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I. Introduction

Congress designed The Racketeer Influenced and Corrupt Organizations Act ("RICO"),\(^1\) enacted as Title IX of the Organized Crime Control Act of 1970,\(^2\) to combat organized crime.\(^3\) RICO also has broad application beyond the organized crime context because Congress mandated that RICO "be liberally construed to effectuate its remedial purposes."\(^4\) The Supreme Court has held that RICO may be applied to legitimate businesses\(^5\) and to enterprises without a profit motive.\(^6\)

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3. Id. According to the "Statement of Finding and Purpose" of RICO:

\[\text{[i]t is the purpose of [RICO] to seek the eradication of organized crime in the United States by strengthening the legal tools in the evidence-gathering process, by establishing new penal prohibitions, and by providing enhanced sanctions and new remedies to deal with the unlawful activities of those engaged in organized crime.}\]

Id. at §1.


5. Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 497, 499 (1985) (holding legitimate enterprises "enjoy neither an inherent incapacity for criminal activity nor immunity from its consequences"). Likewise, RICO is applicable to criminal enterprises that have not infiltrated legitimate business. See United States v. Patrick, 248 F.3d 11, 19 (1st Cir. 2001) (upholding conviction under RICO of gang members involved in drug trafficking enterprise that had not infiltrated legitimate business).
Although the Supreme Court has reaffirmed its reliance on the "liberal construction" clause of RICO, while acknowledging that this clause is not without limits.

Prosecutors use RICO in a wide variety of criminal contexts because it has been construed liberally, it does not require mens rea beyond that necessary for the predicate acts, and it provides for severe sanctions in addition to those a defendant may receive for the underlying offenses.

In addition to criminal actions, RICO permits private plaintiffs and the government to seek redress in civil actions. Under §1964 of RICO, the Attorney General or a private plaintiff may bring a civil action in either state or federal court. RICO provides equitable relief through divestiture of the defendant's interest in the enterprise, restrictions on future activities or investments, and dissolution or reorganization of the enterprise. While this Article focuses primarily on the criminal aspects of RICO, the close relationship between criminal and civil RICO actions necessitates some discussion of civil cases.

This Article generally addresses RICO prosecutions for white collar crimes.


8. See Reves, 507 U.S. at 183 (noting liberal construction clause was "not an invitation to apply RICO to new purposes that Congress never intended" and holding accountants hired to perform audit did not participate in operation or management of cooperatives's affairs as required to impose liability under RICO); see also Attorney Gen. of Canada v. R.J. Reynolds Tobacco Holdings, Inc., 268 F.3d 103, 129 (2d Cir. 2001) (finding language of RICO and legislative history offer no hint Congress intended RICO to afford a civil remedy to a foreign nation for tax evasion by U.S. company); Chappell v. Robbins, 73 F.3d 918, 921-22 (9th Cir. 1996) (declining to presume RICO abrogates common law legislative immunity protection absent clear legislative intent or statutory language).


10. See supra note 7 (listing cases noting Supreme Court's liberal construction of RICO).

11. See Bruner Corp. v. R.A. Bruner Co., 133 F.3d 491, 495 (7th Cir. 1998) (noting mens rea requirement is satisfied if defendant knew predicate was illegal); United States v. Baker, 63 F.3d 1478, 1493 (9th Cir. 1995) ("The mens rea element necessary for a substantive RICO conviction is the same as is required for the predicate crime.").


Section II discusses the elements of a RICO offense. Section III addresses a variety of potential defenses to RICO prosecutions. Section IV addresses criminal penalties for RICO violations, including the now advisory United States Sentencing Guidelines ("Guidelines"). Section V provides a discussion of civil RICO, and Section VI describes several recent developments in this area of the law.

II. ELEMENTS OF THE OFFENSE

Section 1962 of RICO prohibits "any person" from: (i) using income derived from a pattern of racketeering activity or from the collection of an unlawful debt to acquire an interest in an enterprise affecting interstate commerce; (ii) acquiring or maintaining through a pattern of racketeering activity or through collection of an unlawful debt an interest in an enterprise affecting interstate commerce; (iii) conducting or participating in the conduct of the affairs of an enterprise affecting interstate commerce through a pattern of racketeering activity or through collection of an unlawful debt; or (iv) conspiring to participate in any of these activities.

To prosecute a defendant under RICO, the government must prove that the defendant: (i) through the commission of two or more acts constituting a pattern of racketeering activity; (ii) directly or indirectly invested in, maintained an interest in, or participated in, an enterprise; (iii) the activities of which affected interstate or foreign commerce.

Parts A through D of this Section examine the elements of a
RICO offense. Part E addresses prohibited acts. Finally, Part F assesses the scope of outsider liability.

A. Two or More Predicate Acts of Racketeering Activity

First, a RICO offense requires two or more predicate acts of "racketeering activity." RICO defendants need not be convicted of each underlying offense before a RICO offense is charged. In fact, underlying offenses for which the defendant has been acquitted may serve as the basis of a RICO offense.

Under §1961(1), the term "racketeering activity" includes a broad assortment of state and federal crimes. These crimes include: (i) certain acts that are chargeable under state laws and punishable by imprisonment for more than one year; (ii) acts that are indictable under specified provisions of Title 18; (iii) acts that are thing of value at a rate usurious under federal or state law, where the rate is at least twice the enforceable rate. See 18 U.S.C. §1961(6) (as amended by USA Patriot Act of 2001, Pub. L. No. 107-56, §813, 115 Stat. 272, 382) (2003). The government has alleged RICO violations involving the collection of an unlawful debt in a number of cases. See, e.g., United States v. Shifman, 124 F.3d 31, 35-36 (7th Cir. 1997) (noting participation in loan sharking activities can constitute RICO predicate act); United States v. Oreo, 37 F.3d 739, 751 (1st Cir. 1994) (holding a pattern of collection of unlawful debt alone is a predicate act for purposes of RICO liability); United States v. DiSalvo, 34 F.3d 1204, 1211 (3d Cir. 1994) (holding prosecution need only prove that defendant "used, or aided and abetted another person to use, implicit threats to collect a debt").


26. See Sedima, S.P.R.L. v. Imrex Co., Inc. 473 U.S. 479, 488 (1985) (holding fact that defendants had not been convicted of predicate acts under mail or wire fraud statutes did not bar plaintiff's claim). "As defined in the statute, racketeering activity consists not of acts for which the defendant has been convicted, but acts which he could be." Id.

27. See United States v. Farmer, 924 F.2d 647, 649 (7th Cir. 1991) (holding a murder for which the defendant had been acquitted could serve as a basis for a RICO violation).

28. These acts include murder, kidnapping, gambling, arson, robbery, bribery, extortion, dealing in obscene matter, and dealing in a controlled substance or listed chemical (as defined in §102 of the Controlled Substances Act). 18 U.S.C. §1961(A) (2000); see United States v. Polanco, 145 F.3d 536, 541 (2d Cir. 1998) (holding participation in a murder may serve as RICO predicate act); Ideal Dairy Farms v. John Labatt, Ltd., 90 F.3d 737, 746-47 (3d Cir. 1996) (dismissing federal and state RICO claims when plaintiff failed to prove elements under state law fraud statute).

29. This includes acts relating to: bribery; sports bribery; counterfeiting; theft from an interstate shipment; embezzlement from pension and welfare funds; extortionate credit transactions; fraud and related activity in connection with identification documents; transmission of gambling information; mail fraud; wire fraud; financial institution fraud; unlawful procurement of citizenship or nationalization; reproduction of naturalization or citizenship papers; sale of naturalization or citizenship papers; obscene matter; obstruction of justice; obstruction of criminal investigations; obstruction of state or local law enforcement; tampering with a witness, victim, or an informant; false statements in application and use of a passport; forgery or false use of a passport; misuse of a passport; fraud and misuse of visas, permits, and other documents;peonage and slavery; interference with commerce; robbery or extortion; racketeering; interstate transportation of wagering paraphernalia; unlawful welfare fund payments; illegal gambling businesses; laundering of monetary instruments; engaging in monetary transactions in property derived from specified unlawful activity; use of interstate commerce facilities in the commission of murder-for-hire; sexual exploitation of children; interstate transportation of stolen motor vehicles and other stolen property; trafficking in counterfeit labels for phonorecords, computer programs or computer program documentation or packaging and copies of motion pictures or other audiovisual works; criminal infringement of a copyright; unauthorized fixation of and trafficking in sound recordings and music videos of live musical performances; trafficking in goods or services bearing counterfeit marks; trafficking in certain motor
indictable under specified provisions of Title 29;\(^{30}\) (vi) federal offenses that involve bankruptcy, securities fraud, or controlled drugs;\(^{31}\) (v) acts that are indictable under the Currency and Foreign Transactions Reporting Act;\(^{32}\) (vi) acts indictable under §§274, 277, or 278 of the Immigration and Nationality Act, if such acts are done for profit,\(^{33}\) and any act that is indictable under any provision listed in §2332b(g)(5)(B).\(^{34}\) In the Comprehensive Crime Control Act of 1984,\(^{35}\) Congress extended the definition of "racketeering activities" under RICO to include dealing in obscene materials,\(^{36}\) as well as the non-reporting of currency and foreign transactions.\(^{37}\) The Antiterrorism and Effective Death Penalty Act of 1996\(^{38}\) further extended the RICO provisions to include various immigration crimes.\(^{39}\) However, Congress has restricted the definition of "racketeering activities" in other areas, prohibiting the recognition of unconvicted securities fraud as a vehicles or motor vehicle parts; trafficking in contraband cigarettes; and white slave traffic. 18 U.S.C. §1961(1)(B).

30. This includes any act indictable under 29 U.S.C. §186, dealing with restrictions on payments and loans to labor organizations, or §501(c), relating to embezzlement from union funds. 18 U.S.C. §1961(1)(C).

31. This includes "any offense involving fraud connected with a case under title 11 (except a case under section 157 of this title), fraud in the sale of securities, or the felonious manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in a controlled substance or listed chemical (as defined in section 102 of the Controlled Substances Act), punishable under any law of the United States." 18 U.S.C. §1961(1)(D).


33. 18 U.S.C. §1961(1)(E). (stating violations of §274 (harboring certain aliens), §277 (assisting certain aliens into the country), or §278 (importing aliens for immoral purposes) of the Immigration and Nationality Act are racketeering activities for the purpose of RICO).

34. This encompasses acts indictable as "federal crimes of terrorism" under 18 U.S.C. §2332b(g)(5)(B) (2000).


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predicate act under RICO. 40

B. Pattern

RICO applies only where the commission of two predicate acts constitutes a "pattern of racketeering activity." 41 While the statutory definition of "pattern of racketeering activity" requires at least two acts of racketeering occurring within ten years of each other, 42 simply proving two acts may not be sufficient to establish a RICO violation. 43 The Supreme Court has stated that a "pattern of racketeering" can only be established if the predicate acts are continuous and interrelated. 44 Thus, "two isolated acts of racketeering do not constitute a pattern." 45

In H.J. Inc. v. Northwestern Bell Telephone Co., 46 the Court held that the government must establish both a relationship between the predicate acts and continuity of those acts to prove a "pattern of racketeering activity" for RICO purposes. 47 These requirements, referred to as the "continuity plus relationship" test, 48 must be proven independently, but the Court has recognized that evidence establishing the two elements will often overlap. 49

In H.J. Inc., the Court looked to a provision of the Organized Crime Control Act of 1970 50 for guidance in defining the relationship component of the pattern requirement of RICO: "[c]riminal conduct forms a pattern if it embraces criminal

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42. 18 U.S.C. §1961(5) (defining "pattern of racketeering activity").
43. See H.J. Inc. v. Northwestern Bell Telephone Co., 492 U.S. 229, 237-38 (1989) (holding two acts may not be sufficient to establish RICO violation); see also Goren v. New Vision Int'l, Inc., 156 F.3d 721, 729 (7th Cir. 1998) (finding concurrent sale of two items constituted only one fraudulent transaction and was thus insufficient to establish a pattern of racketeering).
45. Id. In Sedima, the Court also noted the more detailed definition of "pattern" in a later provision of the statute, which states that "criminal conduct forms a pattern if it embraces criminal acts that have the same or similar purposes, results, participants, victims, or methods of commission, or otherwise are interrelated by distinguishing characteristics and are not isolated events." Id. (quoting 18 U.S.C. §3575(e) (1982) (relating to increased sentences for dangerous special offenders)), repealed by Sentencing Reform Act of 1984, Pub. L. No. 98-473, §§ 212(a)(1)-(2), 98 Stat. 1837, as amended by Sentencing Act of 1987, Pub. L. No. 100-182, §2, 101 Stat. 1266). The Court suggested that the language in this provision may help to illuminate other sections of the statute. Id.
47. Id. at 239 (allegations that telephone company gave members of Public Utilities Commission numerous bribes at different times over the course of at least a six-year period with the objective of causing the commissioners to approve unfair and unreasonable rates for the company were sufficient to plead a pattern of racketeering activity under RICO); see also Gagan v. Am. Cablevision, Inc., 77 F.3d 951, 962-64 (7th Cir. 1996) (holding fraudulent use of investor's money over four-year period demonstrated requisite continuity and relationship).
48. E.g., Corley v. Rosewood Care Ctr., Inc., 142 F.3d 1041, 1048 (7th Cir. 1998) (analyzing RICO claim under continuity plus relationship test).
49. See H.J. Inc., 492 U.S. at 239.
acts that have the same or similar purposes, results, participants, victims, or methods of commission, or otherwise are interrelated by distinguishing characteristics and are not isolated events."\textsuperscript{51}

The "continuity" component is met by either closed-ended continuity, defined as "a series of related predicates extending over a substantial period of time,"\textsuperscript{52} or open-ended continuity, defined as conduct that poses a threat of extending into the future.\textsuperscript{53} The Court suggested a case-by-case examination of this issue, noting that the existence of a "threat of continued racketeering activity" is a function of particular facts.\textsuperscript{54} The Court offered a non-exhaustive list of situations that may constitute a pattern,\textsuperscript{55} and stated "development of these concepts must await future cases."\textsuperscript{56}

With this guidance, the circuits have reached varying conclusions regarding what conduct constitutes a pattern of racketeering. The primary reason for this difficulty is the potential tension between the two prongs of the pattern requirement: "relationship" and "continuity."\textsuperscript{57} Nine federal circuit courts of appeal consistently apply some form of the "continuity plus relationship" test.\textsuperscript{58} These

\textsuperscript{51} H.J. Inc. v. Northwestern Bell Telephone Co., 492 U.S. 229, 240 (1989) (quoting Title X of OCCA, which provided for enhanced penalties where defendant, among other things, committed a prior felony as part of a pattern of criminal conduct or in furtherance of a conspiracy to engage in a pattern of criminal conduct).

\textsuperscript{52} \textit{Id.} at 242 (defining close-ended continuity); \textit{see also} Howard v. Am. Online, 208 F.3d 741, 750 (1st Cir. 2000) (holding activity that spanned a few months was not sufficiently continuous for closed-ended continuity); Cofacredit, S.A. v. Windsor Plumbing Supply Co., 187 F.3d 229, 243 (2d Cir. 1999) (holding supply company acts spanning less than one year are not sufficiently continuous to establish closed-ended continuity); Tabas v. Tabas, 47 F.3d 1280, 1294 (3d Cir. 1995) (holding defendant's allegedly fraudulent distribution of estate over three and one half years was "substantial" and satisfied closed-ended continuity requirement of RICO).

\textsuperscript{53} \textit{See H.J. Inc.}, 492 U.S. at 242 (suggesting open-ended continuity can be satisfied by showing likelihood of predicate acts continuing into the future or by showing that predicate acts occur in normal course of entity's business); \textit{see also} GE Inves. Private Placement Partners II v. Parker, 247 F.3d 543, 550 (4th Cir. 2001) (finding plaintiff did not show predicate acts of fraud constituted a regular way of conducting business); Allwaste, Inc. v. Hecht, 65 F.3d 1523, 1529 (9th Cir. 1995) (holding defendant gave no indication of ceasing alleged kickback schemes, thereby satisfying the continuity requirement); Tabas, 47 F.3d at 1295 (holding defendant's activities could satisfy open-ended continuity because plaintiffs showed evidence of questionable expenses as an ongoing part of defendant's way of doing business).

\textsuperscript{54} H.J. Inc., 492 U.S. at 242.

\textsuperscript{55} \textit{See id.}


\textsuperscript{57} \textit{See infra} section III.F. (discussing vagueness challenges to RICO pattern requirement).

\textsuperscript{58} \textit{See} N. Bridge Assoc., Inc. v. Boldt, 274 F.3d 38, 42 (1st Cir. 2001) (requiring plaintiffs to demonstrate that predicate acts are related and that they constitute or pose a threat of continued criminal activity); Howard v. Am. Online Inc., 208 F.3d 741, 746 (2000) (holding the term "pattern" requires a showing of relationship and continuity); United States v. Richardson, 167 F.3d 621, 626 (D.C. Cir. 1999) (finding pattern of conduct met continuity prong of test, even though the predicate acts covered span of only thirty-four days, because reasonable jury could find that conduct by its nature projected into future); Wisdom v. First Midwest Bank, 167 F.3d 402, 406 (8th Cir. 1999) (holding relationship is determined by considering similarity of purpose, victims, methods, and results and that continuity can be either closed-ended or open-ended); United States v. Polanco, 145 F.3d 536, 541 (2d Cir. 1998) (holding predicate acts must be related both horizontally to each other and vertically to the enterprise and must pose threat of continued criminal activity); United States v. To, 144 F.3d 737, 747 (11th Cir. 1998) (noting pattern cannot be established unless predicate acts relate to each other and have continuity); Word
circuits use a two-tiered analysis for the continuity prong, focusing on the length of
time and number of acts required for continuity.\textsuperscript{59} Either closed-ended or open-ended
continuity satisfies the continuity test in these circuits.\textsuperscript{60} These circuits also
take a lenient approach to the relationship prong.\textsuperscript{61} The remaining “continuity plus
relationship” circuits have yet to clearly define the elements of the test.\textsuperscript{62}

The Seventh and Tenth Circuits employ the \textit{H.J. Inc.} test and consider duration
and open-endedness of the racketeering activity, but cling to the multi-factor test
applied prior to \textit{H.J. Inc.}\textsuperscript{63} The Fourth Circuit, using a hybrid approach, adopted

\begin{quote}
of Faith World Outreach Ctr. Church, Inc. v. Sawyer, 90 F.3d 118, 122 (5th Cir. 1996) (following \textit{H.J. Inc.} and
concluding that relatedness of racketeering acts is established if acts have “same or similar purposes, results,
participants, victims, or methods of commission”); Edmondson & Gallagher v. Alban Towers Tenants Ass’n, 48
F.3d 1260, 1265 (D.C. Cir. 1995) (failing to find continuity where alleged acts constituted a single scheme
directed at only three victims); Tabas v. Tabas, 47 F.3d 1280, 1294 (3d Cir. 1995) (adopting the \textit{H.J. Inc.} test);
United States v. Blandford, 33 F.3d 685, 703 (6th Cir. 1994) (stating \textit{H.J. Inc.} Court “meant to craft a broad test of
relatedness” and adopting such a test).

59. \textit{See}, e.g., United States v. Shifman, 124 F.3d 31, 36 (7th Cir. 1997) (holding two predicate acts committed
within ten year period must be related and pose threat of continuation); Sagioccolo v. Eagle Ins. Co., 112 F.3d
226, 230 (6th Cir. 1997) (holding complaint alleging predicate acts extending over one month but not alleging
threat of future criminal conduct did not satisfy the continuity prong of the pattern element); \textit{Blandford}, 33 F.3d at
703-04 (finding continuity and relatedness in mail fraud scheme that took place over six years and threatened to
occur in future because defendants denied any wrongdoing).

