7 PJI 1 | RICO | ACQUIRING AN INTEREST IN AN ENTERPRISE BY USE OF INCOME - 18 USC §1962(A)

[Plaintiff] asserts a claim against [Defendant] for allegedly violating the Racketeer Influenced and Corrupt Organizations Act, commonly known as RICO. [Plaintiff] specifically claims that [Defendant] violated §1962(a) of RICO.

To succeed on this claim, [Plaintiff] must prove each of the following four facts by a preponderance of the evidence:

> First, you must find that [Defendant] derived income, either directly or indirectly, from a pattern of racketeering activity.
>
> Second, you must find that [Defendant] participated as a principal in the pattern of racketeering activity.
>
> Third, you must find that some part of that income, or proceeds of that income, was used to acquire or maintain an interest in, or to operate, an enterprise.
>
> And fourth, you must find that the enterprise engaged in, or had some effect on, interstate or foreign commerce.

Now I'll provide you with some additional instructions to apply as you consider the facts that [Plaintiff] must prove.

For the first element, [Plaintiff] must prove that [Defendant] received or obtained money, either directly or indirectly from a pattern of racketeering activity.

> "Racketeering activity" is an act that violates [the specific statute[s] alleged]. I'll explain the law about [this statute/these statutes] to help you determine whether [Plaintiff] proved by a preponderance of the evidence that [Defendant] violated [this statute/these statutes]. An act of "racketeering activity" is also called a "predicate act."

[Plaintiff] must prove that [Defendant] engaged in a pattern of racketeering activity. A "pattern of racketeering activity" means that [Defendant] committed at least two distinct predicate acts. Distinct does not have to mean different types. But by itself, proof of two or more predicate acts doesn't establish a pattern under RICO.

To prove a pattern of predicate acts, [Plaintiff] must show that the acts were related to one another. Two or more acts of racketeering activity that aren't related don't establish a pattern of racketeering activity under RICO. Predicate acts are "related" to one another if they have the same or similar purposes, results, participants, victims, or methods. Predicate acts are also related if they have common distinguishing characteristics and aren't isolated events.

To be related, the predicate acts don't have to be the same kind of acts. For example, the acts may comprise one act of [type of alleged predicate act (e.g., wire fraud)] and one act of [another type of alleged predicate act (e.g., interstate transportation of stolen property)].

A pattern of racketeering activity requires predicate acts showing continuity. This can be demonstrated in two ways. The first is to demonstrate related predicate acts extending over a substantial period of time. The second is to show conduct that doesn't occur over a substantial period of time but, by its nature, is likely to be repeated into the future.

Again, "racketeering activity" means an act that violates [the statute[s] at issue]. But you can't consider just any racketeering act [Defendant] allegedly committed in violation of one of these statutes as bearing on whether [Defendant] has committed two or more predicate acts as a pattern of racketeering activity. [To determine if there is a pattern of racketeering activity, you must consider only those specific racketeering acts [Plaintiff] alleges against [name of defendant.]] And you can't find that [Defendant] engaged in a "pattern of racketeering activity" unless you unanimously agree on which of the alleged predicate acts, if any, make up the pattern.

So it's insufficient if you don't all agree to the finding of what two or more predicate acts [Defendant] committed. Some of you can't find that the predicate acts are A, B, and C and the rest of you find that the predicate acts are X, Y, and B. Put another way, you can't find that [Defendant] has engaged in a pattern of racketeering activity unless you find (1) a "pattern" of predicate acts, and (2) that [Plaintiff] has proved by a preponderance of the evidence that [Defendant] committed each of the two or more predicate acts that you find make up that pattern.

For the second element, [Plaintiff] must prove that [Defendant] "participated as a principal" in the pattern of racketeering activity. To prove this, [Plaintiff] must show by a preponderance of the evidence that [Defendant] either: (1) committed – or aided, abetted, counseled, commanded, induced, or procured the commission of – two or more alleged predicate acts that make up the alleged pattern of racketeering activity; or (2) willfully caused the commission of two or more alleged predicate acts that make up the alleged pattern of racketeering activity, which, if [Defendant] directly performed, would make up the commission of two or more alleged predicate acts that comprise the alleged pattern of racketeering activity. To be a "principal," [Defendant] must have acted with intent or knowledge, rather than by mistake or accident.

For the third element, [Plaintiff] must prove that some part of the income or proceeds of that income derived from the racketeering activity was used to acquire, maintain an interest in, or operate an enterprise.

