourts must always be on the lookout for the putative RICO case that is really nothing more than an ordinary fraud case clothed in the Emperor's trendy garb.") (citation omitted); Toms v. Pizzo, 4 F. Supp.2d 178, 182 (W.D.N.Y. 1998) ("[RICO] was not intended to reach 'every act of corruption or petty crime committed in a business setting.'") (citation omitted); Mathon v. Marine Midland Bank, 875 F. Supp. 986, 1001 (E.D.N.Y. 1995) ("[T]he purposes of civil RICO liability do not include deterrence of unlawful acts, not rising to criminal liability, for which there are state and common law remedies.").

Third Circuit: Tabas v. Tabas, 47 F.3d 1280, 1296 (3d Cir. 1995) (*en banc*) ("[W]e recognize that our ruling means that RICO . . . may be applicable to many 'garden-variety' fraud cases."). (Citation omitted).

Seventh Circuit: Williams v. Aztar Indiana Gaming Corp., 351 F.3d 294 (7th Cir. 2003) (claim of mail fraud against casino arising from its mailings to a compulsive gambler was frivolous and classifying the plaintiff's attempt to use the statute to prosecute his state law claim as "exactly the type of bootstrapping use of RICO that the federal courts abhor."); Uniroyal Goodrich Tire Co. v. Mutual Trading Corp., 63 F.3d 516, 522 (7th Cir. 1995) ("The murkiness of RICO's parameters coupled with its alluring remedies have led many plaintiffs to take garden variety business disputes and dress them up as elaborate racketeering schemes.").

District of Columbia Circuit: Yellow Bus Lines, Inc. v. Drivers, Chauffeurs & Helpers Local Union 639, 913 F.2d 948, 954 (D.C. Cir. 1990) (RICO was not intended to reach minor business corruption and crime).

[19] See Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 488-500, 105 S.Ct. 3275, 87 L.Ed.2d 346 (1985).

[20] See, e.g.:

Second Circuit: Sedima, S.P.R.L. v. Imrex Co., 741 F.2d 482, 487 (2d Cir. 1984), *rev'd* 473 U.S. 479, 105 S.Ct. 3275, 87 L.Ed.2d 346 (1985) (private, civil RICO has been put to extraordinary and outrageous uses and has led to claims against legitimate businesses rather than mobsters).

Ninth Circuit: Hokama v. E. F. Hutton & Co., 566 F. Supp. 636, 642-644 (C.D. Cal. 1983) (requiring plaintiffs to allege some link to organized crime in civil RICO cases).

Eleventh Circuit: Taylor v. Bear Stearns & Co., 572 F. Supp. 667, 681-683 (N.D. Ga. 1983) (discussing various judicially created limits to RICO suits).

proof of a "racketeering injury,"[21] a "competitive injury,"[22] or a "prior conviction."[23] In *Sedima, S.P.R.L. v Imrex Co.*,[24] however, the Supreme Court, in a 5 to 4 decision, struck down these requirements on the ground that they went well beyond the plain language of the statute.[25] Although the *Sedima* majority invited Congress to amend RICO to conform its use to the original intent of the legislation, Congress has only taken modest steps in this direction.[26] Thus, much of the underlying tension that caused the Supreme Court to divide 5 to 4 in *Sedima* remains.[27]

Nonetheless, neither RICO's constitutionality[28] nor its broad scope currently appears to be in serious jeopardy, and the courts have shift-

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[21] See, e.g., Sedima, S.P.R.L. v. Imrex Co., 741 F.2d 482, 487 (2d Cir. 1984).

[22] See, e.g., North Barrington Development, Inc. v. Fanslow, 547 F. Supp. 207, 210 (N.D. Ill. 1980).

[23] See, e.g., *Sedima, S.P.R.L. v. Imrex Co.,* N. 21 *supra,* 741 F.2d at 496-504.

[24] Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 105 S.Ct. 3275, 87 L.Ed.2d 346 (1985). Justice White's majority opinion was joined by Chief Justice Burger and Justices Rehnquist, Stevens, and O'Connor.

[25] *Id.*, 473 U.S. at 488-500. Justice Marshall, in a dissent joined by Justices Brennan, Blackmun, and Powell, stressed that the standing requirements brought the statute into closer accord with the original legislative intent. *Id.* at 500-523 (Marshall, J., dissenting). Justice Powell, in a separate dissent, argued that the majority's reading of the statute was so broad as to vitiate the main limitation of the scope of RICO contained in its actual language, i.e., its limitation to misconduct resulting from a "pattern of racketeering activity." *Id.* at 523-530 (Powell, J., dissenting).

[26] See Private Securities Litigation Reform Act, Pub. L. No. 104-67, 109 Stat. 737 (1997) (codified at 15 U.S.C. § 78u-4) (eliminating conduct that would have been actionable as fraud in the purchase or sale of securities as a predicate act under § 1961).

[27] Although the Supreme Court's subsequent RICO decision in *H. J., Inc. v. Northwestern Bell Telephone Co.*, 492 U.S. 229, 109 S.Ct. 2893, 106 L.Ed.2d 195 (1989), was unanimous in reversing the lower court, the Court remained deeply divided in its view of RICO. Four concurring justices expressed the view that RICO is unconstitutionally vague. *Id.* at 251 (Scalia, J., concurring). See also, Firestone v. Galbreath, 747 F. Supp. 1556, 1579-1581 (S.D. Ohio 1990), *aff'd* 976 F.2d 279 (6th Cir. 1992) (RICO unconstitutionally vague as applied to defendants).

[28] See, e.g.:

First Circuit: United States v. Oreto, 37 F.3d 739 (1st Cir. 1994) (rejecting argument that the continuity plus relationship test for a pattern under section 1962(c) is unconstitutionally vague); United States v. Angiulo, 897 F.2d 1169, 1178-1180 (1st Cir. 1990) (RICO was not unconstitutionally vague as applied to defendants).

Second Circuit: Bingham v. Zolt, 66 F.3d 553, 566 (2d Cir. 1995) (pattern and enterprise requirements were not unconstitutionally vague).

Third Circuit: United States v. Woods, 915 F.2d 854, 862-864 (3d Cir. 1990) (RICO was not unconstitutionally vague as applied to defendants convicted of extortion and other criminal conduct involving political corruption); United States v. Pungitore, 910 F.2d 1084, 1102-1105 (3d Cir. 1990) (statute was constitutional as applied to activities of organized crime).

Fourth Circuit: United States v. Bennett, 984 F.2d 597, 605-607 (4th Cir. 1993) (pattern requirement was not unconstitutionally vague in insurance fraud situation).

ed their attention to other ways of separating legitimate and illegitimate RICO claims.

For example, in *Humana Inc. v. Forsyth*,[29] the Supreme Court addressed the issue of whether RICO's scope was limited by the McCarran-Ferguson Act,[30] which 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."[31]

In the past, various circuit courts reached different conclusions regarding whether the McCarran-Ferguson Act barred federal RICO claims.[32] In *Humana*, the Court initially found that "RICO is not a

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Fifth Circuit: United States v. Krout, 66 F.3d 1420, 1432 (5th Cir. 1995) (pattern requirement was not unconstitutionally vague as applied to member of the Mexican mafia); United States v. Aucoin, 964 F.2d 1492, 1497-1398 (5th Cir. 1992) (RICO was not unconstitutionally vague).

Sixth Circuit: Columbia Natural Resources v. Tatum, 58 F.3d 1101, 1104-1109 (6th Cir. 1995) (rejecting claim that the phrase "pattern of racketeering activity" was void for vagueness as applied to defendants).

Seventh Circuit: United States v. Korando, 29 F.3d 1114, 1119 (7th Cir. 1994) (RICO was not unconstitutionally vague because it is a remedial statute that does not make criminal activity that was otherwise legal); National Organization for Women, Inc. v. Scheidler, 897 F. Supp. 1047, 1089-1091 (N.D. Ill. 1995) (RICO was neither vague nor overbroad; rejected constitutional challenge).

Eighth Circuit: United States v. Keltner, 147 F.3d 662, 667 (8th Cir. 1998) (pattern and enterprise requirements were not unconstitutionally vague).

Ninth Circuit: United States v. Frega, 179 F.3d 793, 800-801 (9th Cir. 1999) (rejecting Commerce Clause challenge to RICO); United States v. Blinder, 10 F.3d 1468, 1475 (9th Cir. 1993) (rejecting vagueness challenge to RICO); United States v. Freeman, 6 F.3d 586, 597-598 (9th Cir. 1993) (term "enterprise" was not unconstitutionally vague as applied to defendant).

Tenth Circuit: United States v. Hayworth, 941 F. Supp. 1057, 1060 (D.N.M. 1996) (pattern and enterprise requirements were not void for vagueness as applied to defendants in drug distribution scheme); Schrag v. Dinges, 788 F. Supp. 1543, 1552-1555 (D. Kan. 1992) (RICO was not unconstitutionally vague as applied to mail fraud scheme).

Eleventh Circuit: Cox v. Administrator, United States Steel & Carnegie, 17 F.3d 1386, 1398 (11th Cir. 1994) (RICO was not unconstitutionally vague), *modified* 30 F.3d 1347 (11th Cir. 1994).

District of Columbia Circuit: Dooley v. United Technologies Corp., 1992 U.S. Dist. LEXIS 8653 (D.D.C. June 16, 1992) (RICO not unconstitutionally vague).

[29] Humana Inc. v. Forsyth, 525 U.S. 299, 119 S.Ct. 710, 142 L.Ed.2d 753 (1999).

[30] 15 U.S.C. §§ 1011, *et seq.*

[31] 15 U.S.C. § 1012(b).

[32] The Fourth, Sixth, and Eighth Circuits adopted the "upset the balance" approach, reasoning that the McCarran-Ferguson Act barred federal RICO claims because otherwise, RICO would invalidate and supersede state remedies and regulatory supervision. See, e.g.:

law that 'specifically relates to the business of insurance,'" and went on to address the key issue of whether applying RICO to the case before it would "invalidate, impair, or supercede Nevada's laws regulating insurance."[33] The Court reached the following formulation:

> "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 McCarran-Ferguson Act does not preclude its application."[34]

The Court in this case concluded that, applying RICO to the case before it did not conflict with the McCarran-Ferguson Act "[b]ecause RICO advances the State's interest in combating insurance fraud, and does not frustrate any articulated Nevada policy."[35]

Most courts addressing the issue after *Humana* have found that the McCarran-Ferguson Act did not prohibit the application of RICO to the cases before them.[36] Clearly, however, the Court's decision does

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Fourth Circuit: Ambrose v. Blue Cross & Blue Shield of Virginia, Inc., 891 F. Supp. 1153 (E.D. Va. 1995), *aff'd* 95 F.3d 41 (4th Cir. 1996).

Sixth Circuit: Kenty v. Bank One, Columbus, N.A., 92 F.3d 384 (6th Cir. 1996).

Eighth Circuit: Doe v. Norwest Bank Minnesota, N.A., 107 F.3d 1297 (8th Cir. 1997).

The First, Third, Seventh, and Ninth Circuits adopted the "direct conflict approach," reasoning that the McCarran-Ferguson Act does not preclude the application of RICO or other federal statutes prohibiting acts that are also prohibited by state insurance laws. See, e.g.:

First Circuit: Villafane-Neriz v. FDIC, 75 F.3d 727 (1st Cir. 1996).

Third Circuit: Sabo v. Metropolitan Life Insurance Co., 137 F.3d 185 (3d Cir. 1998).

Seventh Circuit: Autry v. Northwest Premium Services, Inc., 144 F.3d 1037 (7th Cir. 1998); National Ass'n for the Advancement of Colored People v. American Family Mutual Insurance Co., 978 F.2d 287 (7th Cir. 1992).

Ninth Circuit: Forsyth v. Humana Inc., 114 F.3d 1467 (9th Cir. 1997).

[33] Humana Inc. v. Forsyth, 525 U.S. 299, 119 S.Ct. 710, 142 L.Ed.2d 753 (1999). The Court defined "invalidate" as "to render ineffective, generally without providing a replacement rule or law," and "supersede" as "to displace (and thus render ineffective) while providing a substitute rule." The Court concluded that applying RICO to the case before it "would neither 'invalidate' nor 'supersede' Nevada law."

The Court also questioned whether applying RICO would "impair" Nevada's law. It looked to the definition of "impair" in Black's Law Dictionary ("[t]o weaken, to make worse, to lessen in power, diminish, or relax, or otherwise affect in an injurious manner").

[34] *Id.,* 525 U.S. at 309.

[35] *Id.,* 525 U.S. at 313.

[36] See, e.g.:

Third Circuit: Weiss v. First Unum Life Insurance Co., 482 F.3d 254, 269 (3d Cir. 2007).

Fourth Circuit: American Chiropractic Ass'n, Inc. v. Trigon Healthcare, Inc., 367 F.3d 212, 222 (4th Cir. 2004).

not stand for the proposition that the McCarran-Ferguson Act will never prohibit RICO claims involving insurance.[37]

Sixth Circuit: Brown v. Cassens Transport Co., 546 F.3d 347, 357-363 (6th Cir. 2008) (a state worker's compensation statute did not reverse preempt RICO under the McCarran-Ferguson Act).

Seventh Circuit: Shapo v. Engle, 1999 U.S. Dist. LEXIS 17966, at *33-*40 (N.D. Ill. Nov. 12, 1999).

Eighth Circuit: Cunningham v. PFL Life Insurance Co., 42 F. Supp.2d 872, 881-882 (N.D. Iowa 1999).

Tenth Circuit: Bancoklahoma Mortgage Corp. v. Capital Title Co., Inc., 194 F.3d 1089 (10th Cir. 1999).

[37] See, e.g.: LaBarre v. Credit Acceptance Corp., 175 F.3d 640, 642-643 (8th Cir. 1999) (applying *Humana,* the McCarran-Ferguson Act allowed plaintiff's RICO claims against one defendant, but prohibited RICO claims against other defendants); Doe v. Norwest Bank Minnesota, N.A., 107 F.3d 1297 (8th Cir. 1997).

§ 1.02 The Elements of a RICO Action

Despite its many complexities and intricacies, RICO has at its core a fairly simple design: it prohibits a person[1] from utilizing a pattern of unlawful activities to infiltrate an interstate enterprise.[2] This design reflects legislative findings that mobsters were infiltrating legitimate businesses through racketeering activities or the proceeds derived therefrom. However, given the statute's more general wording, it has been applied well beyond the historical circumstances that motivated its enactment.

Although courts often speak of a RICO cause of action as requiring six, eight, or more essential elements,[3] in fact the elements can basically be reduced to four. Specifically, in order to state a RICO violation, a criminal indictment[4] or civil complaint[5] must at least allege:

(1) that a "person" within the scope of the statute
(2) has utilized a "pattern of racketeering activity" or the proceeds thereof
(3) to infiltrate an interstate "enterprise"
(4) by (a) investing the income derived from the pattern of racketeering activity in the enterprise; (b) acquiring or maintaining an interest in the enterprise through the pattern of racketeering activity; (c) conducting the affairs of the enterprise through the pattern of racketeering activity; or (d) conspiring to commit any of the above acts.[6]

A plaintiff in a private, civil RICO action must also allege that he or she sustained an injury to his business or property "by reason of" one of the foregoing.[7] Each of these elements is discussed in subsequent sections.

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[1] Under RICO, a person "includes any individual or entity capable of holding a legal or a beneficial interest in property." 18 U.S.C. § 1961(3).
[2] 18 U.S.C. § 1962.
[3] See, e.g., Moss v. Morgan Stanley, Inc., 719 F.2d 5, 17 (2d Cir. 1983).
[4] 18 U.S.C. § 1963.
[5] 18 U.S.C. § 1964.
[6] 18 U.S.C. § 1962.
[7] 18 U.S.C. § 1964(c).

§ 1.03 Person

[1]—Statutory Definition

Section 1961(3) of RICO defines "person" to include "any individual or entity capable of holding a legal or beneficial interest in property,"[1] and this definition applies both to putative RICO plaintiffs and defendants. Corporations and partnerships plainly fall within this definition, but courts have also found unincorporated associations, which are capable of holding a legal or beneficial interest in property, to be liable under RICO.[2] Unions and public utilities are also within RICO's definition of "person."[3] Ironically, the Second Circuit has determined that an organized crime family, and specifically "La Cosa Nostra," is *not* a RICO "person."[4] Although most state and local governments qualify as RICO "persons" because they can hold property, they are frequently immune from RICO liability on other grounds.[5]

Courts are divided as to whether a civil RICO claim survives the death or dissolution of a "person" liable under RICO. The division depends on whether the court views RICO's treble-damage provision as remedial, in which case the claim survives,[6] or penal, in which

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[1] 18 U.S.C. § 1961(3).

[2] See Jund v. Town of Hempstead, 941 F.2d 1271, 1281-1282 (2d Cir. 1991).

[3] See, e.g.:

Second Circuit: County of Suffolk v. Long Island Lighting Co., 907 F.2d 1295, 1305-1308 (2d Cir. 1990) (public utility).

Third Circuit: United States v. Local 30, United Slate, Tile, and Composition Roofers, Damp and Waterproof Workers Ass'n, 686 F. Supp. 1139, 1165 (E.D. Pa. 1988) (unions and union officers).

Eleventh Circuit: Taffet v. Southern Co., 930 F.2d 847, 852 (11th Cir. 1991) (RICO was applicable to utilities because they are legal entities capable of holding property), *reh'g en banc granted* 958 F.2d 1514 (11th Cir. 1992), *RICO claims dismissed on other grounds en banc* 967 F.2d 1483, 1486-1494 (11th Cir. 1992).

[4] United States v. Bonanno Organized Crime Family, 879 F.2d 20 (2d Cir. 1989).

[5] See § 1.03[3] *infra*. See also, Attorney General of Canada v. R.J. Reynolds Tobacco Holdings, Inc., 103 F. Supp.2d 134, 146-150 (N.D.N.Y. 2000) *aff'd on other grounds* 268 F.3d 103 (2d Cir. 2001) (determining that Canada, the plaintiff in the litigation, was a person within the meaning of § 1961(3)).

[6] See, e.g.:

Second Circuit: Jerry Kubecka, Inc. v. Avellino, 898 F. Supp. 963, 968 (E.D.N.Y. 1995) ("RICO claims survive the death of a plaintiff"); Costello v. Cooper, 1990 U.S. Dist. LEXIS 946 (S.D.N.Y. Jan. 30, 1990).

Fourth Circuit: Faircloth v. Finesod, 938 F.2d 513, 518 (4th Cir. 1991).

Sixth Circuit: County of Oakland v. City of Detroit, 784 F. Supp. 1275, 1284-1285 (E.D. Mich. 1992).

Seventh Circuit: State Farm Fire & Casualty Co. v. Estate of Caton, 540 F. Supp. 673, 681-682 (N.D. Ind. 1982). But see, Ball v. Marshall Field V, 1993 U.S. Dist. LEXIS 4273 at *29 (N.D. Ill. April 2, 1993) (treble-damage provision penal; court abated plaintiff's claim).

case the claim abates.[7] As to whether one may be liable for another person's RICO violations if one succeeds that person in interest, the case law, though limited, appears to apply the conventional principles of successor liability found in other tort contexts, holding a successor liable if the successor has actual or constructive knowledge of the predecessor's illegal acts.[8]

[2]—Vicarious Liability

As a general rule of agency, a principal is liable for harm caused by the principal's agents when the agents were acting within the scope of their employment or apparent authority.[9] By and large, the courts have applied general agency principles to RICO cases despite language in the statute that could be construed as disfavoring vicarious liability.[10]

There are, however, certain nuances regarding vicarious liability that are peculiar to RICO. The most significant arises in connection with claims brought under Section 1962(c), which prohibits any "person" who is "employed by or associated with any enterprise" from participating "in the conduct of such enterprise's affairs through a pattern of racketeering activity."[11] Although Section 1962(c) envisages that an individual such as an employee, would be the defendant "person" and that an entity, such as the defendant's employer will be the "enterprise" through which the defendant perpetrated his misconduct, many plaintiffs have sought to name the employer as a defendant as well, on the theory that it is vicariously liable for its employee's misconduct. Decisions from the Circuit Courts have rejected this

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[7] See, e.g.:

Third Circuit: Confederation Life Insurance Co. v. Goodman, 842 F. Supp. 836, 837-838 (E.D. Pa. 1994).

Fifth Circuit: Abell v. Potomac Insurance Co., 858 F.2d 1104, 1140-1141 (5th Cir. 1988) (portion of RICO damages exceeding actual damages penal, but other portion remedial).

Seventh Circuit: Ball v. Marshall Field, 1993 U.S. Dist. LEXIS 4273 at *29 (N.D. Ill. April 2, 1993). But see, State Farm Fire & Casualty Co. v. Estate of Caton, 540 F. Supp. 673, 682 (N.D. Ind. 1982) (RICO action was remedial; court allowed recovery of treble damages from deceased's estate).

[8] See RCM Executive Gallery Corp. v. Rolls Capital Co., 901 F. Supp. 630, 635 (S.D.N.Y. 1995). See also: Rodriguez v. Banco Central, 777 F. Supp. 1043, 1065 (D.P.R. 1991), *aff'd* 990 F.2d 7 (1st Cir. 1993); Continental Grain Co. v. Pullman Standard, Inc., 690 F. Supp. 628, 631 (N.D. Ill. 1988); Ghouth v. Conticommodity Services, Inc., 642 F. Supp. 1325, 1328 (N.D. Ill. 1986).

[9] See American Society of Mechanical Engineers, Inc. v. Hydrolevel Corp., 456 U.S. 556, 565-566, 102 S.Ct. 1935, 72 L.Ed.2d 330 (1982). See also, *Restatement (Second) of Agency* §§ 140, 219 (1957).

[10] Starr, "Vicarious Liability," 3 RICO L. Rep. 34 (Jan. 1986).

[11] See § 1.05[3] *infra* for a further discussion of this section.

approach, reasoning that it would render meaningless the distinction made in Section 1962(c) between the "person" and the "enterprise."[12]

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[12] See, e.g.:

First Circuit: United States v. London, 66 F.3d 1227 (1st Cir. 1995); Miranda v. Ponce Federal Bank, 948 F.2d 41, 45 (1st Cir. 1991); Schofield v. First Commodity Corp., 793 F.2d 28, 32 (1st Cir. 1986) ("We think the concept of vicarious liability is directly at odds with [the Congressional intent] behind Section 1962(c).").

Second Circuit: Discon Inc. v. NYNEX Corp., 93 F.3d 1055 (2d Cir. 1996); Moses v. Martin, 360 F. Supp.2d 533, 551 (S.D.N.Y. 2005) ("[A] corporation may not be held vicariously liable under section 1962(c) for the acts of its employees if that corporation is also named as the RICO enterprise."); Dubai Islamic Bank v. Citibank, N.A., 126 F. Supp.2d 659 (S.D.N.Y. 2000) (refusing to hold bank liable under RICO where plaintiff's only specific allegations regarding the alleged fraudulent scheme involved a sales manager and a teller); Kovian v. The Fulton County National Bank and Trust Company, 100 F. Supp.2d 129, 133-134 (N.D.N.Y. 2000); Laro, Inc. v. Chase Manhattan Bank, 866 F. Supp. 132, 139 (S.D.N.Y. 1994) (refusing to hold bank liable under r*espondent superior* for acts of its loan officers), *aff'd* 60 F.3d 810 (2d Cir. 1995).

Third Circuit: Jaguar Cars v. Royal Oaks Motor Car Co., 46 F.3d 258 (3rd Cir. 1995) (corporation was the victim and employees were the "enterprise"); Kehr Packages, Inc. v. Fidelcor, Inc., 926 F.2d 1406, 1411 (3d Cir. 1991); Petro-Tech, Inc. v. Western Co. of North America, 824 F.2d 1349, 1358-1360 (3d Cir. 1987).

Fourth Circuit: New Beckley Mining v. United Mine Workers of America, 18 F.3d 1161 (4th Cir. 1994); United States v. Computer Sciences Corp, 689 F.2d 1181 (4th Cir. 1982); Toucheque v. Price Brothers Co., 5 F. Supp.2d 341, 347 (D. Md. 1998).

Fifth Circuit: Crowe v. Henry, 43 F.3d 198, 206 n.19 (5th Cir. 1995) ("[U]nder 18 U.S.C. § 1962(c), an entity that is the RICO enterprise cannot be held vicariously liable because to do so would be to treat it as both the RICO person and the RICO enterprise.") (citation omitted); Bishop v. Corbitt Marine Ways Inc., 802 F.2d 122 (5th Cir. 1989).

Sixth Circuit: Davis v. Mutual Life Insurance Co., 6 F.3d 367, 378-380 (6th Cir. 1993); Pucket v. Tennessee Eastman Co., 889 F.2d 1481 (6th Cir. 1989).

Seventh Circuit: Richmond v. Nationwide Cassel L.P., 52 F.3d 640 (7th Cir. 1995); Ashland Oil, Inc. v. Arnett, 875 F.2d 1271, 1281 (7th Cir. 1989); D&S Auto Parts, Inc. v. Schwartz, 838 F.2d 964, 967 (7th Cir. 1988) ("Vicarious liability would defeat the purposes of RICO."); Haroco v. American National Bank and Trust Co. of Chicago, 747 F.2d 384 (7th Cir. 1984); Arenson v. Whitehall Convalescent and Nursing Home, Inc., 880 F. Supp. 1202, 1213 (N.D. Ill. 1995) (congressional intent regarding Subsection 1962(c) suggests that vicarious liability is not appropriate when a finding of such liability would require the person and the enterprise to be the same entity).

Eighth Circuit: Fogie v. THORN Americas, Inc., 190 F.3d 889 (8th Cir. 1999); Luthi v. Tonka Corp., 815 F.2d 1229, 1230 (8th Cir. 1987).

Ninth Circuit: Miller v. Yokohama Tire Corp., 358 F.3d 616, 620 (9th Cir. 2004) ("[A]n employer that [benefits from] its employee or agent's violations of section 1962(c) may be held liable under the doctrines of respondeat superior and agency when the employer is distinct from the enterprise"); Ochoa v. Housing Authority of Los Angeles, 47 Fed. Appx. 484 (9th Cir. 2002); Chang v. Gabrych, 80 F.3d 1293 (9th Cir. 1996); Brady v. Dairy Fresh Products Co., 974 F.2d 1149, 1154 (9th Cir. 1992); Larsen v. Lauriel Investors, Inc., 161 F. Supp.2d 1029, 1042 (D. Ariz. 2001) (the "Ninth Circuit has recognized that an employer who is benefitted by an employee or agent's violations of 1962(c) may be held liable under the doctrines of *respondeat superior* and agency when the employer is distinct from the enterprise").

By contrast, however, the text of the other RICO substantive liability Sections 1962(a) and 1962(b) lack similar language directly implying that the "person" and "enterprise" must be distinct and nonidentical, and consequently, most courts (though not all) have applied ordinary principles of vicarious liability to those subsections, permitting a corporate enterprise to be named as the vicarious defendant when it derived a benefit from the acts of its representatives,[13] but rejecting vicarious liability where the corporation was an unwitting participant,[14] itself a victim of the crime,[15] or not an intended benefi-

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Tenth Circuit: Brannon v. Boatmen's First National Bank of Oklahoma, 153 F.3d 1144 (10th Cir. 1998); Garbade v. Great Divide Mining & Milling Corp., 81 F.2d 212, 213 (10th Cir. 1987).

Eleventh Circuit: United States v. Goldin Industries, Inc., 219 F.3d 1271 (11th Cir. 2000).

District of Columbia Circuit: Yellow Bus Lines, Inc. v. Drivers, Chauffeurs & Helpers Local Union 639, 913 F.2d 948 (D.C. Cir. 1990) (*en banc*).

[13] See, e.g.:

Third Circuit: Petro-Tech, Inc. v. Western Co. of North America, 824 F.2d 1349, 1360-1361 (3d Cir. 1987).

Fifth Circuit: Crowe v. Henry, 43 F.3d 198, 206 (5th Cir. 1995).

But see:

Third Circuit: Kaiser v. Stuart, 1997 U.S. Dist. LEXIS 12788, at *14-*16 (E.D. Pa. Aug. 19, 1997) (refusing to impose *respondeat superior* liability under Section 1962(b) on law firm in which an individual defendant was a partner on ground that merely providing legal advice and services to a client is not equal to acquiring or maintaining an interest in or control over an enterprise).

Seventh Circuit: Pinski v. Adelman, 1995 U.S. Dist LEXIS 16550, at *41-*46 (N.D. Ill. Nov. 7, 1995) (refusing to impose vicarious liability on insurance companies under either Subsection 1962(a) or (c) because the insurance agent was a broker acting on behalf of plaintiffs rather than an agent of the insurers).

[14] See, e.g.:

Seventh Circuit: S.K. Hand Tool Corp. v. Dresser Industries, Inc., 852 F.2d 936, 941 (7th Cir. 1988) (refusing to impose vicarious liability on corporation when it was an unwilling conduit for acts of certain employee defendants).

Eighth Circuit: K & S Partnership v. Continental Bank, 952 F.2d 971, 977-980 (8th Cir. 1990) (refusing to impose vicarious liability on the defendant bank for the acts of its employees, which violated established bank policies and procedures).

Ninth Circuit: Dakis v. Chapman, 574 F. Supp. 757, 760 (N.D. Cal. 1983) (refusing to impose *respondeat superior* liability on brokerage firm where firm did not play an active role in the scheme, did not benefit, and was a mere conduit through which its employee engaged in the scheme).

[15] See, e.g.:

Fourth Circuit: Gussin v. Shockey, 725 F. Supp. 271, 276-277 (D. Md. 1989), *aff'd mem.* 933 F.2d 1001 (4th Cir. 1991) (refusing to impose liability under Subsection 1962(c) where the enterprise was a victim, absent a nexus between the defendant and the enterprise).

Seventh Circuit: Northern Trust Bank/O'Hare, N.A. v. Inryco, Inc., 615 F. Supp. 828, 835 (N.D. Ill. 1985) (refusing to impose liability where the corporation was the principal victim rather than the perpetrator of the fraud).

Ninth Circuit: Dakis v. Chapman, 574 F. Supp. 757, 760 (N.D. Cal. 1983).

ciary of the illegal conduct.[16] Even in those cases allowing such *respondeat superior* liability, courts usually will not hold employers liable for negligent or reckless supervision of employees who commit RICO offenses, but only for the intentional conduct that can be directly imputed to the employer.[17] Thus, courts have found corporations and other employers vicariously liable for the acts of their agents where the corporation or employer both promoted the illegal scheme and benefited from it,[18] or where the agent's acts are clearly within the scope of his or her duties and directly benefit the corporation.[19]

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[16] Banque Worms v. Luis A. Duque Pena e Hijos Ltda., 652 F. Supp. 770, 772 (S.D.N.Y. 1986) ("RICO only imposes liability on corporations that benefit from racketeering activity."). See also: Jaguar Cars, Inc., v. Royal Oaks Motor Car Co., 46 F.3d 258, 265-269 (3d Cir. 1995) (officers and employees can be held liable under Section 1962(c) when they manage a corporation and use it to conduct a pattern of racketeering activity); Petro-Tech, Inc. v. Western Co. of North America, 824 F.2d 1349, 1361 (3d Cir. 1987) (an employer might be liable in a civil RICO context where the employer benefited from the predicate acts).

[17] See, e.g.:

Second Circuit: Schmidt v. Fleet Bank, 16 F. Supp.2d 340, 351-353 (S.D.N.Y. 1998) (expressing reluctance to hold defendants who are not central figures in the criminal scheme, or who do not benefit from it, vicariously liable under RICO); Laro, Inc. v. Chase Manhattan Bank, 866 F. Supp. 132, 139-140 (S.D.N.Y. 1994) (vicarious liability might be appropriate if the employer benefited from the predicate acts or acted as a central figure or aggressor in the scheme), *aff'd* 60 F.3d 810 (2d Cir. 1995).

Fourth Circuit: Harrah v. J. C. Bradford and Co., No. 93-2458, 1994 U.S. App. LEXIS 27827, at *14-*15 (4th Cir. Oct. 6, 1994) (refusing to impose liability where plaintiffs failed to show that the defendant brokerage firm either knew about or participated in the scheme of an individual who, although not employed by the defendant, traded through the firm).

Ninth Circuit: O'Brien v. Dean Witter Reynolds, Inc., Fed. Sec. L. Rep. (CCH) ¶ 91,509, at 98,562 (D. Ariz. 1984) (refusing to impose vicarious liability on brokerage firms where their conduct was not knowing or intentional); Dakis v. Chapman, 574 F. Supp. 757, 760 (N.D. Cal. 1983) (refusing to impose *respondeat superior* liability against brokerage firms for negligence or recklessness).

[18] See, e.g.:

Second Circuit: Center Cadillac, Inc. v. Bank Leumi Trust Co., 808 F. Supp. 213, 236 (S.D.N.Y. 1992) (finding liability under the doctrine of *respondeat superior* where the bank benefited from employee's scheme).

Fifth Circuit: Crowe v. Smith, 848 F. Supp. 1258, 1262-1263 (W.D. La. 1994).

Sixth Circuit: Davis v. The Mutual Life Insurance Co., 6 F.3d 367, 378-380 (6th Cir. 1993).

Ninth Circuit: Brady v. Dairy Fresh Products Co., 974 F.2d 1149, 1154 (9th Cir. 1992) ("[A]n employer that is benefited by its employee or agent's violations of Subsection 1962(c) may be held liable under the doctrines of *respondeat superior* and agency when the employer is distinct from the enterprise.").

Eleventh Circuit: Cox v. Administrator, United States Steel & Carnegie, 17 F.3d 1386, 1406 (11th Cir. 1994) (union was subject to liability under Section 1962(c) where the union failed to investigate allegations against its agents, failed to discipline them until after their convictions, and attempted to cover-up their wrongdoing), *modified* 30 F.3d 1347 (11th Cir. 1994).

The Eleventh Circuit was the only circuit court to reject the requirement that the enterprise and the person be distinct in an action brought under Section 1962(c).[20] The Eleventh Circuit's rejection of the requirement that the person and the enterprise be distinct entities removed the principle limitation on the use of vicarious liability in RICO actions. To prove vicarious liability, under RICO, the Eleventh Circuit applied general agency rules and required a showing that the "employees (agents) . . . acts are: (1) related to and committed within the course of employment; (2) committed in furtherance [of the business] of the corporations; and (3) authorized or subsequently acquiesced in by the corporations."[21] The Eleventh Circuit's approach, which was inconsistent with the approach taken by the other circuit courts, created some confusion in subsequent decisions.[21.1] In *United States v. Goldin Industries, Inc.*,[21.2] the Eleventh Circuit overruled its prior decisions and held that under Section 1962(c) the person must be distinct from the RICO enterprise.[21.3] In the subsequent panel opinion in *Goldin Industries*, the court explained that "[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."[21.4] The panel rejected the defendants' argument that the person was not distinct from the enterprise due to overlapping ownership and that "all of the corporate defendants were offshoots of the initial Goldin corpora-

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[19] See, e.g., State Wide Photocopy, Corp. v. Tokai Financial Services, Inc., 909 F. Supp. 137, 142-143 (S.D.N.Y. 1995) (vicarious liability might apply where high-level officers were possibly involved in the illegal scheme). *Cf.* Aspacher v. Kretz, 1997 U.S. Dist. LEXIS 8000, at *26-*35 (N.D. Ill. June 5, 1997) (rejecting *respondeat superior* claim against an entity for the racketeering acts of its agents and noting that a corporation that is not the RICO enterprise may be vicariously liable for the intentional acts of its agents under Section 1962(c) only where the corporation is the central figure or aggressor in the alleged scheme).

[20] United States v. Hartley, 678 F.2d 961, 988 (11th Cir. 1982), *rev'd* United States v. Goldin Industries, Inc., 219 F.3d 1268 (11th Cir. 2000) (*en banc*) ("[a] corporation may be simultaneously both a defendant and the enterprise under RICO").

[21] Quick v. Peoples Bank, 993 F.2d 793, 797 (11th Cir. 1994).

[21.1] Cox v. Administrator, United States Steel & Carnegie, 17 F.3d 1386, 1398, 1403-1408 (11th Cir. 1994), *modified* 30 F.3d 1347 (11th Cir. 1994). The Eleventh Circuit modified its original opinion in *Cox* by deleting certain portions of the initial opinion that had rejected the requirement of enterprise/person distinction; however, the court did not remove other sections of the opinion that also rejected the enterprise/person distinction.

[21.2] United States v. Goldin Industries, Inc., 219 F.3d 1268 (11th Cir. 2000) (*en banc*).

[21.3] *Id.,* 219 F.3d at 1271.

[21.4] United States v. Goldin Industries, Inc., 219 F.3d 1271, 1275 (11th Cir. 2000).

tion."[21.5] The court explained that it rejected defendant's argument because each corporation "is incorporated in a separate state. Each is a separate ongoing business with a separate customer base. Each is free to act independently and advance its own interest contrary to those of the other two corporations."[21.6]

At least two courts have addressed the issue of vicarious liability in the context of partnerships.[22] Both courts concluded that partnerships could be held vicariously liable for the actions of their partners.[23] In *131 Main Street Associates v. Manko*, the district court held that although neither RICO's language nor legislative history addressed the issues of vicarious or partnership liability, there was no basis for concluding that the application of partnership liability in the civil RICO context would disrupt the statutory scheme.[24] Accordingly, the court found that the defendants' status as general partners of a limited partnership made them appropriate defendants in a case alleging RICO violations by the partnership and their partners.[25] In *Crowe v. Henry*, the Fifth Circuit decided that a partnership could be held vicariously liable for the acts of one of its partners under either Subsection 1962 (a) or (b) if the firm benefits from the illegal acts.[26]

One way of framing the issue of vicarious liability as it arises in the context of a RICO "enterprise" that is also named, vicariously, as the defendant, is to analyze whether the enterprise that served as the vehicle for the misconduct was simply a victim or, conversely, was itself blameworthy.[27] In *Volmar Distributors, Inc. v. The New York Post Co.*, the court concluded that a corporate entity could be held liable where it was possible to demonstrate that it caused the illegal conduct.[28] The court decided, however, that the co-defendant, a labor union, could not be held liable for the racketeering acts of its president because the plaintiffs neither alleged that the union had derived

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[21.5] *Id.,* 219 F.3d at 1276.

[21.6] *Id.,* 219 F.3d at 1277.

[22] Crowe v. Henry, 43 F.3d 198, 204, 206 (5th Cir. 1995); 131 Main Street Associates v. Manko, 897 F. Supp. 1507, 1533-1535 (S.D.N.Y. 1995). In *Williams v. Obstfeld*, the Eleventh Circuit declined to address the issue of "under what circumstances a partnership may be held liable under RICO for the illegal acts of one of its partners" because it concluded that neither a partnership nor joint venture existed. Williams v. Obstfeld, 314 F.3d 1270,1276 n.8 (11th Cir. 2002).

[23] See: *Crowe v. Henry,* N. 22 *supra*, 43 F.3d at 206*; 131 Main Street Associates v. Manko,* N. 22 *supra*, 897 F. Supp. at 1533.

[24] *131 Main Street Associates v. Manko*, N. 22 *supra*, 897 F. Supp. at 1533.

[25] *Id*., 897 F. Supp. at 1534.

[26] *Crowe v. Henry,* N. 22 *supra,* 43 F.3d at 206.

[27] Volmar Distributors, Inc. v. The New York Post Co., 899 F. Supp. 1187, 1192-1193 (S.D.N.Y. 1995).

[28] *Id.*

any benefit from the RICO violations[29] nor claimed "that the union was more than a passive conduit for [the] illegal conduct."[30] In a footnote, the court found that a union could not be held liable for simply acquiescing in a fraudulent scheme.[31] In justifying its conclusion, the court explained that

> [a]lthough agency law does recognize that failure to repudiate can act as an affirmance of an unauthorized transaction . . . we do not think that this doctrine should be used to undermine the federal policy of punishing only culpable RICO parties.[32]

[3]—The Immunity of State/Federal Entities, Government Officials, and Foreign States

Consistent with the Supreme Court's increasing receptivity to claims of sovereign immunity by state governments, several circuit courts have held that state governmental entities cannot be sued under RICO.[33] One approach to the issue of sovereign immunity, which is

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[29] *Id.*, 899 F. Supp at 1193.
[30] *Id.*
[31] *Id.*, 899 F. Supp at 1194 n.8.
[32] *Id.*
[33] See e.g.:

Third Circuit: Genty v. Resolution Trust Corp., 937 F.2d 899, 906-914 (3d Cir. 1991).

Ninth Circuit: Pedrina v. Chun, 97 F.3d 1296, 1300 (9th Cir. 1996); Lancaster Community Hospital v. Antelope Valley Hospital District, 940 F.2d 397, 404 (9th Cir. 1991). See also:

Second Circuit: Frooks v. Town of Cortlandt, 997 F. Supp. 438, 456-457 (S.D.N.Y. 1998) (dismissing RICO claim against a town because a municipality cannot form the requisite criminal intent to establish a predicate act and dismissing RICO claims against town employees in their official capacities for the same reason); Rini v. Swirn, 886 F. Supp. 270, 294 (E.D.N.Y. 1995).

Fifth Circuit: Dammon v. Folse, 846 F. Supp. 36, 37-39 (E.D. La. 1994) (school board, as a municipal entity, is not subject to RICO).

Sixth Circuit: Chaz Construction, LLC v. Codell, 137 Fed. Appx. 735, 743 (6th Cir. 2005) (Kentucky transportation cabinet officials protected by sovereign immunity); County of Oakland v. City of Detroit, 784 F. Supp. 1275, 1283 (E.D. Mich. 1992).

Seventh Circuit: Doe v. Board of Trustees of the University of Illinois, 429 F. Supp.2d 930, 941 (N.D. Ill. 2006) (sovereign immunity barred a claim against the University of Illinois); Johnson v. Illinois Commerce Commission, 2005 U.S. Dist. LEXIS 14487 (N.D. Ill. July 1, 2005) (dismissing a RICO claim against the Illinois Commerce Commission); Pelfresne v. Village of Rosemont, 22 F. Supp.2d 756, 761 (N.D. Ill. 1998) (village was not liable, but action was allowed against town mayor and other individual defendants in their individual capacities to proceed).

Ninth Circuit: Vierra v. California Highway Patrol, 644 F. Supp.2d 1219, 1232 (E.D. Cal. 2009) (the Eleventh Amendment barred a RICO claim against the California Highway Patrol).

best exemplified by decisions from the Ninth Circuit, has concluded that government entities cannot violate RICO because they are incapable of forming the "malicious intent" needed to commit predicate acts.[34] The Third Circuit explicitly questioned the soundness of the Ninth Circuit's *mens rea* approach, noting that municipalities are often held liable for remedying the tortious or criminal acts of their officials,[35] but nonetheless reached the same result as the Ninth Circuit by reasoning that RICO is essentially punitive in nature and, therefore, inapplicable to state entities, except where sovereign immunity is expressly waived by statute.[36] Under either approach, local governments are also immune from RICO liability.[37]

With regard to the federal government, at least six circuit courts have held that because a federal agency cannot be subject to criminal prosecution, neither the government nor a private party can bring even a civil RICO claim against the federal government since even civil RICO liability is ultimately premised on allegations of criminal violations.[38] More generally, the federal government in enacting

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Tenth Circuit: Massey v. Oklahoma City, 643 F. Supp. 81, 85 (W.D. Okla. 1986).

Eleventh Circuit: Pine Ridge Recycling, Inc. v. Butts County, 855 F. Supp. 1264, 1273-1274 (M.D. Ga. 1994) (municipal corporation is incapable of forming the criminal intent necessary for the commission of predicate offenses under RICO and *respondeat superior* cannot be used to impute the criminal intent of agents to a governmental entity).

[34] Pedrina v. Chun, 97 F.3d 1296, 1300 (9th Cir. 1996); Lancaster Community Hospital v. Antelope Valley Hospital District, 940 F.2d 397, 404 (9th Cir. 1991).

[35] *Genty v. Resolution Trust Corp.,* N. 33 *supra,* 937 F.2d at 908-910.

[36] *Id.*, 937 F.2d at 906-914. See also:

Fifth Circuit: Dammon v. Folse, 846 F. Supp. 36, 38-39 (E.D. La. 1994).

Tenth Circuit: Massey v. Oklahoma City, 643 F. Supp. 81, 85 (W.D. Okla. 1986).

Eleventh Circuit: Pine Ridge Recycling, Inc. v. Butts County, 855 F. Supp. 1264, 1273 (M.D. Ga. 1994).

[37] See, e.g.:

Third Circuit: Heinemeyer v. Township of Scotch Plains, 198 Fed. Appx. 254 (3d Cir. 2006) ("Defendant Township of Scotch Plains is a municipal corporation and is thus immune to RICO claims.").

Fifth Circuit: Dammon v. Folse, 846 F. Supp. 36, 38-39 (E.D. La. 1994).

Seventh Circuit: Pelfresne v. Village of Rosemont, 22 F. Supp.2d 756, 761 (N.D. Ill. 1998) ("[M]unicipal corporations cannot be held liable under § 1964(c).").

Ninth Circuit: Lancaster Community Hospital v. Antelope Valley Hospital District, 940 F.2d 397, 404 (9th Cir. 1991).

Tenth Circuit: Massey v. Oklahoma City, 643 F. Supp. 81, 85 (W.D. Okla. 1986).

[38] See:

First Circuit: Donahue v. FBI, 204 F. Supp.2d 169, 174 (D. Mass. 2002) ("[F]ederal agencies are immune from state or federal criminal prosecution, and thus cannot satisfy the 'racketeering activity' requirement for civil RICO liability, because they are not 'chargeable,' 'indictable,' or 'punishable' for the offenses listed in 18 U.S.C. § 1961(1).").

Second Circuit: United States v. Bonanno Organized Crime Family, 879 F.2d 20, 23 (2d Cir. 1989).

RICO showed no intent to waive its sovereign immunity. Such a waiver must be unequivocally expressed[38.1] and RICO is a general statute that "does not mention, much less waive, sovereign immunity."[39]

Courts have also relied on sovereign immunity as a basis for dismissing RICO claims against other sovereign entities. In *Smith v. Babbitt,*[40] the court held that an Indian tribe was immune from RICO liability, concluding that RICO lacked language suggesting that Congress intended to waive immunity with respect to Indian tribes.[41] A district court in Louisiana adopted the same reasoning in dismissing a RICO claim against the Louisiana Music Commission, a state entity, finding "no express language in the statute to suggest that Congress intended to abrogate the Eleventh Amendment bar to suits against the states for violations of RICO."[42]

Courts have also found government officials to be exempt from RICO liability on grounds of sovereign immunity or related doctrines.[43] For example, in *Chappell v. Robbins,*[44] the Ninth Circuit

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Fifth Circuit: McNeily v. United States, 6 F.3d 343, 350 (5th Cir. 1993) (prohibiting civil RICO claim against FDIC).

Sixth Circuit: Berger v. Pierce, 933 F.2d 393, 397 (6th Cir. 1991) (ordering district court to hold hearing on whether to apply Rule 11 sanctions for stating claim against the federal government), *on remand* 771 F. Supp. 865 (N.D. Ohio 1991), *rev'd on other grounds* 983 F.2d 1065 (6th Cir. 1992).

Ninth Circuit: Dees v. California State University, 33 F. Supp.2d 1190, 1201 (N.D. Cal. 1998) (dismissing a RICO claim against the Department of Labor and individual Department of Labor defendants on sovereign immunity grounds); McMillan v. Department of the Interior, 907 F. Supp. 322, 326 (D. Nev. 1995), *aff'd* 87 F.3d 1320, (9th Cir. 1996).

Tenth Circuit: Dopp v. Loring, 54 Fed. Appx. 296, 297-298 (10th Cir. 2002) (federal prosecutor immune from suit).

District of Columbia Circuit: Norris v. United States Dep't of Defense, 1997 U.S. App. LEXIS 16360 (D.C. Cir. 1997) (disallowing RICO claims against Department of Defense and Army).

[38.1] Lane v. Pena, 518 U.S. 187, 192, 116 S.Ct. 2092, 135 L.Ed.2d 486 (1996) ("A waiver of the Federal Government's sovereign immunity must be unequivocally expressed in statutory text and will not be implied.").

[39] Chow v. Giordano, 155 F.R.D. 130 (9th Cir. 1994).

[40] Smith v. Babbitt, 875 F. Supp. 1353 (D. Minn. 1995).

[41] *Id.*, 875 F. Supp. at 1365.

[42] Cuccia v. Cyrus, 1995 U.S. Dist. LEXIS 9208, at *6 (E.D. La. June 23, 1995).

[43] Chappell v. Robbins, 73 F.3d 918, 923-925 (9th Cir. 1996). See also:

Second Circuit: Kashelkar v. MacCartney, 79 F. Supp.2d 370 (S.D.N.Y. 1999) (dismissing RICO claims against law secretary to state court judge on Eleventh Amendment and quasi-judicial immunity grounds).

Fifth Circuit: Brown v. NationsBank Corp., 188 F.3d 579, 587-588 (5th Cir. 1999) (dismissing a RICO claim on qualified immunity grounds because "the rights asserted by Appellants were not clearly established at the time of defendants' alleged acts").

Sixth Circuit: Benson v. O'Brien, 67 F. Supp.2d 825, 830-832 (N.D. Ohio 1999) (dismissing RICO claims against county prosecutors, assistant attorney general,

decided that the doctrine of legislative immunity shields state senators accused of accepting bribes from civil RICO liability, at least where the alleged RICO acts consisted of sponsoring and passing legislation in exchange for bribes.[45] The court held that "[i]n passing RICO, Congress [did not intend] to displace common-law immunities" and that, "we find nothing in the nature of RICO's statutory structure which evinces any clear congressional intent to abrogate legislative immunity."[46] The court also rejected the argument that the congressional directive to construe RICO liberally[47] implied authority to abrogate legislative immunity.[48] In certain situations, courts have even extended immunity to individuals who are not government officials. For example, the Sixth Circuit granted qualified immunity to the outside lawyers for the city of Louisville, as well as to the city's mayor and other officials.[49] After applying an objective test as to whether a hypothetical official standing in the defendants' shoes would have understood that taking the steps alleged would have violated the plaintiffs' clearly established constitutional or statutory

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judges, and other state employees on Eleventh Amendment, judicial, and absolute immunity grounds).

Seventh Circuit: Davit v. Davit, 173 Fed. Appx. 515, 517 (7th Cir. 2006) (upholding dismissal of claims against two state court judges on judicial immunity grounds).

Ninth Circuit: Stone v. Baum, 409 F. Supp.2d 1164, 1175 (D. Ariz. 2005) ("The alleged acts were judicial acts, taken within each court's subject matter jurisdiction, and as such Defendant judges are immune from suit.").

Tenth Circuit: Dopp v. Loring, 54 Fed. Appx. 296, 297-298 (10th Cir. 2002) (dismissing claim against state court judge, state prosecutor, and federal prosecutor on absolute immunity grounds); McDonald v. Heaton, 2006 U.S. Dist. LEXIS 40396, at *5-*6 (W.D. Okla. Jun. 16, 2006) (federal district court judge was entitled to absolute judicial immunity). But see, Robbins v. Wilkie, 433 F.3d 755 (10th Cir. 2006) (qualified immunity defense did not apply to Bureau of Land Management employees).

District of Columbia Circuit: Norris v. United States Dep't of Defense, 1997 U.S. App. LEXIS 16360 (D.C. Cir. 1997) (prohibiting RICO claims against senior military officials).

[44] Chappell v. Robbins, 73 F.3d 918, 923-925 (9th Cir. 1996).

[45] *Id.,* 73 F.3d at 920-922. See Thillens, Inc. v. Community Currency Exchange Ass'n of Illinois, 729 F.2d 1128 (7th Cir. 1984) (state legislators who had accepted bribes to lobby the Illinois Department of Financial Institutions to enact certain regulations were immune from civil RICO liability because the allegations "broadly implicate[d] the defendants' function of influencing the legislative process regarding a legitimate legislative issue").

[46] *Id.*, 73 F.3d at 922, 924.

[47] Found in the preamble to RICO though not in the operative text itself.

[48] See *Chappell v. Robbins,* N. 43 *supra*, 73 F.3d at 924-925. *Cf.*: Empress Casino Joliet Corp. v. Blagojevich, 674 F. Supp.2d 993, 1000 (N.D. Ill. 2009) (rejecting claim that the former governor could assert legislative immunity to shield himself from a RICO claim); Pelfresne v. Stephens, 35 F. Supp.2d 1064, 1070 (N.D. Ill. 1999) (legislative immunity does not extend to administrative acts and concluding that the doctrine of legislative immunity did not bar claims against local officers).

[49] Cullinan Associates, Inc. v. Abramson, 128 F.3d 301, 309-312 (6th Cir. 1997).

rights, the court granted the defendants' motion to dismiss on qualified immunity grounds.[50]

A number of Circuit Courts have addressed the issue of whether the Foreign Sovereign Immunities Act of 1976 ("FSIA")[51] prohibits a civil RICO action against a foreign state. Generally, courts to consider the issue have held that the states and their instrumentalities are immune from suit under FSIA, though the reasons have differed depending on the facts of each case.

Two circuit courts, the Tenth and the Sixth, have considered the argument that foreign states and their instrumentalities are immune from civil RICO suits under FSIA because the predicate acts underlying a civil RICO claim must be indictable and the FSIA provides foreign states with immunity from criminal indictment.[52] The Tenth Circuit rejected this argument, stating that FSIA does not specifically address the issue of jurisdiction in criminal matters and, therefore, the court would not assume that foreign states are immune from criminal indictment under FSIA.[53] The court further held that, accepting the allegations of the complaint as true as it was required to do on an interlocutory appeal of a denial of a motion to dismiss, the plaintiff's claims fell within the commercial activity exception to the FSIA and thus the defendants were not immune from a RICO suit.[54] The Sixth Circuit, however, came to the opposite conclusion and held that FSIA provides foreign sovereigns with immunity from criminal prosecution, absent a relevant international agreement or statutory exception.[55] In reaching its decision, the court relied on case law rejecting RICO claims against the United States government on the ground that the federal government is not indictable.[56] Applying the same logic, the court concluded that because the defendant, a federal sovereign, was not indictable under the FSIA, it was immune from civil RICO claims.[57]

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[50] *Id*.

[51] 28 U.S.C. §§ 1330, 1602-1611.

[52] See:

Sixth Circuit: Keller v. Central Bank of Nigeria, 277 F.3d 811, 818-821 (6th Cir. 2002).

Tenth Circuit: Southway v. Central Bank of Nigeria, 198 F.3d 1210, 1214-1215 (10th Cir. 1999).

[53] *Southway*, N. 52 *supra*, 198 F.3d at 1214-1215.

[54] *Id*., 198 F.3d at 1216-1219.

[55] *Keller*, N. 52 *supra,* 277 F.3d at 819-820.

[56] *Id*., 277 F.3d at 820 (citing Berger v. Pierce, 933 F.2d 393, 397 (6th Cir. 1991); McNeily v. United States, 6 F.3d 343, 350 (5th Cir. 1993)).

[57] *Keller*, N. 52 *supra*, 277 F.3d at 821 ("Having determined that a defendant must be indictable for a civil RICO claim to proceed, and that defendants, on the facts before us in this appeal, are not indictable in the United States for the listed

Five circuit courts have found defendants immune from suit because the plaintiffs failed to prove that an exception to FSIA applied to their case. In a later proceeding in *Southway*, the Tenth Circuit held that the commercial activities exception did not apply to the Nigerian government or its central bank when the defendants were not involved in the activities, and the perpetrators of the scam to which the plaintiffs had fallen prey (and which formed the basis of their RICO claim) were neither agents nor employees of the Nigerian government.[58] Similarly, the Second Circuit has held that the commercial activities exception to FSIA did not apply and foreign states were immune from RICO suits when plaintiffs failed to satisfy the requisite nexus between the commercial activity in the United States and the gravamen of the plaintiffs' complaint[59] or failed to show that the defendants' activities caused a "direct effect in the United States."[60] The District of Columbia Circuit has also held that the implicit waiver exception to the FSIA did not apply and a foreign sovereign and its instrumentality were immune from RICO claims when the foreign sovereign had explicitly waived its immunity for specific contractual breaches but not for any other claims, including RICO claims.[61] In *Calzadilla v. Banco Latino Internacional*,[61.1] the Eleventh Circuit rejected plaintiff's claim that the defendants had waived their sovereign immunity by previously initiating a lawsuit against him in federal court because such an interpretation would render meaningless FSIA's "malicious prosecution exception to the noncommercial tort exception."[61.2] In *Dale v. Colagiovannia*,[61.3] the Fifth Circuit addressed whether the Vatican was subject to FSIA's commercial activity exception because its agent, while possessing apparent authority, engaged in commercial activity.[61.4] The court concluded

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RICO predicate offenses, we disagree with the rationale relied upon by the district court in [denying] defendant's motion to dismiss."); *accord*, Gould, Inc. v. Mitsui Mining & Smelting Co., 750 F. Supp. 838, 844 (N.D. Ohio 1990).

[58] Southway v. Central Bank of Nigeria, 328 F.3d 1267, 1274 (10th Cir. 2003) (the perpetrators of the fraud were "private individuals in Nigeria [who] impersonated employees of the Nigerian government and its agency," not "agents nor employees of the Nigerian government").

[59] Kensington International Limited v. Itoua, 505 F.3d 147, 156-157 (2d Cir. 2007) ("Kensington has failed to show how the oil shipments and premium payments, rather than the execution of the prepayment agreements themselves, form the basis of its action.").

[60] *Id*., 505 F.3d at 158.

[61] World Wide Minerals, Ltd. v. Republic of Kazakhstan, 296 F.3d 1154, 1164 (D.C. Cir. 2002).

[61.1] Calzadilla v. Banco Latino Internacional, 413 F.3d 1285 (11th Cir. 2005).

[61.2] *Id.,* 413 F.3d at 1288.

[61.3] Dale v. Colagiovannia, 433 F.3d 425 (5th Cir. 2006).

[61.4] *Id*., 433 F.3d at 428.

"that an agent's acts conducted with the apparent authority of the state is insufficient to trigger the commercial exception to FSIA."[61.5]

In addition, a number of decisions have held that individuals or entities that are neither states nor instrumentalities of states are not, or may not be, immune from suit under the FSIA. For example, the District of Columbia Circuit has held that a company which "is neither a state nor the instrumentality of a state . . . cannot assert sovereign immunity as a defense" to a RICO claim.[62] Similarly, the Sixth Circuit noted that the leaders of foreign states that commit criminal acts that would be indictable as RICO predicate crimes may not be immune from RICO claims under FSIA if those individuals were acting outside of their official capacity.[63] Most recently, the Second Circuit remanded a case to the district court to determine whether FSIA applies to individuals and, if so, whether it would apply to the former chairman of an entity that is immune from a RICO suit because it is a foreign state under FSIA.[64]

In *Rosner v. Bank of China*,[65] a court in the Southern District of New York addressed the Bank of China's alleged role in a fraudulent enterprise that had stolen over $25 million from investors. The court found that the plaintiff's allegations satisfied the commercial activities exception to RICO. The court explained that "the allegation is that [the Bank of China] aided and abetted fraud and violated RICO by providing extensive banking services in the United States, to customers in the United States, that enabled the stolen funds of persons residing in the United States to be transported to Macau."[66] However, the court granted the Bank of China's motion to dismiss the civil RICO claims because the plaintiff failed to sufficiently plead an enterprise and failed to properly allege RICO predicate acts.[67]

[61.5] *Id*., 433 F.3d at 429.

[62] *Id*., 296 F.3d at 1168.

[63] Keller v. Central Bank of Nigeria, 277 F.3d 811, 821 (6th Cir. 2002) ("We note that although a foreign sovereign is not indictable, and therefore not amenable to civil RICO claims, the same conclusions may not follow for individuals who commit criminal acts; such unlawfulness may indicate that they were acting without the authority of the sovereign.") (citing Phaneuf v. Republic of Indonesia, 106 F.3d 302, 306-307 (9th Cir. 1997); Brown v. Nationsbank Corp., 188 F.3d 579, 587 (5th Cir. 1999)).

[64] *Kensington*, N. 59 *supra*, 505 F.3d at 160-161 (the FSIA's definitions of "agency or instrumentality of a foreign state," "[o]n their face . . . do not expressly include or exclude individual officials").

[65] Rosner v. Bank of China, 528 F. Supp.2d 419 (S.D.N.Y. 2007).

[66] *Id*., 528 F. Supp.2d at 425.

[67] *Id*., 528 F. Supp.2d at 429-430.

§ 1.04 Employing a Pattern of Racketeering Activity or the Proceeds Thereof

The second element of RICO is the requirement that the defendant engage in a "pattern of racketeering activity". The racketeering activity must consist of certain specified predicate acts, and, to constitute a "pattern," there must be two or more such acts having sufficient "continuity and relationship."[1]

[1]—Predicate Acts ("Racketeering Activity")

Section 1961(1)[2] of RICO defines the predicate criminal offenses that constitute "racketeering activity" under RICO as acts "indictable" or "punishable" under various federal criminal laws or "chargeable" under various state criminal laws. The section specifically lists the federal offenses that qualify as predicate acts,[3] but lists the state offenses qualifying as predicate acts generally as "any act or threat involving murder, kidnapping, gambling, arson, robbery, which is chargeable under State law and punishable by imprisonment for more than one year."[4]As the Third Circuit has observed, "RICO's list of acts constituting predicate acts of racketeering activity is exhaustive."[5]

[a]—"Indictable," "Punishable," "Chargeable"

Section 1961(1), as interpreted by the Supreme Court in *Sedima, S.P.R.L. v. Imrex Co*.,[6] does not require that a defendant be convicted of the predicate offenses,[7] nor actually be charged by government authorities or indicted by a grand jury.[8] Rather, Section 1961(1) requires only that the defendant could have been indicted because he or she committed acts satisfying the essential elements of the predicate

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[1] See H. J., Inc. v. Northwestern Bell Telephone Co., 492 U.S. 229, 237-249, 109 S.Ct. 2893, 106 L.Ed.2d 195 (1989).

[2] 18 U.S.C. § 1961(1).

[3] 18 U.S.C. § 1961(1)(B)-(F).

[4] 18 U.S.C. § 1961(1)(A).

[5] Annulli v. Panikkar, 200 F.3d 189, 200 (3d Cir. 1999) (citing cases). The *Annulli* court noted that the state crime of theft is not a predicate act under RICO. *Id*., 200 F.3d at 199-200 & n.8. The court concluded that "if garden-variety state law crimes, torts, and contract breaches were to constitute predicate acts of racketeering . . . civil RICO law . . . would swallow state civil and criminal law whole." *Id*., 200 F.3d at 200.

[6] Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 105 S.Ct. 3275, 87 L.Ed.2d 346 (1985).

[7] *Id*., 473 U.S. at 488-493.

[8] *Id*., 473 U.S. at 488.

offense.[9] Moreover, Section 1961(1) does not require a civil RICO plaintiff to prove beyond a reasonable doubt that the defendant committed the predicate acts, but only requires the plaintiff to meet a preponderance of the evidence standard, the normal civil standard.[10] Nevertheless, a RICO claim will be dismissed if the plaintiff fails to prove that the defendant committed the necessary predicate acts.[10.1]

[b]—Federal Offenses

Under Section 1961(1), the following federal offenses qualify as RICO predicate offenses:

Under Section 1961(1)(B)

(a) bribery: 18 U.S.C. § 201
(b) sports bribery: 18 U.S.C. § 224
(c) counterfeiting: 18 U.S.C. §§ 471-473

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[9] *Id*. Prosecutorial guidelines limiting prosecution for certain offenses probably do not provide a defense in a civil RICO action.

[10] Although the *Sedima* Court declined to define the standard of proof necessary for a conviction under civil RICO, it strongly suggested in *dictum* that a preponderance of the evidence was the appropriate standard. Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 491, 105 S.Ct. 3275, 87 L.Ed.2d 346 (1985). Every circuit court to address the issue has held that the plaintiff in a civil RICO action can satisfy its burden by the preponderance of evidence standard.

See, e.g.:

Second Circuit: Cullen v. Margiotta, 811 F.2d 698, 731 (2d Cir. 1987).

Third Circuit: United States v. Local 560, International Brotherhood of Teamsters, 780 F.2d 267, 279-280 n.12 (3d Cir. 1985). But see, Castle v. Cohen, 676 F. Supp. 620, 632 (E.D. Pa. 1987) (requiring predicate act of fraud to be proved by clear and convincing evidence), *vacated on other grounds* 840 F.2d 173 (1988).

Fourth Circuit: Combs v. Bakker, 886 F.2d 673, 677 (4th Cir. 1989).

Fifth Circuit: Armco Industries Credit Corp. v. SLT Warehouse, 782 F.2d 475, 481 (5th Cir. 1987) (suggesting in *dictum* that a preponderance standard applies to civil RICO actions).

Sixth Circuit: Preferred Mutual Insurance Co. v. Dumas, 905 F.2d 1538 (Table), 1990 WL 87048 at *3 (6th Cir. 1990).

Seventh Circuit: Mira v. Nuclear Measurements Corp., 107 F.3d 466, 473 (7th Cir. 1997).

Eighth Circuit: Bieter Co. v. Blomquist, 987 F.2d 1319, 1324 (8th Cir. 1993).

Ninth Circuit: Wilcox v. First Interstate Bank of Oregon, 815 F.2d 522, 531 (9th Cir. 1987).

But see, Maine, "The Standard of Proof in Civil Rico Actions for Treble Damages: Why the Clear and Convincing Standard Should Apply," 22 Ind. L. Rev. 881 (1989).