60. \textit{See}, e.g., \textit{Howard}, 208 F.3d at 750 (explaining closed-ended activity extending over a significant amount
of time is continuous, but that a few months is not considered to be a significant amount of time); \textit{Wisdom}, 167
F.3d at 406 (holding relationship is determined by considering similarity of purpose, victims, methods, and results
and that continuity can be either closed-ended or open-ended).

The Second and Third Circuits have adopted a closed-ended–open-ended dichotomy. \textit{Compare United States v.
Aulicino, 44 F.3d 1102, 1113-14 (2d Cir. 1995) (holding open-ended continuity was established because the list of
intended kidnapping victims had not been exhausted), with Cofacredit, S.A. v. Windsor Plumbing Supply Co.,
187 F.3d 229, 244 (2d Cir. 1999) (holding predicate acts of mail fraud spanning less than one year did not satisfy
closed-ended continuity). \textit{Compare Tabas, 47 F.3d at 1294 (holding a three and a half year scheme satisfied
closed-ended continuity), with id. at 1295 (holding open-ended continuity was met because plaintiffs established a
“threat of continuing fraudulent conduct”).}

61. \textit{See \textit{Blandford}, 33 F.3d at 703 (opining that the Supreme Court in \textit{H.J. Inc.} “meant to craft a broad test of
relatedness” and holding that predicate acts were sufficiently related because they had similar purposes and results
and were otherwise “interrelated by distinguishing characteristics”); Feinstein v. Resolution Trust Corp., 942 F.2d
34, 44 (1st Cir. 1991) (stating relatedness test can be satisfied by fact-specific allegation of common scheme);
United States v. Eufrasio, 935 F.2d 553, 565 (3d Cir. 1991) (holding where an organized crime entity is the
relevant enterprise in a RICO case, the predicate prong of RICO’s pattern requirement is satisfied by
functionally unrelated predicate acts and offenses if the predicates are undertaken in association with, or in
furtherance of, criminal purposes of the same organized crime enterprise). \textit{But cf. \textit{Eufrasio}, 935 F.2d at 565
(noting RICO may not be used to punish a “series of disconnected criminal acts”).}

To determine relationship the court considers factors such as purpose, victims, methods, and results. \textit{See \textit{Howard}, 208 F.3d at 749 (holding relatedness prong was not satisfied because there were different victims,
methods, purposes and results); \textit{see also United States v. Dischner, 974 F.2d 1502, 1510 (9th Cir. 1992) (holding a
number of bribes were sufficiently related because they had consistent methods, purposes, and results), \textit{overruled on other grounds}, United States v. Morales, 108 F.3d 1031, 1035 n.1 (9th Cir. 1997) (en banc).}

62. \textit{See}, e.g., United States v. Starrett, 55 F.3d 1525, 1542 (11th Cir. 1995) (holding although court had not
defined the “exact contours” of the relationship prong, this prong does not require a showing of an effect on
regular affairs of the enterprise).

63. For example, the Seventh Circuit noted that it examines many factors because of “[t]he Court’s suggestion
that continuity encompass a lengthy period of racketeering activity or a threat of continued criminal activity.” 420
the "continuity plus relationship" test to determine pattern, but also reaffirmed its commitment to its prior multi-factor test as a means of determining the continuity prong of the pattern element. The Fourth Circuit broadly interprets the continuity requirement because there is "no question but that a single scheme may be sufficient to establish a pattern."

C. Enterprise

To violate RICO, a person must either, directly or indirectly, acquire an interest in or administer an "enterprise." 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." It is immaterial whether the defendant has a stake in the operation of the enterprise because individuals outside of a business may assist the business in attaining its illegal goals.

E. Ohio Ltd. P'ship v. Cocose, 980 F.2d 1122, 1124 (7th Cir. 1992); see also Corley v. Rosewood Care Ctr., Inc., 142 F.3d 1041, 1048-49 (7th Cir. 1998) (noting relationship is determined by considering purpose, results, participants, victims and methods); Vicom, Inc. v. Harbridge Merch. Servs., Inc., 20 F.3d 771, 780-82 (7th Cir. 1994) (finding no pattern of racketeering under four-part test).

The Tenth Circuit has posited a multi-factor approach in its relationship analysis, but looks mainly at two factors, duration and extensiveness. See Resolution Trust Corp. v. Stone, 998 F.2d 1534, 1543 (10th Cir. 1993) (holding duration and extensiveness "are particularly relevant to the determination of continuity"). Extensiveness is determined by considering the number of victims, the number of acts, the variety of acts, the distinctiveness of the injuries, and the complexity of the scheme. See id. (listing factors that determine "extensiveness").

Before H.J. Inc., the Fourth Circuit adopted a multi-factor test that considered the "number and variety of predicate acts and the length of time over which they were committed, the number of putative victims, the presence of separate schemes, and the potential for multiple distinct injuries." See Parcoil Corp. v. NOWSCO Well Serv., Ltd., 887 F.2d 502, 504 (4th Cir. 1989) (describing multi-factor test used before H.J. Inc.).

65. See Anderson v. Found. for Advancement, 155 F.3d 500, 505-06 (4th Cir. 1998) (discussing establishing continuity and stating criteria depends on the facts of each case); Int'l Data Bank, Ltd. v. Zepkin, 812 F.2d 149, 155 (4th Cir. 1987) (stating no mechanical test can determine the existence of a RICO pattern).

66. Parcoil, 887 F.2d at 503 (criticizing district court's grant of summary judgment solely on the basis that a single scheme to defraud could not constitute a pattern under RICO and stating, on the contrary, a single scheme could constitute a pattern under RICO); see also United States v. Grubb, 11 F.3d 426, 440 (4th Cir. 1993) (holding single scheme of campaign fraud sufficient to show pattern where multiple candidates were elected illegally); Walk v. Baltimore & Ohio R.R., 890 F.2d 688, 690 (4th Cir. 1989) (holding alleged racketeering activity that continued over ten-year period constituted long-term conduct meeting RICO pattern requirement, notwithstanding "closed-ended" nature of conduct that was directed to accomplishment of single discreet objective of forcing out minority in single corporate structure).

67. 18 U.S.C. §1962(c) (2000); e.g., Schacht v. Brown, 711 F.2d 1343, 1360 (7th Cir. 1983) (holding RICO was designed to catch even those only peripherally involved in the enterprise); United States v. Martino, 648 F.2d 367, 382 (5th Cir. 1981) (holding definition of "conduct" under §1962(c) extends to those who perform activities helpful or necessary to operation of enterprise, and not just enterprise's top management).

68. 18 U.S.C. §1962(a)-(c).


70. See, e.g., United States v. Mokol, 957 F.2d 1410, 1417 (7th Cir. 1992) (holding for purposes of RICO, former deputy sheriff was "associated with" amusement company which distributed illegal video poker machines
For RICO purposes, an enterprise must exist independently from the racketeering activity in which it engages, its groups must have a common or shared purpose, and there must be at least some continuity of structure or personnel. To constitute an enterprise, a group must have an ongoing mechanism for directing the affairs of the group on an ongoing, rather than an ad hoc, basis. Federal courts have a tremendous amount of discretion in developing the enterprise prong, and they have recognized a number of enterprise categories not mentioned in the statute. As a result, circuit court approaches vary as to which types of enterprises are encompassed by the statute, how the existence of a RICO enterprise may be established, and whether the “person” charged with a RICO violation and the alleged “enterprise” must be separate and distinct entities.

1. Types of Enterprises

RICO is sufficiently broad to encompass illegal activities relating to any enterprise affecting interstate or foreign commerce. Adhering to Congress’s mandate that RICO be construed liberally, courts have held that the list of enumerated entities in §1961(4) is not exhaustive, but illustrative. A “shifting

71. See United States v. Kehoe, 310 F.3d 579, 586-87 (8th Cir. 2002) (holding white supremacist organization constituted enterprise where members shared common purpose of advancing interests of the organization, members worked in concert to advance those interests through participation in criminal activity, and structure of organization was different from that inherent in acts engaged in by members of group); United States v. Chance, 306 F.3d 356, 373 (6th Cir. 2002) (concluding enterprise consisting of county sheriff, head of vice department, and members of organized crime family and having purpose of controlling criminal activity in county on behalf and for benefit of crime family was separate from pattern of racketeering activity through which enterprise’s affairs were conducted, as required for conviction under RICO); United States v. Phillips, 239 F.3d 829, 844 (7th Cir. 2001) (stating evidence that street gang was well-established, ongoing organization with hierarchical structure facilitating decision-making and that gang was involved in sale of illegal drugs was sufficient to support finding that gang was enterprise under RICO); Simon v. Value Behavior Health Inc., 208 F.3d 1073, 1083 (9th Cir. 2000) (concluding health plans and insurance companies that allegedly collaborated in scheme to defraud plan beneficiaries did not constitute enterprise for purposes of RICO, where plaintiff proved no structure to alleged collusion beyond racketeering activity itself); United States v. Morales, 185 F.3d 74, 80 (2d Cir. 1999) (holding evidence insufficient to prove enterprise continued to exist while its members were incarcerated); United States v. Richardson, 167 F.3d 621, 625-26 (D.C. Cir. 1999) (holding D.C. Circuit test for establishing a RICO enterprise requiring (i) a common purpose among participants; (ii) organization; and (iii) continuity had been met upon showing defendants organized themselves hierarchically and planned their activities, had a consistent pattern in committing robberies, and had association independent of their individual crimes). For a more complete discussion of proof of the enterprise, see infra section II.C.2 of this Article.

72. See infra section II.C.1. of this Article (giving examples of RICO enterprises).


74. See id.; see also United States v. Turkette, 452 U.S. 576, 580 (1981) ("There is no restriction upon the associations embraced by the definition of enterprise."). But see Reves v. Ernst & Young, 507 U.S. 170, 182-83 (1993) (noting courts should not apply RICO to new purposes Congress never intended to reach); Bachman v. Bear, Stearns & Co., 178 F.3d 930, 931-32 (7th Cir. 1999) (noting not every conspiracy is also an enterprise for RICO purposes).
definition of "enterprise" has been held "necessary in view of the fluid nature of criminal associations." A restrictive definition of enterprise excluding legal entities from its scope would:

lead to the bizarre result that only criminals who failed to form corporate shells to aid their illicit schemes could be reached by RICO. The interpretation hardly accords with Congress's remedial purposes: to design RICO as a weapon against the sophisticated racketeer as well as (and perhaps more than) the artless.

Accordingly, courts have found that public entities and governmental agencies, as well as private entities, can constitute RICO enterprises. For example, the term "enterprise" has been found to encompass private businesses, sole proprietorships, corporations, labor organizations, schools, county prosecutors' offices, marriages, and other "associations in fact.

A RICO enterprise need not be part of a formal relationship. A combination of

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75. United States v. Swiderski, 593 F.2d 1246, 1249 (D.C. Cir. 1978) (finding there is no greater notice problem with RICO than there is with any other criminal statute).
77. See U.S. Attorney's Manual, supra note 73, at 39-46; see also De Falco v. Bernas, 244 F.3d 286, 307-09 (2d Cir. 2001) (describing case in which Second Circuit had previously held that a governmental unit could be a RICO enterprise); United States v. Freeman, 6 F.3d 586, 597 (9th Cir. 1993) (holding government entity may constitute a RICO enterprise); Jennings v. Emry, 910 F.2d 1434, 1440 (7th Cir. 1990) (noting government offices can constitute RICO enterprises). But see Bonner v. Henderson, 147 F.3d 457, 459 (5th Cir. 1998) (holding trust is not enterprise under RICO because it is neither legal entity nor association-in-fact).
78. See United States v. Starrett, 55 F.3d 1525, 1545 (11th Cir. 1995) (treating motorcycle club as enterprise); United States v. Console, 13 F.3d 641, 650-51 (3d Cir. 1995) (treating association between law firm and medical practice as enterprise).
79. See Guidry v. Bank of La Place, 954 F.2d 278, 283 (5th Cir. 1992) (finding sole proprietorship qualifies as individual, and thus as RICO "enterprise"); McCullough v. Suter, 757 F.2d 143, 143-44 (7th Cir. 1985) (finding sole proprietorship employing several people an enterprise).
80. See Securitron Magnalock Corp. v. Schnabolk, 65 F.3d 256, 263 (2d Cir. 1995) (finding two corporations owned by same person as an enterprise); Console, 13 F.3d at 650-51 (finding an association between law firm and medical practice a RICO enterprise).
81. See United States v. Cervone, 907 F.2d 332, 336 (2d Cir. 1990) (treating union, trust fund and construction industry corruption as an enterprise); Landry v. Air Line Pilots Ass'n Intl', 901 F.2d 404, 434 (5th Cir. 1990) (finding pilot union an enterprise).
82. See United States v. Weatherspoon, 581 F.2d 595, 597-98 (7th Cir. 1978) (finding beauty college approved for veterans' vocational training by Veterans Administration an enterprise).
83. See United States v. Goot, 648 F.2d 231, 239 (7th Cir. 1981) (finding county prosecutor's office to be RICO enterprise according to United States v. Yonan, 800 F.2d 164, 167 (7th Cir. 1986)).
85. See United States v. Vaccaro, 115 F.3d 1211, 1220 (5th Cir. 1997) (finding cheating scheme in casino constitutes an enterprise); United States v. Rogers, 89 F.3d 1326, 1337 (7th Cir. 1996) (treating criminal gangs as enterprise).
86. See United States v. Tocco, 200 F.3d 401, 425 (6th Cir. 2000) (holding Mafia family to be enterprise); United States v. Goldin Indus., Inc., 219 F.3d 1271, 1275 (11th Cir. 2000) (stating key factor in determining the existence of RICO enterprise is the association of individual entities, however loose or informal, furnishing a
different entities can constitute an enterprise within the meaning of RICO. Several circuits have found that unions of legal entities, including a group of corporations or partnerships, can constitute "associated-in-fact" enterprises. In order to be an association-in-fact, the association must have a shared purpose, continuity, unity, an identifiable structure, and some goals separate from the predicate acts themselves.

Recognition as a RICO enterprise does not demand an economic motive or legitimate business status. In *United States v. Rogers,* the Seventh Circuit observed that "[i]t would be ironic if the RICO statute, aimed primarily at criminal enterprises such as the Mafia and its many petty imitators, was more effective against legal enterprises because the latter have a more perspicuous, articulated structure."

2. Proving the Enterprise

A recurring issue is the type and sufficiency of proof the government must offer to establish the existence of a RICO enterprise. The Supreme Court defines a RICO enterprise as "a group of persons associated together for a common purpose of engaging in a course of conduct" that affects interstate or foreign commerce. Although the circuits have yet to adopt a uniform definition of enterprise, they all
require that the charged RICO enterprise have some sort of organizational structure. 97

When the enterprise under consideration is a legal entity, the enterprise element is satisfied by the mere proof that the entity does in fact have a legal existence. 98

The existence of an association-in-fact requires the more difficult showing that "a group of persons associated together for a common purpose of engaging in a course of conduct." 99

According to the Supreme Court, any type of association can satisfy the enterprise element as long as it meets this definition. 100 As a result, courts have found a broad array of groups and organizations to constitute associations-in-fact. 101

The existence of racketeering activity and enterprise are distinct elements of a

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97. See St. Paul Mercury Ins. Co. v. Williamson, 224 F.3d 425, 440-41 (5th Cir. 2000) (holding a farm constitutes an enterprise for RICO purposes when there is a showing of "ongoing organization, formal or informal, that functions as a continuing unit over time through a hierarchical and consensual decision-making structure"); United States v. Goldin Indus., Inc., 219 F.3d 1271, 1275 (11th Cir. 2000) (holding that several individual corporations named as defendants can be both individual persons and part of an enterprise for RICO purposes even though they are under the same ownership); VanDenBroeck v. Commonpoint Mortgage, 210 F.3d 696, 699 (6th Cir. 2000) (holding subprime mortgage lender working with various secondary lenders to which it sold customers' loans does not constitute an enterprise because there was no minimal level of organizational structure between the entities); Simon v. Value Behavior Health, Inc., 208 F.3d 1073, 1083 (9th Cir. 2000) (holding collaboration between various health care organizations to defraud health plan beneficiaries meets the requirements for conspiracy but not racketeering because the enterprise does not have any sort of decision-making structure); United States v. Owens, 167 F.3d 739, 751 (1st Cir. 1999) (holding two criminal organizations that regularly exchanged money for cocaine, coordinated in the transporting of cocaine, accompanied one another on cocaine buying trips, and assisted one another in acts of violence to protect their drug interests meet the definition of enterprise because they depend on each other structurally and financially, and hence function as a continuing unit with ongoing organization); United States v. Richardson, 167 F.3d 621, 625 (D.C. Cir. 1999) (holding an armed robbery ring qualifies as RICO enterprise when it has a common purpose, organization, and continuity); United States v. Gray, 137 F.3d 765, 772 (4th Cir. 1998) (holding a drug distribution ring that has a central leader and a lieutenant, as well as a system of "stash houses" and stash house workers, meets the requirements of continuity, unity, and shared purpose); United States v. Davidson, 122 F.3d 531, 534 (8th Cir. 1997) (holding a crime ring, though small, satisfied the enterprise requirements because the group had a clear organizational structure and continuity of personnel, the members had a shared purpose of stealing cars and committing other related crimes, and the structure of the crime ring was distinct from the racketeering activity).

98. E.g., Webster v. Omnitrition Intern., Inc., 79 F.3d 776, 786 (9th Cir. 1996) ("[C]orporate entities have a legal existence separate from their participation in the racketeering, and the very existence of a corporation meets the requirement for a separate structure." (citing United States v. Kirk, 844 F.2d 660, 664 (9th Cir. 1988))); Jaguar Cars, Inc. v. Royal Oaks Motor Car Co., 46 F.3d 258, 268 (3d Cir. 1995) ("A corporation is an entity legally distinct from its officers or employees, which satisfies the ‘enterprise’ definition."); U.S. ATROUER'S MANUAL, supra note 73, at 36-37.


100. Turkette, 452 U.S. at 580 (holding both legitimate and illegal criminal organizations can be enterprises for the purposes of racketeering).

101. See United States v. Tocco, 200 F.3d 401, 425 (6th Cir. 2000) (holding organized crime family was association-in-fact); United States v. Torres, 191 F.3d 799, 807 (7th Cir. 1999) (finding an informal unit responsible for collection of drug debts for a larger organization was association-in-fact); Richardson, 167 F.3d at 625 (holding association-in-fact could be made up of band of robbers with a leader and an organized structure); Handeen v. Lemaire, 112 F.3d 1339, 1353 (8th Cir. 1997) (determining that bankruptcy estate possessed necessary
RICO charge, but the proof necessary to establish either can coincide. When the Supreme Court articulated this principle in *United States v. Turkette*, it did not specify how much structure is needed for an association-in-fact enterprise; consequently, the circuits have taken differing positions on the degree of proof necessary to establish the existence of an enterprise that is sufficiently distinct and separate from the underlying pattern of racketeering.

A majority of circuits have interpreted *Turkette* to require that a RICO enterprise have an ascertainable structure separate and distinct from the pattern of racketeering activities. These circuits have expressed concern that allowing too much overlap between the two elements will make them interchangeable. Although these circuits agree on the interpretation of *Turkette*, they apply the standard with varying degrees of rigidity. In contrast to the generally liberal approach of most circuits, the Eighth Circuit applies a rigid standard, requiring that the enterprise exist entirely separately and independently from the pattern of racketeering activity. No other circuit takes this rigid approach; the First Circuit has.

characteristics of association-in-fact); United States v. Qaoud, 777 F.2d 1105, 1116 (6th Cir. 1985) (holding a judge and several bagmen accepting bribes on his behalf were association-in-fact).

102. *Turkette*, 452 U.S. at 583 (finding “enterprise” is an entity, whereas “pattern of racketeering activity” is a series of criminal acts).

