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## Moving to Dismiss a Civil RICO Action

David J. Howard

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# MOVING TO DISMISS A CIVIL RICO ACTION

DAVIS J. HOWARD\*

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## I. INTRODUCTION

The use and abuse of the Racketeer Influenced and Corrupt Organizations Act ("RICO")<sup>1</sup> has troubled judges and lawyers for some time while providing fertile ground for commentators. The plethora of RICO cases is equalled only by the tremendous proliferation of commentary. This Article, while admittedly contributing to this proliferation, is excusable, however, because its purpose is to facilitate summary disposition of RICO claims by providing a practical guide to achieving early dismissal under Rules 12(b)(6) and 56 of the Federal Rules of Civil Procedure.<sup>2</sup>

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<sup>1</sup> Pub. L. No. 91-452, tit. IX, § 901(a), 84 Stat. 941-944 (1970), codified at 18 U.S.C. §§ 1961-1968 (1984).

<sup>2</sup> Citation to the Federal Rules of Civil Procedure suggests that the action will be in federal court. While this will be true in mosts cases, a number of courts have held that state courts have concurrent jurisdiction over RICO claims. See Knox, *Jurisdiction and Civil RICO*, 22 TORR & INS. L.J. 457 (1987), and cases cited therein. Moreover, a number of states have enacted their own anti-racketeering statutes that are modeled after RICO and construed *in pari materia*. Martinez & Richards, *CCA-RICO: Reflections On A Sleeper*, 16 RUTGERS L.J. 655 (1985); Kredietbank, N.V. v. Joyce Morris, Inc., No. 84-1903, slip op. at 8-9

## II. THE "PATTERN" OF RACKETEERING ACTIVITY

RICO provides for an award of treble damages to "[a]ny person injured in his business or property by reason of a violation of Section 1962" of the statute.<sup>3</sup> Section 1962 defines prohibited activities with reference to conduct that constitutes a "pattern of racketeering activity." The statute provides that a pattern requires "at least two acts of racketeering activity,"<sup>4</sup> and enumerates a variety of federal and state offenses that qualify as racketeering predicates.<sup>5</sup> That no RICO claim can survive in the absence of a "pattern" of racketeering activity has never been in dispute.<sup>6</sup> The same cannot be said for precisely what it is that constitutes such a "pattern."

Until mid-1985, the prevailing view was that any two or more predicate acts would satisfy RICO's "pattern" requirement.<sup>7</sup> This view has been almost completely superseded by the United States Supreme Court's decision in *Sedima, S.P.R.L. v. Imrex Co.*<sup>8</sup> The Supreme Court rejected the notion that a RICO plaintiff must either plead a competitive injury or plead that the defendant was previously convicted of the predicate offenses. The Court held that there was no indication that Congress intended to erect such barriers, suggesting instead that RICO overuse be curbed by construing the term "pattern" as requiring both continuity and relationship between and among predicate acts.<sup>9</sup> The Court deemed this appropriate because the legislative history revealed that this was how Congress intended the term "pattern" to be interpreted. In the two years since *Sedima*, courts throughout the nation have increasingly dismissed RICO complaints for failure to plead a "pattern" of racketeering activity; however, the definition of that term remains unsettled.

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n.2 (D.N.J. Jan. 9, 1986)(WESTLAW, DCT database), *aff'd without op.*, 808 F.2d 1516 (3d Cir. 1986). The grounds for dismissal discussed in this Article are for the most part equally applicable to claims asserted under these state anti-racketeering statutes—with the length of the statute of limitations being an exception—though the proper time for moving (*e.g.*, before or after answering) will vary according to local civil practice.

<sup>3</sup> 18 U.S.C. § 1964(c)(1984).

<sup>4</sup> 18 U.S.C. § 1961(5)(1984).

<sup>5</sup> 18 U.S.C. § 1961(1)(1984).

<sup>6</sup> *Morgan v. Bank of Waukegan*, 804 F.2d 970, 973 (7th Cir. 1986); *H.G. Gallimore, Inc. v. Abdula*, 652 F. Supp. 437 (N.D. Ill. 1987); *Eastern Corporate Fed. Credit Union v. Peat, Marwick Mitchell & Co.*, 639 F. Supp. 1532 (D. Mass. 1986).

<sup>7</sup> *See, e.g.*, *United States v. Phillips*, 664 F.2d 971, 1038-39 (5th Cir. 1981), *cert. denied sub nom. Meinster v. United States*, 457 U.S. 1136 (1982); *United States v. Weatherspoon*, 581 F.2d 595, 601-02 (7th Cir. 1978); *Beth Israel Medical Center v. Smith*, 576 F. Supp. 1061, 1065-66 (S.D.N.Y. 1983).

