7 PJI 2 | RICO | ACQUIRING OR MAINTAINING AN INTEREST IN OR CONTROL OF AN ENTERPRISE - 18 USC §1962(B)

[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(b) 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] engaged in a pattern of racketeering activity.
>
> Second, you must find that through the pattern of racketeering activity, [Defendant] acquired or maintained, directly or indirectly, an interest in or control of an enterprise.
>
> And third, 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.

> First, [Plaintiff] must prove that [Defendant] engaged in 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 sometimes referred to as a "predicate act."

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 basic 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 by a preponderance of the evidence that [Defendant], through the pattern of racketeering activity, acquired or maintained an interest in, or control of, an enterprise. To find that [Plaintiff] has established this element, you must find by a preponderance of the evidence not only that [Defendant] had some interest in or control over an enterprise, but also that this interest or control was connected to the pattern of racketeering activity. It isn’t sufficient that [Defendant] engaged in racketeering activities if [he/she/it] acquired an interest in, or control of, the enterprise through legitimate activities.

[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.]

For the third 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(b), you must decide whether that violation caused an injury to [Plaintiff]. The damages that [Plaintiff] may recover are those caused by [Defendant]'s acquisition or control of the alleged enterprise through a pattern of racketeering activity. It's not enough that [Plaintiff] suffered injuries from [Defendant]'s commission of predicate acts. Rather, [Plaintiff]'s injury must flow from [Defendant]'s acquisition or control of the alleged enterprise.

((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(b) of RICO prohibits acquisition through a pattern of racketeering activity of interest in an enterprise involving interstate commerce. See also *Pelletier v. Zweifel, 921 F.2d 1465, 1489 (11th Cir. Ga. 1991)* ("Section 1962(b) imposes criminal liability on anyone who 'through a pattern of racketeering activity acquire[s] or maintain[s], directly or indirectly, any interest in or control of any enterprise... engaged in... interstate... commerce.'") (quoting 18 U.S.C. §1962(b); *Avirgan v. Hull, 691 F. Supp. 1357, 1361 (S.D. Fla. 1988)* ("A defendant violates §1962(b) by acquiring or maintaining through a pattern of racketeering activity any interest in or control of any enterprise which is engaged in or the activities of which affect interstate commerce.").

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. 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*.

This instruction differs from the instruction for §1962(a) in that it requires a plaintiff to establish that a defendant acquired, maintained an interest in, or obtained control over an enterprise, through a pattern of racketeering activity. See *Pelletier, 921 F.2d at 518* (discussing necessity of nexus between racketeering activities and acquisition of interest in or control of enterprise and finding that the plaintiff's complaint failed to indicate how the defendant acquired or maintained a partnership interest in the enterprise at issue through a pattern of racketeering activity); *Johnson Enters. of Jacksonville v. FPL Group, 162 F.3d 1290, 1317 (11th Cir. 1998)* (finding "no evidence that any of the defendants 'acquired or maintained, directly, or indirectly, an interest in or control of [the enterprise at issue] through a pattern of racketeering activity.'") (quoting U.S.C. § 1962(b)).

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.

Pursuant to 18 U.S.C. §1964(c), "[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. See, Fuller v. Home Depot Servs., LLC, 512 F. Supp. 2d 1289, 1294 (N.D. Ga. 2007) ("Just as §1962(a) requires an investment injury, §1962(b) requires an acquisition injury."). 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).

There is a split within the circuit regarding this injury causation issue. However, the prevailing (and more recent) authority establishes that the plaintiff's injury must have resulted from the acquisition itself. Compare: Fuller v. Home Depot Servs., LLC, 512 F. Supp. 2d 1289, 1294 (N.D. Ga. 2007) (finding injury from predicate acts insufficient when injury did not result from alleged acquisition); Smart Sci. Labs., Inc. v. Promotional Mktg. Servs., No. 8:07-CV-1554-T-24EAJ, 2008 U.S. Dist. LEXIS 118270, at *20 (M.D. Fla. June 27, 2008) ("[Plaintiff] fails to allege injury by reason of [Defendant's] acquisition or control of an enterprise through a pattern of racketeering activity."); Design Pallets, Inc. v. Grayrobinson, P.A., 515 F. Supp. 2d 1246, 1255 & n.2 (M.D. Fla. 2007) (dismissing §1962(b) as duplicative of §1962(c) claim when plaintiff failed to explain what additional injury resulted from defendant's interest or control of enterprise) (citing Lightning Lube v. Witco Corp., 4 F.3d 1153 (3rd Cir. 1993)); and Club Car, Inc. v. Club Car (Quebec) Import, Inc., 276 F. Supp. 2d 1276, 1288 (S.D. Ga. 2003) (concluding §1962(b) claim fails when injury did not result from acquisition of enterprise) with: In re Sahlen & Assoc., Sec. Litig., 773 F. Supp. 342, 369 (S.D. Fla. 1991) ("[Defendants] contend that Plaintiffs' claims are deficient in that they fail to allege an injury caused by either the use of income derived from racketeering activity or by the acquisition or maintenance of an interest in a RICO enterprise. Unlike the additional causation connection necessary to state a cause of action under §1962(a), however, §1962((b) does not require such a nexus."); Avirgan, 691 F. Supp. at 1362 ("The causation link of §1962 (b) is direct. The plaintiff must be injured by the defendant's pattern of racketeering activity, that was used to either acquire or maintain any interest in or control of, any enterprise. Accordingly, the plaintiff must be injured by the pattern of racketeering activity committed by the defendant."); Marshall v. City of Atlanta (In re Air Terminal Enters.), 1995 Bankr. LEXIS 1248, at *18 (Bankr. N.D. Ga. June 20, 1995) ("Unlike Section 1962(a), a claim may be made under Section 1962(b) by alleging that the injury occurred as a result of the pattern or racketeering activity that was used to acquire an interest in or control of such an enterprise, as opposed to the acquisition itself.").

The majority position in other jurisdictions accords with the conclusion that an "acquisition injury" is required. See, e.g., *Advocacy Org. for Patients & Providers v. Auto Club Ins. Ass'n, 176 F.3d 315, 330 (6th Cir. 1999)* ("[I]njury from the racketeering acts themselves is not sufficient; rather, a plaintiff must plead facts tending to show that the acquisition or control of an interest injured plaintiff."); *Discon, Inc. v. NYNEX Corp., 93 F.3d 1055, 1062-63 (2nd Cir. 1996)* rev'd on other grounds, 525 U.S. 128 (1998); *Compagnie De Reassurance D'Ile De Fr. v. New Eng. Reinsurance Corp., 57 F.3d 56, 92 (1st Cir. 1995)*; *Old Time Enters. V. Int'l Coffee Corp., 862 F.2d 1213, 1218 (5th Cir. 1989)*; *In re Nat'l Western Life Ins. Deferred Annuities Litig., 467 F. Supp. 2d 1071, 1084 (S.D. Cal. 2006)*; *NL Industries, Inc. v. Gulf & Western Industries, Inc., 650 F. Supp. 1115, 1127-28 (D. Kan. 1986)*.