103. *Id.* The *Turkette* Court stated:

[w]hile the proof used to establish these separate elements may in particular cases coalesce, proof of one does not necessarily establish the other. The ‘enterprise’ is not the ‘pattern of racketeering activity’; it is an entity separate and apart from the pattern of activity in which it engages. The existence of an enterprise at all times remains a separate element which must be proved by the Government.

*Id.*


106. Every circuit except the Second and Eleventh Circuits have adopted the majority view. See Begala v. PNC Bank, 214 F.3d 776, 781-82 (6th Cir. 2000) (holding enterprise and pattern can be proved by same facts, but facts must suggest behavior of entities is coordinated in such a way that they function as a continuing unit); Simon v. Value Behavior Health, Inc., 208 F.3d 1073, 1083 (9th Cir. 2000) (“A group whose members collectively engage in an illegal act, in-and-of-itself, does not constitute an ‘enterprise’ for the purposes of RICO.”); Bachman v. Bear, Stearns & Co., 178 F.3d 930, 932 (7th Cir. 1999) (holding a mere conspiracy to commit fraud does not constitute a RICO organization); United States v. Owens, 167 F.3d 739, 752 (1st Cir. 1999) (refusing to adopt Eighth Circuit’s “enterprise” test, but indicating that evidence established a distinction between an enterprise and the pattern of racketeering activity); United States v. Keltner, 147 F.3d 662, 668 (8th Cir. 1998) (holding enterprise must be distinct and apart from racketeering activity); United States v. Gray, 137 F.3d 765, 772 (4th Cir. 1998) (holding government must prove the enterprise separate and distinct from the racketeering act of murder); United States v. Console, 13 F.3d 641, 652 (3d Cir. 1993) (holding distinct structure is necessary and that association between a law firm and medical practice for purposes of insurance fraud meets this requirement); United States v. Sanders, 928 F.2d 940, 944 (10th Cir. 1991) (holding evidence must be sufficient to establish existence of enterprise separate and apart from racketeering acts).

107. See Chang v. Chen, 80 F.3d 1293, 1297 (9th Cir. 1996) (adopting majority interpretation on the theory that if “pattern” and “enterprise” are not distinguished, every pattern of racketeering activity becomes an enterprise and thus the enterprise element becomes superfluous, in direct contravention of the intentions of the statute).

108. See *Keltner*, 147 F.3d at 668 (holding enterprise must be distinct and apart from racketeering activity). The Eighth Circuit requires that “the person named as the defendant cannot also be the entity identified as the
expressly rejected the Eighth Circuit’s standard. On the liberal extreme, some circuits have allowed the existence of an enterprise to be inferred from the existence of the pattern of racketeering, while still maintaining that the two must be separate and distinct from one another.

Two circuits have decided against the majority approach and have interpreted Turkette in such a way as to allow the organization constituting the enterprise to be no more than the sum of the predicate acts. The Second Circuit has consistently recognized that the same evidence may be used to prove both the nature of the enterprise and the threat of continuity necessary to establish a RICO pattern and allows the government to prove the existence of an enterprise by establishing commission of the racketeering acts. The Eleventh Circuit takes a similar approach.

3. Person-Enterprise Rule

The determination of whether the “person” charged with a RICO violation and the alleged “enterprise” must be separate and distinct turns on whether the action is brought under §1962(a), (b), or (c). Most courts have held that actions brought

enterprise.” See Atlas Pile Driving Co. v. DiCon Fin. Co., 886 F.2d 986, 995-96 (8th Cir. 1989). This distinct structure is required “in order to avoid the danger of guilt by association that arises because RICO does not require a proof of a single agreement as in a conspiracy case, and in order to ensure that criminal enterprises . . . are distinguished from individuals who associate for the commission of sporadic crime.” Id. (citations omitted).

109. See Owens, 167 F.3d at 752 n.6 (refusing to adopt Eighth Circuit’s “enterprise” test, but indicating that evidence established a distinction between an enterprise and pattern of racketeering activity).

110. See United States v. White, 116 F.3d 903, 924 (D.C. Cir. 1997) (“[T]he existence of the enterprise may be inferred from proof of the pattern . . . .” (quoting United States v. Perholtz, 842 F.2d 343, 362 (D.C. Cir. 1988)); United States v. Pelullo, 964 F.2d 193, 212 (3d Cir. 1992) (noting “enterprise” must remain a separate element at all times, but “in the appropriate case, the enterprise can be inferred from proof of the pattern”).

111. See United States v. Goldin Indus., Inc., 219 F.3d 1271, 1275 (11th Cir. 2000) (“[A] RICO enterprise need not possess an ‘ascertainable structure’ distinct from the associations necessary to conduct the pattern of racketeering activity.”); United States v. Conaton, 938 F.2d 1553, 1559 (2d Cir. 1991) (holding proof of various racketeering acts can establish existence of an enterprise).

112. See United States v. Diaz, 176 F.3d 52, 93 (2d Cir. 1999) (holding the “nature of the enterprise may . . . serve to show the threat of continuing activity” (quoting United States v. Indelicato, 865 F.2d 1370, 1383-84 (2d Cir. 1989))).

113. See United States v. Mazzei, 700 F.2d 85, 89 (2d Cir. 1983) (finding that proof used to establish pattern of racketeering activity element and enterprise element proved the functioning of “continuous unit,” (citing United States v. Turkette, 452 U.S. 576, 583 (1981)); see also United States v. Coonan, 938 F.2d 1553, 1559 (2d Cir. 1991) (“Common sense suggests that the existence of an association-in-fact is oftentimes more readily proven by what it does, rather than by an abstract analysis of its structure.”) (internal quotation marks omitted). The Second Circuit bases its view on the fact that neither RICO’s legislative history, nor the statute itself, indicates that Congress intended the two elements to be distinct. See Mazzei, 700 F.2d at 89. Therefore, the Second Circuit relaxes the emphasis on continuity as an element in proving the existence of an enterprise, concluding, “relatedness and continuity are attributes of activity, not of a RICO enterprise.” Indelicato, 865 F.2d at 1381. The Second Circuit recognizes, however, that “[e]vidence of relatedness and continuity, or the threat of continuity, may arise from . . . the nature of the RICO enterprise itself.” United States v. Minicone, 960 F.2d 1099, 1106 (2d Cir. 1992).

114. See Goldin Indus., 219 F.3d at 1275.
under §1962(a)\textsuperscript{115} or (b)\textsuperscript{116} do not require the RICO defendant to be separate from the enterprise.\textsuperscript{117}

In contrast, in an action under §1962(c),\textsuperscript{118} the “person” must be distinct from the “enterprise” that conducts its affairs through a pattern of racketeering.\textsuperscript{119} In June 2001, the Supreme Court resolved a circuit split over the issue of whether an employee of a corporation is a part of or distinct from that corporation by holding that an employee of a corporation, even when that employee is the corporation’s sole shareholder, is a legally distinct “person” associated with the “enterprise” of the corporation.\textsuperscript{120} Therefore, it is uniformly the law that the “person” and “enterprise” alleged under §1962(c) must be only legally, and not necessarily actually, distinct.\textsuperscript{121}

\section*{D. Effect on Interstate Commerce}

For RICO to apply, the alleged racketeering activity must affect interstate commerce.


\textsuperscript{116} 18 U.S.C. §1962(b) (prohibiting acquiring or maintaining interest in enterprise through pattern of racketeering).

\textsuperscript{117} See Crowe v. Henry, 43 F.3d 198, 205 (5th Cir. 1995) (upholding plaintiff’s §1962(a) and §1962(b) claims, but striking §1962(c) claim because RICO person and enterprise were not distinct); Riverwoods Chappaqua Corp. v. Marine Midland Bank, 30 F.3d 339, 345 (2d Cir. 1994) (holding under §1962(a), RICO person and enterprise do not have to be distinct, but they must be separate under §1962(c); outcome under §1962(b) not decided); New Beckley Mining Corp. v. Int’l Union, United Auto Workers, 18 F.3d 1161, 1163 (4th Cir. 1994) (holding under §1962(a), RICO person and enterprise do not have to be distinct, but must be distinct under §1962(c)); Gentry v. Resolution Trust Corp., 937 F.2d 1393, 1396-98 (9th Cir. 1991), 937 F.2d at 907 (same); Busby v. Crown Supply, 896 F.2d 833, 841 (4th Cir. 1990) (overruling earlier case with respect to requirement that RICO person and enterprise be distinct under §1962(a), but maintaining distinctness requirement under §1962(c)); Reynolds v. E. Dyer Co., 882 F.2d 1249, 1251 (7th Cir. 1989) (holding §1962(a) does not require that person and enterprise be distinct); Schreiber Distrib. Co. v. Serv-Well Furniture Co., 806 F.2d 1393, 1396-98 (7th Cir. 1986) (holding under §1962(a) and §1962(b), RICO person and enterprise do not have to be distinct, but must be distinct under §1962(c)).

\textsuperscript{118} 18 U.S.C. §1962(c) (prohibiting person employed by or associated with enterprise from conducting or participating in conduct of enterprise’s affairs through pattern of racketeering activity).

\textsuperscript{119} See Cedric Kushner Promotions, Ltd. v. King, 533 U.S. 158, 161 (2001) ("We do not quarrel with the basic principle that to establish liability under §1962(c) one must allege and prove the existence of two distinct entities: (1) a ‘person’; and (2) an ‘enterprise’ that is not simply the same ‘person’ referred to by a different name.").

\textsuperscript{120} Id. at 163 ("The corporate owner/employee, a natural person, is distinct from the corporation itself, a legally different entity with different rights and responsibilities due to its different legal status.").

\textsuperscript{121} The Court expressly did not decide whether other attempts to circumvent the distinctness requirement are prohibited. Id. at 162. See, e.g., Bachman v. Bear, Stearns & Co., 178 F.3d 930, 932 (7th Cir. 1999) (affirming dismissal of RICO claims because "a firm and its employees, or a parent and its subsidiaries," do not constitute an enterprise separate from the firm for purposes of §1962(c)); Brannon v. Boatman’s First Nat’l Bank of Okla., 153 F.3d 1144, 1147-48 (1998) (holding alleging subsidiary is the RICO “person” and a parent is the enterprise, does not sufficiently state a RICO claim); Fitzgerald v. Chrysler Corp., 116 F.3d 225, 226 (7th Cir. 1997) (holding employer and employees did not constitute RICO enterprise); Riverwoods Chappaqua, 30 F.3d at 344 (holding distinctness requirement may not be avoided by alleging the enterprise as the corporate defendant associated with its employees).
Courts initially held that the enterprise itself, and not the predicate acts, must affect interstate commerce. However, many courts now exercise RICO jurisdiction if the predicate acts have a *de minimis* impact on interstate commerce, demonstrated by "proof of a probable or potential impact." Additionally, this element may be satisfied if the enterprise's activities have an impact on interstate commerce, which includes activities that "affect interstate commerce by impacting the victim."

### E. Prohibited Acts

Activities expressly prohibited under §1962 include: (i) investing income from a pattern of racketeering activity; (ii) acquiring or maintaining an interest in an enterprise through a pattern of racketeering activity; (iii) conducting the affairs of an enterprise through a pattern of racketeering activity; and (iv) conspiring to do any of the above.

#### 1. Investment of Racketeering Proceeds

Section 1962(a) prohibits the establishment or operation of, or acquisition of interest in, any enterprise engaged in or affecting interstate or foreign commerce with income derived, either directly or indirectly, from a pattern of racketeering.

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122. *See* 18 U.S.C. §1962(a)-(c) (2000) (prohibiting participation in illegal enterprises "engaged in, or the activities of which affect, interstate or foreign commerce").

123. *See* United States v. Nerone, 563 F.2d 836, 854 (7th Cir. 1977) (requiring government to introduce evidence that the enterprise affects interstate commerce in order to successfully prosecute a RICO claim).

124. *See* United States v. Feliciano, 223 F.3d 102, 117 (2d Cir. 2000) (holding "effect on interstate or foreign commerce could have occurred in any way, and it need only have been minimal"); United States v. Frega, 179 F.3d 793, 800 (9th Cir. 1999) (requiring individual predicate acts of racketeering only have a *de minimis* impact on interstate commerce); United States v. Owens, 167 F.3d 739, 755 (1st Cir. 1999) (holding only a minimal effect on interstate commerce is necessary); United States v. Beasly, 72 F.3d 1518, 1526 (11th Cir. 1996) (holding religious cult's efforts to spread its influence to other states and countries more than satisfied requirement that predicate acts have "slight" effect on interstate commerce).

125. *See* United States v. Juvenile Male, 118 F.3d 1344, 1349 (9th Cir. 1997) (holding armed robbery of a Subway sandwich franchise by gang members and subsequent murder of an employee had a probable or potential impact on interstate commerce because: defendants robbed a franchise which sends some of its profits to its out-of-state headquarters; in addition to taking money, defendants allegedly stole sandwiches and chips, which contained ingredients purchased from out-of-state suppliers; gun used during robbery had moved in interstate commerce; and defendants hoped to use cash from robbery to obtain additional firearms, which could potentially have a further impact on interstate commerce).

126. 18 U.S.C. §1962(c) ("It shall be unlawful for any person . . . associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to . . . participate . . . in the conduct of such enterprise's affairs through a pattern of racketeering activity . . . ") (emphasis added).

127. *Juvenile Male*, 118 F.3d at 1349 (holding that a district court may examine both the enterprise’s activities and its impact on the victim to determine whether the interstate commerce element is met).


activity.\textsuperscript{132} Subsection (a) is clearly aimed at the "classic Mafia investment case envisioned by Congress,"\textsuperscript{133} where "organized criminals gain control of an uncorrupted business by investing profits from gambling or other illegal activities."\textsuperscript{134}

Relatively few criminal indictments allege a violation of §1962(a).\textsuperscript{135} Section 1962(a) requires the government to prove that the defendant both committed the alleged predicate activities and invested the income from those activities in the targeted manner.\textsuperscript{136} The limited case law suggests that if such a tracing requirement exists, courts tend not to enforce it strictly.\textsuperscript{137} The tracing of income, as well as the defendant's knowledge of the income source, is almost always inferred by courts.\textsuperscript{138} "In most contexts, direct proof of tracing is impossible due to the fungible nature of money and the failure of organized crime figures to maintain records that accurately reflect the source of illgotten gains."\textsuperscript{139}

\begin{itemize}
  \item \textsuperscript{132} 18 U.S.C. §1962(a).
  \item \textsuperscript{134} Id. at §5.02[1].
  \item \textsuperscript{135} Although criminal prosecutions are infrequent, civil suits are more common. \textit{See infra} section V (discussing Civil RICO).
  \item \textsuperscript{136} \textit{See} Blakey \& Blakey, \textit{supra} note 9, at 38 (discussing elements of §1962(a)); \textit{see also} United States v. Vogt, 910 F.2d 1184, 1193-94 (4th Cir. 1990) (finding violation of §1962(a) because defendant used part of bribery money from drug smuggler to establish multi-corporation laundering enterprise); United States v. Porcelli, 865 F.2d 1352, 1364 (2d Cir. 1989) (affirming defendant's RICO conviction under §1962(a) because racketeering proceeds were funneled through defendant's realty companies). \textit{But see} United States v. Robertson, 73 F.3d 249, 253 (9th Cir. 1996) (affirming dismissal of §1962(a) charge where government failed to tie deposit of illegal drug sale proceeds to investment or operation of RICO enterprise).
  \item \textsuperscript{137} \textit{See} Vogt, 910 F.2d at 1194 ("Section 1962(a) does not exact rigorous proof of the exact course of income derived from a pattern of racketeering activity into its ultimate 'use or investment.'"). There is no requirement, under a broad reading of §1962(a), that "the tainted income must be specifically and directly traced in proof from its original illegal receipt to its ultimately proscribed 'use or investment' by the defendant." \textit{Id}.
  \item \textsuperscript{138} Conspicuously absent from the text of §1962(a) is an explicit mens rea requirement. "Nevertheless, the statute has been properly construed to require a showing of knowledge that the invested money is derived from racketeering activity. This standard protects a defendant whose funds are so commingled that he cannot distinguish his dirty money from his legitimate income." SMITH \& REED, \textit{supra} note 133, at §5.02[2] (citation omitted).
  \item \textsuperscript{139} \textit{See} Vogt, 910 F.2d at 1197 ("[T]he offense defined in subsection (a) is only complete upon the use or investment of income, or its proceeds, derived from such a pattern. A prosecution under subsection (a) therefore could not proceed until such use or investment had occurred, without regard to when the pattern of racketeering activity which produced the tainted income may have come to an end."); United States v. McNary, 620 F.2d 621, 628 (7th Cir. 1980) ("[T]he statute on its face does not require immediate or even direct use of illicit income to establish a violation of its terms.").
  \item \textsuperscript{140} Louis C. Long, \textit{Treble Damages for Violations of the Federal Securities Laws: A Suggested Analysis and Application of the RICO Civil Cause of Action}, 85 DICK. L. REV. 201, 229 (1981). However, Smith and Reed argue "the typical racketeer" likely does not take the simple precautions necessary to hide the racketeering proceeds, so that a "reasonably thorough financial investigation ought to be able to trace the invested money back to its illegitimate source in the usual case." SMITH \& REED, \textit{supra} note 133, §5.02[5] (citing McNary, 620 F.2d at 628-29, which found that liberating other funds by receipt of racketeering proceeds was sufficient to meet requirements of §1962(a)); \textit{see also} United States v. Cauble, 706 F.2d 1322, 1342 (5th Cir. 1983) (holding government need only show that some racketeering proceeds were invested in enterprise, not that any specific proceeds were traceable to any specific act).
2. Illegal Acquisition of Enterprise Interest

Section 1962(b) prohibits "any person" from acquiring or maintaining, "through a pattern of racketeering activity," an interest in "any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce." Thus, §1962(b) is aimed at other cases in which organized criminals commit racketeering acts to gain control of legitimate businesses. Like §1962(a), §1962(b) rarely forms the basis of a RICO action. Unlike §1962(a), however, §1962(b) does not require that the defendant receive proceeds from the pattern of activity.