<sup>8</sup> 473 U.S. 479 (1985).

<sup>9</sup> *Id.* at 496 n.14.

Footnote 14 of *Sedima*, the blueprint for decisional law in this area,<sup>10</sup> provides in part:

[T]he definition of a "pattern of racketeering activity" differs from the other provisions in § 1961 in that it states that a pattern "requires at least two acts of racketeering activity," not that it "means" two such acts. The implication is that while two acts are necessary, they may not be sufficient . . . . The legislative history supports the view that two isolated acts of racketeering activity do not constitute a pattern. As the Senate Report explained: "The target of [RICO] is thus not sporadic activity. The infiltration of legitimate business normally requires more than one 'racketeering activity' and the threat of continuing activity to be effective. It is this factor of *continuity plus relationship* which combines to produce a pattern." . . . Significantly, in defining 'pattern' in a later provision of the same bill, Congress was more enlightening: "Criminal conduct forms a pattern if it embraces criminal acts that have the same or similar purposes, results, participants, victims, or methods of commission, or otherwise are interrelated by distinguishing characteristics and are not isolated events." This language may be useful in interpreting other sections of the Act.<sup>11</sup>

*Sedima's* "pattern" pronouncement has the potential for being the most substantial barrier to successful civil RICO actions since the Second Circuit's "criminal conviction" and "competitive injury" restrictions rejected by *Sedima*. However, there has been disagreement as to how, or even if, the Supreme Court's guidance should be applied.

At least three approaches are currently used to determine whether a plaintiff has pled a RICO "pattern."<sup>12</sup> Under the first approach, "when two acts which relate to each other and arise out of the same scheme are alleged, the requirement of pleading a 'pattern of racketeering activity'

<sup>10</sup> "Interpretation of this footnote is now a cottage industry." *Morris v. Gilbert*, 649 F. Supp. 1491, 1502 (E.D.N.Y. 1986).

<sup>11</sup> 473 U.S. 479 at 496 n.14 (emphasis original). See also Powell, J., dissenting:

The definition of 'pattern' may thus logically be interpreted as meaning that the presence of the predicate acts is only the beginning: something more is required for a 'pattern' to be proved. The ABA Report concurs in this view. It argues persuasively that [t]he "pattern" element of the Statute was designed to limit its application to planned, ongoing, continuing crime as opposed to sporadic, unrelated, isolated criminal episodes.'

473 U.S. 479 at 527.

<sup>12</sup> *Gidwitz v. Stirco, Inc.*, 646 F. Supp. 825, 829 (N.D. Ill. 1986); *Schaafsma v. Marriner*, 641 F. Supp. 576, 578 n.2 (D. Vt.), *rev'd in part on other grounds sub nom*, *Schaafsma v. Morin Vermont Corp.*, 802 F.2d 629 (2d Cir. 1986).

has been met."<sup>13</sup> Under this approach, any two or more related predicate acts are a pattern. In *R.A.G.S. Couture, Inc. v. Hyatt*,<sup>14</sup> for example, the court found a pattern based on plaintiff's allegation that the same false invoices had been mailed by the defendant on two occasions, first to plaintiff and then to plaintiff's attorney.<sup>15</sup> Under this "related acts" test, which disregards *Sedima* by treating its "continuity" guidance as dicta, almost every fraud is a "pattern" since given modern means of communication it is virtually impossible to defraud someone without using the mails or interstate wire communications at least twice.<sup>16</sup>

It should be noted that the "related acts" test is distinguishable from the pre-*Sedima* test. Whereas the "related acts" test requires relationship between or among predicates, the test before *Sedima* required neither relationship nor continuity. Although the *Sedima* court devoted comparatively less attention to the continuity requirement than to relationship, there is no rational basis for accepting its guidance on relationship while rejecting its pronouncement on continuity. They either both control or they are both dicta. Because of this flawed logic, the "related acts" approach has been steadily declining in popularity and now represents a minority view, though it has garnered strength recently in a somewhat revised form in the Second Circuit.<sup>17</sup>

<sup>13</sup> *Conan Properties, Inc. v. Mattel, Inc.*, 691 F. Supp. 1167, 1170 (S.D.N.Y. 1985).

<sup>14</sup> 774 F.2d 1350 (5th Cir. 1985).

