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# ANOTHER WEAPON: THE RICO STATUTE AND THE PROSECUTION OF ENVIRONMENTAL OFFENSES

by

*Elizabeth E. Mack\**

## I. INTRODUCTION

CONGRESS enacted the Racketeer Influenced and Corrupt Organizations Act (RICO) in 1970.<sup>1</sup> RICO was designed primarily as a "criminal statute aimed at eradicating organized crime syndicates."<sup>2</sup> After the enactment of RICO, Congress proclaimed that RICO should "be liberally construed to effectuate its remedial purposes."<sup>3</sup> The Supreme Court, in interpreting the statute, has acknowledged that RICO was meant to be an extraordinary federal remedy for particularly offensive activities that harmed all of society.<sup>4</sup> Pursuant to this broad mandate from both Congress and the Supreme Court, plaintiffs have used RICO for a variety of purposes in both the civil and criminal context.

In the general commercial context, litigants have employed RICO for multiple purposes, ranging from imaginative attempts to gain federal jurisdiction<sup>5</sup> to the use of RICO's treble damages remedy provisions to leverage favorable settlements.<sup>6</sup> However, in the realm of environmental disputes, RICO is not needed to acquire federal jurisdiction because the nine federal environmental statutes all provide for jurisdiction in federal district court.<sup>7</sup>

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1. Organized Crime Control Act, Pub. L. No. 91-542, 84 Stat. 941 (codified at 18 U.S.C. §§ 1961-1968 (1988)).

2. S. REP. NO. 269, 101st Cong., 2d Sess. 2 (1990).

3. 18 U.S.C. § 1961 comment (1988).

4. *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 500 (1985) (White, J.).

5. State courts now have concurrent jurisdiction. See *Tafflin v. Levitt*, 493 U.S. 455 (1990).

6. The Eleventh Circuit, however, has recently reversed a district court's order denying sanctions for bringing a frivolous suit in order to extract a settlement and remanded the case for consideration of appropriate sanctions. See *Pelletier v. Zweifel*, 921 F.2d 1465, 1517-23 (11th Cir. 1991).

7. The nine statutes include the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. §§ 9601-9675 (1988); the Resource Conservation and Recovery Act (RCRA), 42 U.S.C.A. §§ 6901-6992k (West 1983 & Supp. 1991); the Clean Water Act, 33 U.S.C.A. §§ 1251-1387 (West 1983 & Supp. 1991); the Rivers and Harbors Act, 33 U.S.C. §§ 401-467n (1988); the Emergency Planning and Community Right-To-Know Act, 42 U.S.C. §§ 11001-11050 (1988); the Federal Insecticide, Fungicide and Rodenticide Act, 7 U.S.C. § 136 (1988); the Toxic Substances Control Act, 15 U.S.C. §§ 2601-

Thus, far from a jurisdictional tool in the environmental context, RICO can be viewed simply as one more draconian statute in the environmental plaintiff's arsenal.

The advent of environmental awareness has led victims of environmental wrongdoings to search for alternative ways to prosecute perceived perpetrators. Even though federal and state environmental laws have gained more notoriety, plaintiffs are constantly seeking to add more punch to claims of environmental wrongdoing. By charging a defendant with a violation of the RICO statute in addition to an environmental violation, a plaintiff may strike a more effective blow. Indeed, a legitimate RICO cause of action adds a new dimension to any lawsuit.

As the federal RICO statute is currently drafted, environmental crimes are not "predicate acts" providing the foundation for RICO liability.<sup>8</sup> Accordingly, plaintiffs seeking relief from environmental wrongdoings utilize RICO as a secondary or tertiary statute from which to attempt to recoup losses and punish violators. Even if not the primary claim, the treble damage and attorneys' fees provisions of the civil RICO statute can provide potent weapons against violators.<sup>9</sup> The cost of defending a RICO case, combined with the risk of losing, is deemed by some defendants to be high enough to force settlements and deter future wrongful conduct.

While the fear of treble damages and the stigma of a "racketeer" label may force many a RICO defendant into settlement, many other RICO defendants refuse to settle due to the difficulty of establishing a RICO claim. Indeed, RICO requires a plaintiff to prove an offense within an offense by essentially establishing that two or more criminal acts occurred. Numerous other requirements further complicate the RICO statutory scheme. Despite the complexity of the statute, RICO is employed more frequently and has become more commonplace in the environmental arena. This Article surveys the use of the RICO statute in the prosecution of environmental

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2671 (1988); the Marine Protection, Research, and Sanctuaries Act, 33 U.S.C. §§ 1401-1445 (1988) and the Clean Air Act, 42 U.S.C.A. §§ 7401-7671 (West 1983 & Supp. 1991). However, these are not the only statutes that qualify as conservationist-oriented. See Endangered Species Act of 1973, 16 U.S.C. §§ 1531-1544 (1988).

8. At least one state's RICO statute defines environmental offenses as predicate acts. See N.J. STAT. ANN. § 13.1E-133 (West Supp. 1991). New Mexico is considering legislation to amend its state RICO-type statute to include environmental offenses as predicate acts. S. Res. 635, 40th Leg., 1st Sess. 1991 (introduced February 14, 1991).

9. This potent weapon may in fact be unconstitutional. Because the RICO statute permits the imposition of treble damages, a RICO violation carries serious punishment. Consequently, it has been said the Constitution requires that the RICO statute should give fair warning of the proscribed behavior. See *Lanzetta v. New Jersey*, 306 U.S. 451, 453 (1939) ("No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes."). At least one Supreme Court Justice has stated the pattern requirement is so vague that even the Supreme Court had difficulty in setting forth a definition. See *H.J. Inc. v. Northwestern Bell Tel. Co.*, 492 U.S. 229, 255 (1989) (Scalia, J., concurring) (pattern is "some requirement beyond the mere existence of multiple predicate acts . . . but what that something more is, is beyond me."). See generally George C. Freeman & Kyle E. McSlarrow, *RICO and the Due Process "Void for Vagueness" Test*, 45 BUS. LAW. 1003 (May 1990) (discussing recent cases where constitutional issue could have been raised but was not). The Supreme Court has declined to consider the constitutionality issue directly. See *United States v. Tripp*, 782 F.2d 38 (6th Cir.), cert. denied, 475 U.S. 1128 (1986).

offenses, both civil and criminal. The Article focuses first on the RICO statute and the elements necessary to establish a RICO violation. The Article then reviews and analyzes cases that demonstrate the use of the RICO statute in connection with the prosecution of environmental offenses. Finally, the Article concludes with an assessment of the continued use of RICO to prosecute offenses which were previously only regulated pursuant to environmental regulatory schemes.

## II. THE RICO STATUTE: AN OVERVIEW

### A. *The Four Sections*

The liability provision of the RICO statute is divided into four sections.<sup>10</sup> The first section, section 1962(a), prohibits investment of income derived from a "pattern of racketeering activity." Section 1962(a) provides in pertinent part:

It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity . . . 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 which is engaged in, or the activities from which affect, interstate or foreign commerce.<sup>11</sup>

In order to establish a violation of section 1962(a), some courts have required a plaintiff to meet the proximate cause requirements of 18 U.S.C. § 1964(c),<sup>12</sup> which instructs plaintiffs to allege injury "by reason of" a violation of section 1962(a).<sup>13</sup>

The second section, section 1962(b), provides as follows: "It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activi-

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10. See 18 U.S.C. § 1962(a)-(d) (1988).

11. *Id.* § 1962(a).

12. 18 U.S.C. § 1964(c) provides in pertinent part: "Any person injured in his business or property by 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 the suit including a reasonable attorney's fee."