3. Conducting an Enterprise Through Racketeering Acts

Section 1962(c) prohibits persons employed by or associated with an enterprise from conducting or participating in the conduct or the affairs of that enterprise through a pattern of racketeering activity. A relationship between the pattern of racketeering activity and the enterprise is required. In Reves v. Ernst & Young, the Supreme Court held that the requisite nexus exists only when the defendant participates in the management or operation of the enterprise. Actions involving a low degree of decision-making may not constitute participation in the affairs of the enterprise. One must play some role in

142. See Barry Tarlow, RICO Revisited, 17 Ga. L. Rev. 291, 323 (1983) ("In practice, [§1962(b)] prosecutions involve relatively simple fact patterns in which the defendant is charged with 'muscling' into businesses through loansharking, bribery, extortion, or fraud."); see also Lightning Lube, Inc. v. Witco Corp., 4 F.3d 1153, 1190-91 (3d Cir. 1993) (holding that plaintiff failed to assert a claim under 18 U.S.C. §1962(b) by failing "to allege a specific nexus between control of any enterprise and the alleged racketeering activity").
143. See SMITH & REED, supra note 133, at §5.03 ("[Section 1962(b)] is the least used of the four subsections.").
146. United States v. Indelicato, 865 F.2d 1370, 1384 (2d Cir. 1989) (holding there must be a relationship between the enterprise and the predicate acts for a RICO violation to occur). RICO prosecutions under §1962(a) and (b) also require this nexus. However, the nexus required under §1962(a) and (b) is explicit: "investment" in or "acquiring or maintaining" an "interest" in an enterprise, respectively. Compare 18 U.S.C. §1962(c) (2000) (making it unlawful for person "employed by or associated with" enterprise to participate in enterprise's conduct through a pattern of racketeering activity), with 18 U.S.C. §1962(a) (making it unlawful for person who has received income derived from pattern of racketeering to obtain interest in enterprise), and 18 U.S.C. §1962(b) (making it unlawful for person to acquire or maintain interest in enterprise through pattern of racketeering activity).
148. Id. at 185 (holding that in order "'to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs,' one must participate in the operation or management of the enterprise itself") (citing 18 U.S.C. §1962(c)).
149. Id. (holding that an accountant who performed audits and prepared financial statements for enterprise did not rise to the requisite level of participation to be held liable under 18 U.S.C. §1962(c)).
directing the affairs of the enterprise to "conduct or participate" in the affairs of the enterprise.\textsuperscript{150}

\textit{Reves} does not preclude professionals, such as lawyers and accountants, from being subject to RICO liability.\textsuperscript{151} The enterprise may be "‘operated’ or ‘managed’ by others ‘associated with’ the enterprise who exert control over it as, for example, by bribery."\textsuperscript{152} Generally, courts have found that the participation must exceed merely reporting to the enterprise.\textsuperscript{153}

\textit{Reves}, while acknowledging that "lower rung" employees could participate in the enterprise,\textsuperscript{154} explicitly declined to decide how far the operation and management test extends down the corporate chain of command.\textsuperscript{155} The Court therefore did not specify what degree of activity is required for such employees to satisfy the participation requirement.\textsuperscript{156} Subsequent circuit court decisions have generally extended RICO liability to employees who carry out instructions.\textsuperscript{157}

\textbf{4. Conspiracy}

Section 1962(d) prohibits "any person" from conspiring to violate any provision


\textsuperscript{151} \textit{Id.} at 1460 (stating accountant or counseling lawyer must have a part in directing affairs of the enterprise to be prosecuted under RICO); see \textit{Reves v. Ernst & Young}, 507 U.S. 170, 178-79 (1993) (holding the "operation or management" test is not met when accounting firm conducts two audits of agricultural cooperative client without consulting with cooperative's board); \textit{United States v. Sites}, 56 F.3d 1020, 1022 (9th Cir. 1995) (stating fraud by professional accountants is more "heinous" than fraud by non-professionals).

\textsuperscript{152} \textit{Reves}, 507 U.S. at 184; see also \textit{United States v. Parise}, 159 F.3d 790, 796 (3d Cir. 1998) (affirming RICO conviction of defendant who bribed union employees because, even though defendant did not hold a formal position in the enterprise, he knew of the general nature of the enterprise and knew it extended beyond his individual role).

\textsuperscript{153} \textit{See Univ. of Md. at Baltimore v. Peat, Marwick, Main & Co.}, 996 F.2d 1534, 1538-39 (3d Cir. 1993) (granting immunity to professionals because "not even action involving some degree of decision-making constitutes participation in the affairs of an enterprise").

\textsuperscript{154} \textit{Reves}, 507 U.S. at 184 (noting 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," but holding accountants hired to perform audit of cooperative's records did not participate in operation or management of cooperative's affairs).

\textsuperscript{155} \textit{Id.} at 184 n.9.

\textsuperscript{156} \textit{Reves v. Ernst & Young}, 507 U.S. 170, 184 n.9 (1993).

\textsuperscript{157} \textit{See United States v. Diaz}, 176 F.3d 52, 92-93 (2d Cir. 1999) (affirming RICO conviction of defendants who had discretionary authority in carrying out instructions, but stating that simply taking directions alone, necessary for operation of the enterprise, does not sufficiently allege a RICO violation); \textit{United States v. Darden}, 70 F.3d 1507, 1543 (8th Cir. 1995) (holding defendants could be held liable as operators and managers under §1962(c), although they acted under the control of another individual); \textit{MCM Partners, Inc. v. Andrews-Bartlett & Assoc., Inc.}, 62 F.3d 967, 974 (7th Cir. 1995) (holding defendants participated in control of enterprise by knowingly implementing management's decisions and could be held liable, even though their participation was somewhat reluctant); \textit{United States v. Oreto}, 37 F.3d 739, 750 (1st Cir. 1994) (holding defendant may participate in the conduct of an enterprise "by knowingly implementing decisions, as well as by making them").
of §1962.158 This provision does not require any overt act by the defendant.159 Instead, the Supreme Court held in Salinas v. United States that "partners in the criminal plan must agree to pursue the same criminal objective," even if each conspirator does not agree to commit or facilitate each and every part of the substantive offense.160 Section 1962(d) therefore allows for prosecution of individuals who have not committed any of the predicate acts of racketeering as long as the government proves the defendant "intend[ed] to further an endeavor which, if completed, would satisfy all of the elements of a substantive criminal offense."161 As a result, a defendant may be found not guilty of the substantive offense, but may still be convicted of conspiracy if there is proof of an agreement to commit the substantive crime.162

III. DEFENSES

This Section addresses a variety of potential defenses to RICO prosecutions. Part A assesses the results when one or more underlying predicate acts supporting a RICO offense is invalidated. Part B discusses the statute of limitations for criminal and civil RICO violations. Part C examines a defendant's withdrawal from a conspiracy as a defense under §1962(d). Parts D and E both discuss preemption challenges to RICO. Specifically, Part D addresses challenges based on the "primary jurisdiction" or "horizontal preemption" defense, while Part E describes approaches using a "reverse vertical preemption" theory. Finally, Part F considers constitutional challenges to RICO.

A. Invalidity of One or More Predicate Acts

Most circuits agree that a RICO conviction may be sustained despite invalidation of multiple predicate acts so long as valid convictions remain to support the

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158. 18 U.S.C. §1962(d) (2000). The penalty for a RICO conspiracy usually parallels the penalty for the offense that was the object of the conspiracy. In addition, consecutive sentences are often permitted when the substantive violation and the conspiracy are both proved. See United States v. Felix, 503 U.S. 378, 389-90 (1992) (holding substantive crime and conspiracy to commit crime are separate and distinct offenses and therefore not the same offense for double jeopardy purposes). For a discussion of double jeopardy defenses to consecutive sentences under RICO, see infra section III.F of this Article. The Guidelines treat the underlying offense as if it was a separate count of conviction. U.S. SENTENCING GUIDELINES MANUAL §2E1.1 (2005) [hereinafter U.S.S.G. MANUAL].

159. See Salinas v. United States, 522 U.S. 52, 61-66 (1997) (upholding conspiracy conviction where defendant did not accept or agree to accept two bribes but still knew about and agreed to facilitate a racketeering scheme involving bribery); see also United States v. Zichettello 208 F.3d 72, 100 ("To be convicted as a conspirator, one must be shown to have possessed knowledge of only the general contours of the conspiracy.").

160. Id. at 63.

161. Id. at 65.

162. Id. ("[A] conspiracy may ... be punished whether or not the substantive crime ensues, for the conspiracy is ... punishable in itself."). See, e.g., Smith v. Berg, 247 F.3d 532, 534 (3d Cir. 2001) (holding defendant could be convicted of conspiracy to violate RICO even though he could not be charged with committing a substantive predicate act).
legal sufficiency of at least two predicate acts.\textsuperscript{163}

Courts face a more difficult issue when the invalidation of predicate acts leaves no remaining substantive convictions to serve as the two predicate acts required for a RICO conviction. Without any indication as to which predicate acts served as the basis for the RICO conviction, there is a risk that the jury may have relied on legally insufficient acts. Courts therefore may reverse a RICO conviction in two situations: (i) when it appears that the jury based the RICO conviction on the invalidated convictions;\textsuperscript{164} or (ii) when the jury did not indicate which of the predicate acts formed the basis of the conviction.\textsuperscript{165}

The Supreme Court has not ruled definitively on this issue with regard to RICO specifically. In \textit{Griffin v. United States},\textsuperscript{166} however, the Court held that a verdict in a multi-object conspiracy conviction should be sustained if the evidence is adequate to support conviction as to any one of the objects.\textsuperscript{167} Two circuits have extended the \textit{Griffin} reasoning to RICO convictions.\textsuperscript{168}

\section*{B. Limitation of Actions}

RICO contains no explicit statute of limitations period. In \textit{Agency Holding Corp. v. Malley-Duff & Assoc., Inc.},\textsuperscript{169} the Supreme Court defined limitation periods for both criminal and civil RICO actions.\textsuperscript{170} For criminal RICO prosecutions, a five-year statute of limitations period applies because Congress has explicitly provided that term as a default statute of limitations for criminal actions.\textsuperscript{171} For civil actions, the Court held that the statute of limitations is four

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163. See, e.g., United States v. Schenberg, 89 F.3d 1461, 1471 (11th Cir. 1996) (holding adequate evidence still supported RICO conviction of defendant on at least two counts even though defendant was acquitted on other counts); United States v. Crockett, 979 F.2d 1204, 1209 (7th Cir. 1992) (upholding RICO conviction even though identification of specific predicate acts in indictment was impossible); United States v. Carpenter, 961 F.2d 824, 829 (9th Cir. 1992) (upholding RICO conviction because "RICO conviction may be sustained if only two of the predicate acts are proved beyond a reasonable doubt," despite invalidation of one of original predicates).

164. Compare United States v. Delano, 55 F.3d 720, 725-29 (2d Cir. 1995) (reversing RICO conviction based on belief that jury might not have convicted defendant if predicate acts of extortion had been properly removed from jury's consideration), with United States v. Paccione, 949 F.2d 1183, 1197-98 (2d Cir. 1991) (noting that use of a special verdict allows a determination of the sufficiency of each predicate act toward a RICO conviction).

165. \textit{See U.S. v. Marcello, 876 F.2d 1147, 1153 (5th Cir. 1989)} (reversing RICO conviction because jury returned general verdict of guilty on RICO count but without any indication that the conviction rested on two legally sufficient predicate acts).


167. \textit{Id.} at 50-1.

168. \textit{See United States v. Vastola, 989 F.2d 1318, 1329-31} (3d Cir. 1993) (citing \textit{Griffin} in analogizing conspiracy conviction to RICO conviction and upholding RICO conviction where evidence sufficient to support two predicate acts); \textit{United States v. Eisen, 974 F.2d 246, 258} (2d Cir. 1992) (citing \textit{Griffin} in stating that RICO conviction will be upheld if evidence is sufficient to support one basis for conviction).


170. \textit{See id.} at 146 (reasoning that absent a specific statute of limitations, the court was to “borrow” the rule from some other source).

171. \textit{Id.} at 155-56; \textit{see also} 18 U.S.C. §3282 (2000) (stating five-year statute of limitations period for federal criminal actions is appropriate where no other period is specified).
years. 172

The "last predicate act" accrual method is used for criminal RICO actions to
determine when the five-year statute of limitations begins to
run. 173 This method
allows for punishment of all predicate acts, no matter when committed, if "the
government . . . demonstrate[s] that a defendant committed at least one predicate
racketeering act within the limitations period." 174

Courts have applied the "last predicate act" method differently depending on
which subsection of §1962 forms the basis of the criminal action. A §1962(a) of-
fense arises when a defendant invests income derived from racketeering activity.
The Fourth Circuit has held that the statute of limitations for this category of
criminal RICO action begins to run upon the investment of the income, as opposed
to the illegal activity from which the income was derived. 175 In contrast, the statute
of limitations for actions arising under criminal RICO §1962(b) and (c) begins to
run when the last illegal predicate act necessary for the RICO conviction is
committed. 176 For a criminal RICO conspiracy action arising under §1962(d), "the
statute of limitations for a RICO conspiracy does not begin to run until the
objectives of the conspiracy have been either achieved or abandoned," 177 even if
the actual illegal predicate acts occurred more than five years prior to the RICO
action's initiation. 178

C. Withdrawal From Conspiracy

Withdrawal from the conspiracy is a permissible defense to an action brought
under §1962(d), but a defendant must prove that affirmative steps were taken,
inconsistent with the objectives of the conspiracy, to disavow or to defeat the

172. Id. This length of time is the same as that under the Clayton Act. Agency Holding Corp. v. Malley-Duff &
Assoc., Inc., 483 U.S. 143, 150-54 (1987); see also 15 U.S.C. §15b (imposing four-year limitation period for civil
action under Clayton Act). The Court in Agency Holding Corp. used the limitation period of the Clayton Act
because it found that civil RICO actions are analogous to private antitrust actions under the Clayton Act and
because the language of the Clayton Act influenced the language of §1964 of RICO. Agency Holding Corp., 483
U.S. at 150-54.


174. United States v. Wong, 40 F.3d 1347, 1367 (2d Cir. 1994) (holding defendant may be liable under
substantive RICO for predicate acts so long as defendant committed one predicate act within statute of limitations
period).

175. Vogt, 910 F.2d at 1196-97 (commencing statute of limitations from date of use or investment of proceeds
derived from pattern of racketeering activity charged in prosecutions under 18 U.S.C. §1962(a)).

176. Id. at 1196 (applying last predicate act rule to 18 U.S.C. §1962(c) action); see Bingham v. Zolt, 66 F.3d
553, 559 (2d Cir. 1995) (recognizing "separate accrual rule" where new claim, with its own limitations period,
develops each time plaintiff finds, or should have found, new injury); United States v. Maloney, 71 F.3d 645, 662
(7th Cir. 1995) (holding one of the predicate acts must have occurred within the five years preceding the date of
indictment).

177. United States v. Eisen, 974 F.2d 246, 264 (2d Cir. 1992); see also United States v. Tocco, 200 F.3d 401,
425 n.9 (6th Cir. 2000); United States v. Yashar, 166 F.3d 873, 876 n.1 (7th Cir. 1999).

178. See United States v. Arnold, 117 F.3d 1308, 1313 (11th Cir. 1997) (stating that the "government satisfies
the requirements of the statute of limitations for a non-overt act conspiracy if it alleges and proves that the
conspiracy continued into the limitations period," thus obviating requirement of proof of an overt act).
conspiratorial objectives. Additionally, the defendant must have either made a reasonable effort to communicate those steps to her co-conspirators or disclosed their scheme to law enforcement authorities.

Moreover, the Third Circuit has held that resignation from the enterprise does not constitute withdrawal as a matter of law. The court found that a defendant may withdraw from the conspiracy by completely severing ties with the enterprise, but the defendant may still be a party to the conspiracy if she continues to take actions that further the goals of the conspiracy and continues to receive benefits from the conspiracy. Several other circuits have adopted this position.

D. “Horizontal Preemption” or “Primary Jurisdiction”

Because many RICO actions involve conduct that is itself the subject of pervasive administrative regulation, some RICO defendants claim a “primary jurisdiction” defense, arguing that the RICO claims are preempted or otherwise are not within the court’s jurisdiction because an administrative body has the duty of regulating the conduct in dispute. The doctrine of primary jurisdiction applies to “claims properly cognizable in court that contain some issue within the special competence of an administrative agency. It requires the court to enable a ‘referral’ to the agency staying further proceedings so as to give the parties reasonable opportunity to seek an administrative ruling.”

Defendants invoke the “primary jurisdiction” defense most frequently in

179. See United States v. Butler, 41 F.3d 1435, 1446 (11th Cir. 1995) (noting continued participation in the conspiracy is presumed unless defendant takes such affirmative steps). For a more detailed discussion about criminal conspiracies, see the Fed. Crim. Conspiracy article in this issue.

180. See Butler, 41 F.3d at 1446; see also United States v. Starrett, 55 F.3d 1525, 1550 (11th Cir. 1995) (upholding rejection of defendant’s withdrawal defense because he had not communicated his withdrawal to his co-conspirators or disclosed the scheme to law enforcement officials).

181. See United States v. Antar, 53 F.3d 568 (3d Cir. 1995) (holding that co-defendant brother’s abandonment of the company was not sufficient when he still held stock in the enterprise and still may profit therefrom), overruled in part by Smith v. Berger, 247 F.3d 532, 534 (3rd Cir. 2001) (finding Antar court’s limited reading of conspiracy liability under § 1962(c) is inconsistent with the broad application of general conspiracy law set forth by Supreme Court).

182. Id. at 582.

183. See, e.g., United States v. Grimmett, 236 F.3d 452, 454 (8th Cir. 2001); United States v. Berger, 224 F.3d 107, 119 (2d Cir. 2000).


186. See, e.g., Trollinger v. Tyson Foods, Inc., 370 F.3d 602, 608-12 (6th Cir. 2004) (rejecting defendant’s claim that National Labor Relations Board (“NLRB”), not federal district court, had primary jurisdiction to hear RICO claim); Moon v. Harrison Piping Supply, 375 F. Supp. 2d 577, 585-88 (E.D.Mich. 2005) (stating, in response to defendants’ motion to dismiss, “a consideration of the relevant factors counsels in favor of applying the primary-jurisdiction doctrine to stay the adjudication of Plaintiff’s RICO claims” and therefore recommending that the dispute be deferred to the Workers’ Disability Compensation Bureau (“the WDCB”) to determine plaintiff’s entitlement to workers’ compensation benefits).
labor law cases, claiming that the alleged racketeering activity is conduct that is an "unfair labor practice," the regulation of which is left to the National Labor Relations Board ("NLRB") under the National Labor Relations Act ("NLRA").

RICO charges are not preempted by federal labor law when the underlying offenses fall within the labor related activities expressly included in the RICO statute at §1961(1)(c). In addition, courts view the primary jurisdiction defense with skepticism in cases where labor disputes are only collaterally related to the RICO charge. "If the existence of the predicate acts depends wholly upon a determination that a violation of federal labor law occurred, jurisdiction is preempted." However, if the predicate acts are illegal independent of labor law, they are not preempted.

In a different scenario, the Second Circuit has held that a district court could, under a consent decree arising from RICO litigation, issue orders normally within NLRB's exclusive province. Horizontal preemption of the district court's jurisdiction was inappropriate in this situation because of the need of the district court to assert comprehensive control over complex litigation and the need for


188. The specific practices prohibited as "unfair labor practices" are described primarily in 29 U.S.C. §158(a) (2000) (unfair labor practices of employers) and §158(b) (unfair labor practices of labor organizations). Several practices are deemed "unfair." See 29 U.S.C. §158(a)(1) (prohibiting any conduct that interferes with, restrains, or coerces any employee in the exercise of the employee's right to self-organization, to form, join, or assist labor organizations, and to engage in concerted activity, or to refrain from any such activity); 29 U.S.C. §§158(a)(3), (b)(2) (prohibiting discrimination against any employee on basis of membership or non-membership in any labor organization); 29 U.S.C. §158(b)(4) (prohibiting "secondary boycotts"); 29 U.S.C. §158(b)(7) (prohibiting recognition or pre-hiring picketing).


190. Section 1961(1)(C) provides that "racketeering activity" means... any act which is indictable under title 29, United States Code, §186 (dealing with restrictions on payments and loans to labor organizations) or §501(c) (relating to embezzlement from union funds). " 18 U.S.C. §1961(1)(C).

191. United States v. Palumbo Bros., 145 F.3d 850, 862-63 (7th Cir. 1998) (holding RICO charges not preempted by NLRA when predicate acts consisted of wire and mail fraud, including the mailing of false employee time sheets, the effect of which was to deprive employees of money owed under the Collective Bargaining Agreement).


193. See Palumbo Bros., 145 F.3d at 868-70 (stating if behavior falls independently under another statute, then preemption may not apply); O'Rourke v. Crosley, 847 F. Supp. 1208, 1212 n.2 (D.N.J. 1994) ("RICO should be read as limited by the exclusive jurisdiction of the NLRA only when the Court would be forced to determine whether some portion of the defendant's conduct violated labor law before a RICO predicate act would be established." (quoting MHC, Inc. v. International Union, United Mine Workers of America 685 F. Supp. 1370, 1376 (E.D. Ky. 1988))).