<sup>15</sup> *Id.* at 1354-55. *R.A.G.S.*, the principal case supporting the "related acts" test, has been criticized for "wholly ignor[ing] the concept of "continuity" of criminal activity emphasized by Congress and the Supreme Court." *Papagiannis v. Pontikis*, 108 F.R.D. 177, 179 n.3 (N.D. Ill. 1985). Moreover, it appears that *R.A.G.S.* is no longer good law in the Fifth Circuit or is at least about to become bad law. *R.A.G.S.* was decided only a few months after *Sedima*, before the full implications of the Supreme Court's "pattern" pronouncement had been recognized. Five months after *R.A.G.S.*, the Fifth Circuit had occasion to comment on the "pattern" issue in *Smoky Greenshaw Cotton Co. v. Merrill, Lynch, Pierce, Fenner & Smith, Inc.*, 785 F.2d 1274 (5th Cir. 1986). This time, without any reference to *R.A.G.S.*, the court recognized the new restrictive definition of "pattern" but did not have occasion to apply it. *Id.* at 1280 n.7. Thereafter, in *Montesano v. Seafirst Commercial Corp.*, 818 F.2d 423 (5th Cir. 1987), a Fifth Circuit panel that included one of the Judges participating in *R.A.G.S.*, was persuaded that the court must reject *R.A.G.S.*' "pattern" test "in order to faithfully serve congressional purpose." *Id.* at 426. The court did not overturn *R.A.G.S.* because of the internal rule forbidding one panel overturning another, but strongly urged that *R.A.G.S.* be overruled *en banc*. *Id.* For other post-*Sedima* cases disregarding the continuity element of the "pattern" test, see *Bankers Trust Co. v. Feldesman*, 648 F. Supp. 17, 24-26 (S.D.N.Y. 1987); *Bank of Am. Nat'l Trust & Sav. Ass'n v. Touche Ross & Co.*, 782 F.2d 966, 970 (11th Cir. 1986); *Tryco Trucking Co. v. Belk Stores Servs., Inc.*, 634 F. Supp. 1327, 1334 (W.D.N.C. 1986); *Watts v. Hadden*, 627 F. Supp. 727, 734-35 (D. Colo. 1986); *LSC Assocs. v. Lomas Nettleton Fin. Corp.*, 629 F. Supp. 979, 981 (E.D. Pa. 1986); *American Principals Corp. v. Imperial Bank, RICO Bus. Disp. Guide (CCH) ¶ 6373, 6146 (C.D. Cal. 1986)*; *Brainerd v. Bridges, RICO Bus. Disp. Guide (CCH) ¶ 6414, 6260-64 (N.D. Ill. 1986)*.

<sup>16</sup> See, e.g., *Small v. Goldman*, 637 F. Supp. 1030 (D.N.J. 1986); *International Data Bank, Ltd. v. Zepkin*, 812 F.2d 149, 154-55 (4th Cir. 1987).

<sup>17</sup> See *infra* note 26.

The remaining approaches apply *Sedima's* "continuity plus relationship" test but differ on the means of doing so. Before addressing the approaches, it is necessary to consider the meaning of continuity and relationship. While *Sedima's* fourteenth footnote provided guidance on the subject, the task of formulating operational definitions was left to the lower federal courts, initially at the trial level. After two years of adjudication of pattern cases, it may be said that "relationship" is usually evidenced by common perpetrators, common victims or types of victims, common methods of commission and common motives or purposes.<sup>18</sup> This is essentially the same definition of relationship as suggested by the *Sedima* Court.

Owing to relative silence by the Supreme Court in defining continuity, the lower courts have fashioned their own definitions. In doing so, lower federal courts have held that continuity requires that the defendant's criminal activities be ongoing and open-ended; that they occur over a substantial period of time and be substantively differentiated; that they create a threat of future criminal activity; and that they epitomize a defendant's usual course of conduct rather than evidencing sporadic behavior or aberrant episodes.<sup>19</sup> Considered together, the requirements of continuity and relationship are obviously designed to insure that RICO liability will be imposed only on someone who has repeatedly engaged in the same type of proscribed behavior over a significant period of time.

Returning to the approaches employed in determining whether continuity and relationship have been pled, the "multiple schemes" test provides there can be no pattern if all predicate acts were undertaken in

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<sup>18</sup> *Torwest DBC, Inc. v. Dick*, 810 F.2d 925 (10th Cir. 1987); *H.J. Inc. v. Northwestern Bell Tel. Co.*, 653 F. Supp. 908, 910 (D. Minn. 1987).