13. See *Grove Fresh Distrib., Inc. v. Flavor Fresh Foods, Inc.*, 720 F. Supp. 714, 717 (N.D. Ill. 1989) (citing *Palumbo v. I.M. Simon & Co.*, 701 F. Supp. 1407, 1408-10 (N.D. Ill. 1988)); see also *Craighead v. E.F. Hutton & Co.*, 899 F.2d 485, 494 (6th Cir. 1990) (plaintiffs' § 1962(a) claim failed because "they have not alleged injuries stemming directly from the defendants' alleged use or investment . . . Unlike Section 1962(c), subsection (a) requires such a separate and traceable injury, and plaintiffs have alleged only injuries traceable to the alleged predicate acts."); *Ouaknine v. MacFarlane*, 897 F.2d 75, 82-83 (2nd Cir. 1990) (plaintiff must show injury by reason of use of racketeering income); *Rose v. Bartle*, 871 F.2d 331, 357 (3rd Cir. 1989) (injury must be caused by use or investment and is truly distinct from injury caused by predicate acts); *Grider v. Texas Oil & Gas Corp.*, 868 F.2d 1147, 1150-55 (10th Cir. 1989), *cert. denied*, — U.S. —, 110 S. Ct. 76, 107 L. Ed. 2d. 43 (1989); *Reddy v. Litton Indus., Inc.*, 912 F.2d 291, 295-96 (9th Cir. 1990), *petition for cert. filed*, 60 U.S.L.W. 9999 (U.S. July 15, 1991) (No. 91-95) (*dicta* discussion); *Old Time Enters., Inc. v. International Coffee Corp.*, 862 F.2d 1213, 1219 (5th Cir. 1989) (upholding dismissal of RICO claims because plaintiffs failed to allege injury proximately caused by violations of the statute).

ties of which affect, interstate or foreign commerce."<sup>14</sup> Section 1962(b) requires a "showing of a relationship or nexus between the pattern of racketeering activity and the interest or control obtained."<sup>15</sup> Plaintiffs must also establish "a causal connection between defendant's interest or control and its injuries."<sup>16</sup>

Section 1962(c), the third section, provides in pertinent part:

It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.<sup>17</sup>

To establish a section 1962(c) violation, a plaintiff must prove, *inter alia*, "(1) conduct; (2) of an enterprise; (3) through a pattern; (4) of racketeering activity."<sup>18</sup>

The fourth and final section, section 1962(d), is the "conspiracy" section of RICO. Section 1962(d) provides that "[i]t shall be unlawful for any person to conspire to violate any of the provisions of Subsections (a), (b), or (c) of this section."<sup>19</sup> Section 1962(d) essentially requires an agreement among the defendants to participate in the affairs of the "enterprise" through the commission of two or more predicate acts.<sup>20</sup>

Proof of an "enterprise," a "pattern of racketeering," and the existence of the necessary "person" subject to liability are necessary to establish RICO liability under each of the four section 1962 provisions. The "person" element is simple to establish because the RICO statute defines almost any individual or organization as a "person." For purposes of the RICO statute, a person has been defined as "an individual or legal entity capable of holding a legal or beneficial interest in property."<sup>21</sup>

## B. The Enterprise Element

### 1. Legal Enterprises

The finding of an enterprise is an essential prerequisite to imposing RICO liability. Congress intended the RICO statute to punish, *inter alia*, illegal

14. 18 U.S.C. § 1962(b) (1988).

15. *Cincinnati Gas & Elec. Co. v. General Elec. Co.*, 656 F. Supp. 49, 55 (S.D. Ohio 1986) (citing *United States v. Ladmer*, 429 F. Supp. 1231, 1244 (E.D.N.Y. 1977)).

16. *Litton Indus. Inc. v. Lehman Bros. Kuhn Loeb, Inc.*, 709 F. Supp. 438, 452 (S.D.N.Y. 1989).

17. 18 U.S.C. § 1962(c) (1988).

18. *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 496 (1985).

19. 18 U.S.C. § 1962(d) (1988).

20. *United States v. Elliott*, 571 F.2d 880, 903 (5th Cir. 1978), *cert. denied*, 439 U.S. 953 (1978).

21. LITIGATION SEC. OF THE A.B.A., MODEL JURY INSTRUCTIONS FOR BUSINESS TORT LITIGATION § 5.06 (2d ed. 1988) [hereinafter MODEL JURY INSTRUCTIONS]. Some courts, however, have held that municipalities are not persons even though they are capable of holding a legal or beneficial interest in property. See *Albanese v. City Fed. Sav. & Loan Ass'n*, 710 F. Supp. 563, 568-69 (D.N.J. 1989); see also *Genty v. Resolution Trust Corp.*, 937 F.2d 899, 914 (3d Cir. 1991) (municipalities cannot be held liable for predicate acts of their officers or agents).

activity that operates through formal, legitimate enterprises.<sup>22</sup> This interpretation is supported by the actual language of the RICO statute, which defines "enterprise" as "includ[ing] any individual, partnership, corporation, or association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity."<sup>23</sup>

The statute itself provides for two types of enterprises: "entity" enterprises and "association-in-fact" enterprises. With respect to an "entity" enterprise, a legitimate business fits the description. However, not every business is necessarily an enterprise. For example, "[w]hen the alleged section 1962(c) violator is a legal entity, such as a corporation, this required separation is not established merely by showing that the corporation, through its employees, officers, and/or directors, committed a pattern of predicate acts in the conduct of its own business."<sup>24</sup> Accordingly, the business must be separate and distinct from the actual racketeering acts in order to establish that a business is an enterprise.

Moreover, legitimate entities cannot be both enterprises and defendants under one section of RICO — section 1962(c). "The clear majority [of courts] holds that where a named defendant is also the alleged RICO enterprise, there is an untenable identity of the RICO person and RICO enterprise."<sup>25</sup> In other words, the alleged culpable "person," the RICO defendant, must be distinct from the alleged RICO enterprise under section 1962(c).<sup>26</sup> This distinction recognizes that, in some instances, the enterprise itself may be nothing more than a passive instrument or victim of the alleged racketeering activity.<sup>27</sup> Under the three other RICO sections, sections 1962(a), (b) and (d), identity of defendant and enterprise is permissible.

## 2. Association-in-Fact Enterprises

The second type of enterprise is an "association-in-fact" enterprise. "To establish an association-in-fact enterprise a plaintiff must 'show "evidence of an ongoing organization, formal or informal, and . . . evidence that the various associates function as a continuing unit." ' "<sup>28</sup> Specifically, "[a]n association-in-fact enterprise . . . (1) must have an existence separate and apart

22. *United States v. Turkette*, 452 U.S. 576, 581 (1981); ARTHUR F. MATHEWS, CIVIL RICO LITIGATION 215 (1985). In *Turkette* the Supreme Court also rejected the theory that the enterprise element only encompasses legitimate enterprises. Indeed, illegitimate enterprises are also within the scope of RICO. *Turkette*, 452 U.S. at 581.

23. 18 U.S.C. § 1961(4) (1988).

24. *Old Time Enters., Inc. v. International Coffee Corp.*, 862 F.2d 1213, 1217 (5th Cir. 1989).

25. *Bishop v. B.J.J. Brake Co.*, 632 F. Supp. 10, 11 (E.D. Tex. 1986), *aff'd sub. nom.*, *Bishop v. Corbitt Marine Ways, Inc.*, 802 F.2d 122 (5th Cir. 1986) (dismissal required where defendant and enterprise are same).

26. This argument is not applicable to sections 1962(a), (b), and (d). See *Haroco v. American Nat'l Bank & Trust Co.*, 747 F.2d 384 (7th Cir. 1984), *aff'd*, 473 U.S. 606 (1985).

27. *Bennett v. U.S. Trust Co.*, 770 F.2d 308, 315 (2d Cir. 1985), *cert. denied*, 474 U.S. 1058 (1986). It is important to note that an enterprise may play three other roles distinct from or in addition to its role as victim: perpetrator, instrument and prize. *Prudential Ins. Co. of America v. United States Gypsum*, 711 F. Supp. 1244, 1260 n.5 (D.N.J. 1989) (citing *Rose v. Bartle*, 871 F.2d 331, 358 (3rd Cir. 1989)).

28. *Manax v. McNamara*, 842 F.2d 808, 811 (5th Cir. 1988) (quoting *Atkinson v.*

from the pattern of racketeering,<sup>29</sup> (2) must be an ongoing organization and (3) its members must function as a continuing unit shown by a hierarchial or consensual decision making structure."<sup>30</sup> Courts have concluded that many different types of gatherings of individuals and entities are sufficient to establish an "association-in-fact" enterprise.<sup>31</sup> Essentially, as long as a plaintiff has pleaded these three criteria, a plaintiff has alleged a proper "association-in-fact" enterprise.

Ten years ago, the Supreme Court analyzed in a criminal case the elements for establishing the existence of an "association-in-fact." In *United States v. Turkette*<sup>32</sup> the Supreme Court held that prosecutors must establish, *inter alia*, a distinction between the "association-in-fact" enterprise and the "pattern of racketeering activity" in order to obtain a conviction.<sup>33</sup> In other words, according to the high court, proof of the "pattern" does not necessarily establish proof of an "enterprise." Importantly, although the Supreme Court emphasized that an "enterprise" must be distinct from the "pattern of racketeering activity," "if the individuals associate together to commit several criminal acts, their relationship gains an ongoing nature, coming within the purview of RICO."<sup>34</sup> Thus, despite the Supreme Court's pronouncement, in actual practice, the proof requirements for the "enterprise" and "pattern of racketeering" often coalesce.<sup>35</sup>

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Anadarko Bank & Trust Co., 808 F.2d 438, 440 (5th Cir. 1987), *cert. denied*, 483 U.S. 1032 (1987) (quoting *United States v. Turkette*, 452 U.S. 576, 583 (1981)).