194. United States v. Int'l Bd. of Teamsters, 948 F.2d 98, 106 (2d Cir. 1991) (allowing district court to order employer to allow non-employee union members access to property to campaign in union elections), vacated as moot sub nom, Yellow Freight Sys., Inc. v. United States, 506 U.S. 802 (1992).
RICO defendants in non-labor law cases have also attempted to invoke the primary jurisdiction preemption defense, but with less success. While this defense has proved successful in actions against public utilities where the “filed rate” doctrine bars courts from setting rates different from those filed with the agency, it has received much less favor in other non-labor contexts. A federal court may not defer to an administrative agency if the claim at issue is of a type such as fraud or deceit that is “within the conventional competence of the courts’ and [where] the judgment of . . . the agency with concurrent jurisdiction [is] not likely to be helpful.” Also, a federal court usually will not invoke the primary jurisdiction doctrine to defer to a state administrative agency.

E. “Reverse Vertical Preemption”

The Supreme Court has established abstention doctrines requiring that a federal court with proper jurisdiction over the subject matter of a dispute nevertheless “stay its hand” in order to promote an overriding policy, such as the maintenance of a particular relationship between the national government and the states. Courts hearing RICO cases in particular have employed “Pullman abstention” and “Burford abstention.” “Pullman abstention” counsels a federal court to refrain from deciding a case if there is a potentially dispositive question of serious, unsettled state law in the case on which a decision may render a decision on the merits of the federal dispute unnecessary. “Burford abstention” counsels a
federal court to refrain from deciding a case if the subject matter of the dispute is the subject of extensive state administrative regulation and a federal decision would risk serious disruption of a state administrative scheme.\(^\text{204}\)

In \textit{DeMauro v. DeMauro},\(^\text{205}\) the First Circuit confronted a RICO action that was intermingled with a divorce proceeding.\(^\text{206}\) The court implemented a limited form of abstention because staying the federal proceedings would reduce the "risk of interfering with interim state allocations and permit the federal court to tailor any final federal judgment to avoid undermining the divorce court's allocation of property."\(^\text{207}\) By contrast, the Second Circuit has held that abstention under \textit{Burford} was inappropriate in a RICO case where the predicate acts were solely federal law violations and where a treble damage award would not interfere with state administrative processes.\(^\text{208}\)

\section*{F. Constitutional Challenges}

RICO has faced several constitutional challenges, including those based on double jeopardy, the First Amendment, the Eighth Amendment, equal protection, due process, vagueness, and the Tenth Amendment.

Courts traditionally hold that RICO does not violate the Fifth Amendment's protections against double jeopardy,\(^\text{209}\) either for prosecutions of separate actions\(^\text{210}\) or when consecutive sentences are imposed for separate RICO and

\begin{itemize}
\item \textit{See Burford}, 319 U.S. at 327. In New Orleans Public Serv., Inc. v. Council of City of New Orleans, 491 U.S. 350, 361 (1989) (quoting \textit{Colorado River}, 424 U.S. at 814), the Court limited the \textit{Burford} doctrine by explaining that where adequate state court review is available, a federal court sitting in equity should abstain from interfering with proceedings of state administrative agencies if (i) there are "difficult questions of state law bearing on policy problems of substantial public import whose importance transcends the result in the case then at bar"; or (ii) "exercise of federal review of the question in a case and in similar cases would be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern."
\item \textit{Id.} at 95-96.
\item \textit{Id.} at 99 (ordering a stay of the proceedings because the RICO action was directed against concealment or transfer of the property subject to the adjudication of the divorce proceedings). \textit{But see} Tucker v. First Md. Savings & Loan, Inc., 942 F.2d 1401, 1405 (9th Cir. 1991) (holding where a \textit{Burford} abstention is appropriate, dismissal, rather than a stay, is the appropriate action). In Johnson v. Collins Entm't Co., 199 F.3d 710, 719-20 (4th Cir. 1999), the Fourth Circuit considered a District Court injunction against the controversial and highly regulated South Carolina video poker industry on behalf of recovering gamblers bringing federal RICO and state law claims. The Fourth Circuit applied the \textit{Burford} abstention, holding that the injunction "supplanted the legislative, administrative, and judicial processes of South Carolina." \textit{Id.}
\item \textit{See County of Suffolk v. Long Island Lighting Co.}, 907 F.2d 1295, 1308-09 (2d Cir. 1990) (holding \textit{Burford} abstention not warranted in suit by county and rate taxpayers alleging utility fraud in rate proceedings before State Public Service Commission, where action was tried solely on federal claims); \textit{see also} Humana, Inc. v. Forsyth, 525 U.S. 299, 313 (1999) (holding private suit under federal RICO against medical insurer does not frustrate state policies and therefore is not blocked by the McCarran-Ferguson Act, 15 U.S.C. §§1011-1013 (1945), which provides for, and prohibits federal interference with, state regulation of insurance).
\item U.S. Const. amend. V. The Fifth Amendment provides in relevant part that "[n]o person shall ... be subject for the same offence to be twice put in jeopardy of life or limb." \textit{Id.}
\item \textit{See United States v. Diaz}, 176 F.3d 52, 116 (2d Cir. 1999) (holding double jeopardy challenge fails when the predicate acts upon which defendant's substantive RICO conviction rests are also conspiracies); United States
predicate offense convictions. Challenges to the imposition of consecutive sentences under the Double Jeopardy Clause have been unsuccessful because RICO actions contain elements beyond the scope of the predicate acts, and convictions based on the predicate offenses conversely require proof of elements not contained in RICO, rendering convictions for distinct crimes.

First Amendment challenges to the application of RICO have also been largely unsuccessful. Alleged RICO violators may not claim that RICO violates their First Amendment right of association because constitutional safeguards do not extend to an "association" that is part of a plan to commit a crime. Challenges based on the First Amendment right of free expression have been rejected when it was determined that there was no unconstitutional "chilling" effect for forfeiture of assets as punishment for past actions. RICO forfeiture provisions have also survived challenges that they are unconstitutionally overbroad with respect to the First Amendment.

The Eighth Amendment's Cruel and Unusual Punishment and Excessive Fines Clause has a limited application regarding fines, forfeitures, or imprisonment for RICO violations. The forfeiture provisions of RICO are analyzed under the

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211. See United States v. White, 116 F.3d 903, 931-32 (D.C. Cir. 1997) (upholding defendant's drug conspiracy sentence and RICO violation sentence, even though conspiracy was lesser included offense of RICO charge, because Congress so intended); Baker, 63 F.3d at 1494 (upholding convictions for conspiracy under both RICO and CCTA). See also Donald Eric Burton, Note, A Closer Look at the Supreme Court and the Double Jeopardy Clause, 49 OHIO ST. L.J. 799, 811 (1988) (arguing that central inquiry for double jeopardy claim is whether Congress clearly intended separate offenses, not whether it intended authorization of consecutive sentences).

212. See United States v. Morgano, 39 F.3d 1358, 1368 (7th Cir. 1994) (holding there is no double jeopardy violation for consecutive punishment on both RICO offense and predicate crimes). See generally Anne Bowen Poulin, Double Jeopardy Protection Against Successive Prosecutions in Complex Criminal Cases: A Model, 25 CONN. L. REV. 95, 132-40 (1992) (advocating a "totality of the circumstances" review of predicate acts in RICO convictions in order to provide appropriate double jeopardy protection).

213. See United States v. Beasley, 72 F.3d 1518, 1527 (11th Cir. 1996) (holding that naming religious organization as racketeering enterprise does not violate First Amendment).

214. See Alexander v. United States, 509 U.S. 544, 553-56 (1993) (arguing that the First Amendment provides much greater protection from prior restraints than subsequent punishments for past speech, a policy dating back to English common law). Alexander involved the application of RICO forfeiture provisions to the assets of an owner of an adult entertainment business who violated federal obscenity laws. Id.

215. See Arcara v. Cloud Books, Inc., 478 U.S. 697, 706-07 (1986) (holding criminal and civil sanctions are not subject to "least restrictive means" scrutiny simply because a particular remedy will have some effect on First Amendment activities of those subject to sanction).

216. U.S. Const. amend. VIII. The Eighth Amendment provides: "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." Id.
Excessive Fines Clause.\(^{217}\) The Eighth Amendment may limit RICO forfeitures when the amount of forfeiture is grossly disproportionate to the underlying offense.\(^{218}\) Courts have also held that sentences under RICO do not violate the Eighth Amendment's prohibition against cruel and unusual punishment.\(^{219}\)

Prosecutorial discretion to determine the type of RICO offenses and predicate acts to charge a defendant with does not violate principles of equal protection unless a prosecutor discriminates based on race, religion, or other arbitrary categories.\(^{220}\) It is not discriminatory to apply RICO to defendants who are not engaged in organized crime if the defendants have "strive[d] to emulate the achievements of their brothers in organized crime."\(^{221}\) Another equal protection claim that has been rejected involved a requirement of two predicate acts for conviction under one theory of liability, but only one predicate act for conviction under "loan sharking."\(^{222}\)

Courts have also considered the constitutionality of RICO under the Due Process Clause,\(^{223}\) most commonly confronting two types of challenges. First, courts have examined a defendant's Due Process rights when the trial court orders

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217. See Alexander, 509 U.S. at 558 (holding that criminal forfeiture authorized by the RICO forfeiture statute "is clearly a form of monetary punishment no different, for Eighth Amendment purposes, from a traditional 'fine'").

218. See id. at 559 (instructing district court to consider extent of criminal activities and length of time in which petition was engaged to determine whether or not forfeiture was "excessive"); United States v. Bieri, 21 F.3d 819, 824 (8th Cir. 1994) ("[C]ourts must consider the proportionality of the forfeiture, which requires a fact-specific evaluation of all the circumstances of the illegal activity."); United States v. Sarbello, 985 F.2d 716, 724 (3d Cir. 1993) (holding court may reduce statute's 100% forfeiture penalty to conform with Eighth Amendment when forfeiture is grossly disproportionate to criminal activity in case where defendant's interest in RICO enterprise had been tainted to extent of 10%); United States v. Busher, 817 F.2d 1409, 1415 (9th Cir. 1987) ("In the context of RICO, the court may consider the degree to which the enterprise operated by the defendant is infected by criminal conduct."); see also William W. Taylor, The Problem of Proportionality in RICO Forfeitures, 65 NOTRE DAME L. REV. 885, 892 (1990) (arguing correct limitation upon forfeiture penalties, and only workable one, is whether property was obtained by or directly used in criminal conduct).

219. See United States v. Beale, 921 F.2d 1412, 1437 (11th Cir. 1991) (holding a sentence for a RICO offense and conspiracy, running consecutively to the sentence for a predicate act, does not constitute an Eighth Amendment violation).

220. See United States v. Aleman, 609 F.2d 298, 306 (7th Cir. 1979) (holding in a RICO action, prosecutorial discretion does not constitute a violation of the Equal Protection Clause unless abused for reasons of race, religion, or other improper classifications), rev'd on other grounds, Jake v. Herschberger, 173 F.3d 1059 (7th Cir. 1999); see also United States v. Schoolcraft, 879 F.2d 64, 68 (3d Cir. 1989) (holding prosecutorial decisions are discretionary and violate the right to equal protection only when made with a discriminatory and improper motive). See generally 2 WAYNE R. LAFAVE & JEROLD H. ISRAEL, CRIMINAL PROCEDURE §13.4 (1984) (discussing equal protection challenges to decision to prosecute criminal activity).

221. Aleman, 609 F.2d at 306.

222. See United States v. Oreto, 37 F.3d 739, 751-52 (1st Cir. 1994) (explaining that the disparity was rationally related to the reasonable governmental objective of making guilt easier to prove for unlawful debt cases than cases involving other racketeering activities).

223. U.S. CONST. amend. V. The Fifth Amendment in relevant part provides: "No person shall be . . . deprived of life, liberty, or property without due process of law." Id.; U.S. CONST. amend. XIV. The Fourteenth Amendment in relevant part provides: "No State shall . . . deprive any person of life, liberty, or property without the due process of law." Id.
a pre-trial restraint of assets but does not exempt assets that are needed to retain defense counsel; some cases have required an adversarial proceeding to establish that there was probable cause to seize the assets. 224 Second, courts have considered allegations that RICO is unconstitutionally vague. 225 Although RICO is subject to conflicting interpretations, the statute has firmly withstood both facial and as applied challenges of constitutional vagueness with respect to the "pattern" and "enterprise" requirements. 226 Courts have also rejected vagueness challenges based on the underlying predicate offenses. 227 Cases involving organized crime are least likely to succeed in a vagueness challenge. 228

Arguments that RICO unconstitutionally intrudes upon state sovereignty in violation of the Tenth Amendment have been summarily rejected. 229 Because the

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224. See United States v. Michelle's Lounge, 39 F.3d 684, 700 (7th Cir. 1994) ("[D]ue process requires the government to participate in a post-seizure adversary hearing on probable cause when . . . the government has seized through civil forfeiture all of the assets a criminal defendant needs to obtain counsel."); infra note IV.B.3 (discussing seizure of assets needed by defendant for attorney fees). See generally Bruce A. Baird & Carolyn P. Vinson, RICO Pretrial Restraints and Due Process: The Lessons of Princeton/Newport, 65 NOTRE DAME L. REV. 1009, 1011 (1990) (proposing that, for due process concerns, a hearing on reasonableness of restraint is required for narrow group of cases).

225. See Oreto, 37 F.3d at 752 (rejecting due process claim to "continuity plus relationship" test and holding appellants failed to show meaning and scope of RICO's pattern element was unclear and vague as applied to their conduct).

226. In H.J. Inc. v. Northwestern Bell Telephone Co., 492 U.S. 229, 255 (1989), Justice Scalia in his concurring opinion stated "Today's opinion . . . increases rather than removes the vagueness" of Supreme Court guidance with respect to RICO. However, most circuits have not followed Justice Scalia's analysis by rejecting vagueness challenges to RICO. See United States v. Keltner, 147 F.3d 662, 667 (8th Cir. 1998), (adopting other circuits' interpretation in dismissing defendant's void for vagueness challenge); Bingham v. Zolt, 66 F.3d 553, 566 (2d Cir. 1995) (rejecting explicitly Justice Scalia's argument and holding that the pattern and enterprise requirements are not unconstitutionally vague); Columbia Natural Res., Inc. v. Tatum, 58 F.3d 1101, 1108 (6th Cir. 1995) (striking defendant's "as applied" challenge to the pattern of racketeering activity element and holding that "[t]he statute need not define with mathematical precision the conduct forbidden"); United States v. Oreto, 37 F.3d 739, 752 (1st Cir. 1994) (rejecting due process claim to "continuity plus relationship" test and holding appellants failed to show that the meaning and scope of RICO's pattern element was unclear and vague as applied to their conduct); United States v. Freeman, 6 F.3d 586, 597 (9th Cir. 1993) (holding the term "enterprise" is not unconstitutionally vague because the RICO statute adequately warns putative defendants that their associations may constitute enterprises under RICO); see also David W. Gartenstein & Joseph F. Warganz, Note, RICO's "Pattern" Requirement: Void For Vagueness?, 90 COLUM. L. REV. 489, 527 (1990) (arguing RICO's pattern requirement is not unconstitutionally vague).

227. See Fort Wayne Books, Inc. v. Indiana, 489 U.S. 46, 58 (1989) (holding because the [Indiana] RICO statute totally encompasses the obscenity law, if the obscenity law is not unconstitutionally vague, then RICO cannot be vague either); United States v. Korando, 29 F.3d 1114, 1119 (7th Cir. 1994) ("RICO is a remedial statute only. It does not make criminal activity that is otherwise legal; it only increases the sanction for engaging in activity that is already forbidden.").

228. See United States v. Angiulo, 897 F.2d 1169, 1178-80 (1st Cir. 1990) (suggesting that "organized criminals" could not succeed in vagueness challenges); see also United States v. Masters, 924 F.2d 1362, 1367 (7th Cir. 1991) ("Provided the statutes criminalizing the predicate acts are not unconstitutionally vague . . . the defendants are on adequate notice that they are committing crimes.").

229. See United States v. Thompson, 685 F.2d 993, 1001 (6th Cir. 1982) (finding that naming "Office of the Governor" a RICO enterprise did not violate Tenth Amendment); United States v. Martino, 648 F.2d 367, 381 (5th Cir. 1981) ("We . . . reject the proposition that RICO violates the . . . Tenth [Amendment].").
Commerce Clause\textsuperscript{230} is the source of Congress’s authority to enact RICO, it is well established that Congress may validly regulate racketeering activity affecting interstate commerce.\textsuperscript{231} The prosecution must prove the element of “enterprise”\textsuperscript{232} in all RICO cases,\textsuperscript{233} and the defendant’s association with an enterprise affecting interstate commerce provides the RICO jurisdiction.\textsuperscript{234} The government is not required to prove that the predicate acts themselves affected interstate commerce, as long as the racketeering activity itself affects interstate commerce.\textsuperscript{235}

IV. CRIMINAL PENALTIES

A. Overview

RICO violators can be fined and/or imprisoned for up to twenty years and are also subject to mandatory asset forfeiture.\textsuperscript{236} These sanctions allow the government to attack the economic roots of racketeering activities. The forfeiture provisions empower the government to seek pre-indictment restraining orders\textsuperscript{237} and forfeitures of property transferred to third parties.\textsuperscript{238} In addition to felony criminal liability under §1963, the RICO statute allows the government to bring a civil action to obtain equitable relief and recover damages against the racketeer under §1964.\textsuperscript{239} A private party who is injured in her business or property because of a RICO violation can also bring a civil action to recover damages.\textsuperscript{240}

\textsuperscript{230} U.S. CONST. art. I, §8, cl. 3. The Constitution provides in relevant part, “The Congress shall have power . . . [t]o regulate commerce . . . among the several states.” \textit{Id.}
\textsuperscript{231} \textit{See United States v. Vignola, 464 F. Supp. 1091, 1098 (E.D. Pa. 1979)} (holding power of Congress to regulate interstate commerce includes the power to regulate intrastate activities which have an effect on interstate commerce (citing Perez v. United States, 402 U.S. 146, 154 (1971))), \textit{aff’d, 605 F.2d 1199} (3d Cir. 1979); see also \textit{United States v. Rodia 194 F.3d 465, 474} (3d Cir. 1999) (holding that Congress had the power to regulate the possession of child pornography even though it had not traveled in interstate commerce); \textit{United States v. Genao 79 F.3d 1333, 1335} (2d Cir. 1996) (holding that Congress’s regulation of intrastate drug activity was a valid exercise of the Commerce Clause).
\textsuperscript{232} \textit{See supra} section II.C. (discussing “enterprise” element of offense).
\textsuperscript{234} \textit{See United States v. Muskovsky, 863 F.2d 1319, 1325} (7th Cir. 1998) (“The required nexus between the activities of the enterprise and interstate commerce need not be great; even a minimal effect on interstate commerce satisfies this jurisdictional element.”).
\textsuperscript{235} \textit{See Mapp v. United States, 170 F.3d 328, 336} (2d Cir. 1999) (requiring the predicate act “bear a strong relationship to racketeering activity that affects interstate commerce”); see also \textit{United States v. Boffa, 513 F. Supp. 444, 471} (D. Del. 1980) (holding the activity of the enterprise, and not each predicate act of racketeering, must have an effect on interstate commerce).
\textsuperscript{236} 18 U.S.C. §1963(a) (2000). This section also provides for life imprisonment if the RICO violation is based on a racketeering charge that carries a life sentence. \textit{Id.}
\textsuperscript{238} 18 U.S.C. §1963(c). This provision makes an exception for bona fide purchasers who at the time of the purchase reasonably had cause to believe that the property was not subject to forfeiture. \textit{Id.}
\textsuperscript{239} 18 U.S.C. §1964(a).
\textsuperscript{240} 18 U.S.C. §1964(c).
B. Forfeiture

1. "Seize and Freeze" Orders

Section 1963(a) describes a broad array of interests that are subject to forfeiture.\(^\text{241}\) If the jury determines that a defendant violated RICO, the district court must order forfeiture of the defendant’s property or interest in an enterprise that had been acquired or maintained in violation of the Act.\(^\text{242}\) Section 1963(b) defines forfeitable property as real property and tangible and intangible personal property.\(^\text{243}\) "All right, title, and interest" in forfeitable property vests in the government at the time of the §1962 violation.\(^\text{244}\) Many circuits do not limit forfeiture to proceeds that the defendant personally obtained, and instead hold defendants jointly and severally liable for all proceeds obtained by co-conspirators.\(^\text{245}\)

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241. The plain language of the statute makes clear the breadth of §1963(a):

[w]hoever violates any provision of section 1962 . . . shall forfeit to the United States . . . (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 (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.