<sup>19</sup> *Torwest*, 810 F.2d 925 (10th Cir. 1987); *Schreiber Distrib. Co. v. Serv-Well Furniture Co.*, 806 F.2d 1393, 1398-99 (9th Cir. 1986); *Cefali v. Buffalo Brass Co.*, 653 F. Supp. 263 (W.D.N.Y. 1986); *Papai v. Cremosnik*, 635 F. Supp. 1402, 1412 (N.D. Ill. 1986). In *Nassau-Suffolk Ice Cream v. Integrated Resources*, 662 F. Supp. 1499, 1505 (S.D.N.Y. 1987), the court opined that:

[T]he continuity judgment may be informed by a confluence of factors considered on a case by case basis. Thus, the court may consider the number and variety of the predicate acts, the length of time over which they were alleged to be committed, the number of victims, whether multiple schemes are alleged, and the nature and diversity of the injuries alleged.

This approach is eclectic to the point of being meaningless. It eliminates neutral principles and the predictability to which they lead and thus invites plaintiffs to file civil RICO claims no matter how much doubt there may be as to the basis for so proceeding. See also *Bartichuck v. Fidelity Union Bank*, No. 86-5870 (3d Cir. Oct. 29, 1987) (WESTLAW, CTA database) (to be reported at 832 F.2d 36), where the court rejected a literal interpretation of the "open endedness" component of the continuity test, noting that such an "approach would allow a party to maintain a RICO claim if he brought suit before the unlawful scheme had attained its objective . . . [but] would deny a RICO cause of action in a case where the scheme had fully accomplished its goal."

furtherance of the same criminal scheme, episode or objective.<sup>20</sup> Under this view, if the alleged injury derives from a single transaction, the claim is dismissed without further attention. The rationale is that there can be no continuity and differentiation over time if there is but a single scheme. Under this test, for a pattern to exist, there must be independent schemes, but they must not be so independent that they are unrelated, since in that event the relationship test would not be satisfied. In sum, although finding a single scheme will defeat the RICO claim, finding multiple schemes will not necessarily sustain it.<sup>21</sup> This exemplifies the fact that continuity, whatever it is, is more than mere duration over time.

The "multiple schemes" approach, which was the first test adopted to implement *Sedima's* pattern pronouncement, is being increasingly rejected on two grounds. First, it results in the dismissal of single-scheme transactions that are sufficiently differentiated and ongoing to legitimately satisfy the requirements of continuity and relationship. Secondly, no accepted formula has been developed which quantifies the number of schemes underlying a RICO claim. Consequently, faced with the same set of facts, one court might reasonably conclude there was a single overall scheme comprised of many sub-schemes, while another court might just as reasonably find multiple schemes by focusing on the components. In sum, the test is inherently arbitrary. It does, however, have the advantage of administrative convenience: once a court determines there is only one scheme, however defined, it may dismiss without considering any other alleged facts. A growing number of courts have been willing to sacrifice this convenience to insure that every genuine RICO plaintiff has his day in court.<sup>22</sup>

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<sup>20</sup> *Madden v. Gluck*, 815 F.2d 1163 (8th Cir. 1987); *Devries v. Prudential-Bache Sec., Inc.*, 805 F.2d 326 (8th Cir. 1986); *H.J. Inc. v. Northwestern Bell Tel. Co.*, 653 F. Supp. 908 (D. Minn. 1987); *Small*, 637 F. Supp. at 1034; *Bigger v. American Commercial Lines, Inc.*, 652 F. Supp. 123 (W.D. Mo. 1986); *Skycom Corp. v. Telstar Corp.*, 813 F.2d 810 (7th Cir. 1987); *Superior Oil Co. v. Fulmer*, 785 F.2d 252 (8th Cir. 1986); *McBee v. IHSS, Inc.*, 655 F.Supp. 448 (D. Colo. 1987); *Corcoran v. American Plan Corp.*, RICO Bus. Disp. Guide (CCH) ¶ 6539, 6666 (E.D.N.Y. 1987).

<sup>21</sup> An inherent tension exists between continuity and relationship because the similarity required to satisfy the relationship test always threatens to defeat the differentiation needed to satisfy the continuity test. *See, e.g., United States v. Freshie Co.*, 639 F. Supp. 442, 445 (E.D. Pa. 1986):

Viewed on a continuum, these two requirements must reach some equitable balance to form a "pattern" . . . One can easily see that as the acts become more related, the same transactions lose some of their separateness. On the other hand, if a series of predicate acts satisfied the requirement of separate "criminal episodes," then those acts might well not meet the relatedness requirement, being too disjointed (different subject matter) and too remote (in time). (emphasis original)(citation omitted).