29. Associated individuals cannot be an "enterprise" sufficient to support a RICO claim unless that association actually exists separate and apart from the alleged "pattern of racketeering." *Landry v. Air Line Pilots Ass'n Int'l*, 901 F.2d 404, 433 (5th Cir. 1990) (citing *Delta Truck & Tractor, Inc. v. J.I. Case Co.*, 855 F.2d 241, 243 (5th Cir. 1988), *cert. denied*, 489 U.S. 1079 (1989)); *Montesano v. Seafirst Commercial Corp.*, 818 F.2d 423, 426-27 (5th Cir. 1987) (enterprise must have an existence apart from commission of predicate acts).

30. *Delta Truck*, 855 F.2d at 243 (citing *Manax*, 842 F.2d at 811).

31. *See, e.g.*, *United States v. Young*, 906 F.2d 615, 619 (11th Cir. 1990) (two or three leaders and several core individuals sufficient); *Moravian Dev. Corp. v. Dow Chem. Co.*, 651 F. Supp. 144, 147 (E.D. Pa. 1986) (association of corporate entities sufficient); *Austin v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 570 F. Supp. 667, 668-69 (W.D. Mich. 1983) (broker and two brokerage houses sufficient).

32. 452 U.S. 576 (1981).

33. In order to secure a conviction under RICO, the Government must prove both the existence of an "enterprise" and the connected "pattern of racketeering activity." The enterprise is an entity, for present purposes a group of persons associated together for a common purpose of engaging in a course of conduct. The pattern of racketeering is, on the other hand, a series of criminal acts. . . . The former is proved by evidence of an ongoing organization, formal or informal, and by evidence that the various associates function as a continuing unit. The latter is proved by evidence of the requisite number of acts of racketeering committed by the participants in the enterprise. While 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 remains a separate element which must be proved by the Government.

*Id.* at 583. Even though the Supreme Court addressed this issue in the context of a criminal prosecution, it is nevertheless applicable to civil cases. *See, e.g.*, *Ocean Energy II, Inc., v. Alexander & Alexander, Inc.*, 868 F.2d 740, 748 (5th Cir. 1989); *Manax*, 842 F.2d at 811.

34. *Montesano*, 818 F.2d at 427.

35. *See Moss v. Morgan Stanley, Inc.*, 719 F.2d 521, 522 (2d Cir. 1983), *cert. denied*, 465

### C. The "Pattern of Racketeering Activity" Element

The "pattern of racketeering activity"—a mandatory element for all four of the RICO sections—requires at least two acts which qualify as "racketeering activity." One of the acts must have occurred after the effective date of the RICO chapter, October 15, 1970, and the last one must have occurred within ten years after the commission of a prior act of "racketeering activity."<sup>36</sup> The acts of "racketeering activity" necessary to form a predicate for the "pattern" must be acts that are either chargeable under several generally described state criminal laws or "indictable" under specific federal criminal statutes.<sup>37</sup> To establish a pattern, the predicate acts, in combination, must demonstrate "continuity" or a "threat of continuing harm."<sup>38</sup>

#### 1. Predicate Acts

The pattern element is probably the most difficult element to establish. First, a RICO plaintiff must prove by a preponderance of the evidence<sup>39</sup> at least two predicate acts as described in the previous paragraph. The predicate act requirement obligates a plaintiff to establish an offense within an offense because proof of the underlying acts is essential to establishing a RICO claim. The most commonly employed predicate acts are mail and wire fraud.<sup>40</sup>

The mail fraud statute, 18 U.S.C. § 1341, provides in pertinent part: Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises . . . places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail . . . which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than \$1,000 or imprisoned not more than five years, or both.<sup>41</sup>

To establish that a defendant in question committed mail fraud, a plaintiff must prove by a preponderance of the evidence:

*First:* That each defendant willfully and knowingly devised a scheme or artifice to defraud, or for obtaining money or property by means of false

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U.S. 1025 (1984) (enterprise element satisfied by an alleged association of persons over a period of two years to use confidential information to purchase stock even though the same evidence would have been offered to prove the alleged pattern of racketeering activity consisting of a scheme to carry out securities fraud violations).

36. 18 U.S.C. § 1961(5) (1988).

37. *Id.* § 1961(1).

38. *H.J. Inc. v. Northwestern Bell Tel. Co.*, 492 U.S. 229 (1989).

39. *Fleischauer v. Feltner*, 879 F.2d 1290, 1296 (6th Cir. 1989), *cert. denied*, — U.S. —, 110 S. Ct. 1122, 107 L. Ed. 2d 1029 (1990), *and cert. denied*, — U.S. —, 110 S. Ct. 1473, 108 L. Ed. 2d 611 (1990). For a discussion of the failure to impose a higher standard of proof, *Wilcox v. First Interstate Bank*, 815 F.2d 522, 532-35 (9th Cir. 1987) (Boochever, J. dissenting).

40. Mail and wire fraud are the foundation for liability for most environmental RICO cases. See discussion *infra* notes 80-131 and accompanying text.

41. 18 U.S.C. § 1341 (1988).



pretenses, representations or promises; and *Second*: That each defendant caused the services of the United States Postal Service to be used for the purpose of executing the scheme to defraud.<sup>42</sup>

The wire fraud statute, 18 U.S.C. § 1343, provides in pertinent part:

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures or sounds for the purpose of executing such scheme or artifice shall be fined not more than \$1,000 or imprisoned not more than five years or both.<sup>43</sup>

To establish that a defendant committed wire fraud, a plaintiff must prove by a preponderance of the evidence:

*First*: That each Defendant willfully and knowingly devised a scheme or artifice to defraud, or for obtaining money or property by means of false pretenses, representations or promises; *Second*: That each Defendant or someone associated with the scheme transmitted or caused to be transmitted by wire communication writings or sounds for the purpose of executing the scheme to defraud. *Third*: That the transmission was interstate.<sup>44</sup>

To act with "intent to defraud means to act knowingly and with the specific intent to deceive, ordinarily for the purpose of causing some financial loss to another or bringing about some financial gain to one's self."<sup>45</sup> Negligence or mistake or mismanagement generally do not constitute guilty knowledge or intent to defraud.<sup>46</sup>

The words "scheme" and "artifice" as used in the mail fraud and wire fraud statutes include any plan or course of action intended to defraud others of money or property or to obtain by false or fraudulent pretenses, representations, or promises, money or property from persons so deceived.<sup>47</sup> Indeed, a plaintiff must prove by a preponderance of the evidence all the elements, *inter alia*, of the criminal offense that is the predicate act in order to attempt to meet the RICO proof requirements.

It is important to note that a RICO claim premised on any type of fraud must be pleaded with sufficient particularity so as to satisfy the requirements

42. MODEL JURY INSTRUCTIONS, *supra* note 21 § 5.07[1]; 18 U.S.C. § 1341.

43. 18 U.S.C. § 1341.

44. MODEL JURY INSTRUCTIONS, *supra* note 21 § 507[1]; *see* 18 U.S.C. § 1343; *United States v. Gordon*, 780 F.2d 1165, 1171 (5th Cir. 1986).

45. *See United States v. Fowler*, 735 F.2d 823, 829 n.6 (5th Cir. 1984), *coram nobis granted*, 891 F.2d 1165 (5th Cir. 1990); *Soper v. Simmons Int'l, Ltd.*, 632 F. Supp. 244 (S.D.N.Y. 1986).

46. *United States v. Sheiner*, 273 F. Supp. 977, 982-83 (S.D.N.Y. 1967), *aff'd*, 410 F.2d 337 (2d Cir. 1969), *cert. denied*, 396 U.S. 859 (1969); *see Fowler*, 735 F.2d at 828-29 (inadvertent mailing of envelope through interstate mail system is a good faith defense to federal mail fraud); *Soper v. Simmons Int'l, Ltd.*, 632 F. Supp. 244, 249-50 (S.D.N.Y. 1986) (nonperformance of a contract, without intent to deceive, does not constitute fraud).

47. MODEL JURY INSTRUCTIONS, *supra* note 21 §§ 5.07[2], [4].

of Rule 9(b) of the Federal Rules of Civil Procedure.<sup>48</sup> A properly pleaded complaint must both describe the scheme to defraud and detail how the use of the mails or wires further that scheme.<sup>49</sup> At least one federal district court has held that a plaintiff must "specify the time, place and contents of the alleged mail and wire fraud, the identity of the person making the representation and the consequences of the misrepresentation."<sup>50</sup> Rule 9(b) is thought to protect the RICO defendant because "the concepts within the [RICO] statute are so nebulous that if the cause of action were only generally pled, a defendant would have no effective notice of a claim showing that the pleader is entitled to relief."<sup>51</sup> Accordingly, the RICO plaintiff should beware the pitfalls of Rule 9(b). Likewise, Rule 9(b) provides many RICO defendants with a basis for dismissing a vague RICO complaint.