[10.1] See Montclair v. L.O.I., Inc., 246 Fed. Appx. 535 (9th Cir. Sept. 4, 2007) (affirming finding of district court that "[w]ithout a violation of the Act or the use of any other criminal means, there is no racketeering activity and the Complaint does not state a RICO claim against E-Z Money upon which relief can be granted").

(d) felonious theft from interstate shipment: 18 U.S.C. § 659

(e) embezzlement from pension and welfare funds: 18 U.S.C. § 664

(f) extortionate credit transactions: 18 U.S.C. §§ 891-894

(g) fraud and related activity in connection with identification documents: 18 U.S.C. § 1028

(h) fraud and related activity in connection with access devices: 18 U.S.C. § 1029

(i) transmission of gambling information: 18 U.S.C. § 1084

(j) mail fraud: 18 U.S.C. § 1341[11]

(k) wire fraud: 18 U.S.C. § 1343

(l) financial institution fraud: 18 U.S.C. § 1344

(m) procurement of citizenship or nationality unlawfully: 18 U.S.C. § 1425

(n) reproduction or naturalization of citizenship papers: 18 U.S.C. § 1426

(o) sale of naturalization or citizenship papers: 18 U.S.C. §1427

(p) dealing in obscene matter: 18 U.S.C. §§ 1461-1465

(q) obstruction of justice: 18 U.S.C. § 1503[12]

(r) obstruction of criminal investigations: 18 U.S.C. § 1510

(s) obstruction of State or local law enforcement: 18 U.S.C. § 1511

(t) tampering with a witness, victim, or informant: 18 U.S.C. § 1512

(u) retaliating against a witness, victim, or informant: 18 U.S.C. § 1513

(v) false statement in application and use of passport: 18 U.S.C. § 1542

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[11] But see:

Fourth Circuit: Semiconductor Energy Laboratory Co. v. Samsung Electronics Co., 4 F. Supp.2d 473, 476 (E.D. Va. 1998) (fraud against United States Patent and Trademark Office does not satisfy RICO's predicate act requirement because otherwise nearly every inequitable conduct claim in a patent case could be brought as a RICO claim).

Seventh Circuit: Balderos v. City Chevrolet, 214 F.3d 849, 854 (7th Cir. 2000) (violations of the Truth in Lending Act involving mail and wire communications, by themselves, were not predicate acts under RICO where plaintiffs did not allege a separate scheme to defraud).

[12] In order to qualify as a predicate act under RICO, the act of obstruction must relate to a proceeding in federal court. See, e.g., O'Malley v. New York City Transit Authority, 896 F.2d 704, 707 (2d Cir. 1990). See also, Streck v. Peters, 855 F. Supp. 1156, 1162 (D. Haw. 1994) (since acts of perjury are indictable under the obstruction of justice statute, in appropriate circumstances they may constitute RICO predicate acts).

(w) forgery or false use of a passport: 18 U.S.C. § 1543

(x) misuse of passport: 18 U.S.C. § 1544

(y) fraud and misuse of visas, permits, and other documents: 18 U.S.C. § 1546

(z) peonage, slavery, and trafficking in persons: 18 U.S.C. §§ 1581-1591

(aa) interference with commerce, robbery, or extortion: 18 U.S.C. § 1951

(bb) racketeering: 18 U.S.C. § 1952

(cc) interstate transportation of wagering paraphernalia: 18 U.S.C. § 1953

(dd) unlawful welfare fund payments: 18 U.S.C. § 1954

(ee) illegal gambling businesses: 18 U.S.C. § 1955

(ff) laundering of monetary instruments: 18 U.S.C. § 1956

(gg) engaging in monetary transactions in property derived from specified unlawful activity: 18 U.S.C. § 1957

(hh) use of interstate commerce facilities in commission of murder-for-hire: 18 U.S.C. § 1958

(ii) sexual exploitation of children: 18 U.S.C. §§ 2251-2252, and 2260

(jj) interstate transportation of stolen motor vehicles: 18 U.S.C. §§ 2312-2313

(kk) interstate transportation of stolen property: 18 U.S.C. §§ 2314-2315

(ll) trafficking in counterfeit labels for phonorecords, computer programs or computer program documentation or packaging and copies of motion pictures or other audiovisual works: 18 U.S.C. § 2318

(mm) criminal infringement of a copyright: 18 U.S.C. § 2319

(nn) unauthorized fixation of and trafficking in sound recordings and music videos of live musical performances: 18 U.S.C. § 2319A

(oo) trafficking in goods or services bearing counterfeit marks: 18 U.S.C. § 2320[13]

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[13] President Clinton signed the Anti-Counterfeiting Consumer Protection Act of 1996, Pub. L. No. 104-153, 110 Stat. 1386, on July 2, 1996. In *Smith v. Jackson*, 84 F.3d 1213 (9th Cir. 1996), the court concluded that the plaintiffs failed to state a RICO claim where they alleged only copyright infringement under the guise of mail and wire fraud because copyright infringement is not a predicate act under RICO. See also:

Second Circuit: United States Media Corp. v. Edde Entertainment, Inc., 1996 U.S. Dist. LEXIS 13389, at *37-*38 (S.D.N.Y. Sept. 12, 1996) (dismissing RICO claim of copyright violations on grounds that they are not equivalent to fraud).

(pp) trafficking in certain motor vehicles or motor vehicle parts: 18 U.S.C. § 2320

(qq) trafficking in contraband cigarettes: 18 U.S.C. §§ 2341-2346

(rr) white slave traffic: 18 U.S.C. §§ 2421-2424

(ss) an unlicensed money transmitting business: 18 U.S.C. § 1960

(tt) the development, production, stockpiling, transfer, acquisition, retention, or possession of any biological agent, toxin, or delivery system for use as a weapon: 18 U.S.C. §§175-178

(uu) the development, production, stockpiling, transfer, acquisition, retention, possession, threatened use, or use of any chemical weapon: 18 U.S.C. §§ 229-229F

(vv) transactions involving nuclear materials: 18 U.S.C. § 831

Under Section 1961(1)(C)

(a) restrictions on payments and loans to labor organizations: 29 U.S.C. § 186

(b) embezzlement from union funds: 18 U.S.C. § 501(c)

Under Section 1961(1)(D)

Any offense involving[14] fraud connected with a case under title 11 (except a case under section 157 of that title), fraud in the sale of securities,[15] 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) punishable under any law of the United States.

Under Section 1961(1)(E)

Any act indictable under the Currency and Foreign Transactions Reporting Act.[16] Plaintiffs most often use mail and wire fraud, which

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Third Circuit: Damiano v. Sony Music Entertainment, Inc., 975 F. Supp. 623 (D.N.J. 1996) ("RICO claims must fail because they are actually nothing more than copyright infringement claims presented as mail fraud and copyright infringement is not a predicate act under RICO.").

[14] Courts have not defined "involving" for purposes of this section or Subsection 1961(1)(A).

[15] On December 22, 1995, Congress enacted the Private Securities Litigation Reform Act, Pub. L. No. 104-67, 109 Stat. 737 (1997) (codified at 15 U.S.C. § 78u-4), eliminating conduct that would have been actionable as fraud in the purchase or sale of securities as a predicate act in private civil RICO actions. See § 2.02[2] *infra*.

[16] Pub. L. No. 91-508, 84 Stat. 1118 (codified at 31 U.S.C. §§ 1051-1062, 1081-1083, 1101-1105, 1121, 1122 (1982)).

are among the broadest criminal statutes, as predicate acts.[17] Securities fraud had been the next most commonly used predicate act[18] until the Private Securities Litigation Reform Act sought to eliminate all private actions based on securities fraud conduct,[19] at least prospectively.[20] Currently, violations of the Hobbs Act are increasingly being used as a predicate acts.[21]

Under Section 1961(1)(F)

Any of the following acts indictable under the Immigration and Nationality Act,[21.1] if committed for the purpose of financial gain:

(a) bringing in and harboring certain aliens: 8 U.S.C. § 1324
(b) aiding or assisting certain aliens to enter the United States: 8 U.S.C. § 1327
(c) importation of alien for immoral purpose: 8 U.S.C. § 1328

UnderSection 1961(1)(G)

Any act that is indictable under any provision listed in 18 U.S.C. § 2332b(g)(5)(B), the Federal Criminal Code section dealing with crimes of terrorism.

[c]—State Offenses

Under Section 1961(1)(A), the following state offenses qualify as predicate acts:

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[17] See Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 503, 105 S.Ct. 3275, 87 L.Ed.2d 346 (1985). Although the Supreme Court limited these statutes to schemes for obtaining money or property in *McNally v. United States*, 483 U.S. 350, 356-361, 107 S.Ct. 2875, 97 L.Ed.2d 292 (1987) (mail fraud statute protects property rights but not citizens' intangible right of honest services), Congress subsequently expanded the statutes to also include certain other deprivations. See 18 U.S.C. § 1346 (reversing *McNally* in part by defining the phrase "scheme or artifice to defraud" in the mail fraud statute to include the intangible right of honest services). See also, United States v. Carpenter, 484 U.S. 19, 25-28, 108 S.Ct. 316, 98 L.Ed.2d 275 (1987) (construing *McNally* narrowly).

[18] See *Sedima,* 473 U.S. at 504-506 (Marshall, J., dissenting).

[19] The amendment eliminates not only private RICO actions predicated on securities fraud violations but also actions predicated on mail or wire fraud violations which rest on securities fraud conduct. See, e.g.:

Second Circuit: In re Prudential Securities, Inc. Ltd. Partnerships Litigation, 930 F. Supp. 68, 77 (S.D.N.Y. 1996).

Third Circuit: Bald Eagle Area School District v. Keystone Financial Inc., 189 F.3d 321, 327-330 (3d Cir. 1999); Burton v. Ken-Crest Services, 127 F. Supp.2d 673, 676-678 (E.D. Pa. 2001).

[20] See § 2.02[2] *infra*.

[21] 18 U.S.C. § 1951. See § 2.02[1A] *infra* for a discussion of RICO and the Hobbs Act.

[21.1] Immigration and Nationality Act, 8 U.S.C. §§ 1101-1537 (1999).

> 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), which is *chargeable* under State law and punishable by imprisonment for more than one year.[22]

[d]—Pleading Requirements

[i]—Generally

In an effort to minimize the temptation for would-be RICO plaintiffs to recast ordinary commercial disputes as racketeering activity, courts strictly require a RICO complaint to allege every essential element of each predicate act.[23] A complaint alleging mail fraud, for example, should include a scheme, a mailing, specific intent, and contemplated harm.[24]

Additionally, civil RICO plaintiffs must also satisfy the more stringent pleading requirements set forth by the Supreme Court's recent decisions in *Bell Atlantic Corp v. Twombly*[24.1] and *Ashcroft v.*

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[22] 18 U.S.C. § 1961(1)(A). (Emphasis added.)

[23] See, e.g.:

First Circuit: Broderick v. Roache, 751 F. Supp. 290, 293-295 (D. Mass. 1990) (dismissing RICO claim because plaintiff did not allege the necessary elements of extortion under Massachusetts law and, therefore, there were no predicate acts to support the RICO claim).

Second Circuit: Moore v. PaineWebber, Inc., 189 F.3d 165, 169-170 (2d Cir. 1999) (setting forth essential elements of a RICO action predicated on fraud).

Fifth Circuit: Tel-Phonic Services, Inc. v. TBS International, Inc., 975 F.2d 1134, 1140 (5th Cir. 1992) (complaint failed to sufficiently allege the "continuity" element of RICO's pattern requirement); Marriott Brothers v. Gage, 911 F.2d 1105, 1109 (5th Cir. 1990) (commercial bribery and theft of fiduciary property were not predicate acts supporting plaintiff's RICO claim where plaintiff failed to establish any fiduciary relationship with defendant).

Ninth Circuit: Sanville v. Bank of America National Trust & Savings Ass'n, 18 Fed. Appx. 500, 501 (9th Cir. 2001) (affirming dismissal of plaintiff's RICO claims for failure to plead with sufficient particularity that the defendants had the specific intent to deceive or defraud as required for both mail and wire fraud). (Internal quotation and citation omitted.)

[24] See, e.g.:

Second Circuit: United States v. Dixon, 536 F.2d 1388, 1398-1401 (2d Cir. 1976); United States v. Regent Office Supply Co., 421 F.2d 1174, 1179-1182 (2d Cir. 1970).

Third Circuit: Tierney and Partners, Inc. v. Rockman, 274 F. Supp.2d 693 (E.D. Pa. 2003).

Sixth Circuit: Kenty v. Bank One, Columbus, N.A., 67 F.3d 1257, 1262 (6th Cir. 1995).

[24.1] Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007).

Iqbal.[24.2] Prior to these decisions, "the accepted rule [was] that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief."[24.3] Under these recent Supreme Court decisions, the court has rejected *Conley*'s gloss on Federal Rule of Civil Procedure 8 and concluded that to survive a motion to dismiss a plaintiff's complaint must satisfy a plausibility standard.[24.4] Under the plausibility standard, a plaintiff is required to plead "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged."[24.5] Thus, pleadings that offer "labels and conclusions" or "a formulaic recitation of the elements of a action will not do."[24.6]

RICO does not set forth a limitations period for civil actions.[25] The Supreme Court, however, has set a limitations period of four years for civil RICO claims.[26] The Court has also addressed the issue of when the four-year limitation period begins to run.[27] In the past, the courts of appeals took three distinct approaches to the issue of when the statute of limitations began to run.[28] Some circuits held that the statute of limitations began to run "when the plaintiff knew or should have known of his injury," the so-called "injury discovery accrual rule."[29] Others applied the "injury and pattern discovery rule," under which the limitations period commenced when the plaintiff discovered, or should have discovered, "both an injury and a pattern of

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[24.2] Ashcroft v. Iqbal, 556 U.S. 662, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009).

[24.3] Conley v. Gibson, 355 U.S. 41, 46, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957).

[24.4] *Iqbal*, 556 U.S. at 677-678; *Twombly*, 550 U.S. at 570.

[24.5] *Iqbal*, 556 U.S. at 678.

[24.6] *Twombly*, 550 U.S. at 555.

[25] Rotella v. Wood, 528 U.S. 549, 120 S.Ct. 1075, 145 L.Ed.2d 1047 (2000). See §§ 2.02[4][c] and 3.04 *infra* for a fuller discussion of the statute of limitations and civil RICO.

[26] Agency Holding Corp. v. Malley-Duff & Associates, Inc., 483 U.S. 156, 107 S.Ct. 2759, 97 L.Ed.2d 121 (1987).

[27] See *Rotella*, N. 25 supra.

[28] *Id*., 528 U.S. at 552.

[29] *Id*. (citing Grimmett v. Brown, 75 F.3d 506, 511 (9th Cir. 1996)). See also:

First Circuit: Rodriguez v. Banco Central Corp., 917 F.2d 664, 665-666 (1st Cir. 1990).

Second Circuit: Bankers Trust Co. v. Rhoades, 859 F.2d 1096, 1102 (2d Cir. 1988).

Fourth Circuit: Pocahontas Supreme Coal Co. v. Bethlehem Steel Corp., 828 F.2d 211, 220 (4th Cir. 1987).

Seventh Circuit: McCool v. Strata Oil Co., 972 F.2d 1452, 1464-1465 (7th Cir. 1992).

RICO activity."[30] Under the final approach, referred to as the "last predicate act" rule, the limitations "period began to run as soon as the plaintiff knew or should have known of the injury and the pattern of racketeering activity, but began to run anew upon each predicate act forming part of the same pattern."[31]

Addressing this issue, the Supreme Court rejected the "injury and pattern discovery" rule, but did not enunciate a final rule because the parties had not fully focused on other possibilities.[32] According to the Court, the remaining possibilities were "some form of the injury discovery rule" or an "injury occurrence" rule, which would make discovery irrelevant.[33] In rejecting the "injury and pattern" discovery rule, the Court stressed that because the predicate acts underlying a RICO claim could take place up to ten years apart, the rule "could in theory open the door to proof of predicate acts occurring 10 years before injury and 14 before commencement of litigation."[34] The Court found that the "injury pattern" discovery rule would undermine "the basic policies of all limitations provisions: repose, elimination of stale claims, and certainty about a plaintiff's opportunity for recovery and a defendant's potential liabilities."[35]

In its decision, the Court noted that "[f]ederal courts . . . generally apply a discovery accrual rule when a statute is silent on the issue," but explained that it is always the discovery of the injury, rather than the discovery of the elements of the claim that commences the limitations period.[36] The Court also rejected the argument that a different accrual rate was required by the fact that fraud would be an element of some RICO patterns, because the issue had already been addressed and rejected by the Court.[37] Furthermore, the Court reasoned that the

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[30] *Rotella,* 528 U.S. at 553 (citing Caproni v. Prudential Securities, Inc., 15 F.3d 614, 619-620 (6th Cir. 1994)). See also:

Eighth Circuit: Granite Falls Bank v. Henrikson, 924 F.2d 150, 154 (8th Cir. 1991).

Tenth Circuit: Bath v. Bushkin, Gaims, Gaines & Jonas, 913 F.2d 817, 820-821 (10th Cir. 1990).

Eleventh Circuit: Bivens Garden Office Building, Inc. v. Barnett Bank, 906 F.2d 1546, 1554-1555 (11th Cir. 1990).

[31] *Rotella,* N. 25 *supra*, 528 U.S. at 553 (citing Keystone Insurance Co. v. Houghton, 863 F.2d 1125, 1130 (3d Cir. 1988)). But see, Klehr v. A.O. Smith Corp., 521 U.S. 179, 11 S.Ct. 1984, 138 L.Ed.2d 373 (1997) (rejecting the "last predicate act" rule).

[32] *Rotella*, N. 25 *supra*, 528 U.S. at 554 n.2.

[33] *Id.* (citing *Klehr*, 521 U.S. at 198 (Scalia, J., concurring in part and concurring in the judgment)).

[34] *Id.*, 528 U.S. at 555.

[35] *Id.*, 528 U.S. at 555 (citing cases).

[36] *Id.*

[37] *Id.*, 528 U.S. at 557 (citing Agency Holding Corp. v. Malley-Duff & Associates, Inc., 483 U.S. 143, 154, 107 S.Ct. 2759, 97 L.Ed.2d 121 (1987)).

use of an injury discovery rule in the Clayton Act[38] suggested that a similar rule should be used for RICO because Congress relied on the Clayton Act when considering RICO, and such a rule would further the purposes of both statutes by suppressing any illegal activity sooner rather than later.[39] The Court observed that the difficulty that sometimes arises in determining when a plaintiff should have discovered an injury would appear simple compared to the difficulty courts would encounter if they had to determine when a plaintiff should have discovered a racketeering pattern.[40] Finally, the Court reasoned that any harsh results stemming from elimination of the "injury pattern" discovery rule could be ameliorated by equitable principles of tolling "where a pattern remains obscure in the face of a plaintiff's diligence in seeking to identify it."[41] Many courts have used the injury discovery rule since *Rotella*.[42]

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[38] 15 U.S.C. §§ 12 *et seq*.

[39] See *Rotella*, N. 25 *supra*, 528 U.S. at 557.

[40] *Id.,* 528 U.S. at 559.

[41] *Id*., 528 U.S. at 561.

[42] For a more extensive discussion of RICO's statute of limitations see *infra* § 3.04. See, e.g.:

First Circuit: Lares Group, II v. Tobin, 221 F.3d 41, 44 (1st Cir. 2000) (applying the injury discovery accrual rule, under which the limitations period begins running when the plaintiff knew, or should have known, of its injury).

Second Circuit: World Wrestling Entertainment, Inc. v. Jakks Pacific, Inc., 328 Fed. Appx. 695, 697 (2d Cir. 2009); McLaughlin v. American Tobacco Co., 522 F.3d 215, 233 (2d. Cir. 2008) (RICO's statute of limitations "begins to run when the plaintiff discovers—or should have reasonably discovered—the alleged injury"); In re Merrill Lynch Ltd. Partnerships Litigation, 154 F.3d 56, 58-59 (2d Cir. 1998).

Third Circuit: Matthews v. Kidder Peabody, 260 F.3d 239 (3d Cir. 2001) (the Third Circuit has adopted the injury discovery rule and analyzing when plaintiffs know or should have known of their injury).

Fourth Circuit: Potomac Electric Power Co. v. Electric Motor & Supply, Inc., 262 F.3d 260, 266 (4th Cir. 2001) ("[P]rivate RICO suits are governed by a four-year statute of limitations, which runs from the date when the plaintiff discovered, or should have discovered, the injury").

Fifth Circuit: Love v. National Medical Enterprises, 230 F.3d 765, 772-775 (5th Cir. 2000) (adopting the "separate accrual" rule for civil RICO actions, which is based upon the injury discovery rule).

Sixth Circuit: Taylor Group v. ANR Storage Co., 24 Fed. Appx. 319, 325 (6th Cir. 2001) ("The limitations period for RICO claims accrues when a plaintiff knew or should have known of an injury").

Seventh Circuit: The Cancer Foundation, Inc. v. Cerberus Capital Management, LP, 559 F.3d 671, 675 (7th Cir. 2009) ("[I]t is the discovery of the injury, not the elements of a particular claim, that gets the clock ticking."); Demes v. Abn Amro Services Co., 59 Fed. Appx. 151, 153 (7th Cir. 2003) ("[C]ivil RICO plaintiffs have only four years to sue after they discover, or through due diligence could have discovered, that they were injured and who caused the injury").

Eighth Circuit: Wal-Mart Stores, Inc. v. Watson, 94 F. Supp.2d 1027, 1033 (W.D. Ark. 2000) ("[W]e believe that the appropriate accrual rule is the injury discovery rule").

The increased use of the injury discovery rule after the Supreme Court's decision in *Rotella* has forced courts to frequently determine when a plaintiff knew or should have known of his or her injury. Circuit courts "have likened inquiry notice to 'storm warnings' of possible fraud that trigger a plaintiff's duty to investigate in a reasonably diligent manner."[42.1] Similarly, courts have found that "[t]he RICO statute of limitations . . . runs even where the full extent of the RICO scheme is not discovered until a later date, so long as there were 'storm warning's that should have prompted an inquiry."[42.2] The Third Circuit has explained that storm warnings "may take numerous forms, including "any financial, legal, or other data that would alert a reasonable person to the probability that misleading statements or significant omissions had been made."[42.3]

In *Mathews v. Kidder, Peabody & Co.*,[42.4] the Third Circuit set forth a two-part test to determine whether a plaintiff has inquiry notice about an injury.[42.5] "First, the burden is on the defendant to show the existence of 'storm warnings.'"[42.6] The Third Circuit explained that "[t]he existence of storm warnings is a totally objective inquiry. Plaintiffs need not be aware of the suspicious circumstances or understand their import."[42.7] "Second, if the defendants establish the existence of storm warnings, the burden shifts to the plaintiffs to show that they exercised due diligence and yet were unable to discover their injuries. This inquiry is both subjective and

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Ninth Circuit: Hunter v. Gates, 68 Fed. Appx. 69 (9th Cir. 2003) ("A RICO cause of action accrues when a plaintiff knows or should have known of the injury that underlies his cause of action"); Marceau v. International Brotherhood of Electrical Workers, 618 F. Supp.2d 1127, 1149 (D. Ariz. 2009) ("The relevant question is *when* did each Plaintiff discover his or her injury, not when Plaintiffs allege or acknowledge that certain predicate acts took place.").

Eleventh Circuit: Pacific Harbor Capital, Inc. v. Barnet Bank, N.A., 252 F.3d 1246, 1250 (11th Cir. 2001) (assuming, without needing to decide, that the statute of limitations period starts from the date of discovery of the injury).

[42.1] Issak v. Trumbull Savings & Loan Co., 169 F.3d 390, 399 (6th Cir. 1999).

[42.2] *Second Circuit:* World Wrestling Entertainment, Inc. v. Jakks Pacific, Inc., 328 Fed. Appx. 695, 697 (2d Cir. 2009).

Sixth Circuit: Issak v. Trumbull Savings & Loan Co., 169 F.3d 390, 399 (6th Cir. 1999) ("[T]he clock begins to tick when a plaintiff senses 'storm warnings, not when he hears thunder and sees lightning").

Eighth Circuit: Great Rivers Cooperative of Southeastern Iowa v. Farmland Industry, Inc., 120 F.3d 893, 896 (8th Cir. 1997) (inquiry notice is satisfied "when there are 'storm warning' that would alert a reasonable person of the possibility of misleading information, relayed either by act or omission").

[42.3] Mathews v. Kidder, Peadbody & Co., 260 F.3d 239, 252 (3d Cir. 2001).

[42.4] *Id.*

[42.5] *Id.*

[42.6] *Id.*

[42.7] *Id.*

objective. The plaintiffs must first show that they investigated the suspicious circumstances. Then, [the court] must determine whether their efforts were adequate."[42.8] The Third Circuit explained that to determine whether a plaintiff's investigation was adequate the court "must consider the magnitude of the existing storm warnings. The more ominous the warnings, the more extensive the expected inquiry."[42.9] Applying the two-part test it articulated, the Third Circuit concluded that plaintiffs' RICO claims were barred by the statute of limitations. The court determined that by early 1990 sufficient storm warnings existed based on the correspondence and financial updates that Kidder Peabody sent to the investors in its investment funds.[42.10] The court explained that "[r]easonable due diligence does not require a plaintiff to exhaust all possible avenues of inquiry. Nor does it require the plaintiff to actually discover his injury."[42.11] The Third Circuit determined the plaintiffs failed to exercise adequate due diligence by merely sending a single letter to the defendant.[42.12]

In *Bendzak v. Midland National Life Insurance Co.*,[42.13] a district court in Iowa addressed the issue of whether RICO's statute of limitations barred the plaintiff's claim. The court determined that it should apply the injury discovery rule to determine when the RICO statute of limitation began to run.[42.14] Under the injury discovery rule, "[t]he Court must ask whether the plaintiff actually knew of her injury, and also, using a reasonable person standard, whether she should have known."[42.15] The court explained that to determine whether the plaintiff had inquiry notice, an objective standard, "the Court must determine the following: (1) the facts of which Bendzak was aware; (2) whether a reasonable person with knowledge of those facts would have investigated the situation further; and (3) upon investigation, whether that reasonable person would have acquired actual notice of the alleged misrepresentations."[42.16] The court determined that the majority of plaintiff's RICO claim, which was based on seven annuity policies, was barred by the statute of limitations because she "did not seek to discover her injury once she had notice

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[42.8] *Id.*

[42.9] *Id.*, 260 F.3d at 255.

[42.10] *Id.*, 260 F.3d at 253-254.

[42.11] *Id.*, 260 F.3d at 255.

[42.12] *Id.* (noting "the only action that might be termed due diligence is a single letter from Attorney Robert Wolf inquiring into the status of Fund I").

[42.13] Bendzake v. Midland National Life Insurance Co., 440 F. Supp.2d 970 (S.D. Iowa 2006).

[42.14] *Id.*, 440 F. Supp.2d at 980.

[42.15] *Id.*

[42.16] *Id.*, 440 F. Supp.2d at 981.

of it."[42.17] The court rejected plaintiff's argument that a fiduciary relationship exception existed to the diligent investigation requirement on the grounds that plaintiff had failed to plead a fiduciary relationship and the "Supreme Court's emphasis on the plaintiff's obligation to investigate potential claims in *Klehr*."[42.18]

In *Cetel v. Kirwan Financial Group, Inc.*,[42.19] the Third Circuit had to determine whether the statute of limitations barred plaintiffs' claim. The court explained that "[s]torm warnings have not been exhaustively catalogued, but they are essentially any information or accumulation of data 'that would alert a reasonable person to the probability that misleading statements or significant omissions had been made.'"[42.20] The Third Circuit determined that the publication of IRS Notice 95-34 explaining that the IRS had previously disallowed the deductions related to Voluntary Employee Beneficiary Associations, the IRS's decision to commence audits of the various defendants, and the Medical Society of New Jersey's decision to stop endorsing Voluntary Employee Beneficiary Associations constituted sufficient "storm warnings" regarding the lawfulness of Voluntary Employee Beneficiary Associations.[42.21] The Third Circuit determined that the plaintiffs did not exercise reasonable diligence in attempting to discover their injuries. The plaintiffs' efforts to ascertain whether they were injured were limited to asking the defendants about the validity of the Voluntary Employee Beneficiary Association.[42.22] The court explained that "[m]erely asking defendants whether the plans were legal is inadequate to show reasonable diligence. As we noted in *Mathews* and reiterate here, plaintiffs who undertake no diligence beyond superficial inquiry of defendants concerning the validity or propriety of their investments cannot obtain the benefit that a finding of reasonable diligence will confer."[42.23]

[ii]—Fraud: Federal Rule of Civil Procedure 9(b)

In addition, when the underlying predicate acts sound in fraud, the essential elements must not only be alleged but must also be particularized.[43] This is because Federal Rule of Civil Procedure 9(b)

[42.17] *Id.*, 440 F. Supp.2d at 983.
[42.18] *Id.*, 440 F. Supp.2d at 982.
[42.19] Cetel v. Kirwan Financial Group, Inc., 460 F.3d 494 (3d Cir. 2006).
[42.20] *Id.*, 460 F.3d at 507 (quoting Mathews v. Kidder, Peadbody & Co., 260 F.3d 239, 252 (3d Cir. 2001)).
[42.21] *Id.*
[42.22] *Id.*, 460 F.3d at 508.
[42.23] *Id.*
[43] See, e.g.: Moore v. PaineWebber, Inc., 189 F.3d 165, 172 (2d Cir. 1999) (requiring that a plaintiff's allegations meet the vigorous pleading requirements of Rule 9(b) where the alleged predicate acts involve mail and wire fraud); Rivera v.

requires that in "all averments of *fraud* or mistake, the circumstances constituting fraud shall be stated with *particularity.*"[44] This pleading requirement applies to all civil RICO actions grounded in fraud.[45] Its equivalent, a bill of particulars, is often required in criminal RICO actions.

The degree of particularization required by Rule 9(b) is, at a minimum, that sufficient to provide the defendant with adequate notice of the acts giving rise to the cause of action, so that the defendant can prepare a meaningful answer and defense.[46] For example, when a party bases an action on such predicate acts as mail, wire, or another type of fraud, the courts require that the complaint set forth the nature and terms of the alleged fraudulent misrepresentations with considerable particularity.[47] Further, a substantial majority of courts require that the complaint state the time, place, and content of the fraudulent misrepresentations, as well as each individual party's role in the fraudulent transaction,[48] although some courts relax these require-

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Golden National Mortgage Banking Co., 2005 U.S. Dist. LEXIS 12564 (S.D.N.Y. June 27, 2005); Mathon v. Feldstein, 303 F. Supp.2d 317, 323 (E.D.N.Y. 2003).

[44] Fed. R. Civ. P. 9(b). (Emphasis added.)

[45] In re Sumitomo Copper Litigation, 995 F. Supp. 451, 455 (S.D.N.Y. 1998) (Rule 9(b) is essential in civil RICO actions because simply initiating a RICO action against a defendant can stigmatize him as a racketeer).

[46] In re Stac Electronics Securities Litigation, 89 F.3d 1399, 1405 (9th Cir. 1996) (Federal Rule of Civil Procedure 9(b) "serves to give defendants adequate notice to allow them to defend against the charge . . . ."). See Bisceglie, "The Importance of Pleading Fraud with Particularity in Civil RICO Actions," 2 RICO L. Rep. 20 (July 1985).

[47] See, e.g., Bologna v. Allstate Insurance Co., 138 F. Supp.2d 310 (E.D.N.Y. 2001) ("In addition, mail and wire fraud claims must set forth the following: (1) the existence of a scheme to defraud; (2) the defendant's knowledge or intentional participation in the scheme; and (3) the use of interstate mails or wires to further the fraudulent scheme."). *Accord* S.Q.K.F.C., Inc. v. Bell Atlantic TriCon Leasing Corp., 84 F.3d 629, 633 (2d Cir. 1996). It should be noted that a plaintiff need not plead a specific falsity in the mailed or wired communication when the communications themselves are not false, but are nonetheless part of a fraudulent scheme. See, e.g.:

Supreme Court: Schmuck v. United States, 489 U.S. 705, 109 S.Ct. 1443, 103 L.Ed.2d 734 (1989).

Second Circuit: Stein v. New York Stair Cushion Co., 2006 U.S. Dist. LEXIS 8410 (E.D.N.Y. Feb. 10, 2006).

Seventh Circuit: Jepson, Inc. v. Makita Corp., 34 F.3d 1321, 1330 (7th Cir. 1994).

Eighth Circuit: Murr Plumbing, Inc. v. Scherer Brothers Financial Services Co., 48 F.3d 1066, 1070 n.6 (8th Cir. 1995).

[48] See, e.g.:

First Circuit: Ahmed v. Rosenblatt, 118 F.3d 886, 889 (1st Cir. 1997) ("[U]nder 9(b), a pleader must state the time, place and content of the alleged mail and wire communications perpetuating the fraud.").

Second Circuit: Moore v. PaineWebber, Inc., 189 F.3d 165, 172-173 (2d Cir. 1999) (requiring particularized allegations of time, place, and nature of alleged fraud, as well as facts supporting a strong inference of fraudulent intent); In re Sumitomo Copper Litigation, 995 F. Supp. 451, 455 (S.D.N.Y. 1998).

ments when plaintiffs are not in a position to know specific facts until after discovery.[49] Moreover, even though Rule 9(b) does not require

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Fifth Circuit: Resolution Trust Corp. v. Hays, 1993 WL 302150 at *6 (W.D. Tex. 1993) (requiring particularized allegations of time, place, and nature of the alleged fraud).

Sixth Circuit: Blount Financial Services, Inc. v. Walter E. Heller & Co., 819 F.2d 151, 152 (6th Cir. 1987) (requiring plaintiff in civil RICO claim alleging mail fraud to particularly state defendant's false statement and the facts showing plaintiff's reliance on such statement); DeLorean v. Cork Gully, 118 B.R. 932, 940 (E.D. Mich. 1990) (requiring plaintiffs to allege with particularity the circumstances surrounding the fraud including the time, place, and contents of the misrepresentations as well as identifying the person making the misrepresentation); Condor American, Inc. v. American Power Devices, Inc., 128 F.R.D. 229, 232 (S.D. Ohio 1989).

Seventh Circuit: Slaney v. International Amateur Athletic Federation, 244 F.3d 580, 599 (7th Cir. 2001) ("In order to satisfy [Rule 9(b)], a RICO plaintiff must allege the identity of the person who made the representation, the time, place and content of the misrepresentation, and the method by which the misrepresentation was communicated to the plaintiff."); Goren v. New Vision International Inc., 156 F.3d 721, 725-726 (7th Cir. 1998) (in a multiple-defendant case Rule 9(b) requires plaintiff to plead sufficient facts to notify each defendant of his alleged participation in the scheme, as well as pleading with specificity the time, place, and content of the alleged communications); Corley v. Rosewood Care Center, Inc., 142 F.3d 1041, 1050 (7th Cir. 1998) ("To satisfy the particularity requirement, we have required a RICO plaintiff to allege the time, place, and content of an allegedly fraudulent communication, as well as the parties to that communication.").

Eighth Circuit: Murr Plumbing, Inc. v. Scherer Brothers Financial Services Company, 48 F.3d 1066 (8th Cir. 2006) (in order to satisfy Rule 9(b) the plaintiff must plead "the time, place and contents of false representation, as well as the identity of the person making the misrepresentation and what was obtained or given up thereby"); Chicago Truck Drivers, Helpers, and Warehouse Workers Union (Independent) Pension Fund v. Brotherhood Labor Leasing, 950 F. Supp. 1454, 1463 (E.D. Mo. 1996) ("[D]efendants must allege the time, place, and nature of the fraudulent activities, including the essential elements of the offenses cited in the proposed pleading.").

Ninth Circuit: Edwards v. Marin Park, Inc., 356 F.3d 1058, 1066 (9th Cir. 2004) (to satisfy Federal Rule of Civil Procedure 9(b) the plaintiff must "state the time, place, and specific content of the false representations as well as the identities of the parties to the misrepresentation"); Moore v. Kayport Package Express, Inc., 885 F.2d 531, 541 (9th Cir. 1989); Schreiber Distributing Co. v. Serv-Well Furniture Co., 806 F.2d 1393, 1401 (9th Cir. 1986); Sebastian International, Inc. v. Russolillo, 128 F. Supp.2d 630, 634-635 (C.D. Cal. 2001); In re Countrywide Financial Corp. Mortgage Marketing and Sales Practices Litigation, 601 F. Supp.2d 1201, 1215 (S.D. Cal. 2009).

Tenth Circuit: Farlow v. Peat, Marwick, Mitchell & Co., 956 F.2d 982, 989 (10th Cir. 1992) (Rule 9(b) requires plaintiffs to allege each element of a RICO violation and its predicate acts of racketeering with particularity because of the threat of treble damages and injury to reputation).

[49] See, e.g.:

First Circuit: New England Data Services, Inc. v. Becher, 829 F.2d 286, 290 (1st Cir. 1987) (where specific information regarding defendant's use of the mails or wires is exclusively within the defendant's control the court should determine whether to allow discovery).

Second Circuit: Wexner v. First Manhattan Co., 902 F.2d 169, 172 (2d Cir. 1990) (in a securities fraud action, allegations of fraud may be based on information and belief despite usual requirements of Rule 9(b) when opposing party has particular knowledge of the facts).

a plaintiff to plead intent itself with particularity, the plaintiff must still allege sufficient facts from which a fact-finder can infer fraudulent intent.[50] In addition to enabling defendants to better prepare their case, these pleading requirements help to prevent plaintiffs from bringing groundless fraud claims.[51]

Although the Supreme Court has generally frowned on "heightened" pleading requirements not specified by express statute or rule,[51.1] some courts have nonetheless required that even civil RICO claims that do not sound in fraud must be alleged with particularity. They have justified this requirement either on the ground that civil RICO claims are quasi-criminal in nature and, therefore, should be subject to pleading requirements that are comparable to what is provided by an indictment plus a bill of particulars, or as an exercise of

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Third Circuit: Saporito v. Combustion Engineering, Inc., 843 F.2d 666, 675 (3d Cir. 1988) (Rule 9(b) requires detailed allegations of fraud but Rule 9(b) requirements might be relaxed where information is within the exclusive control of the defendant), *vacated on other grounds* 489 U.S. 1049, 109 S.Ct. 1306, 103 L.Ed.2d 576 (1989).

Seventh Circuit: Emery v. American General Financial, Inc., 134 F.3d 1321, 1323 (7th Cir. 1998) (Rule 9(b) may be satisfied by showing that further particulars of alleged fraud cannot be obtained without discovery).

Eighth Circuit: Abels v. Farmers Commodities Corp., 259 F.3d 910 (8th Cir. 2001).

[50] See, e.g.:

Second Circuit: Connecticut National Bank v. Fluor Corp., 808 F.2d 957, 962 (2d Cir. 1987) (great specificity is not required regarding allegations of *scienter* because a plaintiff should not be expected to plead a defendant's state of mind).

Sixth Circuit: Kenty v. Bank One, Columbus, N.A., 67 F.3d 1257, 1262 (6th Cir. 1995) (requiring proof of misrepresentations or omissions calculated to deceive the average person in order to allege fraud).

[51] See, e.g.:

First Circuit: New England Data Services, Inc. v. Becher, 829 F.2d 286, 288 (1st Cir. 1987) (in the securities fraud context the First Circuit has strictly applied Rule 9(b) to prohibit plaintiffs with groundless claims from conducting extensive discovery to coerce a settlement).

Seventh Circuit: Ackerman v. Northwestern Mutual Life Insurance Co., 172 F.3d 467, 469 (7th Cir. 1999) ("purpose (the defensible purpose, anyway) of the heightened pleading requirement is to force the plaintiff to do more than the usual investigation before filing his complaint").

Ninth Circuit: In re Stac Electronics Securities Litigation, 89 F.3d 1399, 1405 (9th Cir. 1996) (Federal Rule of Civil Procedure 9(b) prohibits "plaintiff[s] from unilaterally imposing upon the court, the parties, and society enormous social and economic costs absent some factual basis").

See also, PMC, Inc. v. Ferro Corp., 131 F.R.D. 184, 187 (C.D. Cal. 1990) (recognizing the need to limit discovery in RICO suits and barring discovery on matters other than those directly connected to heart of plaintiff's RICO claim).

[51.1] Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit, 507 U.S. 163, 113 S.Ct. 1160. 122 L.Ed.2d 517 (1993) (rejecting a heightened pleading standard for claims brought under Section 1983).

their supervisory powers to avoid frivolous lawsuits.[52] Going further still (though perhaps beyond their authority), some federal districts now require plaintiffs in private civil RICO actions to automatically file "RICO case statements" particularizing their allegations, regardless of whether or not the claims are predicated on fraud.[53]

The pleading requirements for RICO are further complicated by the Supreme Court's recent decision in *Bell Atlantic Corp. v. Twombly*, which considered the pleading standards for claims of violations of the Sherman Act.[53.1] Prior to the Supreme Court's decision in *Twombly*, the controlling standard for determining the sufficiency of a complaint was articulated in *Conley v. Gibson*.[53.2] In *Conley*, the Court explained that Federal Rules of Civil Procedure did "not require a claimant to set out in detail the facts upon which he bases his claim. To the contrary, all the Rules require is 'a short and plain statement of the claim' that will give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests."[53.3] In an

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[52] See, e.g., Dommert v. Petro-Chem Construction Corporation Profit & Equity Participation Plan, No. 85-1105 Div. O (W.D. La. Feb. 9, 1987); Udell v. Securities Settlement Corp., No. 86-4961(K)(2) (E.D. La. Jan. 14, 1987).

[53] See:

First Circuit: Figueroa Ruiz v. Alegria, 896 F.2d 645, 646 (1st Cir. 1990).

Second Circuit: Commercial Cleaning Services, LLC v. Colin Service Systems, Inc., 271 F.3d 374, 385 (2d Cir. 2001) (a case statement "may appropriately require a plaintiff to set forth the information it possesses in helpfully categorized form, as an aid to the court . . . [b]ut it may not make the prosecution of the action dependent on the plaintiff's ability to furnish more information than is required, as a matter of law, to prove the essential elements of the claim.").

Third Circuit: Lorenz v. CSX Corp., 1 F.3d 1406, 1413 (3d Cir. 1993) (upholding dismissal of RICO complaint "after reviewing the amended complaints and RICO case statement"); Cooper v. Broadspire Services, Inc., 2005 WL 1712390 at *1 n.1 (E.D. Pa. July 20, 2005) ("The RICO Case Statement is a pleading that may be considered part of the operative complaint for the purposes of a motion to dismiss.") (citing Lorenz v. CSX Corp., 1 F.3d 1406 (3d Cir. 1993)).

Fifth Circuit: Marriott Brothers v. Gage, 911 F.2d 1105, 1107 (5th Cir. 1990) ("The propriety of a district court's requirement of a case statement to summarize the nature of RICO claims is, however, well-established in this circuit"); Old Time Enterprises, Inc. v. International Coffee Corp., 862 F.2d 1213, 1217 (5th Cir. 1989).

Sixth Circuit: Mulligan v. Prudential-Bache Securities, Inc., 1986 WL 15625 at *1-*2 (E.D. Mich. Nov. 5, 1986) (requiring plaintiff to file supplemental statement to support its RICO allegations to assure compliance with Rule 11); Lyman Steel Co. v. Shearson Lehman Brothers, Inc., 1986 U.S. Dist. LEXIS 29346 (N.D. Ohio Feb. 13, 1986).

Ninth Circuit: Wagh v. Metris Direct, 348 F.3d 1102, 1108 (5th Cir. 2003).

See generally, "The Civil RICO Case Statement [1990]," *RICO Bus. Disputes Guide* (CCH) ¶ 7453 at 10,280 *et seq.* (1990).

[53.1] Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007).

[53.2] Conley v. Gibson, 355 U.S. 41, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957).

[53.3] *Id.,* 355 U.S. at 47 (quoting Fed. R. Civ. P. 8).

oft-quoted statement, the Court stated "that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief."[53.4] In *Twombly*, the Court stated that "this famous observation has earned its retirement. This phrase is best forgotten as a negative gloss on an accepted pleading standard."[53.5]

In *Twombly,* the Court granted certiorari "to address the proper standard for pleading an antitrust conspiracy through allegations of parallel conduct."[53.6] The Court then proceeded to retire Conley's "'no sets of facts' language."[53.7] In its place, the Court stated that the controlling standard was "plausibility."[53.8] The Court explained that to survive a motion to dismiss the plaintiffs must allege "enough facts to state a claim to relief that is plausible on its face."[53.9] The Supreme Court explained that while Federal Rule of Civil Procedure 8 only requires a plaintiff to provide a "short and plain statement of the claim showing that the pleader is entitled to relief," the complaint must contain sufficient "factual allegations . . . to raise a right to relief above the speculative level."[53.10] The Court explained that a complaint that merely offers "labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do."[53.11]

Courts quickly began applying the "plausibility requirement" articulated by the *Twombly* Court to complaints alleging RICO violations.[53.12] As the Seventh Circuit noted, the Supreme Court's concerns in *Twombly* are "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. RICO cases, like antitrust cases, are 'big' cases and the defendant should not be put to the expense of big-case discovery on the basis of a threadbare claim."[53.13]

[53.4] *Id.,* 355 U.S. at 46.
[53.5] *Twombly*, 550 U.S. at 563.
[53.6] *Id.,* 550 U.S. at 553.
[53.7] *Id.,* 550 U.S. at 567.
[53.8] *Id.,* 550 U.S. at 560-561.
[53.9] *Id.,* 550 U.S.at 570.
[53.10] *Id.,* 550 U.S.at 555.
[53.11] *Id*.
[53.12] See, e.g.:

Second Circuit: Baron v. Complete Management, Inc., 260 Fed. Appx. 399 (2d Cir. 2008); Republic of Colombia v. Diageo North America, 531 F. Supp.2d 365, 382-383 (E.D.N.Y. 2007).

Seventh Circuit: Jennings v. Auto Meter Products, Inc., 495 F.3d 466, 472-473 (7th Cir. 2007).

[53.13] Limestone Development Corp. v. Village of Lemont, Illinois, 520 F.3d 797, 803 (7th Cir. 2008).

In *Ashcroft v. Iqbal*,[53.14] the Supreme Court addressed the plausibility standard that it had first articulated in *Twombly*. In *Iqbal*, the Court addressed the sufficiency of a complaint alleging that the federal government had "adopted an unconstitutional policy that subjected respondent to harsh conditions of confinement on account of his race, religion, or national origin."[53.15] In *Ibqal*, the Court rejected the contention that *Twombly*'s plausibility standard should only be applied to antitrust cases.[53.16] The majority noted that there were two principles underlying its decision in *Twombly*. "First, the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions. Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice."[53.17] Secondly, a complaint must state a plausible claim for relief to survive a motion to dismiss.[53.18] The Court explained that the determination of whether a claim is plausible will "be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense."[53.19] The Court explained that "[a] claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged."[53.20] The Court concluded that the complaint had failed to satisfy the plausibility requirement because "the complaint does not show, or even intimate, that petitioners purposefully housed detainees in the ADMAX SHU due to their race, religion, or national origin."[53.21]

After the Supreme Court's decision in *Iqbal*, it is now clear that *Twombly*'s plausibility requirement applies to civil RICO claims.[53.22] However, courts are still working to define the contours of the plausibility requirement.[53.23] The Supreme Court's recent decision in *Iqbal*

[53.14] Ashcroft v. Iqbal, 556 U.S. 662, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009).
[53.15] *Id.,* 556 U.S. at 666.
[53.16] *Id.,* 556 U.S. at 684-686.
[53.17] *Id.,* 556 U.S. at 677.
[53.18] *Id.,* 556 U.S. at 679.
[53.19] *Id.*
[53.20] *Id.,* 556 U.S. at 678.
[53.21] *Id.,* 556 U.S. at 683.
[53.22] Smartix International Corp. v. Mastercard International LLC, 2009 U.S. App. LEXIS 23810, at *3 (2d Cir. Oct. 28, 2009) ("To survive a motion to dismiss, a plaintiff must sufficiently plead each of these elements to meet the standards set forth in *Twombly* and *Iqbal*.").
[53.23] *Sixth Circuit:* United States ex rel. Snapp, Inc. v. Ford Motor Co., 532 F.3d 496, 502 n.6 (6th Cir. 2008) ("At present, there is some confusion. . . .").

Tenth Circuit: Robbins v. Oklahoma *ex rel.* Department of Human Services, 519 F.3d 1241, 1247 (10th Cir. 2008) ("We are not the first to acknowledge that [*Twombly*'s] new formulation is less than pellucid.").

did not provide detailed guidance as to what level of factual support is needed to satisfy the plausibility standard.[53.24] As the Seventh Circuit has explained, "[h]ow many facts are enough will depend on the type of case. In a complex antitrust or RICO case, a fuller set of factual allegations than in the sample complaints in the civil rules' Appendix of Forms may be necessary to show that the plaintiff's claim is not 'largely groundless.'"[53.25] However, the Supreme Court has made clear that a complaint that offers only "labels and conclusions," "a formulaic recitation of the elements of a cause of action," or "naked assertions devoid of further factual enhancement" will not survive a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6).[53.26]

In *American Dental Association v. Cigna Corp.*,[53.27] the Eleventh Circuit applied the Supreme Court's decisions in *Twombly* and *Iqbal* to reject RICO claims brought by the plaintiffs. The plaintiffs were dentists, who alleged that the defendants, dental insurance companies, engaged in improper practices to depress payments to dentists.[53.28] The plaintiffs based their RICO claim on the predicate acts of mail and wire fraud, requiring them to satisfy *Twombly* and *Iqbal* as well as Federal Rule of Civil Procedure 9(b). The court explained that under the Supreme Court's decision in *Twombly* and *Iqbal* "courts may infer from the factual allegations in the complaint 'obvious alternative explanations,' which suggest lawful conduct rather than the unlawful conduct the plaintiff would ask the court to infer."[53.29] The Eleventh Circuit found plaintiffs' RICO claim lacking because "[p]laintiffs do not point to a single specific misrepresentation by Defendants regarding how Plaintiffs would be compensated in any of these communications, nor do they allege the manner in which they were misled by the documents, as they are required to do under Rule 9(b)."[53.30] Plaintiffs also asserted a RICO conspiracy claim under Section 1962(d). In evaluating plaintiffs' conspiracy claim, the Eleventh Circuit did not give any credence to plaintiffs' conclusory statements

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[53.24] *Iqbal*, 556 U.S. at at 679 (explaining that whether a claim for relief is plausible is "a context-specific task that requires the reviewing court to draw on its judicial experience and common sense").

[53.25] Limestone Development Corp. v. Village of Lemont, Illinois, 520 F.3d 797, 803 (7th Cir. 2008). See Moss v. United States Secret Service, 572 F.3d 962, 969 (9th Cir. 2009) ("In sum, for a complaint to survive a motion to dismiss, the non-conclusory 'factual content,' and reasonable inferences from that content, must be plausibly suggestive of a claim entitling the plaintiff to relief.").

[53.26] *Iqbal,* 556 U.S. at 678.

[53.27] American Dental Ass'n v. Cigna Corp., 605 F.3d 1283 (11th Cir. 2010).

[53.28] *Id.,* 605 F.d at 1286.

[53.29] *Id.,* 605 F.d at 1290.

[53.30] *Id.,* 605 F.d at 1292.

that the defendants' actions were "part of a common scheme and conspiracy."[53.31] The court determined that the plaintiffs' remaining factual allegations were insufficient to establish parallel actions because "there [was] an 'obvious alternative explanation' for each of the collective actions alleged that suggests lawful, independent conduct."[53.32]

In *Edwards v. Prime, Inc.*,[53.33] the Eleventh Circuit addressed plaintiffs' RICO claim that a Ruth Chris Steakhouse had engaged in an enterprise to violate federal immigration law by, among other things, "knowingly hir[ing] and employ[ing] illegal aliens, allow[ing] them to work under the names of former Ruth's Chris employees who were United States citizens, and provid[ing] them with the former employees' social security numbers."[53.34] Applying the Supreme Court's decision in *Iqbal* and *Twombly*, the Eleventh Circuit concluded that the plaintiffs had adequately plead the existence of predicate acts, under 8 U.S.C. § 1324(a)(1)(A)(iv), to survive a motion to dismiss. Whether the plaintiffs had adequately alleged a violation of Section 1324(a)(1)(A)(iv) turned on whether the defendants had "encouraged or induced illegal aliens to reside in the country."[53.35] The court found that the plaintiffs had satisfied this standard because "[t]he amended complaint alleges not only that the defendants hired and actively sought individuals known to be illegal aliens but also that the defendants provided them with names and social security numbers to facilitate their illegal employment."[53.36] However, the court rejected the plaintiffs conspiracy and aiding and abetting allegations because "under *Twombly* [] [t]he mere use of the words 'conspiracy' and 'aiding and abetting' without any more explanation of the grounds of the plaintiffs' entitlement to relief is insufficient."[53.37]

[2]—"Pattern"

[a]—Statutory Language

Section 1962 prohibits the use of a "pattern"[54] of any of the above predicate acts,[55] or the proceeds thereof, to gain an interest or role in an interstate "enterprise."[56] Under Section 1961(5), a

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[53.31] *Id.,* 605 F.d at 1293-1294.
[53.32] *Id.,* 605 F.d at 1295.
[53.33] Edwards v. Prime, Inc., 602 F.3d 1276 (11th Cir. 2010).
[53.34] *Id.,* 602 F.3d at 1284-1285.
[53.35] *Id.,* 602 F.3d at 1294-1295.
[53.36] *Id.,* 602 F.3d at 1296 .
[53.37] *Id.,* 602 F.3d at 1300.
[54] But see: United States v. Oreto, 37 F.3d 739, 751 (1st Cir. 1994) (the pattern requirement does not apply to the collection of an unlawful debt); United States v. Giovanelli, 945 F.2d 479, 490 (2d Cir. 1991) ("Unlike a 'pattern of racketeering activity' which requires proof of two or more predicate acts, to satisfy RICO's 'col-

> "pattern of racketeering activity requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter [October 15, 1970] and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity."[57]

Thus, two acts of racketeering activity are a necessary[57.1]—but not necessarily sufficient—condition of a "pattern of racketeering activity."[58] A plaintiff need not allege that at least two acts were perpetrated against him, so long as he alleges that he has been injured by an act that is part of a pattern of racketeering activity.[58.1] The purpose of the pattern requirement is

> "to weed out garden variety fraud allegations and to prevent RICO from being misused as a tool wherewith a disgruntled party may exact disproportionate vengeance against his partners or associates when their business dealings turn sour."[59]

Nevertheless, defining exactly what constitutes a RICO pattern has proven problematic.

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lection of unlawful debt' definition the government need only demonstrate a single collection."); United States v. Eufrasio, 935 F.2d 553, 576 (3d Cir. 1991) ("Only one act of collecting or attempting to collect unlawful debt is necessary to establish that predicate act."); United States v. Pepe, 747 F.2d 632, 661 (11th Cir. 1984); United States v. Megale, 363 F. Supp.2d 359, 363 (D. Conn. 2005).

[55] See § 1.04[1][b], [c] *supra* for a list of federal and state offenses qualifying as predicate acts.

[56] 18 U.S.C. § 1962 (a)-(c).

[57] 18 U.S.C. § 1961(5). (Emphasis added).

[57.1] See Quach v. Cross, 252 Fed. Appx. 775, 776 (9th Cir. 2007) ("The complaint alleges only one event with any particularity, namely, a purported raid against plaintiff's jewelry establishment. One swallow does not a spring make, nor one raid a 'pattern of racketeering.'").

[58] Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 496 n.14, 105 S.Ct. 3275, 87 L.Ed.2d 346 (1985).

[58.1] Brown v. Cassens Transport Co., 546 F.3d 347, 353 (6th Cir. 2008) ("nowhere does the statute require that the injury to each plaintiff must have independently consisted of a pattern of activity by the defendant").

[59] Hunter v. J. Craig Construction Co., 1995 U.S. App. LEXIS 6515, at *2 (7th Cir. March 29, 1995). See also, Automated Salvage Transportation, Inc. v. N.V. Koninklijke KNP BT, 1997 U.S. Dist. LEXIS 14062, at *42 (D.N.J. Sept. 12, 1997) (the pattern requirement insures that the statute's extraordinary treble-damage remedy does not threaten ordinary commercial transactions).

[b]—Judicial Interpretation of the "Pattern" Requirement

[i]—Sedima, S.P.R.L. v. Imrex Co.[60]

In its initial consideration of the definition of a RICO "pattern," the Supreme Court in *Sedima* noted that the definition implies "that while two acts are necessary, they may not be sufficient" and that "[t]he legislative history supports the view that two isolated acts of racketeering activity do not constitute a pattern."[61] Further, in *dictum,* the Court cited language in a Senate Report suggesting that a pattern required "continuity plus relationship."[62] Justice Powell, dissenting on other grounds, suggested that in the future lower courts could look to the pattern requirement as a method of limiting civil RICO now that the prior-conviction and racketeering-injury requirements had been rejected.[63] In summary, although *Sedima* did not clearly define what is needed to meet the "pattern" requirement, it indicated to the lower courts that two unrelated predicate acts would not suffice.

[ii]—Aftermath of Sedima

In the wake of *Sedima*, the lower courts took a wide variety of approaches in attempting to define a RICO "pattern." The majority of these cases discussing the definition of a "pattern" have involved predicate acts of mail and wire fraud, federal crimes that consist of using either the mails or interstate wires in furtherance of a scheme to defraud.[64] Although each separate mailing or use of the wires technically constitutes an indictable act of mail or wire fraud, criminal prosecutions tend to focus on the overall fraudulent scheme and treat the uses of the mails or wires as largely jurisdictional.[65]

[iii]—"Mailings" vs. "Episodes" vs. "Schemes"

Following *Sedima*, some courts, including the Fifth Circuit and, at one point, the Second Circuit, held that two or more separate uses of

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[60] Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 105 S.Ct. 3275, 87 L.Ed.2d 346 (1985).

[61] *Id.,* 473 U.S. at 496 n.14.

[62] Id. (quoting S. Rep. No. 91-617, 91st Cong., 1st Sess. 158 (1969)).

[63] *Id.* 473 U.S. at 528 n.25 (Powell, J., dissenting) ("By construing 'pattern' to focus on the manner in which the crime was perpetrated, courts could go a long way toward limiting the reach of the statute to its intended target—organized crime."). See § 1.01, Ns. 21-23 *supra,* and accompanying text for a discussion of the prior-conviction and racketeering-injury requirements.

[64] See, e.g., Pereira v. United States, 347 U.S. 1, 8, 74 S.Ct. 358, 98 L.Ed.2d 435 (1954).

[65] See generally, Rakoff, "The Federal Mail Fraud Statute (Part I)," 18 Duquesne L. Rev. 771 (1980).

the mails or interstate wires in the course of perpetrating a single fraudulent scheme are separate racketeering acts constituting a "pattern" satisfying *Sedima's* "continuity plus relationship" language.[66] Essentially, these courts, while paying lip service to the *dictum* in *Sedima*, were as a practical matter unaffected by it.[67]

Other courts held that two or more uses of the mails and/or interstate wires perpetrated in the course of a single scheme did not constitute a pattern of racketeering activity, but disagreed as to whether what was required instead were two entirely separate fraudulent schemes or simply two separate "episodes," "events," or "transactions" within the one scheme.[68]

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[66] See, e.g.:

Second Circuit: Beauford v. Helmsley, 865 F.2d 1386, 1390-1391 (2d Cir. 1989) (a plaintiff may establish a pattern without proof of multiple schemes, episodes, or transactions but recognizing that proof of two predicate acts alone is insufficient to establish a pattern), *vacated* 492 U.S. 914 (1989), *adhered to* 893 F.2d 1433, 1433-1434 (2d Cir. 1989).

Fifth Circuit: R.A.G.S. Couture, Inc. v. Hyatt, 774 F.2d 1350, 1354-1355 (5th Cir. 1985). While following the *R.A.G.S.* decision, a Fifth Circuit panel made an unusual request for *en banc* review of that decision and urged that it be overturned in *Montesano v. Seafirst Commercial Corp*., 818 F.2d 423 (5th Cir. 1987). The Fifth Circuit later recognized that the Supreme Court's decision in *H.J., Inc. v. Northwestern Bell Telephone Co*., 492 U.S. 229, 109 S.Ct. 2893, 106 L.Ed.2d 195 (1989), abrogated its decision in *R.A.G.S.* See Smith v. Cooper/T. Smith Corp., 886 F.2d 755, 756 (5th Cir. 1989).

Later, the Fifth Circuit held that plaintiffs must demonstrate, using the test articulated by the Supreme Court in *H.J., Inc. v. Northwestern Bell Telephone Co*., N. 70, *infra,* that the predicate acts have the same or similar purposes, results, participants, victims, methods of commission, or are otherwise related by distinguishing characteristics, and that the acts are not isolated events. Heller Financial Inc. v. Grammco Computer Sales, Inc., 71 F.3d 518 (5th Cir. 1996).

See also:

First Circuit: United Fish Co. v. Barnes, 627 F. Supp. 732, 735 (D. Me. 1985).

Third Circuit: Pennsylvania v. Derry Construction Co., Inc., 617 F. Supp. 940, 944 (W.D. Pa. 1985).

Seventh Circuit: Trak Microcomputer Corp. v. Wearne Brothers, 628 F. Supp. 1089, 1096 (N.D. Ill. 1985) (rejecting the argument that a pattern must involve more than one scheme); Systems Research, Inc. v. Random, Inc., 614 F. Supp. 494, 497 (N.D. Ill. 1985).

[67] See Rakoff, "RICO and the Second Circuit," 9 RICO L. Rep. 408 (1989).

[68] See, e.g.:

First Circuit: Apparel Art International, Inc. v. Jacobson, 967 F.2d 720, 722-724 (1st Cir. 1992) (requiring more than a single criminal episode to establish a pattern).

Second Circuit: GICC Capital Corp. v. Technology Financial Group, Inc., 67 F.3d 463, 465-469 (2d Cir. 1995) (plaintiff is required to allege either open- or closed-ended continuity and recognizing that the latter does not require proof of multiple schemes).

Third Circuit: Hughes v. Consol-Pennsylvania Coal Co., 945 F.2d 594, 609-611 (3d Cir. 1991) (plaintiff is required to show relatedness and continuity to establish a pattern, recognizing that continuity can be either open- or closed-ended, and stating that duration of the defendant's alleged predicate acts is the main factor in establishing closed-ended continuity).

[iv]—"Continuity" and "Relationship" vs. "Distinctiveness"

One difficulty implicit in all of the foregoing approaches was distinguishing between a single relevant unit of conduct and two distinct elements that are nonetheless related by continuity and relationship. If the degree of continuity and relationship is too great, the conduct may be treated as a single unit and, therefore, not a "pattern." If the degree is too little, the parts of the conduct may be treated as too dis-

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Fourth Circuit: GE Investment Private Placement Partners II v. Parker, 247 F.3d 543 (4th Cir. 2001) (numerous uses of the mails and wires in furtherance of a single scheme did not satisfy the pattern requirement); Anderson v. Foundation for Advancement, Education and Employment of American Indians, 155 F.3d 500, 505-506 (4th Cir. 1998) (recognizing that simply alleging two predicate acts is insufficient to establish a pattern and requiring relatedness and continuity).

Fifth Circuit: Calcasieu Marine National Bank v. Grant, 943 F.2d 1453, 1463-1464 (5th Cir. 1991).

Sixth Circuit: Newmyer v. Philatelic Leasing, Ltd., 888 F.2d 385, 396-397 (6th Cir. 1989) (recognizing that after *H.J., Inc.,* plaintiffs no longer need to allege multiple schemes).

Seventh Circuit: Corley v. Rosewood Care Center, Inc., 142 F.3d 1041, 1048-1049 (7th Cir. 1998) (recognizing that plaintiffs must show relatedness and continuity to establish a pattern); Appley v. West, 832 F.2d 1021, 1027-1028 (7th Cir. 1987); Marks v. Pannell Kerr Forster, 811 F.2d 1108, 1110 (7th Cir. 1987); Morgan v. Bank of Waukegan, 804 F.2d 970, 975 (7th Cir. 1986) (rejecting the proposition that predicate acts must always be part of separate schemes in order to constitute a pattern); Lipin Enterprises, Inc. v. Lee, 803 F.2d 322, 324 (7th Cir. 1986) (several acts of mail and wire fraud committed in furtherance of a single fraudulent scheme with only one injury and victim did not satisfy the pattern requirement of § 1962(c)).

Eighth Circuit: Lange v. Hocker, 940 F.2d 359, 361-362 (8th Cir. 1991) (adopting requirements set out by the Supreme Court in *H.J., Inc*. for establishing a pattern).

Ninth Circuit: Religious Technological Center v. Wollersheim, 971 F.2d 364, 365-367 (9th Cir. 1992) (an allegation of two isolated criminal acts is insufficient to establish a pattern); Medallion TV Enterprises, Inc. v. SelecTV of California, Inc., 833 F.2d 1360, 1363 (9th Cir. 1986) (plaintiffs need not show that defendants engaged in more than one "scheme" or "criminal episode" to satisfy the pattern requirement but that the circumstances of the case suggest a threat of continuing criminal activity).

Tenth Circuit: Resolution Trust Corp. v. Stone, 998 F.2d 1534 (10th Cir. 1993) (Two factors, duration of the related predicate acts and extensiveness of the scheme, are considered to determine whether acts are "related." To make a showing on the extensiveness factors, plaintiffs can show the number of victims, the number and variety of racketeering acts, whether distinct injuries were caused, the complexity and size of the scheme, and the nature or character of the enterprise or unlawful activity.); Boone v. Carlsbad Bancorp., Inc., 972 F.2d 1545, 1554-1555 (10th Cir. 1992) (plaintiffs need not allege more than one scheme to satisfy the pattern requirement, court required that plaintiffs must show continuity).