> [Alternative #1: Individual or entity enterprise: An "enterprise" may consist of an individual, partnership, corporation, association, or other legal entity. In this case the enterprise is alleged to be [Enterprise].]

> [Alternative #2: Association-in-fact enterprise: An "enterprise" doesn't have to be a legal entity. It can be an association of persons or entities. In this case, the enterprise is alleged to be [Enterprise]. The association between the enterprise's members might be loose or informal. But the enterprise must have at least a purpose, relationships among those associated with the enterprise, and a duration sufficient to permit those associates to pursue the enterprise's purpose. Also, an enterprise must have a property interest that [Defendant] can acquire.]

For the fourth element, [Plaintiff] must prove that the enterprise engaged in or had an effect on interstate or foreign commerce. "Engage in or have an effect on interstate or foreign commerce" means that the enterprise either engaged in, or had an effect on commerce between two or more states, or on commerce between a state and a foreign country.

If you find that [Defendant] violated §1962(a), you must decide whether that violation caused an injury to [Plaintiff]. The damages that [Plaintiff] may recover are those caused by the use or investment of racketeering income to injure [Plaintiff] or [his/her/its] business or property. Put another way, [Plaintiff]'s injury must flow from [Defendant]'s use or investment of racketeering income.

((Rev. 03/2022) | Judicial Council of the United States Eleventh Judicial Circuit)

Annotations and Comments

The Eleventh Circuit held in *United States v. Pepe, 747 F.2d 632, 675-76 (11th Cir. 1984)* that "a plain reading of the statute indicates that RICO does not contain any separate mens rea or scienter elements beyond those encompassed in its predicate acts." As a result, in a §1962(a) case, the only relevant mental state is that necessary to commit the predicate acts. See, e.g., *Edwards v. Prime, Inc., 602 F.3d 1276, 1292-97 (11th Cir. 2010)* (analyzing different knowledge and intent requirements of specific categories of predicate offenses). This is in contrast to a RICO conspiracy, which requires the additional element of agreement. *United States v. Martino, 648 F.2d 367, 383 (5th Cir. 1981)*.

The Eleventh Circuit's treatment of this issue is, however, not completely consistent. For example, in *Pepe*, the court affirmed where a Defendant had been acquitted of RICO conspiracy but found guilty of a §1962(c) violation, noting that the evidence was sufficient to permit the jury to find that the Defendant engaged in racketeering activity and was an active participant in the enterprise, which was characterized as "knowing participant in the enterprise." 747 F.2d at 665. As between these two, the requirement that the Defendant be an active participant seems to be more appropriate but this is not a completely settled area of law in this circuit. Accordingly, current case activity should be researched before this instruction is used to determine if more recent circuit authority on this issue is available.

This instruction assumes a single plaintiff suing a single defendant. It needs to be modified if there are multiple parties.

In *Beck v. Prupis, 162 F.3d 1090, 1095 n.8 (11th Cir. 1998)*, the Eleventh Circuit noted that §1962(a) of RICO prohibits the investment of income derived from a pattern of racketeering activity in any enterprise involving interstate commerce. See also *Pelletier v. Zweifel, 921 F.2d 1465, 1489 (11th Cir. Ga. 1991)* ("Section 1962(a) makes it a crime for anyone who has derived income from 'a pattern of racketeering activity... in which such person has participated as a principal... to use or invest, directly or indirectly, any part of such income... in acquisition of any interest in, or the establishment or operation of, any enterprise... engaged in... interstate... commerce.") (quoting 18 U.S.C. §1962(a)); *Club Car, Inc. v. Club Car (Quebec) Import, Inc., 276 F. Supp. 2d 1276, 1288 (S.D. Ga. 2003)* ("Section 1962(a) has two components: (1) receiving income from a pattern of racketeering activity, and (2) investing that income in an enterprise.") (quoting *Georgia v. Dairymen, Inc., 813 F. Supp. 1580, 1584 (S.D. Ga. 1991)*).

The definition of "predicate act" comes from *Williams v. Mohawk Indus., Inc., 465 F.3d 1277, 1283 (11th Cir. 2006)* (quoting *Maiz v. Virani, 253 F.3d 641, 671 (11th Cir. 2001)*). "A 'pattern' of racketeering activity is shown when a racketeer commits at least two distinct but related predicate acts." Id. (quoting *Maiz v. Virani, 253 F.3d at 671*). In Williams, the Court affirmed denial of the defendant's Rule 12(b)(6) motion to dismiss the RICO claims, finding that the plaintiff's allegations that the defendant had "committed hundreds, even thousands, of violations of federal immigration laws" were sufficient to plead a "pattern of racketeering activity." Id.