## 2. Continuity

In addition to establishing predicate acts, a RICO plaintiff must demonstrate a "pattern" of continuing harm. "The term 'pattern' itself requires the showing of a relationship between the predicates [and] 'threat of continuing activity.'"<sup>52</sup> "It is this factor of *continuity plus relationship* which combines to produce a pattern."<sup>53</sup> It is not enough to plead that the alleged racketeering activities are related; "[t]o establish a RICO pattern it must also be shown that the predicates themselves amount to, or that they otherwise constitute a threat of, *continuing* racketeering activity."<sup>54</sup> "Continuity" is both a closed- and open-ended concept, referring either to a closed period of repeated conduct, or to past conduct that by its nature projects into the future with the threat of repetition.<sup>55</sup> In explaining the two different types of continuity, the Supreme Court has noted:

A party alleging a RICO violation may demonstrate continuity over a closed period by proving a series of related predicates extending over a substantial period of time. . . . Often a RICO action will be brought before continuity can be established in this way. In such cases, liability depends on whether the *threat* of continuity is demonstrated.<sup>56</sup>

Courts have found continuity to exist in a variety of fact scenarios. For example, in *Triad Associates, Inc. v. Chicago Housing Authority*,<sup>57</sup> the Sev-

48. FED. R. CIV. P. 9(b). The rule provides in pertinent part as follows: "Fraud, Mistake, Condition of the Mind. In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity."

49. See *Howell Petroleum Corp. v. Weaver*, 780 F.2d 1198, 1198-99 (5th Cir. 1986) (*per curiam*).

50. *Coronet Ins. Co. v. Seyfarth*, 665 F. Supp. 661, 671 (N.D. Ill. 1987); see also *Laterza v. American Broadcasting Co.*, 581 F. Supp. 408, 412 (S.D.N.Y. 1984) (complaint dismissed where factual allegations were "grossly inadequate").

51. *Taylor v. Bear Stearns & Co.*, 572 F. Supp. 667, 682 (N.D. Ga. 1983).

52. *H.J. Inc. v. Northwestern Bell Tel. Co.*, 492 U.S. 229, 239 (1989) (quoting 116 CONG. REC. 18,940 (1970)).

53. *Id.* (emphasis added).

54. *Id.* at 240.

55. *Id.* at 241.

56. *Id.* at 242 (emphasis in original).

57. 892 F.2d 583 (7th Cir. 1989), *cert. denied*, — U.S. —, 111 S. Ct. 129, 112 L. Ed. 2d 97 (1990).

enth Circuit affirmed the dismissal of several RICO counts for failure to allege a pattern. Despite allegations of the defendant's use of the mails for several transactions, the court concluded that Triad had alleged only one type of injury, which is insufficient to establish a RICO violation.<sup>58</sup> Based on these conclusions, the court determined that the "pattern" requirement had not been met and that dismissal was appropriate.<sup>59</sup>

The same court, in *Jones v. Lampe*,<sup>60</sup> upheld the dismissal of a complaint on similar facts. In *Jones*, plaintiffs alleged 120 separate predicate acts — most involving mail fraud — with injury to four victims. The circuit court affirmed dismissal, finding that the facts only truly alleged one general scheme, caused one distinct injury, and threatened no further harm.<sup>61</sup>

Many courts have determined a pattern to exist on less onerous facts. For example, in *Swistock v. Jones*<sup>62</sup> the Third Circuit reversed the district court's dismissal of RICO claims.<sup>63</sup> The court concluded that one perpetrator, two victims, and numerous acts of mail and wire fraud over a period of fourteen months satisfied the closed-ended continuity requirement.<sup>64</sup>

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58. *Id.* at 595.

59. *Id.*

60. 845 F.2d 755 (7th Cir. 1988).

61. *Id.* at 758; see also *Management Computer Servs., Inc. v. Hawkins, Ash, Baphtie & Co.*, 883 F.2d 48, 51 (7th Cir. 1989) (this "is simply not a case that involves long-term criminal conduct or activity that could, in common sense, be called a pattern of racketeering"); *Lane v. Peterson*, 899 F.2d 737, 745 (8th Cir. 1990), *cert. denied*, — U.S. —, 111 S. Ct. 134, 112 L. Ed. 2d 48 (1990) (no allegation that Peterson posed a threat; accordingly, complaint dismissed); *Figueroa Ruiz v. Alegria*, 896 F.2d 645, 648 n.3 (1st Cir. 1990) (no suggestion that defendants had visited any such alleged scheme on other individuals) (*citing* *Roeder v. Alpha Indus., Inc.*, 814 F.2d 22, 31 (1st Cir. 1987)); *Sutherland v. O'Malley*, 882 F.2d 1196, 1205 (7th Cir. 1989) (defendant was isolated offender engaged in one shot effort to inflict single injury and thus no valid RICO claim); *Elliott v. Chicago Motor Club Ins. Co.*, 809 F.2d 347, 350 (7th Cir. 1986) (no pattern where all allegations of fraud related to the settlement of insurance claim arising out of one accident); *Azurite Corp. v. Amster & Co.*, 730 F. Supp. 571, 581 (S.D.N.Y. 1990) ("In light of the brief duration of the alleged scheme, and the failure to plead any threat of ongoing or past activity, the Court finds that plaintiff's RICO claims must be dismissed in their entirety"); *Continental Realty Corp. v. J.C. Penney Co.*, 729 F. Supp. 1452, 1455 (S.D.N.Y. 1990) (mail and wire fraud over one year period fails to show continuity); *Disandro-Smith & Assocs., P.C., v. Edron Copier Serv., Inc.*, 722 F. Supp. 912, 916 (D.R.I. 1989) ("three sales of used copy machines as new . . . do not amount to the 'long-term criminal conduct' that civil RICO is intended to redress"); *Fry v. General Motors Corp.*, 728 F. Supp. 455, 458-59 (E.D. Mich. 1989) (activities were not a way of conducting business, thus continuity requirement not met); *Ferdinand Drexel Inv. Co., v. Alibert*, 723 F. Supp. 313, 331-33 (E.D. Pa. 1989), *aff'd without op.*, 904 F.2d 694 (3d Cir. 1990), *cert. denied*, — U.S. —, 111 S. Ct. 154, 112 L. Ed. 2d 120 (1990) (two mailings, even if assumed to be fraudulent, do not satisfy continuity requirement when directed to one person within a one month period); *Orchard Hills Co-Op. Apts., Inc. v. Germania Fed. Sav. & Loan*, 720 F. Supp. 127, 131 (C.D. Ill. 1989) (no continuity established when there was "only one general scheme . . . one major transaction . . . one actual victim . . . one distinct injury . . . and threatened no repeated harm").

62. 884 F.2d 755 (3rd Cir. 1989).

63. *Id.* at 759.

64. *Id.* at 757-59; see also *United States v. Boylan*, 898 F.2d 230, 249-51 (1st Cir. 1990), *cert. denied*, — U.S. —, 111 S. Ct. 139, 112 L. Ed. 2d 106 (1990) (closed-ended scheme by police officers to receive case payments for rendering "favors" over six years constituted a pattern); *Morley v. Cohen*, 888 F.2d 1006, 1010 (4th Cir. 1989) (mail and wire transmission by one company to defraud two investors over a five year period satisfied closed-ended continuity requirement); *Atlas Pile Driving Co. v. DiCon Fin. Co.*, 886 F.2d 986, 993-95 (8th Cir. 1989) (closed-ended three-year scheme to defraud two sets of residential housing subcontractors

Both the "enterprise" and "pattern" elements are critical to establishing a RICO claim. The failure to prove these elements will defeat a RICO cause of action. However, simply establishing these elements is not sufficient to prove a RICO claim. To illustrate, the conspiracy section of the RICO statute, section 1962(d), requires additional proof: to establish a section 1962(d) violation, some courts require proof of the existence of an agreement among defendants "to participate, directly or indirectly, in the affairs of an enterprise through the commission of two or more predicate crimes."<sup>65</sup> In other words, in addition to proof of the "pattern," "enterprise," and RICO "person," a plaintiff must allege and prove facts which demonstrate that the defendants had an agreement to participate in a "collective venture directed toward a common goal."<sup>66</sup> Still other courts have required a showing that each defendant must have personally agreed to commit two or more predicate acts.<sup>67</sup>

The Circuits are split as to the requirements of section 1962(a). Some courts have ruled that section 1962(a), the "reinvestment" provision of the RICO statute, requires a plaintiff to allege and prove, in addition to the "pattern," "enterprise," and "person" elements, injury by reason of violation of section 1962(a). These courts have concluded that "allegations of reinvestment of the racketeering income back into the racketeering enterprise are insufficient to satisfy the proximate cause requirement of a RICO claim based on section 1962(a)."<sup>68</sup> Pursuant to this standard, the reinvestment of the income — not the racketeering activity — must be the proximate cause of injury.<sup>69</sup>

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based on mail fraud was a pattern); *Richmark Corp. v. Timber Falling Consultants*, 730 F. Supp. 1525, 1533 (D. Or. 1990) (scheme involving the solicitation of kickbacks, one victim and lasting for period of seven months constituted continuity); *Polycast Technology Corp. v. Uniroyal, Inc.*, 728 F. Supp. 926, 948 (S.D.N.Y. 1989), *aff'd*, 129 F.R.D. 621 (S.D.N.Y. 1990) (sale of company by one corporation to another, use of mails and violations of securities laws over an eight month period sufficient for continuity).