Eleventh Circuit: United States v. Gonzalez, 921 F.2d 1530, 1545 (11th Cir. 1991) (a pattern requires more than simply two predicate acts and requires continuity and relatedness).

District of Columbia Circuit: Pyramid Securities Ltd. v. IB Resolution, Inc., 924 F.2d 1114, 1117 (D.C. Cir. 1991) (plaintiff must show relatedness and continuity as well as at least two predicate acts in order to establish a pattern).

tinct from one another and, therefore, again not a "pattern." In the years immediately after *Sedima*, several courts recognized and wrestled with this problem,[69] but no court arrived at a solution that commanded a clear consensus.

[c]—*H.J., Inc.* and Its Aftermath

Four years after the Court decided *Sedima*, it addressed the pattern issue again in *H.J. Inc. v. Northwestern Bell Telephone Co.*,[70] a case that challenged the Eighth Circuit's requirement that a plaintiff plead and prove that a defendant engaged in two separate criminal schemes, in order to predicate a RICO action on mail or wire fraud. By the time of *H.J. Inc.*, the disposition of hundreds of cases since *Sedima* had not brought the circuits to a common view of the pattern requirement. To the contrary, as Justice Scalia observed, the post-*Sedima* pattern cases had "produced the widest and most persistent Circuit split on an issue of federal law in recent memory."[71]

Notwithstanding the fact that this division was the direct result of the lower courts' attempts to make sense of the "continuity plus relationship" *dictum* cited in *Sedima,* the Court in *H.J. Inc.* essentially confirmed *Sedima*'s suggestion by elevating it from *dictum* to holding.[72] In *H.J. Inc.*, however, the Court attempted to explain further the concept of "continuity."

First, the Court said "'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."[73] Second, the Court rejected the bright-line approaches of the Fifth Circuit (two bare acts) and the Eighth Circuit (two entire

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[69] See, e.g.:

Second Circuit: Anisfeld v. Cantor Fitzgerald & Co., 631 F. Supp. 1461, 1467 (S.D.N.Y. 1986) ("[A] pattern requires 'repeated criminal *activity*, not merely repeated *acts* to carry out the same criminal activity.'"). (Citation omitted).

Third Circuit: Petro-Tech, Inc. v. Western Co. of North America, 824 F.2d 1349, 1355 (3d Cir. 1987).

Seventh Circuit: Marks v. Pannell Kerr Forster, 811 F.2d 1108, 1110-1012 (7th Cir. 1987).

Eighth Circuit: Superior Oil Co. v. Fulmer, 785 F.2d 252, 254-256 (8th Cir. 1986) (struggling with the various post-*Sedima* interpretations of pattern).

Ninth Circuit: Medallion TV Enterprises, Inc. v. SelecTV of California, Inc., 833 F.2d 1360, 1362-1365 (9th Cir. 1987).

Tenth Circuit: Grant v. Union Bank, 629 F. Supp. 570, 577-579 (D. Utah 1986).

[70] H.J., Inc. v. Northwestern Bell Telephone Co., 492 U.S. 229, 109 S.Ct. 2893, 106 L.Ed.2d 195 (1989).

[71] *Id.*, 492 U.S. at 251 (Scalia, J., concurring). See also, *id.* at 236 (noting many different views of the circuit courts on the pattern issue).

[72] *Id.*, 492 U.S. at 236-240.

[73] *Id.*, 492 U.S. at 241.

schemes) as too rigid and formalistic in comparison to its more fluid standard.[74]

The Court, however, did not provide definitive guidelines for applying this standard. Rather, it stated that the "precise methods by which relatedness and continuity or its threat may be proved, cannot be fixed in advance" and "development of these concepts must await future cases, absent a decision by Congress to revisit RICO to provide clearer guidance as to the Act's intended scope."[75] The concurring justices were pessimistic that the concept of "pattern" could ever be developed into a meaningful concept without further guidance from Congress.[76] Justice Scalia found "no reason to believe that the Courts of Appeals will be any more unified in the future, than they have in the past, regarding the content of this law."[77] As a result, the concurring Justices invited a constitutional challenge to RICO as void for vagueness.[78] Subsequently, however, when the lower courts addressed such challenges, the overwhelming majority found the statute to be constitutional.[79]

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[74] *Id.* 492 U.S. at 240-241.
[75] *Id.* 492 U.S. at 242.
[76] *Id.* 492 U.S. at 254-256 (Scalia, J., concurring).
[77] *Id.* 492 U.S. at 255.
[78] *Id.*
[79] See, e.g.:

First Circuit: United States v. Angiulo, 897 F.2d 1169, 1178-1180 (1st Cir. 1990) (RICO was not unconstitutionally vague as applied to the activities of organized crime).

Second Circuit: Bingham v. Zolt, 66 F.3d 553, 566 (2d Cir. 1995) (rejecting the argument that RICO's pattern and enterprise requirements are unconstitutionally vague).

Third Circuit: United States v. Woods, 915 F.2d 854, 862-864 (3d Cir. 1990) (RICO was not unconstitutionally vague as applied to defendants with a history of public corruption), United States v. Pungitore, 910 F.2d 1084, 1104 (3d Cir. 1990) (although the statute may be vague as applied to legitimate businesses, its application to the criminal activities of organized crime families was well established).

Fourth Circuit: United States v. Bennett, 984 F.2d 597, 605-607 (4th Cir. 1993) (pattern requirement was not unconstitutionally vague in insurance fraud situation).

Fifth Circuit: United States v. Krout, 66 F.3d 1420, 1432 (5th Cir. 1995) (pattern requirement was not unconstitutionally vague as applied to a member of the Mexican mafia). United States v. Aucoin, 964 F.2d 1492, 1497-1498 (5th Cir. 1992) (RICO not unconstitutionally vague).

Sixth Circuit: Columbia Natural Resources v. Tatum, 58 F.3d 1101, 1104-1109 (6th Cir. 1995) (rejecting claim that pattern requirement was void for vagueness as applied to defendants); United States v. Busacca, 739 F. Supp. 370, 378 (N.D. Ohio 1990) (rejecting vagueness challenge to the pattern requirement). But see, Firestone v. Galbreath, 747 F. Supp. 1556, 1579-1581 (S.D. Ohio 1990) (pattern requirement was unconstitutionally vague as applied to defendants because a person of ordinary intelligence would not be on notice that RICO proscribes his contemplated conduct).

Seventh Circuit: United States v. Korando, 29 F.3d 1114, 1119 (7th Cir. 1994) (RICO was not unconstitutionally vague because it is a remedial statute only and does not make an otherwise legal activity criminal).

Despite the concurring Justices' fears, the circuits have become somewhat more unified in their interpretation of the term "pattern" since *H.J. Inc.*[80] But differences persist. For example, there is no consensus on whether a particular period of time is sufficient to establish continuity. Thus, whereas the Second Circuit has held that multiple related acts over a period of almost ten years more or less automatically qualify as a pattern,[81] the Fourth Circuit has held that multiple schemes occurring over even a ten-year period do not necessarily establish a pattern.[82] Further, there is still no consensus as to what conduct constitutes a discrete predicate act.[83]

More generally, there is a division between courts emphasizing a "multifactor approach" for determining whether a pattern exists,[84] and

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Eighth Circuit: United States v. Keltner, 147 F.3d 662, 667 (8th Cir. 1998) (pattern and enterprise requirements were not unconstitutionally vague).

Ninth Circuit: United States v. Blinder, 10 F.3d 1468, 1475 (9th Cir. 1993) (rejecting vagueness challenge to RICO).

Tenth Circuit: United States v. Hayworth, 941 F. Supp. 1057, 1060 (D.N.M. 1996) (pattern and enterprise were requirements not void for vagueness as applied to defendants in drug distribution scheme); Schrag v. Dinges, 788 F. Supp. 1543, 1552-1555 (D. Kan. 1992) (RICO was not unconstitutionally vague as applied to mail fraud scheme).

Eleventh Circuit: Cox v. Administrator, United States Steel & Carnegie, 17 F.3d 1386, 1398 (11th Cir. 1994) (rejecting argument that RICO is unconstitutionally vague).

District of Columbia Circuit: Dooley v. United Technologies Corp., 1992 U.S. Dist. LEXIS 8653, at *34-*35 (D.D.C. June 16, 1992) (RICO was not unconstitutionally vague).

[80] *Compare,* H.J., Inc. v. Northwestern Bell Telephone Co., 492 U.S. 229, 109 S.Ct. 2893, 106 L.Ed.2d 195 (1989), *with* the cases cited in Ns. 78-89 *infra.*

[81] GICC Capital Corp. v. Technology Financial Group, Inc., 67 F.3d 463, 466 (2d Cir. 1995) (predicate acts occurring over almost ten years satisfies the continuity requirement).

[82] Walk v. Baltimore & Ohio R.R., 890 F.2d 688, 690 (4th Cir. 1989) (favoring a case by case approach). See also, Western Associates Limited Partnership v. Market Square Associates, 235 F.3d 629 (D.C. Cir. 2001) (alleged conduct spanning an eight-year period was insufficient to satisfy the pattern requirement).

[83] Schlaifer Nance & Co. v. Estate of Andy Warhol, 119 F.3d 91 (2d Cir. 1997).

[84] See, e.g.:

Second Circuit: GICC Capital Corp. v. Technology Financial Group, Inc., 67 F.3d 463, 467 (2d Cir. 1995) (favoring a multifactor approach to determining whether a pattern exists); Bernstein v. Misk, 948 F. Supp. 228, 237 (E.D.N.Y. 1997); Pier Connection Inc. v. Lakhani, 907 F. Supp. 72, 75 (S.D.N.Y. 1995) (in determining whether continuity exists for purposes of establishing a pattern courts should look at the context in which the predicate acts occurred). (Citations omitted.)

Third Circuit: Tabas v. Tabas, 47 F.3d 1280, 1296 (3d Cir. 1994) (applying a multifactor approach only when continuity cannot be established under a closed- or open-ended analysis); United States v. Pelullo, 964 F.2d 193, 207-208 (3d Cir. 1992) (continuity must be determined on a case-by-case basis and that duration is the most significant factor, but not the sole factor in the determination); Hindes v. Castle, 937 F.2d 868, 872-875 (3d Cir. 1991) (multifactor test was relevant to pattern inquiry, but

stating that duration is the most important factor); Kehr Packages, Inc. v. Fidelcor, Inc., 926 F.2d 1406, 1417-1419 (3d Cir. 1991) (addressing multiple factors to determine whether a pattern existed); Banks v. Wolk, 918 F.2d 418, 423 (3rd Cir. 1990); Temple University Hospital, Inc. v. Medifor-X Corp., 1998 U.S. Dist. LEXIS 14389, at *8-*11 (E.D. Pa. Sept. 2, 1998) (plaintiff established neither open-ended nor closed-ended continuity because the defendant was no longer in business and the alleged illegal acts occurred over a period of less than six months).

Fourth Circuit: Lyon v. Campbell, 1994 U.S. App. LEXIS 17388, at *10 (4th Cir. July 15, 1994) (requiring courts to use common sense and look at specific facts when determining whether a pattern exists); Parcoil Corp. v. Nowsco Well Services, Ltd., 887 F.2d 502, 504 (4th Cir. 1989) (declining to adopt mechanical rules in determining the existence of a pattern and requiring case-by-case inquiry); Brandenburg v. Seidel, 859 F.2d 1179, 1185 (4th Cir. 1988); Park v. Jack's Food Systems, Inc., 907 F. Supp. 914, 920 (D. Md. 1995) (Fourth Circuit has adopted a case-by-case, fact-specific approach to determining continuity and listing factors to be considered in such a determination).

Fifth Circuit: Wardlaw *ex rel*. Owen v. Whitney National Bank, 1996 U.S. Dist. LEXIS 5046, at *5-*6 (E.D. La. April 18, 1996) (applying a multifactor test to determining whether plaintiff alleged a pattern); Southwest Realty, Ltd. v. Daseke, 1990 U.S. Dist. LEXIS at *12 (N.D. Tex. May 9, 1990) ("[F]actors other than the duration of the allegedly illegal activity must be considered in determining whether the requisite continuity exists.").

Sixth Circuit: Columbia Natural Resources, Inc. v. Tatum, 58 F.3d 1101, 1110 (6th Cir. 1995) (Sixth Circuit follows a multifactor test and listing factors to be used in determining the existence of a pattern); United States v. Busacca, 936 F.2d 232, 238 (6th Cir. 1991) (many factors must be considered in determining whether continuity has been established); General Motors Corp. v. Ignacio Lopez De Arriortua, 948 F. Supp. 670, 676 (E.D. Mich. 1996) (courts examine the totality of the circumstances in determining whether a pattern exists, and listing factors used in making such a determination).

Seventh Circuit: Uniroyal Goodrich Tire Co. v. Mutual Trading Corp., 63 F.3d 516, 524 (7th Cir. 1995) (Seventh Circuit uses a multifactor approach in determining the existence of a pattern and listing these factors); Vicom, Inc. v. Harbridge Merchant Services, Inc., 20 F.3d 771, 780 (7th Cir. 1994); McDonald v. Schencker, 18 F.3d 491, 497 (7th Cir. 1994) (applying multifactor test; single two-month scheme was insufficient to establish a pattern); J. D. Marshall International v. Redstart, Inc., 935 F.2d 815, 820 (7th Cir. 1991).

Eighth Circuit: Diamonds Plus, Inc. v. Kolber, 960 F.2d 765, 769 (8th Cir. 1992) ("[T]he existence of a pattern is a question of fact."); Terry A. Lambert Plumbing, Inc. v. Western Security Bank, 934 F.2d 976, 980-981 (8th Cir. 1991) (determination of a pattern is a factual determination and must involve a flexible approach).

Ninth Circuit: Allwaste, Inc. v. Hecht, 65 F.3d 1523, 1527-1528 (9th Cir. 1995) (refusing to adopt a bright-line rule that closed-ended continuity required predicate acts spanning at least one year).

Tenth Circuit: Resolution Trust Corp. v. Stone, 998 F.2d 1534, 1543-1545 (10th Cir. 1993) (applying multifactor approach in determining the existence of a pattern); Niedens v. Chaloupka, 1991 U.S. Dist. LEXIS 2838 (D. Kan. Feb. 12, 1991) (allegations involving one scheme to defraud, one victim, and no evidence of any threat of similar activity in the future failed to establish a pattern).

Eleventh Circuit: United States v. Link, 921 F.2d 1523, 1527 (11th Cir. 1991) (examining the totality of the evidence in determining the existence of continuity); Aldridge v. Lily-Tulip, Inc. Salary Retirement Plan Benefits Committee, 741 F. Supp. 906, 912 (S.D. Ga. 1990) (considering duration of alleged scheme, number of victims, and occurrence of distinct injuries in determining whether a pattern was alleged).

those which focus on particular factors as outcome determinative.[85] For example, the Second Circuit has observed that where the acts of the defendant or the enterprise (such as murder or obstruction of justice) are inherently unlawful and are in pursuit of inherently unlawful goals such as narcotics trafficking, the nature of the activity establishes "open-ended" continuity even if the duration of the acts themselves is brief.[86] Insofar as "closed-ended" patterns are concerned, however, the courts have moved increasingly toward treating the length or duration of the series of predicate acts as the primary factor.

For example, in a 1995 case, the Second Circuit, observing that it had found closed-ended continuity only twice since *H.J. Inc.,*[87] noted that in those instances the alleged patterns had extended for several years, and concluded that although giving such weight to the duration of criminal activities was somewhat mechanistic, it was "required to effectuate Congress's intent to target 'long-term criminal conduct.'"[88] Similarly, the Third Circuit, sitting *en banc*, held that other factors

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District of Columbia Circuit: Edmondson & Gallagher v. Alban Towers Tenants Ass'n, 48 F.3d 1260, 1265 (D.C. Cir. 1995); Western Associates Limited Partnership v. Market Square Associates, 235 F.3d 629 (D.C. Cir. 2001).

[85] See, e.g.:

First Circuit: Fleet Credit Corp. v. Sion, 893 F.2d 441, 445-446 (1st Cir. 1990) (multifactor approach unreliable after *H.J., Inc.*; many related predicte acts committed over a substantial period of time establishes continuity regardless of other factors).

Third Circuit: Tabas v. Tabas, 47 F.3d 1280, 1296 (3d Cir. 1995) (duration is the most important factor in establishing continuity, and the multifactor test is an analytical tool to be used when the issue of continuity cannot be clearly determined under a closed- or open-ended analysis); Hinde v. Castle, 937 F.2d 868 (3d Cir. 1991) (multifactor test is relevant to pattern inquiry but duration is the most important factor); Seneca Insurance Co. v. Commercial Transportation, Inc., 906 F. Supp. 239, 242-243 (M.D. Pa. 1995) (multifactor test is to be used only where relatedness and continuity are in doubt; the multifactor approach may no longer be relevant in the Third Circuit because of the fractured opinion in *Tabas*) (citations omitted); Puricelli v. Estate of Elizabeth Bachman, 1995 U.S. Dist. LEXIS 10593, at *7 n.8, *20-*21 (E.D. Pa. July 27, 1995) (duration is the most important factor in determining closed-ended continuity, and noting that the multifactor test may no longer be applicable in the Third Circuit).

[86] United States v. Aulicino, 44 F. 3d 1102, 1113-1114 (2d Cir. 1995) (kidnapping scheme abandoned after three and one-half months posed threat of continued criminal activity); Pier Connection Inc. v. Lakani, 907 F. Supp. 72, 75-78 (S.D.N.Y. 1995) (acts spanning ten months that were not inherently unlawful did not establish continuity where there was only one victim and one scheme); Protter v. Nathan's Famous Systems, Inc., 904 F. Supp. 101, 109-110 (E.D.N.Y. 1995) (the activity alleged was not inherently unlawful, lasted only a few months and, therefore, did not establish continuity).

[87] GICC Capital Corp. v. Technology Financial Group, Inc., 67 F.3d 463, 468 (2d Cir. 1995).

[88] *Id.*

were of little relevance in testing the adequacy of continuity where the acts in question had extended over several years,[89] because "duration is the *sine qua non* of continuity."[90] Other circuits have offered similar comments.[91]

But if duration is the key to closed-ended continuity, how much duration is needed? A review of the post-*H.J. Inc.* cases suggests that closed-ended conduct lasting less than one year will not satisfy the pattern requirement.[92] Indeed, the Second Circuit has suggested that

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[89] Tabas v. Tabas, 47 F.3d 1280, 1296 n.21 (3d Cir. 1995) (*en banc*).

[90] *Id.*

[91] See, e.g.:

Fourth Circuit: Combs v. Bakker, 886 F.2d 673, 677-678 (4th Cir. 1989).

Seventh Circuit: New Burnham Prairie Homes, Inc. v. Village of Burnham, 910 F.2d 1474, 1478 (7th Cir. 1990).

But see, Resolution Trust Corp. v. Stone, 998 F.2d 1534, 1543-1545 (10th Cir. 1993) (courts should consider the duration of related predicate acts, effectiveness of an enterprise's scheme, the number and variety of acts, distinct injuries, and the complexity and size of the scheme).

[92] See, e.g.:

First Circuit: Eagle Investment Systems Corp. v. Tamm, 146 F. Supp.2d 105, 108-109 (D. Mass. 2001).

Second Circuit: Lutin v. New Jersey Steel Corp., 1997 U.S. App. LEXIS 21005, at *21-*23 (2d Cir. Aug. 7, 1997) (bribery allegations concerning two incidents that took place in one month failed to satisfy the closed-ended continuity requirement); J-Square M Marketing, Inc. v. Sipex Corp., 1997 U.S. Dist. LEXIS 12723, at *10-*11 (D. Conn. Aug. 20, 1997) (allegations covering a six-month period were insufficient to meet closed-ended continuity requirement); Rini v. Zwirn, 886 F. Supp. 270, 299 (E.D.N.Y. 1995); Boucher v. Sears, 1995 U.S. Dist. LEXIS 6505, at *19-*21 (N.D.N.Y. May 8, 1995) (ten-month scheme to force plaintiff out of business did not show open- or closed-ended continuity).

Third Circuit: Tabas v. Tabas, 47 F.3d 1280, 1293 (3rd Cir. 1995) (*en banc*) (suggesting conduct must last more than twelve months to satisfy closed-ended continuity requirement); United States v. Pellulo, 964 F.2d 193, 209 (3d Cir. 1992) ("While declining to define with precision the meaning of a 'substantial period of time,' we have never found such a period to exist where the racketeering activity occurred over a period of one year or less.").

Seventh Circuit: Jennings v. Auto Meter Products, Inc., 495 F.3d 466, 474 (7th Cir. 2007) (pattern not established by allegations of several fraudulent acts over a ten month period of time); Pizzo v. Bekin Van Lines Co., 258 F.3d 629, 632-633 (7th Cir. 2001) (pattern element not satisfied by allegations of two fraudulent schemes occurring within five months of each other where there was no evidence indicating a danger of recurrence); Hunter v. J. Craig Construction Co., 1995 U.S. App. LEXIS 6515, at *6-*7 (7th Cir. March 30, 1995) (acts occurring over one month and directed against two victims, each sustaining a single injury, did not establish continuity); Peterson v. H & R Block Tax Services, 22 F. Supp.2d 795, 805 (N.D. Ill. 1998) (pattern not established where the alleged scheme lasted only thirteen weeks).

Eighth Circuit: Wisdom v. First Midwest Bank, 167 F.3d 402, 406-407 (8th Cir. 1999) (activity occurring over a six-month period inadequate to satisfy closed-ended continuity); Primary Care Investors, Seven, Inc. v. PHP Healthcare Corp., 986 F.2d 1208, 1215 (8th Cir. 1993).

Ninth Circuit: Neely v. Campos, 1994 U.S. App. LEXIS 12704, at *10 (9th Cir. May 27, 1994) (no case in which activity lasted less than a year satisfied the pattern

the emerging consensus is to require at least a two-year duration to satisfy closed-end continuity.[93] Although other factors (such as the number of participants,[94] predicate acts, and victims[95]) may be relevant,[96] these factors are far more pertinent to assessing open-ended continuity than closed-ended continuity.[97] Finally, it is well settled that "where a Plaintiff alleges a single scheme promulgated for the purpose of defrauding a single victim, continuity cannot be established."[98]

In contrast to closed-ended continuity, a party may establish "open-ended continuity" by alleging "predicate acts occurring over a short period of time so long as there is a threat that such conduct will recur

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requirement); Allwaste, Inc. v. Hecht, 65 F.3d 1523, 1528 (9th Cir. 1995) (activity lasting only a few months is not sufficiently continuous, but refusing to adopt a strict one-year rule).

[93] Spool v. World Child International Adoption Agency, 250 F.3d 178, 184 (2d Cir. 2008) ("Since the Supreme Court decided *H.J. Inc.*, we have never held a period of less than two years to constitute a "substantial period of time." (quotations omitted)); Cofacredit, S.A. v. Windsor Plumbing Supply Co., Inc., 187 F.3d 229 (2d Cir. 1999). See also, Gamboa v. City of Chicago, 2004 U.S. Dist. LEXIS 12122, at *13-*15 (N.D. Ill. Jun. 30, 2004) (pattern found for three years of witness intimidation).

[94] See, e.g.:

Second Circuit: Schlaifer Nance & Co. v. Estate of Warhol, 119 F.3d 91, 97 (2d Cir. 1997) (predicate acts committed by the same participant not related).

Sixth Circuit: Vild v. Visconsi, 956 F.2d 560, 566-568 (6th Cir. 1992) (acts by same defendants against plaintiff unrelated to acts against third parties).

Ninth Circuit: Howard v. America Online, Inc., 208 F.3d 741, 749 (9th Cir. 2000) (predicate acts not related where they shared only the same participants).

But see, United States v. Simmons, 923 F.2d 934, 951 (2d Cir. 1991) ("[T]he involvement of similar participants is sufficient to demonstrate a relationship among the predicate acts").

[95] Al-Abood v. Elshamari, 217 F.3d 225, 238-239 (4th Cir. 2000) (dismissing RICO claims notwithstanding the fact that they were related and involved three distinct schemes, because there was only one victim and the claims arose out of a dispute between formerly close family friends).

[96] *Id.* See also:

First Circuit: Efron v. Embassy Suites (Puerto Rico), Inc., 223 F.3d 12, 17-21 (1st Cir. 2000) (applying multi-factor approach, and concluding that plaintiff had not established closed-ended continuity based upon finite nature of alleged racketeering activities and their occurrence over a modest amount of time).

District of Columbia Circuit: Western Associates Limited Partnership v. Market Square Associates, 235 F.3d 629 (D.C. Cir. 2001) (applying multi-factor approach to alleged closed-ended scheme spanning an eight-year period).

[97] See Lincoln National Life Insurance Co. v. Silver, 966 F. Supp. 587, 615-618 (N.D. Ill. 1995), *aff'd* 114 F.3d 1191 (7th Cir. 1997).

[98] See, e.g.:

First Circuit: Efron v. Embassy Suites (Puerto Rico), Inc., 223 F.3d 12, 16 (1st Cir. 2000) (no open-ended continuity where "no specific threat of repetition extending indefinitely exist[ed]").

Seventh Circuit: Corley v. Rosewood Care Center, Inc. of Peoria, 142 F.3d 1041, 1049 (7th Cir. 1998).

in the future."[99] The threat that such illegal conduct will recur in the future 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."[100] As the Second Circuit has noted, "[t]his threat is generally presumed when the enterprise's business is primarily or inherently unlawful."[100.1]

In *Abraham v. Singh*,[100.2] the Fifth Circuit held that the plaintiffs' complaint met the liberal pleading standard of alleging continuity of racketeering activity. The Court rejected the district court's application of a more stringent pleading requirement, and held that plaintiffs had sufficiently pled open-ended continuity of racketeering activity, or its threat, because they had alleged that the defendants engaged in a scheme that lasted at least two years involving the systematic victimization of Indian citizens who were convinced to pay the defendants and travel to the United States in order to obtain work.[100.3]

On appeal, at least some courts will not reverse a jury verdict for a substantive RICO violation "simply because some predicate acts are factually insufficient, as long as there remain at least two adequately proven acts."[100.4] In *United States v. Browne*, the Eleventh Circuit adopted the Third Circuit's approach,[100.5] in which "the court rejected 'speculations about the jury's rational deliberation process' and independently determined that there was sufficient evidence of at least two predicate acts to support a substantive RICO conviction, even though it was impossible to determine from the verdict whether the jury actually found more than one predicate act."[100.6] Thus, once continuity in a pattern of racketeering activity is found, courts are hesitant to overturn that finding.

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[99] Dempsey v. Sanders, 132 F. Supp.2d 222 (S.D.N.Y. 2001). See also: Schlaifer Nance & Co. v. Estate of Andy Warhol, 199 F.3d 91, 97 (2d Cir. 1997); GICC Capital Corp. v. Technology Finance Group, Inc., 67 F.3d 463 468 (2d Cir. 1995); China Trust Bank of New York v. Standard Chartered Bank, PLC, 981 F. Supp. 282, 287-288 (S.D.N.Y. 1997); CPF Premium Funding, Inc. v. Ferrarini, 1997 WL 158361 at *9 (S.D.N.Y. Apr. 3, 1997).

[100] *Id.* See, e.g., System Management, Inc. v. Loiselle, 138 F. Supp.2d 78 (D. Mass. 2001) (open-ended continuity satisfied where plaintiffs alleged "a clear pattern of racketeering activity . . . that posed a real threat of continuing indefinitely").

[100.1] *Spool*, N. 93 *supra*, 250 F.3d at 185 (citing *Cofacredit*, N. 93 *supra*, 187 F.3d at 242-243). (Other citations omitted.)

[100.2] Abraham v. Singh, 480 F.3d 351, 356 (5th Cir. 2007).

[100.3] *Id.*

[100.4] United States v. Browne, 505 F.3d 1229, 1262 (11th Cir. 2007).

[100.5] See United States v. Vastola, 989 F.2d 1318, 1330 (3d Cir. 1993).

[100.6] *Browne,* N. 100.4 *supra*, 505 F.3d at 1262.

Regarding the "relationship" prong, there has been considerably less case law, perhaps because the Supreme Court defined it so broadly in *H.J. Inc*. However, the Fifth Circuit attempted to give some further definition to the relationship requirement in *Heller Financial, Inc. v. Gramm Company Computer Sales, Inc*.[101] In *Heller,* the plaintiff alleged two types of criminal activity: commercial bribery of an employee and use of the mails and wires to fraudulently induce the plaintiff into extending credit to the defendant.[102] The court noted that the defendant directed the two acts toward different victims, and committed them for distinct and dissimilar purposes.[103] The alleged bribery affected only a third-party corporation and the alleged fraudulent acts injured only the plaintiff.[104] The court interpreted "the relationship prong of the pattern requirement to require more than an articulable factual nexus," and held that a plaintiff must establish a "relationship between the criminal aspects of the predicate criminal acts, . . . supporting the conclusion that the criminal acts are 'ordered or arranged.'"[105]

In *Fujisawa Pharmaceutical Company v. Kapoor*[106] the Seventh Circuit discussed the relationship requirement in the context of the criminal takeover of a legitimate business, which the defendant used both to launder his illegal earnings and to lure an investor into investing more money into the company.[107] In finding that this satisfied the relationship requirement,[108] the court found that the criminal takeover served to bind together what might otherwise have been considered unrelated predicate acts committed thereafter.[109]

The Second Circuit has found predicate acts to be related when they "have the same or similar purposes, results, participants, victims, or other methods of commission, or otherwise are interrelated by dis-

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[101] Heller Financial, Inc. v. Gramm Company Computer Sales, Inc., 71 F.3d 518, 524-525 (5th Cir. 1996).

[102] *Id.,* 71 F.3d at 524.

[103] *Id.*

[104] *Id.*

[105] *Id.,* 71 F.3d at 525. (Citation omitted). See also, German de la Roche v. Calcagnini, 1997 U.S. Dist. LEXIS 7664, at *23-*24 (S.D.N.Y. June 2, 1997) (bank fraud claim was unrelated to a separate scheme to defraud an individual plaintiff of his interest in certain companies because each criminal act had a different victim).

[106] Fujisawa Pharmaceutical Co. v. Kapoor, 115 F.3d 1332 (7th Cir. 1997).

[107] *Id.*, 115 F.3d at 1338.

[108] *Id.*

[109] *Id.* See also, United States v. Abed, 203 F.3d 822, 2000 WL 14190 at *27-*28 (4th Cir. 2000) (table op.) (relatedness requirement satisfied when the predicate acts were proven to be related to the affairs of the enterprise, even though the acts were not directly related to each other).

tinguishing characteristics and are not isolated events."[110] The interrelationship between the predicate acts may be established by proving "temporal proximity, common goals, or similarity of methods, or repetitions."[111] The Second Circuit also requires that the predicate acts be related "directly or indirectly, to each other as well as to the enterprise."[112] Even when predicate acts are varied, they may still be related enough to form a pattern.[113]

The Second Circuit has also held that the requirement that the predicate acts be related to each other (horizontal relatedness) and the enterprise (vertical relatedness) "are generally satisfied by linking each predicate act to the enterprise."[114] Moreover, both horizontal and vertical relatedness can be "proven by overlapping evidence tending to establish proof satisfying both inquiries."[115]

A review of existing case law indicates that much uncertainty still pervades the determination of a RICO "pattern," but certain rough principles have emerged. First, predicate acts that do not extend over a period of at least one to two years are unlikely to fulfill the requirements for continuity of a "closed-ended" or completed, pattern.[116] Second, although open-ended continuity (i.e., the continuity of a continuing scheme) will be assessed on a multifactor basis, schemes involving organized crime, narcotics conspiracies, and other hard-core criminal enterprises are more likely to satisfy open-ended continuity than others.[117] Third, the relationship requirement will be satisfied in all but extreme cases.

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[110] Schlaifer Nance & Co. v. Estate of Andy Warhol, 199 F.3d 91, 97 (2d Cir. 1997).

[111] Azrielli v. Cohen Law Offices, 21 F.3d 512, 520 (2d Cir. 1994).

[112] United States v. Locasio, 6 F.3d 924, 943 (2d Cir. 1993).

[113] United States v. Eppolito, 543 F.3d 25, 58 (2d Cir. 2008) ("Where a given partnership has offered a variety of services to a defined category of customers, it is not entitled to a ruling that as a matter of law its services do not constitute a pattern simply because the offered services were varied.").

[114] United States v. Daidone, 471 F.3d 371, 376 (2d Cir. 2006).

[115] *Id.*

[116] North Bridge Associates, Inc. v. Boldt, 274 F.3d 38, 43 (1st Cir. 2001) (two acts of mail fraud did not satisfy the continuity requirement where "both the number of acts (two) and the span of time over which they extend (four months) were minimal"); Cofacredit, S.A. v. Windsor Plumbing Supply Co., Inc., 187 F.3d 229 (2d Cir. 1999).

[117] See e.g.:

Second Circuit: Schlaifer Nance & Co. v. Estate of Andy Warhol, 119 F.3d 91, 97 (2d Cir. 1997).

Sixth Circuit: United States v. Busacca, 936 F.2d 232, 238 (6th Cir. 1991).

Seventh Circuit: United States v. Torres, 191 F.3d 799, 808 (7th Cir. 1999).

§ 1.05 The "Enterprise"

Engaging in a pattern of racketeering activity, or using the proceeds thereof, does not, by itself, constitute a RICO violation. Rather, such activity or investment of proceeds must, *inter alia*, impact upon an interstate "enterprise."[1] An "enterprise" is thus the third element of a RICO claim.

Under RICO, the definition of an 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."[2] Resolving early on what could otherwise have been a major issue regarding the enterprise element, the Supreme Court held in 1981 that an enterprise can be a legitimate or illegitimate entity such as a group of criminal conspirators.[3] Most of the remaining controversy over the enterprise element of a RICO claim has focused on the concept of a "group of individuals associated in fact" that is included in the statutory definition.[4]

[1]—"Associated in Fact" Enterprises

The Supreme Court has described an "association-in-fact" enterprise as "a group of persons associated together for a common purpose of engaging in a course of conduct" and as an "ongoing organization, formal or informal [with] . . . various associates function[ing] as a continuing unit."[5] Further, the Court has stated that an enterprise is "an entity separate and apart from the pattern of activity in which it engages."[6] A formal enterprise, such as a corporation or other business entity, necessarily has an ascertainable structure distinct from the predicate acts. Thus, the restriction regarding separation between the enterprise and the pattern of racketeering activity is largely directed towards those enterprises lacking such a structure and, therefore, constituting "associations-in-fact."

Prior to the Supreme Court's decision in *Boyle v. United States*,[6.1] many courts had interpreted this aspect of the enterprise element to

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[1] See § 1.06 *infra* for a discussion of the ways such conduct must impact the enterprise.

[2] 18 U.S.C. § 1961(4). (Emphasis added.)

[3] United States v. Turkette, 452 U.S. 576, 580-593, 101 S.Ct. 2524, 69 L.Ed.2d 246 (1981).

[4] See § 1.05[2] *infra* for a further discussion of "associations-in-fact."

[5] *Turkette*, N. 3 *supra*, 452 U.S. at 583. See also, United States v. Weinstein, 762 F.2d 1522, 1537 n.13 (11th Cir. 1985) (emphasizing that a "continuing unit" does not require participation of all members throughout the life of the enterprise).

[6] See *Turkette,* N. 3 *supra*, 452 U.S. at 583.

[6.1] Boyle v. United States, 556 U.S.938, 129 S.Ct. 2237, 173 L.Ed.2d 1265 (2009).

require that the enterprise have an organization or structure beyond that which is necessary to commit the racketeering acts.[7] In *United States v. Bledsoe,*[8] the Eighth Circuit concluded that the "enterprise cannot simply be the undertaking of the acts of racketeering, neither can it be the minimal association which surrounds these acts."[9] The additional factors necessary to satisfy the enterprise requirement must be met through a separate economic, temporal or spatial existence, or

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[7] See, e.g.:

First Circuit: Miranda-Rodriguez v. Ponce Federal Bank, F.S.B., 751 F. Supp. 18, 21 (D.P.R. 1990), *aff'd on other grounds* 948 F.2d 41 (1st Cir. 1991) ("[T]he term 'enterprise' must signify an association that is substantially different from the acts which form the 'pattern of racketeering activity.'"). (Citation omitted.)

Second Circuit: Schmidt v. Fleet Bank, 16 F. Supp.2d 340, 349 (S.D.N.Y. 1998). ("[T]he RICO enterprise must always have an ascertainable structure distinct from that inherent in the conduct of a 'pattern of racketeering.'")

Third Circuit: Seville Industries Machinery Corp. v. Southmost Machinery Corp., 742 F.2d 786, 787-788 (3d Cir. 1984); McClure Enterprises, Inc. v. Fellerman, 2007 U.S. Dist. LEXIS, at *11 (M.D. Pa. May 15, 2007).

Fourth Circuit: United States v. Tillett, 763 F.2d 628, 632 (4th Cir. 1985).

Fifth Circuit: In re McCann, 268 Fed. Appx. 359 (5th Cir. 2008) (finding no "enterprise" where individuals "were merely partners in a scheme too unsophisticated to be labeled 'organized crime,'" and where "[t]his Court has previously declined the invitation to expansively define an association-in-fact enterprise as merely a scheme involving two or more people"); Clark v. Douglas, 2008 U.S. App. LEXIS 113, at *13 (5th Cir. Jan. 4, 2008) (affirming dismissal of complaint where association-in-fact "did not exist separately and apart from the pattern of racketeering activity alleged and therefore did not exist in violation of § 1962" and noting that "the members of any alleged enterprise will have an existence separate from the pattern of racketeering activity (easily demonstrated by their engaging in such activities as brushing their teeth), but § 1962 applies solely where the enterprise as a whole exists separately and apart from the alleged pattern of racketeering activity"); Landry v. Air Line Pilots Ass'n International AFL-CIO, 901 F.2d 404, 433 (5th Cir. 1990).

Seventh Circuit: Richmond v. Nationwide Cassel L.P., 52 F.3d 640, 645 (7th Cir. 1995) (citing United States v. Neapolitan, 791 F.2d 489, 499-500 (7th Cir. 1986)); Jubelirer v. Mastercard International, Inc., 68 F. Supp.2d 1049, 1052-1053 (W.D. Wis. 1999) (alleged enterprise consisting of bank, credit card company, and on-line casino was insufficient to support RICO claim). See also, Bachman v. Bear, Stearns & Co., 178 F.3d 930, 932 (7th Cir. 1999) (allegations of an agreement to defraud might establish a conspiracy but not an enterprise because every conspiracy is not also an enterprise for RICO purposes).

Eighth Circuit: United States v. Bledsoe, 674 F.2d 647, 664 (8th Cir. 1982).

Ninth Circuit: Chang v. Chen, 80 F.3d 1293, 1298 (9th Cir. 1996), *overruled by* Odom v. Microsoft Corp., 486 F.3d 541 (9th Cir. 2007) (*en banc*).

Tenth Circuit: United States v. Sanders, 928 F.2d 940, 943 (10th Cir. 1991).

Cf., United States v. Perholtz, 842 F.2d 343, 362-363 (D.C. Cir. 1988) (the enterprise cannot be equivalent to the pattern of racketeering activity, but the organization necessary to comprise an enterprise can be inferred from the pattern).

[8] United States v. Bledsoe, 674 F.2d 647 (8th Cir. 1982).

[9] *Id.*, 674 F.2d at 664.

a similar relationship.[10] In a subsequent decision, the Eighth Circuit noted that it was unnecessary to show that the enterprise had a function that was wholly unrelated to the racketeering activity and observed that the existence of an association-in-fact enterprise was often more readily proven by what the enterprise does, rather than by its structure.[11] The Seventh Circuit has noted that an enterprise must have "a structure and goals separate from the predicate acts themselves," but observed that since RICO applies "not only to formal enterprises, but also to informal ones like criminal gangs,"[12] there need not be much structure to distinguish an enterprise from a conspiracy. Moreover, said the court, "the continuity of an informal

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[10] See, e.g.:

First Circuit: Libertad v. Welch, 854 F. Supp. 19, 25-28 (D.P.R. 1993), *aff'd on other grounds* 53 F.3d 428 (1st Cir. 1995) (alleged association-in-fact was not a valid RICO enterprise when it had no structure or organization beyond that necessary to commit the underlying predicates).

Second Circuit: In re Sumitomo Copper Litigation, 995 F. Supp. 451, 453-454 (S.D.N.Y. 1998) (construing the enterprise element of RICO liberally and finding an allegation that the defendants coordinated their copper trading through joint and individual accounts in an effort to manipulate prices sufficient to allege an illegal enterprise).

Third Circuit: United States v. Console, 13 F.3d 641, 649-652 (3d Cir. 1993) (requiring proof of an ongoing organization functioning as a continuing unit that is separate from the pattern of racketeering activity).

Fourth Circuit: United States v. Fiel, 35 F.3d 997, 1003-1004 (4th Cir. 1994) (a motorcycle club was an enterprise because it was a group of individuals with an identifiable structure that was associated for a common purpose).

Fifth Circuit: Wardlaw *ex rel.* Owen v. Whitney National Bank, 1994 U.S. Dist. LEXIS 15215 (E.D. La. Oct. 18, 1994) (requiring an association-in-fact enterprise to be more than a summation of predicate acts and to continue beyond the time necessary to commit the predicate acts).

Seventh Circuit: Johnson v. Midland Career Institute, 1996 U.S. Dist. LEXIS 1308 (N.D. Ill. Feb. 8, 1996) (a group of associated businesses operating in concert do not make an enterprise as an association-in-fact enterprise requires a structure distinct from the RICO predicate acts). *Cf.* McCullough v. Suter, 757 F.2d 142, 144 (7th Cir. 1985) (a sole proprietorship could be an enterprise because the proprietor had several employees that together constituted more than one entity).

Ninth Circuit: In re Omnitrition International, Inc., 1994 U.S. Dist. LEXIS 13089 (N.D. Cal. July 25, 1994), *overruled by* Odom v. Microsoft Corp., 486 F.3d 541 (9th Cir. 2007) (*en banc*) (requiring that an enterprise have an ascertainable structure distinct from the racketeering activity).

[11] See, e.g.:

Sixth Circuit: Vandenbroeck v. CommonPoint Mortgage Co., 22 F. Supp.2d 677, 682 (W.D. Mich. 1998) (allegations were insufficient to establish an enterprise, because plaintiffs essentially alleged nothing more than a typical business relationship).

Eighth Circuit: United States v. Darden, 70 F.3d 1507, 1521 (8th Cir. 1995).

[12] United States v. Korando, 29 F.3d 1114, 1117 (7th Cir. 1994). See also, United States v. Stokes, 64 Fed. Appx. 352, 358 (4th Cir. 2003) (group of drug dealers was an enterprise where the elements of continuity, unity, shared purpose and identifiable structure are satisfied).

enterprise, and the differentiation of roles can provide the necessary 'structure' to satisfy RICO's statutory requirement."[13] The Ninth Circuit had held that the participation of a corporation in a racketeering scheme was sufficient to give the enterprise a structure separate from the racketeering activity.[14] The court also found that a corporation that was established to conduct only illegal activities can constitute an enterprise separate from the racketeering activity.[15]

Prior to the Supreme Court's decision in *Boyle*, the Eighth Circuit had held that an enterprise must exhibit three characteristics:

(1) a common or shared purpose;
(2) some continuity of structure and personnel; and
(3) an ascertainable structure distinct from that inherent in a pattern of racketeering.[16]

There appeared to be some confusion as to what was required to find an association-in-fact enterprise in the Second Circuit. Many courts within the Second Circuit had found that "the enterprise must have an ascertainable structure distinct from the pattern of racketeering, and cannot simply be the sum of the predicate acts."[17] One panel had held that an association-in-fact enterprise was not alleged where the complaint did not provide "'any solid information regarding the hierarchy, organization, and activities' of the alleged enterprise, 'from which we could fairly conclude that its members functioned as a

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[13] *Id.,* 29 F.3d at 1117-1118. See also, Sikes v. American Telephone & Telegraph Co., 179 F.R.D. 342, 352 (S.D. Ga. 1998) (plaintiffs may rely on the same evidence to show the commission of the predicate acts and the existence of the enterprise; no need to show that an enterprise had an ascertainable structure).

[14] Webster v. Omnitrition International, Inc., 79 F.3d 776, 786 (9th Cir. 1996).

[15] *Id.,* 79 F.3d at 786-787.

[16] United Healthcare Corp. v. American Trade Insurance Co. Ltd., 88 F.3d 563, 570 (8th Cir. 1996). See also, Craig Outdoor Advertising, Inc. v. Viacom Outdoor, Inc., 528 F.3d 1001, 1026-1027 (8th Cir. 2008) (RICO claim fails where the purposes of the entities constituting the association-in-fact enterprise are not sufficiently aligned to be considered a common purpose).

[17] Schmidt v. Fleet Bank, 16 F. Supp.2d 340, 349 n.5 (S.D.N.Y. 1998). *Accord:* Pavlov v. The Bank of New York Co., 135 F. Supp.2d 426, 430 (S.D.N.Y. 2001) ("[T]here must be more to an 'enterprise' than simply an aggregation of predicate acts of racketeering activity. . . . [A]n 'enterprise' must exhibit more structure than is inherent simply in the alleged pattern or racketeering activity."); In re Sumitomo Copper Litigation, 104 F. Supp.2d 314, 318 (S.D.N.Y. 2000) (the enterprise "cannot simply be the sum of the predicate acts" and must have an ascertainable structure distinct from the pattern of racketeering); see also, Cedar Swamp Holdings, Inc. v. Zaman, 487 F. Supp.2d 444, 451 (S.D.N.Y. 2007) (allegations of a "hub-and-spokes" structure, where two individuals were the hub of the enterprise and perpetrated independent frauds with unassociated individuals were found to be insufficient to constitute an enterprise under RICO).

unit.'"[17.1] The court noted that such requirements were intended to "ensure that distinctness is not achieved by simply tacking on entities to the enterprise which do not in fact operate as a 'continuing unit' or share a 'common purpose.'"[17.2] On the other hand, some panels had stated that the Second Circuit had rejected any requirement that an enterprise have a hierarchy or decision-making framework, noting that "a RICO enterprise's organization 'is oftentimes more readily proven by what it does rather than by abstract analysis of its structure.'"[17.3]

Nevertheless, the Second Circuit does not require that an enterprise have "an independent economic significance from the pattern of racketeering activity."[18] Nor does the Second Circuit require that "the evidence offered to prove the 'enterprise' and 'pattern of racketeering' . . . be distinct."[19]

The Eleventh Circuit does not require that the RICO enterprise "possess an 'ascertainable structure' distinct from the associations necessary to conduct the pattern of racketeering activity."[20] Similarly, the First Circuit has rejected requiring proof of an ascertainable structure because criminal enterprises "may not observe the niceties of legitimate organizational structures."[20.1]

The Ninth Circuit, in *Odom v. Microsoft*, reviewed the state of the law regarding whether a RICO association-in-fact enterprise must have an ascertainable structure separate and apart from that inherent in the pattern of racketeering activity.[21] In *Odom*, the plaintiffs alleged that defendants Microsoft and Best Buy had violated RICO through the execution of an agreement whereby Microsoft invested in Best Buy and promoted Best Buy's online store and Best Buy, in turn, promoted Microsoft's products, including MSN internet service, in its stores. Specifically, the plaintiffs—Best Buy customers—alleged that they had been injured by the trial subscriptions they had been unknowingly given to the MSN service.[22]

[17.1] City of New York v. Smokes-Spirits.com, Inc., 541 F.3d 425, 451-452 (2d Cir. 2008), *rev'd on other grounds* Hemi Group LLC v. City of New York, __U.S. __, 130 S.Ct. 983, 175 L.Ed.2d 943 (2010) (quoting First Capital Asset Management, Inc. v. Satinwood, Inc., 385 F.3d 159, 174 (2d Cir. 2004)).

[17.2] *Smokes-Spirits.com*, 541 F.3d at 447. (Citations omitted.)

[17.3] United States v. Henderson, 303 Fed. Appx. 30, 34 (2d Cir. 2008) (citing United States v. Edwards, 214 Fed. Appx. 57, 63 (2d Cir. 2007) (summary order) and United States v. Coonan, 938 F.2d 1553, 1559 (2d Cir. 1991)).

[18] Moss v. Morgan Stanley, Inc., 719 F.2d 5, 22 (2d Cir. 1983).

[19] *Id.* (citing United States v. Mazzei, 700 F.2d 85, 89-90 (2d Cir. 1983)).

[20] United States v. Weinstein, 762 F.2d 1522, 1537 n.13 (11th Cir.), *modified* 778 F.2d 673 (11th Cir. 1985).

[20.1] United States v. Patrick, 248 F.3d 11, 18-19 (1st Cir. 2001).

[21] Odom *v.* Microsoft Corp., 486 F.3d 541 (9th Cir. 2007) (*en banc*).

[22] *Id.*, 486 F.3d at 543.

In the context of a motion to dismiss, the court recognized the split in the circuits regarding whether an association-in-fact enterprise needs to have an ascertainable structure distinct from that inherent in the pattern of racketeering, as well as equivocation in prior Ninth Circuit decisions on this issue. The Ninth Circuit joined the circuits that had held that an association-in-fact enterprise under RICO does not require any particular organizational structure, separate or otherwise, and explicitly overruled any past precedent from the Ninth Circuit to the extent it suggested otherwise.[23] The Ninth Circuit held that, pursuant to the Supreme Court's decision in *Turkette*, the existence of an association-in-fact enterprise can be shown by evidence of a common purpose, an ongoing organization, and facts that demonstrate the associates functioned as a continuing unit.[24] Specifically, the court held that the plaintiffs' complaint sufficiently alleged an association-in-fact enterprise because (1) "defendants had the common purpose of increasing the number of people using Microsoft's Internet Service, and doing so by fraudulent means;" (2) "Microsoft and Best Buy formed a vehicle for the commission of at least two predicate acts of fraud;" and (3) "Plaintiffs allegations cover almost two years of conduct by Best Buy and Microsoft."[25-26]

Even after *Odom*, the Seventh Circuit retained its requirement that an enterprise have a structure of some kind. In *Limestone Development Corp. v. Village of Lemont, Illinois*, the court held that a complaint did not adequately allege an enterprise when it contained "no reference to a system of governance, an administrative hierarchy, a joint planning committee, a board, a manager, a staff, headquarters, personnel having differentiated functions, a budget, records, or any other indicator of a legal or illegal enterprise."[27] The Seventh Circuit read the statutory language of "associated in fact" to "mean[] structured without the aid of legally defined structural forms such as the business corporation."[28] The court's holding rested on its belief that "[w]ithout a requirement of structure, 'enterprise' collapses to 'conspiracy.'"[29]

The Supreme Court granted certiorari in *United States v. Boyle* to address the circuit split that had arisen over whether an association-in-fact enterprise must have an ascertainable structure that is distinct from that inherent in the pattern of racketeering activity in which the

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[23] *Id.*, 486 F.3d at 551.
[24] *Id.*, 486 F.3d at 552.
[25-26] *Id.*, 486 F.3d at 552-553.
[27] Limestone Development Corp. v. Village of Lemont, Illinois, 520 F.3d 797, 804 (7th Cir. 2008).
[28] *Id.*, 520 F.3d at 804-805.
[29] *Id.*, 520 F.3d at 805.

enterprise engages.[29.1] The Supreme Court's decision in *Boyle* arose out of Boyle's involvement with a group of loosely affiliated criminals that had carried out numerous robberies.[29.2] Boyle was apprehended and prosecuted for bank burglary, attempted bank burglary, substantive RICO offenses, and conspiracy to commit a RICO offense.[29.3] At his trial, the jury was instructed "that it could 'find an enterprise where an association of individuals, without structural hierarchy, form[ed] solely for the purpose of carrying out a pattern of racketeering acts' and that '[c]ommon sense suggests 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.'"[29.4] Boyle was convicted on eleven counts, including the RICO charges, and, on appeal, the Second Circuit found his challenge to the RICO jury instruction "without merit."[29.5]

In *Boyle*, the Supreme Court held that "an association-in-fact enterprise must have at least three structural features: a purpose, relationships among those associated with the enterprise, and longevity sufficient to permit these associates to pursue the enterprise's purpose."[29.6] Although a group needs to possess these three structural characteristics to qualify as an association-in-fact, a district court does not need to utilize "the term 'structure' in its jury instructions."[29.7]

The majority did not find any basis in the statutory text of RICO for imposing a requirement that an associated-in-fact enterprise have an ascertainable structure distinct from the pattern of racketeering.[29.8] Furthermore, the majority explained that "telling the members of the jury that they had to ascertain the existence of an ascertainable structure would have been redundant and potentially misleading."[29.9] The majority explained that an association-in-fact enterprise:

> "need not have a hierarchical structure or a 'chain of command'; decisions may be made on an ad hoc basis and by any number of methods . . . . Members of the group need not have fixed roles; different members may perform different roles at different times.

[29.1] Boyle v. United States, 556 U.S. 938, 940-941 129 S.Ct. 2237, 173 L.Ed.2d 1265 (2009).
[29.2] *Id.*, 556 U.S. at 942-943.
[29.3] *Id.* .
[29.4] *Id.*, 556 U.S. at 942. (Internal citation omitted.)
[29.5] United States v. Boyle, 283 Fed. Appx. 825, 826 (2d Cir. 2007).
[29.6] *Boyle*, 556 U.S. at 946 (quoting *Turkette*, 452 U.S. at 583).
[29.7] *Id.* .
[29.8] *Id.*, 556 U.S. at 945-947.
[29.9] *Id.*, 556 U.S. at 947.

> The group need not have a name, regular meetings, dues, established rules and regulations, disciplinary procedures, or induction or initiation ceremonies. While the group must function as a continuing unit and remain in existence long enough to pursue a course of conduct, nothing in RICO exempts an enterprise whose associates engage in spurts of activity punctuated by periods of quiescence. Nor is the statute limited to groups whose crimes are sophisticated, diverse, complex, or unique; for example, a group that does nothing but engage in extortion through old-fashioned, unsophisticated, and brutal means may fall squarely within the statute's reach."[29.10]

Thus, an associated-in-fact enterprise is nothing more than "a continuing unit that functions with a common purpose."[29.11]

In *In re Insurance Brokerage Litigation*,[29.12] the Third Circuit addressed RICO claims that arose from allegations that insurance brokers were directing consumers to certain insurance companies and in return insurance brokers received contingent commission payments from the participating insurance companies. Following the Supreme Court's decision in *Twombly*, the Third Circuit held that a RICO claim alleging an association-in-fact enterprise "must plead facts plausibly implying the existence of an enterprise with the structural attributes identified in *Boyle*."[29.13] The Third Circuit found plaintiffs' allegations, with the exception of those that related to a Marsh-centered Enterprise, failed "the basic requirement that the components function as a unit, that they be 'put together to form a whole'" because plaintiffs' allegations merely implied parallel conduct by the insurers.[29.14] However, the Third Circuit concluded that the allegations of an association-in-fact enterprise for a Marsh-centered enterprise were sufficient to survive the defendants' motion to dismiss. The court determined that the plaintiffs' had plausibly plead the enterprise's purpose, "to increase profits by deceiving insurance purchasers about the circumstances surrounding their purchase," that the allegations of reciprocal bid rigging "if prove[n] . . . would plausibly demonstrate the insurers 'joined together' in the pursuit of the aforementioned common purpose, and that the allegations that the alleged conduct had persisted for a period of sev-

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[29.10] *Id.*, 556 U.S. at 948.

[29.11] *Id.*, 556 U.S. at 951. See United States v. Hutchinson, 573 F.3d 1011, 1021 (10th Cir. 2009) (after *Boyle,* "an association-in-fact enterprise need have no formal hierarchy or means for decision-making, and no purpose or economic significance beyond or independent of the group's pattern of racketeering activity").

[29.12] In re Insurance Brokerage Litigation, 618 F.3d 300 (3d Cir. 2010).

[29.13] *Id.,* 618 F.3d at 369-370.

[29.14] *Id.,* 618 F.3d at 374.

eral years plausibly demonstrate that there was sufficient time for the members of the associated-in-fact enterprise to pursue the enterprise's purpose."[29.15] Additionally, the Third Circuit rejected the district court's conclusion that the plaintiffs had failed to prove that the Marsh defendants conducted and participated in the affairs of the enterprise because the plaintiffs had alleged sufficient facts to establish this element of their RICO claim.

The Seventh Circuit has also addressed the implications of the Supreme Court's decision in *Boyle*. In *Jay E. Hayden Foundation v. First Neighbor Bank, N.A.*,[29.16] plaintiffs alleged that the defendants had formed an association-in-fact enterprise that had engaged in a fraud scheme and looted the plaintiffs' money. Although the court concluded that the RICO claims were barred by the statute of limitations, Judge Posner proceeded to address the allegations surrounding the association-in-fact enterprise.[29.17] Judge Posner noted that the Supreme Court's decision in *Boyle* overturned prior Seventh Circuit precedent regarding the need for an association-in-fact enterprise to have a distinct structure, which was rooted in the fact that "RICO enterprises . . . are often hard to distinguish from conspiracies, the distinction is essential—otherwise the requirement of proving an enterprise and not merely a conspiracy would be read out of the statute."[29.18] The court determined that the allegations established that the enterprise had a purpose, the necessary relationship, and sufficient duration, and stated that "if *Boyle* is taken at face value nothing more is required to make a conspiracy a RICO enterprise."[29.19] However, the court concluded that plaintiffs' RICO claims were deficient because they failed to allege that the defendants used the "enterprise to engage in a pattern of racketeering activity."[29.20]

In an appeal from a criminal conviction under Section 1962(d), the Court of Appeals for the District of Columbia Circuit addressed whether the Supreme Court's decision in *Boyle* required the district court to instruct the jury that for the government to secure a conspiracy conviction under § 1962(d) "a defendant must participate in the operation or management of the enterprise."[29.21] Prior to the Supreme

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[29.15] *Id.,* 618 F.3d at 376.

[29.16] Jay E. Hayden Foundation v. First Neighbor Bank, N.A., 610 F.3d 382 (7th Cir. 2010).

[29.17] *Id.,* 610 F.3d at 388.

[29.18] *Id.*

[29.19] *Id.,* 610 F.3d at 389. See Allstate Insurance Co. v. Etienne, 2010 U.S. Dist. Lexis 113995, at *17 (E.D.N.Y. Oct. 26, 2010) (explaining that the "*Boyle* decision establishes a low threshold for pleading [] an [association-in-fact] enterprise"). (Internal quotations and citation omitted.)

[29.20] *Jay E. Hayden Foundation,* 610 F.3d at 389.

[29.21] United States v. Wilson, 605 F.3d 985, 1019 (D.C. Cir. 2010).

Court's decision in *Boyle*, the circuit courts had been unanimous in concluding that the operation or management test articulated by the Supreme Court in *Reves v. Ernst & Young* did not apply to a conspiracy prosecution under Section 1962(d).[29.22] The D.C. Circuit explained that the Supreme Court's decision in *Boyle* "does not alter this understanding of § 1962(d). *Boyle* addressed § 1962(c), not § 1962(d)."[29.23] The court noted that Section "1962(c) is the only subsection of § 1962 to explicitly include the sort of participation requirement discussed in *Reves*.[29.24]

In *Elsevier Inc., v. W.H.P.R., Inc.*,[29.25] a district court in the Southern District of New York addressed whether plaintiffs' allegations of an association-in-fact enterprise satisfied the standard set forth in the Supreme Court's *Boyle* decision. The plaintiffs asserted that the defendants, from 1998 until 2009, "associated together for the common purpose of carrying out the scheme of buying journal subscriptions at lower rates, based on false representations about the identity of the purchasers, and then reselling the journals to institutions at a higher rate."[29.26] The court found that this allegation satisfied *Boyle*'s requirement of common purpose and duration. The court noted "[t]he fact that not every individual defendant is alleged to have engaged in fraudulent activity for that entire period is of no moment for longevity purposes, since (as is well known) a person can join in some ongoing fraudulent activity at any point."[29.27] However, the district court found the plaintiffs' allegations regarding the "relationships among the individuals associated with the enterprise" were insufficient because they had failed to set forth sufficient facts alleging that the defendants had any interpersonal relationships.[29.28] The court explained that "[i]n this post-*Twombly* era, [] a plaintiff must allege something more than the fact that individuals were all engaged in the same type of illicit conduct during the same time period."[29.29] However, the plaintiffs' complaint failed to address "how these particular people, located in different parts of the country, came to an agreement to act together—or even how they knew each other."[29.30]

[29.22] *Id.*
[29.23] *Id.*
[29.24] *Id.*
[29.25] Elsevier Inc. v. W.H.P.R., Inc., 692 F. Supp.2d 297 (S.D.N.Y. 2010).
[29.26] *Id.,* 692 F. Supp.2d at 306.
[29.27] *Id.*
[29.28] *Id.,* 692 F. Supp.2d at 306 ("The *Boyle* Court made a point of noting that an association required proof on interpersonal relationships. Nothing in the Complaint explains how these particular people, located in different parts of the country, came to an agreement to act together or even how they knew each other.").
[29.29] *Id.,* 692 F. Supp.2d at 307.
[29.30] *Id.*

An issue distinct from, but related to, whether an enterprise must have an ascertainable structure beyond the pattern of racketeering activity is whether *proof* of the "enterprise" and "pattern of racketeering" elements must be separate or distinct. The majority of courts that have addressed the issue have concluded that proof of the "enterprise" and "pattern of racketeering" elements need not be distinct.[30]This approach was recently confirmed by the Supreme Court's decision in *Boyle*. The Court stated that while the enterprise and pattern of racketeering activity are separate elements of a RICO claim "evidence used to prove the pattern of racketeering activity and the evidence establishing an enterprise 'may in particular cases coalesce.'"[30.1] However, the Supreme Court cautioned that proof "that several individuals, independently and without coordination, engaged in a pattern of crimes listed as RICO predicates . . . would not be enough to show that the individuals were a member of an enterprise."[30.2]

A few other applications bear mention. A district court has noted that contractual relationships can establish a RICO enterprise.[31] Although the statutory language refers to an "association of *individuals* in fact,"[32] most circuits have held that all the members of an "association-in-fact" enterprise do not have to be individuals: a group

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[30] See, e.g.:

First Circuit: United States v. Patrick, 248 F.3d 11, 19 (1st Cir. 2001) ("While 'enterprise' and 'pattern of racketeering activity' are separate elements of a RICO offense, proof of these two elements need not be separate or distinct but may in fact 'coalesce.'" (citing United States v. Turkette, 452 U.S. 576, 583, 101 S.Ct. 2524, 69 L.Ed.2d 246 (1981)).

Second Circuit: United States v. Mazzei, 700 F.2d 85, 89 (2d Cir. 1983) ("We do not . . . read *Turkette* to hold that proof [of the enterprise and pattern] elements be distinct and independent, as long as the proof offered is sufficient to satisfy both elements.").

Fourth Circuit: United States v. Griffin, 660 F.2d 996, 1001 (4th Cir. 1981).

Fifth Circuit: United States v. Diecidue, 603 F.2d 535, 545 (5th Cir. 1979).

Sixth Circuit: VanDenBroeck v. Commonpoint Mortgage Co., 210 F.3d 696, 699 (6th Cir. 2000), *overruled on other grounds* Bridge v. Phoenix Bond & Indemnity Co., 553 U.S. 639, 128 S.Ct. 2131, 170 L.Ed.2d 1012 (2008); United States v. Qaoud, 777 F.2d 1105, 1115 (6th Cir. 1985) ("Although 'enterprise and 'pattern of racketeering activity' are separate elements, they may be proved by the same evidence.").

Ninth Circuit: United States v. DeRosa, 670 F.2d 889, 895-896 (9th Cir. 1982); United States v. Bagnariol, 665 F.2d 877, 890-891 (9th Cir. 1981).

Eleventh Circuit: United States v. Cagina, 697 F.2d 915, 920-921 (11th Cir. 1983).

[30.1] *Boyle*, 556 U.S. at 947 (quoting *Turkette*, 452 U.S. at 583).

[30.2] *Id.* . See Rao v. BP Products North America, Inc., 589 F.3d. 389, 399 (7th Cir. 2009) (the complaint failed to properly allege an associated-in-fact enterprise because the allegations failed to show how the defendants were associated).

[31] Loma Linda University Medical Center, Inc. v. Farmers Group, 1995 U.S. Dist. LEXIS 9668 (E.D. Cal. May 15, 1995).

[32] 18 U.S.C. §1961(4).

of corporations can be such an enterprise.[33] In *Boyle*, the Supreme Court noted that the RICO statute "does not purport to set out an exhaustive definition of the term enterprise . . . . Accordingly, this provision does not foreclose the possibility that the term might include, in addition to the specifically enumerated entities, others that fall within the ordinary meaning of the term 'enterprise.'"[33.1] According to one district court,[34] this interpretation is due to the fact that the statutory language is not to be read as all-inclusive, and because otherwise such a limitation of the concept of enterprise would insulate the most sophisticated racketeering combinations from RICO's sanctions.[35]

In *United States v. Philip Morris USA Inc.*,[35.1] nine cigarette manufacturers and two tobacco trade organizations appealed the district court's determination that an associated-in-fact enterprise could be comprised of both individuals and corporations.[35.2] The D.C. Circuit rejected the contention that an associated-in-fact enterprise could not contain both individuals and corporations.[35.3] First, the court noted the

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[33] See, e.g.:

First Circuit: United States v. London, 66 F.3d 1227, 1243 (1st Cir. 1995).