The continuity and relationship elements are derived from *United States v. Browne, 505 F.3d 1229, 1257 (11th Cir. 2007)* (noting that to establish a pattern of predicate acts, the plaintiff must prove that the predicate acts relate to each other and have continuity). In defining how “the predicate acts must relate to each other,” the Eleventh Circuit has stated this “the predicate acts must ‘have the same or similar purposes, results, participants, victims, or methods of commission, or otherwise [be] interrelated by distinguishing characteristics and... not [be] isolated events.'") Id. (quoting *Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 496, n.14 (1985)*); *United States v. Starrett, 55 F.3d 1525, 1543 (11th Cir. 1995)* (same). In *Starrett*, the court found that the evidence that the defendant used a communication facility in the perpetration of a felony, transported an individual across state lines for the purpose of prostitution, and intended to distribute cocaine and marijuana supported a finding that the defendant's predicate acts were related. Id. at 1547. Specifically, the court found that "[f]our of the [defendant's] predicate acts shared the purpose of facilitating illegal prostitution, and the other four predicate acts share the purpose of furthering narcotics distribution." Id.

Starrett also discussed examples of how the two required predicate acts need not be the same type of acts to be related. Id. (finding that the evidence that the defendant used a communication facility in the perpetration of a felony, transported an individual across state lines for the purpose of prostitution, and intended to distribute cocaine and marijuana supported a finding that the defendant's predicate acts were related). As for continuity, “[p]redicate acts demonstrate continuity if they are either ‘a closed period of repeated conduct,’ or ‘past conduct that by its nature projects into the future with a threat of repetition.’” Id. at 1543 (quoting *H.J., Inc. v. NW Bell Tel. Co., 492 U.S. 229 (1989)*). See also, *Browne, 505 F.3d at 1257*. The continuity of predicate acts was found to be satisfactorily alleged where defendants “had agreed to a scheme whereby [one] would supply [the other] with cocaine on an on-going basis.” *Starrett, 55 F.3d at 1547*.

The second element requires a plaintiff to establish that the defendant “participated as a principal.” Courts have interpreted 18 U.S.C. §2(a) and (b) as permitting plaintiff to satisfy this element by establishing that a defendant either: aided, abetted, counseled, commanded, induced, or procured the commission of two or more alleged predicate offenses that constitute the pattern of racketeering activity ; or willfully caused acts to be done which if directly performed by him would constitute the commission of two or more alleged predicate offenses that constitute the pattern of racketeering activity. See, e.g., *In re Sahlen & Assoc., Sec. Litig., 773 F. Supp. 342, 368 (S.D. Fla. 1991)* (aiding and abetting); *Grimsley v. First Alabama Bank, No. 88000113, 1988 U.S. Dist. LEXIS 16042, at *3 (S.D. Ala. 1988)*. Also premised on 18 U.S.C. §2 is that a defendant must have intent or knowledge in order to act as a principal. Id. (“One cannot aid, abet, counsel, command, induce, willfully cause or perform without knowledge or intent.”).

An example of the third element - that “some part of the income or proceeds of that income derived from the racketeering activity was used to acquire, maintain an interest in, or operate and enterprise” - was discussed in *In re Sahlen. 773 F. Supp at 366* (finding that the plaintiffs had sufficiently alleged a violation of 1962(a) by alleging that the defendants had derived income as officers and directors of a company through fraudulent securities offerings and sales of stock and then invested this income back into the company to continue the scheme and guarantee the company's growth and increased value, to the detriment of the investing public).

18 U.S.C. 1961(4) provides the definition of enterprise as "any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity." For discussion regarding the definitions of individual or entity enterprise or association-in-fact enterprise, see *Starrett, 55 F.3d at 1541* (the South Florida Chapter of the Outlaw Motorcycle Club constituted an enterprise under 18 U.S.C. §1961(4)); *Williams, 465 F.3d at 1284* ("[T]he definitive factor in determining the existence of a RICO enterprise is the existence of an association of individual entities, however loose or informal, that furnishes a vehicle for the commission of two or more predicate crimes, that is, the pattern of racketeering activity.") (quoting *United States v. Goldin Industries, Inc., 219 F.3d 1271, 1275 (11th Cir. 2000)*). In *Williams*, the Court found that the plaintiff's allegations that the defendant corporation worked with third-party temp agencies/recruiters to bring illegal workers into this country for the defendant's benefit were sufficient to allege an "enterprise" under this section.