65. *See United States v. Elliott*, 571 F.2d 880, 903 (5th Cir. 1978), *cert. denied sub nom.*, *Delph v. United States*, 439 U.S. 953 (1978) (emphasis omitted).

66. *Laterza v. American Broadcasting Co.*, 581 F. Supp. 408, 412-13 (S.D.N.Y. 1984).

67. *Friedman v. Arizona World Nurseries, Ltd.*, 730 F. Supp. 521, 548-49 (S.D.N.Y. 1990), *aff'd*, 927 F.2d 594 (2d Cir. 1991); *but see Banks v. Wolk*, 918 F.2d 418, 421 (3d Cir. 1990) (defendant can be liable under § 1962(d) for simply agreeing to the commission of a pattern); *Casperone v. Landmark Oil & Gas Corp.*, 819 F.2d 112, 115 (5th Cir. 1987) (personal agreement not necessary); *George v. Blue Diamond Petroleum, Inc.*, 718 F. Supp. 539, 550 (W.D. La. 1989), *aff'd*, 922 F.2d 838 (5th Cir. 1990) (defendants who were aware of but did not personally commit predicate acts of mail fraud liable under RICO).

68. *Grove Fresh Distrib., Inc. v. Flavor Fresh Foods, Inc.*, 720 F. Supp. 714, 717 (N.D. Ill. 1989) (citing *Palumbo v. I.M. Simon & Co.*, 701 F. Supp. 1407, 1411 (N.D. Ill. 1988)).

69. *Id.*; *see also Brittingham v. Mobil Corp.*, No. 90-1989, 1991 U.S. App. LEXIS 19460, at \*17 (3d Cir. Aug. 23, 1991); *Craighead v. E.F. Hutton & Co.*, 899 F.2d 485, 494 (6th Cir. 1990) (plaintiffs' § 1962(a) claim failed because "they have not alleged injuries stemming directly from defendants' alleged use or investment. . . . Unlike section 1962(c), subsection (a) requires such a separate and traceable injury, and plaintiffs have alleged only injuries traceable to the alleged predicate acts."); *Ouaknine v. MacFarlane*, 897 F.2d 75, 82-83 (2d Cir. 1990), (plaintiff must show injury by reason or use of racketeering income); *Reddy v. Litton Indus., Inc.*, 912 F.2d 291, 296 (9th Cir. 1990), *petition for cert. filed*, 60 U.S.L.W. 9999 (U.S. July 15, 1991) (No. 91-95) (plaintiff failed to plead or allege injury from use or investment of racketeering income); *Rose v. Bartle*, 871 F.2d 331, 357 (3d Cir. 1989) (injury must be caused by use or investment truly distinct from predicate acts); *Grider v. Texas Oil & Gas Corp.*, 868 F.2d

Other courts have approached section 1962(a) somewhat differently. According to these courts, the only causation requirement for section 1962(a) is injury from the pattern of racketeering activity itself. Assessing the elevated causation standard, these courts have concluded that nothing in the "by reason of" language limits a plaintiff's right of recovery to damages solely sustained by use or investment of the income or enterprise.<sup>70</sup> At least one district court has noted that employing the "use or investment" rule would make it impossible to prove a violation of section 1962(a) under any circumstances:

the "use or investment" of funds gotten from racketeering activity is never measurable or traceable in a situation like that presently before me, i.e. where the defendant acquires cash by racketeering and invests the cash in itself. Because it is not traceable, no causal connection between the use or investment of ill gotten cash and an injury to the plaintiff is provable. The defendant argues that this lack of proof should defeat the plaintiff's cause of action, even though § 1962(a) is the plaintiff's only recourse against a single corporate defendant who commits a pattern of racketeering activity against a plaintiff without infiltrating the plaintiff's enterprise.

I disagree with the defendant's view because I believe the statute contemplates that corporations should be held liable for the damages provided by 18 U.S.C. § 1964(c) when they are the perpetrators or central figures in a RICO violation.<sup>71</sup>

This position is supported by the language of the Supreme Court in *Sedima*:

Section 1962 in turn makes it unlawful for "any person" — not just mobsters — to use money derived from a pattern of racketeering activity to invest in an enterprise, to acquire control of an enterprise through a pattern of racketeering activity, or to conduct an enterprise through a pattern of racketeering activity . . . . If the defendant engages in a pattern of racketeering activity in a manner forbidden by these provisions, and the racketeering activities injure the plaintiff in his business, or property, the plaintiff has a claim under § 1964(c). There is no room in the statutory language for an additional, amorphous "racketeering injury" requirement.<sup>72</sup>

Based on this authority, a RICO plaintiff need only allege and prove that money derived from the pattern of racketeering activity was reused or reinvested in the enterprise. Despite the fact that at least one court has con-

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1147, 1150-55 (10th Cir. 1989), *cert. denied*, — U.S. —, 110 S. Ct. 76, 107 L. Ed. 2d 43 (1989) (upholding dismissal of RICO claims based on plaintiff's failure to allege any facts showing injury from the use and investment of racketeering income); *Old Time Enters. Inc. v. International Coffee Corp.*, 862 F.2d 1213, 1219 (5th Cir. 1989) (upholding dismissal of plaintiffs' RICO claims under subsections (a), (b), (c), and (d) because, *inter alia*, plaintiffs failed to allege injury proximately caused by violations of these subsections).

70. See *Busby v. Crown Supply, Inc.*, 896 F.2d 833, 837 (4th Cir. 1990).

71. *Louisiana Power & Light Co. v. United Gas Pipe Line Co.*, 642 F. Supp. 781, 806-07 (E.D. La. 1986).

72. *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 495 (1985) (footnote omitted); see also *American Nat'l Bank & Trust Co. v. Haroco, Inc.*, 473 U.S. 606, 609 (1985) (rejecting submission that the injury must flow not from predicate acts but from the fact that they were performed as part of the conduct of the enterprises).

cluded that the additional causation requirement would make it impossible to prove a violation of section 1962(a),<sup>73</sup> in reality the omission of the additional causation requirement will essentially result in a finding of injury under section 1962(a) whenever there is a finding of liability under section 1962(c). Indeed, once it is established that a defendant acquired or maintained an interest or control in an enterprise through a pattern of racketeering activity, it is relatively simple to prove that the defendant reinvested at least some money back into that enterprise.

Regardless whether section 1962(a) imposes an additional causation requirement, all sections of RICO have their own discrete elements of proof and all have overlapping criteria in the "enterprise," "pattern," and "person" requirements. These multiple requirements make liability difficult to establish under the RICO statute. Yet, due to the lure of treble damages and attorneys' fees, many aggrieved parties will make such an attempt.

#### D. Amendments to the RICO Statute

It is important to note that the RICO statute may not remain in its current incarnation for long because Congress is currently considering legislation that would amend civil RICO.<sup>74</sup> Introduced by Representative William J. Hughes of New Jersey, the RICO Amendments Act of 1991 cleared the House Judiciary Subcommittee on Intellectual Property and Judicial Administration on May 2, 1991.<sup>75</sup> The proposed legislation is known as "a judicial gatekeeper" provision because it screens out civil RICO actions which are not based on so-called "egregious criminal conduct."<sup>76</sup> Apparently, the Subcommittee was addressing concerns from the bar and judiciary of pleading inflation. One court described the litigious climate and the overuse of the RICO statute:

Since civil practitioners discovered the RICO statute some ten years ago, it seems that the lure of transforming a simple, single damage contract claim into a treble damage RICO claim has proved irresistible. To sketch what is becoming more frequent is to begin to understand the dangers of abusing the RICO weapon. Even if one ignores the *in terrorem* effect of spurious treble damage suits, the danger of protracted and extraordinarily expensive discovery engendered by civil RICO claims is all too real.<sup>77</sup>

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73. See *Louisiana Power & Light*, 642 F. Supp. at 806-07.