<sup>22</sup> Two of the better discussions of the problems inherent in the "multiple schemes" test are found in *Bridges v. Weingeroff Enter., Inc.*, RICO Bus. Disp. Guide (CCH) ¶ 6414, 6258 (N.D. Ill. 1986) and *McLendon v. Continental Group, Inc.*, RICO Bus. Disp. Guide (CCH)

The remaining view provides that no mechanical test can resolve the "pattern" question, and each case must therefore be examined on its facts to determine whether the alleged predicate acts have achieved that equitable balance of continuity and relationship necessary to make a "pattern."<sup>23</sup> This case-by-case or intermediate approach, which developed after the "multiple schemes" test, has now become the majority view.<sup>24</sup> Under the intermediate approach, a tremendous amount of discretion is placed in the trial judge, whose fact-based "pattern" determination is less likely to be reversed than a legal ruling as to the number of schemes. Although this reduces predictability with respect to the survival of any particular RICO claim, application of the case-by-case approach has led to numerous dismissals, though not as many as under the "multiple schemes" approach. This is to be expected since the case-by-case approach is designed to sustain single-scheme patterns that would not survive the "multiple schemes" test. Thus, the case-by-case approach is not only analytically intermediate between the "related acts" test and the "multiple schemes" approach, but is also middle of the road in terms of its impact on the sustainability of RICO actions under the "pattern" test in general.<sup>25</sup>

Notwithstanding these somewhat artificial distinctions, one should not lose sight of the fact that the "multiple schemes" and intermediate approaches are fundamentally the same. Each inquires as to continuity and relationship and consults the same indicia to find them.<sup>26</sup> However,

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¶ 6374, 6146 (D.N.J. 1986). See also *Kearny v. Hudson Meadows Urban Renewal Corp.*, 829 F.2d 1263 (3d Cir. 1987).

<sup>23</sup> *Bartcheck v. Fidelity Union Bank*, No. 86-5870 (3d Cir. Oct. 29, 1987) (WESTLAW, CTA database) (to be reported at 832 F.2d 36); *Sun Sav. & Loan Ass'n v. Dierdorff*, 825 F.2d 187 (9th Cir. 1987); *Bank of Am. Nat'l Trust & Sav. Ass'n v. Touche Ross & Co.*, 782 F.2d 966 (11th Cir. 1986); *Illinois Dep't of Revenue v. Phillips*, 711 F.2d 312 (7th Cir. 1985); *International Data Bank, Ltd. v. Zepkin*, 812 F.2d 149, 155; *Roeder v. Alpha Indus., Inc.*, 814 F.2d 22, 31 (1st Cir. 1987); *Proctor & Gamble Co. v. Big Apple Indus. Bldgs., Inc.*, 655 F. Supp. 1179 (S.D.N.Y. 1987); *Chronister v. Atlantic Richfield Co.*, 653 F. Supp. 1576, 1583 (M.D. Pa. 1987); *Roberts v. Smith Barney Harris Upham & Co., Inc.*, 653 F. Supp. 406, 412 (D. Mass. 1986); *Environmental Tectonics Corp. v. W.S. Kirkpatrick & Co.*, 659 F. Supp. 1381, (D.N.J. 1987).

<sup>24</sup> See Brodsky, *Pattern' Requirement Under RICO*, N.Y.L.J., September 9, 1987, at 1, col. 1, contrasting the Second Circuit's "related acts" approach with the Eighth Circuit's "multiple schemes" approach. See also Black, *Racketeer Influenced and Corrupt Organizations - Securities and Commercial Fraud as Racketeering Crime after Sedima: 'What is a Pattern of Racketeering Activity'?*, 6 *PAGE L. REV.* 365 (1986).

<sup>25</sup> See Note, *RICO: Limiting Suits By Altering The Pattern*, 28 *WM. & MARY L. REV.* 177 (1986); Batista, *Seventh Circuit Complicates RICO Defense*, 9 *NAT'L L.J.* 39 (June 8, 1987).

<sup>26</sup> There is, however, more than one way to find "continuity." In *Beck v. Manufacturers Hanover Trust Co.*, 820 F.2d 46 (2d Cir. 1987), the court held that in order to plead a pattern, it is necessary only to allege two or more related predicate acts. But the requirement of continuity was not entirely dispensed with. Rather, the court held it was necessarily satisfied by the requirement for pleading an "enterprise," since one of the



a court employing the "multiple schemes" test will examine these elements only if it first concludes there is more than one scheme.<sup>27</sup> All three approaches are somewhat heuristic. It is best to view them as points along a continuum. Characterizing RICO pattern decisions as falling into one of the above "tests" serves to impose order on chaos rather than to accurately reflect chaotic reality.

