7 PJI 3 | RICO | CONDUCT THE AFFAIRS OF THE ENTERPRISE - 18 USC §1962(C)

[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(c) of RICO.

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

> First, you must find the existence of an enterprise.
>
> Second, you must find that the enterprise engaged in, or had some effect on, interstate or foreign commerce.
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> Third, you must find that [Defendant] was employed by or associated with the alleged enterprise.
>
> Fourth, you must find that [Defendant] participated, either directly or indirectly, in the conduct of the affairs of the enterprise.
>
> And fifth, you must find that [Defendant] participated through a pattern of racketeering activity.

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 the existence of 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].]
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> [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 second 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.

For the third element, [Plaintiff] must prove that [Defendant] was employed by or associated with the alleged enterprise. The requirement that [Defendant] be "employed by or associated with" the enterprise means [he/she/it] must have some minimal association with the alleged enterprise. [Defendant] must know something about the alleged enterprise's activities as they relate to the racketeering activities.

For the fourth element, [Plaintiff] must also prove by a preponderance of the evidence that [Defendant] "participated, directly or indirectly, in the conduct of the affairs of the enterprise." To prove this, [Plaintiff] must show that [Defendant] actively conducted or participated in conducting the affairs of the alleged enterprise through a pattern of racketeering activity. [Defendant] doesn't need to participate in, or be aware of, all of the enterprise's activities. It's sufficient if [Defendant] conducted or participated in the conduct of some of the enterprise's activities through a pattern of racketeering activity.

For the fifth element, [Plaintiff] must prove that [Defendant] participated in the conduct of the enterprise's affairs through 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."
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> 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 and to the enterprise. 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)].

To make up a pattern of racketeering activity, predicate acts must demonstrate continuity. Continuity 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.

A person doesn't violate RICO just by associating with or being employed by an otherwise lawful enterprise if others conduct the enterprise's affairs through a pattern of racketeering activity in which the person isn't personally engaged.

If you find that [Defendant] violated §1962(c), you must decide whether that violation caused an injury to [Plaintiff]. The damages that [Plaintiff] may recover are those caused by the predicate acts constituting the pattern of racketeering activity if they injure [Plaintiff] or [his/her/its] business or property. It isn't necessary that every predicate act caused damage to [Plaintiff]. But [he/she/it] can only recover damages caused by predicate acts that are part of the pattern of racketeering activity.

((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. It also assumes that a single enterprise is at issue, and will need to be modified if multiple enterprises are at issue.

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, *Sedima, S.P.R.L., 173 U.S. at 496*. 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).

"To establish a violation of 18 U.S.C. §1962(c), [a plaintiff] must prove: (1) the existence of an enterprise; (2) that the enterprise affected interstate commerce; (3) that the defendants were employed by or associated with the enterprise; (4) that the defendants participated, either directly or indirectly, in the conduct of the affairs of the enterprise; and (5) that the defendants participated through a pattern of racketeering activity." *United States v. Starrett, 55 F.3d 1525, 1543 (11th Cir. 1995)* (citing *United States v. Kotvas, 941 F.2d 1141, 1143-44 (11th Cir. 1991)*; *United States v. Young, 906 F.2d 615, 618-29 (11th Cir. 1990)*; *United States v. Russo, 769 F.2d 1443, 1455 (11th Cir. 1986)*).

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 at 1543* (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*.

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.

A claim under §1962(c), requires a plaintiff to establish that the defendant[s] "conduct[ed] or participate[d], directly or indirectly, in the conduct of [an] enterprise's affairs though a pattern of racketeering activity." 18 U.S.C. 1962(c). The Supreme Court has defined this term as meaning that a defendant "participate in the operation or management of the enterprise itself." *Reeves v. Ernst & Young, 507 U.S. 170, 184 (1993)*. In *Reeves*, the defendant accounting firm performed financial audits for a cooperative that issued notes to individuals. The defendant's audits indicated its doubt about whether a certain investment was recoverable, but the condensed financial statement distributed at the cooperative's annual meeting omitted this information. The Supreme Court held that the defendant's failure to tell the cooperative's board about the investment was insufficient to constitute participation in the operation or management of the cooperative to give rise to §1962(c) liability.