18 U.S.C. §1963(a) (2000). Most circuits interpret proceeds obtained from racketeering activity or unlawful debt collection, which are forfeited under §1963(a)(3), to include all revenue tainted by the RICO violation, and do not require the government to prove net profits. See United States v. Simmons, 154 F.3d 765, 770-71 (8th Cir. 1998) (upholding district court’s refusal to deduct costs of racketeering activity from gross receipts because “proceeds” are defined as gross receipts, not net profits); United States v. McHan, 101 F.3d 1027, 1042 (4th Cir. 1996) (holding proceeds are constituted by all receipts, rather than net profits); United States v. Hurley, 63 F.3d 1, 21 (1st Cir. 1995) (emphasizing Congress used the term “proceeds” to alleviate unreasonable burden on government to prove profits). But see United States v. Masters, 924 F.2d 1362, 1370 (7th Cir. 1991) (holding “proceeds” refers to net profits, not gross receipts).

242. United States v. Corrado, 227 F.3d 543, 552 (6th Cir. 2000) (establishing forfeiture is mandatory according to the language of 18 U.S.C. §1963(a) and is not left to jury’s discretion once statutory elements are established).


244. 18 U.S.C. §1963(c). Section 1963(c) codifies the “relation-back” doctrine, which posits that title to forfeitable property vests in the government immediately upon commission of the proscribed acts, even though the defendant maintains physical possession of the property until a forfeiture order is issued. See United States v. BCCI Holdings, 46 F.3d 1185, 1191 (D.C. Cir. 1995) (indicating Congress designed §1963(c) as statutory scheme that reaches back to time of criminal acts to forfeit property to the United States); Counihan v. Allstate Ins. Co., 25 F.3d 109, 112 (2d Cir. 1994) (stating title vests in United States upon commission of violation, but property may not be transferred until final judgment of forfeiture); United States v. Ginsburg, 773 F.2d 798, 801 (7th Cir. 1985) (explaining government’s interest vests at time of RICO violation, and thus government can require forfeiture of entire amount acquired in violation of RICO, not just the amount remaining at time of conviction).

245. See Corrado, 227 F.3d at 553 (holding co-conspirators of RICO enterprise jointly and severally liable for entire amount collected in “street tax” extortions, profits from sale of enterprise’s interests in hotel, and for amount extorted by one defendant in exchange for assistance in maintaining labor peace); Simmons, 154 F.3d at 769-70 (holding defendant liable for actions of codefendant that were “reasonably foreseeable” to him and stating, “[t]he government is not required to prove the specific portion of proceeds for which each defendant is responsible”); Hurley, 63 F.3d at 22 (“[A] member of a conspiracy is responsible for the foreseeable acts of other
Section 1963(d) authorizes courts to issue temporary restraining orders or injunctions to preserve the forfeitable property until adjudication concludes. A district court’s interlocutory denial of a motion to dissolve a pretrial conspiracy restraining order may be immediately appealed. Under §1963(d), prior to the filing of an indictment or information, the court may enter an order if: (i) the government gives notice to persons with an interest in the property, (ii) there is a substantial probability that the property will be deemed forfeitable and that it would become unavailable without the court’s order, and (iii) the need to preserve the property outweighs any hardship the order may cause. A ten-day ex parte order may be granted if the government has probable cause to believe that notice would jeopardize the availability of forfeitable property. A requested hearing concerning the ex parte order must be held at the earliest possible time and prior to the expiration of the temporary order. If the defendant is convicted and the court enters a judgment of forfeiture, the Attorney General may seize all forfeitable property. Section 1963(m) provides that when otherwise forfeitable property cannot be seized, the defendant may be required to forfeit substitute assets up to the value of that property. The circuit courts disagree on whether and when courts may place pre-conviction restraints on these substitute assets, and the Supreme Court has not resolved this question. The Fourth Circuit has held that Congress intended to allow pretrial restraints on substitute assets. However, according to the Third Circuit, the statutory language of RICO prohibits pretrial restraints on substitute assets. The Fifth, Eighth, and Ninth Circuits have not permitted pretrial restraints on substitute assets in cases involving criminal forfeiture provisions of other statutes.

members of the conspiracy taken in furtherance of the conspiracy."); Masters, 924 F.2d at 1369 (upholding jury order finding each defendant jointly and severally liable for entire amount obtained from racketeering activities); United States v. Caporale, 806 F.2d 1487, 1506-09 (11th Cir. 1986) (finding imposition of joint and several liability ensures effectiveness of RICO forfeiture provision).

246. 18 U.S.C. §1963(d)(1)(B) (2000) (indicating temporary restraining orders are effective for no more than 90 days, but court may grant extension for good cause or if indictment has been filed).


248. HBE Leasing Corp. v. Frank, 48 F.3d 623, 632 (2d Cir. 1995) (ruling immediate appeal may be taken from interlocutory order granting injunction under 28 U.S.C. §1292(a)(1)); In re Assets of Martin, 1 F.3d 1351, 1355 (3d Cir. 1993) (holding pretrial asset-restraint orders are subject to immediate appeal as “injunctions” under 28 U.S.C. §1292(a)(1)); United States v. Jenkins, 974 F.2d 32, 34 (5th Cir. 1992) (holding denial of a motion to dissolve an order preserving forfeitable property is immediately appealable).


254. In re Billman, 915 F.2d 916, 921 (4th Cir. 1990) (arguing Congress intended forfeiture provisions to be liberally construed and §1963(d) must be read in conjunction with §1963(m)).

255. In re Assets of Martin, 1 F.3d 1351, 1359 (3d Cir. 1993) (holding substitute assets are not subject to pretrial restraint considering plain language of RICO statute).
that are similar to the RICO forfeiture provision.\textsuperscript{256} In \textit{United States v. Gotti},\textsuperscript{257} the Second Circuit found that the language of §1963(d), authorizing pretrial restraints, does not include substitute assets under §1963(m), but recognized a limited exception under circuit precedent for pretrial restraint of substitute assets when a restraint on directly forfeitable assets burdens unindicted third parties.\textsuperscript{258}

2. Rights of Innocent Third Parties

Property transferred to third persons by the defendant subsequent to the §1962 violation is subject to forfeiture\textsuperscript{259} and pretrial restraint.\textsuperscript{260} A third-party purchaser may seek relief from the court by establishing that she was a bona fide and innocent purchaser for value.\textsuperscript{261} An innocent third-party property holder who is not deemed to be a bona fide and innocent purchaser under the meaning of §1963(g) and thus is unable to seek relief from the court may petition the Attorney General for mitigation or remission of the forfeited property.\textsuperscript{262}

3. Attorneys' Fees

Whether assets that a defendant used or planned to use to pay for legal counsel are forfeitable has primarily been addressed in the context of criminal forfeiture provisions of other statutes, such as the Continuing Criminal Enterprise Statute ("CCE")\textsuperscript{263} and the Comprehensive Drug Abuse Prevention and Control Act of

\textsuperscript{256} See United States v. Riley, 78 F.3d 367, 371 (8th Cir. 1996) (holding substitute assets are not subject to pretrial restraints in context of substantially similar forfeiture provision of Comprehensive Drug Abuse Prevention and Control Act of 1970 ("CDAPCA"); United States v. Ripinsky, 20 F.3d 359, 363 (9th Cir. 1994) (deciding forfeiture provision of CDAPCA does not authorize government to restrain substitute assets prior to conviction); United States v. Floyd, 992 F.2d 498, 500 (5th Cir. 1993) (holding Comprehensive Forfeiture Act of 1984—identical to all material elements of RICO forfeiture provision—does not permit preconviction restraint of substitute assets).

\textsuperscript{257} 155 F.3d 144 (2d Cir. 1998).

\textsuperscript{258} Id. at 148-49 (establishing pretrial restraints on substitute assets are not authorized by statutory language of RICO and previous case permitting pretrial restraints on such assets was limited to particular facts involving undue burdens on third parties).


\textsuperscript{260} 18 U.S.C. §1963(d).

\textsuperscript{261} 18 U.S.C. §1963(c); see also United States v. BCCI Holdings, 46 F.3d 1185, 1191-92 (D.C. Cir. 1995) (holding depositors to bank, as general creditors, can never have interest in specific forfeited property and thus are not bona fide purchasers entitled to recover assets from court).

\textsuperscript{262} 18 U.S.C. §1963(g) authorizes the Attorney General to grant petitions for action necessary to protect interests of innocent parties. See \textit{BCCI Holdings}, 46 F.3d at 1192 (establishing general creditors must seek relief from Attorney General instead of the court adjudicating forfeiture).

1970 ("CDAPCA"), which are nearly identical to the RICO forfeiture provisions. Although the Supreme Court has not examined the issue with respect to RICO, it rejected Sixth Amendment and statutory challenges to the forfeiture of attorney’s fees as applied to the CCE. Absent a strong argument for drawing distinctions between the nearly identical statutes, the Court may follow its reasoning in the CCE cases in a future challenge to the RICO forfeiture of assets used to pay for legal counsel. However, some courts have found that the Due Process Clause requires some type of adversarial probable cause hearing before a pre-trial seizure of assets used to secure defendant’s counsel takes place.

C. Sentencing

The United States Supreme Court recently held the United States Sentencing Guidelines ("the Guidelines") to be advisory only, excising two statutory provisions: (1) 18 U.S.C. §3553(b)(1), which made the Guidelines mandatory; and (2) 18 U.S.C. §3742(e), an appeals provision that the Court determined was inextricably linked to §3553(b)(1). However, the Court explained that “[t]he district courts, while not bound to apply the Guidelines, must consult those Guidelines and take them into account when sentencing.” The controlling statutory provision in sentencing is 18 U.S.C. §3553(a), which states that the Guidelines are one among a number of factors—including the purposes of punishment and the nature and circumstances of the offense and the history and characteristics of the defendant—to be considered in imposing federal sentences. Accordingly, the Guidelines remain highly relevant despite their advisory nature.

264. 21 U.S.C. §801 (2000); 21 U.S.C. §853; see United States v. Bissell, 866 F.2d 1343, 1351-54 (11th Cir. 1989) (finding CDAPCA forfeiture amendment authorizing pretrial restraint of assets used to pay for attorneys did not violate Sixth Amendment right to counsel as long as defendants received competent representation from appointed counsel); United States v. Nichols, 841 F.2d 1485, 1493, 1502, 1506-08 (10th Cir. 1988) (holding attorney fees are not exempt from criminal forfeiture under CDAPCA and such forfeiture does not violate defendant’s Fifth Amendment right to a fair trial or Sixth Amendment right to counsel).

265. For a more detailed discussion of the issues surrounding the forfeiture of funds intended to be used to pay for counsel, see Margaret Cotter & Michael Gilbert, Attorney Fee Forfeiture, 29 AM. CRIM. L. REV. 639 (1992).

266. In Caplin & Drysdale, Chartered v. United States, 491 U.S. 617, 626-28 (1989), the Court held that forfeiture of assets does not violate the Sixth Amendment right to counsel, as a defendant has no right to spend money belonging to another, even if utilization of such funds constitutes the sole means by which to obtain counsel of choice. The Court relied on the principle that the defendant’s forfeited property vests in the government upon commission of the crime charged. Id.

267. See United States v. Michelle’s Lounge, 39 F.3d 684, 700-1 (7th Cir. 1994) ("[D]ue process requires the government to participate in a post-seizure adversary hearing on probable cause when . . . the government has seized through civil forfeiture all of the assets a criminal defendant needs to obtain counsel."); United States v. Monsanto, 924 F.2d 1186, 1203 (2d Cir. 1991) (holding the Fifth and Sixth Amendments, considered together, require a post-restraint, pretrial hearing to establish probable cause for such forfeiture); Nichols, 841 F.2d at 1505 (holding evidentiary hearing is required only when government seeks restraining order prior to indictment; otherwise grand jury indictment is sufficient to subject property to pretrial forfeiture).


269. Id. at 264.
Section 2E1.1 of the Guidelines applies to defendants convicted under the RICO statute. The base offense level set by section 2E1.1(a)(1) and (a)(2) is the greater of nineteen or the offense level applicable to the underlying racketeering activity. Conduct underlying prior sentences for RICO violations can be included in the calculation of the defendant's criminal history. To determine whether the base offense level is greater under subsection (a)(1) or (a)(2), the adjustments set forth in Chapter Three of the Guidelines are to be applied to both subsections. Courts can adjust the base offense level upwards for specified conduct by the defendant, even if the conduct was an element of the underlying offense and would not otherwise lead to an adjustment under section 2E1.1(a)(2) of the Guidelines.

If the underlying conduct is a state law offense, "the offense level corresponding to the most analogous federal offense is to be used." When the defendant is

271. U.S.S.G. MANUAL §§2E1.1(a)(1), (2) (2005); see United States v. Tocco, 200 F.3d 401, 430-31 (6th Cir. 2000) (instructing district court to select offense level attributable to underlying racketeering activity if it exceeds nineteen); United States v. Olson, 22 F.3d 783, 786 (8th Cir. 1994) (ruling district court misapplied §2E1.1(a) in calculating defendant's base offense level at seventeen because base offense level for a RICO offense is nineteen, unless offense level applicable to underlying racketeering activity is greater); United States v. Butler, 954 F.2d 114, 121-22 (2d Cir. 1992) (finding error in applying base offense level of less than nineteen for RICO conviction on grounds that offense level applicable to underlying racketeering activity was less than nineteen).
272. The application notes explain:

 certain conduct may be charged in the count of conviction as part of a "pattern of racketeering activity" even though the defendant has previously been sentenced for that conduct. Where such previously imposed sentence resulted from a conviction prior to the last overt act of the instant offense, treat as a prior sentence under §4A1.2(a)(1) and not as part of the instant offense. This treatment is designed to produce a result consistent with the distinction between the instant offense and criminal history found throughout the guidelines. If this treatment produces an anomalous result in a particular case, a guideline departure may be warranted.

U.S.S.G. MANUAL §2E1.1, cmt. 4 (2005); see also United States v. Marrone, 48 F.3d 735, 737 (3d Cir. 1995) (stating predicate offenses are valid bases for criminal history points in sentencing for RICO conviction when defendant is convicted of predicate offense before last overt RICO offense); United States v. Minicone, 960 F.2d 1099, 1111 (2d Cir. 1992) (finding district court reasonably construed Comment 4 to mean conduct underlying previously imposed sentence should be used in calculating criminal history, but not base level for instant offense); United States v. Crosby, 913 F.2d 313, 314-15 (6th Cir. 1990) (stating state court conviction could be included in calculating defendant's criminal history score, even though activities were part of enterprise).
273. U.S.S.G. MANUAL §2E1.1, cmt. 1 (2005). The Seventh and Eleventh Circuits held that a defendant's leadership role in the overall RICO conspiracy, rather than the leadership role in the underlying offenses, can be the basis for increasing the offense level. See United States v. Yeager, 210 F.3d 1315, 1317 (11th Cir. 2000) (approving four-level enhancement for defendant's role in over-all RICO conspiracy, rather than finding defendant played a leadership role in underlying drug conspiracy); United States v. Damico, 99 F.3d 1431, 1436-38 (7th Cir. 1996) (holding trial court's consideration of defendant's leadership role in overall conspiracy in sentencing was proper).
274. See United States v. Bustamante, 45 F.3d 933, 947 (5th Cir. 1995) (holding district court did not abuse its discretion by determining defendant's base offense level to be nineteen and then increasing by two for abuse of position of public trust, even though his congressional office had already been used to satisfy RICO enterprise element); United States v. Ford, 21 F.3d 759, 764-67 (7th Cir. 1994) (rejecting defendant's argument that enhancement for abuse of position of public trust should not apply when offense itself entails an abuse of public trust).
convicted of multiple counts, either under one statute or a variety of statutes, the Guidelines relating to multiple count convictions is applied to determine a single offense level.\footnote{276}{U.S.S.G. Manual ch. 3, pt. D (2005) (explaining how to calculate single offense level for multiple count convictions).}

The existence of relevant conduct is determined at sentencing by a preponderance of the evidence.\footnote{277}{United States v. Corrado, 227 F.3d 543, 558 (6th Cir. 2000) (instructing district court to determine whether defendants conspired to commit murder by preponderance of the evidence).} Relevant conduct is not limited to the acts that the defendant personally participated in or conduct charged against the particular defendant. Relevant conduct includes all conduct, including the acts and omissions of others in the enterprise that are reasonably foreseeable in connection with the jointly undertaken criminal activity and in furtherance of that activity.\footnote{278}{U.S.S.G. Manual §1B1.3(a)(1) (2005); see United States v. Tocco, 306 F.3d 279, 288 (6th Cir. 2002) (finding racketeering activity by co-conspirators involving a hotel was relevant conduct in determining base offense level); United States v. Wing, 135 F.3d 467, 470 (7th Cir. 1998) (holding that knowing about, but not directly overseeing, collection of illegal "street tax" is relevant conduct in furtherance of conspiracy); United States v. Miranda-Santiago, 96 F.3d 517, 524 (1st Cir. 1996) (holding defendants in drug conspiracy responsible not only for quantities they handled, but also for amounts defendants reasonably foresaw would be involved in conspiracy); United States v. Carrozza, 4 F.3d 70, 75 (1st Cir. 1993) (finding defendant liable for foreseeable criminal acts of others in furtherance of the enterprise, even though he did not personally participate in the acts).} To hold a defendant accountable for the acts of others, a court must make two findings: (i) that the acts were within the scope of the defendant’s agreement, and (ii) that they were foreseeable to the defendant.\footnote{279}{United States v. Campbell, 279 F.3d 392, 399-400 (6th Cir. 2002) (holding fact that defendant was aware of overall operation is not enough to make him accountable for activities of whole operation). Compare United States v. Studley, 47 F.3d 569, 574 (2d Cir. 1995) (remanding for a determination of whether defendant sales representative’s agreement to participate in a fraudulent telemarketing scheme was limited to his own activity or encompassed fraudulent activity of other representatives within company), with United States v. Duliga, 204 F.3d 97, 101 (3d Cir. 2000) (finding defendant was a key player in inception of telemarketing scheme).} A defendant’s knowledge of another participant’s criminal acts is not enough to hold the defendant responsible for those acts under the first prong.\footnote{280}{See Studley, 47 F.3d at 575 ("[T]he fact that defendant is aware of the scope of the overall operation is not enough to hold him accountable for the activities of the whole operation.").} To determine the scope of the criminal activity that the particular defendant agreed to jointly undertake, the court may consider any explicit agreement or implicit consent fairly inferred from the conduct of the defendant and others.\footnote{281}{See Tocco, 200 F.3d at 430-31 (remanding for findings as to what criminal activities by defendant were in furtherance of the conspiracy).}

V. CIVIL RICO

A. Civil Penalties

In addition to providing for felony criminal liability under §1963, RICO establishes broad authority for the imposition of equitable remedies under
§1964. The Attorney General may seek civil remedies under §1964(a), which include orders of divestiture, restrictions on future activities, and dissolution or reorganization of the enterprise. These penalties are intended to provide "new weapons of unprecedented scope for an assault upon organized crime and its economic roots." The Second Circuit recently held that ordering a defendant to contribute to the cost of eliminating the vestiges of his racketeering activities in the enterprise he corrupted is an equitable remedy to prevent RICO violations.