The plaintiffs' bar has failed to adjust to the restrictive interpretation of "pattern" suggested by *Sedima* and implemented by the lower federal courts. As a result, a substantial percentage of RICO claims will continue to be dismissed for failure to properly plead a "pattern." Many plaintiffs allege injury to their business or property arising from what is essentially a unidimensional scheme or transaction. Sometimes plaintiff is the only party who sustained injury, as where plaintiff was the purchaser in a private sale of closely held securities. On other occasions, plaintiff may be one of many similarly situated parties who were injured at or about the same time under similar circumstances, as where plaintiff and others purchased publicly traded securities in reliance on the same misleading prospectus.<sup>28</sup> When many parties are injured, the RICO action may take

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definitional components of an enterprise is continued existence over time. *Id.* at 51. Query whether such an analysis is applicable only in jurisdictions where the attributes of the enterprise must be pled (*see text infra*). Since the continued existence of the enterprise has no direct connection to the continuity of the alleged RICO predicates, *Beck's* lip service to *Sedima's* continuity dicta has no significance and *Beck* is thus nothing more than the latest manifestation of the Second Circuit's adoption of a "related acts" approach. Its predecessors include *United States v. Ianiello*, 808 F.2d 184 (2d Cir. 1986), and *United States v. Weisman*, 624 F.2d 1118 (2d Cir.), *cert. denied*, 449 U.S. 871 (1980). *Beck* does clarify that the Circuit's "pattern" pronouncement in criminal cases applies on the civil side as well. *See Khaimi v. Schonenberger*, 664 F. Supp. 54, 56-57 (E.D.N.Y. 1987).

<sup>27</sup> Courts adopting the intermediate approach generally criticize the "multiple schemes" test for being overbroad. While it succeeds in screening out RICO claims that lack the requisite continuity and relationship, there will be occasions when its application may result in dismissal of single-scheme conduct that does manifest sufficient continuity and relationship among predicate offenses. *Morgan v. Bank of Waukegan*, 804 F.2d 970, 975 (7th Cir. 1986); *Roeder*, 814 F.2d at 31; *Paul S. Mullin & Assocs., Inc. v. Bassett*, 632 F. Supp. 532, 541 (D. Del. 1986); *Roberts*, 653 F. Supp. at 411. Thus, a defendant with a single objective might engage in predicate acts that are sufficiently numerous and differentiated and extend over a sufficient length of time that a court would be justified in finding a "pattern" notwithstanding that there is only one ultimate objective. Only in cases such as these will the two approaches lead to different results since they both seek the same goal, but the "multiple schemes" test paints with a broader brush.

<sup>28</sup> Since continuity is purely a temporal concept, it should not be increased by an increase in the number of victims, assuming they were all injured at the same time. *See Brandenburg v. First Maryland Sav. & Loan*, 660 F. Supp. 717 (D. Md. 1987). *But see Lipin Enters., Inc. v. Lee*, 803 F.2d 322, 324 (7th Cir. 1986); *Tkaczuk v. Weil*, No. 86-C-4695 (N.D. Ill. Jan. 29, 1987) (WESTLAW, DCT database) (suggesting that a multiplicity of victims may increase the likelihood of pleading a pattern); *Bartcheck v. Fidelity Union Bank*, No. 86-5870 (3d Cir. Oct. 29, 1987) (WESTLAW, CTA database) (to be reported at 832 F.2d 36). *See also Gutfreund v. Christoph*, 658 F. Supp 1378 (N.D. Ill. 1987),

the form of a class action. Plaintiff will assert multiple acts—usually wire, mail and securities fraud. Under these circumstances, and assuming the fraud was quickly accomplished, it is unlikely that a “pattern” will be sustained under the “multiple schemes” test or the intermediate approach, since the pleading will not establish that the defendant was in the habit of committing the type of crime charged.

Assuming that the injury-producing activities occurred over a short period of time and that each alleged predicate was designed to accomplish the same objective, a court adopting the “multiple schemes” test will dismiss the RICO claim because there was only a single scheme or episode of criminal conduct and, a fortiori, the requirement of “continuity” has not been met.<sup>29</sup> In *Emmanouilides v. Buckthorn, Ltd.*,<sup>30</sup> for example, the court refused to find a pattern based on the allegation that

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in which District Judge Shadur, constrained (and obviously annoyed) by recent Seventh Circuit pronouncements, found a “pattern” when interests in the same limited partnership were sold to 16 different people over a several-month period. *Id.* at 1392-93.