74. This is not the first time that Congress has proposed an amendment to the RICO statute. On October 7, 1987, the House passed H. R. 5445, a RICO reform bill introduced by Congressman Rick Boucher, by a vote of 371-28. H.R. 5445, 99th Cong., 2d Sess. (1986). Senators Metzenbaum and Bumpers attempted to add the House-passed bill to an appropriations bill. The attempt was tabled by the Senate by a vote of 47-44. In the 100th Congress Senator Metzenbaum introduced S. 1523. S. 1523 was favorably reported by the Committee on May 24, 1988, but efforts to bring the bill to the Senate floor were unsuccessful. In the 101st Congress, S. 438 was introduced by Senators DeConcini, Hatch, Symms, and Heflin. The Committee discussed but did not act on S. 438.

75. H.R. 1717, 102d Cong., 1st Sess. (1991).

76. *RICO Judicial Gatekeeper Bill Cleared by House Subcommittee*, [New Developments] RICO Bus. Disp. Guide (CCH), at 5051 (May 10, 1991) [hereinafter *RICO Developments*].

77. *PMC, Inc. v. Ferro Corp.*, 131 F.R.D. 184, 187 (C.D. Cal. 1990).

If enacted, the new bill would define the egregious conduct required for a civil suit as "a pattern of criminal conduct which was an integral part of ongoing racketeering activities and which was characterized by a combination of aggravating circumstances that renders the defendant's conduct more reprehensible than the minimum conduct necessary to sustain a violation" of the RICO statute.<sup>78</sup> In addition, a court would be required to dismiss claims

that fail to satisfy all three of the following criteria: (1)(a) the defendant was previously convicted of a RICO violation or a predicate act based on the conduct from which the claim arises or (b) the remedy is appropriate because of the magnitude or significance of the injury attributed to the defendant's conduct; (2) the defendant was a major participant in the criminal conduct responsible for the injury; and (3) the remedy is needed to deter future egregious criminal conduct by the defendant or others similarly situated.<sup>79</sup>

A close examination of this language reveals that this amendment might not deter spurious RICO complaints. Indeed, the three new criteria are simple to allege, even if difficult to prove. A RICO plaintiff can easily allege that treble damages are appropriate due to the alleged injury sustained, that the RICO defendant or person was a major player in the criminal conduct, and that without the remedy, violations would continue to occur. The last two criteria are simply part and parcel of the case law that has already evolved around the RICO statute. For example, pursuant to established case law, the criminal acts constituting the predicate acts "must be conducted by the defendant, and not by some other participant in the alleged enterprise, in order to show a pattern of racketeering activity" against that defendant.<sup>80</sup> Thus, the requirement that a RICO defendant be the major participant is already part of the law, even if not part of the statute. Similarly, because a plaintiff is currently required to allege and to prove, at a minimum, the threat of future or continued conduct pursuant to the Supreme Court's decision in *H.J. Inc.*,<sup>81</sup> the third proposed criteria of demonstrating the need for deterrence of future conduct, is not new. Accordingly, this new legislation does not threaten to carry much bite in the general civil context and will likely not deter a potential plaintiff seeking to bring a RICO action predicated on environmental wrongdoings.

### III. THE USE OF RICO TO PROSECUTE ENVIRONMENTAL VIOLATIONS

Formerly viewed only as a means of eradicating organized crime, the RICO statute with all its intricacies is now used as a means of prosecuting

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78. *RICO Developments*, *supra* note 76, at 1-2.

79. *Id.* at 2.

80. *Hutchinson v. Wickes Co.*, 726 F. Supp. 1315, 1320 (N.D. Ga. 1989) (citing *United States v. Peacock*, 654 F.2d 339 (5th Cir. 1981), *vacated in part on other grounds*, 686 F.2d 356 (5th Cir. 1982), *cert. denied*, 464 U.S. 965 (1983)); *United States v. Cauble*, 706 F.2d 1322, 1331-32 (5th Cir. 1983), *cert. denied*, 465 U.S. 1005 (1984) (defendant must have committed the racketeering acts); *but see George v. Blue Diamond Petroleum, Inc.*, 718 F. Supp. 539, 550 (W.D. La. 1989), *aff'd*, 922 F.2d 838 (5th Cir. 1990) (defendants who were aware of but did not personally commit predicate acts of mail fraud liable under RICO).

81. 492 U.S. 229 (1989); *see supra* text accompanying note 52.

the environmental offender. That environmental offenses are not predicate acts has in no way interfered with the prosecution of environmental offenses utilizing the RICO statute. In the environmental context, prosecutors and private civil litigants have found that the mail and wire fraud statutes serve sufficiently as predicate acts.

One case in which RICO was employed to prosecute environmental crimes is *United States v. Paccione*.<sup>82</sup> The defendants were charged with the operation of an illegal landfill and the illegal transferring, storage, and disposing of medical and infectious waste. Defendants moved to dismiss the indictment because "environmental crimes are not found in the statutory list of offenses that can constitute predicate racketeering activity under the RICO statute."<sup>83</sup> They urged that by charging environmental crimes as RICO offenses, "the government [was] circumvent[ing] the express limitation of RICO by characterizing defendants' alleged environmental misconduct as mail or wire fraud."<sup>84</sup> The court rejected the argument, concluding that "[t]he allegations of mail and wire fraud [were] not invalidated as predicate acts because the alleged enterprise is accused of violations of environmental laws as well."<sup>85</sup> The court reasoned that as long as mail and wire fraud were properly alleged, mail and wire fraud may be predicate acts even when "the enterprise is alleged to have engaged in violations of regulatory schemes which do not constitute racketeering activity on their own."<sup>86</sup>

Defendants also sought to dismiss the RICO charges by arguing that they should not be punished under the RICO statute when other regulatory schemes — in this case, the environmental statutes — provided adequate punishments in the event that defendants were found guilty. Not surprisingly, the court rejected this argument as well, stating that "contrary to defendants' contention, the existence of environmental regulatory schemes, including criminal penalties, does not somehow 'preempt' the use of properly stated allegations of mail fraud as racketeering activity in charging a violation of RICO because violations of that environmental regulatory scheme are also implicated."<sup>87</sup> The court concluded that despite the fact that a defendant may be charged with environmental crimes, mail and wire fraud had been properly alleged.<sup>88</sup> Thus, the court clearly found that environmentally related offenses may go hand-in-hand with RICO charges.<sup>89</sup> In so holding, the court rejected the defendants' arguments that a RICO charge for an environmental crime pushed RICO beyond its outer limits.<sup>90</sup>

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82. 738 F. Supp. 691 (S.D.N.Y. 1990). While *Paccione* is a criminal RICO case, its reasoning is instructive for the civil practitioner as well.

83. *Id.* at 699.

84. *Id.*

85. *Id.*

86. *Id.*

87. 738 F. Supp. at 699.

88. *Id.* Of course, numerous other offenses may be considered predicate acts. See 18 U.S.C. § 1961(1) (1988).

89. 738 F. Supp. at 699.

90. *Id.*



In *Standard Equipment, Inc. v. Boeing*<sup>91</sup> the defendants did not question the propriety of employing RICO for prosecuting an environmental offense, but instead argued that the RICO requirements had not been properly alleged. The defendants in *Boeing* were generators and transporters of waste deposited in a site owned by Western Processing. The plaintiff, Standard Equipment, Inc., was a company engaged in the construction, mining, and development business. It alleged that hazardous waste was improperly stored at the site: "Plaintiff's basic allegation [was] that improperly stored hazardous waste from the Western Processing site . . . migrated through the soil and contaminated [p]laintiff's property."<sup>92</sup> Simply stated, plaintiff alleged a classic environmental tort scenario in the form of a RICO claim.

The plaintiff alleged four federal causes of action and eleven pendent state claims. Three of the federal claims were brought under the RICO statute, and the fourth was brought pursuant to the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA).<sup>93</sup>

In its first RICO claim, the plaintiff alleged that all of the RICO defendants were "an 'enterprise' which engaged in a fraudulent scheme to dump rather than recycle waste at Western's site and to 'cover up' their illegal activity."<sup>94</sup> The plaintiff further alleged that the RICO defendants had actual knowledge of Western's improper and illegal procedures, or at a minimum, constructive knowledge of their illegal activity based upon Western's deflated prices which could only be due to its failure to comply with costly regulations. In order to allege its predicate acts, the plaintiff argued that defendants either knew about ten identified false mail and wire communications or should have known that these communications were made in furtherance of a deceptive scheme.