Second Circuit: United States v. Huber, 603 F.2d 387, 393-394 (2d Cir. 1979); C.A. Westel De Venezuela v. American Telephone & Telegraph Co., 1994 U.S. Dist. LEXIS 14481 (S.D.N.Y. Oct. 11, 1994).

Third Circuit: United States v. Console, 13 F.3d 641, 652 (3d Cir. 1993).

Fourth Circuit: Chisolm v. Charlie Falk's Auto Wholesale, Inc., 851 F. Supp. 739, 746-747 (E.D. Va. 1994), *vacated on other grounds by* Chisolm v. TranSouth Financial Corp., 95 F.3d 331 (4th Cir. 1996).

Fifth Circuit: United States v. Thevis, 665 F.2d 616, 625-626 (5th Cir. 1982).

Seventh Circuit: Richmond v. Nationwide Cassel L.P., 52 F.3d 640, 645 (7th Cir. 1995) (a group of businesses could constitute an association-in-fact); Trak Microcomputer Corp. v. Wearne Brothers, 628 F. Supp. 1089, 1094 (N.D. Ill. 1985), *later proceeding* Trak Microcomputer Corp. v. Wearne Brothers, Ltd., 1988 U.S. Dist. LEXIS 10375 (N.D. Ill. Sept. 14, 1988).

Eighth Circuit: Atlas Pile Driving Co. v. DiCon Finance Co., 886 F.2d 986, 995 n.7 (8th Cir. 1989).

Ninth Circuit: United States v. Blinder, 10 F.3d 1468, 1473 (9th Cir. 1993).

Eleventh Circuit: Williams v. Mohawk Industries, Inc., 465 F.3d 1277, 1284 (11th Cir. 2006) (a corporation and its third-party agents can constitute an associated-in-fact enterprise).

District of Columbia Circuit: United States v. Perholtz, 842 F.2d 343, 352-353 (D.C. Cir. 1988).

[33.1] *Boyle*, 556 U.S. at 944 n.2.

[34] C.A. Westel de Venezuela v. American Telephone & Telegraph Co., 1994 U.S. Dist. LEXIS 14481 (S.D.N.Y. Oct. 11, 1994).

[35] *Id.*

[35.1] United States v. Philip Morris USA Inc., 566 F.3d 1095 (D.C. Cir. 2009). See § 12.02 *infra* for a more comprehensive discussion of the D.C. Circuit's decision in *Philip Morris*.

[35.2] *Id.*, 566 F.3d at 1111.

[35.3] *Id.*

all of the other circuit courts to address the issue had determined that a corporation could be a member of an associated-in-fact enterprise.[35.4] Second, the court rejected the cigarette manufacturers' argument that *Cedric Kushner Promotions, Ltd. v. King* had undermined the motivating rationale of those decisions.[35.5] According to the court, the cigarette manufacturers' reliance on *Cedric Kushner* was misplaced because distinctness between enterprise and defendant was not a primary concern in cases that had held that a corporation could be part of an associated-in-fact enterprise.[35.6] Rather, the animating concern had been "that a group of sophisticated racketeers who would otherwise constitute an association-in-fact might evade RICO's grasp by virtue of their ability to operate through corporations and establish complex networks of companies, kickbacks, and contracts to achieve their elicit ends."[35.7] Third, the D.C. Circuit emphasized that "the use of the word 'includes' indicates that RICO's list of enterprise is non-exhaustive. Indeed, section 1961 makes the non-exhaustive nature of 'includes' clear and by alternating between the words means and includes to introduce the section's various definitions."[35.8]

Although seemingly counterintuitive and difficult to assert, some courts have accepted the theory that the plaintiff itself is the enterprise "where [the] plaintiff alleges that the defendants infiltrated the enterprise and used it as a tool to defraud it and others."[36]

[2]—Test to Establish Existence of an Enterprise: Associations-in-Fact

Prior to the Supreme Court's decision in *Boyle v. United States*, the various Circuits had adopted different tests to determine whether a group qualified as an association-in-fact. In 1982 the Eighth Circuit enunciated a three-pronged test for establishing an association-in-fact enterprise:

(1) those engaged in the enterprise must share a "commonality of purpose";

(2) the enterprise must "function as a continuing unit"; and

[35.4] *Id.*

[35.5] *Id.*, 566 F.3d at 1113.

[35.6] *Id.*, 566 F.3d at 1113-1114.

[35.7] *Id.*, 566 F.3d at 1114.

[35.8] *Id.*, 566 F.3d at 1114.

[36] Hexagon Package Corp. v. Manny Gutterman and Associates, Inc., 1997 U.S, Dist. LEXIS 8345, at *37 (N.D. Ill. June 9, 1997). See Aetna Casualty Surety Co. v. P&B Autobody, 43 F.3d 1546 (1st Cir. 1996) (Aetna, the victim of the racketeering activity, was actually the RICO enterprise).

(3) the enterprise must have "an ascertainable structure distinct from that inherent in the conduct of a pattern of racketeering activity."[37]

In a 1983 case,[38] the Third Circuit adopted a variation of the Eighth Circuit's test, requiring:

(1) an ongoing organization with a decision-making structure;
(2) the various members of the organization "function[ing] as a continuing unit"; and
(3) a distinct organization, separate from the pattern of racketeering activity, with an existence beyond that necessary to commit the predicate acts.[39]

The Fourth Circuit has largely followed the Third and Eighth Circuit tests, usually finding the existence of an independent enterprise. In 1981, the Fourth Circuit held that the government established an association-in-fact enterprise where the enterprise consisted of a group of independent "bookies" who associated to bribe police, by proving an ongoing bookmaking organization with persons associated for a common purpose and functioning as a continuing unit.[40] The Fifth Circuit had also adopted an approach similar to that of the Third Circuit.[41]

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[37] United States v. Bledsoe, 674 F.2d 647, 665 (8th Cir. 1982). See also, United Healthcare Corp. v. American Trade Insurance Co. Ltd., 88 F.3d 563, 570 (8th Cir. 1996).

[38] United States v. Riccobene, 709 F.2d 214 (3d Cir. 1983). See, e.g.:

Tenth Circuit: United States v. Smith, 413F.3d 1253, 1266-1267 (10th Cir. 2005) (adopting a variation of the Third Circuit's test).

Eleventh Circuit: Boyd v. Florida, 578 So.2d 718, 721-723 (Fla. Dist. App. 1991) (reversing state RICO convictions by strictly applying the *Riccobene* approach).

[39] *Riccobene*, 709 F.2d at 223-224. See also: United States v. Console, 13 F.3d 641, 650 (3d Cir. 1993); Seville Industrial Machinery Corp. v. Southmost Machinery Corp., 742 F.2d 786, 790 (3d Cir. 1984) (emphasizing that this proof analysis is not to be used in determining the sufficiency of the allegations of the complaint).

[40] United States v. Griffin, 660 F.2d 996, 999 (4th Cir. 1981). See also, United States v. Tillett, 763 F.2d 628, 631 (4th Cir. 1985) (a marijuana smuggling venture constituted an illegitimate association-in-fact enterprise because of its common purpose and the ongoing nature of the enterprise beyond that necessary to commit predicate crimes).

[41] Clark v. Douglas, 2008 U.S. App. LEXIS 113, at *11 (5th Cir. Jan. 4, 2008) ("Accordingly, an 'association-in-fact enterprise 1) must have an existence separate and apart from the pattern of racketeering, 2) must be an ongoing organization and 3) its members must function as a continuing unit as shown by a hierarchical or consensual decision making structure.'"); see also, Calcasieu Marine National Bank v. Grant, 943 F.2d 1453, 1461 (5th Cir. 1991) (same). This represents a departure from earlier Fifth Circuit cases rejecting a structural approach. See, e.g., United States v. Williams, 809 F.2d 1072, 1093-1094 (5th Cir. 1987) (rejecting the Eighth Circuit's "ascertainable structure" and "common goal" requirements).

Similarly, the Seventh Circuit had distinguished the organizational structure and goals of the enterprise from the predicate acts themselves.[42] The Sixth Circuit recognizes that the "enterprise" and "pattern" are separate elements of a RICO claim, but does not require separate proof for each element.[43] The Sixth Circuit required an associated-in-fact enterprise "to be an ongoing organization that "function[s] as a continuing unit, and [is] separate from the pattern of racketeering activity in which it engages."[44] Some circuits, notably the First, Second and Eleventh, had rejected the Third, Fourth, and Eighth Circuit tests,[45] whereas others had not formulated a precise test.

The Supreme Court's decision in *Boyle v. United States* resolved the Circuit split over whether proof of some form of structure beyond that inherent in the pattern of racketeering activity is necessary to establish that a group is an associated-in-fact enterprise.[45.1] The Court concluded that there was no basis in RICO for imposing a requirement

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[42] Richmond v. Nationwide Cassel L.P., 52 F.3d 640, 645 (7th Cir. 1995); United States v. Neapolitan, 791 F.2d 489, 500 (7th Cir. 1986) ("An enterprise must be more than a group of people who get together to commit a 'pattern of racketeering activity.'"). See also, Wardlaw *ex rel*. Owen v. Whitney National Bank, 1994 U.s. Dist. LEXIS 15215 (E.D. La. Oct. 17, 1994).

[43] VanDenBroeck v. Commonpoint Mortgage Co., 210 F.3d 696, 699 (6th Cir. 2000); United States v. Qaoud, 777 F.2d 1105, 1114-1115 (6th Cir. 1985).

[44] Frank v. D'Ambrosi, 4 F.3d 1378, 1386 (6th Cir. 1993).

[45] See:

First Circuit: United States v. Patrick, 248 F.3d 11, 18-19 (2001) (court rejects the Eight Circuit test "as an additional requirement beyond the *Turkette* instruction").

Second Circuit: United States v. Ferguson, 758 F.2d 843, 853 (2d Cir. 1985) (allowing RICO action where enterprise and predicate acts were essentially the same); United States v. Mazzei, 700 F.2d 85, 89 (2d Cir. 1983) (proof of an enterprise and a pattern of racketeering activity need not be distinct and independent); Hansel 'n Gretel Brand, Inc. v. Savitsky, 1997 U.S. Dist. LEXIS 13324 (S.D.N.Y. Sept. 3, 1997) (proof of an enterprise need not be distinct from the pattern of racketeering activity so long as the proof offered is sufficient to satisfy both elements); Colony at Holbrook, Inc. v. Strata, G.C., Inc., 928 F. Supp. 1224, 1235-1236 (E.D.N.Y. 1996) (rejecting the view that an enterprise encompasses only an association with an ascertainable structure having an existence apart from the commission of the predicate acts constituting the racketeering activity).

Eleventh Circuit: United States v. Weinstein, 762 F.2d 1522, 1537 n.13 (11th Cir. 1985), *modified* 778 F.2d 673 (11th Cir. 1985) (the definitive factor in determining existence of RICO enterprise is an association of individuals, however loose or informal, furnishing a vehicle for commission of two or more predicate crimes); United States v. Hewes, 729 F.2d 1302, 1310 (11th Cir. 1984) (rejecting defendants' argument that an ascertainable structure distinct from the pattern of racketeering activity is an essential element of a RICO enterprise).

District of Columbia Circuit: United States v. Perholtz, 842 F.2d 343, 362-363 (D.C. Cir. 1988) (the organization necessary to comprise an enterprise can be inferred from the pattern of racketeering activity).

[45.1] Boyle v. United States, 556 U.S. 938, 940, 129 S.Ct. 2237, 173 L.Ed.2d 1265 (2009).

that a group have some ascertainable structure beyond that which is necessary to engage in a pattern of racketeering activity.[45.2] The Supreme Court stated that "[f]rom the terms of RICO, it is apparent that an association-in-fact enterprise must have at least three structural features: a purpose, relationships among those associated with the enterprise, and longevity sufficient to permit these associates to pursue the enterprise's purpose."[45.3]

After some initial hesitation, most courts now agree that virtually any combination of persons and entities can constitute an association-in-fact as long as it satisfies the test set forth in *Boyle v. United States*.[45.4] The Seventh Circuit has even held that a sole proprietorship can be an "enterprise" with which the proprietor can be "associated."[46] In a later decision, however, the Seventh Circuit held that when an entity is an individual who conducts his own affairs through a pattern of racketeering, there is no enterprise and no valid Subsection 1962(c) claim.[47] Addressing the same issue, the First Circuit rejected an individual defendant's allegation that he was legally indistinguishable from the alleged enterprise consisting of two businesses that he owned.[48] The court found that the government had established an enterprise because one of the entities, although a sole proprietorship, had at least one other employee, and the corporation, of which the defendant was the sole shareholder, had several employees.[49] Essentially, when a closely-held corporation or a sole proprietorship employs others, an association-in-fact may be found to exist.[50]

[45.2] *Id.*, 556 U.S. at 947-948.

[45.3] *Id.*, 556 U.S. at 956.

[45.4] See, e.g.:

Seventh Circuit: Rao v. BP Products North America, Inc., 589 F.3d 389, 399 (7th Cir. 2009) (complaint failed to properly allege an associated-in-fact enterprise because the allegations failed to show how the defendants are associated "and do not suggest a group of persons acting together for a common purpose").

Tenth Circuit: United States v. Hutchinson, 573 F.3d 1011, 1022 (10th Cir. 2009).

[46] McCullough v. Suter, 757 F.2d 142, 144 (7th Cir. 1985). This holding, however, was partly based on the fact that Suter had other employees with whom he could associate and was not just a "one man show." *Id.* See also, Mirman v. Berk & Michaels, P.C., 1994 U.S. Dist. LEXIS 10771 (S.D.N.Y. Aug. 3, 1994) (an individual may be both the RICO person and the enterprise if he is merely a part of that enterprise and not its sole member).

[47] Richmond v. Nationwide Cassel, L.P., 52 F.3d 640, 646-647 (7th Cir. 1995).

[48] United States v. London, 66 F.3d 1227, 1244 (1st Cir. 1995).

[49] *Id.*

[50] See, e.g.:

First Circuit: United States v. London, 66 F.3d 1227, 1244 (1st Cir. 1995).

Sixth Circuit: United States v. Blandford, 33 F.3d 685, 703 (6th Cir. 1994) (the office of a state legislator could be an association-in-fact enterprise); Fleischhauer v. Feltner, 879 F.2d 1290, 1297 (6th Cir. 1989) (the sole shareholder of a corporation is distinct from the corporation).

In practice, the determination of whether an association-in-fact enterprise has been adequately alleged often turns on the court's view of whether the Supreme Court's 1984 *Copperweld* doctrine—that a corporation cannot conspire with its own employees or subsidiaries[51]—applies in the RICO context. Under Section 1962(c), most courts have determined that a defendant employer and its employees are not sufficiently distinct to constitute an association-in-fact when the employees' alleged racketeering activities consist of the conduct of their regular course of business.[52] Courts have reached conflicting results as to whether the *Cooperweld* doctrine bars claims that are brought under Section 1962(d). In *Ashland Oil, Inc. v. Arnett*, the Seventh Circuit determined that the *Cooperweld* doctrine did not apply to a RICO conspiracy claim because unlike in the antitrust context, "intracorporate conspiracies do threaten RICO's goals of preventing the infiltration of legitimate businesses by racketeers and sep-

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Seventh Circuit: Ashland Oil Co. v. Arnett, 875 F.2d 1271, 1280 (7th Cir. 1989) (a close corporation is distinct from its employees).

Ninth Circuit: United States v. Feldman, 853 F.2d 648, 655-656 (9th Cir. 1988) (allowing an enterprise consisting of two individuals and seven corporations).

But see, Guidry v. Bank of LaPlace, 954 F.2d 278, 283 (5th Cir. 1992) (sole proprietor not distinct from the proprietorship itself because the proprietorship had no employees).

[51] Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 777, 104 S.Ct. 2731, 81 L.Ed.2d 628 (1984).

[52] See, e.g.:

First Circuit: Odishelidze v. Aetna Life & Casualty Co., 853 F.2d 21, 23-24 (1st Cir. 1988).

Second Circuit: Riverwoods Chappaqua Corp. v. Marine Midland Bank, N.A., 30 F.3d 339, 344 (2d. Cir. 1994); Lorentzen v. Curtis, 18 F. Supp.2d 322, 331 (S.D.N.Y. 1998).

Third Circuit: Brittingham v. Mobil Corp., 943 F.2d 297, 301-302 (3d Cir. 1991) (a corporate defendant and its agents do not constitute an association-in-fact unless the corporation took a "distinct role" in the wrongdoing); United National Insurance Co. v. Equipment Insurance Managers, 1995 U.S. Dist. LEXIS 15868 (E.D. Pa. Oct. 27, 1995) (dismissing a conspiracy claim because employees of a corporation acting in the course and scope of their employment cannot conspire with each other unless they are acting in pursuit of their own ends).

Fourth Circuit: NCNB National Bank v. Tiller, 814 F.2d 931, 936 (4th Cir. 1987), *overruled on other grounds* Busby v. Crown Supply, Inc., 896 F.2d 833, 841 (4th Cir. 1990) (*en banc*).

Fifth Circuit: Old Time Enterprises, Inc. v. International Coffee Corp., 862 F.2d 1213, 1217 (5th Cir. 1989).

Seventh Circuit: Emery v. American General Finance, Inc. 134 F.3d 1321, 1325 (7th Cir. 1998) (a corporation was not be an enterprise distinct from its employees).

Tenth Circuit: Board of County Commissioners v. Liberty Group, 965 F.2d 879, 885 (10th Cir. 1992).

District of Columbia Circuit: Yellow Bus Lines, Inc. v. Drivers, Chauffeurs & Helpers Local Union 639, 883 F.2d 132, 139-141 (D.C. Cir. 1989) (alleged association-in-fact of union local and agent not distinct from union).

arating racketeers from their profits."[52.1] The Seventh Circuit has explained that the *Cooperweld* doctrine does not apply to conspiracy claims brought under Section 1962(d) "because the Sherman Act is premised, as RICO is not, on the 'basic distinction between concerted and independent action.' The policy considerations discussed in *Cooperweld*[] therefore do not apply to RICO, which is targeted primarily at the profits from patterns of racketeering activity."[52.2] Relying on the rationale of the Seventh Circuit, the Ninth Circuit determined that the *Cooperweld* doctrine does not apply to a RICO conspiracy claim.[52.3] Relying on the Supreme Court's decision in *Cedric Kushner Promotions, Ltd. v. King*, the Eleventh Circuit determined that the *Cooperweld* doctrine is inapplicable to a RICO conspiracy claim because "corporations and their agents are distinct entities and, thus, agents may be held liable for their own conspiratorial actions."[52.4]

In contrast to the Seventh, Ninth, and Eleventh Circuits, the Eight Circuit has determined that the *Cooperweld* doctrine applies to a RICO conspiracy claim.[52.5] The Eight Circuit held that "as a matter of law a parent corporation and its wholly owned subsidiaries are legally incapable of forming a conspiracy, with one another."[52.6] The Eight Circuit rejected the rationale of the Seventh and Ninth Circuits because they failed to "explain[] why, when two entities are under common control and there is no distinctiveness or independence of action, an agreement or understanding between them creates any of the special dangers § 1962(d) targets."[52.7] A recent decision from the District of New Jersey explained " [t]he decision that a RICO conspiracy claim cannot stand where a corporation is alleged essentially to have done nothing more than act in concert with its officers and employees, stems from the premise that '[a]corporation, legally con-

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[52.1] Ashland Oil, Inc. v. Arnett, 875 F.2d 1271, 1281 (7th Cir. 1989).

[52.2] Haroco, Inc. v. American National Bank and Trust Company of Chicago, 747 F.2d 384, 403 n.22 (7th Cir. 1984) (citing Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 757, 104 S.Ct. 2731, 81 L.Ed.2d 628 (1984)), *cert. granted* 469 U.S. 1157, 105 S.Ct. 902, 83 L.Ed.2d 917 (1985), *aff'd on other grounds* 473 U.S. 606, 105 S.Ct. 3291, 87 L.Ed.2d 437 (1985). See Bates v. Northwestern Human Services, Inc., 466 F. Supp.2d 69, 83 n.14 (D.D.C. 2006) ("the holding in *Cooperweld* 'turned on specific antitrust objectives' that are not present in the RICO context.") (quoting Cedric Kushner Promotions, Ltd. v. King, 533 U.S. 158, 166, 121 S.Ct. 2087, 150 L.Ed.2d 198 (2001)).

[52.3] Webster v. Omnitrition International, Inc., 79 F.3d 776, 787 (9th Cir.1996).

[52.4] Kirwin v. Price Communications Cellular, Inc., 391 F.3d 1323, 1327 (11th Cir. 2004) (citing *Cedric Kushner*, 533 U.S. at 163).

[52.5] Fogie v. THORN Americas, Inc., 190 F.3d 889, 898 (8th Cir. 1999).

[52.6] *Id.*

[52.7] *Id.*

ceived, is only one person' under RICO."[52.8] The district courts within the Third Circuit have reached conflicting results as to whether a corporation can conspire with its wholly owned subsidiary to violate RICO.[52.9]

Courts are divided as to whether an associated-in-fact enterprise can be comprised solely of a defendant employer and its outside agents.[53] In addition, some courts have concluded that the relationship between a corporation and its unincorporated divisions and offices, or wholly owned subsidiaries, is not an association-in-fact.[54] In address-

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[52.8] District 1199P Health and Welfare Plan v. Janssen, L.P., 2008 U.S. Dist. LEXIS 103526 (D.N.J. Dec. 23, 2008), *dismissed* 2011 U.S. Dist. LEXIS 28629 (D.N.J. March 21, 2011) (quoting Emcore Corp. v. PricewaterhouseCoopers LLP, 102 F. Supp.2d 237, 266 (D.N.J. 2000)).

[52.9] *Compare* Curley v. Cumberland Farms Dairy, Inc, 728 F. Supp. 1123, 1135 (D.N.J. 1990) (*Copperweld* did not bar a conspiracy claim under Section 1962(d)), *with District 1199P Health and Welfare Plan v. Janssen, L.P.*, 2008 WL 5413105 at *15 (the *Copperweld* doctrine barred a conspiracy claim under Section 1962(d)). *District 1199P* was dismissed in 2011. District 1199P Health and Welfare Plan v. Janssen, L.P., 2011 U.S. Dist. LEXIS 28629 (D.N.J. March 21, 2011).

[53] See, e.g.: Brittingham v. Mobil Corp., 943 F.2d 297, 301 (3d Cir. 1991); *Yellow Bus Lines, Inc.,* N. 52 *supra,* 883 F.2d at 139-141 (refusing to recognize enterprise consisting of the defendant union, its business agent, and trustee), *adopted on reh'g* 913 F.2d 948, 951 (D.C. Cir. 1990) (*en banc*). But see:

Seventh Circuit: Gassner v. Stotler and Co., 671 F. Supp. 1187, 1191-1192 (N.D. Ill. 1987).

Eleventh Circuit: Williams v. Mohawk Industries, Inc., 465 F.3d 1277, 1284 (11th Cir. 2006).

[54] See, e.g.:

First Circuit: Odishelidze v. Aetna Life & Casualty Co., 853 F.2d 21, 23-24 (1st Cir. 1988) (an insurance company and its subsidiaries and employees are not an association-in-fact).

Second Circuit: Black Radio Network, Inc. v. NYNEX Corp., 44 F. Supp.2d 565, 580-581 (S.D.N.Y. 1999) (corporate affiliates and their employees, by themselves, cannot constitute a RICO enterprise); Rush v. Oppenheimer & Co., 628 F. Supp. 1188, 1194-1198 (S.D.N.Y. 1985) (branch office is not distinct from corporation).

Third Circuit: Brittingham v. Mobil Corp., 943 F.2d 297, 301 (3d Cir. 1991) (corporation and wholly owned subsidiary were not an association-in-fact); Medcalf v. PaineWebber Inc., 886 F. Supp. 503, 511-515 (W.D. Pa. 1995) (PaineWebber was not distinct from its subsidiaries, related corporations, agents, and affiliates).

Fourth Circuit: NCNB National Bank v. Tiller, 814 F.2d 931, 936 (4th Cir. 1987) (wholly owned subsidiary and corporation did not constitute an association-in-fact), *overruled on other grounds by* Busby v. Crown Supply, Inc., 896 F.2d 833, 840-842 (4th Cir. 1990) (*en banc*).

Fifth Circuit: Atkinson v. Anadardo Bank & Trust Co., 808 F.2d 438, 440-441 (5th Cir. 1987) (bank, its holding company, and employees were insufficient to form an association-in-fact).

Seventh Circuit: Emery v. American General Finance, Inc., 134 F.3d 1321, 1324 (7th Cir. 1998) (plaintiff must show that defendant firm used its agents or affiliates to conduct a pattern of racketeering activity, rather than simply showing that the firm had agents or affiliates); Miller v. Chevy Chase Bank, 1998 U.S. Dist. LEXIS 3651

ing this issue, at least one court has looked to whether the parent and its subsidiary were distinct when the alleged RICO violations occurred, rather than looking at the corporation's structure during the litigation.[55] The court concluded that where there was an integrated operational relationship at the time the alleged violations occurred,[56] the corporation and its subsidiary were not distinct.[57]

The Seventh Circuit rejected a claim in which the plaintiff alleged an enterprise consisting of Chrysler Corporation, its subsidiaries, its dealers, and certain trusts controlled by Chrysler that sold retail installment contracts, noting that it had previously held that an employer and its employees together cannot, without more, constitute an illegal enterprise.[58] The court observed that in a typical RICO case, "a person bent on criminal activity seizes control of a previously legitimate firm and uses the firm's resources, contacts, [and] facilities . . . to perpetrate criminal acts. . . ."[59] A slight variation on this fact pattern is where the defendant "uses the acquired enterprise to engage in some criminal activities but [is largely] content to allow [the enterprise] to continue to conduct its normal, lawful business. . . ."[60]

In yet another variation on this theme, the defendant will seize control of a subsidiary of a corporation and will turn the subsidiary into a criminal enterprise that successfully wrests control from or exerts influence over the parent.[61] The major issue in such a case is whether the subsidiary can be deemed a RICO person.[62] In *Fitzgerald*, the Seventh Circuit found no support for applying RICO to a free-standing corporation such as Chrysler, "merely because Chrysler does business through agents as virtually every manufacturer does." If Chrysler were even larger than it is and, as a result, had no agents, but only

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(N.D. Ill. March 24, 1998) (parent and subsidiary constituted an enterprise); Chamberlain Manufacturing Corp. v. Maremont Corp., 919 F. Supp. 1150, 1157 (N.D. Ill. 1996) (parent and subsidiary must be meaningfully distinct in order for plaintiff to allege an enterprise consisting of parent and subsidiary); Richards v. Combined Insurance Co. of America, 1993 U.S. Dist. LEXIS 17883, at *5-*6 (N.D. Ill. Dec. 15, 1993) (parent and its subsidiary distinct for purposes of the enterprise test).

[55] See:

First Circuit: Deane v. Weyerhaeuser Mortgage Co., 967 F. Supp. 30, 33-34 (D. Mass. 1997).

Eighth Circuit: Fogie v. THORN Americas, Inc., 190 F.3d 889, 896-898 (8th Cir. 1999).

[56] Deane, N. 55 *supra*, 967 F. Supp. at 34-35.

[57] *Id.*

[58] Fitzgerald v. Chrysler Corp., 116 F.3d 225, 226 (7th Cir. 1997).

[59] *Id.*, 116 F.3d at 227.

[60] *Id.*

[61] *Id.*

[62] *Id.*

employees it could not be made liable for warranty fraud under RICO."[63]

The Seventh Circuit found it irrelevant for purposes of RICO "that Chrysler sells its products to the consumer through franchised dealers rather than through dealerships that it owns."[64] Finally, the court concluded that ordinary interactions between a reputable manufacturer and its various agents were insufficient to constitute a RICO enterprise.[65]

There is, however, a minority view. In particular, the Ninth Circuit has held that a corporation can engage in a RICO conspiracy with its own officers and representatives and that Subsection 1962(d) applies to intra-corporate conspiracies.[66] Although this is not a decision on "enterprise" *per se*, in practical terms the concepts of "enterprise" and "pattern" tend to merge in courts that impose RICO liability for intra-corporate conspiracies, because proof of one necessarily provides proof of the other. In these courts, RICO has effectively become just a very broad conspiracy statute.

[3]—Distinction Between Enterprise and Defendant

As explained below, a "person" commits a RICO violation by using a pattern of racketeering activity, or the proceeds thereof, to impact an enterprise in any of three prohibited ways.[67] One of those ways, however, applies only to a person "*employed by or associated with any enterprise*" and makes it unlawful for such a person "to conduct or participate in the conduct of such enterprise's affairs through a pattern of racketeering activity."[68] As discussed earlier,[69] courts have construed this language to mean that, in a RICO claim based on Section 1962(c), the same individual or entity may not be both the liable "person" (the defendant) and the enterprise (the "victim") because it does not make sense to speak of a person being "employed by" himself or victimizing himself. In *Haroco, Inc. v. American National Bank & Trust Co.*,[70] the Seventh Circuit enunciated the majority view, holding that Subsection 1962(c) requires the liable per-

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[63] *Id.*

[64] *Id.*

[65] *Id.*, 116 F.3d at 228.

[66] Webster v. Omnitrition International, Inc., 79 F.3d 776, 787 (9th Cir. 1996). See also, Ashland Oil, Inc. v. Arnett, 875 F.2d 1271, 1280-1281 (7th Cir. 1989).

[67] See § 1.06 *infra*.

[68] 18 U.S.C. § 1962(c). (Emphasis added.)

[69] See § 1.03 *supra*.

[70] Haroco, Inc. v. American National Bank & Trust Co., 747 F.2d 384 (7th Cir. 1984), *aff'd* 473 U.S. 606, 1055 S.Ct. 3291, 87 L.Ed. 2d 437 (1985).

son and the enterprise to be separate entities.[71] By requiring plaintiffs to name both a distinct person and a distinct enterprise in their pleadings, the overwhelming majority of courts have supplied a potential defense to enterprises that are also named as defendants.

As noted above,[72] the prohibition against naming a person as both an individual defendant and the enterprise usually cannot be escaped through the doctrine of *respondeat superior* (or, similarly, through resort to concepts of aiding and abetting). A different escape, however, has been approved by a number of courts, notably the Second Circuit in *Cullen v. Margiotta*.[73] The *Cullen* court stated that,

> While we have held that a solitary entity cannot, as a matter of law, simultaneously constitute both the RICO 'person' whose conduct is prohibited and the entire RICO 'enterprise' whose affairs are impacted by the RICO person . . . we see no reason why a sin-

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[71] *Id.*, 747 F.2d at 400. See also:

Supreme Court: Cedric Kushner Promotions, Ltd. v. King, 533 U.S. 158, 162, 111 S.Ct. 2839, 150 L.Ed.2d 198 (2001) (the "12 Courts of Appeals have interpreted Section 1962(c) as embodying some . . . distinctness requirement").

First Circuit: Doyle v. Hasbro, Inc., 103 F.3d 186, 190 (1st Cir. 1996).

Second Circuit: United States v. Gelb, 881 F.2d 1155, 1164 (2d Cir. 1989).

Third Circuit: Brittingham v. Mobil Corp., 943 F.2d 297, 300-303 (3d Cir. 1991). But see, Jaguar Cars, Inc. v. Royal Oaks Motor Car Co., 46 F.3d 258, 268 (3d Cir. 1995) (allowing plaintiff to allege enterprise consisting of corporation and its officers and employees who manage the corporation through a pattern of racketeering activity).

Fourth Circuit: Palmetto State Medical Center, Inc. v. Operation Lifeline, 117 F.3d 142, 148 (4th Cir. 1997).

Fifth Circuit: Guidry v. Bank of LaPlace, 954 F.2d 278, 283 (5th Cir. 1992).

Sixth Circuit: Davis v. Mutual Life Insurance Co. of New York, 6 F.3d 367, 378 (6th Cir. 1993).

Eighth Circuit: Atlas Pile Driving Co. v. DiCon Finance Co., 886 F.2d 986, 995 (8th Cir. 1989). *Cf.*, United States v. Fairchild, 189 F.3d 769, 776-777 (8th Cir. 1999) (allowing indictment charging defendant as both a person and part of an enterprise).

Ninth Circuit: Sever v. Alaska Pulp Corp., 978 F.2d 1529, 1533 (9th Cir. 1992).

Tenth Circuit: Garbade v. Great Divide Mining and Milling Corp., 831 F.2d 212 (10th Cir. 1987).

Eleventh Circuit: United States v. Goldin Industries, Inc., 219 F.3d 1268 (11th Cir. 2000) (*en banc*).

District of Columbia Circuit: Yellow Bus Lines, Inc. v. Drivers, Chauffeurs & Helpers Local Union 639, 883 F.2d 132, 140-141 (D.C. Cir. 1989), *rev'd in part on other grounds* 913 F.2d 948 (D.C. Cir. 1990) (*en banc*).

[72] See §1.03 *supra* for a discussion of vicarious liability under RICO.

[73] Cullen v. Margiotta, 811 F.2d 698 (2d Cir. 1987), *overruled on other grounds* Agency Holding Corp. v. Malley-Duff &Associates Inc., 483 U.S. 143, 156, 107 S.Ct. 3759, 97 L.Ed.2d 121 (1987).

gle entity could not be both the RICO 'person' and one of a number of members of the RICO 'enterprise.'[74]

Because the Second Circuit has also held that numerous corporate entities can collectively constitute an "enterprise,"[74.1] *Cullen* allows a private plaintiff to name a "deep-pocket" corporation as a defendant, even if it is also part of the enterprise through which the racketeering activity was conducted, provided that the enterprise can be meaningfully defined to include other corporations or individuals as well. This result is possible even where all of the members of an alleged association-in-fact enterprise are named as defendants.[75] However, courts will be hesitant to find the enterprise element satisfied where a plaintiff has engaged in artful pleading in an attempt to satisfy the requirement.[76]

In a 1995 case, the Second Circuit rejected a defendant's assertion that the alleged enterprise was insufficiently distinct from the persons

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[74] *Id.*, 811 F.2d at 729-730. See also:

Second Circuit: Riverwoods Chappaqua Corp. v. Marine Midland Bank, 30 F.3d 339, 344 (2d Cir. 1994) (for 1962(c) purposes, a defendant may be both a RICO person and one of number of members of the RICO enterprise).

Third Circuit: American Trade Partners, L.P. v. A-1 International Importing Enterprises, Ltd., 755 F. Supp. 1292, 1299 (E.D. Pa. 1990) (the liable person and the enterprise do not have to be completely separate entities).

[74.1] See United States v. Haber, 603 F.2d 387, 394 (2d Cir. 1979).

[75] See, e.g.:

Second Circuit: C.A. Westel de Venezuela v. AT&T, 1994 U.S. Dist. LEXIS 14481 (S.D.N.Y. Oct. 11, 1994) (it is possible to plead a valid Section 1962(c) claim where each of the members of an association-in-fact is also named as a defendant so long as the overlap between the RICO persons and the RICO enterprise is only partial).

Third Circuit: Shearin v. E. F. Hutton Group, Inc., 885 F.2d 1162, 1165-1166 (3d Cir. 1989) (upholding a complaint alleging that three defendant corporations formed an association-in-fact enterprise); Gurfein v. Sovereign Group, 826 F. Supp. 890, 913-915 (E.D. Pa. 1993) (an association-in-fact enterprise permissible where the relationship among the members of the enterprise is the relationship of parts to a whole; a claim may be stated where the related entities are distinct).

Fourth Circuit: Lifschultz Fast Freight Inc. v. Consolidated Freightways Corp., 1993-1 CCH Trade Cas. ¶ 70, 291 (4th Cir. 1993) (an alleged enterprise consisting of an association-in-fact of a union and its trustees is sufficiently distinct from the union and the two trustees alleged to have conducted its affairs because only partial overlap existed between the person and the enterprise).

Sixth Circuit: Fleischhauer v. Feltner, 879 F.2d 1290, 1292 n.1, 1296-1297 (6th Cir. 1989).

Ninth Circuit: River City Markets, Inc. v. Fleming Foods West, Inc., 960 F.2d 1458, 1461-1462 (9th Cir. 1992) (two contracting businesses can form an enterprise and also be named as defendants as long as they also fall within the other statutory requirements).

[76] See Manhattan Telecommunications Corp. v. DialAmerica Marketing, Inc., 156 F. Supp.2d 376 (S.D.N.Y. 2001) (dismissing RICO claim based upon allegation of enterprise consisting of corporation and its customers).

participating in the enterprise, finding that the defendants (two separate and distinct corporations and an individual who was an officer or agent of each corporation) constituted an enterprise that, while consisting of no more than these three persons, was distinct from each of them.[77] The court added that the corporations plainly benefited from the illegal activities of their agents and noted that even if the individual defendant had owned 100% of the shares of each corporation, the corporations still would be viewed as separate legal entities capable of constituting an association-in-fact enterprise.[78]

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[77] Securitron Magnalock Corp. v. Schnabolk, 65 F.3d 256, 262-264 (2d Cir. 1995). See also:

Second Circuit: Mark v. J. I. Racing, Inc., 1997 U.S. Dist. LEXIS 9931 (E.D.N.Y. July 9, 1997) (enterprise and person were sufficiently distinct to survive a motion to dismiss where there was only partial overlap alleged between the person and the enterprise and the alleged association-in-fact included several non-party individuals and entities).

Eleventh Circuit: United States v. Goldin Industries, Inc., 219 F.3d 1271, 1274-1277 (11th Cir. 2000) (three separate corporate defendants with overlapping ownership were sufficiently distinct to survive the distinctness requirement).

[78] *Securitron*, 65 F.3d at 263. But see:

Second Circuit: DISCON, Inc. v. NYNEX Corp., 93 F.3d 1055, 1063-1064 (2d Cir. 1996) (legally separate entities acting within the scope of a single corporate structure and guided by a single corporate consciousness could not constitute an enterprise separate and distinct from the person), *vacated on other grounds sub nom.* NYNEX Corp. v. DISCON, Inc., 525 U.S. 128, 119 S.Ct. 493, 142 L.Ed.2d 510 (1998); NRB Industries, Inc. v. R. A. Taylor and Associates, Inc., 1998 U.S. Dist. LEXIS 25 (S.D.N.Y. Jan. 7, 1998) (enterprise consisting of a corporate defendant associated with its own employees or agents was invalid; the fact that some of the defendants were legally separate from the corporate defendant was insufficient to make them distinct where operative identity was otherwise complete); Sartini v. Portofino Sun Center Columbus Avenue Corp., 1997 U.S. Dist. LEXIS 10161 (S.D.N.Y. July 15, 1997) (plaintiff's allegations based on misrepresentations made and actions taken by the defendant's agent were insufficient to allege an enterprise distinct from the RICO person); Protter v. Nathan's Famous Systems, Inc., 925 F. Supp. 947, 955-956 (E.D.N.Y. 1996) (defendant employees did not form an enterprise with the employer corporation where they acted in the course of their employment and on behalf of the corporation).

Fifth Circuit: Brown v. Coleman Investments, Inc., 993 F. Supp. 416, 427-430 (M.D. La. 1998) (plaintiff did not state a RICO claim where the parent was the alleged enterprise and the subsidiary was the alleged person).

Seventh Circuit: Bucklew v. Hawkins, Hawkins, Ash, Bridge, Baptie & Co., 329 F.3d 923, 934 (7th Cir. 2003) (rejecting a RICO claim where enterprise was wholly owned subsidiary of the alleged racketeer); Miller v. Chevy Chase Bank, 1998 U.S. Dist. LEXIS 3651 (N.D. Ill. March 24, 1998) (under Section 1962(c), a subsidiary must participate in the control of the parent in order to be deemed a RICO enterprise); Mark v. Keycorp Mortgage, Inc., 1996 U.S. Dist. LEXIS 11675 (N.D. Ill. Aug. 8, 1996) (a subsidiary is a distinct legal entity from its parent for purposes of Subsection 1962(c)).

The Supreme Court has decided the issue of whether a person who is the president and sole shareholder of a corporation is sufficiently distinct from the corporation to satisfy the enterprise/person distinctiveness requirement.[79] The Court affirmed the principle that in order to establish liability under Section 1962(c) a party must allege a person separate and distinct from the alleged enterprise.[80] However, the Court concluded that under circumstances where "a corporate employee, 'acting within the scope of his authority' . . . allegedly conducts the corporation's affairs" in a manner forbidden by RICO, the corporate employee is distinct from the corporation.[81] Hence, Section 1962(c) "applies when a corporate employee unlawfully conducts the affairs of the corporation of which he is the sole owner—whether he conducts those affairs within the scope, or beyond the scope, of corporate authority."[81.1]

In *Kress v. Hall-Houston Oil Co.*,[82] a district court noted that "courts must be cautious when corporations and employees" are alleged to constitute an enterprise.[83] According to the court, a Section 1962(c) enterprise "must be more than an association of individuals or entities conducting the normal affairs of a defendant corporation" because the rule requiring that the person and enterprise be distinct "would be eviscerated if a plaintiff could successfully plead that the enterprise consists of a defendant corporation in association with employees, agents, or affiliated entities acting on its behalf."[84]

In *Kress,* the plaintiffs named a corporation and several partnerships that operated the corporation as general partners as the enterprise and named the corporation and the chief executive officer of the

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[79] Cedric Kushner Promotions, Ltd. v. King, 533 U.S. 158, 121 S.Ct. 2087, 150 L.Ed.2d 198 (2001).

[80] *Id.,* 533 U.S. at 162.

[81] *Id.,* 533 U.S. at 164.

[81.1] *Id.*, 533 U.S. at 166.

[82] Kress v. Hall-Houston Oil Co., 1993 U.S. Dist. LEXIS 6350 (D.N.J. May 12, 1993).

[83] *Id.*, 1993 U.S. Dist. LEXIS 6350 at *24-*25.

[84] Id., U.S. Dist. LEXIS 6350 at *25 (citing Brittingham v. Mobil Corp., 943 F.2d 297, 301 (3d Cir. 1991)). See also:

Second Circuit: Riverwoods Chappaqua Corp. v. Marine Midland Bank, N.A., 30 F.3d 339, 344 (2d Cir. 1994); Nasik Breeding & Research Farm, Ltd. v. Merck & Co., 165 F. Supp. 2d 514, 539 (S.D.N.Y. 2001).

Fourth Circuit: United States v. Computer Sciences Corp., 689 F.2d 1181, 1190 (4th Cir. 1982), *overruled on other grounds* Busby v. Crown Supply, Inc., 896 F.2d 833 (4th Cir. 1990) (*en banc*).

Sixth Circuit: Begala v. PNC Bank, Ohio, National Ass'n, 214 F.3d 776, 781 (6th Cir. 2000) ("An organization cannot join with its own members to undertake a regular corporate activity and thereby become an enterprise distinct from itself.").

corporation as the RICO persons.[85] Although the court was skeptical that any real distinction among these entities existed, it required an expanded factual record to determine the relationship between the enterprise and the defendants.[86]

Similarly, in *Riverwoods Chappaqua Corp. v. Marine Midland Bank, N.A.*,[87] the Second Circuit concluded that a plaintiff may not circumvent the distinctiveness requirement by alleging a RICO enterprise that consists merely of a corporate defendant associated with its own employees or agents carrying on the regular affairs of the defendant.[88] The court reasoned that because a corporation can only function through its employees and agents,

> where employees of a corporation associate together to commit a pattern of predicate acts in the course of their employment and on behalf of the corporation, the employees in association with the corporation do not form an enterprise distinct from the corporation.[89]

The Fifth Circuit has reached a similar conclusion, noting that although it is theoretically possible for a corporation to play a separate, active role in RICO violations committed by its employees and

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[85] *Kress*, 1993 U.S. Dist. LEXIS 6350 at *27.

[86] *Id.*, U.S. Dist. LEXIS 6350 at *27-*28. See also:

Sixth Circuit: VanDenBroeck v. Commonpoint Mortgage Co., 210 F.3d 696, 701 (6th Cir. 2000), *overruled on other grounds* Bridge v. Phoenix Bond & Indemnity Co., 553 U.S. 639, 128 S.Ct. 2131, 170 L.Ed.2d 1012 (2008) (corporation and sole shareholder were sufficiently distinct to support a § 1962(c) claim).

Ninth Circuit: United States v. Feldman, 853 F.2d 648 (9th Cir. 1998) (RICO person can be the sole shareholder in one or many corporations constituting the enterprise).

District of Columbia Circuit: Bates v. Northwestern Human Service, 466 F. Supp.2d 69, 87 (D.D.C. 2006) (allowing plaintiffs to amend their complaint and its two wholly owned subsidiaries to aid the court in determining if they are distinct).

[87] Riverwoods Chappaqua Corp. v. Marine Midland Bank, N.A., 30 F.3d 339 (2d Cir. 1994).

[88] *Id.*, 30 F.3d at 344. See also:

First Circuit: Bessette v. AVCO Financial Services, Inc., 230 F.3d 439, 449-450 (1st Cir. 2000).

Second Circuit: Cedric Kushner Promotions, Ltd. v. King, 219 F.3d 115, 117 (2d Cir. 2000), *rev'd on other grounds* 533 U.S. 158, 121 S.Ct. 2087, 150 L.Ed.2d 198 (2000) (rejecting the argument that the distinctness requirement does not apply when only the person, and not the enterprise, is a defendant). See In re Parmalat Securities Litigation, 479 F. Supp.2d 332 (S.D.N.Y. 2007) (the necessary distinctness between the enterprise and defendant cannot be manufactured by including reference to anonymous attorneys, accountants, and other agents).

[89] *Riverwoods Chappaqua Corp.*, N. 87 *supra*, 30 F.3d at 44.

agents, the distinctiveness requirement is not met where the alleged association-in-fact is actually no different from the association of individuals or entities constituting a defendant person and carrying out its activities.[90] Similarly, the Tenth Circuit has found allegations that the RICO person is a subsidiary conducting the affairs of its parent insufficient to state a claim under Section 1962(c).[91] The court noted that such a broad rule would allow the application of RICO in every fraud case against a corporation and concluded that dramatically expanding RICO liability because of a business organization choice made little sense.[92]

According to the Third Circuit, a "narrow," "theoretical," and "rare" exception to the rule requiring that the enterprise and person be distinct under Section 1962(c) might exist where the plaintiff alleges that the defendant corporation "had a role in the racketeering activity that was distinct from the undertakings of those acting on its behalf."[93] The court, however, concluded that the plaintiff had failed to allege such facts.[94] In a later decision, the Third Circuit concluded that the distinctiveness doctrine does not shield officers and employees who manage a corporate enterprise through a pattern of racke-

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[90] Khurana v. Innovative Healthcare Systems, Inc., 130 F.3d 143, 155 (5th Cir. 1997), *vacated on other grounds sub nom*. Teel v. Khurana, 525 U.S. 979, 119 S.Ct. 442, 142 L.Ed.2d 397 (1998). But see, St. Paul Mercury Insurance Co. v. Williamson, 224 F.3d 425, 445-447 (5th Cir. 2000) (discussing prior Fifth Circuit law on the enterprise/person distinction requirement and concluding that an individual can be both a RICO person and part of an association-in-fact enterprise). See also: Kaczmarek v. International Business Machines Corp., 30 F. Supp.2d 626, 629-630 (S.D.N.Y. 1998) (alleged enterprise consisting of defendant and its employees or subsidiaries insufficient); Goldberg v. Merrill, Lynch, Pierce, Fenner, and Smith, 1998 U.S. Dist. LEXIS 1187 (S.D.N.Y. Feb. 6, 1998) (a Subsection 1962(c) claim deficient because the alleged enterprise consisted only of a corporate defendant associated with its own employees and agents carrying on the regular affairs of the defendant).

[91] Brannon v. Boatmen's First National Bank of Oklahoma, 153 F.3d 1144, 1146 (10th Cir. 1998). See also:

First Circuit: Bessette v. AVCO Financial Services, Inc., 230 F.3d 439, 448-449 (1st Cir. 2000).

Seventh Circuit: Bucklew v. Hawkins, Ash, Bridge, Baptie & Co., 329 F.3d 923, 934 (7th Cir. 2003) (a wholly owned subsidiary and its parent company are not sufficiently distinct unless the plaintiff demonstrates that "the RICO enterprise's decision to operate through subsidiaries rather than [intracorporate] divisions somehow facilitated its unlawful activity").

[92] *Brannon*, N. 91 *supra*, 153 F.3d at 1146-1147 ("[I]n order to state a viable claim under [Section 1962(c)] against a [subsidiary] for conducting the affairs of its parent corporation, a plaintiff, at the very least, must allege the parent somehow made it easier to commit or conceal the fraud of which the plaintiff complains.")

[93] Gasoline Sales v. Aero Oil Co., 39 F.3d 70, 73 (3d Cir. 1994). (Citation omitted).

[94] *Id.*

teering activity from Section 1962(c) liability.[95] The court held that a plaintiff could recover against the defendant officers and employees—but not against the corporation—where such persons "controlled" the corporate enterprise.[96] Under those circumstances, the corporation itself would be liable only if it engaged in racketeering activity in another distinct enterprise.[97] The Fifth Circuit has also held that where a corporation is the alleged enterprise, Section 1962(c) may impose liability on individual corporate officers and employees who conduct the corporate enterprise through a pattern of racketeering activity.[98]

In *Jaguar Cars, Inc. v. Royal Oaks Motor Car Co.*,[99] the Third Circuit concluded that the victim of the racketeering activity could not comprise part of the racketeering enterprise.[100] As discussed below,[101] in *National Organization for Women, Inc. v. Scheidler*,[102] the Supreme Court observed that "the enterprise in subsection (c) of 1962 connotes generally the vehicle through which the unlawful pattern of racke-

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[95] Jaguar Cars, Inc. v. Royal Oaks Motor Car Co., 46 F.3d 258, 265-269 (3d Cir. 1995). But see, Dow Chemical Co. v. Exxon Corp., 30 F. Supp.2d 673, 699-702 (D. Del. 1998) (citing Metcalf v. PaineWebber Inc., 886 F. Supp. 503, 513 (W.D. Pa. 1995), *aff'd without opinion* 79 F.3d 1138 (3d. Cir. 1996), and concluding that *Jaguar Cars* should not be read expansively and that a claim that simply names one corporation as both the enterprise and person is insufficient under Subsection 1962(c)).

[96] *Jaguar Cars*, 46 F.3d at 265-169.

[97] *Id.* See also, S&W Contracting Services, Inc. v. Philadelphia Housing Authority, 1998 U.S. Dist. LEXIS 3966 (E.D. Pa. March 25, 1998) (refusing to grant motion to dismiss because defendant corporation was only one member of alleged enterprise); J&M Turner, Inc. v. Applied Bolting Technology Products, Inc., 1997 U.S. Dist. LEXIS 1907 (E.D. Pa. Feb. 24, 1997) (alleging conduct by corporate officers or employees who operate or manage an enterprise satisfies the distinctiveness requirement because the corporation is an entity legally distinct from its officers or employees); Brokerage Concepts, Inc. v. U.S. Healthcare, Inc., 1996 U.S. Dist. LEXIS 1159 (E.D. Pa. Feb. 2, 1996) (a complaint was satisfactory where it alleged that all of the defendants were both RICO persons and a component of an association-in-fact enterprise; the alleged association-in-fact was distinct from its members even though it acted only through one or more of the members); Brook-Med Imaging P.A. v. Imaging Management Associates, Inc., 1995 U.S. Dist. LEXIS 1028 (D.N.J. Jan. 27, 1995) (a corporation that leased radiology equipment was distinct from its officers and employees for purposes of Subsection 1962(c)).

[98] Khurana v. Innovative Healthcare Systems, Inc., 130 F.3d 143, 156 (5th Cir. 1997), *vacated on other grounds sub nom.* Teel v. Khurana, 525 U.S. 979, 119 S.Ct. 442, 142 L.Ed.2d 397 (1998).

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

[100] *Id.*, 46 F.3d at 266-267.

[101] See § 1.05[4] *infra* for a discussion of National Organization for Women, Inc. v. Scheidler.

[102] National Organization for Women, Inc. v. Scheidler, 510 U.S. 249, 114 S.Ct. 79, 127 L.Ed.2d 99 (1994).

teering activity is committed rather than the victim of that activity."[103] Some cases suggest, however, that *N.O.W.* does not necessarily preclude the victim of racketeering activity from comprising part of the racketeering enterprise.[104]

Courts have also found that the offices of public officials can be RICO enterprises that are separate and distinct from the person holding the office. For example, a district court in Pennsylvania found that the plaintiff's allegation that the individual defendants operated the board of supervisors of a township had clearly stated that the individual defendants and the township were distinct.[105]

Because Sections 1962(a) and 1962(b) do not contain the same limiting language as Section 1962(c), most courts have held that the defendant and the enterprise do not have to be distinct in a RICO action predicated on the former two sections.[106] This view is especially common in cases brought pursuant to Section 1962(a), which prohibits investing the proceeds of a pattern of racketeering in an enterprise.[107] In that context, most circuits have held that a corporate

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[103] *Id.*, 510 U.S. at 259.

[104] See:

First Circuit: Aetna Casualty Surety Co. v. P&B Autobody, 43 F.3d 1546 (1st Cir. 1996).

Second Circuit: Allstate Insurance Co. v. Rozenberg, 590 F. Supp.2d 384, 392 (E.D.N.Y. 2008); Hansel 'n Gretel Brand, Inc. v. Savitsky, 1997 U.S. Dist. LEXIS 13324 (S.D.N.Y. Sept. 3, 1997).

Seventh Circuit: Shapo v. Engle, 1999 U.S. Dist. LEXIS 17966, at *28 (N.D. Ill. Nov. 12, 1999); LaSalle Lake View v. Seguban, 937 F. Supp. 1309, 1323 (N.D. Ill. 1996).

Eleventh Circuit: United States v. Browne, 505 F.3d 1229, 1273 (11th Cir. 2007) ("By so qualifying its language, therefore, the *Scheidler* Court did not foreclose the possibility that the enterprise can also be the victim of the alleged RICO violation.").

[105] Heritage Building Group, Inc. v. Plumstead Township, 1996 U.S. Dist. LEXIS 1676 (E.D. Pa. Feb. 16, 1996).

[106] See, e.g.:

Fifth Circuit: Crowe v. Henry, 43 F.3d 198, 204-205 (5th Cir. 1995) (association-in-fact of plaintiff and his attorney satisfied Sections 1962(a) and (b), but not Section 1962(c)).

Sixth Circuit: Whaley v. Auto Club Insurance Ass'n, 891 F. Supp. 1237, 1241-1242 (E.D. Mich. 1995), *aff'd* 129 F.3d 1266 (6th Cir. 1997).

Seventh Circuit: Haroco, Inc. v. American National Bank & Trust Co., 747 F.2d 384, 401 (7th Cir. 1984), *aff'd* 473 U.S. 606, 105 S.Ct. 3291, 87 L.Ed.2d 437 (1985).

[107] See, e.g.:

First Circuit: Schofield v. First Commodity Corp. of Boston, 793 F.2d 28, 30 (1st Cir. 1986).

Second Circuit: Official Publications, Inc. v. Kable News Co., 884 F.2d 664, 668 (2d Cir. 1989).

Third Circuit: Hoxworth v. Blinder, Robinson & Co., 903 F.2d 186, 204 (3d Cir. 1990); Petro-Tech, Inc., v. Western Co. of North America, 824 F.2d 1349, 1361 (3d Cir. 1987).

enterprise may be held liable under Section 1962(a) as the person and the enterprise when it acts as a perpetrator of the alleged predicate acts.[108]

The circuits are more divided regarding Section 1962(b), with some courts requiring a distinction between the defendant and the enterprise,[109] while others do not.[110] Similarly, courts are split on the issue of whether the person/enterprise distinction is required by Section 1962(d).[111] Nevertheless, some courts have allowed plaintiffs to

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Fourth Circuit: Busby v. Crown Supply, Inc., 896 F.2d 833, 840-842 (4th Cir. 1990) (*en banc*).

Fifth Circuit: Bishop v. Corbitt Marine Ways, Inc., 802 F.2d 122, 123 (5th Cir. 1986); Crowe v. Smith, 484 F. Supp. 1258 (W.D. La. 1994).

Seventh Circuit: Masi v. Ford City Bank and Trust Co., 779 F.2d 397, 401-402 (7th Cir. 1985).

Ninth Circuit: Schreiber Distribution Co. v. Serv-Well Furniture Co., 806 F.2d 1393, 1398 (9th Cir. 1986).

Tenth Circuit: Garbade v. Great Divide Mining & Milling Corp., 831 F.2d 212, 213-214 (10th Cir. 1987).

District of Columbia Circuit: Yellow Bus Lines, Inc. v. Drivers, Chauffeurs & Helpers Local Union 639, 913 F.2d 948 (D.C. Cir. 1990) (*en banc*).

[108] See, e.g., Nundy v. Prudential-Bache Securities, Inc., 762 F. Supp. 40, 42 (W.D.N.Y. 1991) (the corporate enterprise need not be distinct from the person under Section 1962(a)).

[109] See, e.g., Official Publications, Inc. v. Kable News Co., 884 F.2d 664, 668 (2d Cir. 1989).

[110] See, e.g.:

Third Circuit: Pennsylvania v. Derry Construction Co., 617 F. Supp. 940, 943-944 (W.D. Pa. 1985). But see, Lightning Lube Inc., v. Witco Corp., 4 F.3d 1153, 1190 (3d Cir. 1993) (Section 1962(b) may require the person and enterprise to be distinct entities).

Fifth Circuit: Landry v. Air Line Pilots Ass'n International, AFL-CIO, 901 F.2d 404, 425 (5th Cir. 1990).

Seventh Circuit: Liquid Air Corp. v. Rogers, 834 F.2d 1297, 1307 (7th Cir. 1987).

Eighth Circuit: Bowman v. Western Auto Supply Co., 773 F. Supp. 174, 179 (W.D. Mo. 1991), *rev'd on other grounds* 985 F.2d 383 (8th Cir. 1993).

Ninth Circuit: Schreiber Distribution Co. v. Serv-Well Furniture Co., Inc., 806 F.2d 1393, 1398 (9th Cir. 1986).

Tenth Circuit: In re The Dow Company "Sarabound" Products Liability Litigation, 666 F. Supp. 1466, 1473-1474 (D. Col. 1987).

[111] See, e.g.:

First Circuit: Gaudette v. Panosk, 650 F. Supp. 912, 914 (D. Mass. 1987) (the person and enterprise have to be different).

Second Circuit: Compare, Faberge, Inc. v. Wyman, 1997 U.S. Dist. LEXIS 13686, at *10-*11 (S.D.N.Y. 1987) (allowing no distinction) *with* Morris v. Gilbert, 649 F. Supp. 1491, 1500-1501 (E.D.N.Y. 1986) (the enterprise and the person cannot be the same entity under Subsection 1962(d)).

Seventh Circuit: Barkman v. Wabash, 674 F. Supp. 623, 632-633 (N.D. Ill. 1987) (allowing for no distinction).

Ninth Circuit: Wilcox Development Co. v. First Interstate Bank of Oregon, 590 F. Supp. 445, 451 (D. Ore. 1984) (requiring separate entities), *rev'd on other grounds* 815 F.2d 522 (9th Cir. 1987).

plead around the distinction requirement by naming the corporation as a defendant and as one entity among several that together comprise the enterprise.[112-113]

Although most courts have held that the defendant and the enterprise must be distinct, the plaintiff does not have to be distinct from the enterprise.[114]

[4]—Economic Motive

In *National Organization for Women, Inc. v. Scheidler*[115] ("N.O.W."), the Supreme Court resolved a split in the circuits, holding that RICO does not require either the racketeering enterprise or the predicate acts of racketeering to be motivated by an economic purpose.[116]

Prior to this decision, the Second, Seventh, and Ninth Circuits required either the predicate acts of racketeering or the enterprise to have some financial motive,[117] and the Eighth Circuit mandated that

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[112-113] See, e.g.:

Second Circuit: Cullen v. Margiotta, 811 F.2d 698, 730 (2d Cir. 1987), *overruled on other grounds by* Agency Holding Corp. v. Malley-Duff & Associates, Inc., 483 U.S. 143, 156, 107 S.Ct. 2759, 97 L.Ed.2d 121 (1987).

Third Circuit: Petro-Tech, Inc. v. Western Co. of North America, 824 F.2d 1349, 1358 (3d Cir. 1987).

[114] See, e.g.:

First Circuit: Aetna Casualty Surety Co. v. P&B Autobody, 43 F.3d 1546 (1st Cir. 1996).

Second Circuit: Allstate Insurance Co. v. Rozenberg, 590 F. Supp.2d 384, 392 (E.D.N.Y. 2008); Com-Tech Associates v. Computer Associates International, Inc., 753 F. Supp. 1078, 1088 (E.D.N.Y. 1990) ("[P]laintiffs are free to allege that they or one of their members is a RICO enterprise or part of a RICO enterprise.") *aff'd* 938 F.2d 1574 (2d Cir. 1991). (Citation omitted.)

Ninth Circuit: United Energy Owners Committee, Inc. v. United States Energy Management Systems, Inc., 837 F.2d 356, 362 (9th Cir. 1988).

Although difficult to assert, courts have found the theory that the plaintiff itself is the enterprise plausible where the plaintiff alleges that the defendants infiltrated the enterprise and used it as a tool to defraud the enterprise and others. See, e.g.:

First Circuit: Aetna Casualty Surety Co. v. P&B Autobody, 43 F.3d 1546 (1st Cir. 1996).

Seventh Circuit: Hexagon Packaging Corp. v. Manny Gutterman and Associates, Inc., 1997 U.S. Dist. LEXIS 8345 (N.D. Ill. June 9, 1997).

[115] National Organization for Women, Inc. v. Scheidler, 510 U.S. 249, 114 S.Ct. 798, 127 L.Ed.2d 99 (1994) ("N.O.W.").

[116] *Id.,* 510 U.S. at 257.

[117] *Second Circuit:* United States v. Ferguson, 758 F.2d 843, 853 (2d Cir. 1985) (allowing a RICO prosecution against members of the Black Liberation Army because their activities centered around the commission of economic crimes); United States v. Bagaric, 706 F.2d 42, 55 (2d Cir. 1983) (allowing RICO prosecution against members of a Croation terrorist group because predicate acts such as extortion were economic crimes); United States v. Ivic, 700 F.2d 51, 65 (2d Cir. 1983)

an enterprise be directed toward an economic goal.[118] The Third Circuit had avoided directly addressing the question of whether RICO requires an economic motive by holding that because no economic motive is necessary under the Hobbs Act, no economic motive is required when the Hobbs Act is used as a predicate under RICO.[119]

In *N.O.W.,* plaintiffs brought a RICO class action against several individuals and organizations opposing abortion. Their claim "alleged that defendants were members of a nationwide conspiracy to shut down abortion clinics through a pattern of racketeering activity including extortion in violation of the Hobbs Act."[120] The district court dismissed the complaint and the Seventh Circuit affirmed, concluding that the "aim of the extortion [was] to close women's health centers," not to raise funds, and that the "non-economic crimes committed in furtherance of non-economic motives are not within the ambit of RICO."[121]

The Supreme Court began its analysis by focusing on the language of the statute. As the Court observed, "[n]owhere in either § 1962(c) or the RICO definitions in § 1961 is there any indication that an economic motive is required."[122] Although the Court found language in Section 1962(c) concerning "any enterprise engaged in, or the activities of which affect, interstate . . . commerce" that came close to suggesting an economic motive, it noted that enterprises whose activities "affect" interstate commerce could well include enterprises lacking profit-seeking motives.[123]

(refusing to allow a RICO charge against Croatian activists whose terrorist activities, including bombings, assassination, and other forms of violence, had no profit-making motive).

Seventh Circuit: National Organization for Women, Inc. v. Scheidler, 968 F.2d 612, 629 (7th Cir. 1992) ("[N]on-economic crimes committed in furtherance of non-economic motives are not within the ambit of RICO.").

Ninth Circuit: United States v. Freeman, 6 F.3d 586, 597 (9th Cir. 1993) (RICO violation requires an economic motive behind either the predicates or the enterprise).

[118] United States v. Flynn, 852 F.2d 1045, 1052 (8th Cir. 1988) (allowing RICO charge against members of an enterprise directed towards controlling St. Louis labor unions for their own economic gain); United States v. Anderson, 626 F.2d 1358, 1372 (8th Cir. 1980) (Congress intended the term "enterprise" to include only organizations with economic goals).

[119] Northeast Women's Center, Inc. v. McMonagle, 868 F.2d 1342, 1349-1350 (3d Cir. 1989) (allowing a civil RICO claim against anti-abortion demonstrators; plaintiff need not prove an economic motivation if the underlying predicate act is a Hobbs Act offense).

[120] *N.O.W.*, N. 115 *supra,* 510 U.S. at 253.

[121] *N.O.W.*, N. 117 *supra,* 968 F.2d at 629.

[122] *N.O.W.*, N. 115 *supra*, 510 U.S. at 257.

[123] *Id.*, 510 U.S. at 257-258.