Congress's liberal-construction mandate is most strongly applied to §1964, and courts have interpreted the statute as "grant[ing] courts broad discretion and latitude in enjoining violators" of RICO from activities that might...
lead to future violations.\textsuperscript{290} However, in fashioning the penalties the court must make due provision for the rights of innocent parties.\textsuperscript{291} While the courts have recognized that certain injunctions may implicate a defendant’s First Amendment rights of association, the government’s significant interest in eradicating organized crime may override such concerns.\textsuperscript{292}

\textbf{B. Civil Cause of Action for Private Parties}

The far-reaching civil enforcement scheme of RICO also provides for a private cause of action to recover damages for injury incurred by a violation of the substantive provisions of the statute. Any person or class of persons\textsuperscript{293} injured in their business or property by reason of a violation of 18 U.S.C. §1962 can sue for treble damages, costs of filing the lawsuit, and reasonable attorney’s fees.\textsuperscript{294}

The Supreme Court has repeatedly reinforced Congress’s intent that civil RICO be construed broadly by instructing the lower courts to heed the expansive language of the statute. In \textit{Sedima},\textsuperscript{295} the Court held that the Second Circuit’s restrictions on standing were inconsistent with the statutory language of RICO and Congress’s intention for the statute to be construed broadly.\textsuperscript{296} In \textit{NOW I},\textsuperscript{297} the Supreme Court did away with another of the circuits’ significant restrictions on

\textsuperscript{290} United States v. Private Sanitation Indus. Ass’n, 995 F.2d 375, 377 (2d Cir. 1993) (upholding injunctive relief against company convicted of using force and threatening to use force against others engaged in collection of solid waste).

\textsuperscript{291} 18 U.S.C. §1964(a) (2000); see United States v. Local 30, 871 F.2d 401, 407 (3d Cir. 1989) (finding courts can restrain and prevent future violations so long as due provision is made for rights of innocent parties).

\textsuperscript{292} \textit{See Private Sanitation Indus. Ass’n}, 995 F.2d at 377-78 (permitting curtailment of associational rights in furtherance of significant governmental interests); \textit{Local 560}, 974 F.2d at 345 (concluding governmental interest in eliminating organized crime from unions justifies curtailment of associational rights).

\textsuperscript{293} \textit{See Klay v. Humana, Inc.}, 382 F.3d 1241, 1250 (11th Cir. 2004) (noting that, like any class, a class of persons asserting a RICO claim may be certified only after meeting the requirements for certification under Rule 23 of the Federal Rules of Civil Procedure).


\textsuperscript{295} 473 U.S. 479 (1985).

\textsuperscript{296} \textit{Id.} at 500. First, the Court struck down requirements that a plaintiff file a civil suit under §1964(c) only after a criminal RICO conviction and that plaintiff prove a “racketeering injury” distinct from harm caused by predicate acts. \textit{Id.} at 488-95. Second, the Court established that plaintiff has a claim under §1964(c) if defendant engaged in a pattern of racketeering activity in a manner forbidden by §1962 and such activity injured plaintiff in his business or property. \textit{Id.} at 495. Third, the Court clarified that “[t]he [c]ompensable injury necessarily is the harm caused by [the] predicate acts” of a RICO violation for a civil claim based on a violation of §1962(c). \textit{Id.} at 497. Finally, the Court recognized that Congress may not have anticipated the use of civil RICO against legitimate businesses, but noted that Congress intended to target both legitimate and illegitimate enterprises engaged in criminal conduct prohibited by substantive provisions of the statute. \textit{Id.} at 499.

private civil RICO claims\textsuperscript{298} by holding that RICO does not require that the racketeering enterprise be accompanied by an underlying economic motive.\textsuperscript{299}

Despite the expansive language of the statute and Congress's intent for RICO to be construed broadly, significant limitations remain on the availability of private civil RICO claims in areas such as standing, the person/enterprise distinction, and the statute of limitations.

\textit{1. Standing}

To have standing for a civil cause of action, a plaintiff must show: (i) a violation of §1962(a), (b), (c), or (d); (ii) injury to her business or property; and (iii) causation of the injury by the violation.\textsuperscript{300} To sue for a violation of §1962(a), a plaintiff must show that someone received income from a pattern of racketeering activity and used or invested such income in an enterprise.\textsuperscript{301} Most courts hold that a compensable injury must flow from the use or investment of the income and cannot just flow from the predicate acts.\textsuperscript{302} In contrast, the Fourth Circuit only

\textsuperscript{298} The Seventh Circuit had ruled that civil RICO was limited by requirement that either the enterprise or the racketeering activity be economically motivated. Nat'l Org. 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."), rev'd, 510 U.S. 249 (1994).

\textsuperscript{299} NOW I, 510 U.S. at 259 (granting standing to abortion clinics that brought civil RICO action against antiabortion groups alleged to have conspired to use force against clinic employees and patients). The Court explained that:

\begin{quote}
the 'enterprise' in [§1962(c)] connotes generally the vehicle through which the unlawful pattern of racketeering activity is committed, rather than the victim of that activity. Subsection (c) makes it unlawful for 'any person employed by or associated with any enterprise... to conduct or participate... in the conduct of such enterprise's affairs through a pattern of racketeering activity' . . . Consequently, since the enterprise in subsection (c) is not being acquired, it need not have a property interest that can be acquired nor an economic motive for engaging in illegal activity; it need only be an association-in-fact that engages in a pattern of racketeering activity.
\end{quote}

\textsuperscript{300} See 18 U.S.C. §1964(c) (2000).

\textsuperscript{301} See St. Paul Mercury Ins. Co. v. Williamson, 224 F.3d 425, 441-45 (5th Cir. 2000) (holding plaintiff could bring suit for injuries resulting from deposit of funds into RICO enterprise, but not for injuries resulting just from predicate acts); Simon v. Value Behavior Health, Inc., 208 F.3d 1073, 1082 (9th Cir. 2000) (dismissing claim alleging fraudulent denial of health benefits and subsequent investment of proceeds in groups of preferred medical providers because plaintiff failed to demonstrate that he was injured by investment of racketeering income); Fogie v. Thorn Americas, Inc., 190 F.3d 889, 895-96 (8th Cir. 1999) (holding reinvestment of income obtained from unlawful debt collection did not result in compensable injury because injury was not separate and distinct from injuries caused by predicate acts); Vemco v. Camardella, 23 F.3d 129, 132-33 (6th Cir. 1994) (requiring plaintiff to plead specific injury caused by investment of income into racketeering enterprise, distinct from any injuries caused by predicate acts of racketeering); Danielsen v. Burnside-Ott Aviation Training Ctr., 941 F.2d 1220, 1230 (D.C. Cir. 1991) (finding that employees' allegations by employees that contractors intentionally underpaid legally required minimum wages failed to allege injury arising from use or investment of racketeering income, and thus did not sufficiently plead RICO claim); Ouaknine v. MacFarlane, 897 F.2d 75, 82-83 (2d Cir. 1990) (dismissing claim for violation of §1962(a) because plaintiff did not allege any facts asserting injury by reason of defendants' investment of racketeering income).
requires a plaintiff to establish that he suffered an injury because of a predicate act, and not that the injury suffered was caused by an investment of income from a pattern of racketeering activity.\textsuperscript{303} For standing purposes, §1962(b) functions the same as, and is subject to the same analysis as, §1962(a).\textsuperscript{304}

To sue for a violation of §1962(c), a plaintiff must have suffered an injury to business or property caused by one of the predicate acts of racketeering.\textsuperscript{305} For example, a person wrongfully discharged for refusing to participate in a pattern of racketeering activity lacks standing to sue for a violation of §1962(c) because the harm suffered is caused by the termination, not the predicate acts of racketeering.\textsuperscript{306}

The Supreme Court recently resolved the split among the circuits as to standing where the underlying violation is an alleged RICO conspiracy prohibited by §1962(d)\textsuperscript{307} In \textit{Beck v. Prupis},\textsuperscript{308} the Court rejected the approach taken by the Third, Fifth, and Seventh Circuits, and held that an injury caused by an overt act

\textsuperscript{303} Potomac Elec. Power Co. v. Elec. Motor and Supply, Inc., 262 F.3d 260, 264 (4th Cir. 2001) (holding plaintiff need not show damages flowed from use or investment of racketeering income, but only that damages flowed from racketeering activity itself).

\textsuperscript{304} See 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 'acquisition' injury, analogous to the 'use or investment injury' required under §1962(a)." (quoting \textit{Danielsen}, 941 F.2d at 1231)), vacated on other grounds, 525 U.S. 128 (1998); Crowe v. Henry, 43 F.3d 198, 205 (5th Cir. 1995) (concluding both subsections 1962(a) and (b) require "a nexus between the claimed RICO violations and the injury suffered by the plaintiff").

\textsuperscript{305} See Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 497 (1985) ("Any recoverable damages occurring by reason of a violation of §1962(c) will flow from commission of the predicate acts."); see also Abrahams v. Young & Rubicam, Inc., 79 F.3d 234, 238 (2d Cir. 1996) (holding Jamaican tourist official who suffered damage to reputation from public links to defendant's bribery scandal lacked standing to sue for violation of §1962(c) because his injuries did not flow from harms that predicate acts intended to cause (citing Am. Express Co. v. Robinson, 39 F.3d 395, 399-400 (2d Cir. 1994))).

\textsuperscript{306} See Rehkop v. Berwick Healthcare Corp., 95 F.3d 285, 289 (3d Cir. 1996) (explaining employee who lost his job because of refusal to conceal conspiracy to defraud Medicare and Medicaid was not direct victim of racketeering activity and thus, could not sue for violation of §1962(c)); Bowman v. W. Auto Supply Co., 985 F.2d 383, 385 (8th Cir. 1993) (holding that employee terminated for refusing to participate in employer's alleged fraudulent activities lacked standing to sue for violation of §1962(c)); Reddy v. Litton Indus., Inc., 912 F.2d 291, 293-94 (9th Cir. 1990) (ruling employee terminated for refusing to participate in cover-up of illegal bribes to foreign officials lacked standing to sue for violation of §1962(c)).


Specifically, the circuits were divided as to whether the conspiratorial act which results in an injury and provides the basis for a civil claim must be specifically codified as a RICO predicate act, or whether any overt act in furtherance of a conspiracy to violate RICO is sufficient for standing. The First, Second, Eighth, Ninth, and Eleventh Circuits held that in order to establish standing for a civil conspiracy claim, the act causing the injury must be specifically codified as a RICO predicate act. See \textit{Hamm v. Rhone-Polenc Rohrer Pharm., Inc.}, 187 F.3d 941, 954 (8th Cir. 1999) (holding employees of pharmaceutical company, who alleged that company marketed products in unlawful manner by promoting off-label uses, did not sustain injury caused by violation of predicate act); Beck v. Prupis, 162 F.3d 1090, 1095-96 (11th Cir. 1998) (holding an overt act must be a predicate act), aff'd, 529 U.S. 494 (2000); \textit{Young & Rubicam, Inc.}, 79 F.3d at 239 (holding RICO affords standing only to plaintiffs injured by racketeering behavior against which RICO was designed to protect); \textit{Bowman}, 985 F.2d at 388 (limiting standing to bring RICO conspiracy suit "to those individuals who have been harmed by a §1961(1) RICO predicate act committed in furtherance of conspiracy to violate RICO"); Miranda v. Ponce Fed. Bank, 948 F.2d 41, 48 (1st Cir. 1991) ("[An] actionable claim under section 1962(d), like a claim under section 1962(c), requires
that is not an act of racketeering or otherwise unlawful under RICO is not sufficient to bring a civil RICO suit. Therefore, a plaintiff bringing a civil RICO claim for injuries sustained from a violation of §1962(d) must demonstrate that the injuries arose from a predicate act that is independently wrongful under RICO.

Moreover, a plaintiff must prove that the defendant’s violation of §1962 was the proximate cause of the plaintiff’s injury to have standing for a civil RICO action. In creating this proximate cause requirement, the Court reasoned that Congress modeled §1964(c) on the civil action provisions in the Clayton Act, which federal courts have long held to require a showing of proximate causation. In addition, civil RICO is not available to compensate the economic

that the complainant’s injury stem from a predicate act within the purview of 18 U.S.C. §1961(1). Therefore, a plaintiff bringing a civil RICO suit must prove proximate cause. See Khurana v. Innovative Health Care Sys., Inc., 130 F.3d 143, 153-54 (5th Cir. 1997) (holding physician who was terminated for refusing to participate in conspiracy to defraud Medicare and Medicaid lacked standing to pursue claims for termination injuries or loss of business opportunities, except for such injuries and losses that resulted from act in furtherance of conspiracy, vacated sub nom., Teel v. Khurana. 525 U.S. 979 (1998); Gagan v. Am. Cablevision, Inc., 77 F.3d 951, 959 (7th Cir. 1996) (ruling plaintiff must allege that defendant’s overt act in furtherance of the RICO conspiracy injured plaintiff’s business or property to sue for a violation of §1962(d)); Rehkop, 95 F.3d at 290-91 (holding employee who lost his job because of refusal to conceal conspiracy to defraud Medicare and Medicaid had standing to sue under §1962(d) because termination was in furtherance of the conspiracy).

See id. at 505-07 (finding plaintiff did not have standing to sue because his termination was an overt act in furtherance of the defendants’ conspiracy, not a violation of a predicate act prohibited by RICO). In response to the plaintiff’s argument that such an interpretation of §1962(d) would render it meaningless because it would necessarily require the plaintiff to also show a violation of §1962(a), (b), or (c), the Court said that a plaintiff could rely on §1962(d) to “sue co-conspirators who might not themselves have violated one of the substantive provisions of §1962.” Id. at 507.

See Jones v. Enterprise Rent A Car Co. of Texas, 187 F. Supp. 2d 670, 678 (S.D. Tex. 2002) (holding plaintiff did not have standing to bring RICO suit because plaintiff’s “stated injury, her loss of employment, may have been factually caused by Defendants’ fraudulent activities, but it was not proximately caused by any of these schemes”(emphasis supplied)); Alden v. Allied Adult & Child Clinic, LLC, 171 F. Supp. 2d 647, 653 (E.D. La. 2001) (holding plaintiff alleging injury caused by termination of employment had no cause of action under RICO because overt act of termination was not itself a RICO predicate act).

See Holmes v. Sec. Investor Prot. Corp., 503 U.S. 258, 268 (1992) (holding link between stock manipulation, which caused the injury, and losses to nonpurchasing customers was too contingent on the broker dealer’s inability to pay the claims, making it too remote to satisfy the proximate cause requirement). As plaintiffs continue to bring more creative civil RICO claims, proximate causation has proven to be a major obstacle of damage awards. In De Falco v. Bernas, 244 F.3d 286, 329 (2d Cir. 2001), the Second Circuit held that plaintiffs had successfully demonstrated that the Town of Delaware, NY was being operated as a RICO enterprise; however, the plaintiffs’ damages award was vacated because they failed to prove proximate causation.

Holmes, 503 U.S. at 268. Because the 91st Congress used the same language in drafting §1964(c) of RICO that had been used in the Clayton Act, the Court concluded that Congress intended the language to have the same meaning. Id. The comparable section of §1964(c) states, “Any person injured in his business or property by
consequences of personal injuries sustained as a result of a RICO predicate act.314

2. The Person/Enterprise Distinction

To establish liability under 1962(c), a plaintiff must prove the existence of two distinct entities: (i) a “person,” and (ii) an “enterprise” that is not simply the same “person” referred to by a different name.315 Recently, the Supreme Court elaborated on this distinction, holding that “[a]n employee, a natural person, is distinct from the corporation itself, a legally different entity with different rights and responsibilities due to its different legal status.”316

3. Statute of Limitations

Although no limitations period is explicitly stated in RICO for either civil or criminal actions,317 the Supreme Court held in Agency Holding Corp.318 that the statute of limitations for a civil RICO action is four years.319 The prevailing rule for determining when the limitations period for a civil RICO claim begins to run is the “injury discovery” rule.320 Under the “injury discovery” rule,321 the limitations

reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States District Court and shall recover threefold the damages he sustains and the cost of his suit, including a reasonable attorney’s fee.” 18 U.S.C. §1964(c).

The Court went on to describe three reasons why proximate cause is a central requirement in causation. 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.” Holmes, 503 U.S. at 269. Second, without proximate cause the courts would have to implement rules apportioning damages among plaintiffs, so as to “obviate the risk of multiple recoveries.” Id. Third, because directly injured plaintiffs will enforce the law as private attorneys general, there is little need to deal with indirect injury problems. Id. at 269-70.

314. See Pilkington v. United Airlines, 112 F.3d 1532, 1536 (11th Cir. 1997) (ruling pecuniary losses arising from personal injury are not cognizable under RICO).

315. See Cedric Kushner Promotions, Ltd. v. King, 533 U.S. 158, 163 (2001) (holding president and sole shareholder of corporation was a “person” distinct from the enterprise subject to liability under RICO).

316. Id. at 163. See supra section II.C.3 of this Article (discussing the person-enterprise rule).

317. See Litton Indus. v. Lehman Bros., 967 F.2d 742, 751-52 (2d Cir. 1992) (discussing statute of limitations as affirmative defense and finding no explicit period in statute).


319. Id. at 156 (adopting four-year statute of limitations based on Clayton Act); see Klehr v. A.O. Smith Corp., 521 U.S. 179, 183 (1997) (reaffirming the four year statute of limitations); see also 15 U.S.C. §15(b) (2000) (imposing a four-year limitation period for civil action under the Clayton Act). The Court used the limitation period of the Clayton Act because it found that civil RICO actions are analogous to private antitrust actions under the Clayton Act and because the language of the Clayton Act influenced the language of §1964 of RICO.

320. Historically, lower courts used three different rules to determine when the statute of limitations begins to run: (i) the injury discovery rule (also known as discovery accrual rule); (ii) the “injury and pattern discovery” rule; and (iii) the “last predicate act” rule.

The Court rejected the “last predicate act” rule in Klehr, 521 U.S. at 186-87. The Court found that the rule was unlawful for two reasons. First, the rule could create a longer limitations period than Congress contemplated, because a series of predicate acts can continue indefinitely. Second, the Court determined, “the rule is inconsistent with §4B of the Clayton Act, under which a cause of action accrues . . . when a defendant commits an act that injures a plaintiff’s business.” Id. at 180.

In Rotella v. Wood, the Court dismissed the “injury and pattern discovery” rule, concluding the rule would potentially result in an excessively long limitations period, which contradicted Congress’s intention to reject a
period may begin running before a plaintiff can satisfy the pattern requirement of RICO, so long as its two components are satisfied.

VI. RECENT DEVELOPMENTS IN THE RICO STATUTE

RICO has been used in a non-traditional sense as the basis of claims in a variety of circumstances. Typically, RICO cases have been brought under the Clayton Act and RICO. 528 U.S. 549, 555-58 (2000). The Court also noted that the considerable effort that may be required before a RICO plaintiff can tell whether a pattern of racketeering is demonstrable does not warrant a longer limitations period. Id.

Although the injury discovery rule has not been rejected by the Court, the Court has not explicitly embraced this as the final rule on determining when a civil RICO claim begins to accrue. Id. at 554 (stating the Court was not establishing final rule, despite its rejection of injury plus pattern discovery test). In Rotella, the Court noted its willingness to consider the “straight injury occurrence rule,” in the future but declined to establish it as the definitive test for determining when the limitations period begins running because the parties did not focus on this rule. Id. Under this rule, the discovery of the injury is irrelevant, and the limitations period begins accruing at the time that the plaintiff is injured. Id. Noting how the similarities in “the purpose, structure, and aims” of RICO and the Clayton Act warrant the adoption of the “Clayton Act injury rule” for civil RICO actions, Justice Scalia espoused the injury occurrence rule in his concurrence in Kiehr, 521 U.S. at 198-201.