<sup>29</sup> See, e.g., *Kearny v. Hudson Meadows Urban Renewal Corp.*, 648 F. Supp. 1412, 1418 (D. N.J. 1986) *rev'd on other grounds*, 829 F.2d 1263 (3d Cir. 1987) (three different bribes in exchange for related but distinct promises are not sufficiently ongoing to form a pattern); *Small v. Goldman*, 637 F. Supp. 1030, 1034 (D. N.J. 1986) (defendants' commission of mail fraud on two or more occasions “in order to implement, effectuate and conceal their scheme to defraud plaintiff. . . do[es] not constitute a pattern of racketeering where all of them were aimed at implementing a single fraudulent scheme”); *Kredietbank, N.V. v. Joyce Morris, Inc.*, No. 84-1903 (D. N.J. Oct. 11, 1985), *reconsideration denied*, (D. N.J. Jan. 9, 1986), *aff'd without op.*, 808 F.2d 1516 (3d Cir. 1986) (two instances of submitting false affidavits to court in connection with single matter under litigation are not a “pattern” of racketeering activity); *Superior Oil Co. v. Fulmer*, 785 F.2d 252 (8th Cir. 1986) (several related acts of mail and wire fraud in pursuit of underlying conversion or theft are not a “pattern”); *Emmanouilides v. Buckthorn, Ltd.*, 642 F. Supp. 964, 966 (S.D.N.Y. 1986) (“Any fraudulent mail or wire communications made in connection with this case are not themselves alleageable as parts of a pattern; rather, they are the components of a single activity, the alleged vessel fraud. Plaintiff may not splinter the alleged fraud into its subordinate pieces in an attempt to meet the RICO pattern requirement”); *Northern Trust Bank/O'Hare, N.A. v. Inryco, Inc.*, 615 F. Supp. 828 (N.D. Ill. 1985) (two mailings to effectuate same kickback scheme are not a “pattern”); *Allington v. Carpenter*, 619 F. Supp. 474 (C.D. Cal. 1985) (multiple acts of fraud over fourteen-month period were in furtherance of one scheme and therefore did not constitute a “pattern”); *Professional Assets Management, Inc. v. Penn Square Bank, N.A.*, 616 F. Supp. 1418 (W.D. Okla. 1985) (multiple actions in furtherance of preparation and issuance of allegedly fraudulent audit report do not constitute a “pattern”); *Grant v. Union Bank*, 629 F. Supp. 570, 578 (D. Utah 1986) (“We consider that multiple mail and wire communications in furtherance of that single allegedly fraudulent loan are insufficient to show a pattern under RICO”); *Lipin Enters., Inc. v. Lee*, 625 F. Supp. 1098 (N.D. Ill. 1985), *aff'd*, 803 F.2d 322 (7th Cir. 1986) (twelve predicate acts of mail fraud in furtherance of scheme to defraud purchaser of securities is not a pattern). See also *Torwest DBC, Inc. v. Dick*, 810 F.2d 925 (10th Cir. 1987); *H.J. Inc. v. Northwestern Bell Tel. Co.*, 648 F. Supp. 419, 423 (D. Minn. 1986); *Satellite Fin. Planning Corp. v. First Nat'l Bank of Wilmington*, 646 F. Supp. 118 (D. Del. 1986).

<sup>30</sup> 642 F. Supp. 964.

defendant generated many phone calls and letters in order to defraud plaintiff in the simultaneous sale of seven vessels, noting that “[p]laintiff may not splinter the alleged fraud into its subordinate pieces in an attempt to meet the RICO pattern requirement.”<sup>31</sup> That each call or letter may have constituted a separate indictable offense under the wire or mail fraud statutes was deemed irrelevant to establishing a RICO pattern.

The same result should obtain under the intermediate approach, where the court will look directly to the aforementioned indicia of continuity and relationship. However, the likelihood of dismissal will be less since a court will be more likely to discern a “pattern” as the duration and complexity of the underlying events increase.<sup>32</sup> It is impossible to state what length of time or degree of complexity or differentiation will serve as the threshold for finding a pattern. Given that the intermediate approach is by definition a “case-by-case” approach, no hard and fast rules apply.<sup>33</sup> Still assuming a short and simple scenario (e.g., a single purchase of securities), the relationship test will be satisfied, since there is an identity of perpetrators, victims, methods of commission, and motives. However, there will be a lack of continuity and the differentiation that is needed for a pattern to exist. The transaction is neither ongoing nor open-ended and does not create a threat of future criminality or the inference that it is representative of the defendant’s normal and ongoing course of conduct.<sup>34</sup> To factually allege that a defendant made two or more phone calls or mailed two or more letters to accomplish a single objective appears insufficient to properly establish a “pattern” of racketeering activity. This is the message of nearly all courts recently deciding RICO pattern cases. Whether they adopt the “multiple schemes”

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<sup>31</sup> *Id.* at 966.

<sup>32</sup> See, e.g., *King v. E.F. Hutton & Co.*, RICO Bus. Disp. Guide (CCH) ¶ 6578, 6836 (D. D.C. 1987)(pattern properly pled when brokerage firm defrauded several investors over a two and one-half year period); *McLendon v. Continental Group, Inc.*, RICO Bus. Disp. Guide (CCH) ¶ 6146, 6373 (D.N.J. 1986)(pattern properly pled when numerous employees were deprived of pension benefits over a period of several years by means of elaborate computerized system).