The Court rejected the argument that the use of the term "enterprise" in Sections 1962(a) and (b), where it is concededly more tied in with economic motivation, supported the inference that such motivation also should be required in Section (c).[124] In reaching this conclusion, the Court stressed the different roles played by these subsections. The Court stated:

> The 'enterprise' referred to in subsections (a) and (b) is . . . something acquired through the use of illegal activities or by money obtained from illegal activities. The enterprise in these subsections is the victim of unlawful activity and may very well be a 'profit-seeking' entity that represents a property interest and may be acquired. But the statutory language in subsections (a) and (b) does not mandate that the enterprise be a 'profit-seeking' entity; it simply requires that the enterprise be an entity that was acquired through illegal activity or the money generated from illegal activity. [125]

By contrast, the enterprise in Section (c) was described as the "vehicle through which the unlawful pattern of racketeering activity is committed, rather than the victim of that activity."[126] Because this "vehicle" was not being acquired, the Court noted that it was unnecessary for such an enterprise to have a property interest that can be acquired or an economic motive for engaging in illegal activity.[127] To the contrary, the Court found that it need only to be "an association in fact that engages in a pattern of racketeering activity."[128] The Court concluded, "petitioners may maintain this action if respondents conducted the enterprise through a pattern of racketeering activity. . . . RICO contains no economic motive requirement."[129]

Justices Souter and Kennedy, in a concurring opinion, noted that "nothing in the majority opinion precludes a RICO defendant from raising the First Amendment in its defense," and that "[c]onduct alleged to amount to Hobbs Act extortion . . . [might] turn out to be fully protected First Amendment activity, entitling the defendant to dismissal. . . ."[130]

On remand, the Seventh Circuit followed the concurring opinion's suggestion and directed the district court to determine the issues of

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[124] *Id.*, 510 U.S. at 258.
[125] *Id.*, 510 U.S. at 259.
[126] *Id.*
[127] *Id.*
[128] *Id.*
[129] *Id.*, 510 U.S. at 262.
[130] *Id.*, 510 U.S. at 263-264.

whether the complaint alleged that defendants' actions violated the Hobbs Act and whether any of the defendants' activities are protected by the First Amendment.[131] On remand, the district court held that the plaintiff had adequately alleged a violation of the Hobbs Act despite the defendants' assertions that they had not profited economically from the alleged acts.[132] Some of the complaint's allegations were stricken on First Amendment grounds, but others withstood such scrutiny.[133]

After the Seventh Circuit affirmed the district court's ruling,[134] the Supreme Court reversed. In *Scheidler v. National Organization For Women, Inc.*,[135] the Court held that the petitioners did not violate the Hobbs Act because they did not commit extortion.[135.1] The Court ruled that extortion under the Hobbs Act required petitioners to have "obtained" the property of another, not merely to have forced respondents to have parted with it.[135.2] The Court found that petitioners did not violate the Hobbs Act because they did not "obtain" property from respondents.[136] As such, the Court found that respondents' Hobbs Act claims failed as a matter of law. In addition, the Supreme Court ruled that "[b]ecause all of the predicate acts supporting the jury's finding of a RICO violation must be reversed, the judgment that petitioners violated RICO must also be reversed."[137]

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[131] National Organization for Women, Inc. v. Scheidler, 1994 WL 196761 at *2 (7th Cir. May 16, 1994).

[132] National Organization for Women, Inc. v. Scheidler, 897 F. Supp. 1047, 1073-1074 (N.D. Ill. 1995).

[133] *Id.*, 897 F. Supp. at 1083-1088.

[134] National Organization For Women v. Scheidler, 267 F.3d 687 (7th Cir. 2001).

[135] Scheidler v. National Organization For Women, 537 U.S. 393, 123 S.Ct. 1057, 154 L.Ed.2d 991 (2003).

[135.1] *Id.*, 537 U.S. at 397.

[135.2] *Id.*

[136] *Id.,* 537 U.S. at 411. The Second Circuit recently considered the scope of the Court's holding in *Scheidler v. National Organization for Women*, 537 U.S. 393, 123 S.Ct. 1057, 154 L.Ed.2d 991 (2003). In *United States v. Gotti*, 459 F.3d 296 (2d Cir. 2006), several defendants argued that *Scheidler* invalidated all Hobbs Act counts against them that "were premised on the extortion of intangible property rights." *Id.* at 300. The Second Circuit held that these counts were not invalidated, because the 2003 *Scheidler* case, "far from holding that a Hobbs Act extortion could not be premised on the extortion of intangible property rights-simply clarified" that for Hobbs Act liability, there must be a showing that the defendant did not just attempt to deprive the victim of the property right at issue, but "also sought to obtain that right for himself." *Id.* That standard, the Second Circuit stated, could be met whether the property right at issue was tangible or intangible. *Id.*

[137] *Scheidler*, N. 135 *supra,* 537 U.S. at 411. On remand, the Seventh Circuit considered NOW's argument that the jury's RICO verdict was based on four acts or threats of physical violence that were unrelated to extortion, in addition to the predicate acts alleging extortion-related conduct. See National Organization for Women, Inc. v. Scheidler, 91 Fed. Appx. 510, 512 (7th Cir. 2004). NOW argued that the

[5]—Types of Enterprises

Although "associations-in-fact" are the most commonly pled RICO enterprises, many formal entities also qualify. These include:

[a]—Legitimate Business Entities

It is clear from the face of the statute and from the legislative history that legitimate businesses are the prototypical RICO enterprises.[138] These include companies and partnerships. As previously noted, the Act was primarily intended to remedy the infiltration of legitimate business by organized crime.

[b]—Illegal Enterprises

The Supreme Court, in *United States v. Turkette*,[139] resolved a split among the circuits by holding that the term "enterprise" includes illegitimate enterprises as well, i.e., enterprises organized for the purpose of conducting criminal activity.[140] The Court relied, in part, on RICO's express mandate that the provisions of the statute "shall be liberally construed to effectuate its remedial purposes,"[141] finding that, in light of RICO's more general purpose of attacking racketeering on a wide front, "insulating the wholly criminal enterprise from prosecution under RICO [would be] the more incongruous position."[142] In so holding, the Supreme Court adopted the reasoning of

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Supreme Court's initial grant of *certiorari* had not included the issue of non-extortion related conduct. The Seventh Circuit remanded the case to the district court to consider whether the four instances or threats of violence, unrelated to extortion, could support the injunction that had initially been ordered. *Id.*

The defendants then sought *certiorari* to review the Seventh Circuit's decision. The Supreme Court ruled against NOW, and stated that "[w]e conclude that Congress did not intend to create a freestanding physical violence offense in the Hobbs Act. It did intend to forbid acts or threats of physical violence in furtherance of a plan or purpose to engage in what the statute refers to as robbery or extortion (and related attempts or conspiracies)." Scheidler v. National Organization for Women, Inc., 547 U.S. 9, 23, 126 S.Ct. 1264, 164 L.Ed.2d 10 (2006).

[138] See, e.g.:

Second Circuit: United States v. Parness, 503 F.2d 430 (2d Cir. 1974) (alleging a hotel as the enterprise).

Eighth Circuit: Bennett v. Berg, 685 F.2d 1053, 1060-1061 (8th Cir. 1982) (alleging a retirement home as the enterprise), *reh'g* 710 F.2d 1361 (8th Cir. 1983).

Eleventh Circuit: United States v. Hartley, 678 F.2d 966, 988-990 (11th Cir. 1982) (alleging a seafood producer as the enterprise).

District of Columbia Circuit: United States v. Swiderski, 593 F.2d 1246, 1248-1249 (D.C. Cir. 1978) (alleging a restaurant as the enterprise).

[139] United States v. Turkette, 452 U.S. 576, 101 S.Ct. 2524, 69 L.Ed.2d 246 (1981).

[140] *Id.*, 452 U.S. at 580-581.

[141] Pub. L. No. 91-452 § 904(a), 84 Stat. 922, 947 (1970).

[142] Turkette, N. 139 *supra,* 452 U.S. at 583.

the Second, Fifth, and Ninth Circuits,[143] rejecting the reasoning of the First, Sixth, and Eighth Circuits.[144]

[c]—Individuals

Under Section 1961(4), an "individual" is included in the definition of an enterprise, thus leaving open the possibility that a single person could constitute an enterprise.[145]

[d]—Labor Unions

Labor unions are expressly included within the definition of an "enterprise," and courts have found other labor organizations to be "associations" within the meaning of Section 1961(4).[146]

[e]—Governmental Entities

Given the broad language of Section 1961(4), many courts have held that a public entity may constitute an enterprise, notwithstanding the lack of support for this conclusion in the legislative history.[147] Recently, the Seventh Circuit even affirmed the use of the State of Illinois as the enterprise in a RICO conspiracy prosecution, although noting that the case was "exceptional" because "the prosecution may have [had] no real alternative to naming the state as the RICO enterprise."[147.1]

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[143] See, e.g.:

Second Circuit: United States v. Altese, 542 F.2d 104, 106-107 (2d Cir. 1976).

Fifth Circuit: United States v. Clemones, 577 F.2d 1247, 1255 (5th Cir. 1978), *modified* 581 F.2d 1373 (5th Cir. 1978).

Ninth Circuit: United States v. Rone, 598 F.2d 564, 568-569 (9th Cir. 1979).

[144] See, e.g.:

Sixth Circuit: United States v. Sutton, 605 F.2d 260, 264-268 (6th Cir. 1979), *rev'd* 642 F.2d 1001, 1003-1005 (6th Cir. 1980) (*en banc*).

Eighth Circuit: United States v. Anderson, 626 F.2d 1358, 1365-1372 (8th Cir. 1980).

[145] See, e.g.:

Second Circuit: Three Crown Limited Partnership, 817 F. Supp. 1033, 1045 (S.D.N.Y. 1993) (sole proprietor not distinct from a sole proprietorship with no other employees); United States v. Weinberg, 852 F.2d 681, 684 (2d Cir. 1988).

Third Circuit: Borah v. Monumental Life Insurance Co., 2005 U.S. Dist. LEXIS 2013, at *6-*7 (E.D. Pa. Feb. 14, 2005) (dismissing RICO complaint against sole proprietorship where sole proprietor was deceased at the time it was filed, finding that, under Pennsylvania law, a sole proprietorship is not a legally separate entity from its owner and therefore no claims against the sole proprietorship could be maintained after the owner's death); Blue Cross of Western Pennsylvania v. Nardone, 680 F. Supp. 195 (W.D. Pa. 1988).

Seventh Circuit: McCullough v. Suter, 757 F.2d 142, 144 (7th Cir. 1985).

Ninth Circuit: United States v. Benny, 786 F.2d 1410, 1414-1416 (9th Cir. 1986) (if sole proprietorship has other employees and the individual is separable from the

[f]—Foreign Corporations

Foreign corporations may be "enterprises" so long as they affect the interstate or foreign commerce of the United States.[148]

[6]—Effect on Interstate or Foreign Commerce

The provisions of RICO conferring federal jurisdiction provide that the *enterprise*, not the predicate acts or pattern, must be engaged in or affect interstate or foreign commerce.[149] This provision has been liberally construed, with even slight interstate involvement held sufficient to establish jurisdiction.[150] However, an occasional case has

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enterprise, an individual may be associated with his or her own sole proprietorship to form an association-in-fact enterprise).

[146] See, e.g.: United States v. Boffa, 688 F.2d 919, 923 (3d Cir. 1982); United States v. Campanale, 518 F.2d 352, 364 (9th Cir. 1975).

[147] See, e.g.:

Second Circuit: United States v. Angelilli, 660 F.2d 23, 30-35 (2d Cir. 1981) (governmental units, including the New York City Civil Court, are within the definition of an enterprise).

Third Circuit: Averbach v. Rival Manufacturing Co., 809 F.2d 1016, 1018 (3d Cir. 1987) (the federal district court for the Eastern District of Pennsylvania may be an enterprise, but only where the participants in the enterprise intended to corrupt the court's processes).

Fourth Circuit: United States v. Long, 651 F.2d 239, 241 (4th Cir. 1981).

Fifth Circuit: United States v. Dozier, 672 F.2d 531, 543 & n.8 (5th Cir. 1982).

Sixth Circuit: United States v. Thompson, 685 F.2d 993, 993-1003 (6th Cir. 1982) (*en banc*) (allowing the government to name the Office of the Governor of the State of Tennessee as the enterprise, but questioning the wisdom of naming governmental entities as enterprises).

Seventh Circuit: United States v. Lee Stoller Enterprises, Inc. 652 F.2d 1313, 1316-1319 (7th Cir. 1981) (*en banc*).

Eighth Circuit: United States v. Clark, 646 F.2d 1259, 1261-1267 (8th Cir. 1981).

Ninth Circuit: United States v. Freeman, 6 F.3d 586, 587 (9th Cir. 1993) ("We adopt the view of seven circuit courts and hold that a governmental entity may constitute an 'enterprise' within the meaning of RICO.").

[147.1] United States v. Warner, 498 F.3d 666, 696 (7th Cir. 2007) ("No legal rule prohibited the prosecution from concluding that there was no single entity or office that it could have identified, short of the state as a whole, that would have encompassed the enterprise that was used by the defendants.").

[148] See United States v. Parness, 503 F.2d 430, 439-440 (2d Cir. 1974).

[149] See: United States v. Murphy, 768 F.2d 1518, 1531 (7th Cir. 1985); United States v. Dickens, 694 F.2d 765, 781 (3d Cir. 1982); United States v. Diecidue, 603 F.2d 535, 546-548 (5th Cir. 1979). See also, Reynolds v. Conden, 908 F. Supp. 1494, 1508 n.6 (N.D. Iowa 1995) (the enterprise rather than the individual defendants must affect interstate commerce).

[150] See, e.g.:

First Circuit: United States v. Nascimento, 491 F.3d 25 (1st Cir. 2007) (rejecting defendants' contentions that the RICO statute, as applied to enterprises that are engaged only in noneconomic activity, is either unconstitutional or requires a heightened showing of the effect of the activity on interstate commerce); United States v.

been dismissed for failure to establish such a nexus with interstate commerce.[151]

In *United States v. Robertson,*[152] the Supreme Court reviewed the Ninth Circuit's reversal of a RICO conviction on the ground that the government had failed to introduce evidence that the enterprise—a gold mine in Alaska—was engaged in or affected interstate com-

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Marino, 277 F.3d 11, 34-35 (1st Cir. 2002) (rejecting defendant's contention that the enterprise's activity must have a substantial effect on interstate commerce and stating that RICO "require[s] only 'some effect on interstate commerce'").

Second Circuit: United States v. Parkes, 497 F.3d 220, 229 (2d Cir. 2009) (after the Supreme Court's decisions in *Apprendi v. United States* and *United States v. Booker* it was inappropriate to use congressional findings to satisfy the government's burden of proving that the enterprise affected interstate commerce); DeFalco v. Bernas, 244 F.3d 286, 309 (2d Cir. 2001) ("The law in this Circuit does not require RICO plaintiffs to show more than a minimal effect on interstate commerce."); United States v. Miller, 116 F.3d 641, 674 (2d Cir. 1997); United States v. Mannino, 635 F.2d 110, 118 (2d Cir. 1980) (purchase of a home in a neighboring state was sufficient to satisfy interstate commerce requirement). See also, Calica v. Independent Mortgage Bankers, Ltd., 1989 WL 117057 at *2 (E.D.N.Y. Sept. 28, 1989) (it is not difficult to establish the required nexus between the enterprise and interstate commerce).

Fourth Circuit: United States v. Long, 651 F.2d 239, 241-242 (4th Cir. 1981) (government must show that state senate office affects interstate commerce).

Sixth Circuit: United States v. Gardiner, 463 F.3d 445 (6th Cir. 2006); United States v. Johnson, 440 F.3d 832 (6th Cir. 2006); United States v. Chance, 306 F.3d 356, 373 (6th Cir. 2002); United States v. Riddle, 249 F.3d 529, 535-537 (6th Cir. 2001); United States v. Robinson, 763 F.2d 778, 781 (6th Cir. 1985) (it is well-settled that the enterprise need only have a minimal impact on interstate commerce).

Seventh Circuit: United States v. Espinoza, 52 Fed. Appx. 846 (7th Cir. 2002); United States v. Murphy, 768 F.2d 1518, 1531 (7th Cir. 1985) (the Circuit Court of Cook County affected commerce by its effect on the lawyers and litigants who appeared before it).

Ninth Circuit: United States v. Fernandez, 388 F.3d 1199, 1218 (9th Cir. 2004); United States v. Shryock, 342 F.3d 948, 984 (9th Cir. 2003); United States v. Juvenile Male, 118 F.3d 1344, 1346-1350 (9th Cir. 1997).

Eleventh Circuit: United States v. Flores, 527 F.3d 1254, 1267-1268 (11th Cir. 2009) (Sur-13, a gang, affected interstate commerce because it was a national organization and many of its members had fled to other states and countries to avoid prosecution).

District of Columbia Circuit: United States v. Philip Morris, USA, Inc., 449 F. Supp.2d 1, 143 (D.D.C. 2006), *aff'd in part and vacated in part* 566 F.3d 1095 (D.C. Cir. 2009) (a non-profit corporation affected interstate commerce because it utilized the "interstate banking system" and disseminated its views through television appearances, newspapers, and magazines).

[151] See, e.g.:

Fifth Circuit: Owl Construction Co. v. Ronald Adams Contractor, Inc., 642 F. Supp. 475, 478 (E.D. La. 1986) (rejecting plaintiff's claim for failure to produce any evidence showing an effect on interstate commerce).

Ninth Circuit: United States v. Robertson, 15 F.3d 862, 868-869 (9th Cir. 1994), *rev'd* 514 U.S. 669, 115 S.Ct. 1732, 131 L.Ed.2d 714 (1995) (the government failed to show that the RICO enterprise had anything more than an incidental effect on interstate commerce).

merce.[153] On appeal, the parties focused primarily on the issue of whether the gold mine's activities had affected interstate commerce.[154] However, the Supreme Court decided that it was unnecessary to address this issue because the "affecting" commerce test was relevant only when assessing whether certain intrastate activity had substantial interstate effects.[155] Reviewing the record at trial, the Supreme Court found that there was ample evidence that the gold mine satisfied the alternative requirement of Section 1962(a), i.e., that it had "engaged" in interstate commerce.[156] The Supreme Court found that equipment and supplies were purchased out of state, workers were solicited and hired from out of state, and the mine's output was taken out of state.[157] The Court concluded that a corporation is "generally engaged in commerce when it is itself directly engaged in the production, distribution or acquisition of goods and services in interstate commerce" and held that the activities of the gold mine brought it well within the "engaged in" language of Section 1962(a).[158]

Relying on *Robertson*, the Seventh Circuit rejected a defendant's assertions that there was an insufficient connection between alleged bribe payments and a law firm's participation in interstate commerce.[159] The Seventh Circuit noted that the government had presented numerous items purchased by the law firm in interstate commerce and found evidence sufficient to support the jury's finding that payment of a bribe could potentially deplete the assets with which the firm purchased goods and services in interstate commerce.[160]

[7]—Avoiding the Enterprise/Person Identity Problems

The required distinctness between the enterprise and the defendant under Subsection 1962(c) is a potential hazard for a prosecutor or, more commonly, for a private civil RICO plaintiff who wants to name as a defendant a corporation that is the same as or as closely relatedas possible to the enterprise. As previously noted, cases have suggested that a corporation can be both a defendant and *part* of the enterprise, as long as it is not the entire enterprise.[161]

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[152] *Id.,* 514 U.S. 669.

[153] United States v. Robertson, 514 U.S. 669, 115 S.Ct. 1732, 131 L.Ed.2d 714 (1995).

[154] *Id.*, 514 U.S. at 671.

[155] *Id.*

[156] *Id.*

[157] *Id.*

[158] *Id.*, 514 U.S. at 671-672.

[159] United States v. Stillo, 57 F.3d 553, 558-560 (7th Cir. 1995).

[160] *Id.*

[161] See, e.g.:

Second Circuit: Riverwoods Chappaqua Corp. v. Marine Midland Bank, N.A., 30 F.3d 339, 344 (2d Cir. 1994).

Although the doctrine of *respondeat superior* might also appear to be an attractive means of bypassing the distinctness requirement by imputing the acts of the agent or employee to the principal (which could also be the enterprise), nonetheless, as previously noted,[162] many courts have shown reluctance to apply *respondeat superior* (or the related approach of aiding and abetting) in this context.[163] Independently, as discussed below, there is also considerable (but not unanimous) authority that aiding and abetting claims are no longer viable in light of the Supreme Court's decision in *Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*[164]

Sixth Circuit: Begala v. PNC Bank, Ohio, N.A., 214 F.3d 776, 781 (6th Cir. 2000) ("Under RICO, a corporation cannot be both the 'enterprise' and the 'person' conducting or participating in the affairs of that enterprise"); Van Dorn Co. v. Howington, 623 F. Supp. 1548, 1554 (N.D. Ohio 1985).

Seventh Circuit: Trak Microcomputer Corp. v. Wearne Brothers, 628 F. Supp. 1089, 1095 (N.D. Ill. 1986); Energy Independence Partners v. Centennial Energy Co., 1986 U.S. Dist. LEXIS 28647, at *2-*4 (N.D. Ill. Feb. 28, 1986). But see, Rokeach v. Eisenbach, 1985 U.S. Dist. LEXIS 13226, at *23-*24 (N.D. Ill. Nov. 27, 1985) (individual defendants were not distinct from the corporation they owned).

Ninth Circuit: River City Markets, Inc. v. Fleming Foods West, Inc., 960 F.2d 1458, 1461-1462 (9th Cir. 1992).

[162] See § 1.03[2] *supra* and accompanying notes for a discussion of vicarious liability under RICO.

[163] See § 3.01[3] *infra* for a discussion of *respondent superior* liability under RICO. See also: Hanrahan v. Britt, 1995 U.S. Dist. LEXIS 9745 (E.D. Pa. July 11, 1995) (aiding and abetting liability satisfactorily alleged under Subsection 1962(c) when the enterprise is alleged to be an association-in-fact of a corporate defendant and individual defendants); Brown v. Siegel, 1995 U.S. Dist. LEXIS 1945 (E.D. Pa. Feb. 10, 1995) (a corporation cannot be vicariously liable for conducting an enterprise with itself and its own employees because the employees' actions are constructively the enterprise's own actions); Fidelity Federal Savings & Loan Ass'n v. Felicetti, 830 F. Supp. 257, 261 (E.D. Pa. 1993) (civil RICO liability for aiding and abetting advances the goals of RICO).

Seventh Circuit: Aspacher v. Kretz, 1997 U.S. Dist. LEXIS 8000 (N.D. Ill. June 5, 1997) (rejecting *respondent superior* claim against an entity for the racketeering acts of its agents and noting that a non-enterprise corporation may be vicariously liable for the intentional acts of its agents under Subsection 1962(c) only where the corporation is actually the central figure or the aggressor in the alleged scheme).

Eleventh Circuit: Quick v. Peoples Bank of Cullman County, 993 F.2d 793, 797-798 (11th Cir. 1993) (imposing *respondent superior* liability under Subsection 1962(b) only when the enterprise has derived some benefit from the illegal activity).

[164] Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A., 511 U.S. 164, 114 S.Ct. 1439, 128 L.Ed.2d 119 (1994). See § 1.06[3] *infra* for a discussion of the impact of the Supreme Court's decision in *Central Bank of Denver* on aiding and abetting liability.

§ 1.06 Activities Prohibited Under the Act

A person who employs a pattern of racketeering activity, or the proceeds thereof, so as to impact an interstate enterprise is guilty of a RICO violation only if the impact takes one of three forms, known as "prohibited activities." These prohibited activities are thus the fourth element of a RICO claim. As set forth in Section 1962, they are:

> (1) using or investing the proceeds of any income derived from a pattern of racketeering activity, or from the collection of an unlawful debt, in which that person participated as a principal, to establish, operate or acquire any interest in any enterprise engaged in or affecting interstate commerce (Subsection 1962(a));[1]
>
> (2) acquiring an interest or control of an enterprise through a pattern of racketeering activity or through collection of an unlawful debt (Subsection 1962(b));
>
> (3) if the person is employed by or associated with an enterprise, conducting the affairs of that enterprise through a pattern of racketeering activity or collection of an unlawful debt (Subsection 1962(c)).[2]

In addition, Subsection 1962(d) prohibits two or more persons from conspiring to commit any of these violations.

[1]—Investment of the Proceeds

Under Subsection 1962(a), it is unlawful for any person to use or invest any income, or the proceeds of any income, derived from a pattern of racketeering activity or the collection of an unlawful debt,[3] to establish, operate or acquire any interest in any enterprise engaged in or affecting interstate commerce.[4] The subsection further requires that the defendant have "participated as a principal" in the unlawful activity or debt collection (although the language might be read as apply-

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[1] See Chapman v. Ontra Inc., 1997 U.S. Dist. LEXIS 8331, at *25-*26 (N.D. Ill. June 6, 1997) (under Subsection 1962(a) plaintiff must allege that the predicate acts were the proximate cause of his injury).

[2] The "unlawful debt" portions of these provisions are rarely used. But see:

Second Circuit: United States v. Giovanelli, 945 F.2d 479, 490-491 (2d Cir. 1991) (affirming RICO convictions based on collection of unlawful debt).

Eleventh Circuit: Johnson v. Fleet Financial, Inc., 785 F. Supp. 1003, 1010-1011 (S.D. Ga. 1992) (non-usurious interest rates cannot form the basis of a federal or state RICO claim).

[3] In general, courts construe the derivation of income language fairly broadly. But see Mylan Laboratories, Inc. v. Akzo, N.V., 770 F. Supp. 1053, 1083 (D. Md. 1991) (employees' use of their salaries in their personal finances could not be considered use or investment of income derived from a pattern of racketeering activity).

ing only to the latter). This requirement avoids criminalizing the conduct of those who receive the proceeds of a pattern of racketeering activity innocently or unknowingly. More important, it has been read to require that the victim suffer an injury resulting from the investment of the unlawfully obtained proceeds of racketeering activity, as opposed to any injuries caused by the racketeering activities themselves.[5] Although Subsection 1962(a) is directed at the activity with which Congress was most concerned in enacting RICO, i.e., use of illegally obtained profits to buy into legitimate businesses, the section was rarely used before 1985. After 1985 it was used somewhat more frequently as a way of avoiding the Subsection 1962(c) "identity" problem discussed in the previous section, but in more recent years it has been sparingly used because of the difficulty in demonstrating that the investment injury was distinct from the injury caused by the predicate acts.[6]

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[4] See, e.g., Guerrero v. Katzen, 571 F. Supp. 714, 721 (D.D.C. 1983) (rejecting plaintiff's Subsection 1962(a) claim for failure to allege that defendants invested the proceeds in an interstate enterprise), *aff'd on other grounds* 774 F.2d 506 (D.C. Cir. 1985). There is an exception under this section for the purchase of securities on the open market for investment purposes which meet certain other requirements. One court has construed Subsection 1962(a) such that investing income in oneself does not violate the section. See Cashco Oil Co. v. Moses, 605 F. Supp. 70, 71 (N.D. Ill. 1985).

[5] See, e.g.:

First Circuit: Rodriguez v. Banco Central, 727 F. Supp. 759, 770-771 (D.P.R. 1989), *aff'd in part and vacated in part* 917 F.2d 664 (1st Cir. 1990).

Second Circuit: Ouaknine v. MacFarlane, 897 F.2d 75, 82 (2d Cir. 1990).

Third Circuit: Glessner v. Kenny, 952 F.2d 702, 708-710 (3d Cir. 1991).

Fifth Circuit: Parker & Parsley Petroleum v. Dresser Industries, 972 F.2d 580, 584 & n.4 (5th Cir. 1992).

Sixth Circuit: Vemco, Inc. v. Camardella, 23 F.3d 129, 132 (6th Cir.), *cert. denied* 513 U.S. 1017 (1994).

Seventh Circuit: Hexagon Packaging Corp. v. Manny Gutterman & Associates, Inc., 1997 U.S. Dist. LEXIS 8345, at *40-*41 (N.D. Ill. June 6, 1997).

Eighth Circuit: Fogie v. THORN Americas, Inc., 190 F.3d 889, 894-896 (8th Cir. 1999).

Ninth Circuit: Nugget Hydroelectric, L.P. v. Pacific Gas & Electric Co., 981 F.2d 429, 437 (9th Cir. 1992), *cert. denied* 508 U.S. 908 (1993).

Tenth Circuit: Grider v. Texas Oil & Gas Corp., 868 F.2d 1147, 1149-1151 (10th Cir.), *cert. denied* 493 U.S. 820 (1989).

District of Columbia Circuit: Danielsen v. Burnside-Ott Aviation Training Center, Inc., 941 F.2d 1220, 1229-1230 (D.C. Cir. 1991).

[6] See Mark v. J. I. Racing, Inc., 1997 U.S. Dist. LEXIS 9931 (E.D.N.Y. July 9, 1997). See also, Goldberg v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 1998 U.S. Dist. LEXIS 8906, at *10 (S.D.N.Y. June 16, 1998) (dismissing a Subsection 1962(a) claim where the plaintiff failed to allege a use or investment injury distinct from an injury resulting from the alleged predicate acts; allegations that the money was used to perpetuate the enterprise were insufficient). But see, St. Paul Mercury Insurance Co. v. Williamson, 224 F.3d 425, 441-445 (5th Cir. 2000) (investment injury distinct from injury caused by predicate acts).

[2]—Acquiring an Interest in or Control of an Enterprise

Subsection 1962(b) prohibits a person from acquiring or maintaining any *interest* in or *control* of any enterprise *through* a pattern of racketeering activity or through the collection of an unlawful debt. Unlike Subsection 1962(a), which can apply to racketeering activity unrelated to the enterprise in which the investment is made, Subsection 1962(b) requires that the *object* of the predicate racketeering activity itself be to gain an interest in or control of the particular enterprise.[7] Criminal actions brought under Subsection 1962(b) commonly involve allegations that defendants "muscled in" on a business through loan sharking, bribery, extortion, or fraud.

While some private civil actions under Subsection 1962(b) follow this pattern, plaintiffs often allege a subsection (b) violation to avoid the person/enterprise identity bar of Subsection 1962(c). But in such instances, Subsection 1962(b) claims can be difficult to maintain because the plaintiff may have difficulty establishing that it suffered an injury that was actually and proximately caused by the defendant's acquisition or maintenance of an interest in or control of an enterprise through a pattern of racketeering activity.[8] In particular, some (though not all) courts have required that the plaintiff show an injury caused

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[7] See, e.g.:

Second Circuit: United States v. Parness, 503 F.2d 430, 438 (2d Cir. 1974) (upholding defendant's conviction under Subsection 1962(b) for acquiring an interest in a corporation through a pattern of racketeering activity).

Third Circuit: Northeast Jet Center, Ltd. v. Lehigh-Northampton Airport Authority, 767 F. Supp. 672, 683 (E.D. Pa. 1991) (dismissing Subsection 1962(b) claim for failure to properly allege that defendant acquired an ownership interest in itself as the claimed enterprise).

Fourth Circuit: In re American Honda Motor Co., Inc. Dealerships Relations Litigation, 965 F. Supp. 716, 722-723 (D. Md. 1997) (Subsection 1962(b) claim failed where the plaintiff provided insufficient evidence to infer that the defendant gained sufficient power to engage in the day to-day operations of the plaintiff or affect the composition of its board of directors).

Seventh Circuit: Hexagon Packaging Corp. v. Manny Gutterman & Associates, Inc., 1997 U.S. Dist. LEXIS 8345 (N.D. Ill. June 6, 1997) (rejecting Subsection 1962(b) claim where there were no allegations that defendant gained an interest or control through a pattern of racketeering activity, but only that defendant conducted an enterprise through such a pattern).

District of Columbia Circuit: BCCI Holdings (Luxembourg) S.A. v. Clifford, 964 F. Supp. 468, 482-484 (D.D.C. 1997) (acquisition injury adequately alleged).

[8] See Mark v. J. I. Racing, Inc., N. 6 *supra,* 1997 U.S. Dist. LEXIS 9931, at *11-*12 (Subsection 1962(b) claim failed where there was no injury independent of the predicate acts). See also, S&W Contracting Services, Inc. v. Philadelphia Housing Authority, 1998 U.S. Dist. LEXIS 3966, at *17-*20 (E.D. Pa. March 25, 1998) (rejecting plaintiff's Subsection 1962(b) claim because of failure to allege an injury caused by the defendant's acquisition of an interest in control of the alleged enterprise).

by the defendant's acquisition of an interest in the enterprise that is independent of or at least additional to injuries caused by the predicate acts that were used to acquire the interest. This somewhat ephemeral concept of a separate "racketeering" injury, which fits reasonably with Subsection 1962(a) and has been rejected with respect to Subsection 1962(c), applies only with difficulty with respect to Subsection 1962(b).

[a]—Interest

Courts have construed the term "interest" broadly. For example, in 1982 the Second Circuit held that a defendant loan shark had an interest in a bakery when he took an assignment of the bakery's lease as security for an unlawful loan.[9] Nonetheless, the "interest" must be shown to be material in some relevant respect.[10]

[b]—Control

In 1984, the Seventh Circuit gave broad construction to the term "control" by finding that "control" of an enterprise is not limited to "control" through stock or capital ownership.[11] Nonetheless, where control takes the form of ability to direct, rather than ownership, courts have interpreted "control" of the enterprise under Subsection 1962(b) to mean more than simply being a manager or corporate officer. Rather, "control" connotes domination, such as the "kind of power that an owner of 51% or more of an entity would normally enjoy."[12] One district court observed that control under Subsection 1962(b) need not be formal, but does require "that the defendant participate in the actual operation or management of the enterprise."[13] Where the defendants were operators of a township and a board of supervisors who allegedly took steps to prevent plaintiff landowners

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[9] United States v. Jacobson, 691 F.2d 110, 112-113 (2d Cir. 1982).

[10] See O'Brien v. Dean Witter Reynolds, Inc., 1984 U.S. Dist. LEXIS 18239, at *7-*9 (D. Ariz. March 26, 1984).

[11] Sutliff, Inc. v. Donovan Companies, 727 F.2d 648, 653 (7th Cir. 1984), *overruled on other grounds by* Hammes v. AAMCO Transmissions, Inc., 33 F.3d 774, 782 (7th Cir. 1994). *Cf.* Rosenthal v. Vogt, 229 Cal. App.3d 69, 78-79 (Cal. App. 1991) (defendants had not "controlled" the State Bar of California in disbarment proceedings within the strict meaning of control under Subsection 1962(b)).

[12] Kaiser v. Stewart, 1997 U.S. Dist. LEXIS 12788, at *9 (E.D. Pa. Aug. 19, 1997). See also: Ikuno v. Yip, 912 F.2d 306, 310 (9th Cir. 1990); Sutliff v. Donovan Co., 727 F.2d 648, 653 (7th Cir. 1984), *overruled on other grounds by* Hammes v. AAMCO Transmissions, Inc., 33 F.3d 774, 782 (7th Cir. 1994); Cincinnati Gas & Electric Co. v. General Electric Co., 656 F. Supp. 49, 85 (S.D. Ohio 1986) (involvement in management and designation as an officer or director may be sufficient to establish control).

[13] Heritage Building Group, Inc. v. Plumstead Township, 1996 U.S. Dist. LEXIS 1676, at *6 (E.D. Pa. Feb. 15, 1996).

from developing their properties, the court concluded that the defendants merely influenced the plaintiffs and never rose to the level of control necessary to maintain a Subsection 1962(b) claim.[14]

Overall, Subsection 1962(b) remains the least well-developed of RICO's three prohibited acts.[15]

[3]—Conducting the Affairs of an Enterprise

[a]—The "Operation or Management" Test

Subsection 1962(c), the most frequently used of the RICO provisions, makes it 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 an unlawful debt."

In *Reves v. Ernst & Young*,[16] the Supreme Court held that one must "participate in the operation or management of the enterprise itself" to be subject to liability under this provision.[17]

[b]—*Reves v. Ernst & Young*

Reves involved the actions of independent accountants in conducting two year-end audits for a farmers' cooperative (the "Co-op").[18] The former general manager of the Co-op had taken loans from it to finance the construction of a gasohol plant that turned out to be economically unsuccessful.[19] To discharge those loans, the general manager arranged for the Co-op—through a consent decree settling a declaratory judgment action commenced by the Co-op—to be deemed to have acquired the gasohol plant in 1980.[20]

The general manager, together with an inside accountant, were convicted of tax fraud in January 1981.[21] The Co-op then retained the

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[14] *Id.*, 1996 U.S. Dist. LEXIS 1676, at *8.

[15] By comparison, see §1.06[3] *infra* for a discussion of the requirements under Subsection 1962(c).

[16] Reves v. Ernst & Young, 507 U.S. 170, 113 S.Ct. 1163, 122 L.Ed.2d 525 (1993).

[17] *Id.*, 507 U.S. at 185.

[18] *Id.*, 507 U.S. at 172-175.

[19] *Id.*, 507 U.S. at 172-173.

[20] *Id.*, 507 U.S. at 173.

[21] *Id.*

defendant accountants to perform its 1981 and 1982 financial audits.[22] If the accountants had accepted the facts as to the 1980 acquisition established by the consent decree, the gasohol plant would have been given its fair market value for accounting purposes "which was somewhere between $444,000 and $1.5 million."[23]

However, despite the consent decree that vested title to the gasohol plant in the Co-op in 1980, the accountants concluded that the Co-op had owned the plant since 1979, and that the plant's value for accounting purposes was "its fixed-asset value of $4.5 million."[24] In the absence of this higher valuation of the gasohol plant, the Co-op was insolvent.[25] By employing the $4.5 million valuation, however, the Co-op was accorded the appearance of a positive net worth.[26] The accountants did not inform the Co-op's board of the facts regarding the valuation.[27] The Co-op entered bankruptcy in 1984, and the bankruptcy trustee, *inter alia*, asserted a RICO claim against the accountants.[28]

The Supreme Court, by a 7 to 2 majority, found no RICO cause of action on these facts and held that the defendant accountants were entitled to summary judgment on the alleged RICO claim.[29] The *Reves* majority concluded that "'to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs,' § 1962(c), one must participate in the operation or management of the enterprise itself."[30] Applying that test to the facts before it in *Reves*, the majority rejected the contention that by creating the Co-op's financial statements, the defendant accountants participated in the management of the Co-op.[31] Rather, the majority stressed that the defendant accountants had "relied upon existing Co-op records in preparing the 1981 and 1982 audit reports," and that "the AICPA's professional standards state that an auditor may draft financial statements in whole or in part based on information from management's accounting system."[32]

Noting that the challenged audit reports revealed to the Co-op's board that the value of the gasohol plant had been calculated based

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[22] *Id.* The accountants were partners of an Arkansas accounting firm, Russell Brown & Co., which merged with Arthur Young & Co., and subsequently became Ernst & Young.

[23] *Id.*

[24] *Id.*

[25] *Id.*

[26] *Id.*

[27] *Id.*

[28] For related litigation predicated on the federal securities laws, see Reves v. Ernst & Young, 494 U.S. 1092, 110 S.Ct. 1840, 108 L.Ed.2d 968 (1990).

[29] *Reves*, N. 16 *supra,* 507 U.S. at 186.

[30] *Id.*, 507 U.S. at 185.

[31] *Id.*, 507 U.S. at 185-186.

[32] *Id.*, 507 U.S. at 186.

on the Co-op's investment in the plant, the *Reves* majority further determined that the defendant accountants' "failure to tell the Co-op's board that the plant should have been given its fair market value" did not constitute actionable "participation" and was "not sufficient to give rise to liability under § 1962(c)."[33]

[c]—The *Reves* Majority's Analysis

To reach the broad conclusion and test recited above, the *Reves* Court, per Justice Blackmun, was required to analyze "the meaning of the phrase 'to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs'" as used in Subsection 1962(c).[34] The Court conducted that analysis on several levels.

First, looking at the "plain and ordinary meanings" of these words, the Court read "the word 'conduct' to require some degree of direction and the word 'participate' to require some part in that direction. . . ."[35] Thus, according to the Court:

> "In order to 'participate, directly or indirectly, in the conduct of such enterprise's affairs,' one must have some part in directing those affairs. Of course, the word 'participate' makes clear that RICO liability is not limited to those with primary responsibility for the enterprise's affairs, just as the phrase 'directly or indirectly' makes clear that RICO liability is not limited to those with a formal position in the enterprise, . . . but *some* part in directing the enterprise's affairs is required. The 'operation or management' test expresses this requirement in a formulation that is easy to apply."[36]

Second, the Court found that RICO's legislative history confirms that "one is not liable under that provision unless one has participated in the operation or management of the enterprise itself."[37] Third, the *Reves* majority also found RICO's "liberal construction" clause to be consistent with the "operation or management" test.[38]

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[33] *Id.*

[34] *Id.*, 507 U.S. at 177.

[35] *Id.*, 507 U.S. at 179.

[36] *Id.*

[37] *Id.*, 507 U.S. at 183.

[38] *Id.*, 507 U.S. at 183-184. As noted, Congress has directed that the "provisions of this title shall be liberally construed to effectuate its remedial purposes." *Id.* at 183. The *Reves* majority stressed that although the "liberal construction" clause "seeks to ensure that Congress' intent is not frustrated by an overly narrow reading of the statute, . . . it is not an invitation to apply RICO to new purposes that Congress never intended." On the contrary, the clause "only serves as an aid for resolving an ambiguity; it is not to be used to beget one." *Id.* at 183-184 (citing Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 492 n.10, 105 S.Ct. 3275, 87 L.Ed.2d 346

Fourth, and most instructive, the Court analyzed the words in question from Subsection 1962(c) in the context of that subsection's relation to the other subsections of Section 1962.[39] These subsections chart a progression, from infiltration of an enterprise through mere investment,[40] to gaining control from outside,[41] to conducting the enterprise's internal affairs.[42] Although it acknowledged that an enterprise "might be 'operated' or 'managed' by outsiders 'associated with' the enterprise who exert control over it as, for example, by bribery,"[43] the Court concluded that Subsection 1962(c) "cannot be interpreted to reach complete 'outsiders' because liability depends on showing that the defendants conducted or participated in the conduct of the 'enterprise's affairs,' not just their own affairs."[44]

The *Reves* majority also acknowledged that "liability under § 1962(c) is not limited to upper management,"[45] but stressed that the "operation or management" test is consistent with that proposition: "An enterprise is 'operated' not just by upper management but also by lower-rung participants in the enterprise who are under the direction of upper management."[46] With regard to the issue of whether "low-level employees could be considered to have participated in the conduct of an enterprise's affairs,"[47] however, the Court declined to decide "how far § 1962(c) extends down the ladder of operation. . . ."[48] Several cases have addressed this issue since the Court's decision in *Reves*.[49]

(1985), quoting Callanan v. United States, 364 U.S. 587, 596, 81 S.Ct. 321, 5 L.Ed.2d 312 (1961)). In the case before it, the *Reves* majority found it "clear that Congress did not intend to extend RICO liability under § 1962(c) beyond those who participate in the operation or management of an enterprise through a pattern of racketeering activity." *Id.* at 184.

[39] Reves, 507 U.S. at 185.

[40] 18 U.S.C. §1962(a).

[41] 18 U.S.C. §1962(b).

[42] 18 U.S.C. §1962(c).

[43] *Reves*, N. 16 *supra,* 507 U.S. at 184-185.

[44] *Id.*, 507 U.S. at 185.

[45] *Id.*

[46] *Id.*

[47] *Id.* n.9.

[48] *Id.* [text]. "Outsiders" might be subject to Subsection 1962(c) liability if they associate with an enterprise and participate in its operation or management. *Id.*

[49] See, e.g.:

First Circuit: United States v. Oreto, 37 F.3d 739, 750 (1st Cir. 1994).

Fifth Circuit: United States v. Posada-Rios, 158 F.3d 832 (5th Cir. 1998); Dale v. Frankel, 131 F. Supp.2d 852, 857-858 (S.D. Miss. 2001).

Seventh Circuit: Goren v. New Vision International, Inc. 156 F.3d 721, 728 n.3 (7th Cir. 1998); MCM Partners, Inc. v. Andrews-Bartlett & Associates, Inc., 62 F.3d 967, 978 (7th Cir. 1995).

Based on this analysis, the *Reves* majority concluded that "'to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs,' § 1962(c), one must participate in the operation or management of the enterprise itself."[50]

[d]—Certain Implications of *Reves*

As numerous commentators have observed,[51] the Supreme Court's decision in *Reves* limits the prospective liability under RICO of outside professionals, such as accountants and attorneys, who provide advice and services to businesses, but do not perform functions similar to those of officers or directors of public companies.[52] However, in-house professionals may not benefit to the same extent from the *Reves* decision, particularly if their performance is perceived as being supervised by officers and directors of the enterprise in question.[53] In some instances, however, this distinction between in-house and outside professionals may be unwarranted where liability is sought to be imposed on in-house professionals solely for the performance of professional services, such as the rendering of legal advice or the preparation of audited financial statements.[54] Moreover, certain commentators have suggested that while *Reves* probably represents an important limitation on the potential RICO liability of professionals and other outside contractors, *Reves* may also be viewed as tacitly supporting the use of RICO claims against professionals in those cases in which there is a basis for alleging that the *Reves* participation standard has been met.[55]

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[50] *Reves,* 507 U.S. at 185. Justice Souter, joined by Justice White, dissented from the majority on two principal grounds. He disputed that Congress intended Subsection 1962(c) to be limited to those who conduct or participate in the affairs of the enterprise. *Id.* at 187 (Souter, J., dissenting). He also expressed the view that the majority "misapplie[d] its own 'operation or management' test" to the facts presented. *Id.*

[51] See generally, Rakoff, "Will the Supreme Court Come to Terms with RICO?" New York Law Journal, p. 3 (Sept. 10, 1992) (offering a pre-*Reves* analysis). See Pitt & Johnson, "Freeing Corporate Professionals from the Threat of RICO Liability," New York Law Journal, p. 1 (March 15, 1993) (offering a post-*Reves* analysis). See also: Biskupic, "Supreme Court Limits Use of Racketeering Law," Washington Post, p. A1 (March 4, 1993); Brodsky, "The Narrow Scope of RICO for Accountants," New York Law Journal, p. 3 (May 12, 1993).

[52] See United States v. Parise, 159 F.3d 790, 796-797 (3d Cir. 1998) (finding the *Reves* "operation or management" test applicable to criminal and civil RICO actions).

[53] See Pitt & Johnson, N. 51 *supra,* at p. 1.

[54] *Id.*

[55] See Weissman, "Need a Business Development Plan? Just Figure Out How to Get Certiorari More Often," 17 RICO L. Rep. 722, 728 (Apr. 1993). See generally, the other articles on *Reves* contained in that publication.

Plaintiffs may seek to circumvent the *Reves* "operation or management" test as to a particular defendant by alleging that that defendant "aided and abetted" another party who unquestionably participated in the operation and management of the claimed RICO enterprise.[56] In the period immediately following *Reves*[57] a few courts accepted this argument. For example, in *Fidelity Federal Savings & Loan Ass'n. v. Felicetti*[58] a federal district court in Pennsylvania rejected the argument that the *Reves* decision rendered aider and abettor liability inconsistent with Subsection 1962(c) liability, and held that an aider and abettor of two predicate acts could be civilly liable under RICO.[59] Similarly, a federal district court in New York accepted the possibility of aider and abettor liability under Subsection 1962(c) although it dismissed the claim because the defendant had not knowingly assisted in the alleged scheme.[60] To be an aider and abettor, as explained by the Fifth Circuit, one must have associated with the primary violators, participated in the violations, sought to make them succeed, and shared the criminal intent of the principals of the primary violation.[61]

Other courts took a different view. For example, another federal district court in New York, in *Amalgamated Bank of New York v. Ash*,[62] concluded that most aiding and abetting allegations as to outsiders inherently lacked "'some degree of direction' as is now required by the Supreme Court."[63] Still other courts, while not excluding the possibility of aiding and abetting liability altogether, held that such liability could rarely be demonstrated under Subsection 1962(c) consistent with the *Reves* requirement that the defendant operate or manage the affairs of the alleged enterprise.[64]

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[56] As discussed in § 1.06[4] *infra*, plaintiffs may also seek to assert conspiracy claims under Subsection 1962(d) if they are unable to meet the *Reves* operation or management test under Subsection 1962(c).

[57] *Reves* was decided in 1990.

[58] Fidelity Federal Savings & Loan Ass'n v. Felicetti, 830 F. Supp. 257 (E.D. Pa. 1993).

[59] *Id.*, 830 F. Supp. at 261.

[60] Strong & Fisher, Ltd. v. Maxima Leather, Inc., 1993 U.S. Dist. LEXIS 10080 (S.D.N.Y. July 22, 1993).

[61] Armco Industries Credit Corp. v. SLT Warehouse Co., 782 F.2d 475, 485 (5th Cir. 1986).

[62] Amalgamated Bank of New York v. Ash, 823 F. Supp. 209 (S.D.N.Y. 1993).

[63] *Id.*, 823 F. Supp. at 220-221.

[64] See, e.g.:

Second Circuit: First Interregional Advisors Corp. v. Wolff, 956 F. Supp. 480, 485 (S.D.N.Y. 1997) (aiding and abetting liability under RICO applies only if a party had some part in directing the affairs of the enterprise).

Third Circuit: Rolo v. City Investing Co. Liquidating Trust, 845 F. Supp. 182, 230-234 (D.N.J. 1994) (defendants must participate in the operation or management

The proponents of aiding and abetting liability under Subsection 1962(c) received a further setback in 1994 when the Supreme Court decided *Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*[65] In *Central Bank*, the Supreme Court rejected the position of eleven courts of appeals and held that civil liability under Section 10(b) of the Securities Exchange Act of 1934[66] does not extend to those who aid and abet the primary fraud, for the simple reason that the text of Section 10(b) makes no mention of such secondary liability.[67] Because there is no reference to "aiding and abetting" liability anywhere in the text of the RICO statute, except in reference to the collection of an unlawful debt, the logic of the *Central Bank* decision would seem to preclude aiding and abetting liability under RICO as well, at least as to civil actions.[68]

Not every court was immediately persuaded of this conclusion, however. For example, in *Wardlaw ex rel. Owen v. Whitney National Bank*[69] a district court acknowledged that the *Central Bank* opinion contained language arguably applicable to RICO, but noted that much of the opinion was based on issues specific to the Securities Exchange Act.[70] The court concluded that,

> "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."[71]

However, in *United States v. Viola*,[72] the Second Circuit, citing *Central Bank*, held that under *Reves*, simply aiding and abetting a violation is not sufficient to trigger liability because:

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of the enterprise in order to be subject to aiding and abetting liability under Subsection 1962(c)), *aff'd* 43 F.3d 1462 (3d Cir. 1994), *vacated* 66 F.3d 312 (3d Cir. 1995).

Fourth Circuit: Clark v. Milam, 847 F. Supp. 409, 415-417 (S.D. W. Va. 1994), *aff'd sub nom.* Clark v. Allen, 139 F.3d 888 (4th Cir. 1998).

[65] Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A., 511 U.S. 164, 114 S.Ct. 1439, 128 L.Ed.2d 119 (1994).

[66] See 15 U.S.C. § 78j(b).

[67] *Central Bank of Denver,* 511 U.S. at 176-177.

[68] In criminal cases, aiding and abetting liability is expressly permitted under 18 U.S.C. § 2.

[69] Wardlaw *ex rel.* Owen v. Whitney National Bank, 1994 U.S. Dist. LEXIS 15215 (E.D. La. Oct. 17, 1994).

[70] *Id.*, 1994 U.S. Dist. LEXIS 15215, at *16-*18.

[71] *Id.,* 1994 U.S. Dist. LEXIS 15215, at *17-*18

[72] United States v. Viola, 35 F.3d 37 (2d Cir. 1994).

"aiding and abetting liability extends beyond persons who engage, even indirectly, in a proscribed activity; aiding and abetting liability reaches persons who do not engage in the proscribed activity at all, but who give a degree of aid to those who do."[73]

Subsequently, a growing number of courts have held that no cause of action may exist for aiding and abetting a violation of RICO,[74] given *Central Bank*[75] and the absence of any reference to aiding and abetting under RICO.[76] As one district court noted, given the fact that the RICO civil action was expressly created by the statute,[77] there is no reason to believe that the omission of language in RICO covering aiders and abettors was inadvertent.[78]

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[73] *Id.,* 35 F.3d at 41. See also, Dayton Monetary Associates v. Donaldson, Lufkin & Jenrette Securities Corp., 1995 U.S. Dist. LEXIS 1198 (S.D.N.Y. Feb. 1, 1995) (if a person aids and abets a criminal predicate act, and is guilty as a principal in such racketeering activity, the aider and abettor may face civil liability under RICO).

[74] See, e.g.:

Second Circuit: Ling v. Deutsche Bank, 2005 U.S. Dist. LEXIS 9998, at *11 (S.D.N.Y. May 26, 2005) ("[T]he law is clear" that there is no private cause of action for aiding and abetting a RICO violation); Lippe v. Bairnco Corp., 218 B.R. 294 (S.D.N.Y. 1998) (*Central Bank of Denver* forecloses aiding and abetting liability for a civil RICO violation and citing cases).

Third Circuit: Pennsylvania Ass'n of Edwards Heirs v. Rightenour, 235 F.3d 839 (3d Cir. 2000) (the reasoning in *Rolo* applies to common law-based RICO civil aiding and abetting claims as well); Rolo v. City Investing Co. Liquidating Trust, 155 F.3d 644, 656-657 (3d Cir. 1998).

Fourth Circuit: In re American Honda Motor Co., Inc. Dealerships Relations Litigation, 965 F. Supp. 716, 723 (D. Md. 1997) (an allegation that a party had aided and abetted the conduct of an enterprise under Subsection 1962(c) did not survive *Central Bank of Denver*).

Fifth Circuit: In re MasterCard International Inc., 132 F. Supp.2d 468, 494-495 (E.D. La. 2001); ("[w]ithout further guidance from the higher court, this Court finds that aiding and abetting liability under § 1962(c) was eliminated by the Court's holding in *Central Bank*.").

Sixth Circuit: Wuliger v. Liberty Bank, N.A., 2004 U.S. Dist. LEXIS 27353, at *31 (N.D. Ohio March 4, 2004) ("[T]his court finds there is no private right of action for aiding and abetting in violation of RICO.").

Seventh Circuit: Cobbs v. Sheahan, 385 F. Supp.2d 731, 739 (N.D. Il. 2005) ("[W]e turn to the language of § 1962(c) and find no evidence that Congress intended to permit aiding and abetting liability."); Jubelirer v. Mastercard International, Inc., 68 F. Supp.2d 1049, 1053-1054 (W.D. Wis. 1999); Soranno v. New York Life Insurance Co., 1999 WL 104403 at *7 (N.D. Ill. Feb. 24, 1999).

[75] Rolo v. City Investing Co. Liquidating Trust, 155 F.3d 644, 656-657 (3d Cir. 1998).

[76] Department of Economic Development v. Arthur Andersen & Co., 924 F. Supp. 449, 468 (S.D.N.Y. 1996).

[77] *Id.,* 924 F. Supp. at 475-476.

[78] *Id.*

Although this approach already commands a majority among courts that have considered the issue,[79] it is not unanimous. For example, two district court decisions in the Seventh Circuit have refused to reject aiding and abetting claims,[80] reasoning that Subsection 1962(c)'s prohibition against "directly or indirectly" participating in illegal activities supplies the equivalent of a statutory grant of aiding and abetting liability.[81]

Nevertheless, it still remains for the lower courts to further delineate, in light of *Reves*, which actions by professionals constitute sufficient participation in the operation or management of the enterprise to give rise to liability under Subsection 1962(c). Many post-*Reves* decisions have rejected allegations that professionals participated in the operation or management of an enterprise sufficiently to give rise to liability under Subsection 1962(c).[82] In fact, the Second Circuit has noted that the *Reves* "operation or management" requirement makes it unlikely that an outsider could be subjected to RICO liability.[83] Similarly, the Third Circuit found that an accounting firm did not participate in the affairs of an enterprise merely because it performed accounting services, attended Board meetings, and provided computerized and financial services to the enterprise.[84] Rejecting plaintiff's RICO claim,[85] the court concluded that the essence of the plaintiff's allegation was that the accounting firm had performed "materially

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[79] See also, Hayden v. Paul, Weiss, Rifkind, Wharton & Garrison, 955 F. Supp. 248, 256 (S.D.N.Y. 1997); Sundial International Fund Ltd. v. Delta Consultants, Inc., 923 F. Supp. 38 (S.D.N.Y. April 22, 1998) (aiding and abetting liability in connection with securities fraud cannot be a basis for liability under RICO).

[80] See: American Automotive Accessories, Inc. v. Fishman, 991 F. Supp. 987, 993 n.7 (N.D. Ill. 1998); American Automotive Accessories, Inc. v. Fishman, 1996 U.S. Dist. LEXIS 12207, at *18 (N.D. Ill. Aug. 22, 1996).

[81] *American Automotive Accessories*, 1996 U.S. Dist. LEXIS 12207, at *18.

[82] See, e.g.: Perlberger v. Perlberger, 32 F. Supp.2d 197, 205-209 (E.D. Pa. 1998) (Subsection 1962(c) claim against accountants providing nothing more than accounting services to an enterprise failed as a matter of law), *vacated in part and modified in part on other grounds* 34 F. Supp.2d 282 (E.D. Pa. 1998); Madanes v. Madanes, 981 F. Supp. 241, 256-257 (S.D.N.Y. 1997) (dismissing Subsection 1962(c) claim against an attorney because he fit the description of an outsider providing professional services to the alleged RICO enterprise, and concluding that providing important services to an enterprise is not the same as directing its affairs even when the provision of those services is essential to the operation of the enterprise; knowing concealment of the fraudulent activities of the enterprise did not change this result).

[83] Vickers Stock Research Corp. v. Quotron Systems, Inc., 1997 U.S. Dist. LEXIS 10837 (S.D.N.Y. July 25, 1997), *aff'd without opinion* (2d Cir. Aug. 24, 1998).

[84] University of Maryland v. Peat, Marwick Main & Co., 996 F.2d 1534, 1539 (3d Cir. 1993). See also, In re Phar-Mor, Inc., 893 F. Supp. 484, 487-488 (W.D. Pa. 1995) (rejecting claim that Coopers & Lybrand was engaged in the operation or management of the enterprise or that it knowingly directed or engaged in fraudulent conduct; and finding allegations that it consciously ignored warnings is insufficient).

[85] *University of Maryland*, 996 F.2d at 1539.

deficient financial services," not that it had any part in operating or managing the affairs of the enterprise.[86]

In *Nolte v. Pearson*[87] the Eighth Circuit decided that an attorney had not participated in the conduct of the affairs of an enterprise where he merely prepared offering documents and included facts provided to him by the promoters.[88] Subsequently, the Eighth Circuit observed that furnishing a client with ordinary legal assistance would not normally rise to the level of participation sufficient to satisfy *Reves*, but cautioned that attorneys should not conclude from this statement that they could never be liable under RICO for associating with an enterprise.[89] The Ninth Circuit came to the same conclusion,[90] adding that whether the attorney performed his services "well or poorly, properly or improperly, [was] irrelevant to the *Reves* test."[91] However, a district court in the Third Circuit denied a motion to dismiss where the plaintiff alleged that the defendant attorney had the power to direct his clients to take certain actions and engaged in behavior that went beyond the provision of legal services.[92]

The Sixth Circuit has found that a bank's performance of services for an individual alleged to have defrauded customers did not support an inference that the bank had participated in the operation or management of the enterprise.[93] Similarly, the Eighth Circuit held that "simply because a bank *allows* a heavily indebted customer to take actions such as overdrafts and late note payments that the bank might prevent by exercising its formidable rights as creditor is not evidence that the bank controlled the customer's operations and management."[93.1] In another decision, the Sixth Circuit held that an accountant/sales representative did not participate in the operation or management of an enterprise, or have any part in directing its affairs,

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[86] *Id.* See also, Sikes v. American Telephone & Telegraph Co., 179 F.R.D. 342, 354-355 (S.D. Ga. 1998) (rejecting the contention that commission of the predicate acts must be the act which constitutes participation in the operation or management of the enterprise under *Reves*).

[87] Nolte v. Pearson, 994 F.2d 1311 (8th Cir. 1993).

[88] *Id.,* 994 F.2d at 1314, 1317.

[89] Handeen v. Lemaire, 112 F.3d 1339, 1348-1349 (8th Cir. 1997).

[90] Hannelure Baumer v. Pachl, 8 F.3d 1341, 1344-1345 (9th Cir. 1993).

[91] *Id.*, 8 F.3d at 1344. See also, Azrielli v. Cohen Law Offices, 21 F.3d 512, 521-522 (2d Cir. 1994) (attorney was not liable where he did not manage or control enterprise).

[92] Mruz v. Caring, Inc., 991 F. Supp. 701, 719-720 (D.N.J. 1998).

[93] McNew v. People's Bank of Ewing, 995 F.2d 540, 1993 U.S. App. LEXIS 26216 (6th Cir. July 6, 1993) (table op.).

[93.1] Dahlgren v. First National Bank of Holdrege, 533 F.3d 681 (8th Cir. 2008) (noting it has "not found any post-*Reves* case in which a bank or financial services company was held to have conducted the affairs of a RICO enterprise that was an unrelated customer of the bank").

merely by selling leases for the enterprise and receiving undisclosed commissions on his sales.[94]

Similarly, a Third Circuit district court found that the degree to which an enterprise relied on the services of a real estate appraiser was irrelevant in determining whether or not the appraiser operated or managed the enterprise.[95] A federal district court in Iowa, in *De Wit v. Firstar Corp.*,[96] held that a bank that performed functions which were the "cornerstone" of the enterprise and that decided who among the investors would be paid nevertheless did not participate in the operation or management of the enterprise.[97] In *De Wit*, the court found the fact that the RICO enterprise might not have been able to function without the banking scheme in place was not dispositive, stating that "even provision of services essential to the operation of the RICO enterprise itself is not the same as participating in the conduct of the affairs of the enterprise."[98]

In summary, most of the recent cases addressing the issue of Subsection 1962(c) liability of lawyers, accountants, and other professionals for participating in the operation or management of an enterprise have found such professionals not subject to RICO liability.[99] In

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[94] Stone v. Kirk, 8 F.3d 1079, 1080, 1092 (6th Cir. 1993).

[95] Fidelity Federal Savings & Loan Ass'n v. Felicetti, 830 F. Supp. 257, 259-261 (E.D. Pa. 1993).

[96] De Wit v. Firstar Corp., 879 F. Supp. 947 (N.D. Iowa 1995).

[97] *Id.*, 879 F. Supp. at 966.

[98] *Id.*

[99] See, e.g.:

Second Circuit: Hayden v. Paul, Weiss, Rifkind, Wharton & Garrison, 955 F. Supp. 248, 254 (S.D.N.Y. 1997) (dismissing plaintiffs' Subsection 1962(c) claims where they did not allege facts permitting a rational inference that the defendant participated in the operation or management of a RICO enterprise and noting that it was "well established" that professional services rendered by outsiders to a racketeering enterprise were not sufficient to satisfy the participation requirements of RICO); Friedman v. Hartmann, 1996 U.S. Dist. LEXIS 11668 (S.D.N.Y. Aug. 13, 1996).

Third Circuit: Schuylkill Skyport Inn, Inc. v. Rich, 1996 U.S. Dist. LEXIS 12655 (E.D. Pa. Aug. 20, 1996) (holding the position of assistant secretary is not enough to satisfy the operation or management requirement; claims against an accountant and corporate attorneys were also rejected as they failed to satisfy the operation or management of test). See also, Mayo, Lynch & Associates, Inc. v. Pollack, 351 N.J. Super. 486, 799 A.2d 12, 22 (2002) ("Pollack's rendering legal opinions, together with failing to disclose that the bonds were fraudulent, are not evidence that he directed the affairs of the enterprise. While the services were rendered incompetently and possibly dishonestly this does not impute culpability under *Reves*.").

Fifth Circuit: In re Taxable Municipal Bond Securities Litigation, 1993 U.S. Dist. LEXIS 17978 (E.D. La. Dec. 13, 1993).

Eighth Circuit: Progressive Northern Insurance Co. v. Alivio Chiropractic Clinic, Inc., 2005 U.S. Dist. LEXIS 27538 (D. Minn. Oct. 24, 2005).

Seventh Circuit: MCM Partners, Inc. v. Andrews-Bartlett & Associates, 62 F.3d 967, 979 (7th Cir. 1995).

fact, several courts have even concluded that lawyers may be substantially involved in an enterprise's activities without becoming liable under Subsection 1962(c).[100] While an attorney's provision of legal services generally does not constitute operation or management of an enterprise even if the advice facilitates a fraudulent scheme, an attorney may, however, be held liable under RICO where his or her "actions are unrelated to representation of a client or demonstrate a direct and independent role in the affairs of the enterprise."[101]

The fact that a professional might have violated the professional standards of his or her particular field is largely irrelevant in considering the operation or management issue.[102] Rather, the issue is one of control. Thus, in *Department of Economic Development v. Arthur Andersen & Co.*[103] the court considered an allegation that the defendants' accountants had participated in the operation and management of the enterprise. The court noted that *Reves* had made it difficult to find outsiders liable under Subsection 1962(c) and that outside professionals who provide important services to an enterprise are not treated as if they direct the affairs of the enterprise.[104] The court recognized that some plaintiffs had argued that an outside professional can participate in the operation or management of a RICO enterprise by knowingly concealing the enterprise's fraudulent activities,[105] but the court rejected that argument, finding a difference between actual-

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Ninth Circuit: Webster v. Omnitron International, Inc., 79 F.3d 776, 789 (9th Cir. 1996).

Tenth Circuit: Bancoklahoma Mortgage Corp. v. Capital Title Co., 194 F.3d 1089, 1101-1102 (10th Cir. 1999) (defendant title companies did not participate in the conduct of the alleged enterprise).