321. The “injury discovery” rule provides that the statute of limitations runs when the plaintiff knew or should have known of the injury underlying her cause of action. In re Merrill Lynch Ltd. P’ships Litig., 154 F.3d 56, 58-59 (2d Cir. 1998) (holding statute of limitations runs from the time of discovery of injury): Rotella, 147 F.3d at 440 (same), aff’d, 528 U.S. 549 (2000); Detrick v. Panalpina, Inc., 108 F.3d 529, 537-40 (4th Cir. 1997) (same); Grimmett v. Brown, 75 F.3d 506, 511 (9th Cir. 1996) (same); McCool v. Strata Oil Co., 972 F.2d 1452, 1464-65 (7th Cir. 1992) (same); Rodriguez v. Banco Cent., 917 F.2d 664, 665-68 (1st Cir. 1990) (same).

322. See Paul B. O’Neill, Note, “Mother of Mercy. Is This the Beginning of RICO?”: The Proper Point of Accrual of a Private Civil RICO Action, 65 N.Y.U. L. REV. 172, 205-06 (1990) (arguing discovery rule does not serve broad remedial purpose of RICO because it reduces “the potential amount of a private plaintiff’s recovery before she has a chance to bring suit”). See generally Grimmett, 75 F.3d at 512 (discussing relationship between limitations period and civil pattern requirement in civil RICO action).

323. First, the civil RICO limitations period begins to run when a plaintiff knew or should have known of the injury that underlies his cause of action. See Detrick, 108 F.3d at 537 (stating RICO claim “begins to accrue and the statute of limitations runs where a plaintiff knows or should know of the injury that underlies his cause of action” (quoting Pocahontas Supreme Coal Co. v. Bethlehem Steel Corp., 828 F.2d 211, 220 (4th Cir. 1987)); see also Grimmett, 75 F.3d at 510 (adopting “injury discovery rule”); McCool, 972 F.2d at 1464-65 (same). The plaintiff is not required to have actual knowledge that the injury is part of a pattern of racketeering for this period to begin to run. E.g., Grimmett, 75 F.3d at 510 (stating limitations period begins to run, regardless of whether the plaintiffs knew or should have known of the injury).

The second component is the “separate accrual rule” which states that a new claim, and consequently a new four-year limitations period, accrues each time a “new and independent injury” is incurred from the same RICO violation. See Bingham v. Zolt, 66 F.3d 553, 561 (2d Cir. 1995) (holding plaintiff’s RICO claims were not time barred under the separate accrual rule). However, the lower courts are split in their interpretation of Zenith Radio Corp. v. Hazeltine Research, Inc., 401 U.S. 321 (1971), in which the Supreme Court examined the effect of the “separate accrual rule” on future damages.

Specifically, in Zenith, the Supreme Court stated that future damages can be awarded in most cases, but that future damages that might arise from the conduct sued on are “unrecoverable if the fact of their accrual is speculative or their amount and nature unprovable.” Id. at 339. The circuits are split concerning how this rule affects future damages in civil RICO cases where the amount of recovery is uncertain merely because of the pendency of other actions concerning the same damages. Compare First Nationwide Bank v. Gelt Funding Corp., 27 F.3d 763, 768 (2d Cir. 1994) (holding “cause of action does not accrue under RICO until the amount of damages becomes clear and definite”), with Grimmett, 75 F.3d at 516-17 (rejecting “clear and definite” damage rule distinguishing “uncertain damage, which prevented recovery, from an uncertain extent of damage, which did not prevent recovery”).
of cases, including those involving protests, the tobacco industry, divorce, health care fraud, and police misconduct.

A. Protests

The legal community debated whether an expansive use of civil RICO against social and civil protest groups threatened First Amendment protections following a ruling by the Supreme Court that permitted a civil RICO claim against anti-abortion groups allegedly seeking to close abortion clinics. In ruling on the merits of the claim, the Supreme Court decided by an 8-1 vote that the defendants had not violated RICO because they never "obtained" property from the plaintiffs; thus the defendants’ actions did not violate the predicate acts of extortion underlying the RICO claim. RICO claims have subsequently been upheld against abortion protest groups and environmental activists.

Although Congress originally intended for RICO to be used by the government


325. See id. at 262 (ruling on the availability of the RICO claim but not on the merits of the case).

326. See Scheidler v. Nat’l Org. for Women, Inc., 537 U.S. 393, 404-05 (2003). The relevant definition of extortion within the Hobbs Act is “the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.” 18 U.S.C. §1951(b)(2) (2000). Chief Justice Rehnquist went on to say “[p]etitioners may have deprived or sought to deprive respondents of their alleged property right of exclusive control of their business assets, but they did not acquire any such property. Petitioners neither pursued nor received ‘something of value from’ respondents that they could exercise, transfer, or sell.” NOW, 537 U.S. at 405 (citing United States v. Nardello, 393 U.S. 286, 290 (1969)).

327. See Tompkins v. Cyr, 202 F.3d 770, 787 (5th Cir. 2000) (holding physician and his wife had valid grounds for a RICO complaint against anti-abortion protesters who tried to stop doctors from performing abortions by harassing and threatening them and their families with violence). Although the jury had not reached a verdict on the civil RICO claim, the Court of Appeals denied a motion by the defendants on appeal to sanction the plaintiffs for filing a frivolous RICO claim.

328. See Huntingdon Life Sciences, Inc. v. Rokke, 986 F. Supp. 982, 992 (E.D.Va. 1997) (upholding RICO claim against the People for the Ethical Treatment of Animals (PETA)). In Huntingdon, the defendant was allegedly an undercover PETA operative who falsely represented herself to gain employment in the plaintiff’s laboratory to investigate its animal testing practices. Id. at 984. With the information collected by the defendant, PETA launched a public relations campaign against the plaintiff. Id. at 985.
to combat the infiltration of organized crime into labor unions, civil RICO may be used by corporations as a weapon against the activities of the labor unions. In *Bayou Steel Corp. v. United Steel Workers of America*, the plaintiffs filed a civil RICO lawsuit against a group of unions for waging a "corporate campaign" of harassment and violence after failed labor negotiations. Prior to the settlement agreement reached by the parties, a federal district court held that the plaintiff alleged sufficient facts for a RICO claim and denied the defendants' motion to dismiss the complaint.

**B. Tobacco Litigation**

Relying on the expansive reach of RICO, union health funds, hospitals, and even foreign governments have attempted to recover costs of treating tobacco-related illnesses from the tobacco industry, but largely to no avail. The courts have found that union health and welfare funds have no standing to sue tobacco companies under RICO for costs of providing health care to beneficiaries with tobacco-related illnesses. Health funds have not been able to demonstrate that their economic injury was proximately caused by the defendants' alleged con-

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329. See Raymond P. Green, *The Application of RICO to Labor-Management and Employment Disputes*, 7 St. Thomas L. Rev. 309, 312-26 (1995) (describing RICO prosecutions of labor officials and unions); see also, United States v. Sasso, 215 F.3d 283, 285 (2d Cir. 2000) (finding district court had authority to order contribution to costs of monitoring union from union officials who committed RICO violations by using threats of physical, economic, and financial harm, including work stoppages, to obtain cash payments from representatives of companies whose employees were members of union); United States v. Carson, 52 F.3d 1173, 1181-84 (2d Cir. 1995) (holding order of disgorgement of "ill-gotten gains" from union officer prosecuted for committing racketeering acts benefiting organized crime should be limited to sums intended solely to prevent and restrain future RICO violations); United States v. Int'l Bhd. of Teamsters, 19 F.3d 816, 818, 822 (2d Cir. 1994) (upholding disciplinary actions against union official for associating with organized crime figure pursuant to consent decree reforming electoral and disciplinary processes of union infiltrated by organized crime).


333. See *Laborers Local 17 Health & Benefit Fund v. Philip Morris, Inc.*, 191 F.3d 229, 239-41 (2d Cir. 1999) (finding plaintiffs did not have standing to bring RICO claim because (i) injury was derivative of harm suffered by beneficiaries from smoking; (ii) there was a risk of double recovery by smokers who may file individual RICO suits or seek recovery under state law; and (iii) extreme difficulty of calculating damages); *Int'l Bhd. of Teamsters, Local 734 v. Philip Morris, Inc.*, 196 F.3d 818, 825-26 (7th Cir. 1999) (same); *Oregon Laborers-Employers Health & Welfare Trust Fund v. Philip Morris, Inc.*, 185 F.3d 957, 963-67 (9th Cir. 1999) (same); *Steamfitters Local Union No. 420 Welfare Fund v. Philip Morris, Inc.*, 171 F.3d 912, 921, 933-34 (3d Cir. 1999) (concluding plaintiffs did not have standing because their injury was too remote from the defendants' conspiracy to conceal health risks of smoking and because of difficulty of apportioning damages between smokers and health funds).
spiration to mislead the public regarding the full health risks of smoking.\textsuperscript{334} Likewise, hospitals seeking to recover unreimbursed costs of health care provided to nonpaying patients suffering from tobacco-related illnesses have been denied standing to sue under RICO.\textsuperscript{335}

Foreign governments have also been unsuccessful in using RICO against tobacco companies. A claim brought by the governments of Guatemala, Nicaragua, and Ukraine to recover costs of treating their citizens for tobacco-related illnesses was dismissed because the court deemed the loss too remote from the manufacture and sale of cigarettes.\textsuperscript{336} Moreover, when Canada brought a RICO claim against R.J. Reynolds for alleged participation in a smuggling scheme to circumvent Canada's heavy taxation of cigarettes, the Second Circuit held the claim was barred by the revenue rule.\textsuperscript{337}

The federal government brought a RICO claim against the tobacco industry, alleging that the tobacco companies engaged in racketeering by presenting the public with false information concerning the safety of smoking cigarettes.\textsuperscript{338} The suit sought injunctive relief and disgorgement of profits from tobacco companies, rather than treble damages under §1964(c).\textsuperscript{339}

\textsuperscript{334} See Laborers Local 17, 191 F.3d at 236-40 (explaining a showing of proximate cause is required as an element of standing in all RICO cases); Int'l Bhd. of Teamsters, Local 734, 196 F.3d at 825-26 (same); Oregon Laborers-Employers, 185 F.3d at 967 (same); Steamfitters Local Union No. 420, 171 F.3d at 921, 933 (same).

\textsuperscript{335} See Allegheny General Hosp. v. Philip Morris, Inc., 228 F.3d 429, 444-45 (3d Cir. 2000) (arguing against standing for hospitals because "when an injury is indirect, remote, and many steps away from the alleged cause, it is unadvisable to allow a case to proceed"); see also Ass'n of Wash. Pub. Dists. v. Philip Morris, Inc., 241 F.3d 696, 701-02 (9th Cir. 2001) (holding public hospital districts lacked standing because the injury alleged was too remote because (i) there are more direct victims who can be counted on to vindicate the law as private attorneys general; (ii) it is difficult to ascertain the amount of damages attributable to defendant's wrongful conduct, and (iii) the courts will have to adopt complicated rules apportioning damages to obviate risk of multiple recoveries); Tex. Carpenters Health Benefit Fund v. Philip Morris, Inc., 199 F.3d 788, 789-90 (5th Cir. 2000) (holding health benefit fund lacked standing for RICO claim because the fund suffered indirect injury); Lyons v. Philip Morris Inc., 225 F.3d 909, 914-15 (8th Cir. 2000) (finding trustees of multi-employer health plans seeking to recover costs incurred in paying claims for tobacco-related illnesses lacked standing because injury was too remote).

\textsuperscript{336} Service Employees Int'l. Union Health and Welfare Fund v. Philip Morris, Inc., 249 F.3d 1068 (D.C. Cir. 2001) (holding that the harms alleged by the nations were too remote from the defendants' alleged wrongdoing to provide standing for a RICO claim).

\textsuperscript{337} See Attorney General of Canada v. R.J. Reynolds Tobacco Holdings, Inc., 268 F.3d 103, 106-07 (2d Cir. 2001). The revenue rule is a common law doctrine holding that the courts of one sovereign will not enforce tax judgments or claims of another sovereign. Id. at 106; see also European Cmty. v. RJR Nabisco, Inc., 424 F.3d 175, 179-82 (2d Cir. 2005) (affirming district court's ruling that revenue rule barred RICO based on smuggling). But see Elizabeth J. Farnam, Racketeering, RICO and the Revenue Rule in Attorney General of Canada v. R.J. Reynolds: Civil RICO Claims for Foreign Tax Law Violations, 77 WASH. L. REV. 843, 843 (2002) (arguing majority opinion in R.J. Reynolds impermissibly expanded the revenue rule to restrict the scope of RICO because the rule had previously only applied to claims based on foreign tax laws).

\textsuperscript{338} United States v. Philip Morris, Inc., 116 F. Supp. 2d 116, 121 (D.D.C. 2000) (basing its claim on §1964(a) of RICO, which authorizes the government to obtain equitable remedies from defendants allegedly engaged in racketeering activity).

\textsuperscript{339} Because the relief the government is seeking is equitable in nature, the district court denied the defendants' request for a jury trial. See United States v. Philip Morris, Inc., 273 F. Supp. 2d 3 (D.D.C. 2002).
C. Health Care Fraud

Following the Supreme Court's ruling in 1999 that beneficiaries of a managed care organization ("MCO") can sue under civil RICO for the MCO's failure to pass onto its customers the substantial discounts it obtained from area hospitals, the insured parties who participated in a health maintenance organization ("HMO") brought a civil RICO action against the HMO for false advertising and marketing designed to encourage enrollment. The Third Circuit explained that because the plaintiffs did not show that they received inadequate, inferior, or delayed care or were denied benefits, they failed to establish a RICO injury sufficient to sue under §1964(c).

The Seventh Circuit dismissed a civil RICO complaint alleging a mass conspiracy among health care providers to defraud health plan beneficiaries. The claim was brought by an assignee to whom employee health plan beneficiaries' claims were reassigned by the providers. The plaintiff alleged that the defendants violated §1962(a) by denying claims for mental health care benefits on fraudulent grounds and then investing the proceeds to develop a group of preferred medical providers who operated to eliminate outside providers. The defendants also allegedly violated §1962(c) and §1962(d) by colluding to defraud health plan beneficiaries. The court found that the plaintiff did not prove an injury to

Though the court has yet to rule on the merits of the case, the D.C. Circuit foreclosed the possibility of disgorgement as a remedy. See United States v. Philip Morris USA Inc., 396 F.3d 1190 (D.C. Cir. 2005), cert. denied, 126 S.Ct. 478 (2005). However, the court dismissed the government's action against one of the defendants—a British tobacco company—for lack of personal jurisdiction in Philip Morris, 116 F. Supp. 2d at 120. See generally, Elizabeth Vella Moeller, DOJ Tobacco Suit Threatens Commercial Speech Rights, 17 No. 15 ANDREWS TOBACCO INDUS. LITIG. REP. 10 (2002) (stating government's suit is unlikely to survive a constitutional challenge because the "Department of Justice is seeking advertising-related injunctive relief that would censor constitutionally protected commercial speech").


341. See Maio v. Aetna, Inc., 221 F.3d 472, 475 (3d Cir. 2000) (claiming that the HMO falsely represented that its members would receive high quality health care, when in reality the HMO's policies restrict a physician's ability to provide high quality health care).

342. Id. at 490-93 (rejecting appellants' argument that standing was based on their financial losses in obtaining a health care product with diminished economic value). But see Mathews v. Kidder, Peabody, & Co., 260 F.3d 239, 256 (3d Cir. 2001) (holding investors did have standing under RICO when they purchased overpriced equity investments based upon fraudulent misrepresentation); In re Managed Care Litigation, 150 F. Supp. 2d 1330, 1339 (S.D. Fla. 2001) (holding plaintiffs did have standing under RICO based upon fraudulent inducement). In Mathews, the Third Circuit distinguished the injury in Maio because the plaintiffs in Maio were not injured until the HMO failed to deliver benefits promised under the plan. Mathews, 260 F.3d at 248. However, the plaintiffs in Mathews were immediately injured because they purchased a legitimate property interest. Id.


344. Id.

345. Id. at 1083 (alleging fraudulently denying claims for mental health care benefits to develop group of preferred medical providers violated §1962(a)).

346. Id. at 1083-84 (alleging defendants violated §1962(c) and §1962(d) by colluding to defraud health plan beneficiaries).
himself, and thus failed to plead a cognizable claim under §1962(a). The court also held that the plaintiff was unable to show that the health insurance companies associated with an enterprise engaged in racketeering activity, and thus found no violation of sections 1962(c) or (d).

D. Divorce

Within the field of family law, civil RICO claims have been attempted in divorce cases, but most plaintiffs have been unsuccessful. However, a claim by a woman that her ex-husband, along with the other defendants, participated in a fraudulent scheme to conceal the true value of his income during the couple's divorce proceedings has twice survived motions for summary judgment.

At least one commentator believes it is possible for a RICO action to be successfully litigated in the area of divorce if it meets the following criteria: (i) the plaintiff must show an injury to business or property because of the divorce proceedings; (ii) the plaintiff must show that the defendant acted as part of an enterprise to further the act of hiding assets to minimize divorce settlements; and (iii) there must be either multiple violations of the same predicate act, or the commission of more than one predicate act.

E. Police Misconduct

Another nontraditional use of RICO that has emerged is in actions against police. A plaintiff who had been convicted of various narcotic offenses filed a claim of RICO against police officers, alleging that the officers unlawfully

347. Id. at 1083 (holding plaintiff must prove injury to himself to have cognizable claim).
348. Simon v. Value Behavior Health, Inc., 208 F.3d 1073, 1083-1084 (holding plaintiff must show that health insurance companies engaged in racketeering activity to violate sections 1962(c) or (d)).
349. See Erin Alexander, The Honeymoon is Definitely Over: The Use of Civil RICO in Divorce, 37 SAN DIEGO L. REV. 541, 546, 572 (2000) (concluding divorce is a legitimate use of civil RICO and forecasting its growing importance in this field).
350. See id. at 560 (discussing the failure of RICO claims in divorce cases).
353. See Alexander, supra note 349, at 560-61. In a divorce proceeding, showing an injury to business or property can be done "by demonstrating that the defendant conducted a fraudulent scheme that decreased the divorce settlement." See id. at 560-61. To show that the defendant acted as part of an enterprise to further the act of hiding assets to minimize divorce settlements, the "plaintiff will likely allege that the enterprise consisted of the defendant and lawyer, law firm, or perhaps a new love interest." Id. at 570. Finally, "[t]he predicate act most commonly used to bring forth a RICO claim in the divorce arena is mail fraud." Id. at 571.
354. See generally Steven P. Ragland, Using the Master's Tools: Fighting Persistent Police Misconduct with Civil RICO, 51 AM. U. L. REV. 139 (2001). Ragland argues that civil RICO is "both an appropriate and sustainable avenue to address a long-standing pattern of police corruption and misconduct." Id. at 164. Ragland contends that civil RICO is a good method for injured parties seeking redress against the police because of other barriers to prosecution of police misconduct. Id. at 166.
detained and searched him, planted drugs on him, illegally arrested him, and used excessive force. The suit was allowed to proceed under the RICO theory. It has been argued that because there are barriers to prosecution of police corruption and inappropriate behavior, civil RICO can serve as an important and useful tool in the fight against police misconduct.

JAMES MORRISON MECONE
JULIE B. SHAPIRO
TIMOTHY B. MARTIN

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356. Id. at 1293 (denying defendant’s motion to dismiss and holding that plaintiff has standing to plead RICO claim). But see Walker v. Gates, 2002 WL 1065618 at *7 (C.D. Cal. May 28, 2002) (holding plaintiff did not have standing to sue because false arrest was not an injury to business or property); Moreno v. Baca, 2002 WL 338366 at *19 (C.D. Cal. Feb. 25, 2002) (distinguishing Guerrero because the plaintiff could not show any evidence from which a persistent pattern of police misconduct could be inferred). For a discussion on Walker and Guerrero see Michael Rowan, Leaving No Stone Unturned: Using RICO as a Remedy for Police Misconduct, 31 Fla. St. U. L. Rev. 231 (2003).
357. Ragland, supra note 354 at 147.