In *Boyle v. United States, 556 U.S. 938, 946-47, 129 S. Ct. 2237, 2244 (2009)*, the Supreme Court held that "an association-in-fact enterprise must have at least three structural features: a purpose, relationships among those associated with an enterprise, and longevity sufficient to permit these associates to pursue the enterprise's purpose."). See also *Williams, 465 F.3d at 1284-85* (allegations that the defendant corporation worked with third-party temp agencies/recruiters to bring illegal workers into this country for the defendant's benefit were sufficient to allege common purpose). In *Boyle*, the defendant was charged in connection with a series of bank thefts allegedly conducted by a group that was loosely organized and did not appear to have a leader or hierarchy. The Supreme Court ruled that although the three structural features set forth above were necessary for a finding of an association -in-fact enterprise, there are no additional structural features such as hierarchy or a chain of command required.

Section 1962(a) also requires that an enterprise have a property interest that can be acquired by the defendant. See *Nat'l Org. for Women v. Scheidler, 510 U.S. 249, 259, 114 S. Ct. 798, 804 (1994)* ("The 'enterprise' referred to in subsections (a) and (b) [of § 1962] is thus something acquired through the use of illegal activities or by money obtained from illegal activities. The enterprise in these subsections is the victim of unlawful activity and may very well be a 'profit-seeking' entity that represents a property interest and may be acquired. But the statutory language in subsections (a) and (b) does not mandate that the enterprise be a 'profit-seeking' entity; it simply requires that the enterprise be an entity that was acquired through illegal activity or the money generated from illegal activity. By contrast, the 'enterprise' in subsection (c) [of §1962] connotes generally the vehicle through which the unlawful pattern of racketeering activity is committed, rather than the victim of that 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. Nothing in subsections (a) and (b) directs us to a contrary conclusion."); *Lockheed Martin Corp. v. Boeing Co., 357 F. Supp. 2d 1350, 1368 (M.D. Fla. 2005)* ("Unlike a §1962(c) enterprise, which 'generally connotes the vehicle through which the unlawful pattern of racketeering activity is committed,= a '1962(a) enterprise is something acquired through the use of illegal activities or by money obtained from illegal activities. A §1962(a) enterprise is, in other words, the victim of unlawful activity, not the vehicle through which that activity is committed.@ (citations and quotations omitted).

Pursuant to 18 U.S.C. ' 1964(c), A[a]ny person injured in his business or property by reason of a violation of section 1962 . . . may sue . . . in any appropriate United States district court@ and may recover treble damages and a reasonable attorney's fee. However, no person may rely upon any conduct that would have been actionable as fraud in the purchase or sale of securities to establish a violation of Section 1962. This exclusion concerning securities does not apply to an action against any person that is criminally convicted in connection with a securities fraud. 18 U.S.C. ' 1964(c). In contrast to the injury requirement under ' 1962(c), which my be satisfied by harm alleged to be the result of racketeering activity,, a majority of courts that have addressed the issue have determined that a claimant under '1962(a) must plead an injury which stems not from the racketeering predicate acts themselves= but from the use or investment of... racketeering income.=@). Id. at 1369 (quoting *Fogie v. Thorn Ams., Inc., 190 F.3d 889, 895 (8th Cir. 1999)* (adopting the majority position that limits >standing only to plaintiffs who have suffered injury from the use or investment or racketeering income@)); *Club Car, Inc., 276 F. Supp. 2d at 1288* (AThe plain language of Federal RICO shows that injury by reason of investment of racketeering income B investment injuryB is required.@) (quoting *Dairymen, Inc., 813 F. Supp. at 1584*)). In Club Car, the court dismissed the plaintiff=s ' 1962(a) claim for failure to allege Aany injury resulting from the investment of racketeering income,@ as opposed to injury from the underlying predicate acts.@ 276 F. Supp. 2d at 1288. See also, *Danielsen v. Burnside-Ott Aviation Training Center, Inc., 291 U.S. App. D.C. 303, 941 F.2d 1220, 1229 (D.C. Cir. 1991)* (holding that injury to a plaintiff must flow from a Defendant=s use or investment of racketeering income.)