But see: Cohen v. Wolgin, 1995 U.S. Dist. LEXIS 972 (E.D. Pa. Jan. 24, 1995) (accountants for a real estate developer acted in the chain of command and not as an independent entity providing accounting services when the developer misrepresented the financial condition of the company to its creditors); Clark v. Milam, 847 F. Supp. 409, 417 (S.D. W. Va. 1994) (auditors who allegedly concealed a racketeering scheme could be liable where their concealment was integral to the continuing operations of the enterprise; even if auditors were not the primary agent of control, they could still participate in control).

[100] See, e.g., Friedman v. Hartmann, 1996 U.S. Dist. LEXIS 11668 (S.D.N.Y. Aug. 8, 1996) (citing cases).

[101] Turkish v. Kasenetz, 964 F. Supp. 689, 694 (E.D.N.Y. 1997). See also, San Francisco Bay Area Rapid Transit District v. Spencer, 2005 U.S. Dist. LEXIS 42096, at *18 (N.D. Cal. Sept. 6, 2005) ("[Plaintiff] alleges that [the attorney defendant] was involved throughout the entire existence of the . . . joint venture, and was an active participant in directing the fraudulent scheme.").

[102] In re Taxable Municipal Bond Securities Litigation, N. 99 *supra,* 1993 U.S. Dist. LEXIS 17978, at *12 (citing *Felicetti*, N. 94 *supra,* 830 F. Supp. at 261).

[103] Department of Economic Development v. Arthur Andersen & Co., 924 F. Supp. 449 (S.D.N.Y. 1996).

[104] *Id.*, 924 F. Supp. at 465-466.

[105] *Id.*

ly controlling an enterprise and associating with an enterprise in ways that do not involve control.[106] The court concluded that only the former is sufficient under *Reves* because "the test is not involvement but control."[107] It found that even an outsider with the ability to exercise "substantial persuasive power to induce management to take certain actions does not exercise control over the enterprise within the meaning of *Reves*."[108]

Of course, where the enterprise itself is a law firm or an accounting firm there may be a different result. Thus, in *Napoli v. United States*[109] the Second Circuit held that attorneys who participated in the core activities that constituted the affairs of the law firm—trying cases and obtaining (fraudulent) settlements—exercised a significant degree of direction over the affairs of the enterprise and had played a part in directing the affairs of the enterprise sufficient for purposes of Subsection 1962(c).[110] Similarly, in *Reynolds v. Condon*[111] a district court in Iowa found that a law firm was properly alleged to be a RICO enterprise.[112] Although the court recognized that some courts were distressed by RICO's reach beyond the activities of organized crime, it concluded that "the Supreme Court regarded the extensive reach of RICO as an indication of the breadth Congress intended the statute to have, not as a defect in its drafting."[113] The *Reynolds* court, however, rejected the plaintiff's allegation that certain clients of the firm were also liable because they allegedly managed the firm's affairs.[114] The court stated that it could not "conceive of a construction of the 'conduct' requirement that would turn a client's demands upon a lawyer into conduct of the law firm."[115] Nor was a given defendant's status as a partner in the law firm sufficient in itself to give rise to liability.[116] The court noted that:

> "[s]imply by alleging that an attorney acted on behalf of a client, whether the means used were fair or foul, and that in doing so, the attorney used the facilities of the firm, does not allege that the

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[106] *Id.*
[107] *Id.* (Citation omitted.)
[108] *Id.*, 924 F. Supp. at 467. (Citation omitted.)
[109] Napoli v. United States, 45 F.3d 680 (2d Cir. 1995).
[110] *Id.,* 45 F.3d at 683-684 (investigators who provided substantial assistance to lawyers who litigated and settled fraudulent lawsuits were involved in playing a part in the direction of the affairs of the enterprise).
[111] Reynolds v. Condon, 908 F. Supp. 1494 (N.D. Iowa 1995).
[112] *Id.*, 908 F. Supp. at 1509-1510.
[113] *Id.*, 908 F. Supp. at 1507.
[114] *Id.*, 908 F. Supp. at 1511.
[115] *Id.*
[116] *Id.*

attorney has conducted *the affairs of the law firm* in which she is a partner, or that the clients indirectly conducted *the affairs of the law firm* through the attorney, *through racketeering activity.*"[117]

Thus, ultimately the court dismissed the RICO claim in its entirety.[118] Similarly, the Ninth Circuit has held that the *Reves* test was not satisfied for an attorney or her law firm—both part of the enterprise—because "[s]imply performing services for the enterprise does not rise to the level of direction, whether one is 'inside' or 'outside.'"[118.1]

A number of other post-*Reves* decisions have considered whether persons inside an organization were sufficiently involved to be deemed to have operated or managed the enterprise. In *United States v. Viola*[119] the Second Circuit concluded that, under *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 section 1962(c)."[120] In that case, the court held that although the defendant's "acts might have contributed to the success of the RICO enterprise, he simply did not come within the circle of people who operated or managed the enterprise's affairs."[121] Recognizing that *Reves* attaches liability to those down the "ladder of operation" who nonetheless play some management role, the court concluded that the defendant "was not on the ladder at all, but rather, as . . . janitor and handyman, was sweeping up the floor underneath it."[122]

In *United States v. Oreto*,[123] however, the First Circuit rejected the defendant's claim that "mere employees," by definition, do not participate in the operation or management of an enterprise.[124] The court noted that *Reves* focused on the liability of an outside advisor, and cautioned that this "horizontal" analysis could not automatically be translated into a "vertical" analysis of how far RICO liability might extend down an organizational ladder within an enterprise.[125]

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[117] *Id.*, 908 F. Supp. at 1512. (Emphasis added.)

[118] *Id.*

[118.1] Walter v. Drayson, 538 F.3d 1244, 1249 (9th Cir. 2008).

[119] United States v. Viola, 35 F.3d 37 (2d Cir. 1994).

[120] *Id.,* 35 F.3d at 41.

[121] *Id.*, 35 F.3d at 43.

[122] *Id.* See also: United States v. Norton, 17 Fed. Appx. 98, 102 (4th Cir. 2001), *cert. denied* 534 U.S. 1095 (2002) (vacating a Section 1962(c) conviction because the district court improperly instructed the jury that it could convict the defendant if it found that he "merely performed acts that were necessary or helpful to the enterprise"); Soanes v. Empire Blue Cross/Blue Shield, 970 F. Supp. 230, 239-241 (S.D.N.Y. 1997) (where defendant's participation was limited to negotiating and procuring a contract there was no Subsection 1962(c) liability).

[123] United States v. Oreto, 37 F.3d 739 (1st Cir. 1994).

[124] *Id.*, 37 F.3d at 750-751.

[125] *Id.*, 37 F.3d at 750.

Although the court found no evidence that the individual defendants had "participated in the enterprise's decision-making," it did find that they and other persons who collected loans that were issued as part of a loan sharking operation were "plainly integral to carrying out the collection process."[126] Accordingly, the court concluded that nothing in *Reves* precluded a finding that "one may take part in the conduct of an enterprise by knowingly implementing decisions, as well as by making them."[127] The court posited that, "[w]e think Congress intended to reach all who participate in the conduct of [a loan sharking enterprise], whether they are generals or foot soldiers."[128]

In a later decision, the First Circuit stated that the *Reves* analysis does not apply where a party is determined to be inside a RICO enterprise.[129] Similarly, a Seventh Circuit district court concluded that where the defendant is alleged to be a lower-rung insider participant, the absence of authority or power to control the enterprise does not preclude the application of Subsection 1962(c). Such a requirement, the court held, applies only to outside defendants.[130]

While the issue of whether or not there is aiding or abetting liability under RICO arises only with respect to civil actions (because it is expressly permitted in criminal RICO actions by virtue of 18 U.S.C. Section 2), the *Reves* operation or management test applies to both civil and criminal RICO actions. The same is true for hybrid government/civil RICO actions. In *United States v. Allen*,[131] for

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[126] *Id.*

[127] *Id.*

[128] Id., 37 F.3d at 751. See also:

First Circuit: United States v. Marino, 277 F.3d 11, 34 (1st Cir. 2002) (approving the district court's jury charge stating that "[a]n enterprise is 'operated' not just by upper management but also by lower-rung participants in the enterprise who are under the direction of upper management").

Second Circuit: United States v. Wong, 40 F.3d 1347, 1373-1374 (2d Cir. 1994) (a defendant can act under the direction of superiors in a RICO enterprise and still participate in the operation of the enterprise under Subsection 1962(c)); United States v. Private Sanitation Industry Ass'n of Nassau/Suffolk, Inc., 1997 U.S. Dist. LEXIS 16240(E.D.N.Y. Sept. 30, 1997) (low-level employees providing substantial assistance to enterprise managers were liable as RICO enterprise participants, as well as those exhibiting autonomous authority by carrying out acts in furtherance of the enterprise's goals without direct instruction from the enterprise's managers); Tribune Co. v. Purcigliotti, 869 F. Supp. 1076 (S.D.N.Y. 1994) (plaintiff adequately alleged participation in the conduct of the affairs of an enterprise where individuals were alleged to have operated the enterprise under the direction of decision makers).

Ninth Circuit: Moreland v. Behl, 1995 U.S. Dist. LEXIS 4633 (N.D. Cal. March 22, 1995) ("RICO liability is not limited to upper management since an enterprise is operated 'also by lower-rung participants . . . who are under the direction of upper management.'"). (Citation omitted.)

[129] United States v. Owens, 167 F.3d 739, 753-754 (1st Cir. 1999).

[130] Williams v. Ford Motor Co., 980 F. Supp. 938, 942 (N.D. Ill. 1997).

[131] United States v. Allen, 155 F.3d 35 (2d Cir. 1998).

example, the Second Circuit discussed the circumstances in which summary judgment would be appropriate in determining whether defendants were involved in management or operation of an enterprise under Subsection 1962(c).

There were two sets of defendants in *Allen*. One group argued in opposition to the government's motion for summary judgment that although the facts permitted an inference that they were involved in the management or operation of the enterprise, one could also infer that although they were involved in bribery they took no part in the direction of the activity.[132] The other set of defendants also opposed summary judgment against them, arguing that the evidence suggested only that they accidentally discovered a bribery scheme and insisted that the benefits be provided to them on the same terms as were given to members of the enterprise.[133] The court observed that the word "operating" in the *Reves* test referred to "directing" as opposed to "doing" an act.[134] The Second Circuit concluded that the only principle to be drawn from the various post-*Reves* decisions was that "the commission of crimes by lower level employees of a RICO enterprise may be found to indicate participation in the operation or management of the enterprise but does not compel such a finding."[135] The court therefore declined to grant summary judgment against the first group of defendants, reasoning that where there is still a question as to whether a defendant directed the affairs of an enterprise, that question is to be assessed by the finder of fact, taking into account all of the relevant circumstances.[136] The court also refused to grant summary judgment against the second group of defendants on the Government's theory that they operated an enterprise by bribing it.[137] The Court decided that whether the defendants' bribes demonstrated operation or management of the enterprise was an issue for the trier of fact.[138]

In a 1997 New York district court case, plaintiffs alleged that the payment of kickbacks was sufficient to constitute participation in and control over a RICO enterprise.[139] The court distinguished various post-*Reves* decisions holding the payment of bribes to be sufficient by noting that all of those cases involved the use of bribery "to corrupt

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[132] *Id.*, 155 F.3d at 40.
[133] *Id.*
[134] *Id.*, 155 F.3d at 41.
[135] *Id.*, 155 F.3d at 42.
[136] *Id.*
[137] *Id.*, 155 F.3d at 43.
[138] *Id.*
[139] Mason Tenders District Council Pension Fund v. Messera, 958 F. Supp. 869, 875 (S.D.N.Y. 1997).

and induce criminal activity by an otherwise legitimate organization."[140] In the case before it, the court did not consider the bribes paid by the defendants to be an exertion of control over the pension fund enterprise because the bribes influenced only the choice to hire certain law firms to manage pension funds and, in the court's view, such a limited influence over the decision-making and functioning of an enterprise was not sufficient to satisfy *Reves*.[141]

In a Ninth Circuit case, the court dismissed a Subsection 1962(c) claim against a mayor on the grounds that plaintiff's allegations of wrongful conduct did not relate to the mayor's management of the alleged enterprise, but rather to allegations that the enterprise controlled him.[142] According to the court, this failed to satisfy the *Reves* standard.

Another issue arising in connection with the "operation or management" test is the degree to which lower-level employees may be subject to liability. A district court in the Seventh Circuit noted that lower-echelon management may operate an enterprise by "knowingly implementing decisions [of upper-echelon management], as well as by making them."[143] The court found that an assistant teller manager for a bank, involved in making and carrying out decisions for the bank, was a "management level" employee.[144]

A district court in Maryland similarly concluded that employees who make decisions or carry them out and are subject to the direction of management, but who commit racketeering acts without the explicit or tacit approval of upper management, can satisfy the operation and management test.[145] In this court's view, nothing in *Reves* limits RICO liability to lower-level employees who commit predicate acts at the express direction of upper management.[146] Thus, a lower-level employee who committed a predicate act was liable even if upper management neither knew nor approved of the employee's racketeering activity.[147]

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[140] *Id.,* 958 F. Supp. at 883.

[141] *Id.*, 958 F. Supp. at 884.

[142] Pedrina v. Chun, 97 F.3d 1296, 1300-1301 (9th Cir. 1996).

[143] LaSalle Bank Lake View v. Seguban, 937 F. Supp. 1309, 1321-1322 (N.D. Ill. 1996) (quoting MCM Partners, Inc. v. Andrews-Bartlett & Associates, Inc., 62 F.3d 967, 978 (7th Cir. 1995)).

[144] *Id.*, 937 F. Supp. at 1322. See also, Whaley v. Autoclub Insurance Ass'n, 129 F.3d 1266, 1997 WL 720451 (6th Cir. Nov. 12, 1997) (table op.) (a defendant who was a participating member of a facility whose representatives sat on the board of governors of an entity did not participate in and control the enterprise).

[145] Toucheque v. Price Brothers Co., 5 F. Supp.2d 341 (D. Md. 1998).

[146] *Id.*, 5 F. Supp.2d at 348.

[147] *Id.*

[e]—Pre-*Reves* Decisions

Although *Reves* sets the standard for assessing outsider liability under Subsection 1962(c), it is important to notice that it does not as directly address the extent of an insider's participation needed to trigger liability under that subsection, to which much pre-*Reves* law is still relevant.[148] For example, prior to *Reves* it had been established that the participation element did not necessarily require that the enterprise benefit from the pattern of racketeering activity. The proper emphasis was on "whether the affairs of the [enterprise] were *conducted* through the pattern of racketeering activity."[149] Even though courts that construe this phrase vary as to whether to focus on the words "participation," "conduct" or "through," all courts agree that Subsection (c) requires a claimant to demonstrate a meaningful nexus between the affairs of an enterprise and the pattern of racketeering activity. Whether this requirement has been satisfied depends on the position of the defendant in the enterprise and on whether the predicate offenses are related to the enterprise's activities. Hence, although the circuits did not agree on a single test for determining what constitutes "through a pattern of racketeering,"[150] the following approaches are illustrative of the pre-*Reves* case law that may still be pertinent to aspects of insider liability under Subsection 1962(c).

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[148] See, e.g.:

Second Circuit: United States v. Scotto, 641 F.2d 47, 54 (2d Cir. 1980) (one conducts the activities of an enterprise through a pattern of racketeering when that person's position enables him or her to commit the predicate acts or the predicate acts are related to the activities of the enterprise), *overruled in part by* Reves v. Ernst & Young, 507 U.S. 170, 113 S.Ct. 1163, 122 L.Ed.2d 525 (1993).

Fifth Circuit: United States v. Kimble, 719 F.2d 1253, 1256 (5th Cir. 1983) (requiring the government to prove that the defendants agreed to participate in the conduct of the affairs of the enterprise by committing at least two predicate crimes in a Subsection 1962(d) prosecution); United States v. Welch, 656 F.2d 1039, 1057 (5th Cir. 1981) (evidence must show that defendant committed at least two predicate crimes to constitute participation in the affairs of an enterprise satisfying Subsection 1962(c)).

[149] United States v. Webster, 669 F.2d 185, 186-187 (4th Cir. 1982). *Accord:*

Second Circuit: United States v. Scotto, 641 F.2d 47, 54 (2d Cir. 1980), *overruled in part by* Reves v. Ernst & Young, 507 U.S. 170, 113 S.Ct. 1163, 122 L.Ed.2d 525 (1993).

Seventh Circuit: United States v. Ambrose, 740 F.2d 505, 512 (7th Cir. 1984) (police conducted the affairs of an enterprise where they extorted money from drug dealers).

Eleventh Circuit: United States v. Hartley, 678 F.2d 961, 991 (11th Cir. 1980).

[150] See, e.g.:

Second Circuit: United States v. Huber, 603 F.2d 387, 395-396 (2d Cir. 1979) (finding a link between the pattern of racketeering activity and the enterprise).

Fifth Circuit: United States v. Elliott, 571 F.2d 880, 899 n.23 (5th Cir. 1978) (the predicate crimes must be related to the affairs of the enterprise).

The Second Circuit had established the broadest interpretation of the "participation in the conduct" language.[151] In *United States v. Scotto*, the court stated that a sufficient nexus exists

> "when (1) one is enabled to commit the predicate offenses solely by virtue of his position in the enterprise or involvement in or control over the affairs of the enterprise, or (2) the predicate offenses are related to the activities of that enterprise."[152]

Because the Second Circuit test presented an alternative, racketeering activity that was in any way "related to" conduct of the enterprise satisfied this liberal nexus. The Ninth Circuit adopted the *Scotto* test without elaboration.[153]

Determining that the Second Circuit test was overbroad, the Fifth Circuit, in *United States v. Cauble*, modified the *Scotto* standard by replacing the "or" with an "and" to shift the emphasis to the defendant's position in the enterprise rather than the extent of the effect on the enterprise.[154] Specifically, *Cauble* held that,

> "[while t]he mere fact that a defendant works for a legitimate enterprise and commits racketeering acts while on the business premises does not establish that the affairs have been conducted 'through' a pattern of racketeering activity,"

it is sufficient if the defendant is enabled to commit the predicate offenses solely by virtue of his position in the enterprise or if the predicate offenses are related to the activities of that enterprise.[155] The Seventh Circuit joined the Fifth Circuit's modified approach.[156]

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[151] United States v. Scotto, 641 F.2d 47, 54 (2d Cir. 1980).

[152] *Id.*

[153] United States v. Yarbrough, 852 F.2d 1522, 1544 (9th Cir. 1988).

[154] United States v. Cauble, 706 F.2d 1322, 1332-1333 (5th Cir. 1984). See also: *Third Circuit:* United States v. Janotti, 729 F.2d 213, 226 (3d Cir. 1984).

Seventh Circuit: Overnight Transportation Co. v. Truck Drivers Union Local No. 705, No. 89-1443 (7th Cir. June 12, 1990) (Subsection 1962(c) claim dismissed against defendant drivers' union local when plaintiffs failed to allege facts which demonstrate the defendant union's relationship with the enterprise "facilitated" the commission of predicate acts); United States v. Conn, 769 F.2d 420, 425 (7th Cir. 1985) (defendant's duties as court clerk and use of court's (enterprise's) facilities were sufficient to prove participation "through" pattern of racketeering activity); United States v. Blackwood, 768 F.2d 131, 137-138 (7th Cir. 1985).

[155] *Id.*

[156] United States v. Blackwood, 768 F.2d 131, 137-138 (7th Cir. 1985).

Finally, the Eighth Circuit[157] and the District of Columbia Circuit[158] had held that in order to be liable under Subsection 1962(c), a defendant must, through a pattern of racketeering activity, have exercised significant control over and within an enterprise and participated not merely in the enterprise's affairs, but in the conduct of those affairs themselves.[159] The latter court noted that:

> conduct is synonymous with 'management' or 'direction'. . . [and] thus connotes more than just some relationship to the enterprise's activity; the phrase refers to the guidance, management, direction or other exercise of control, over the course of the enterprise's affairs."[160]

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[157] Arthur Young & Co. v. Reves, 937 F.2d 1310, 1324 (8th Cir. 1992), *aff'd sub nom.* Reves v. Ernst & Young, 507 U.S. 170, 113 S.Ct. 1163, 122 L.Ed.2d 525 (1993); Bennett v. Berg, 710 F.2d 1361, 1364 (8th Cir. 1983). See also:

First Circuit: Cooperativa de Ahorro y Creditor Aguada v. Kidder, Peabody & Co., 758 F. Supp. 64, 73-74 (D.P.R. 1991) (detrimental reliance insufficient to establish the type of control necessary under the statute).

Third Circuit: T. I. Construction Co. v. Kiewit Eastern Co., 1992 WL 382306 (E.D. Pa. Aug. 5, 1992) (influence gained through extortion and mail and wire fraud does not constitute control under Subsection 1962(b)).

Seventh Circuit: Lipin Enterprises, Inc. v. Lee, 625 F. Supp. 1098, 1100 (N.D. Ill. 1985), *aff'd* 803 F.2d 322 (7th Cir. 1986) (requiring a role in the direction or management of the enterprise).

[158] Yellow Bus Lines, Inc. v. Drivers, Chauffeurs & Helpers Local Union 639, 913 F.2d 948, 954 (D.C. Cir. 1990) (*en banc*) (because union protest was not facilitated by participants' role in enterprise, alleged racketeering activities were not conducted through the employer).

[159] See: *Arthur Young & Co*., N. 157 *supra,* 937 F.2d at 1324*; Yellow Bus Lines*, N. 158 *supra,* 913 F.2d at 954. Although the Supreme Court in *Reves* adopted the "operation or management" test, it should be noted that the Court stated that "we disagree with the suggestion of the Court of Appeals for the District of Columbia Circuit that § 1962(c) requires '*significant control* over or within an enterprise.'" Reves v. Ernst & Young, N. 157 *supra,* 507 U.S. at 179 n.4 (citing *Yellow Bus Lines*, 913 F.2d at 954). (Emphasis added). The *Reves* Court determined that RICO liability is not limited to those with primary responsibility for the enterprise's affairs, although "*some* part in directing the enterprise's affairs is required." *Id*. at 179. (Emphasis added.)

[160] Yellow Bus Lines, N. 158 *supra,* 913 F.2d at 954. Similarly, a court in the Southern District of New York declined to dismiss an indictment under Subsection 1962(c) against a broker who claimed he did not conduct or participate in the enterprise's affairs, citing the statute's prohibition of "indirect" participation. United States v. Chovanec, 467 F. Supp. 41, 44 (S.D.N.Y. 1979). See also:

Fifth Circuit: United States v. Elliott, 571 F.2d 880, 903 (5th Cir. 1978) (RICO applies to insiders and outsiders who participate directly and indirectly in the enterprise's affairs).

Eleventh Circuit: United States v. Watchmaker, 761 F.2d 1459, 1476 (11th Cir. 1985) (RICO applies to those merely "associated with" the enterprise on a temporary basis where each defendant participated in affairs of the enterprise through a series of "racketeering" acts).

Deflecting criticism of the "operation and management" test from some other circuits, the court noted that this construction allowed for participation in the conduct of an enterprise's affairs by "outsiders" as well as "insiders."

Of course, it was in essence the Eighth Circuit's test that the Supreme Court adopted in *Reves*. But the earlier cases remain relevant in highlighting the fact that showing "operation or management" of the enterprise is not necessarily sufficient to establish liability under Subsection 1963(c) if that control cannot be meaningfully related to the racketeering activity.

Moreover, echoes of prior tests can still be heard in the circuits' interpretations of *Reves*. Thus, the Second Circuit[161] and the Fifth Circuit[162] continue to interpret "operation and management" more liberally than most others.[163]

[4]—Conspiracy

Subsection 1962(d) makes it unlawful for any person to conspire with any other person to violate Subsections 1962(a), 1962(b), or 1962(c). In a RICO conspiracy, as in other conspiracies, it is the agreement that is necessary for a conviction. Therefore, a defendant may be guilty of conspiracy even if he or she did not commit the substantive acts that could constitute violations of Subsections 1962(a), (b), or (c).[164] An agreement to commit such acts is sufficient.[165]

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[161] See, e.g., United States v. Diaz, 176 F.3d 52 (2d Cir. 1999).

[162] See, e.g., United States v. Posada Rios, 158 F.3d 832 (5th Cir. 1988).

[163] See, e.g., Goren v. New Vision International, Inc., 156 F.3d 721, 728 (7th Cir. 1998).

[164] United States v. Alonso, 740 F.2d 862, 871-872 (11th Cir. 1984) (commission of substantive offenses unnecessary for conviction under RICO conspiracy section).

Cf.:

Third Circuit: United States v. Palmeri, 630 F.2d 192, 200-201 (3d Cir. 1980) (it is not necessary that the acts establishing a conspiracy be illegal).

Fifth Circuit: United States v. Sutherland, 656 F.2d 1181, 1186-1187 n.4 (5th Cir. 1981) (Subsection 1962(d) does not require the government to prove that defendants committed two predicate acts, but rather that one of the conspirators committed an overt act furthering the conspiracy).

Ninth Circuit: United States v. Fiander, 547 F.3d 1036 (9th Cir. 2008) (defendant could not be prosecuted for a substantive violation of the Contraband Cigarette Trafficking Act, nor a substantive RICO offense based on the CCTA, because of a treaty with the Yakama Nation, of which he was a member; however, he could be prosecuted for a RICO conspiracy in which the racketeering activity is contraband cigarette trafficking because other members of the conspiracy were subject to the CCRA and he agreed to facilitate the commission of the crime of contraband cigarette trafficking).

[165] Some courts previously required proof of one or more overt acts. See, e.g.: Medallion TV Enterprises, Inc. v. SelecTV of California, Inc., 627 F. Supp. 1290, 1298 (C.D. Cal. 1986) (requiring one or more overt acts causing injury to the plain-

Unlike the general federal conspiracy statute,[166] a RICO conspiracy does not even require proof of an overt act.[167]

A conspiracy to violate RICO is not the same as a conspiracy to commit the predicate acts. Rather, it is a conspiracy to commit one of the activities prohibited under Subsections 1962(a), (b), or (c), i.e., using the racketeering pattern to invest, acquire, or participate in an enterprise. Thus, there must be an agreement to employ a pattern of racketeering activity, or the proceeds thereof, so as to effect an enterprise in one of the three ways set forth in those sections. Formerly, there was a conflict among the circuits as to whether a conspirator must personally agree to commit two predicate acts forbidden by RICO in order to be liable for a conspiracy. The First and Second Circuits required that the defendant himself commit or agree to commit two or more predicate acts in order to be liable for conspiracy.[168] Eight other Courts of Appeals did not require such an agreement.[169] The Supreme Court has now stated, however, that "[a] conspiracy may exist even if a conspirator does not agree to commit or facilitate

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tiff and in furtherance of the conspiracy in order for a defendant to be liable under Subsection 1964(c)), *aff'd* 833 F.2d 1360 (9th Cir. 1987); Greyhound Financial Corp. v. Willyard, 1989 U.S. Dist. LEXIS 16040, at *132 (D. Utah Dec. 26, 1989). But see, Salinas v. United States, 522 U.S. 52, 118 S.Ct. 469, 139 L.Ed.2d 352 (1997).

[166] 18 U.S.C. § 371.

[167] *Salinas v. United States*, N. 165 *supra*; United States v. Harriston, 329 F.3d 779, 783 (11th Cir. 2003); United States v. Barton, 647 F.2d 224, 237 (2d Cir. 1981). See also, United States v. Glecier, 923 F.2d 496, 500 (7th Cir. 1991) ("Neither overt acts . . . nor specific predicate acts that the defendant agreed personally to commit . . . need to be alleged or proved for a section 1962(d) offense.").

[168] *First Circuit:* United States v. Winter, 663 F.2d 1120, 1125 n.6 (1st Cir. 1981); The Overton Corp. v. Case Equipment Co., 1990 U.S. Dist. LEXIS 18275, at *15-*16 (D. Me. Dec. 20, 1990) (the absence of any allegations that the defendants formed an agreement to commit the predicate acts or an agreement to participate in the conduct of the alleged enterprise was fatal to RICO conspiracy count); Gott v. Simpson, 745 F. Supp. 765, 772 (D. Me. 1990).

Second Circuit: Hecht v. Commerce Clearing House, 897 F.2d 21, 25 (2d Cir. 1990).

[169] See, e.g.:

Third Circuit: United States v. Pugnitore, 910 F.2d 1084, 1130 (3rd Cir. 1990).

Fourth Circuit: United States v. Pryba, 900 F.2d 748, 760 (4th Cir. 1990).

Fifth Circuit: United States v. Marmalejo, 89 F.3d 1185, 1196 (5th Cir. 1996), *aff'd sub nom.* Salinas v. United States, 522 U.S. 52, 118 S.Ct. 469, 139 L.Ed.2d 352 (1997).

Sixth Circuit: United States v. Joseph, 781 F.2d 549, 554 (6th Cir. 1986).

Seventh Circuit: United States v. Neapolitan, 791 F.2d 489, 494 (7th Cir. 1986).

Ninth Circuit: United States v. Tille, 729 F.2d 615, 619 (9th Cir. 1984).

Eleventh Circuit: United States v. Carter, 721 F.2d 1514, 1519 (11th Cir. 1984).

District of Columbia Circuit: United States v. Thomas, 114 F.3d 228, 242 (D.C. Cir. 1997).

each and every part of the substantive offense."[170] Under this view, if the conspirators have a plan that calls for some individuals to perpetrate the crime and others to provide support, the supporters are as guilty as the perpetrators. Accordingly, if a conspirator adopts the goal of furthering or facilitating the conspiracy, for example, by agreeing to facilitate only some of the acts leading to the substantive offense, he may be found liable for conspiracy under RICO. In reaching this conclusion, the Supreme Court noted that:

> "the RICO conspiracy statute . . . broadened conspiracy coverage by omitting the requirement of an overt act; it did not . . . work the radical change of requiring the Government to prove that each conspirator agreed that he would be the one to commit two predicate acts."[171]

Nonetheless, there still must be an *agreement* to commit at least two predicate acts.

Courts in many circuits have held that it is sufficient that the defendant agreed to a plan that contemplated a course of action that would result in someone's committing such acts.[172] In a post-*Salinas* deci-

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[170] Salinas v. United States, 522 U.S. 52, 65, 118 S.Ct. 469, 139 L.Ed.2d 352 (1997). See also, United States v. Abed, 2000 U.S. App. LEXIS 261, at *17-*21 (4th Cir. Jan. 10, 2000).

[171] *Id.*

[172] *Third Circuit:* Rehkop v. Berwick Healthcare Corp., 95 F.3d 285, 290-291 (3d Cir. 1996) (plaintiff's termination from employment was sufficient to constitute an overt act of alleged conspiracy and an injury sustained by reason of a violation of Subsection 1962(d)); United States v. Adams, 759 F.2d 1099, 1116 (3d Cir. 1985) (to be convicted of a RICO conspiracy, defendant must agree only to the commission of the predicate acts, and need not agree to commit those acts personally).

Fourth Circuit: United States v. Pryba, 900 F.2d 748, 760 (4th Cir. 1990) (rejecting requirement that each conspirator personally commit illegal acts in furtherance of conspiracy).

Seventh Circuit: United States v. Korando, 29 F.3d 1114, 1117 (7th Cir. 1994) (requiring only that the defendant agree to operate an enterprise and that it be conducted through the commission of two predicate acts); United States v. Neapolitan, 791 F.2d 489, 494 (7th Cir. 1986) (requiring only that defendants agreed to participate in a racketeering enterprise).

Ninth Circuit: Howard v. America Online, Inc., 208 F.3d 741, 751 (9th Cir. 2000) ("To establish a violation of section 1962(d), Plaintiffs must allege either an agreement that is a substantive violation of RICO or that the defendants agreed to commit, or participated in, a violation of two predicate offenses."); Neibel v. Trans World Assurance Co., 108 F.3d 1123, 1127-1129 (9th Cir. 1997) (a civil conspiracy claim could survive even if the substantive claim did not; also, conspiring to operate or manage an enterprise qualifies as a Subsection 1962(d) violation, but conspiring with someone who is operating or managing an enterprise does not).

Tenth Circuit: Greyhound Financial Corp. v. Willyard, 1989 WL 201094 at *46 (D. Utah Dec. 23, 1989) (requiring only agreement to participate in enterprise's affairs).

sion, the Seventh Circuit noted that the touchstone of liability under Subsection 1962(d) is the agreement to participate in an endeavor which, if completed, would violate the statute.[173] Although the courts no longer require that the defendant agree to commit personally two predicate acts, a plaintiff must allege that each defendant agreed that someone would commit at least two predicate acts.[174] The First and Second Circuits have noted that it is not necessary to prove that each defendant knew all of the details or the full extent of the conspiracy.[175] Conversely, some courts refuse to allow conspiracy claims where the defendant's actions are not central to the alleged conspiracy. In one such decision the court noted that:

> "if § 1962(d) is construed so expansively as to bring within the reach of RICO every person who has committed any act related to the underlying wrongful conduct prohibited by RICO, however tangential and inconsequential, the technical restrictions placed by Congress and the courts upon claims arising (and prosecutions brought) under RICO's substantive provisions would become meaningless."[176]

Another limitation on a Subsection 1962(d) conspiracy claim is that under the doctrine of intra-corporate conspiracy, a defendant cannot conspire with his or her own employees or attorney.[177]

The Seventh, Ninth, and Eleventh Circuits have concluded that a parent corporation can conspire with its wholly-owned subsidiaries to

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Eleventh Circuit: United States v. Abbell, 271 F.3d 1286, 1299 (11th Cir. 2001) ("Agreement to participate in a RICO conspiracy can be proved in one of two ways: 1) by showing an agreement on an overall objective; or, 2) by showing that a defendant agreed personally to commit two predicate acts and therefore to participate in a single objective conspiracy."); United States v. Brazel, 102 F.3d 1120, 1138 (11th Cir. 1997) (requiring only that defendant agreed to conduct or participate in the affairs of an enterprise either by agreeing personally to commit at least two predicate acts or by agreeing to the overall objective and knowing that others were conspiring to participate in the same enterprise through a pattern of racketeering activity).

[173] Goren v. New Vision International, Inc., 156 F.3d 721, 731 (7th Cir. 1998).

[174] *Id.*

[175] See, e.g.:

First Circuit: Aetna Casualty & Surety Co. v. P & B Autobody, 43 F.3d 1456, 1994 U.S. App. LEXIS 39784 (1st Cir. Dec. 29, 1994) (table op.). At the time this case was decided, the First Circuit still required that a defendant commit or agree to commit two or more predicate offenses in order to be subject to Subsection 1962(d) liability. *Id.,* 43 F.3d at 1561-1562.

Second Circuit: United States v. Zichettello, 208 F.3d 72, 100 (2d Cir. 2000).

[176] In re American Honda Motor Co., Inc. Dealerships Relations Litigation, 965 F. Supp. 716, 724 (D. Md. 1997).

[177] Sadighi v. Daghighfekr, 36 F. Supp.2d 279, 296-298 (D.S.C. 1999).

violate Subsection 1962(d),[178] while the Fourth and Eighth Circuits have reached the opposite conclusion.[179]

The Supreme Court's decision in *Reves* has raised the issue of whether a defendant can be found liable under Subsection 1962(d) for merely conspiring with someone who is operating or managing an enterprise, or whether a defendant must actually conspire "to operate or manage an enterprise."[180] Most circuits have found that it is sufficient for a defendant to simply conspire with someone who is operating or managing an enterprise, concluding that the *Reves* "operation or management" test does not apply to Subsection 1962(d) conspiracy claims.[181]

Many courts require that, in order to support a Subsection 1962(d) claim, a plaintiff must plead its conspiracy allegations with some specificity. If a plaintiff merely submits conclusory allegations that fail to demonstrate each defendant's agreement to the commission of

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[178] See:

Seventh Circuit: Ashland Oil, Inc. v. Arnett, 875 F.2d 1271 (7th Cir. 1989).

Ninth Circuit: Webster v. Omnitriton International, Inc., 79 F.3d 776, 787 (9th Cir.), *cert. denied* 519 U.S. 865 (1996).

Eleventh Circuit: Kirwin v. Price Communications Corp., 391 F.3d 1323, 1327 (11th Cir. 2004).

But see, Fogie v. THORN Americas, Inc., 190 F.3d 889, 899 n.6 (8th Cir. 1999) (recent Seventh Circuit decisions may undercut the conclusions reached in *Ashland*).

[179] See:

Fourth Circuit: Detrick v. Panalpina, 108 F.3d 529, 544 (4th Cir. 1997) (noting, though, that "[a] well established exception, however, exists to the doctrine, namely, when the parties have 'an independent personal stake' in the conspiracy").

Eighth Circuit: Fogie v. THORN Americas, Inc., 190 F.3d 889, 898-899 (8th Cir. 1999) (relying on Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 104 S.Ct. 2731, 81 L.Ed.2d 628 (1984), and concluding that parent corporation and wholly-owned subsidiary cannot conspire to violate § 1962(d)).

[180] See Joseph, "Federal Practice: Civil RICO Conspiracy," *National Law Journal,* p. B16 (June 28, 1999).

[181] See:

Second Circuit: Napoli v. United States, 45 F.3d 680, 683-684 (2d Cir. 1995).

Third Circuit: Smith v. Berg, 247 F.3d 532, 536-537 (3d Cir. 2001).

Fifth Circuit: United States v. Posada-Rios, 158 F.3d 832, 857 (5th Cir. 1998).

Seventh Circuit: United States v. Quintanilla, 2 F.3d 1469, 1484-1485 (7th Cir. 1993). See also, Brouwer v. Raffensperger, Hughes & Co., 199 F.3d 961, 964-967 (7th Cir. 2000) (one must agree to personally facilitate the activities of those operating or managing the enterprise in order to be liable under § 1962(d)).

Ninth Circuit: United States v. Fernandez, 388 F.3d 1199, 1229-1230 (9th Cir. 2004).

Eleventh Circuit: United States v. Starrett, 55 F.3d 1525, 1547 (11th Cir. 1995).

District of Columbia Circuit: United States v. Philip Morris USA, Inc., 327 F. Supp.2d 13, 20 (D.D.C. 2004) ("[L]iability for a RICO conspiracy under Section 1962(d) does not require the same proof of participation in the 'operation or management' of the alleged RICO enterprise, just as it does not require proof of commission of all the other elements of the Section 1962(c) substantive offense.").

two or more predicate acts by some member of the conspiracy, or that each defendant knew that these predicates were part of a pattern of racketeering, the complaint is subject to dismissal.[182]

A recent New York district court case, however, held that the more liberal pleading standard contained in Fed. R. Civ. P. 8(a) governed allegations of RICO conspiracies, irrespective of the underlying predicate acts.[183] In *Gulf Coast*, plaintiff real estate developers alleged that defendant financing company misrepresented its ability to procure funding for various construction projects in order to fraudulently induce the developers to pay fees on loans that were never obtained.[184] Defendants moved to dismiss, arguing that because the predicate acts alleged by plaintiffs sounded in fraud, the developers' conspiracy allegations were subject to the heightened pleading requirements of Fed. R. Civ. P. 9(b).[185] The court ruled that the claim of RICO conspiracy alleged by plaintiffs, regardless of the alleged predicate acts, was governed by the pleading requirements of Fed. R. Civ. P. 8(a), which requires only a clear and concise statement of the claim.[186]

(Text continued on page 1-109)

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[182] Costello v. Troiani, 1993 WL 330662 (N.D. Ill. Aug. 25, 1993).

[183] Gulf Coast Development Group LLC v. Lebor, 2003 U.S. Dist. LEXIS 21740 (S.D.N.Y. Dec. 4, 2003).

[184] *Id.,* U.S. Dist. LEXIS 21740 at *2-*3.

[185] *Id.,* U.S. Dist. LEXIS 21740 at *20.

[186] *Id.,* U.S. Dist. LEXIS 21740 at *14-*15.

§ 1.07 Injury

Neither a criminal RICO prosecution nor a civil RICO action brought by the government requires proof of injury.[1] However, in a private civil RICO action, the plaintiff must allege and prove that he has been "injured in his business or property by reason of a [RICO] violation."[2] This is a requirement of "standing" to sue, and therefore can result in the dismissal of a complaint at the outset if not satisfactorily alleged.[3] The courts have interpreted this to exclude many persons, such as corporate shareholders or the government, who are suing in a derivative or representative capacity.[4]

[1]—*Sedima, S.P.R.L. v. Imrex Co.*

The Supreme Court's decision in *Sedima, S.P.R.L. v. Imrex Co.*[5] held that a plaintiff suing under Subsection 1962(c) need only allege and prove an injury proximately resulting from the underlying predicate offenses that form the basis of the RICO claim, and not (as the Second Circuit had held)[6] some more technical "racketeering injury."[7] The Court stated that "[i]f the defendant engages in a pattern of racketeering activity . . . and the racketeering activities injure the plaintiff

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[1] In any RICO action premised on mail fraud or wire fraud, however, the defendant must be shown to have contemplated harm to another's money or property. See McNally v. United States, 483 U.S. 350, 107 S.Ct. 2875, 97 L.Ed.2d 2923 (1987).

[2] 18 U.S.C. § 1964(c).

[3] See Fed. R. Civ. P. 12(b)(1). See, e.g.:

Second Circuit: Moore v. Guesno, 2008 WL 5082982 at *1 (2d Cir. Dec. 1, 2008) (wife did not have standing to sue for injury to her "marital property" when the facts giving rise to her claim occurred before she was married).

Ninth Circuit: Ghereni v. Lagomarsino, 258 Fed. Appx. 81, 83-84 (9th Cir. 2007) ("Ghereni does not have standing to bring his RICO challenge. Because he never had a property interest in the Ghereni Ranch, Ghereni was not 'injured in *his* business or property by reason of a [RICO] violation.'"). (Alteration in original.)

[4] United States v. Bonanno Organized Crime Family, 879 F.2d 20, 21-27 (2d Cir. 1989). In *Warren v. Manufacturers National Bank of Detroit*, 759 F.2d 542, 543-545 (6th Cir. 1985), the Sixth Circuit held that a sole shareholder was not the proper plaintiff in a RICO action alleging injuries to the corporation by reason of defendant's fraud. 879 F.2d at 544. The court reasoned that in his capacity as shareholder, "any injury he incurred was actually one sustained by the corporation." *Id.* However, New York City was found to have standing to assert a RICO claim in its capacity as an employer of the alleged wrongdoers. City of New York v. Jam Consultants, Inc., 889 F. Supp. 103, 105-106 (S.D.N.Y. 1995).

[5] Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 105 S.Ct. 3275, 87 L.Ed.2d 346 (1985).

[6] Sedima, S.P.R.L. v. Imrex Co., 741 F.2d 482 (2d Cir. 1984).

[7] *Sedima*, N. 5 *supra,* 473 U.S. at 495. Subsequent cases have held that a plaintiff can recover even if he was only injured by one of the underlying predicate acts. Guilano v. Everything Yogurt, 819 F. Supp.2d 240, 243 n.3 (E.D.N.Y. 1993) (collecting cases).

in his business or property, the plaintiff has a claim under § 1964(c)."[8] The *Sedima* Court emphasized, however, that "the 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."[9] Thus,

> [w]here the plaintiff alleges each element of the violation, the compensable injury necessarily is the harm caused by predicate acts sufficiently related to constitute a pattern, for the essence of the violation is the commission of those acts in connection with the conduct of an enterprise.[10]

The Supreme Court further interpreted the injury requirement in *American National Bank & Trust Co. v. Haroco, Inc.*,[11] a companion case to *Sedima*. In *Haroco,* the Court held that to recover, the plaintiff need only have suffered damages from the proscribed predicate offenses. Plaintiff's injury need not flow from the fact that the predicate offenses were performed as part of the conduct of an enterprise in violation of Section 1962.[12]

Sedima and *Haroco* took away from the lower courts one method of limiting the profusion of private civil RICO actions. Prior to *Sedima*, several lower courts had required that the plaintiff plead and prove a "racketeering injury" distinct and different from the injury

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[8] *Id.*

[9] *Id.*, 473 U.S. at 496. See also:

Third Circuit: American Trade Partners, L.P. v. A-1 International Importing Enterprises, Ltd., 755 F. Supp. 1292, 1298-1299 (E.D. Pa. 1990).

Fifth Circuit: Marriott Brothers v. Gage, 911 F.2d 1105, 1108 (5th Cir. 1990) ("The causal nexus between the alleged predicate acts and the defendant's [*sic*] injury must be direct: it is not sufficient that the injury alleged is simply the result of an unlawful act connected to the operation of the alleged RICO enterprise, or in furtherance of its goals.").

Sixth Circuit: Burke v. FBI, 2 RICO L. Rep. 41 (N.D. Ohio 1985) (requiring plaintiff to allege a direct injury; plaintiff's allegation that the defendants intended to destroy his career was not direct), *aff'd* 798 F.2d 1413 (6th Cir. 1986).

Seventh Circuit: Gibe v. General American Life Insurance Co., No. 84 C 1280 (N.D. Ill. March 14, 1985). *Cf.* Rokeach v. Eisenbach, 1985 WL 4831 *5-*6 (N.D. Ill. Dec. 3, 1985).

[10] Sedima, N. 5 *supra,* 473 U.S. at 497. But see, People of State of Illinois v. Life of Mid-America Insurance, 805 F.2d 763, 765-766 (7th Cir. 1986) (the injury requirement is broad, but not so broad as to allow a state attorney general to allege injury suffered by state senior citizens at hands of insurance company in RICO complaint).

[11] American National Bank & Trust Co. v. Haroco, Inc., 473 U.S. 606, 105 S.Ct. 3291, 87 L.Ed.2d 437 (1985).

[12] *Id.,* 473 U.S. at 609. See also, Marshall & Ilsley Trust Co. v. Pate, 819 F.2d 806, 809 (7th Cir. 1987) (plaintiff need not allege injury caused by at least two predicate acts or all the acts adding up to a pattern).

that may have been sustained from the individual predicate acts that formed the "pattern of racketeering activity."[13] These courts noted that the private civil action provision of RICO, Section 1964(c), authorized such suits only for injuries suffered by reason of a violation of Section 1962, which prohibited the use of a pattern of racketeering activity and not the predicate acts *per se*. Therefore, these courts reasoned, standing was limited to those plaintiffs who could allege some injury resulting from the combination of the predicate violations into an infiltrating pattern. Damages were limited as a result.[14] Some other courts took an opposing view, finding that the term "racketeering injury" was incapable of a precise definition, and its use served only to deny recovery to the direct and immediate victims of a RICO crime while permitting those indirectly and peripherally injured to recover.[15] In *Sedima*, the latter reasoning prevailed.

Although some courts have interpreted the Supreme Court holding in *Sedima* as putting an end to any special limitation on the kind of showing needed to establish injury for RICO claims brought under any subsection of Section 1962,[15.1] other decisions have limited this holding to actions under Section 1962(c) and required a special "investment" injury under Section 1962(a) or a special "acquisition" injury under Section 1962(b).[15.2] A number of courts have addressed the issue of whether a RICO plaintiff must be injured by the acquisition or control of the enterprise in order to state a claim under 18

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[13] See, e.g.:

Second Circuit: Clute v. Davenport Co., 584 F. Supp. 1562, 1569 (D. Conn. 1984).

Sixth Circuit: Landmark Savings & Loan v. Rhoades, 527 F. Supp. 206, 208-209 (E.D. Mich. 1981).

Ninth Circuit: Wilcox Development Co. v. First Interstate Bank, N.A., 590 F. Supp. 445, 451 (D. Or. 1984), *rev'd* 815 F.2d 522 (9th Cir. 1987).

[14] See, e.g., Bankers Trust Co. v. Rhoades, 741 F.2d 511, 516 (2d Cir. 1984), *vacated* 473 U.S. 922, 105 S.Ct. 3550, 87 L.Ed.2d 673 (1985).

[15] See, e.g.:

Second Circuit: Mauriber v. Shearson/American Express, Inc., 567 F. Supp. 1231, 1240-1241 (S.D.N.Y. 1983).

Third Circuit: Kimmel v. Peterson, 565 F. Supp. 476, 493-495 (E.D. Pa. 1983).

Ninth Circuit: Crocker National Bank v. Rockwell International Corp., 555 F. Supp. 47, 49-50 (N.D. Cal. 1982).

[15.1] See Busby v. Crown Supply, Inc., 896 F.2d 833, 837 (4th Cir. 1990) (*en banc*).

[15.2] See, e.g.:

Second Circuit: Discon Inc. v. Nynex Corp., 93 F.3d 1055, 1063 (2d Cir. 1996) ("[I]n order to state a cause of action under subsection 1962(b), plaintiffs must allege an acquisition injury, analogous to the use or investment injury required under § 1962(a)."), *vacated on other grounds* 525 U.S. 128, 119 S.Ct. 493, 142 L.Ed.2d 510 (1998).

Fifth Circuit: Crowe v. Henry, 43 F.3d 198, 205 (5th Cir. 1995).

U.S.C. § 1962(b). Most decisions on this "acquisition" injury issue find that a plaintiff must be injured by such acquisition or control.[16] For example, a district court in the Northern District of Illinois gave two reasons for so holding: the language of Section 1962(a) separates the predicate racketeering acts from the investment of the proceeds more clearly than that of Section 1962(c); Section 1962(a) is more clearly directed against the infiltration of legitimate businesses and the use of illicit funds to finance interstate enterprises, all to the detriment of honest competitors than Section 1962(c).[17] Although some courts have followed this approach,[18] others have disagreed.[19]

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[16] See:

Third Circuit: Lightning Lube, Inc. v. Venuto, 4 F.3d 1153 (3d Cir. 1993) (plaintiff's injury must stem from defendant's acquisition or control of an interest in the enterprise).

Fifth Circuit: Old Time Enterprises v. International Coffee Corp., 862 F.2d 1213 (5th Cir. 1989) (plaintiff's claim failed where there was no proximate causal relationship between an acquisition of an interest in the enterprise and the damages claimed was shown).

District of Columbia Circuit: Danielson v. Burnside-Ott Aviation Training Center, Inc., 941 F.2d 1220, 1231 (D.C. Cir. 1991).

[17] Heritage Insurance Co. of America v. First National Bank of Cicero, 629 F. Supp. 1412 (N.D. Ill. 1986). But see, Schiffels v. Kemper Financial Services, Inc., 978 F.2d 344, 348 (7th Cir. 1992), discussed in §1.07[3] *infra*.

[18] See:

First Circuit: Schofield v. First Commodity Corp., 793 F.2d 28, 31 n.2 (1st Cir. 1986) (Section 1962(a) requires a showing of the source of income, proof it was channeled into the corporation, and that it was used for wrongdoing); Rodriguez v. Banco Central, 727 F. Supp. 759, 770-771 (D.P.R. 1989), *aff'd in part and vacated in part* 917 F.2d 664 (1st Cir. 1990).

Second Circuit: Ouaknine v. MacFarlane, 897 F.2d 75, 82-83 (2d Cir. 1990); Dietrich v. Bauer, 76 F. Supp.2d 312 (S.D.N.Y. 1999); Williamson v. Simon & Schuster, 735 F. Supp. 565, 567-568 (S.D.N.Y. 1990).

Third Circuit: Kolar v. Preferred Real Estates Investments, Inc., 2010 WL 104500 (3d Cir. Jan. 12, 2010) (finding the allegation that defendants purchased property "through an investment of the fraudulently obtained discount" insufficient to state a claim under Section 1962(a)); Rose v. Bartle, 871 F.2d 331, 356-358 (3rd Cir. 1989).

Fifth Circuit: Nolen v. Nucentrix Broadband Networks, Inc., 293 F.3d 926 (5th Cir. 2002) (injury must stem from a use or investment of fees, not merely from an assessment or collection of late fees); Parker & Parsley Petroleum v. Dresser Industries, 972 F.2d 580, 584 & n.4 (5th Cir. 1992).

Sixth Circuit: Craighead v. E. F. Hutton & Co., 899 F.2d 485, 494 (6th Cir. 1990).

Seventh Circuit: Vicom v. Harbridge Merchant Services, Inc., 20 F.3d 771, 779 n.6 (7th Cir. 1994) (the Seventh Circuit has not definitely stated its view on whether "an allegation of investment-use is necessary to assert standing under § 1962(a)"); Grove Fresh Distributors, Inc. v. Flavor Fresh Foods, Inc., 720 F. Supp. 714, 716-717 (N.D. Ill. 1989).

Eighth Circuit: Fogie v. THORN Americas, Inc., 190 F.3d 889, 894-896 (8th Cir. 1999) (standing to bring suit under § 1962(a) only for individuals who have suffered injury from the use or investment of racketeering income).

[2]—Standing for Private Individuals Who Can Show Injury

Such controversy aside, even after *Sedima* a private person does not have standing to sue under any section of RICO unless he or she can show an injury "by reason of" the underlying predicate acts.[20] For a period of time, the exact contours of this requirement were uncertain.[21] Whereas some courts required that the injury sustained from a

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Ninth Circuit: Sybersound Records, Inc. v. UAV Corp., 517 F.3d 1137, 1149 (9th Cir. 2008) ("Sybersound has not alleged an investment injury separate and distinct from the injury flowing from the predicate act, as required for a RICO claim brought under § 1962(a)."); Nugget Hydroelectric, L.P. v. Pacific Gas & Electric Co., 981 F.2d 429, 437 (9th Cir. 1992), *cert. denied* 508 U.S. 908 (1993); Simon v. Value Behavioral Health, Inc., 208 F.3d 1073, 1083 (9th Cir. 2000) (dismissing claim under § 1962(a) where plaintiff failed to allege an injury caused by the investment of racketeering income).

Tenth Circuit: Grider v. Texas Oil & Gas Corp., 868 F.2d 1147, 1149-1150 (10th Cir. 1989).

Eleventh Circuit: Super Vision International, Inc. v. Mega International Commercial Bank Co., 534 F. Supp.2d 1326 (S.D. Fla. 2008) (the Eleventh Circuit has not squarely addressed the issue, but would likely require proof of an investment injury); In re Shalen & Associates, Inc. Securities Litigation, 773 F. Supp. 342 (S.D. Fla. 1991) (reinvestment of racketeering income so that the enterprise may continue its harm is sufficient nexus between income and plaintiff's harm).

District of Columbia Circuit: Danielsen v. Burnside-Ott Aviation Training Center, Inc., 941 F.2d 1220, 1229-1230 (D.C. Cir. 1991).

[19] See, e.g., Busby v. Crown Supply, Inc., 896 F.2d 833, 836-840 (4th Cir. 1990). See also, § 1.06[1] *supra*.

[20] See, e.g.:

First Circuit: Miller v. New America High Income Fund, 755 F. Supp. 1099, 1110 (D. Mass. 1991), *aff'd sub nom*. Lucia v. Prospect Street High Income Portfolio, Inc., 36 F.3d 170 (1st Cir. 1994).

Second Circuit: Enzo Biochem, Inc. v. Johnson & Johnson, 1990 U.S. Dist. LEXIS 12013 (S.D.N.Y. Sept. 3, 1990).

Third Circuit: The University of Maryland v. Peat Marwick Main & Co., 923 F.2d 265 (3d Cir. 1991) (permitting policyholders to maintain RICO action in federal court for fraudulent certification of financial statements despite pendency of state suit brought by state insurance commissioner).

Sixth Circuit: Henry & Wright Corp. v. Automatic Press Corp., 1991 WL 11601 at *2-*3 (6th Cir. Feb. 5, 1991); De Lorean v. Cork Gully, 118 B.R. 932, 944-946 (Bankr. E.D. Mich. 1990) (plaintiffs' suit dismissed for failure to allege injury stemming from defendants' use or investment of illegally obtained income).

Seventh Circuit: RWB Services, LLC v. Hartford Computer Group, Inc., 539 F.3d 681, 686 (7th Cir. 2008).

Eighth Circuit: Fogie v. THORN Americas, Inc., 190 F.3d 889, 893 (8th Cir. 1999).

Tenth Circuit: Deck v. Engineered Laminates, 349 F.3d 1253, 1257 (10th Cir. 2003).

State Courts:

Pennsylvania: Drohan v. Sorbus, 401 Pa. Super. 29, 584 A.2d 964, 968-969 (1990). See § 1.07[3] *infra* for a discussion of standing to bring conspiracy claims.

[21] See Sperber v. Boesky, 849 F.2d 60, 64-66 (2d Cir. 1988). See also, § 1.07[6] *infra,* discussing Holmes v. Securities Investor Protection Corp., 503 U.S. 258, 112

predicate act be direct and proximate, rather than indirect,[22] other courts did not require that injury flow from a predicate act.[23]

These and similar controversies were resolved in *Holmes v. Securities Investor Protection Corp.*,[24] where the Supreme Court held that

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S.Ct. 1311, 117 L.Ed.2d 532 (1992). In *Holmes*, the Supreme Court held that the "by reason of" language of Section 1964(c) requires a showing by the plaintiff that his or her injuries are "directly" or "proximately" caused by the defendant's misconduct. *Holmes,* 503 U.S. at 265-270.

[22] See:

First Circuit: Bennett v. Centerpoint Bank, 761 F. Supp. 908, 913-916 (D.N.H. 1991), *aff'd mem*. 953 F.2d 634 (1st Cir. 1991) (promoter of a failed bank venture lacked standing when the allegations of securities fraud and bank fraud indicated injuries to the venture's stockholders and creditors, but only a remote injury to promoter himself).

Second Circuit: Hecht v. Commerce Clearing House, Inc., 897 F.2d 21, 23-25 (2d Cir. 1990); Sperber v. Boesky, 849 F.2d 60, 64-66 (2d Cir. 1988); United Fence & Guard Rail Corp. v. Royal Guard Fence Co., 765 F. Supp. 55, 57-58 (E.D.N.Y. 1991) (plaintiff failed to show injury by merely alleging a decline in market share); Security Pacific Equipment Leasing, Inc. v. Earthworm Tractor Co., 1990 WL 96757 at *4-*6 (S.D.N.Y. July 3, 1990) (financing company sufficiently alleged proximate cause in fraudulent loan scheme); Shaw v. Rolex Watch U.S.A., Inc., 745 F. Supp. 982, 984-986 (S.D.N.Y. 1990) (defendant's misrepresentations to third party may be considered proximate cause sufficient to allow plaintiff to proceed with RICO claim).

Third Circuit: In re Sunrise Securities Litigation, 108 B.R. 471, 475-482 (Bankr. E.D. Pa. 1989), *aff'd* 916 F.2d 874 (3d Cir. 1990).

Fourth Circuit: Flinders v. Datasec Corp., 742 F. Supp. 929, 931-932 (E.D. Va. 1990) (no standing under Subsection 1962(a) because injury was not proximately caused by alleged predicate acts of mail and wire fraud).

Fifth Circuit: National Enterprises, Inc. v. Mellon Financial Services Corp. Number 7, 847 F.2d 251, 253-255 (5th Cir. 1988); Texas Carpenters Health Benefit Fund v. Philip Morris, Inc., 21 F. Supp.2d 664, 669-671 (E.D. Tex. 1998) (the alleged injury could not be a direct injury because plaintiffs did not properly allege proximate cause).

Seventh Circuit: Sears v. Likens, 912 F.2d 889, 892 (7th Cir. 1990); Rylewicz v. Beaton Services, Ltd., 888 F.2d 1175, 1178-1180 (7th Cir. 1989); Reynolds v. East Dyer Development Co., 882 F.2d 1249, 1253-1254 (7th Cir. 1989); Craig v. First American Capital Resources, Inc., 740 F. Supp. 530, 537-538 (N.D. Ill. 1990) (failing to meet proximate cause requirement when plaintiff did not allege an injury "by reason of" defendant's use or investment of income derived from alleged racketeering activity).

Ninth Circuit: Steele v. Hospital Corp. of America, 36 F.3d 69, 70-71 (9th Cir. 1994) (former patients of a psychiatric care unit lacked standing to sue the hospital for overbilling insurance companies where any improper billings caused a financial loss only to the insurance companies and not to the plaintiffs).

Eleventh Circuit: O'Malley v. O'Neill, 887 F.2d 1557, 1560-1564 (11th Cir. 1989).

[23] National Organization for Women, Inc. v. Scheidler, 1997 U.S. Dist. LEXIS 14854, at *24 (N.D. Ill. Sept. 19, 1997) (citing Schiffels v. Kemper Finantial Services, Inc., 978 F.2d 344 (7th Cir. 1992)).

[24] Holmes v. Securities Investor Protection Corp., 503 U.S. 258, 112 S.Ct. 1311, 117 L.Ed.2d 532 (1992).

the "by reason of" language requires a showing of both "direct" and "proximate" causality.[25] One consequence of the *Holmes* decision relates to its effect on lower court decisions regarding the question of standing.

First, most plaintiffs who have alleged that they were terminated from their jobs because they refused to participate in, or even affirmatively exposed, their employers' alleged RICO violations have been denied standing, since the harm to the plaintiffs in such an instance stems not from the alleged predicate acts but rather from injuries that occur as the result of the exposure of these acts.[26]

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[25] The elaboration of these terms following *Holmes* is discussed more fully in § 1.07[6] *infra*.

[26] See:

First Circuit: Miranda v. Ponce Federal Bank, 948 F.2d 41, 47 (1st Cir. 1991).

Second Circuit: Hecht v. Commerce Clearing House, Inc., 897 F.2d 21, 25 (2d Cir. 1990). Allen v. Berenson Pari-Mutuel of New York, Inc., 1998 U.S. Dist. LEXIS 2020, at *7-*13 (S.D.N.Y. Feb. 20, 1998) (injury to business or property for reporting or refusing to participate in an enterprise engaging in a pattern of racketeering activity is not injury sufficient for standing); Skeete v. IVF America, Inc., 972 F. Supp. 206, 210-211 (S.D.N.Y. 1997); J. S. Service Center Corp. v. General Electric Technical Services Co., 937 F. Supp. 216, 220-225 (S.D.N.Y. 1996) (loss of employment for refusing to participate in an enterprise engaging in a pattern of racketeering activity is not injury sufficient to confer standing); Nassiri v. Craumer, 1996 U.S. Dist. LEXIS 5803, at *13-*15 (S.D.N.Y. April 26, 1996) (plaintiff failed to show causation where he was discharged by the defendant following the plaintiff's independent investigation of the defendant's acts and his confrontation of the defendant). See also, §8.05[1][d] *infra* for a discussion of standing for "whistleblowers."

Third Circuit: Anderson v. Ayling, 396 F.3d 265, 269-270 (3d Cir. 2005) ("it is possible that a predicate act of racketeering that *directly* caused a plaintiff to lose his job could create RICO standing"); Shearin v. E. F. Hutton Group, Inc., 885 F.2d 1162, 1168 (3d Cir. 1989); Burton v. Ken-Crest Services, Inc., 127 F. Supp.2d 673, 677-678 (E.D. Pa. 2001); Stonelake v. Host Marriott Corp., 1996 U.S. Dist. LEXIS 11170, at *14-*18 (E.D. Pa. July 31, 1996).

Fourth Circuit: Camelio v. American Federation, 137 F.3d 666, 672 (4th Cir. 1998) (dismissing plaintiff's RICO claim arising from his alleged wrongful discharge and noting that while it might be possible to allege a wrongful discharge resulting directly from the RICO predicate act, such allegations are not typical and most such claims fail to survive a motion to dismiss); Sadighi v. Daghighfekr, 36 F. Supp.2d 279, 295 (D.S.C. 1999) (plaintiffs do not have standing to assert a civil RICO claim for termination damages when their termination resulted from refusal to perform a predicate act or the likelihood that they would expose an employer's fraudulent conduct).

Fifth Circuit: Cullom v. Hibernia National Bank, 859 F.2d 1211, 1214 (5th Cir. 1988).

Sixth Circuit: Mitchell v. Biomagnetic Resonance, Inc., 1997 U.S. App. LEXIS 11800, at *17-*18 (6th Cir. May 15, 1997) (allegations that a plaintiff lost her job because the defendants feared she would expose their illegal activities were insufficient to create standing).

Eighth Circuit: Hamm v. Rhone-Poulenc Rorer Pharmaceuticals, Inc., 187 F.3d 941, 951-954 (8th Cir. 1999); Bowman v. Western Auto Supply Co., 985 F.2d 383, 385-386 (8th Cir. 1993).

Second, a RICO plaintiff will often be denied standing to bring a derivative action, not only because of the bar to securities-based RICO claims that was added to the RICO statute by the Private Securities Litigation Reform Act of 1995,[26.1] but also because the alleged injury is to the company, and not to the plaintiff.[26.2] Thus, in *In re American Express Company Shareholder Litigation*,[27] the Second Circuit affirmed the dismissal of a shareholder derivative action against certain officers, directors, and employees of American Express. The court also found, as additional grounds for dismissal, that the alleged wrongful activity was intended to benefit American Express,[28] and that the exposure of the defendant's acts, rather than the commission of the RICO violations, caused the injury to American Express.[29] Accordingly, the court dismissed the claim.[30]

In *Joffroin v. Tufaro*,[30.1] plaintiffs were homeowners in a subdivision in Louisiana and initiated a lawsuit alleging RICO claims that

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Ninth Circuit: Reddy v. Litton Industries, 912 F.2d 291, 294 (9th Cir. 1990).

Eleventh Circuit: Beck v. Prupis, 162 F.3d 1090, 1098 (11th Cir. 1998) (rejecting plaintiff's Section 1962(a) and (b) claims based on his firing for refusing to participate in illegal activity on proximate cause grounds); O'Malley v. O'Neill, 887 F.2d 1557, 1563 (11th Cir. 1989).

[26.1] See § 2.02[2] *infra*.

[26.2] See, e.g.:

Second Circuit: Lakonia Management Ltd. v. Meriwether, 106 F. Supp.2d 540, (S.D.N.Y. 2000) ("[P]laintiff may only assert claims under RICO if the injury it alleges is direct and not merely derivative of injury suffered by LTC V.").