For its second claim, the plaintiff alleged that only two of the defendants were RICO enterprises and that the RICO defendants who were generators and transporters of waste aided and abetted the enterprise by "sending Western waste and thus enabling it to carry out its disposal business in an economical fashion."<sup>95</sup> The plaintiff once again alleged mail and wire fraud, contending that the RICO defendants should have known about the mail and wire fraud scheme. For the third RICO claim, the plaintiff alleged a conspiracy between and among the RICO defendants to violate 18 U.S.C. § 1962(c) in violation of § 1962(d).

The defendants filed a motion to dismiss based on numerous grounds, the first of which was procedural. The court concluded that the plaintiff had met the particularity requirements of Federal Rule of Civil Procedure 9(b) because the complaint gave sufficient detail to allow the defendants to answer.<sup>96</sup> As the second basis for motion to dismiss, the defendants urged that the plaintiff failed to claim that the alleged acts caused its injury. The court

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91. 23 Env't Rep. Cas. (BNA) 2112 (W.D. Wash. 1985).

92. *Id.* at 2115.

93. 42 U.S.C. §§ 9601-75 (1988).

94. 23 Env't Rep. Case (BNA) at 2115.

95. *Id.* at 2115-16.

96. *Id.* at 2116.

rejected this argument.<sup>97</sup> Citing *Haroco, Inc. v. American National Bank & Trust Co.*,<sup>98</sup> the court ruled that a RICO plaintiff needed only to allege that it was proximately injured by the RICO enterprise's racketeering activity, regardless of the context in order to overcome a motion to dismiss.<sup>99</sup> In the instant case, the court concluded that plaintiff's allegation of property and business injury as a result of wrongful waste disposal was sufficient.<sup>100</sup>

Although the court rejected defendant's arguments as to Rule 9(b) and causation, the court ultimately granted the motion to dismiss with respect to one of plaintiff's three RICO claims and the CERCLA claim.<sup>101</sup> As for the RICO claim, the court concluded that Count 2 was "devoid of any allegation that [d]efendant 'participated' in any fraudulent scheme."<sup>102</sup> Indeed, plaintiff had only "allege[d] that [d]efendants 'acted with knowledge' of the fraudulent scheme."<sup>103</sup> The court concluded that "[e]ven according to [p]laintiff's own authority . . . in order to be liable for the predicate acts of mail fraud, [d]efendant must have been a *participant* in the fraudulent scheme."<sup>104</sup> The CERCLA claim was dismissed because the plaintiff had not incurred any actual clean up costs.<sup>105</sup> The defendants filed additional motions to dismiss, which the court denied.<sup>106</sup>

As in *Boeing*, the defendants in *Brittingham v. Mobil Corp.*<sup>107</sup> did not claim that RICO was improper in the environmental context. Instead, they claimed that the RICO pleading requirements had not been met. Both the district court and the court of appeals agreed.<sup>108</sup> Defendant Mobil Chemical Company produced Hefty "degradable" bags. The product packaging contained the following statement: "New Hefty Degradable Trash Bags contain a special ingredient that promotes their breakdown after exposure to elements like sun, wind and rain. This ingredient promotes degradation without harming the environment."<sup>109</sup> Plaintiffs were individual consumers who bought Hefty bags, but claimed that the packaging statement was false because the bags cannot degrade in a modern landfill. They filed suit under RICO — specifically, sections 1962(a) and (c) — based on the false and misleading packaging.

The court focused on the enterprise element as a basis for affirming dis-

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97. *Id.* at 2117.

98. 747 F.2d 384 (7th Cir. 1984).

99. *Standard Equipment*, 23 Env't Rep. Cas. (BNA) at 2117.

100. *Id.*

101. *Id.* at 2116.

102. *Id.* at 2119.

103. *Id.*

104. *Standard Equipment*, 23 Env't Rep. Cas. (BNA) at 2119-2120 (emphasis in original). Plaintiff reasserted this dismissed RICO count, having corrected the pleading defects. The court permitted leave to amend the pleadings on April 3, 1986; see also *supra* note 80 and accompanying text.

105. *Id.* at 2120.

106. See *Standard Equipment, Inc. v. Boeing*, No. C 84-11290D (W.D. Wash. Oct. 3, 1986).

107. No. 90-1989, 1991 U.S. App. LEXIS 19460 (3d Cir. Aug. 23, 1991).

108. *Id.* at \*1.

109. *Id.*

dismissal of plaintiffs' section 1962(c) claim. The court concluded that because plaintiffs alleged that Mobil Corporation and Mobil Chemical were both RICO "persons" and "enterprises," plaintiffs had not properly alleged a violation of section 1962(c).<sup>110</sup> The court held that "a 1962(c) enterprise must be more than an association of individuals or entities conducting the normal affairs of a defendant corporation."<sup>111</sup>

The Mobil court also affirmed the dismissal of plaintiffs' section 1962(a) claims.<sup>112</sup> The court concluded that plaintiffs' section 1962(a) allegations — that they paid higher prices and that they failed to receive the goods that they bargained for — were simply not sufficient to state a claim under the "use or investment" section of RICO.<sup>113</sup>

Although the court affirmed dismissal of the RICO claims, it opined that plaintiffs may have had a valid RICO claim if they had sued individual defendants under Section 1962(c).<sup>114</sup> In other words, the Third Circuit expressed its acceptance of the use of RICO in the environmental context, as long as the strict pleading requirements of the RICO statute are met.

Another case employing the RICO statute in an attempt to impose liability for an environmental offense is *Prudential Insurance Co. of America v. United States Gypsum*.<sup>115</sup> Plaintiff had an ownership interest in a number of commercial office buildings, hotels, and residential rental properties located in various states which had been constructed and/or maintained with asbestos-containing products that defendants allegedly manufactured, processed, marketed, distributed, supplied, and/or sold. Because of the purported health dangers associated with asbestos, plaintiffs apparently instituted an inspection, monitoring, maintenance, and abatement program with respect to certain buildings. The procedure was to determine the asbestos-containing materials present, the extent of the contamination, and the remedial measures necessary to remove, enclose, or encapsulate the materials. Plaintiffs brought suit seeking reimbursement for the costs of these programs and for damage that had or could occur from the presence of the asbestos-containing products in their building.

Plaintiffs originally brought their suit under CERCLA, but the court rejected plaintiff's argument that the defendant incurred CERCLA liability.<sup>116</sup> The Court concluded that no factual allegations existed to support a claim that there had been a "disposal" as defined under CERCLA.<sup>117</sup> Although plaintiff's CERCLA claims were dismissed, plaintiffs had pending a motion for leave to amend which included, *inter alia*, a RICO count. The defendants objected to the motion for leave, contending that plaintiff's RICO claim failed to state a claim upon which relief could be granted. Specifically, de-

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110. *Id.*; see also *supra* note 25 and accompanying text.

111. *Id.* at \*8.

112. 1991 U.S. App. LEXIS 19460 at \*20.

113. *Id.* at \*17.

114. *Id.* at \*21.

115. 711 F. Supp. 1244 (D.N.J. 1989).

116. *Id.* at 1255.

117. *Id.*

fendants argued that plaintiffs made conclusory allegations that defendants engaged in unidentified acts of fraud and that plaintiffs failed to set forth a time, place, or identity of the speakers or recipients of the fraudulent representations. The defendants also urged that most of the wrongful acts alleged were not acts of racketeering as defined by the RICO statute, including allegations of misrepresentations without any assertion that the mails or wires had been used in connection with the misrepresentation.<sup>118</sup> The defendants also specifically objected to each of the section 1962(a), (c), and (d) claims for failure to meet the pleading requirements.

In assessing whether to grant leave to amend, the court noted that "Rule 15(a) reflects a general presumption in favor of allowing a party to amend its pleadings."<sup>119</sup> In addition, the court noted that the Third Circuit, in keeping with Congressional intent, has a policy of liberally construing RICO to effectuate its remedial purpose.<sup>120</sup>

Taking its mandate from the Third Circuit to resist the temptation to restrict civil RICO,<sup>121</sup> the court analyzed plaintiff's proposed amendment to determine whether plaintiffs had properly alleged a RICO offense. The court found that plaintiffs alleged that from the 1950's to the 1980's "defendants made representations in advertisements, sales literature, and trade publications that the asbestos-containing products were safe, nontoxic, fully tested, suitable for commercial buildings and desirable."<sup>122</sup> The court found that plaintiffs further alleged that "defendants made these representations, despite their knowledge of the falsity and having fraudulently concealed the truth about the dangerous nature of the product, with an intent to induce purchasers to buy the product."<sup>123</sup> The court also found that plaintiffs alleged reliance on the representations and that they were damaged by the representations.<sup>124</sup> Because plaintiffs alleged that defendants conducted an enterprise through a pattern of racketeering activity, the court found that they had properly alleged another element of their claim.<sup>125</sup> Having concluded that plaintiffs presented a properly pleaded civil RICO claim, the court granted their motion for leave to amend their complaint.<sup>126</sup> By granting the motion for leave to amend, the court affirmed the use of RICO in the environmental context.

In *Bernfield v. Chester Valley Disposal Co.*<sup>127</sup> the court did not specifically address the issue whether RICO claims could be asserted in an environmental context, although, like the *United States Gypsum*<sup>128</sup> court, it implicitly

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118. *Id.* at 1257.

119. *Id.* at 1259. (citing cases).

120. 711 F. Supp. at 1259 (citing *Keystone Ins. Co. v. Houghton*, 863 F.2d 1125, 1128 (3d Cir. 1988)).

121. *Id.*

122. *Id.* at 1263.

123. *Id.*

124. *Id.*

125. 711 F. Supp. at 1262.

126. *Id.* at 1264.

127. CIV. A. 87-1373, 1988 WL 25283 (E.D. Pa. Mar. 15, 1988).

128. 711 F. Supp. 1244 (D.N.J. 1989).

made such a finding by allowing the plaintiff to amend its complaint to include RICO claims. Plaintiff, an environmental broker, brought suit against defendants, a trash hauling firm and its principal, alleging violations of the RICO statute and various pendent state claims. Defendant moved to dismiss the RICO claims or in the alternative for more definite statement. The court concluded that plaintiff had not properly pleaded a RICO cause of action but granted plaintiff leave to amend its complaint in order to cure the deficiencies.<sup>129</sup> The court in essence permitted RICO claims to be asserted in an action involving largely environmental concerns.<sup>130</sup>

The district court in New Jersey considered another RICO/environmental action in *Albanese v. City Federal Savings and Loan Ass'n*.<sup>131</sup> Plaintiffs, who were homeowners, purchased property near a municipally owned landfill. They filed suit against the township owning the landfill and other parties based on alleged fraud in inducing their purchases. They charged that the township and the other defendants knew that the landfill presented a health hazard but nonetheless sanctioned and facilitated the development of residential housing in its vicinity. Plaintiffs argued that the township engaged in a pattern of racketeering activity by fraudulently facilitating development and by covering up the hazard presented by the landfill.

The township moved the court for summary judgment, contending that a municipality cannot violate RICO. The court agreed.<sup>132</sup> Quoting *In re CitiSource, Inc. Securities Litigation*,<sup>133</sup> the court reasoned that "[t]he issue of intent is the Achilles' heel of the plaintiff seeking to impose RICO liability upon a municipal corporation under 18 U.S.C. § 1962(c). Unlike an ordinary corporation, a municipal corporation is incapable of the criminal intent necessary to support the alleged predicate offenses."<sup>134</sup> Although the court dismissed the township, holding that it was not a RICO person,<sup>135</sup> the court said nothing of the propriety of the RICO claims in the environmental context as against the other parties.

In a related case, *Genty v. Resolution Trust Corp.*,<sup>136</sup> the Third Circuit affirmed that municipalities cannot be held liable for the predicate acts of their officers or agents. The plaintiffs in *Genty*, like the *Albanese* plaintiffs, complained that "the defendants failed to warn [them] about known dangers associated with living near [an] allegedly toxic landfill"<sup>137</sup> and that city officials fraudulently assured them that the landfill was innocuous. They filed suit pursuant to the RICO statute.

In order to determine whether to hold the municipality liable pursuant to RICO, the court reviewed, *inter alia*, the mandatory treble damage provision

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129. *Bernfield*, 1988 WL 25283 at \*4.

130. *Id.*

131. 710 F. Supp. 563 (D.N.J. 1989).

132. *Id.* at 569.

133. 694 F. Supp. 1069, 1079 (S.D.N.Y. 1988).

134. *Albanese*, 710 F. Supp. at 565.

135. *Id.* at 569.

136. 937 F.2d 899 (3d Cir. 1991).

137. *Id.* at 904.

of RICO<sup>138</sup> — which, it found, provides for a remedy “far in excess of an amount necessary to compensate an injured RICO victim”<sup>139</sup> — and concluded that RICO damages are punitive in nature.<sup>140</sup> The court also analyzed Supreme Court cases prohibiting punitive damages against municipalities “unless a statute expressly provides such damages against municipalities.”<sup>141</sup> Because RICO does not explicitly state that municipalities will be liable for treble damages, the court concluded that to impose RICO liability would be contrary to Supreme Court authority.<sup>142</sup>

Even more compelling than its holding regarding municipalities is the *Genty* court’s conclusion regarding recovery under RICO for injuries, illness and economic harm resulting from proximity to the dump. The court held that plaintiffs simply could not recover under RICO for these types of harms because “RICO provides for recovery only for ‘any person injured in his business or property.’”<sup>143</sup> Because the language of the RICO statute does not contemplate physical or mental harm to a person, the court determined that plaintiffs could not recover for harmful exposure to toxic waste.<sup>144</sup> Thus, without harm to property or business, there will be no recovery under RICO for environmental injuries. Personal injury resulting from environmental wrongdoings is simply not compensable under the RICO statute.

In *PMC, Inc. v. Ferro Corp.*<sup>145</sup> the court, while clearly dismayed by the number and scope of civil RICO claims in general, did not criticize the use of RICO in connection with an alleged environmental offense. The action arose from an asset purchase agreement between PMC and Ferro. PMC alleged that Ferro misrepresented material information relating to PMC’s purchase of the assets of a chemical plant in California. The suit had thirteen claims for relief, including one claim brought under CERCLA and two based on the RICO statute. As the basis for its racketeering claims, PMC alleged, *inter alia*, that Ferro used the mails and wires for the specific purpose of avoiding “its lawful responsibilities in terms of environmental matters.”<sup>146</sup> While the issue before the court was a discovery matter and while the court strongly suggested that PMC might not be able to withstand a motion for summary judgment on the RICO claim,<sup>147</sup> the court did not comment that RICO was impermissible in the environmental context.

These cases simply underscore the trend to prosecute environmental wrongdoers with every weapon available. Although not always successful, creative plaintiffs can attempt to turn a CERCLA violation into a quasi-

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138. 18 U.S.C. § 1964(c) (1988).

139. 937 F.2d at 910 (citing cases).

140. *Id.*; see also *supra* note 9.

141. 937 F.2d at 910.

142. *Id.* at 914.

143. *Id.* at 918.

144. *Id.* at 918-19.

145. 131 F.R.D. 184 (C.D. Cal. 1990).

146. *Id.* at 186.

147. The court suggested that PMC would not be able to prove a violation of RICO because the court denied PMC discovery which PMC claimed it needed to establish the “continuity” element. *Id.* at 188.

criminal act of racketeering. The trend to seek and employ more potent prosecutorial weapons cannot be ignored.

#### IV. CONCLUSION

Although the RICO statute has been on the books for more than twenty years, it has only been discovered by plaintiffs in the last ten. The use of RICO in an environmental context has only recently gained momentum. Because plaintiffs will forever search for different and more effective ways to prosecute environmental offenses, the RICO statute will continue to be employed in tandem with the more conventional environmental statutes.

As society continues to focus on maintaining the integrity of the environment, aggrieved parties will search for the most powerful remedial tools available to compensate for an environmental harm. In the civil context, the recovery of treble damages provides for greater relief than many, if not all, of the environmental statutes. Particularly when used in combination with an environmental statute, RICO provides a very effective remedy.<sup>148</sup>

Despite its complexity, RICO has gained notoriety as an effective prosecutorial weapon. Those plaintiffs lured by the big bucks of treble damages are willing to accept its complexities. Environmental violators can take no comfort from the fact that RICO is not specifically aimed at environmental wrongdoings. Seemingly an all purpose prosecutorial device, RICO has emerged as a new weapon in the environmentalist's arsenal.

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148. For example, the Clean Water Act provides only for injunctive relief. See 33 U.S.C. § 1365(a)(2) (1988) ("[t]he district courts shall have jurisdiction . . . to enforce . . . an effluent standard or limitation"). Thus, using RICO along with the citizens suit provision of the Clean Water Act provides the potent combination of both a legal and an equitable remedy.