Eighth Circuit: Craig Outdoor Advertising v. Viacom Outdoor, Inc., 528 F.3d 1001, 1024-1025 (8th Cir. 2008) ("A shareholder generally may not sue on his own behalf—under Missouri law or RICO—to recover the wrongful diminution in value of his stock or to recoup his share of money taken from the corporation, such claims must generally be pursued in a shareholders derivative action.").

Tenth Circuit: Bixler v. Foster, 596 F.3d 751, 758-759 (10th Cir. 2010) ("Because plaintiffs' injuries were based on the diminution of their METCO shares, and not on direct injury to them, we conclude their claims are derivate of the corporations," and therefore hold that the plaintiffs lacked RICO standing).

[27] In re American Express Company Shareholder Litigation, 39 F.3d 395 (2d Cir. 1994). See also: Anaren Microwave, Inc. v. Loral Corp., 49 F.3d 62, 63 (2d Cir. 1995) (concluding that any injury to plaintiff was derivative of the injury to its general contractor and, therefore, injury was not proximately caused by defendant's alleged misconduct); North South Financial Corp. v. Al-Turki, 1996 U.S. Dist. LEXIS 1303, at *22-*26 (S.D.N.Y. Feb. 8, 1996) (shareholder lacked standing to sue for injuries derivative to injury to the corporation).

[28] *American Express*, N. 27 *supra*, 39 F.3d at 400.

[29] *Id*.

[30] *Id*., 39 F.3d at 400-402. See also, In re College Bound Consolidated Litigation, 1995 U.S. Dist. LEXIS 10684, at *39-*42 (S.D.N.Y. July 31, 1995) (injury to plaintiff was neither the preconceived purpose nor the specifically intended consequence of defendants' acts and, therefore, the unintended victim of the scheme lacked standing to assert a RICO claim).

[30.1] Joffroin v. Tufaro, 606 F.3d 235 (5th Cir. 2010).

were premised upon the defendants' control of the subdivision's home owners association. The plaintiffs alleged that the defendants had failed to maintain the common areas and diverted the plaintiffs' assessments for their own benefit.[30.2] The district court determined that the plaintiffs lacked standing to assert a RICO claim, which was affirmed by the Fifth Circuit. The Fifth Circuit explained that "[w]here, as here, RICO plaintiffs bring claims analogous to shareholder derivative claims, we apply a three-part test to determine whether the plaintiffs satisfy general standing requirements."[30.3] Specifically, a court will inquire into "(1) whether the racketeering activity was directed against the corporation; (2) whether the alleged injury to the shareholder merely derived from, and thus was not distinct from, the injury to the corporation; and (3) whether state law provides that the sole cause of actions accrues in the corporation."[30.4] The court explained that "[i]f each of these questions can be answered 'yes,' then the plaintiffs do not have the requisite standing."[30.5] In *Joffroin*, the court found that alleged racketeering activity was directed at the home owners association, that the plaintiffs' injuries were not distinct from the injuries suffered by the home owners association, and that Louisiana law established that the sole cause of action was vested in the home owners association. Therefore, the court concluded that the plaintiffs lacked standing.

Relying on the Supreme Court's decision in *Holmes*, the Seventh Circuit reversed a district court decision that had dismissed a RICO claim for lack of standing.[30.6] In *Bridge v. Phoenix Bond & Indemnity Co*., the plaintiffs were individual bidders on tax liens sold at public auction in Cook County, Illinois.[30.7] The plaintiffs filed a RICO action against other bidders for violating a rule established by the county to apportion parcels fairly.[30.8] Although it noted that the plaintiffs and other competing bidders would be the only ones harmed by the violation of the rule, the district court held that the plaintiffs lacked standing because they "are not in the class of individuals protected by the mail fraud statute, and therefore are not within the zone of interests that the RICO statute protects, because they were not

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[30.2] *Id*., 606 F.3d at 236-237.

[30.3] *Id*., 606 F.3d at 238.

[30.4] *Id*., 606 F.3d at 238. (Internal citation and quotations marks omitted.)

[30.5] *Id*. (Internal citation and quotations marks omitted.)

[30.6] See Phoenix Bond & Indemnity Co. v. Bridge, 477 F.3d 928 (7th Cir. 2007), *aff'd* 553 U.S. 639, 128 S.Ct. 2131, 170 L.Ed.2d 1012 (2008). See § 2.02[1] *infra* for a discussion of the Supreme Court's decision in *Bridge*.

[30.7] *Id*., 477 F.3d at 930.

[30.8] *Id*.

recipients of the alleged misrepresentations and, at best were indirect victims of the alleged fraud."[30.9]

The Seventh Circuit reversed, concluding that "standing is not a problem in this suit because plaintiffs suffered a real injury when they lost the valuable chance to acquire more liens, and because that injury can be redressed by damages."[30.10] The court held that the plaintiffs had adequately alleged proximate cause under *Holmes* because they were "immediately injured" by the defendants' failure to follow the county's rule.[30.11] The Supreme Court granted certiorari in the case on another issue and left the Seventh Circuit's ruling on standing undisturbed.[30.12]

When the case was remanded to the district court, the defendants filed a motion for summary judgment asserting "that Plaintiffs cannot prove that Defendant's alleged Cook County Treasurer's [Single, Simultaneous Bidder Rule] proximately caused Plaintiffs' injuries."[30.13] The district court agreed with the defendants that the plaintiffs were unable to establish proximate cause.[30.14] The court explained that the evidence had shown that the lien "auction system was not designed to ensure an equal allocation of liens. Without this equal allocations, assessing the impact Defendants' alleged violation of the [Single, Simultaneous Bidder Rule] had on the value of Plaintiffs' lien portfolios necessarily implicates the type of intricate, uncertain inquires that the Supreme Court has cautioned against allowing to overrun RICO litigation."[30.15]

A decision from the Seventh Circuit that addressed RICO's proximate cause requirement arose from the allegations of riverboat casinos that they were the victims of a pay-to-play scheme that involved former Illinois Governor Rod Blagojevich and John Johnston, who owned several Illinois horseracing tracks.[30.16] The plaintiffs alleged "that Blagojevich 'sold' and Johnston 'bought' the enactment of two Illinois gaming laws requiring them to pay 3% of their adjusted gross

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[30.9] Phoenix Bond & Indemnity Co. v. Bridge, 2005 WL 3527232 at *5 (N.D. Ill. Dec. 21, 2005).

[30.10] *Phoenix Bond*, N. 30.1 *supra*, 477 F.3d at 930.

[30.11] *Id*., 477 F.3d at 930-932.

[30.12] *Phoenix Bond*, N. 30.1 *supra*, 553 U.S. at 646.

[30.13] Phoenix Bond & Indemnity Co., 2010 U.S. Dist LEXIS 91178 (N.D Ill. Sept. 1, 2010).

[30.14] *Id*. at *44 ("The uncertainty inherent in the awarding of liens at tax sales, coupled with Plaintiffs' failure to present evidence at nearly every level of the proximate cause inquiry, leads this court to conclude that Plaintiffs have failed to demonstrate a genuine issue of material fact to survive summary judgment.").

[30.15] *Id*. at *26-*27.

[30.16] Empress Casino Joliet Corp. v. Blagojevich, 638 F.3d 519 (7th Cir. 2011).

revenue into a 'Horse Racing Equity Trust Fund' as a condition of their gaming licenses."[30.17] The defendants argued that defendants had failed to satisfy RICO's proximate cause requirement because "the cause of the injury . . . is the drafting and enactment of the Racing Acts by the Illinois General Assembly, not any conspiracy among the RICO defendants."[30.18] The Seventh Circuit rejected this argument. The court explained that RICO's proximate cause requirement is meant to ensure "that the link between the alleged RICO conspiracy and the plaintiff's injury [is] not too remote, or purely contingent, or indirect."[30.19] The court found that "[t]he casinos' injury is not too remote from the conspiracy; to the contrary, the object of the conspiracy was to put money in Blagojevich's pocket (or in his campaign committee's coffers) in exchange for the enrichment of the racetracks at the casinos' expense via the enactment and signing of the Racing Acts."[30.20]

The Second Circuit has also considered the requirements for standing.[30.21] In *City of New York v. Smokes-Spirits.com, Inc*., the City of New York filed RICO claims against out-of-state cigarette retailers who allegedly failed to report purchases of cigarettes by residents of New York City and New York State, contrary to the Jenkins Act.[30.22] The City alleged that the defendants engaged in a "'pattern of racketeering' by committing mail or wire fraud each time they use, or cause to be used, the mails or wires to effect a sale of cigarettes to New York City residents without complying with the Jenkins Act's reporting requirements to the State."[30.23] Both the City and State of New York imposed separate taxes on cigarette sales, and the two had entered into agreements that obligated the State to disclose to the City

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[30.17] *Id*.

[30.18] *Id*. at *39.

[30.19] *Id*. (Internal citation and quotations marks omitted.)

[30.20] *Id*. at *40. See:

Fifth Circuit: Oceanic Exploration Co. v. Phillips Petroleum Co. ZOC, 352 Fed. Appx. 945, 952 (5th Cir. 2009) ("It takes conclusory pleading to new levels to have proximate causation rest on a politically disruptive, hypothetical lawsuit between nations.").

Ninth Circuit: Couch v. Cate, 379 Fed. App'x 560, 566 (9th Cir. 2010) ("*Hemi Group* definitely foreclosed RICO liability for consequences that are only foreseeable without some direct relationship.").

District of Columbia Circuit: Murray v. Mulgrew, 704 F. Supp.2d 45 (D.D.C. 2010).

[30.21] See City of New York v. Smokes-Spirits.com, Inc., 541 F.3d 425, 440 (2d Cir. 2008), *rev'd sub nom*. Hemi Group, LLC v. City of New York, __ U.S. __, 130 S.Ct. 983, 175 L.Ed.2d 983 (2010).

[30.22] *Id*., 541 F.3d at 432-433.

[30.23] *Id*., 541 F.3d at 434.

"any information relevant to the collection of cigarette taxes, including Jenkins Act reports."[30.24]

The Second Circuit held that the City had standing because it alleged that it had lost tax revenues—injury—by the defendants' RICO violations, predicate acts of mail and wire fraud, that were recoverable as damages (a specific dollar amount for each package of cigarettes sold without complying with the Jenkins Act).[30.25] The court found that the City's injury was directly caused by the defendants' actions, which distinguished this case from *Holmes,* where the plaintiff's injury was derivative, and *Anza,* where the plaintiff's injury was too attenuated.[30.26] The court held that, as alleged, the defendants' actions were clearly a substantial factor in the City's loss, the City's loss was direct and distinct from any loss to the State, and there were no speculative steps in the chain of causation.[30.27] A dissent, however, would have held that the City lacked standing, finding that the defendants' lack of any duty to report to the City (rather than the State) under the Jenkins Act defeated any finding of proximate cause.[30.28]

The Supreme Court reversed the Second Circuit's decision that the City of New York had stated a valid claim under RICO.[30.29] In a plurality opinion, Chief Justice Roberts found that the City of New York could not state a claim under RICO because its "theory of causation . . . cannot meet RICO's direct relationship requirement."[30.30] The Chief Justice explained that the City of New York could not satisfy "RICO's direct relationship requirement" because "Hemi's obligation was to file the Jenkins Act reports with the State, not the City, and the City's harm was directly caused by the customers, not Hemi."[30.31] In a concurrence, Justice Ginsburg stated that the City of New York did not have a valid RICO claim because she would not construe the RICO statute "to allow the City to end-run its lack of authority to collect tobacco taxes from Hemi Group or to reshape the 'quite limited

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[30.24] *Id*., 541 F.3d at 433-434.

[30.25] *Id*., 541 F.3d at 441.

[30.26] *Id*., 541 F.3d at 441-442 (distinguishing Holmes v. Securities Investor Protection Corp., 503 U.S. 258, 112 S.Ct. 1311, 117 L.Ed.2d 532 (1992), discussed at N. 101 *et seq*. *infra*, and Anza v. Ideal Steel Supply Corp., 547 U.S. 451, 126 S.Ct. 1991, 164 L.Ed.2d 720 (2006), discussed at N. 119 *et seq*. *infra*).

[30.27] *Smokes-Spirits.com*, N. 30.21 *supra*, 541 F.3d at 442-444.

[30.28] *Id*., 541 F.3d at 460-461 (Winter, J., dissenting in part and concurring in part).

[30.29] Hemi Group, LLC v. City of New York, __ U.S. __, 130 S.Ct. 983, 175 L.Ed.2d 943 (2010).

[30.30] *Id*., 130 S.Ct. at 989 (plurality opinion).

[30.31] *Id*., 130 S.Ct. at 990.

remedies' Congress has provided for violations of the Jenkins Act. . . ."[30.32] The dissenting opinion would have found that the City satisfied RICO's requirements of proximate cause because "had Hemi told New York State the truth about its New York City customers, New York City would have written letters to the purchasers and obtained a significant share of the tobacco taxes buyers owed."[30.33]

District courts in the Second Circuit have held that the principal shareholders of a corporation cannot pursue a RICO claim for an injury to property in which the corporation alone held an interest.[31] In *Jerry Kubecka, Inc. v. Avellino,*[32] a district court held that an individual who was the sole shareholder of two corporations lacked standing to bring a RICO claim because his injury was contingent on the harm suffered by the corporations.[33] The court concluded that the general interest in deterring injurious conduct would be served by permitting the corporations, which had suffered a more direct and immediate business injury, to vindicate their interests.[34] In *Aramony v. United Way of America,*[35] the court found that damage to an organization's reputation was a sufficient injury to confer standing on the organization, but only if such damage was the intended result of the defendant's wrongful actions.[36]

[30.32] *Id*., 130 S.Ct. at 995 (Ginsburg, J. concurring in part and concurring in judgment).

[30.33] *Id*., 130 S.Ct. at 996 (Breyer, J. dissenting).

[31] See A. Terzi Productions, Inc. v. Theatrical Protective Union, 2 F. Supp.2d 485, 496 (S.D.N.Y. 1998) (the Second Circuit has consistently denied RICO standing to persons who sustained injuries in their capacities as creditors, shareholders or employees of a company where the company itself was the primary target of the alleged RICO activity); Lippe v. Bairnco Corp., 218 B.R. 294, 301-302 (Bankr. S.D.N.Y. 1998) (the RICO claim belongs to creditors of a corporation and not to the company, its trustees in bankruptcy, or anyone else standing in the shoes of the debtor corporation). See also, Mayes v. Local 106, International Union of Operating Engineers, 1999 U.S. Dist. LEXIS 1118, at *9-*10 (N.D.N.Y. Feb. 5, 1999) (plaintiff seeking to bring a RICO action in a personal capacity lacked standing where the injury alleged was incurred by his union, and any derivative injury to him was no different from that sustained by similarly situated members of the same union); Creative Dimensions in Management, Inc. v. Thomas Group, Inc., 1997 U.S. Dist. LEXIS 15368, at *6-*8 (E.D. Pa. Sept. 30, 1997) (injuries to one's corporation is not cognizable under RICO).

[32] Jerry Kubecka, Inc. v. Avellino, 898 F. Supp. 963 (E.D.N.Y. 1995). See also, Hexagon Packaging Corp. v. Manny Gutterman & Associates, Inc., 1997 U.S. Dist. LEXIS 8345, at *45 (N.D. Ill. June 6, 1997) (a shareholder, even if the sole shareholder of a corporation, does not have standing to bring RICO claims for injuries to the corporation).

[33] *Kubecka,* 898 F. Supp. at 967-969.

[34] *Id*., 898 F. Supp. at 969.

[35] Aramony v. United Way of America, 969 F. Supp. 226 (S.D.N.Y. 1997).

[36] *Id.,* 969 F. Supp. at 232-233.

Taking a slightly different approach, the Eleventh Circuit has held that although losses suffered by shareholders as a result of racketeering activity against the company do not give them standing under RICO, shareholders will have standing in a derivative suit if the racketeering act that forms the basis of the RICO claim was directed at the corporation.[37] In the same case, however, the court ruled that a plaintiff's status as a creditor of the corporation was too remote to confer standing based on injuries sustained by the corporation.[38]

The Eighth Circuit has held that a "shareholder generally may not sue on his own behalf . . . to recover the wrongful diminution in value of his stock or to recoup his share of money taken from the corporation; such claims must generally be pursued in a shareholders derivative action."[38.1] The court affirmed the dismissal of a RICO claim that sought to recover the loss the plaintiff had suffered by selling his company at a lower price than it would have been worth had the defendant not acted fraudulently.[38.2] The court noted that equity did not demand an exception to the derivative-standing rule on the facts of the case, even though the shareholder could not pursue a derivative action because he no longer held stock in the allegedly injured company.[38.3] However, the Eight Circuit did not foreclose the possibility that an exception to the derivative-standing rule could be appropriate in other circumstances.[38.4]

In *Bixler v. Foster*,[38.5] the Tenth Circuit addressed whether the plaintiffs, who were minority shareholders of the Mineral Energy and Technology Corporation, had standing to assert a RICO claim. The plaintiffs alleged that the defendants had violated RICO "when they arranged to transfer METCO's assets to an Australian corporation."[38.6] The court noted that it is well-settled law "that conduct which harms a corporation confers standing on the corporation, not its shareholders."[38.7] The court explained that there was an exception to the shareholder standing rule that permits "a shareholder with a direct, personal interest in a cause of action to bring suit even if the

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[37] Bivens Gardens Office Building, Inc. v. Barnett Bank of Florida, Inc., 140 F.3d 898, 906-907 (11th Cir. 1998).

[38] *Id.,* 140 F.3d at 907-908.

[38.1] Craig Outdoor Advertising, Inc. v. Viacom Outdoor, Inc., 528 F.3d 1001, 1024 (8th Cir. 2008).

[38.2] *Id*., 528 F.3d at 1024.

[38.3] *Id*., 528 F.3d at 1025.

[38.4] *Id*.

[38.5] Bixler v. Foster, 596 F.3d 751 (10th Cir. 2010).

[38.6] *Id.,* 596 F.3d at 754.

[38.7] *Id.,* 596 F.3d at 756.

corporation's rights are also implicated."[38.8] The plaintiffs argued that they fell within the exception to the shareholder standing rule because "defendants' actions caused their proportionate corporate ownership to be diluted, and . . . defendants have pursued abusive litigation against them in an effort to coerce them into abandoning their interests in METCO."[38.9] However, the court found that the plaintiffs had failed to show that their ownership had been diluted because "they made no showing that more shares were issued or that the value of the majority shareholders' shares increased more than theirs."[38.10] Additionally, the court rejected plaintiffs' argument that the defendants had engaged in frivolous litigation tactics. The court explained that it was unwilling "to recognize abusive litigation as a form of extortion because doing so would subject almost any unsuccessful lawsuit to a colorable extortion (and often a RICO) claim."[38.11]

A district court in the Seventh Circuit has held that business rivals may not sue under RICO for injuries indirectly caused by mail fraud perpetrated against third parties.[39] The court dismissed a RICO claim against a nonprofit organization that allegedly used libel to persuade a state legislature to enact massage therapy regulations, thereby injuring a business rival.[40] Because the state legislature, and not the plaintiff, was the direct victim of the alleged fraud, the court concluded that the plaintiff's indirect injury did not give rise to a RICO remedy.[41]

The First Circuit has held that a plaintiff who alleged an injury stemming from a proceeding in which he was removed from his position as a trustee lacked standing to recover for an injury to the trusts.[42] Although, as previously noted, "whistleblowers" normally lack standing to sue under RICO,[43] where a plaintiff is able to allege

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[38.8] *Id*., 596 F.3d at 757.

[38.9] *Id*.

[38.10] *Id*., 596 F.3d at 758.

[38.11] *Id*.

[39] Associated Bodywork and Massage Professionals v. American Massage Therapy Ass'n, 897 F. Supp. 1116, 1121 (N.D. Ill. 1995).

[40] *Id*.

[41] *Id*.

[42] Gabovitch v. Shear, 1995 U.S. App. LEXIS 32856, at *3-*4 (1st Cir. Nov. 21, 1995).

See also, Kaiser v. Stewart, 965 F. Supp. 684, 687 (E.D. Pa. 1997) (a liquidator had no standing to bring a civil RICO action on behalf of policy holders and other creditors of a company).

[43] Khurana v. Innovative Healthcare Systems, Inc., 130 F.3d 143, 147-149 (5th Cir. 1997), *vacated on other grounds sub nom*. Teel v. Khurana, 525 U.S. 979, 119 S.Ct. 442, 142 L.Ed.2d 397 (1998).

that his firing was an overt act critical to the alleged RICO conspiracy,[44] his claim of lost legitimate employment opportunities may confer standing.[45]

In *Hamid v. Price Waterhouse,*[46] the Ninth Circuit held that depositors of the Bank of Credit & Commerce International ("BCCI") could not bring claims against the individuals and firms who had allegedly contributed to BCCI's insolvent financial condition, but who otherwise had no direct relationship with the plaintiffs and had caused plaintiffs no direct harm.[47] The court observed that permitting depositors to bring individual actions for injuries would impair the rights of general creditors and claimants with superior interests, and relied upon decisions by both the Second and Third Circuits that wrongdoing by bank officers that adversely affected all depositors created a liability for which only the bank could recover.[48]

In *Rezner v. Bayerische Hypo-Und Vereinsbank AG*,[48.1] the Ninth Circuit addressed whether the plaintiff was able to demonstrate that the defendants' "scheme to defraud the United States of tax revenue through fraudulent tax shelters. . . caused injury to the purchasers of such shelters."[48.2] The court noted that plaintiff's "asserted injury only indirectly resulted from HVB's fraudulent activity against the United States."[48.3] The court stated that one consideration in the proximate cause analysis "is whether a better suited plaintiff would have an incentive to sue."[48.4] Here, the court noted that the United States had commenced litigation over the tax fraud, and had entered into a deferred prosecution agreement with the defendants.[48.5] Therefore, the court explained, RICO's proximate cause requirement was not satisfied because "the United States, not Rezner, was the immediate victim of HVB's fraud and better situated to sue HVB."[48.6]

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[44] *Id*., 130 F.3d at 150-153.
[45] *Id*.
[46] Hamid v. Price Waterhouse, 51 F.3d 1411 (9th Cir. 1995).
[47] *Id*., 51 F.3d at 1418-1421. See also, Sun City Taxpayers' Ass'n v. Citizens Utilities Co., 45 F.3d 58, 61 (2d Cir. 1995) (taxpayers' association lacked standing to sue a utility company because it was not directly injured by the company's alleged misrepresentations to the rate commission).
[48] *Hamid*, N. 45 *supra,* 51 F.3d at 1419-1420.
[48.1] Rezner v. Bayerische Hypo-Und Vereinsbank AG, 630 F.3d 866 (9th Cir. 2010).
[48.2] *Id*., 630 F.3d at 868.
[48.3] *Id*., 630 F.3d at 873.
[48.4] *Id*.
[48.5] *Id*.
[48.6] *Id*., 630 F.3d at 874.

The Second Circuit, however, has recognized a limited exception to the rule denying creditors and shareholders standing.[49] Under this exception, a plaintiff can maintain a RICO action if he sustains an injury that is separate and distinct from the injuries to the corporation.[50] When fraudulent activity initially induces the shareholder to become a shareholder, the injury is not deemed derivative.[51]

The Third Circuit held that a nurse who was fired for declining to participate in an alleged scheme to wrongfully bill Medicare could not bring a RICO claim because he did not suffer an injury substantially caused by the RICO enterprise.[52] The court noted that the direct victims of the racketeering act were the Medicare and Medicaid programs that were wrongfully billed and, therefore, the plaintiff did not have standing to sue under Section 1962(c).[53] However, the court allowed the plaintiff to pursue a conspiracy claim.[54]

In another case, a California district court found that a municipality's RICO claim for medical expenses for the smoking-related illnesses of its residents was not viable because it was wholly derivative of the primary victims' claims.[55] The primary victims were those who actually suffered personal injuries resulting in the health care expenses paid by the plaintiffs.[56]

Several health insurers and ERISA welfare benefit funds have sued tobacco producers under RICO, claiming that the tobacco producers were required to compensate the insurers for the cost of treating smoking-related illnesses.[56.1] The plaintiffs premised their RICO

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[49] See Department of Economic Development v. Arthur Andersen & Co., 924 F. Supp. 449, 464 (S.D.N.Y. 1996).

[50] *Id*.

[51] *Id*.

[52] Rehkop v. Berwick Healthcare Corp., 95 F.3d 285, 289 (3d Cir. 1996).

[53] *Id*.

[54] *Id*., 95 F.3d at 289-291.

[55] City and County of San Francisco v. Philip Morris, Inc., 957 F. Supp. 1130, 1136-1138 (N.D. Cal. 1997).

[56] *Id*.

[56.1] See, e.g.:

Second Circuit: Laborers Local 17 Health and Benefit Fund v. Philip Morris Inc., 191 F.3d 229 (2d Cir. 1999).

Third Circuit: Steamfitters Local Union No. 420 Welfare Fund v. Philip Morris Inc., 171 F.3d 912 (3d Cir. 1999).

Fifth Circuit: Texas Carpenters Health Benefit Fund v. Philip Morris Inc., 199 F.3d 788 (5th Cir. 2000).

Seventh Circuit: International Brotherhood of Teamsters, Local 734 Health and Welfare Trust Fund v. Philip Morris Inc., 196 F.3d 818 (7th Cir. 1999).

Ninth Circuit: Oregon Laborers-Employers Health & Welfare Trust v. Philip Morris Inc., 185 F.3d 957 (9th Cir 1999).

claims on the allegation "that they were defrauded by the defendants—tobacco companies and related industry organizations—into paying for their participants' smoking-related illnesses, as well as prevented by these defendants from informing the funds' participants about safer smoking and smoking-cessation products. The defendants allegedly conspired to prevent the funds from obtaining and using information that would have reduced the incidence of smoking—and therefore of illness—among the funds' participants."[56.2] Courts have uniformly rejected such claims.[56.3] The courts have concluded "that the loss suffered by insurers is too remote from the manufacture and sale of cigarettes to justify direct recovery by the funds for any alleged . . . RICO violations."[56.4] Similarly, RICO claims brought by subscribers to health insurance plans against tobacco companies, which were premised upon the payment of increased insurance premiums due to smokers being present in the insurance pool, have been dismissed because "[p]laintiffs' claims . . . not only are contingent on harm to a third party, but also on [Blue Cross/Blue Shield's] increasing their premium amounts due to smoking-related medical costs."[56.5]

In *UFCW Local 1776 v. Eli Lilly and Company*,[56.6] the Second Circuit addressed a civil RICO claim that alleged that Eli Lilly had committed mail and wire fraud through a campaign of misinformation regarding the effectiveness and the potential side effects of Zyprexa.[56.7] The plaintiffs, who were organizations that had underwritten the purchase of Zyprexa, initiated a class action claiming that they had been injured in two respects: that they had overpaid for Zyprexa due to the misrepresentations and that they had underwritten purchases of Zyprexa that would not have occurred absent the misrepresentations.[56.8] The Second Circuit concluded that the plaintiffs' RICO claim could not proceed as a class action because the proof necessary to establish the elements of the RICO claim were not susceptible to generalized proof.

District of Columbia Circuit: Service Employees International Union Health and Welfare Fund v. Philip Morris Inc., 249 F.3d 1068 (D.C. Cir. 2001).

[56.2] Steamfitters Local Union No. 420 Welfare Fund v. Philip Morris Inc., 171 F.3d 912, 917 (3d Cir. 1999).

[56.3] Service Employees International Union Health and Welfare Fund v. Philip Morris Inc., 249 F.3d 1068, 1071 (D.C. Cir. 2001).

[56.4] Texas Carpenters Health Benefit Fund v. Philip Morris Inc., 199 F.3d 788, 790 (5th Cir. 2000).

[56.5] Perry v. American Tobacco Co., Inc, 324 F.3d 845, 850 (6th Cir. 2003).

[56.6] UFCW Local 1776 v. Eli Lilly & Co., 620 F.3d 121 (2d Cir. 2010).

[56.7] *Id.*, 620 F.3d at 123.

[56.8] *Id.*

In rejecting plaintiffs' RICO claim, the Second Circuit addressed the impact of the Supreme Court's decision in *Bridge v. Phoenix Bond & Indemnity Co*. on the necessity of proving reliance in a RICO fraud claim. Plaintiffs contended that the Supreme Court's holding in *Bridge* eliminated any requirement of reliance.[56.9] The court rejected this argument and explained that "while reliance may not be an element of the cause of action, there is no question that in this case plaintiffs allege, and must prove, third-party reliance as part of their chain of causation. . . . [b]ecause reliance is a necessary part of the causation theory advanced by the plaintiffs . . . ."[56.10] The court, therefore, noted that the Supreme Court's decision in *Bridge* established only that a plaintiff alleging a RICO claim based on mail fraud was not required to demonstrate first-person reliance.[56.11] The Second Circuit noted that doctors do not typically consider price when deciding whether to prescribe a medication, and explained, therefore, that "[a]ny reliance by doctors on misrepresentations as to the efficacy and side effects of a drug, therefore, was not a but-for cause of the price that [plaintiffs] ultimately paid for each prescription."[56.12] The court also found that the plaintiffs were unable to satisfy RICO's requirement of proximate cause through generalized proof. The court noted that there was an attenuated link between the alleged misrepresentations made by Eli Lilly and the injury sustained by the plaintiffs, "as physicians, PBMs, and PBM Pharmacy and Therapeutics Committees all play a role in the chain between Lilly and [the plaintiffs]."[56.13] Additionally, the court explained that since the plaintiffs were the parties responsible for establishing the price they paid for Zyprexa "the only reliance that might show proximate causation with respect to price is reliance by the [plaintiffs], not reliance by the doctors."[56.14] Furthermore, the court cited to evidence that even when the side effects of Zyprexa became public knowledge most third-party payors continued to pay full prize for Zyprexa when it was prescribed for schizophrenia while some third-party payors sought discounts when Zyprexa was proscribed for other medical uses. The court stated that this evidence raises "questions about why certain TPPs negotiated Zyprexa's price where others didn't, and why approval of Zyprexa for some indications was limited by some TPPs, [and thus]

[56.9] *Id*.
[56.10] *Id*., 620 F.3d at 133.
[56.11] *Id*., 620 F.3d at 132.
[56.12] *Id*., 620 F.3d at 133-134.
[56.13] *Id*., 620 F.3d at 134.
[56.14] *Id*.

generalized proof of reliance by doctors cannot complete the causation chain."[56.15]

The plaintiffs additionally asserted a quantity effect theory of injury. The quantity effect theory was premised on the claim "that improper promotion of off-label use for Zyprexa resulted in more off-label prescriptions for Zyprexa than would otherwise have been written."[56.16] The court explained that this theory was unable to satisfy RICO's proximate cause requirement because "the nature of prescriptions . . . is interrupted by the independent actions of prescribing physicians . . . . An individual's patient's diagnosis, past and current medications being taken by the patient, the physician's own experience with prescribing Zyprexa, and the physician's knowledge regarding the side effects of Zyprexa are all considerations that would have been taking into account in addition to the alleged misrepresentations distributed by Lilly."[56.17]

A recent decision from the Eleventh Circuit addressed civil RICO claims brought by health insurers, alleging that AstraZeneca had fraudulently induced doctors to prescribe Seroquel for off-label uses.[56.18] The plaintiffs asserted that AstraZeneca "falsely represented that Seroquel was safer and more effective in treating many off-label conditions than less expensive drugs also used to treat those conditions."[56.19] The district court had dismissed plaintiffs' RICO claims because it concluded the plaintiffs were unable to demonstrate a direct link between the alleged misrepresentations and their losses.[56.20]

[56.15] *Id*.

[56.16] *Id*., 620 F.3d at 129.

[56.17] *Id*., 620 F.3d at 135. See, e.g.:

First Circuit: In re Neurontin Marketing and Sales Practice Litigation, 2010 WL 5037005 (D. Mass. Dec. 10, 2010) ("Because the Class TPP Plaintiffs have not directly relied on misrepresentations by defendants, and because they have presented no evidence as to how many or which physicians who prescribed Neurontin to their members relied on fraud, they cannot establish causation").

Eleventh Circuit: Ironworkers Local Union No. 68 v. AstraZeneca Pharmaceuticals LP, 585 F. Supp.2d 1339 (M.D. Fla. 2008) ("[I]t is clear from the complaint that the Plaintiffs in this case have alleged third party reliance by prescribing physicians. . . . Whether this alleged third-party reliance is sufficient to establish proximate cause is another issue. . . .").

[56.18] Ironworkers Local Union 68 v. AstraZeneca Pharmaceutical, LP, 634 F.3d 1352 (11th Cir. 2011).

[56.19] *Id*., 634 F.3d at 1356.

[56.20] Ironworkers Local Union No. 68 v. AstraZenca Pharmaceuticals LP, 585 F. Supp.2d 1339, 1344-1345 (M.D. Fla. 2008) (Presumably . . . physicians use their independent medical judgment to decide whether Seroquel is the best treatment for a given patient.").

The Eleventh Circuit affirmed the dismissal of the plaintiffs' RICO claims on different grounds. The court explained that to have a plausible civil RICO claim the plaintiffs had to allege an economic injury.[56.21] The court stated that "[i]n light of physicians' exercise of professional judgment, a patient suffers no economic injury merely by being prescribed and paying for a more expensive drug; instead the prescription additionally must have been unnecessary or inappropriate according to sound medical practice—i.e., the drug was either ineffective or unsafe for the prescribed use."[56.22] "To allow recovery based purely on that fact the prescription was comparatively more expensive than an alternative drug—but otherwise safe and effective—would mean that physicians owe their patients a professional duty to consider a drug's price when making a prescription decision."[56.23]

The Eleventh Circuit noted that physicians did not owe their patients such a duty. The court held that "when a physician's decision to prescribe a drug for a particular use purportedly was caused by false representations concerning the drug's safety and efficacy in that use, a plaintiff must allege that she not only paid for the drug, but also that its prescription was medically unnecessary or inappropriate. To make this showing, the payor-plaintiff must allege a counterfactual: that her physician—had he known all the true information about the medication—would not have prescribed the drug under the standards of sound medical practice because the drug actually was unsafe or ineffective in treating the plaintiff's condition."[56.24]

Applying the principles it had articulated earlier in its decision, the Eleventh Circuit concluded that the plaintiffs had failed to successfully plead a cause of action under RICO.[56.25] In making this determination the court examined the insurers' business model. The court concluded that the plaintiffs' had failed to plead a plausible economic injury caused by AstraZeneca's alleged misrepresentations because "the insurers consciously chose to assume the risk of paying for all medically unnecessary or inappropriate prescription of formulary-listed drugs—like Seroquel—we must further infer that they adjusted their premiums upward to reflect the projected value of claims for these prescriptions. Such estimates, when calculated properly, take

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[56.21] Ironworkers Local Union 68 v. AstraZeneca Pharmaceutical, LP, 634 F.3d 1352, 1359 (11th Cir. 2011).

[56.22] *Id.*,634 F.3d at 1360.

[56.23] *Id.,* 634 F.3d at 1363.

[56.24] *Id.*

[56.25] *Id.*

into account all known risks that might cause the insurers to pay for medically unnecessary or inappropriate prescriptions."[56.26]

[3]—Standing to Bring Conspiracy Claims

The Supreme Court has examined the issue of "whether a person injured by an overt act in furtherance of a conspiracy may assert a civil RICO conspiracy claim under § 1964(c) for a violation of § 1962(d) even if the overt act does not constitute 'racketeering activity.'"[57] The Court concluded that a person must be injured by an "act of racketeering" rather than any overt act "done in furtherance of a RICO conspiracy."[58] This conclusion was in harmony with the decisions of the majority of circuits that had addressed the issue.[59] Three circuits had previously reached the opposite conclusion.[60]

The Court looked "to the well-established common law of civil conspiracy" in interpreting the phrase "injured . . . by reason of a 'conspiracy.'"[61] Finding that "[b]y the time of RICO's enactment . . . it was widely accepted that a plaintiff could bring suit for civil conspiracy only if he had been injured by an act that was itself tortious," the Court reasoned that a RICO plaintiff must allege injury from an act "that is independently wrongful under RICO."[62] Lastly, the Court

(Text continued on page 1-123)

[56.26] *Id.,* 634 F.3d at 1368.

[57] Beck v. Prupis, 529 U.S. 494, 499, 120 S.Ct. 1608, 146 L.Ed.2d 561 (2000).

[58] *Id*., 529 U.S. at 495-496.

[59] See, e.g.:

First Circuit: Miranda v. Ponce Federal Bank, 948 F.2d 41, 48 (1st Cir. 1991).

Second Circuit: Hecht v. Commerce Clearing House, Inc., 897 F.2d 21, 25 (2d Cir. 1990).

Sixth Circuit: Sanders Confectionery Products, Inc. v. Heller Financial, Inc., 973 F.2d 474, 487 (6th Cir. 1992).

Eighth Circuit: Bowman v. Western Auto Supply Co., 985 F.2d 383, 386-388 (8th Cir. 1993).

Ninth Circuit: Reddy v. Litton Industries, Inc., 912 F.2d 291, 294-295 (9th Cir. 1990).

Eleventh Circuit: Beck v. Prupis, 162 F.3d 1090, 1098-1099 (11th Cir. 1998).

[60] See, e.g.:

Third Circuit: Shearin v. E.F. Hutton Group, Inc., 885 F.2d 1162, 1168-1170 (3d Cir. 1989).

Fifth Circuit: Khurana v. Innovative Healthcare Systems, Inc., 130 F.3d 143 (5th Cir. 1997), *vacated as moot* 525 U.S. 979 (1998).

Seventh Circuit: Schiffels v. Kemper Financial Services, Inc., 978 F.2d 344, 348 (7th Cir. 1992).

[61] *Beck v. Prupis*, N. 57 *supra*, 529 U.S. at 500.

[62] *Id*., 529 U.S. at 501-506.

rejected the plaintiff's argument that the Court's interpretation of the statute had rendered § 1962(d) meaningless because "any person who had a claim for a violation of § 1962(d) would necessarily have a claim for a violation of § 1962(a), (b), or (c)." The Court disagreed, stating that "under [its] interpretation, a plaintiff could, through a § 1964(c) suit for a violation of § 1962(d), sue co-conspirators who might not themselves have violated one of the substantive provisions of § 1962."[63]

[4]—Injury to Business or Property

A RICO injury must be to a plaintiff's "business or property."[64] Personal injuries, mental and emotional stress, defamation, humiliation, and the like will not suffice.[65] A RICO injury, however, need not be

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[63] *Id*., 529 U.S. at 506.

[64] 18 U.S.C. § 1964(c).

[65] See, e.g.:

First Circuit: Zareas v. Bared-San Martin, 209 Fed. Appx. 1, 2 (1st Cir. 2006); Hibbard v. Benjamin, 1992 U.S. Dist. LEXIS 15894, at *6-*7 (D. Mass. Sept. 21, 1992).*Second Circuit:* Gotlin v. Lederman, 367 F. Supp.2d 349, 357 (E.D.N.Y. 2005) ("Plaintiffs' allegations are personal in nature, notwithstanding their incidental economic loss of $17,500 as payment for defendants' service. In analogous cases, courts routinely dismiss RICO claims in which plaintiffs allege personal injury as a result of alleged RICO violations."); Davis Lee Pharmacy, Inc., v. Manhattan Central Corp., 327 F. Supp.2d 159, 165 (E.D.N.Y. 2004) ("Neither the suspension or exclusion of a person from membership in a religious community, nor the resulting emotional distress, are cognizable injuries within the meaning of section 1964(c)."); Tsipouras v. Malkin, 9 F. Supp.2d 365, 367-368 (S.D.N.Y. 1998) (injuries to character, business reputation, and the intentional infliction of emotional distress are not actionable under civil RICO); Ginett v. Computer Task Group, Inc., No. Civ-89-1602E (W.D.N.Y. Jan. 15, 1991); Aeropulse, Inc. v. Armstrong & Brooks, Ltd., 740 F. Supp. 938, 943-944 (E.D.N.Y. 1990) (plaintiff was required to prove that the fraudulent scheme caused a monetary loss).

Third Circuit: Magnum v. Archdiocese of Philadelphia, 253 Fed. Appx. 224, 226-227, 229 (3d Cir. 2007) (plaintiffs lacked standing because "a lost opportunity to bring state law personal injury claims against the Archdiocese is not cognizable as an injury to 'business or property' in a civil RICO action"); Genty v. Resolution Trust Corp., 937 F.2d 899, 918-919 (3d Cir. 1991) (personal injuries arising from exposure to toxic waste are not compensable under RICO).

Fourth Circuit: Tel-Instrument Electronics Corp. v. Teledyne Industries, Inc., 1991 WL 87194 at *2 (4th Cir. May 28, 1991) (bidder who would not have been awarded a government contract regardless of winning bidder's fraud lacked standing to bring RICO claim against winning bidder).

Fifth Circuit: Petty v. Merck & Co., 285 Fed. Appx. 182 (5th Cir. 2008) (plaintiff does not have RICO standing where injury alleged is bodily injury allegedly caused by prescription drug).

Sixth Circuit: Kramer v. Bachan Aerospace Corp., 912 F.2d 151, 154 (6th Cir. 1990); Drake v. B. F. Goodrich Co., 782 F.2d 638, 643-644 (6th Cir. 1986) (RICO does not apply to personal injuries).

quantifiable.[66] Acivil RICO plaintiff must prove some damage, but not necessarily a specific amount.[67] A number of courts have suggested, however, that intangible economic injuries are covered.[68]

It is well established, however, that not all economic injuries are compensable under RICO, and various courts have articulated limita-

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Seventh Circuit: Grafman v. Century Broadcast Corp., 727 F. Supp. 432, 434 (N.D. Ill. 1989) (shareholder who suffers particularized injury, such as diminution of voting power, may sue under Section 1964(c)).

Ninth Circuit: Berg v. First State Insurance Co., 915 F.2d 460, 463-464 (9th Cir. 1990) (RICO injuries must be to business or property, not "personal" in nature); Reddy v. Litton Industries, Inc., 912 F.2d 291, 293-294 (9th Cir. 1990).

Tenth Circuit: McCormick v. City of Lawrence, 325 F. Supp.2d 1191, 1209 (D. Kan. 2004) ("The alleged deprivation of First Amendment rights alone does not constitute the kind of injury required to invoke RICO's civil remedies.").

Eleventh Circuit: Moore v. Potter, 141 Fed. Appx. 803, 805 (11th Cir. 2005) ("a claim stemming from 'personal injury, or pecuniary losses resulting from personal injury' is 'not cognizable under RICO'"); Taffet v. Southern Co., 930 F.2d 847, 856-857 (11th Cir. 1991) (fraudulent accounting practices leading to illegal rates constituted an injury to business or property), *vacated on other grounds* 958 F.2d 1514 (11th Cir.), *reh'g* 967 F.2d 1483 (11th Cir. 1992).

But see, McEvoy Travel Bureau, Inc. v. Heritage Travel, Inc., 904 F.2d 786 (1st Cir. 1990) (fraud aimed at third parties that did not deprive anyone of either money or property cannot constitute a predicate act under RICO).

[66] Potomac Electric Power Co. v. Electric Motor and Supply, Inc., 262 F.3d 260, 265 (4th Cir. 2001).

[67] *Id*.

[68] See:

Fourth Circuit: Smithfield Foods, Inc. v. United Food and Commercial Workers International Union, 2008 WL 2233979 (E.D. Va. May 30, 2008) ("Contrary to the position of the Defendants, *Scheidler* [v. *National Organization for Women, Inc*., 537 U.S. 393, 123 S.Ct. 1057, 154 L.Ed.2d 991 (2003)] did not remove extortion of intangible property rights from the reach of RICO.").

Sixth Circuit: Media General, Inc., v. Tanner, 625 F. Supp. 237, 243-244 (W.D. Tenn. 1985) (harm to business reputation is injury to business).

Seventh Circuit: Maryville Academy v. Loeb Rhoades & Co., 530 F. Supp. 1061, 1069 (N.D. Ill. 1981) (rejecting claim for expense of litigation and damages to reputation because the injuries did not arise from the racketeering activities but from separate acts).

Eighth Circuit: Alexander Grant & Co. v. Tiffany Industries, 742 F.2d 408, 411 (8th Cir. 1984), *vacated* 473 U.S. 922 (1985) (plaintiff's injury was cognizable and included loss of business reputation, lost fees for services rendered to defendant, and cost of representation during any SEC investigation). *Cf*. Hamm v. Rhone-Poulenc Rorer Pharmaceuticals, Inc., 187 F.3d 941, 954 (8th Cir. 1999) ("Damage to reputation is generally considered personal injury and thus is not an injury to business or property within the meaning of § 1964(c).").

But see, Callan v. State Chemical Manufacturing Co., 584 F. Supp. 619, 623 (E.D. Pa. 1984) (injuries or harm to business reputation, mental anguish, and loss of confidence and self-esteem were not cognizable).

tions on which such injuries are cognizable.[69] For example, in *Oscar v. University Students Co-Operative Ass'n*,[70] the Ninth Circuit, sitting *en banc*, held that a tenant who claimed a diminution in enjoyment of her apartment due to alleged drug dealing and other wrongful conduct by students in a neighboring housing co-operative did not suffer a RICO injury.[71] In reaching this result, the Ninth Circuit stressed two limitations on the types of injuries that are compensable under RICO.

First, the court determined that to show an "injury" under Section 1964(c) the plaintiff must prove concrete financial loss, rather than merely "injury to a valuable intangible property interest."[72] Second,

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[69] See:

Second Circuit: Skeete v. IVF America, Inc., 972 F. Supp. 206, 210-211 (S.D.N.Y. 1997) (injuries to business and professional reputation insufficient to confer standing because they were not caused by the predicate acts).

Third Circuit: Doug Grant, Inc. v. Greate Bay Casino Corp., 3 F. Supp.2d 518, 534 (D.N.J. 1998) (a lost opportunity to obtain a financial benefit from playing blackjack was too speculative to constitute an injury to business or property).

Eighth Circuit: Reynolds v. Condon, 908 F. Supp. 1494, 1519 (N.D. Iowa 1995) (mere injuries to employment or income from employment were not RICO injuries, and personal injuries such as emotional distress were insufficient to meet the statutory requirement of injury to business or property).

[70] Oscar v. University Students Co-Operative Ass'n, 965 F.2d 783 (9th Cir. 1992).

[71] *Id.*, 965 F.2d at 785-788.

[72] *Id*., 965 F.2d at 785. See also:

Second Circuit: Donohue v. Teamsters Local 282 Welfare, Pension, Annuity, Job Training and Vacation and Sick Leave Trust Funds, 12 F. Supp.2d 273, 277-278 (E.D.N.Y. 1998) (lost rights under ERISA were too speculative and insufficient to confer standing); Rosendale v. Citibank N.A., 1996 U.S. Dist. LEXIS 4700, at *9-*12 (S.D.N.Y. April 12, 1996) (disallowing recovery for personal or emotional injuries under RICO).

Third Circuit: Magnum v. Archdiocese of Philadelphia, 253 Fed. Appx. 224, 226-227 (3d Cir. 2007); Maio v. Aetna, Inc., 221 F.3d 472 483 (3d Cir. 2000) (rejecting plaintiffs' claim that allegedly overpaying for inferior health care was an injury to business or property).

Fifth Circuit: In re Taxable Municipal Bond Securities Litigation, 51 F.3d 518, 523 (5th Cir. 1995) (the lost opportunity to obtain a loan is an intangible property interest not protected by RICO).

Sixth Circuit: Fleischhauer v. Feltner, 879 F.2d 1290, 1299-1301 (6th Cir. 1989) (allowing plaintiffs under Subsection 1964(c) to recover only for money they paid out as a result of racketeering activity).

Seventh Circuit: Serfecz v. Gallitano, 1995 U.S. Dist. LEXIS 19550, at *16-*18 (N.D. Ill. Jan. 5, 1996) (plaintiff's injuries indefinite and unclear and, therefore, concluding that plaintiff lacked standing to assert a RICO claim).

Eight Circuit: Regions Bank v. J.R. Oil. Co., LLC, 387 F.3d 721, 728-29 (8th Cir. 2004).

Ninth Circuit: Ove v. Gwinn, 264 F.3d 817, 825 (9th Cir. 2001) (deprivation of "honest services" is not a concrete financial loss); Forsyth v. Humana, Inc., 114 F.3d 1467, 1481 (9th Cir. 1997), *aff'd on other grounds* 525 U.S. 299, 199 S.Ct. 710, 142 L.Ed.2d 753 (1999); Berg v. First State Insurance Co., 915 F.2d 460, 464 (9th Cir. 1990); First Pacific Bancorp v. Bro, 847 F.2d 542, 547 & n.12 (9th Cir. 1988).

the court noted that personal injuries are not compensable under RICO.[73] Applying those limitations to the facts in *Oscar*, the Ninth Circuit concluded that the plaintiff had not alleged any loss that would be compensable under the statute.[74] As a matter of policy, the Ninth Circuit further noted that RICO was intended to "combat organized crime, not to provide a federal cause of action and treble damages to

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[73] *Oscar*, N. 70 *supra,* 965 F.2d at 785-786. See also:

Supreme Court: Reiter v. Sonotone Corp., 442 U.S. 330, 339, 99 S.Ct. 2326, 60 L.Ed.2d 931 (1979).

Second Circuit: Rosendale v. Citibank N.A., 1996 U.S. Dist. LEXIS 4700, at *9-*12 (S.D.N.Y. April 12, 1996) (denying recovery for personal or emotional injuries under RICO); Pappas v. Passias, 887 F. Supp. 465, 470-471 (E.D.N.Y. 1995) (claim of emotional distress not cognizable under RICO).

Third Circuit: Genty v. Resolution Trust Corp., 937 F.2d 899, 918 (3d Cir. 1991) (plaintiffs could not recover for medical expenses and emotional distress resulting from their exposure to toxic waste).

Fifth Circuit: Borskey v. Medtronics, Inc., 1995 U.S. Dist. LEXIS 3749, at *8 (E.D. La. March 17, 1995).

Sixth Circuit: Drake v. B.F. Goodrich Co., 782 F.2d 638, 644 (damages for physical injury and wrongful death resulting from exposure to toxic waste not recoverable under RICO); Lamb v. Pajtas, 1994 U.S. Dist. LEXIS 5729, at *14 (W.D. Mich. April 1, 1994).

Seventh Circuit: Rylewicz v. Beaton Services, 888 F.2d 1175, 1180 (7th Cir. 1989) (harassment and intimidation of litigants in an attempt to get them to settle lawsuit could not support RICO claim). See also, National Organization for Women, Inc. v. Scheidler, 968 F.2d 612, 614 (7th Cir. 1992), *rev'd on other grounds* 510 U.S. 249, 114 S.Ct. 798, 127 L.Ed.2d 99 (1994).

Ninth Circuit: O'Rourke v. Peck, 1999 U.S. App. LEXIS 2511, at *4 (9th Cir. Feb. 17, 1999); Allum v. BankAmerica Corp., 1998 U.S. App. LEXIS 6642, at *4-*5 (9th Cir. March 31, 1998) (allegations of emotional and physical distress, lost income and litigation expenses were insufficient because none constituted an injury to business or property), *modified* 1998 U.S. App. LEXIS 17899 (9th Cir. Aug. 3, 1998); Pierce v. Citibank (S.D.) N.A., 1996 U.S. App. LEXIS 18496, at *2 (9th Cir. July 25, 1996) (plaintiff who suffered no out-of-pocket loss and no damage to her credit rating lacked standing); Yovev v. Northrop Corp., 1994 U.S. App. LEXIS 21252, at *4 (9th Cir. Aug. 9, 1994) (personal injuries caused by an alleged conspiracy to persuade a court to dismiss plaintiff's state court proceeding found to be not compensable under RICO); Berg v. First State Insurance Co., 915 F.2d 460, 464 (9th Cir. 1990) (loss of security and peace of mind due to cancellation of insurance policy were not actionable under RICO).

Tenth Circuit: Price v. Pinnacle Brands, Inc., 138 F.3d 602, 607 (10th Cir. 1998) (injury to mere expectancy interests was too intangible to confer standing).

Eleventh Circuit: Grogan v. Platt, 835 F.2d 844, 846-847 (11th Cir. 1988) (denying family of murder victim recovery under RICO for economic consequences of murder).

[74] Oscar v. University Students Co-Operative Ass'n, 965 F.2d 783, 787 (9th Cir. 1992). See also, Maio v. Aetna, Inc., 221 F.3d 472 (3d Cir. 2000) (participants in defendant's HMO plan did not properly plead an injury to business or property where they failed to allege "that the benefits they received under [defendant's] . . . plan were compromised or diminished as a direct consequence of the systemic practices alleged in the complaint").

every tort plaintiff."[75] Requiring a plaintiff to demonstrate a concrete financial loss to her business or property, the court found, was consistent with the legislative purpose, and was also consistent with what the Supreme Court has termed the "restrictive significance" of the phrase "injured in his business or property."[76]

In *Diaz v. Gates*,[77] the Ninth Circuit considered the claims of a plaintiff who alleged that due to police misconduct, he was falsely convicted and was "rendered unable to pursue gainful employment while defending himself against unjust charges and while unjustly incarcerated."[78] The court stated that Diaz did not allege "that he had lost actual employment, only that 'he was rendered unable to pursue gainful employment'" during his defense and imprisonment.[78.1] This, the Ninth Circuit held, was insufficient to state an injury to business or property.[79]

In November 2004, however, a three-judge panel of the Ninth Circuit voted to rehear the case *en banc*.[79.1] Then, in August 2005, the Ninth Circuit reversed.[79.2] The Ninth Circuit found that the panel's attempt to distinguish actual employment from an inability to pursue gainful employment was not persuasive.[79.3] The court stated that although this approach would allow more claims to go forward, there is "no room in the statutory language for an additional, amorphous requirement that, for an injury to be to business or property, the business or property interest have been the 'direct target' of the predicate act."[79.4]

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[75] *Oscar,* 965 F.2d at 786.

[76] *Id*. (quoting Reiter v. Sonotone Corp., 442 U.S. 330, 339, 99 S.Ct. 2326, 60 L.Ed.2d 931 (1979)). But see, *Oscar,* 965 F.2d at 791-798 (Kleinfeld, J., dissenting).

[77] Diaz v. Gates, 380 F.3d 480 (9th Cir. 2004), *reh'g granted* 389 F.3d 869 (9th Cir. 2004).

[78] *Id*., 380 F.3d at 482.

[78.1] *Id*., 380 F.3d at 484.

[79] *Id*., 380 F.3d at 484. But see:

First Circuit: Hunt v. Weatherbee, 626 F. Supp. 1097, 1101 (D. Mass. 1986) (RICO standing for plaintiff alleging interference with her ability to pursue employment).

Fourth Circuit: Sadighi v. Daghighfekr, 36 F. Supp.2d 279, 290 (D.S.C. 1999) (citing *Khurana* and finding RICO standing for real estate developer alleging "injury to his professional reputation").

Fifth Circuit: Khurana v. Innovative Health Care Systems, Inc., 130 F.3d 143, 150-152 (5th Cir. 1997), *rev'd on other grounds by* Beck v. Prupis, 529 U.S. 494, 505, 120 S.Ct. 1608, 146 L.Ed.2d 561 (2002) (plaintiff's allegations of damage to professional as a result of fraudulent hiring and loss of employment opportunities stated a RICO claim).

[79.1] Diaz v. Gates, 389 F.3d 869 (9th Cir. 2004).

[79.2] Diaz v. Gates, 420 F.3d 897, 903 (9th Cir. 2005) (*per curiam*).

[79.3] *Id*., 420 F.3d at 900-901.

[79.4] *Id*., 420 F.3d at 901.

In *Evans v. City of Chicago*,[80] the Seventh Circuit reached a different conclusion. The plaintiff filed a complaint against several Chicago police officers, who he claimed systematically harassed, intimidated and retaliated against him for several months after he accused two police officers of murder.[80.1] He charged that he had been wrongly targeted for prosecution and unjustifiably imprisoned, and as a result he was damaged in his business or property, asserting that he lost potential income during that period of time.[80.2] He also alleged further injury because the police's conduct required him to incur attorney's fees to defend himself.[80.3]

The Seventh Circuit found that "[t]he loss of income as a result of being unable to pursue employment opportunities while allegedly falsely imprisoned—similar to monetary losses flowing from the loss of consortium, loss of security and peace, wrongful death and similar claims sounding in tort—are quintessentially pecuniary losses derivative of personal injuries arising under tort law,"[81] and as such did not constitute an injury to business or property. The Seventh Circuit recognized that its decision was at odds with the Ninth Circuit, , but stated that the *Diaz* court had "blur[red] 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."[82]

The Federal Circuit has held that in order to recover damages, a RICO plaintiff must prove a concrete financial loss. Injury to a valuable intangible property interest does not satisfy that test.[83] The court concluded that although the defendant had stolen the plaintiff's trade secrets, the plaintiff failed to show that it had suffered a concrete financial loss, even though the defendant would have had to pay to obtain the trade secrets legitimately.[83.1]

In *Reynolds v. Condon*, a district court in the Eighth Circuit held that detrimental effects to employment status or income from employment were not cognizable injuries under RICO and that personal injuries and pecuniary losses occurring therefrom do not meet the statutory requirement of injury to business or property.[84] The court

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[80] Evans v. City of Chicago, 434 F.3d 916 (7th Cir. 2006)
[80.1] *Id*., 434 F.3d at 919.
[80.2] *Id*., 434 F.3d at 925.
[80.3] *Id*.
[81] *Id*., 434 F.3d at 926-927.
[82] *Id*., 434 F.3d at 931 n.26.
[83] Litton Systems, Inc. v. Ssangyong Cement Industries Co., 1997 U.S. App. LEXIS 2386, at *26 (Fed. Cir. Feb. 13, 1997).
[83.1] *Id*.
[84] Reynolds v. Condon, 908 F. Supp. 1494, 1517-1520 (N.D. Iowa 1995).

noted "it is plain that any emotional distress caused by the termination of (plaintiff's) parental rights or by any of the other conduct of the defendants is not a RICO injury."[85] However, "the court [was not able to] find as a matter of law that loss of non-business property, such as the marital home in this case, or loss of income is not a RICO injury."[86]

A California district court heard a case in which the plaintiffs alleged that the defendant, a cigarette manufacturer, engaged in a conspiracy to mislead the plaintiffs, the City of San Francisco and San Francisco County, and their residents about the dangers associated with smoking.[87] The court rejected the plaintiffs' claim for medical expenses flowing form smoking-related illnesses, finding that the alleged injury was a purely physical injury and not recoverable under RICO.[88]

In *Bieter Co. v. Blomquist*,[89] however, the Eighth Circuit held that Section 1964's requirement of injury to "business or property" may be satisfied in appropriate cases even where "the injury to the plaintiff is difficult to ascertain with precision."[90] Thus, a real estate developer alleged that "it had a development proposal that, but for the corruption of various public officials, would have been approved," and that it had lost "what likely would have been the most valuable use of its property" as a result of defendants'corrupt activities.[91] The defendants, relying on *Oscar*, contended that this was "simply a lost opportunity, not the sort of actual, concrete injury for which RICO was designed."[92] The Eighth Circuit, however, determined that the difficulty in precise determination of injury did not require dismissal of the action, but simply reflected on the question of damages.[93]

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[85] *Id.,* 908 F. Supp. at 1519. See also, Mayes v. Local 106, International Union of Operating Engineers, 1999 U.S. Dist. LEXIS 1118, at *13 (N.D.N.Y. Feb. 5, 1999) (neither unquantifiable harm to union membership nor personal injuries, such as emotional distress, are actionable under RICO).

[86] *Id.*

[87] City & County of San Francisco v. Philip Morris Inc., 957 F. Supp. 1130 (N.D. Cal. 1997).

[88] *Id.,* 957 F. Supp. at 1139. See also: Hughes v. Tobacco Institute, Inc., 278 F.3d 417, 422 (5th Cir. 2001) (affirming dismissal of plaintiffs' RICO claims where plaintiffs asserted damages for personal injuries only); Gause v. Philip Morris, 2000 WL 34016343 at *4 (E.D.N.Y. Aug. 8, 2000) ("Plaintiff's asserted 'loss of property' is, in essence, a loss of income due to an alleged inability to work since becoming afflicted with emphysema. . . . A loss of income, however, is not considered a 'loss of property' as required under RICO.").

[89] Bieter Co. v. Blomquist, 987 F.2d 1319 (8th Cir. 1993).

[90] *Id.,* 987 F.2d at 1328.

[91] *Id.*, 987 F.2d at 1329.

[92] *Id.*, 987 F.2d at 1328-1329.

[93] *Id.*, 987 F.2d at 1328. See also, Environmental Tectonics v. W.S. Kirkpatrick, Inc., 847 F.2d 1052, 1067 (3d Cir. 1988), *aff'd* 493 U.S. 400, 110 S.Ct. 701, 107 L.Ed.2d 816 (1990) (cognizable injury in the context of alleged bribery of public officials).

In *Dornberger v. Metropolitan Life Insurance Co.*,[94] a New York district court held that a plaintiff who was fraudulently induced to enter into a transaction did not suffer injury until the defendant failed to perform.[95] In *Dornberger*, because the insurance company never refused to honor the insurance policies which inured to the benefit of the plaintiff, the court concluded that the plaintiff did not suffer a RICO injury tantamount to the full amount of the premiums she paid.[96] The court rejected the plaintiff's argument that the policies were riskier than she had bargained for and that she was thus entitled to recovery, concluding that claims of mental or emotional distress are not cognizable under RICO.[97]

Nor may a government entity "rely on expenditures alone to establish civil RICO standing."[97.1] In *Canyon County v. Syngenta Seeds, Inc*., a county in Idaho filed a RICO suit against four companies and the executive director of an organization that provided assistance for migrant workers, alleging that they employedr and harbored large numbers of illegal immigrants and that the county's expenditures for public health care and law enforcement services were thereby increased.[97.2] The Ninth Circuit found that the county failed to allege an injury to its business or property, relying primarily on precedent interpreting the Clayton Act's phrase "business or property" to exclude "states' interests in their sovereign or quasi-sovereign capacities."[97.3] In addition, the court held that the alleged RICO violations were not the proximate cause of the county's alleged additional expenditures, because "varied factors" may result in increased demand for those services and "the proceedings required to evaluate the County's injury would be speculative in the extreme."[97.4] The court found it "particularly inappropriate to label a governmental entity 'injured in its property' when it spends money on the provision of additional public services, given that those services are based on legislative mandates and are intended to further the public interest."[97.5]

Nevertheless, shortly after the Ninth Circuit decided *Syngenta Seeds*, the Second Circuit held that "lost taxes can constitute injury to

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[94] Dornberger v. Metropolitan Life Insurance Co., 961 F. Supp. 506 (S.D.N.Y. 1997).
[95] *Id.,* 961 F. Supp. at 521.
[96] *Id*.
[97] *Id*., 961 F. Supp. at 522.
[97.1] Canyon County v. Syngenta Seeds, Inc., 519 F.3d 969, 976 (9th Cir. 2008).
[97.2] *Id*., 519 F.3d at 971.
[97.3] *Id*., 519 F.3d at 975-976.
[97.4] *Id*., 519 F.3d at 983.
[97.5] *Id*., 519 F.3d at 976.

'business or property' for purposes of RICO."[97.6] In that case, the Second Circuit expressly rejected dicta from an earlier case that was endorsed by the Ninth Circuit in *Syngenta Seeds*.[97.7] The Second Circuit rejected its own suggestion from *Town of West Hartford v. Operation Rescue* "that a municipality must have sustained its injury as a party to a commercial transaction to have standing under RICO."[97.8] The court saw "no reason to import an additional standing requirement on municipalities for RICO claims," noting that it has "consistently held that tax losses from unpaid taxes are 'property' for purposes of the mail and wire fraud statutes."[97.9]

In *Hemi Group, LLC v. City of New York*, neither the plurality opinion nor Justice Ginsburg's concurrence addressed the issue of whether the loss of tax revenues can constitute an injury to business or property.[97.10] However, the dissent would have found that the City of New York's loss of tax revenue constituted a valid injury to business or property for the purposes of RICO.[97.11] In support of this conclusion, Justice Breyer examined the Department of Justice's prosecution guidelines, which allow for prosecution "only where there is at issue 'a large fraud or a substantial pattern of conduct.'"[97.12] In the instant case, Justice Breyer believed that the guidelines would have authorized prosecution of Hemi and therefore the City of New York's loss of tax revenue satisfied RICO's requirement of harm to business or property.[97.13] However, Justice Breyer's dissent specifically declined to "express a view as to how or whether RICO's civil action provisions apply to simpler instances of individual tax liability."[97.14]

[5]—The Filed Rate Doctrine

Courts have enunciated a further limitation on injuries compensable under RICO, which involve civil RICO claims against public utilities. Where customers have alleged that utilities obtained

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[97.6] City of New York v. Smokes-Spirits.com, Inc., 541 F.3d 425, 445 (2d Cir. 2008), *rev'd on other grounds sub nom*. Hemi Group, LLC v. City of New York, __ U.S. ___, 130 S.Ct. 983, 175 L.Ed.2d 943 (2010).

[97.7] *Id*., 541 F.3d at 445.

[97.8] *Id*., 541 F.3d at 445 (referring to Town of West Hartford v. Operation Rescue, 915 F.2d 92 (2d Cir. 1990)).

[97.9] *Smokes-Spirits.com, Inc.,* N. 97.6 *supra*, 541 F.3d at 445.

[97.10] Hemi Group LLC v. City of New York, ___ U.S. __, 130 S.Ct. 983, 175 L.Ed.2d 943 (2010).

[97.11] *Id*., 130 S.Ct. at 997-998 (Breyer, J. dissenting).

[97.12] *Id*., 130 S.Ct. at 1001 (quoting United States Dep't of Justice, United States Attorneys' Manual, § 6-4.210(A) (2007)).

[97.13] *Id*.

[97.14] *Id*.

approval of excessive rates through fraud, courts have held that they suffered no cognizable RICO injury by having paid the allegedly excessive rates. Rather, courts have applied the "filed rate doctrine," which states that a prior governmental rate determination precludes any right to pay another rate and bars any compensable injury under RICO.[98] However, the filed rate doctrine would not bar a RICO claim arising from retail sales that are beyond the government's rate-setting authority.[98.1]

One district court found that there is no exception for public utilities under RICO and held that the filed rate doctrine did not bar a RICO claim that essentially sought to enforce the filed tariff because the claim did not involve a direct or indirect challenge to the filed rate itself.[98.2] Citing the Supreme Court's decision in *Humana Inc. v. Forsyth*,[99] the court noted that applying RICO to utilities would not frustrate state policy or interfere with the administrative regime and refused to dismiss the plaintiff's RICO claim against the utility.[100]

[6]—Causation Nexus

The majority opinion in *Holmes v. Securities Investor Protection Corp*.[101] held that the "by reason of" language of Section 1964(c)

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[98] See:

Second Circuit: Sun City Taxpapers' Ass'n v. Citizens Utilities Co., 45 F.3d 58, 61-63 (2d Cir. 1995) (rates approved by a governing regulatory agency *per se* reasonable under the filed rate doctrine).

Eighth Circuit: Saunders v. Farmers Insurance Exchange, 440 F.3d 940 (8th Cir. 2006); H.J., Inc. v. Northwestern Bell Telephone Co., 954 F.2d 485, 488-494 (8th Cir. 1992) (filed rate doctrine precluded RICO suit to recover claimed damages relating to allegedly fraudulent rate approved by state commission).

Ninth Circuit: See Wah Chang v. Duke Energy Trading and Marketing LLC, 507 F.3d 1222, 1225 & n.4 (9th Cir. 2007).

Eleventh Circuit: Taffet v. Southern Co., 967 F.2d 1483, 1494 (11th Cir. 1992) ("The appellants suffered no legally cognizable injury by virtue of paying the filed rate.").

But see, Gelb v. American Telephone & Telegraph Co., 813 F. Supp. 1022, 1026-1031 (S.D.N.Y. 1993) (refusing to dismiss RICO claim against a telephone utility and its two top officers because the liability issue in the case was whether the defendant committed fraud rather than the determination of a reasonable rate).

[98.1] See Sierra Pacific Resources v. El Paso Merchant Energy, L.P., 250 Fed. Appx. 776 (9th Cir. 2007) ("Based on the record, it is reasonable to infer that at least some of the retail transactions between Nevada Power and the Gas Companies did not flow from FERC-approved upstream transactions and therefore claims based on these transactions are not barred by the Filed Rate Doctrine.").

[98.2] Black Radio Network, Inc. v. NYNEX Corp., 44 F. Supp.2d 574-578 (S.D.N.Y. 1999).

[99] Humana, Inc. v. Forsyth, 525 U.S. 299, 119 S.Ct. 710, 142 L.Ed.2d 753 (1999).

[100] *Black Radio Network, Inc*., N. 98.2 *supra*, 44 F. Supp.2d at 574-578.

[101] Holmes v. Securities Investor Protection Corp. 503 U.S. 258, 112 S.Ct. 1311, 117 L.Ed.2d 532 (1992).

requires a showing by the plaintiff that his or her injuries are "directly" and "proximately" caused by the defendant's misconduct.[102] Relying on its earlier construction of the "by reason of" language in the Clayton Act, the Court ruled that Congress intended a similar construction when it adopted the identical phrase in RICO.[103] Accordingly, as in antitrust cases, proximate causation is the requisite nexus for an action under RICO.[104] In *Holmes,* the Court concluded that the alleged stock manipulation activities of the defendant broker-dealers were not the proximate cause of the plaintiffs' injuries because the plaintiffs were not purchasers or sellers of the manipulated securities.[105]

The traditional requirements of proximate and direct causation—which *Holmes* construed the "by reason of" language to incorporate into RICO—must be distinguished from mere factual or "but for" causation.[106] The primary consideration in determining whether a plaintiff's injuries have been proximately caused by a defendant's violations of Section 1962 is the *directness* of the relationship "between the injury asserted and the injurious conduct alleged."[107]

In *Holmes*, the Supreme Court discussed three reasons for the directness requirement:

> First, the less direct an injury is, the more difficult it becomes to ascertain the amount of a plaintiff's damages attributable to the violation, as distinct from other, independent factors. Second, . . . recognizing claims of the indirectly injured would force courts to adopt complicated rules apportioning damages among plaintiffs removed at different levels of injury from the violative acts, to obviate the risk of multiple recoveries. And, finally . . . directly injured victims can generally be counted on to vindicate the law as

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[102] *Id.,* 503 U.S. at 268-270.

[103] *Id*., 503 U.S. at 267-268. The Court's reliance on the Clayton Act precedents represents a departure from its rejection of that approach in *Sedima, S.P.R.L. v. Imrex Co*., 473 U.S. 479, 105 S.Ct. 3275, 87 L.Ed.2d 346 (1985). See Rakoff, "The Supreme Court Scolds RICO," 15 RICO L. Rep. 668 (April 1992).

[104] *Holmes*, 503 U.S. at 267-268. See also, Callahan v. A.E.V., Inc., 182 F.3d 237, 260-268 (3d Cir. 1999) (applying *Holmes* and dismissing plaintiff's RICO claims on proximate causation grounds). It should be noted that this restrictive causation nexus runs counter to the Court's earlier affirmation in *Sedima* that RICO applies to all injuries that flow "indirectly" from the racketeering activity.

[105] *Holmes*, 503 U.S. at 270-272. The named plaintiff, Securities Investor Protection Corporation, was subrogated only to the rights of customers who were not purchasers or sellers of manipulated securities.

[106] *Id*., 503 U.S. at 265-268.

[107] *Id*., 503 U.S. at 269.

private attorneys general, without any of the problems attendant upon suits by plaintiffs injured more remotely.[108]

Notwithstanding *Holmes*, the Eighth Circuit has indicated that an overly narrow interpretation of the concepts of directness and proximate causation must not be permitted to "undermine RICO as a means of rooting out public corruption" or to "provide a formula to those who seek to achieve private gain through corruption of our democratic processes."[109] In *Bieter Co. v. Blomquist*[110] a real estate developer sued competing developers, a municipality, and its former mayor under RICO, alleging that bribery of city officials had resulted in its failure to receive the necessary approvals to proceed with a proposed development.[111] Although the district court found a lack of causation on the theory that plaintiff had lacked the requisite number of city council votes regardless of the bribery, the Eighth Circuit rejected this view and found that the plaintiff adequately alleged causation, holding in part that the district court had adopted "too narrow a view of causation in group decision making, such as that which occurs within a city council."[112]

It remains to be seen whether and to what extent other circuits will follow the Eighth Circuit in stressing that the directness requirement and the proximate causation principle enunciated in *Holmes* must not be applied "too narrow[ly]," so as to thwart RICO's anti-corruption objectives.[113] A Pennsylvania district court has held that although a plaintiff need not prove that the defendant's acts were the sole cause of its injury, a plaintiff does not state a RICO claim if the defendant

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[108] *Id*. (Citations omitted). See also, Commercial Cleaning Services L.L.C. v. Colin Service Systems, Inc., 271 F.3d 374, 380-385 (2d Cir. 2001) (plaintiff adequately pled proximate causation under the three factor test set out in *Holmes*).

[109] Bieter Co. v. Blomquist, 987 F.2d 1319, 1320 (8th Cir. 1993).

[110] *Id*.

[111] *Id*., 987 F.2d at 1320.

[112] *Id*., 987 F.2d at 1326.

[113] See also, Red Ball Interior Demolition Corp. v. Palmadessa, 874 F. Supp. 576, 587 (S.D.N.Y. 1995) (sound policy counsels against granting relief where the causal connection between plaintiff's injury and the acts of the defendants is so remote, particularly where state law deterrents are in place). But see:

Third Circuit: Rodriguez v. McKinney, 878 F. Supp. 744, 749 n.2 (E.D. Pa. 1995) (no requirement that the deceived and the injured person be the same for a RICO claim).

D.C. Circuit: BCCI Holdings (Luxembourg), S.A. v. Khalil, 214 F.3d 168, 174 (D.C. Cir. 2000) (rejecting defendant's argument that proximate cause requirement required plaintiff to prove it was "'intended target' and that the injury was the 'preconceived purpose' of the RICO activity").

can demonstrate that other factors were an intervening direct cause of its injury.[114]

The Second Circuit currently requires that in the context of predicate acts grounded in fraud the plaintiff must prove both transaction and loss causation.[115] In such circumstances, the plaintiff must not only show that but for the defendant's misrepresentations the transaction would not have come about, but also demonstrate that the misstatement was the reason the transaction failed.[116] Applying this analysis, the Second Circuit has held that when factors other than the defendant's fraud are an intervening direct cause of plaintiff's injury, his or her injury cannot be said to have occurred by reason of the defendant's actions.[117] Thus, in one case, injuries allegedly occurring as a result of fixed horse races failed to establish direct causation because the court found that there were many independent factors shaping the outcome of the race, which made it impossible to determine whether and to what extent the defendant's alleged fraudulent activities caused plaintiff's horses to finish poorly in the races at issue.[118] Similarly, in *UFCW Local 1776 v. Eli Lily and Company*,[118.1] the Second Circuit found that the third-party payors were unable to satisfy RICO's proximate cause requirement in a case regarding alleged false statements associated with the marketing of Zyprexa to doctors because "[a]n individual patient's diagnosis, past and current

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[114] Klein v. Boyd, 1996 U.S. Dist. LEXIS 5956, at *20 (E.D. Pa. May 3, 1996). See also, Martin v. A. O. Smith Corp., 931 F. Supp. 543, 548-549 (W.D. Mich. 1996). But see, Iron Workers Local Union No. 17 Insurance Fund v. Philip Morris, Inc., 22 F. Supp.2d 771, 778-784 (N.D. Ohio 1998) (declining to dismiss RICO claims on proximate cause grounds even though the court considered the difficulty the plaintiff would have in showing that plaintiff's damages flowed from the defendant's conduct).

[115] See, e.g.: Moore v. PaineWebber, Inc., 189 F.3d 165, 169-170, 171-172 (2d Cir. 1999); First Nationwide Bank v. Gelt Funding Corp., 27 F.3d 763, 769 (2d Cir. 1994); Citibank, N.A. v. K-H Corp., 968 F.2d 1489, 1495 (2d Cir. 1992). See also: *Moore*, 189 F.3d at 174-180 (Calabresi, J., concurring) (discussing transaction and loss causation and examining the different significance the elements of causation have in fraud cases as opposed to common law negligence cases, as well as the difference between causation concepts in common law and statutory cases); Fisher v. Reich, 1994 U.S. Dist. LEXIS 17121 (S.D.N.Y. Dec. 1, 1994) (causal connection was not established where loss did not occur until eight years after the alleged misrepresentations).

[116] *First Nationwide Bank*, 27 F.3d at 769.

[117] See, e.g.: Powers v. British Vita PLC, 57 F.3d 176, 189-191 (2d Cir. 1995); Moore v. PaineWebber, Inc., 1997 U.S. Dist. LEXIS 13884, at *15-*17 (S.D.N.Y. Jan. 14, 1997).

[118] Allen v. Barrenson Pari-Mutuel of New York, Inc., 1998 U.S. Dist. LEXIS 2020, at *7-*13 (S.D.N.Y. Feb. 10, 1998).

[118.1] UFCW Local 1776 v. Eli Lily and Co., 620 F.3d 121 (2d Cir. 2010).

medications being taken by the patient, the physician's own experience with prescribing Zyprexa, and the physician's knowledge regarding the side effects of Zyprexa are all considerations that would have been taken into account in addition to the alleged misrepresentations distributed by Lilly."[118.2]

The Supreme Court examined proximate causation in *Anza v. Ideal Steel Supply Corp*.[119] Ideal claimed that National Steel Supply, Inc., Anzas' company and Ideal's competitor,, failed to charge the required New York sales tax to customers who paid cash, which allowed the company to reduce its prices without affecting its profits.[120] National Steel Supply allegedly submitted fraudulent tax returns to attempt to hide their conduct. The submission of the tax returns was allegedly mail and wire fraud. Ideal pled violations of §§ 1962(a) and 1962(c).

The Supreme Court analyzed the § 1962(c) claim in the context of *Holmes* because "[t]he attenuated connection between Ideal's injury and the Anzas' injurious conduct thus implicates fundamental concerns expressed in *Holmes*."[121] The court explained that the "cause of Ideal's asserted harms, however, is a set of actions (offering lower prices) entirely distinct from the alleged RICO violation (defrauding the State)."[122] The Court concluded that "[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."[123] In this case, the court concluded that there was no direct relationship between the alleged mail and wire fraud and Ideal's injury. As proximate causation was not present, the Court did not reach the issue of whether a showing of reliance was required. Because the parties devoted most of their attention to the § 1962(c) claim, the Court vacated and remanded the § 1962(a) claim to the Second Circuit to determine whether Ideal's claims properly pled proximate causation under § 1962(a).[124] Subsequent appellate decisions

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[118.2] *Id.,* 620 F.3d at 135.

[119] Anza v. Ideal Steel Supply Corp., 547 U.S. 451, 126 S.Ct. 1991, 64 L.Ed.2d 720 (2006).

[120] *Id*., 547 U.S. at 453. The district court had dismissed Ideal's claim, finding that Ideal had not alleged that it relied on the false tax returns. The Second Circuit vacated the district court decision, finding that where a complaint alleged a pattern "that was intended to and did give the defendant a competitive advantage over the plaintiff, the complaint adequately pleads proximate cause, and the plaintiff has standing to pursue a RICO claim." Ideal Steel Supply Corp. v. Anza, 373 F.3d 251, 263 (2d Cir. 2004). Therefore, the Second Circuit allowed the § 1962(a) and § 1962(c) claims.

[121] *Anza,* 547 U.S. at 458.

[122] *Id*.

[123] *Id.,* 547 U.S. at 461.

[124] *Id.,* 547 U.S. at 462.

have drawn on both *Holmes* and *Anza* in addressing questions of proximate cause.[125]

On remand in *Ideal*, the district court dismissed Ideal's § 1962(a) claim because it found the complaint failed to "allege facts explaining how Defendants' investment of purported racketeering income to establish and operate its Bronx business location proximately caused Ideal to lose sale, profits, and market share."[125.1] In the alternative, the district court granted the defendants' motion for summary judgment due to a lack of proximate cause because Ideal's claim "would require a complex assessment to establish what portion of Ideal's lost sales were the product of National's conduct because businesses lose and gain customers for many reasons."[125.2]

On appeal, Ideal contended that the district court failed to properly distinguish the different acts contemplated by § 1962(a) and § 1962(c). The Second Circuit explained that "to the extent that Ideal claims injury from National's continuation in its Bronx store of the cash-no-tax scheme conducted in the Queens store, that claim appears to be conceptually indistinguishable from the § 1962(c) claim rejected by the Supreme Court."[125.3] The court, however, determined that the district court had erred in granting judgment on the pleading and summary judgment regarding "Ideal['s] claims that it lost sales to National because defendants invested the proceeds of their pattern of racketeering activity to establish and operate National's new store in the Bronx."[125.4] The court explained that the proper focus of the proximate cause analysis under Section 1962(a) "is defendants' use or

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[125] See:

Third Circuit: V-Tech Services, Inc. v. Street, 215 Fed. Appx. 93 (3d Cir. 2007) (proximate cause was not satisfied because allegations indicated that federal, state, and local government entities—and not plaintiff—were the direct victims of the defendants' fraudulent conduct).

Seventh Circuit: Phoenix Bond & Indemnity Co. v. Bridge, 477 F.3d 928, 932 (7th Cir. 2007), *aff'd* 553 U.S. 639, 128 S.Ct. 2131, 170 L.Ed.2d 1012 (2008) (a "direct *victim* may recover through RICO whether or not it is the direct *recipient* of the false statements").

Ninth Circuit: Sybersound Records, Inc. v. UAV Corp., 517 F.3d 1137, 1148 (9th Cir. 2008) (proximate cause was not present where "the court would have to engage in a speculative and complicated analysis to determine what percentage of Sybersound's decreased sales, if any, were attributable to the Corporation Defendants' decision to lower their prices or a Customer's preference for a competitor's products over Sybersound's, instead of to acts of copyright infringement or mail and wire fraud").

[125.1] Ideal Steel Supply Corp. v. Anza, 2009 WL 1883272 at *4 (S.D.N.Y. June 30, 2009).

[125.2] *Id*. at *6. (Internal quotations and citations omitted.)

[125.3] Ideal Steel Supply Corp. v. Anza, 652 F.3d 310, 318 (2d Cir. 2011).

[125.4] *Id*.

investment of the funds, derived directly or indirectly from the alleged pattern of racketeering activity, to establish or operate the National facility in the Bronx.[125.5] In reversing the district court's decision to grant judgment on the pleadings, the Second Court found that the district court had imposed a level of specificity regarding the allegations in the complaint that was not warranted by the Supreme Court's decision in *Iqbal* or *Twombly*.[125.6] Additionally, the court noted that "[i]n light of the fact that discovery in this case had been completed prior to the decision in *Ideal IV*, we do not regard *Twombly* as requiring that defendants' Rule12(c) motion be granted if evidence that had already been produced during discovery would fill the perceived gaps in the Complaint."[125.7] The Second Circuit reversed the district court's grant of summary judgment on the issue of proximate cause as the "district court viewed the proximate cause inquiry as the same for a claim under subsection (a) as for one under subsection (c), and it does not appear to have given effect to the different referents required by the different prohibitions."[125.8] Specifically, the court explained that under Section 1962(a)

> the act constituting the violation is the very act that causes the harm: the use or investment of the funds derived from the pattern of mail and wire frauds to establish and operate the Bronx store is both the violation and the cause of Ideal's lost sales. The district court . . . does not appear to have focused on the fact that the alleged subsection (a) violation itself, the investment or use of all or part of the income derived directly or indirectly from the racketeering activity in the establishment or operation of a store that simply by its existence attracts customers away from a competitor, may be the direct cause of injury to plaintiff in business or property.[125.9]

The court further rejected the district court's finding that there was an intervening cause in Ideal having received allegedly inferior products during the relevant time period; the Second Circuit instead characterized that suggestion as an issue of but for, not proximate, causation.[125.10]

[125.5] *Id.*
[125.6] *Id.*, 652 F.3d at 315.
[125.7] *Id.*, 652 F.3d at 325.
[125.8] *Id.*, 652 F.3d at 327.
[125.9] *Id.*
[125.10] *Id.*

Judge Cabranes dissented from the court's decision. Judge Cabranes explained that "alleged illegal activity *is not* National's creation of a new store in the Bronx—on its own, a perfectly legitimate, competitive pursuit, but rather defendants' investment of ill-gotten proceeds."[125.11] Judge Cabranes noted that this distinction was important as a court would have to discern the reason for why the Anzas opened a facility in the Bronx. Furthermore, Judge Cabranes's dissent expressed concern that companies would utilize RICO to assert claims against competitors in an effort to stifle competition.[125.12]

In the Supreme Court's decision in *Hemi Group, LLC v. City of New York*,[125.13] a plurality opinion relied upon the Court's prior decisions in *Holmes* and *Anza* to hold that the City of New York was unable to satisfy the proximate cause requirement of RICO.[125.14] The City of New York contended that the proximate cause requirement was satisfied because Hemi had sold cigarettes to New York City residents and had failed to comply with its obligation under the Jenkins Act to report the sales of those cigarettes to New York State thereby rendering it impossible for the City of New York to determine "which customers had failed to pay the [applicable cigarette] tax."[125.15] The plurality concluded that this theory did not satisfy the proximate cause requirement because "the City's theory of liability rests not just on *separate actions*, but separate actions carried out by separate *parties*."[125.16] The plurality explained that accepting the City of New York's casual chain would render meaningless the proximate cause requirement because "Hemi's obligation was to file the Jenkins Act reports with the State, not the City, and the City's harm was directly caused by the customers, not Hemi."[125.17] In support of their conclusion that the City of New York had failed to satisfy the proximate cause requirement, the plurality noted that the "State [of New York] certainly is better situated than the City to seek from recovery from Hemi."[125.18]

For a while, another limitation on recovery under civil RICO subsumed within the proximate causation requirement was the need for the plaintiff to have relied on the misrepresentations that constituted

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[125.11] *Id.*, 652 F.3d at 331.
[125.12] *Id.*
[125.13] Hemi Group, LLC, v. City of New York, __ U.S. __, 130 S.Ct. 983, 175 L.Ed.2d 983 (2010).
[125.14] *Id.*, 130 S.Ct. at 994 (plurality opinion).
[125.15] *Id.*, 130 S.Ct. at 985.
[125.16] *Id.*
[125.17] *Id.*
[125.18] *Id.*

the predicate acts of mail or wire fraud. While some courts had imposed such a limitation,[126] others had not.[127] The Seventh Circuit has held that *Holmes* did not completely preclude the possibility of recovering for an indirect injury, thereby allowing a business derivatively injured by acts aimed at its potential customers to bring a RICO

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[126] See, e.g.:

Second Circuit: Metromedia Co. v. Fugazy, 983 F.2d 350, 368 (2d Cir. 1992); In re Sumitomo Copper Litigation, 995 F. Supp. 451, 458 (S.D.N.Y. 1998); Curatola v. Ruvolo, 949 F. Supp. 223, 225 (S.D.N.Y. 1997); DeFiore v. DiLorenzo, 1997 WL 722697 at *6 (E.D.N.Y. Sept. 19, 1997); B.V. Optische Industrie de Oude Delft v. Hologic, Inc., 909 F. Supp. 162, 170 (S.D.N.Y. 1995).

Third Circuit: Ideal Dairy Farms, Inc. v. John Labatt, Ltd., 90 F.3d 737, 746-747 (3d Cir. 1996).

Fourth Circuit: Chisolm v. TranSouth Financial Corp., 95 F.3d 331, 337 (4th Cir. 1996); Lifschultz Fast Freight, Inc. v. Consolidated Freightways Corp., 1993 WL 241742 at *1 (4th Cir. July 6, 1993); Brandenburg v. Seidel, 859 F.2d 1179, 1188 n.10 (4th Cir. 1988).

Fifth Circuit: Summit Properties, Inc. v. Hoechst Celanese Corp., 214 F.3d 556, 558-561 (5th Cir. 2000) ("[W]hen civil RICO damages are sought for injuries resulting from fraud, a general requirement of reliance by the plaintiff is a commonsense liability limitation."). *Cf.,* Procter & Gamble Co. v. Amway Corp., 242 F.3d 539, 564-565 (5th Cir. 2001) (Fifth Circuit recognizes a narrow exception to the rule that a plaintiff must show reliance on the fraud where the other elements of proximate causation are present).

Sixth Circuit: Yax v. United Parcel Service, 196 Fed. Appx. 379 (6th Cir. 2006); Central Distributors of Beer, Inc. v. Conn, 5 F.3d 181, 184 (6th Cir. 1993); Iron Workers Local Union No. 17 Insurance Fund v. Philip Morris, Inc., 182 F.R.D. 523, 535-537 (N.D. Ohio 1998).

Seventh Circuit: In re EDC, Inc., 930 F.2d 1275, 1280 (7th Cir. 1991) (assuming without discussion that reliance is an element of a RICO wire fraud claim); Reynolds v. East Dyer Development Co., 882 F.2d 1249, 1253 (7th Cir. 1989); Krause v. G.E. Capital Mortgage Services, Inc., 1998 WL 831896 at *5 (N.D. Ill. Nov. 20, 1998).

Eighth Circuit: Appletree Square I v. W.R. Grace & Co., 29 F.3d 1283, 1286 (8th Cir. 1994).

Eleventh Circuit: Pelletier v. Zweifel, 921 F.2d 1465, 1499-1500 (11th Cir. 1991).

[127] See, e.g.:

Second Circuit: County of Suffolk v. Long Island Lighting Co., 907 F.2d 1295, 1311 (2d Cir. 1990); Sterling Interiors Group, Inc. v. Haworth, Inc., 1996 U.S. Dist. LEXIS 13908, at *4-*12 (S.D.N.Y. Sept. 23, 1996) (discussing Second Circuit law on this issue); Volmar Distributors, Inc. v. New York Post Co., 825 F. Supp. 1153, 1162-1163 (S.D.N.Y. 1993); Shaw v. Rolex Watch U.S.A., Inc., 726 F. Supp. 969, 973 (S.D.N.Y. 1989).

Third Circuit: Tabas v. Tabas, 47 F.3d 1280, 1294 n.18 (3d Cir. 1995) (*en banc*); Rodriguez v. McKinney, 878 F. Supp. 744, 749 (E.D. Pa. 1995); American Health Systems, Inc. v. Visiting Nurse Ass'n of Greater Philadelphia, 1994 WL 314313 at *6-*7 (E.D. Pa. June 29, 1994).

Seventh Circuit: Israel Travel Advisory Services, Inc. v. Israel Identity Tours, Inc., 61 F.3d 1250, 1257 (7th Cir. 1995); Arensen v. Whitehall Convalescent & Nursing Home, Inc., 164 F.R.D. 659, 666 (N.D. Ill. 1996); Johnson v. Aronson Furniture Co., 1998 WL 641342 at *7-*8 (N.D. Ill. Sept. 11, 1998).

claim.[128] However, the court concluded that the plaintiff could not base its claim on predicate acts of mail fraud because the mail fraud statute protected customers only and not potential vendors.[129] Since then, the Supreme Court has held that first-party reliance is not required for a plaintiff to assert a civil RICO claim predicated on mail fraud.[129.1] However, the Court noted that a RICO plaintiff may be unable to establish the requisite causation if no one relied on the misrepresentations.[129.2] Following the Supreme Court's decision in *Bridge*, the Eleventh Circuit reaffirmed its earlier decision that when mail or wire fraud serves as a predicate act "[t]he plaintiff may not assert misrepresentations that were directed toward another person or entity, but he must have been the target of the scheme to defraud and detrimentally relied on the misrepresentations.[129.3]

Federal courts have rendered several many important decisions concerning the issue of proximate causation in the context of suits against tobacco companies and their affiliated entities. Most of these suits have been filed by union health and welfare funds, alleging that the defendant tobacco companies and their related entities deceived and defrauded them, compelling them to pay for the smoking-related illnesses of their members and precluding them from informing their participants about the harms of smoking and the means by which they could have stopped smoking. Similar suits have been filed by health maintenance organizations, health care insurance plans and state hospital districts.[130]

Most of the courts considering these cases have found the plaintiffs' injuries too attenuated and have dismissed the suits.[131] The courts have analyzed these suits using the three-factor test set forth in *Holmes*:

> (1) whether more direct victims of the alleged wrongful conduct exist who will enforce the law;

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[128] Israel Travel Advisory Services, Inc. v. Israel Identity Tours, Inc., 61 F.3d 1250, 1257 (7th Cir. 1995).

[129] *Id*., 61 F.3d at 1258.

[129.1] Bridge v. Phoenix Bond & Indemnity Co., 553 U.S. 639, 128 S.Ct. 2131, 2134, 170 L.Ed.2d 1012 (2008).

[129.2] *Id*., 553 U.S. at 658-659.

[129.3] Halpin v. Crist, 405 Fed. Appx. 403 (11th Cir. 2010).

[130] See, e.g.: Group Health Plan, Inc. v. Philip Morris Inc., 86 F. Supp.2d 912 (D. Minn. 2000) (health maintenance organizations); Regence Blueshield v. Philip Morris, Inc., 40 F. Supp.2d 1179 (W.D. Wash. 1999) (health care insurance plans); Association of Washington Public Hospital Districts v. Philip Morris Inc., 79 F. Supp.2d 1219 (W.D. Wash. 1999) (state hospital districts), *aff'd* 241 F.3d 696 (9th Cir. 2001).

[131] See, e.g.:

First Circuit: Rhode Island Laborers' Health & Welfare Fund v. Philip Morris Inc., 1999 WL 619064 (D.R.I. Aug. 11, 1999).

(2) whether it will be difficult to ascertain the amount of the plaintiff's damages attributable to the defendants wrongful conduct; and

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Second Circuit: Laborers Local 17 Health & Benefit Fund v. Philip Morris Inc., 191 F.3d 229 (2d Cir. 1999), *cert. denied* 528 U.S. 1080 (2000); Attorney General of Canada v. RJ Reynolds Tobacco Holdings, Inc., 103 F. Supp.2d 134, 150-155 (N.D.N.Y. 2000), *aff'd* 268 F.3d 103 (2d Cir. 2001) (injuries claimed by plaintiff Canada too attenuated to support recovery under RICO).

Third Circuit: Allegheny General Hospital v. Philip Morris, Inc., 228 F.3d 429 (3d Cir. 2000) (dismissing RICO claims brought by sixteen Pennsylvania hospitals); Steamfitters Local Union No. 420 Welfare Fund v. Philip Morris Inc., 171 F.3d 912 (3d Cir. 1999), *cert. denied* 528 U.S. 1105 (2000).

Fourth Circuit: Seafarers Welfare Plan v. Philip Morris Inc., 27 F. Supp.2d 623 (D. Md. 1998).

Fifth Circuit: Texas Carpenters Health Benefit Fund v. Philip Morris Inc., 199 F.3d 788 (5th Cir. 2000).

Sixth Circuit: Perry v. The American Tobacco Co., 324 F.3d 845, 849 (6th Cir. 2003).

Seventh Circuit: International Brotherhood of Teamsters, Local 734 Health & Welfare Trust Fund v. Philip Morris Inc., 196 F.3d 818 (7th Cir. 1999).

Eighth Circuit: Lyons v. Philip Morris Inc., 225 F.3d 909 (8th Cir. 2000); Group Health Plan, Inc. v. Philip Morris Inc., 86 F. Supp.2d 912 (D. Minn. 2000); Arkansas Carpenters' Health & Welfare Fund v. Philip Morris Inc., 75 F. Supp.2d 936 (E.D. Ark. 1999).

Ninth Circuit: Oregon Laborers-Employers Health & Welfare Trust Fund v. Philip Morris Inc., 185 F.3d 957 (9th Cir. 1999), *cert. denied* 528 U.S. 1075 (2000); Association of Washington Public Hospital Districts v. Philip Morris, Inc., 79 F. Supp.2d 1219 (W.D. Wash. 1999) (dismissing claims of state public hospital districts), *aff'd* 241 F.3d 696 (9th Cir. 2001); Regence Blueshield v. Philip Morris, Inc., 40 F. Supp.2d 1179 (W.D. Wash. 1999) (dismissing claims of health care insurance plans).

Eleventh Circuit: United Food and Commercial Workers Unions, Employers Health and Welfare Fund v. Philip Morris, Inc, 223 F.3d 1271 (11th Cir. 2000); Southeast Florida Laborers District Health and Welfare Trust Fund v. Philip Morris Inc., 1998 WL 186878 (S.D. Fla. April 13, 1998).

District of Columbia Circuit: Service Employees International Union Health and Welfare Fund v. Philip Morris Inc., 249 F.3d 1068 (D.C. Cir. 2001) (dismissing RICO claims by union health and welfare funds and Republics of Guatemala, Nicaragua and Ukraine).

But see:

Second Circuit: The National Asbestos Workers Medical Fund v. Philip Morris, 74 F. Supp.2d 221 (E.D.N.Y. 1999) (allowing RICO claims of medical provider plans and ERISA trust funds to proceed under a subrogation theory); Blue Cross and Blue Shield of New Jersey, Inc v. Philip Morris Inc., 36 F. Supp.2d 560 (E.D.N.Y. 1999).

Sixth Circuit: Kentucky Laborers District Council Health and Welfare Trust Fund v. Hill & Knowlton, Inc., 24 F. Supp.2d 755, 761-764, 767-771 (W.D. Ky. 1998) (dismissing claims of union health and welfare trust funds regarding any alleged wrongdoing directed at the funds' participants, but allowing claims in which the alleged wrongful conduct was directed at the funds themselves); Iron Workers Local Union No. 17 Insurance Fund v. Philip Morris Inc., 23 F. Supp.2d 771, 784-786, 788-790 (N.D. Ohio 1998) (refusing to dismiss the plaintiff's, a union health insurance trust, RICO claims on proximate cause grounds).

(3) whether courts will need to adopt complicated rules apportioning damages to avoid the risk of multiple recoveries.[132]

(Text continued on page 1-143)

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[132] See, e.g., *Oregon Laborers*, N.131 *supra,* 185 F.3d at 963.

With respect to the first factor, courts have generally concluded that the smokers are more direct victims of the alleged wrongful conduct and can be relied upon to vindicate their rights. In considering the second factor, courts have found it too difficult to ascertain the damages attributable to the defendants' conduct, as opposed to the damages attributable to other factors, because the plaintiffs' claims would have required them to determine "how many smokers would have stopped smoking if provided with smoking-cessation information, how many would have begun smoking less dangerous products, how much healthier these smokers would have been if they had taken these actions, and the savings the Funds would have realized by paying out fewer claims for smoking-related illnesses."[133] Finally, with respect to the third factor, courts have recognized the risk of double recovery and the complexity that would arise from attempting to apportion damages.[134] In reaching its decision in *Oregon Laborers*, the Ninth Circuit stated that "[a]lthough the smokers cannot recover under either RICO or the antitrust laws, they can seek recovery under other state law theories for personal injury and the associated medical costs—the same damages that plaintiffs seek to recover."[135]

The Seventh Circuit considered both factual and proximate causation in its determination of whether a company showed that its injury occurred "by reason of" the alleged violation where the district court had found that the injury the company suffered "was simply a bump in the road on the path to defraud Wal-Mart."[135.1] Regarding factual causation, the court stated that the relevant question was "whether the plaintiff's alleged injury would have resulted but for the entire 'violation of *section 1962*.' . . . If a predicate act was sufficient to cause the plaintiff's injury and that predicate act was part of the entire 'violation of *section 1962*," the plaintiff has pled causation."[135.2] Regarding proximate causation, the court found that the existence of a "better" plaintiff did not defeat a finding of proximate causation for the company, which was a direct victim of the scheme, even though Wal-Mart was a direct victim as well.[135.3] It further noted that "the existence of a 'better' plaintiff is most relevant where the plaintiff alleges only an indirect injury."[135.4] Because the company in this case was a

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[133] *Id.,* 185 F.3d at 964-965 (quoting *Steamfitters*, 171 F.3d at 929).

[134] *Id.,* 185 F.3d at 965-966.

[135] *Id.*

[135.1] RWB Services, LLC v. Hartford Computer Group, Inc., 539 F.3d 681 (7th Cir. 2008).

[135.2] *Id.*, 539 F.3d at 687.

[135.3] *Id.*, 539 F.3d at 688.

[135.4] *Id.*, 539 F.3d at 689.

[136] Mendoza v. Zirkle Fruit Co., 301 F.3d 1163 (9th Cir. 2002).

direct victim, Wal-Mart's injury did not prevent the company from bringing a RICO action to recover for its own injuries.

When RICO is used to target companies that allegedly hire illegal immigrants for the purpose of driving down wages, defendants have unsuccessfully argued that the numerous factors affecting wages prevent plaintiffs from showing that their decreased wages were proximately caused by the hiring schemes.

In *Mendoza v. Zirkle Fruit Co.*,[136] legally authorized apple workers sued several growers under RICO alleging violations of the immigration laws. The district court dismissed the complaint for lack of proximate cause. The Ninth Circuit reversed, holding that the suit was not one for a derivative or passed-on harm since the scheme had the alleged purpose of depressing the wages paid directly to the documented employees by the growers. The other alleged weaknesses in the chain of causation were held to be matters for summary judgment, not dismissal on the pleadings. The court characterized as "speculative" the intervening factors described by the defendant, including the wage paid by the other orchards in the area, the skill and qualifications of each plaintiff, the profitability of defendants' businesses without the undocumented workers, and the general availability of documented workers in the area.[136.1] The court concluded that the workers must be allowed to make their case through presentation of evidence, including experts who would testify about the labor market, the geographic market and the effect of the illegal scheme.[136.2]

Courts in other circuits have relied on the Ninth Circuit's reasoning to decide that similarly situated plaintiffs had overcome dismissal motions based on proximate cause grounds.[137]

The Supreme Court's decision in *Anza v. Ideal Steel Supply Corp.*[138] has impacted this line of cases, however. The Court vacated[139] the

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[136.1] *Id.*, 301 F.3d at 1170-1171.

[136.2] *Id.*, 301 F.3d at 1171.

[137] See:

Sixth Circuit: Trollinger v. Tyson Foods, Inc., 370 F.3d 602 (6th Cir. 2004).

Eleventh Circuit: Williams v. Mohawk Industries, Inc., 314 F. Supp.2d 1333 (N.D. Ga. 2004), *aff'd in part and rev'd in part* 465 F.3d 1277 (11th Cir. 2006).

See also, Commercial Cleaning Services v. Colin Service Systems, Inc., 271 F.3d 374 (2d Cir. 2001) (in a RICO action against a business competitor, motion to dismiss denied to give plaintiff an opportunity to show it lost contracts directly because of the cost savings defendant realized through its scheme to employ illegal workers). But see, Baker v. IBP, Inc., 357 F.3d 685 (7th Cir. 2004) (raising, *in dicta,* the difficulty of establishing that lower wages paid by defendant in comparison to its competitors were proximately caused by its alleged hiring of illegal aliens).

[138] Anza v. Ideal Steel Supply Corp., 547 U.S. 451, 126 S.Ct. 1991, 164 L.Ed.2d 720 (2006).

[139] Mohawk Industries, Inc. v. Williams, 547 U.S. 516, 126 S.Ct. 2016, 164 L.Ed.2d 776 (2006).

result of *Mohawk Industries, Inc. v. Williams*[140] and remanded the case to the Eleventh Circuit, for further consideration in light of *Anza*.

On remand, however, the Eleventh Circuit held that plaintiffs had pled proximate cause.[141] The court found that that the "complaint alleges a sufficiently direct injury to satisfy *Anza* and *Holmes*."[142] The court also commented that "[t]he concerns expressed in *Anza* and *Holmes* are not present in this case. There is no more directlu injured party who could bring suit."[143]

A decision by the District Court for the Southern District of New York addressed claims by the plaintiffs that their wages had been depressed because their employer knowingly employed undocumented immigrants.[144] The court rejected plaintiffs' RICO claim. The court determined plaintiffs had failed to properly plead "the necessary allegation that defendants knew that at least 10 of the aliens they hired were brought into the country by someone else."[145] The court found that plaintiffs' claim that the defendants harbored undocumented immigrants in violation of 8 U.S.C. § 1324(a)(1)(A)(iii) did not satisfy RICO's proximate cause requirement.[146] Proximate cause for this claim was found to be lacking because "[t]here [was] no direct relationship between the harboring of illegal aliens and the plaintiffs' depressed wages."[147]

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[140] Williams v. Mohawk Industries, Inc., 411 F.3d 1252 (11th Cir. 2005).

[141] Williams v. Mohawk Industries, Inc., 465 F.3d 1277, 1288-1289 (11th Cir. 2006).

[142] *Id.,* 465 F.3d at 1289.

[143] *Id*., 465 F.3d at 1290. In a subsequent opinion, the Eleventh Circuit vacated the district court's denial of class certification. Williams v. Mohawk Industries, Inc., 586 F.3d 1350, 1359 (11th Cir. 2009). The Eleventh Circuit determined that the district court had erred in concluding that there were no questions that were common to the proposed class because "[w]hether Mohawk had conducted the affairs of an enterprise through a pattern of racketeering activity that depressed the wages of all employees is a question common to each employee's complaint." *Id*., 586 F.3d at 1355-1356.

[144] Nichols v. Mahoney, 680 F. Supp.2d 526, 529 (S.D.N.Y. 2009).

[145] *Id*., 680 F. Supp.2d at 534.

[146] *Id*., 680 F. Supp.2d at 541-542.

[147] *Id*., 680 F. Supp.2d at 541. See Hall v. Thomas, 753 F. Supp.2d 1113 (N.D. Ala. 2010) (rejecting RICO claim predicated on the allegation that the defendants had knowingly employed undocumented workers to depress wages because plaintiffs failed to show they were damaged by reasons of the alleged violations of the Immigration and Nationality Act).

§ 1.08 Sanctions and Remedies

[1]—Criminal Sanctions

The criminal penalties that may be imposed for a RICO violation are set forth in Section 1963(a), which provides:

> Whoever violates any provision of section 1962 of this chapter shall be fined under this title or imprisoned not more than 20 years, . . . or both, and shall forfeit to the United States, irrespective of any provision of State law—
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> (1) any interest the person has acquired or maintained in violation of section 1962;
>
> (2) any (A) interest in; (B) security of; (C) claim against; or (D) property or contractual right of any kind affording a source of influence over; any enterprise which the person has established, operated, controlled, conducted, or participated in the conduct of, in violation of section 1962; and any—
>
> (A) interest in;
>
> (B) security of;
>
> (C) claim against; or
>
> (D) property or contractual right of any kind affording a source of influence over;
>
> any enterprise which the person has established, operated, controlled, conducted, or participated in the conduct of, in violation of section 1962;
>
> (3) any property constituting, or derived from, any proceeds which the person obtained, directly or indirectly, from racketeering activity or unlawful debt collection in violation of section 1962.
>
> The court, in imposing sentence on such person shall order, in addition to any other sentence imposed pursuant to this section, that the person forfeit to the United States all property described in this subsection. In lieu of a fine otherwise authorized by this section, a defendant who derives profits or other proceeds from an offense may be fined not more than twice the gross profits or other proceeds.[1]

The statute thus provides for a jail sentence of up to twenty years, a substantial fine (defined elsewhere in Title 18), and forfeiture not only of the proceeds of the crime, but also of the defendant's interest in the enterprise.

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[1] 18 U.S.C. § 1963(a).

The most unusual of these penalties is forfeiture. The interest that the defendant must forfeit, as provided for by statute, is a broad interest, including, in appropriate cases, both the enterprise itself and the proceeds derived from the conduct of the enterprise.[2]

A RICO forfeiture is imposed directly on the individual "as part of a criminal prosecution rather than in a separate proceeding *in rem* against the property subject to forfeiture."[3] The forfeiture proceeding itself is "quasi-criminal" because of its punitive nature—penalizing an individual for a violation of the law.[4]

Prior to the enactment of RICO, criminal forfeiture was rare and was usually an *in rem* proceeding,[5] directed against contraband property, not the person.[6] By contrast, RICO forfeitures, which are also contained in certain other federal statutes, are *in personam*, meaning they are imposed directly against the individual,[7] and, because they extend well beyond contraband, may be far more onerous than *in rem* forfeitures. A district court in the Eastern District of New York explained *in personam* forfeiture in the following manner:

> [I]n an *in personam* forfeiture, the interest subject to the proceeding is the defendant's *proprietary* interest in the enterprise. Accordingly, the property must be before the court before the government may constitutionally deprive [the defendant] of that interest. Before a person's interest in an enterprise can be declared forfeited under RICO, that person must be convicted of an offense prohibited by RICO. Therefore, unlike an *in rem* proceeding, the

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[2] See:

Supreme Court: Russello v. United States, 464 U.S. 16, 22-26, 104 S.Ct. 296, 72 L.Ed.2d 474 (1983) (requiring forfeiture of insurance proceeds from arson).

Fifth Circuit: United States v. Cauble, 706 F.2d 1322, 1346-1350 (5th Cir. 1983) (requiring forfeiture of entire partnership interest); United States v. Martino, 681 F.2d 952 (5th Cir.), *aff'd sub nom*. Russello v. United States, 464 U.S. 16, 104 S.Ct. 296, 72 L.Ed.2d 474 (1893).

Eleventh Circuit: United States v. Browne, 505 F.3d 1229, 1278-1280 (11th Cir. 2007) (upholding a forfeiture order that imposed joint and several liability for substantive RICO offenses and a RICO conspiracy, although one of the defendants was not charge with two of the predicate acts); United States v. Navarro-Ordas, 770 F.2d 959, 969-970 (11th Cir. 1985) (requiring forfeiture of dollar amount of loan proceeds).

[3] United States v. Huber, 603 F.2d 387, 396 (2d Cir. 1979).

[4] Id., 603 F.2d at 397.

[5] United States v. Ambrosio, 575 F. Supp. 546, 549 (E.D.N.Y. 1983).

[6] Id. See also, J. W. Goldsmith, Jr-Grant Co. v. United States, 254 U.S. 505, 511, 41 S.Ct. 189, 65 L.Ed. 376 (1921).

[7] Ambrosio, N. 5 *supra,* 575 F. Supp. at 550. See also, United States v. Angiulo, 897 F.2d 1169 (1st Cir. 1990).

guilt or innocence of the owner of the interest subject to forfeiture is crucial in an *in personam* forfeiture under RICO.[8]

The criminal forfeiture provisions of RICO (and related pre-trial attachments of defendant's property) are highly controversial and form the subject of an entire chapter of this book.[9] It should be noted here, however, that one aspect of that controversy, i.e., the forfeiture and pre-trial attachment of attorneys' fees, has been settled in large part by the Supreme Court. Specifically, in *Caplin & Drysdale, Chartered v. United States*[10] and *United States v. Monsanto*[11] the Court held that RICO criminal forfeiture provisions that have the effect of preventing a non-yet-convicted defendant of retaining counsel of choice do not unconstitutionally impinge upon a criminal defendant's Fifth Amendment due process rights or his Sixth Amendment qualified right to counsel of choice.[12]

The Supreme Court also addressed RICO forfeiture provisions in *Alexander v. United States*,[13] which vacated a judgment and remanded for consideration the issue of whether a RICO forfeiture order violated the Eighth Amendment's Excessive Fines Clause.[14] The Court in *Alexander* also rejected a First Amendment attack on RICO's forfeiture provisions.[15]

[2]—Civil Remedies

Section 1964 provides civil remedies for RICO violations.[16] Section 1964(a) gives a district court the power to "order [] any person

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[8] Ambrosio, N. 5 *supra*, 575 F. Supp. at 551. (Citation omitted). (Emphasis added). See Note, "RICO Forfeiture and the Rights of Innocent Third Parties," 18 Cal. L. Rev. 345, 350-351 (1982).

[9] See Chapter 6 *infra* for a detailed discussion of the criminal forfeiture provisions of RICO.

[10] Caplin & Drysdale, Chartered v. United States, 491 U.S. 617, 109 S.Ct. 2646, 105 L.Ed.2d 528 (1989).

[11] United States v. Monsanto, 491 U.S. 600, 109 S.Ct. 2657, 105 L.Ed.2d 512 (1989).

[12] Caplin & Drysdale, N. 10 *supra,* 491 U.S. at 623-635. *Caplin & Drysdale* involved post-conviction forfeiture of assets already used to pay the defendant's attorneys (21 U.S.C. § 853(c)), while *Monsanto* addressed the forfeiture issue in the context of a pre-trial restraining order which deprived the defendant of assets that would otherwise have been used to employ an attorney (21 U.S.C. § 853(e)(1)(A)). See also, United States v. Noriega, 746 F. Supp. 1541, 1542-1546 (S.D. Fla. 1990) (discussing constitutionality of forfeiture).

[13] Alexander v. United States, 509 U.S. 544, 113 S.Ct. 2766, 125 L.Ed.2d 441 (1993).

[14] *Id.,* 509 U.S. at 558-559.

[15] *Id*., 509 U.S. at 549-558.

[16] 18 U.S.C. § 1964.

to divest himself of any interest, direct or indirect, in any enterprise; impos[e] reasonable restrictions on the future activities or investments of any person, including prohibiting a person from engaging in the same type of enterprise; or dissolve the enterprise.[17] These are sweeping remedies. However, as discussed below, it is doubtful that a private civil litigant", as opposed to the government, can apply for this relief, at least by virtue of RICO itself.

Section 1964(b) provides for civil actions brought by the government.[18] During the pendency of such an action, the court has the power to issue restraining orders and to take other necessary and appropriate actions prohibiting the continuation of the violation.[19] It is pursuant to this subsection that the government, as previously discussed, has sought to attach, in advance of trial, most or all of a defendant's assets, including monies he might otherwise use for his defense.

If a private person suffers an injury to his business or property, Section 1964(c) entitles him to receive treble damages, costs, and reasonable attorney's fees.[20] This provision, together with the access to federal courts, is the main reason why there has been a great increase in the number of private civil RICO actions.[20.1]

Finally, Subsection 1964(d) collaterally estops a person convicted in a criminal RICO prosecution from denying the essential allegations of the criminal offense in a subsequent civil action.[21]

[a]—Equitable Relief for Private Parties

RICO does not explicitly provide for equitable remedies for private parties, although such relief is available to the government under

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[17] 18 U.S.C. § 1964(a).

[18] 18 U.S.C. §1964(b).

[19] *Id*.

[20] 18 U.S.C. §1964(c). The Second Circuit has held that the defense should not be permitted to inform the jury that RICO provides for treble damages and awards attorneys' fees to the victorious party. HBE Leasing Corp. v. Frank, 22 F.3d 41, 45-47 (2d Cir. 1994). Courts have found class action treatment of RICO claims to be appropriate. See:

Second Circuit: Spencer v. The Hartford Financial Services Group, Inc., 256 F.R.D. 284, 295-298 (D. Conn. 2009).

Third Circuit: In re Insurance Brokerage Antitrust Litigation, 579 F.3d 241, 269-270 (3d Cir. 2009).

Eleventh Circuit: Williams v. Mohawk Industries, Inc., 568 F.3d 1350 (11th Cir. 2009); Sikes v. American Telephone & Telegraph Co., 179 F.R.D. 342, 347 (S.D. Ga. 1998).

[20.1] See, e.g., Gross v. Waywell, 628 F. Supp.2d 475, 480 (S.D.N.Y. 2008) (detailing the lack of success experienced by civil RICO plaintiffs and concluding that "[p]laintiffs' perseverance against such heavy odds derives predominantly from RICO's prospect of treble damages and attorney fees for the successful claimant").

[21] 18 U.S.C. §1964(d).

Subsection 1964(b). The circuit courts are currently split on the issue of whether private plaintiffs can obtain injunctive relief under RICO. Only two circuit courts have addressed the issue directly. The Seventh Circuit has determined that RICO authorizes private parties to seek injunctive relief.[22] According to the Ninth Circuit, however, such relief is not available to a private party.[23] The other circuit courts adverting to the issue are split, with the Second,[24] Fourth,[25] Fifth,[26] and Sixth[27] Circuits suggesting that injunctive relief is not available to private plaintiffs and the Eighth[28] suggesting that it is. Meanwhile, the First,[29] Third,[30] and Tenth[31] Circuits have acknowledged the issue,

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[22] National Organization For Women, Inc. v. Scheidler, 267 F.3d 687, 695-700 (7th Cir. 2001).

[23] Religious Technology Center v. Wollersheim, 796 F.2d 1076, 1082-1089 (9th Cir. 1986).

[24] Sedima, S.P.R.L. v. Imrex Co., 741 F.2d 482, 490 (2d Cir. 1984), *rev'd on other grounds*, 473 U.S. 479, 105 S.Ct. 3275, 87 L.Ed.2d 346 (1985); Trane Co. v. O'Connor Securities, 718 F.2d 26, 28-29 (2d Cir. 1983) (expressing "serious doubt" as to "the propriety of private party injunctive relief" under RICO); Town of West Hartford v. Operation Rescue, 726 F. Supp. 371, 377 (D. Conn. 1989), *vacated on other grounds*, 915 F.2d 92 (2d Cir. 1990). But see, Aetna Casualty and Surety Co. v. Liebowitz, 730 F.2d 905 (2d Cir. 1983) (affirming grant of injunctive relief to private plaintiff where availability of such relief was not contested).

[25] Johnson v. Collins Entertainment Co., 199 F.3d 710, 726 (4th Cir. 1999); Dan River, Inc. v. Icahn, 701 F.2d 278, 290 (4th Cir. 1983) (expressing "substantial doubt" that injunctive relief was available); Minter v. Wells Fargo Bank, N.A., 593 F. Supp.2d 788, 794-796 (D. Md. 2009) (equitable remedies are not available to private plaintiffs under RICO).

[26] In re Fredeman Litigation, 843 F.2d 821, 828-830 (5th Cir. 1988) (RICO does not authorize injunctive relief against the transfer of defendant assets, but reserving on the question of whether all forms of injunctive or equitable relief are foreclosed to private plaintiffs under RICO). See also: Price v. Pinnacle Brands, Inc., 138 F.3d 602 (5th Cir. 1998) (noting the issue and the circuit split); Conkling v. Turner, 18 F.3d 1285, 1296 (5th Cir. 1994) (same).

[27] Ganey v. Raffone, 91 F.3d 143 (Table), 1996 WL 382278 at *4 n.6 (6th Cir. July 5, 1996) (finding the Ninth Circuit's analysis in Wollersheim persuasive but disposing of matter by other means).

[28] Bennett v. Berg, 710 F.2d 1361, 1366 (8th Cir. 1983) (McMillan, J., concurring). See also, Airlines Reporting Corp. v. Barry, 825 F.2d 1220, 1223 & n.5 (8th Cir. 1987). But see, First National Bank and Trust Co., Rogers, Arkansas v. A.L. Hollingsworth, 701 F. Supp. 701, 702-704 (W.D. Ark. 1988) (injunctive relief is not available in a private civil RICO action).

[29] Sterling Suffolk Racecourse Ltd. Partnership v. Burrillville Racing Ass'n, Inc., 989 F.2d 1266, 1273 n.8 (1st Cir. 1993); Lincoln House, Inc. v. Dupre, 903 F.2d 845, 848 (1st Cir. 1990).

[30] Steamfitters Local Union No. 420 Welfare Fund v. Philip Morris, 171 F.3d 912, 935 n.20 (3d Cir. 1999); Northeast Women's Center v. McMonagle, 868 F.2d 1342, 1355 (3rd Cir. 1989). But *compare*, Curley v. Cumberland Farms Dairy, Inc., 728 F. Supp. 1123, 1136-1138 (D.N.J. 1989) (injunctive relief is not available in a private civil RICO action) *with* Chambers Development Co. v. Browning-Ferris Industries, 590 F. Supp. 1528, 1540-1541 (W.D. Pa. 1984) (injunctive relief is available in a private civil RICO action).

but have yet to decide it. In *United States v. Philip Morris*, the D.C. Circuit determined that private parties seeking equitable relief were properly allowed to intervene in the government's RICO suit, despite the dispute over whether RICO allows private parties to seek equitable relief, because "intervention of right only requires 'an interest in the litigation' – not a cause of action or permission to sue."[31.1]

In a case of first impression, the Second Circuit held that disgorgement under Section 1964 is an inappropriate means of redressing *past* RICO violations.[32] The court reversed the district court's order that a defendant disgorge income earned from embezzlement and found that the equitable remedies of Section 1964 were available only to prevent ongoing and future misconduct, not to remedy past misconduct.[33] The Second Circuit, however, remanded the case so that the district court could determine which disgorged amounts, if any, were intended solely to prevent and restrain future violations.[34] The Fifth Circuit has stated that it "agree[s] with the Second Circuit's reasoning in *Carson*. Section 1964(a) establishes that equitable remedies are available only to prevent ongoing and future conduct."[34.1] However, the D.C. Circuit, over a vigorous dissent, determined that disgorgement was "a quintessentially backward-looking remedy focused on remedying the effects of past conduct to restore the status quo" and thus was "not within the terms of [RICO's] statutory grant [of equitable power] because § 1964(a) was designed to prevent future violations of RICO."[34.2]

[b]—Punitive Damages and Contribution

The RICO statute does not provide for either punitive damages or contribution. The courts have generally held that there is no right to contribution under civil RICO.[35] In addressing the issue of the

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[31] FDIC v. Antonio, 843 F.2d 1311, 1313 n.1 (10th Cir. 1988).

[31.1] United States v. Philip Morris, 566 F.3d 1095, 1145-1146 (D.C. Cir. 2009).

[32] United States v. Carson, 52 F.3d 1173, 1181-1182 (2d Cir. 1995).

[33] *Id.,* 52 F.3d at 1182.

[34] *Id*.

[34.1] Richard v. Hoechst Celanese Chemical Group, Inc, 355 F.3d 345, 354-355 (5th Cir. 2003).

[34.2] United States v. Philip Morris, 396 F.3d 1190, 1198-1199 (D.C. Cir. 2005).

[35] See, e.g.:

Second Circuit: Local 875 I.B.T. Pension Fund v. Pollack, 49 F. Supp.2d 130 (E.D.N.Y. 1999); O & K Trojan, Inc. v. Municipal & Contractors Equipment Corp., 751 F. Supp. 431, 433 (S.D.N.Y. 1990).

Third Circuit: The County of Hudson v. Janiszweski, 2009 WL 3387960 at *2 (3d Cir. Oct. 22, 2009); Boone v. Beacon Building Corp., 613 F. Supp. 1151, 1154-1155 (D.N.J. 1985).

Seventh Circuit: Daniels v. Bursey, 329 F. Supp.2d 975 (N.D. Ill. 2004).

availability of punitive damages under civil RICO, a district court in the Second Circuit noted that the split in authority among the courts with respect to the availability of punitive damages in civil RICO depends upon whether the court views the purpose of the treble damage award as remedial or punitive.[36] The court in this case permitted the punitive damage claim to survive the pleading stage, relying on the Supreme Court's statement that civil RICO is primarily remedial in nature and only secondarily punitive.[37] Nevertheless, even where punitive damages are recoverable, they may be reduced by the amount that the actual damages were trebled.[37.1]

[c]—Rule 11 Sanctions

Motions for Rule 11 sanctions are not uncommon in RICO cases and must be made prior to the entry of final judgment. The Seventh Circuit has held that a reasonableness standard will apply when reviewing motions for Rule 11 sanctions.[38] The Tenth Circuit has determined that a court may impose sanctions on a plaintiff when a complaint contains a frivolous RICO claim and meritorious claims under state law.[38.1]

The Fifth Circuit, reversing an order of sanctions for alleged discovery abuse, noted that Rule 11 "must not bar the courthouse door to people who have some support for a complaint but need discovery

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D.C. Circuit: First American Corp. v. Al-Nahyan, 948 F. Supp. 1107 (D.D.C. 1996).

[36] Com-Tech Associates v. Computer Associates International, Inc., 753 F. Supp. 1078, 1093 (E.D.N.Y. 1991). See also, Mylan Laboratories, Inc. v. Akzo, N.V., 770 F. Supp. 1053 (D. Md. 1991) (treble damages are inherently punitive in nature).

[37] Com-Tech, 753 F. Supp. at 1093 (citing Shearson/American Express, Inc. v. McMahon, 482 U.S. 220, 107 S.Ct. 2332, 96 L.Ed.2d 185 (1987)). See also, Toucheque v. Price Brothers Co., 5 F. Supp.2d 341, 50 (D. Md. 1998) (punitive damages not available in a civil RICO action because the treble damage provisions of the statute furnish a punitive damages remedy).

[37.1] See:

Second Circuit: Bingham v. Zolt, 823 F. Supp. 1126 (S.D.N.Y. 1993) (reducing a punitive damage award because plaintiff received trebled damages under RICO).

District of Columbia Circuit: Al-Kazemi v. General Acceptance & Investment Corp., 633 F. Supp. 540 (D.D.C. 1986).

[38] Kaplan v. Zenner, 956 F.2d 149 (7th Cir. 1992) (Rule 11 motion filed several months prior to the entry of final judgment was timely). See Margo v. Weiss, 213 F.3d 55, 65 (2d Cir. 2000) ("[T]he standard for triggering the award of fees under Rule 11 is objective reasonableness.").

[38.1] Kearney v. Dimanna, 195 Fed. Appx. 717, 722-23 (10th Cir. 2006). See also, Townsend v. Holman Consulting Corp., 929 F.2d 1358 (9th Cir. 1991) (*en banc*) (explaining that federal courts possess the authority under Rule 11 to sanction individuals when pleadings contain both frivolous and meritorious claims because Rule 11 was designed "'to deter baseless filings in District Court'") (quoting Cooter & Gell v. Hartmarx Corp., 496 U.S. 384, 110 S.Ct. 2247, 110 L.Ed.2d 359 (1990)).

to prove their case," but nonetheless emphasized that "parties and their counsel must be especially diligent before filing RICO complaints in order to avoid sanctions" under the rule.[39]

[d]—Arbitration

In *Shearson/American Express, Inc. v. McMahon*,[40] the Supreme Court ruled that private RICO claims are subject to arbitration agreements.[41] The Court said:

> [T]here is nothing in the text of the RICO statute that even arguably evinces congressional intent to exclude civil RICO claims from the dictates of the Arbitration Act. This silence in the text is matched by silence in the statute's legislative history.[42]

Based on this silence, the Court determined there was "no basis for concluding that Congress intended to prevent enforcement of agreements to arbitrate RICO claims."[43]

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[39] Smith v. Our Lady of the Lake Hospital, Inc., 960 F.2d 439, 446, 448 (5th Cir. 1992).

[40] Shearson/American Express, Inc. v. McMahon, 482 U.S. 220, 107 S.Ct. 2332, 96 L.Ed.2d 185 (1987).

[41] *Id*. The *McMahon* court ruled unanimously that RICO claims are arbitrable whereas other portions of the decision relating to whether claims under Section 10(b) of the Securities Exchange Act of 1934 are arbitrable were not unanimous. For cases following the *McMahon* decision, see:

Second Circuit: Buckwalter v. Napoli, Kaiser & Bern LLP, 2005 WL 736216 at *8 (S.D.N.Y. March 29, 2005) ("Moreover, even Plaintiffs' federal RICO claim is within the scope of the clauses given that it relates to the establishment of the lawyer-client relationships and the negotiation of the settlement, and the Supreme Court has held that RICO claims are subject to arbitration.").

Third Circuit: Horizon Financial, F.A. v. E. F. Hutton Mortgage Corp., No. 86-5141 (E.D. Pa. July 14, 1987).

Eighth Circuit: Larry's United Super, Inc. v. Werries, 253 F.3d 1083, 1085 (8th Cir. 2001); Daisy Manufacturing, Inc. v. NCR Corp., 29 F.3d 389, 396 (8th Cir. 1994); Nesslage v. York Securities, Inc., 823 F.2d 231 (8th Cir. 1987).

Ninth Circuit: Monex Deposit Co. v. Gilliam, 616 F. Supp.2d 1023, 1025-1027 (C.D. Cal. 2009).

Eleventh Circuit: Jenkins v. First American Cash Advance of Georgia LLC, 400 F.3d 868 (11th Cir. 2005) (Georgia state RICO claims).

But see, Blythe v. Deutsche Bank, 2005 WL 53281 at *6 (S.D.N.Y. Jan. 7, 2005) ("Because the consulting agreements containing the arbitration clauses are mutually fraudulent, the contracts cannot be enforced. Therefore, there is no valid agreement to arbitrate."); Kerr-McGee Refining Corp. v. Triumph Tankers, Ltd., 740 F. Supp. 288 (S.D.N.Y. 1990) (vacating arbitration decision on other grounds, but arbitration panel did not exceed its power under maritime arbitration agreement by considering RICO claim).

[42] *Shearson/American Express,* N. 40 *supra*.

[43] *Id*., 482 U.S. at 242. But see, Vega v. Contract Cleaning Service, 2006 WL 1554383 at *3 (N.D. Ill. Jun. 1, 2006) (the right to arbitration was waived where

In *Pacificare Health Systems, Inc. v. Jeffrey Book*,[44] the Supreme Court considered the question whether "respondents can be compelled to arbitrate claims arising under . . . [RICO], notwithstanding the fact that the parties' arbitration agreements may be construed to limit the arbitrator's authority to award damages under that statute."[45] Respondents were members of a group of physicians who filed suit against several managed-health-care organizations. Petitioners moved the District Court to compel arbitration. The respondents opposed the motion, asserting that because the arbitration provisions prohibited punitive damages, respondents could not obtain "meaningful relief" in their arbitration.[46] The Court did not know how the arbitrator would construe the RICO remedial limitations, and thus found the questions whether this rendered the parties' agreements unenforceable, and whether it was for the courts or arbitrators to decide enforceability, "unusually abstract."[47] The Court found the proper course was to compel arbitration, reversing the decision of the Eleventh Circuit and the District Court.[47.1]

[3]—Government Civil RICO

In a series of innovative actions under RICO, the government has sought not only to forfeit entire businesses but also to impose trusteeships on unions and other entities. Most of the legal questions raised by these actions have yet to be decided by more than a handful of courts, if at all.[48] They are, however, discussed at length in Chapter 12.

"[m]ore than two years elapsed between the filing of the first amended complaint and the motion to compel arbitration. . . .").

[44] Pacific Health Systems, Inc. v. Book, 538 U.S. 401, 123 S.Ct. 1531, 155 L.Ed.2d 578 (2003).

[45] *Id.,* 538 U.S. at 402.

[46] *Id.*

[47] *Id.*, 538 U.S. at 406.

[47.1] *Id.*, 538 U.S. at 407.

[48] See, e.g.:

Second Circuit: United States v. Ianniello, 824 F.2d 203 (2d Cir. 1987); United States v. International Brotherhood of Teamsters, 708 F. Supp. 1388 (S.D.N.Y. 1989).

Third Circuit: United States v. Hanley, 6 F.3d 780 (3d Cir. 1993); United States v. Local 560, 780 F.2d 267 (3d Cir. 1985).