<sup>33</sup> The problem with characterizing decisions under the intermediate approach is that there is no unified approach. Rather, the intermediate cases are what is left over after the “related acts” and “multiple schemes” cases are subtracted from the total body of pattern cases. To predict how a particular RICO pleading will fare, one must consult the case law of the jurisdiction where the action is pending. The best way to make a general prediction is to test the pleading under the most stringent “multiple schemes” approach. Provided it survives this test, it will probably survive any other test as well. If it fails this test, one must inquire whether the case fits within that small subset of cases that would be dismissed under the “multiple schemes” test but should be salvaged by the intermediate approach. Duration and complexity of the liability-producing acts will be critical to this determination.

<sup>34</sup> *H.J. Inc. v. Northwestern Bell Tel. Co.*, 653 F. Supp. 908, 911 (D. Minn. 1987)(“continuity” means repeated criminal activity, not merely repeated acts to carry out the same criminal activity).

approach or look directly to indicia of continuity and relationship, no pattern is found under such circumstances. Only if the events underlying the lawsuit are complex and differentiated and take place over a substantial period of time might the result be otherwise. The number of people injured by defendant's activities should be irrelevant, as it is the duration and complexity of the causal act—not its effect—that determines whether the defendant habitually engaged in proscribed conduct.<sup>35</sup>

Some plaintiffs allege that the defendant committed additional predicates at a point in time removed from the first group of predicates, thus seeking to create continuity where none would otherwise be found. Whether a "pattern" may thus be established will depend on the facts of the case. If plaintiff is the victim in all the episodes and has sustained each injury in a similar fashion (i.e., as a result of similar "methods of commission" by the defendant), a court should conclude that a "pattern" has been alleged.<sup>36</sup> This would occur, for example, if the defendant fraudulently sold different securities to the plaintiff on three separate occasions over a period of several years, or perhaps even several months.

A pattern should also be found if the additional episodes did not injure the plaintiff but caused a similar type of injury to similarly-situated persons.<sup>37</sup> To hold otherwise would be to restrict civil RICO to plaintiffs who themselves were repeatedly injured by the same pattern of racketeering activity. While RICO's civil liability provisions are largely remedial, the statute as a whole seeks to deter conduct that causes harm to the public at large, and civil damages are trebled partly to accomplish this goal. If the standing requirement was so narrow as to preclude a plaintiff from asserting *any* predicate acts that caused harm to others, this goal would be inhibited,<sup>38</sup> since a criminal could methodically

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<sup>35</sup> See *supra* note 28.

<sup>36</sup> *Lipin Enters. Inc. v. Lee*, 803 F.2d 322, 324 (7th Cir. 1986).

<sup>37</sup> *Id.*

<sup>38</sup> *But see* *Kearny v. Hudson Meadows Urban Renewal Corp.*, 648 F. Supp. 1412, 1418 (D.N.J. 1986), *rev'd*, 829 F.2d 1263 (3d Cir. 1987), where the trial court observed that "plaintiff cannot simply allege that some acts in a larger pattern injured it; the acts that caused plaintiff's injury, in themselves, must constitute a pattern." The appellate court disagreed. 829 F.2d at 1268. Although a RICO plaintiff directly injured by at least one predicate should have standing to assert additional predicates causing injury to others, it is difficult to understand why this has not been done more frequently. Many RICO defendants are large corporations repeatedly sued under RICO by many different plaintiffs in many different jurisdictions. If a plaintiff had standing to allege that injury caused by the corporation to *others* could form part of the "pattern" for *his* RICO action against the same corporation, he could conduct a computer search and locate scores if not hundreds of cases in which the same defendant had injured or allegedly injured others through similar types of racketeering activity. The cases do not bear this out. In the majority of reported decisions, the only conduct alleged by a plaintiff is that which caused injury to him alone and many such cases are dismissed for failure to plead a pattern. When a plaintiff does refer to other victims (or all such victims combine in a class action), it usually involves victims of the

execute a pattern of fraudulent conduct in such a way that none of his victims was injured by more than one RICO "episode," with the result that he would be insulated from civil liability to any victim under RICO.<sup>39</sup> There is no indication that Congress intended RICO to be so limited or that courts are willing to adopt such an obviously inequitable approach.

However, if the temporally discrete episodes involved unrelated and isolated methods of commission, then whether they caused injury to plaintiff alone or to plaintiff and others, there should be no pattern because neither relationship nor continuity will be found. This was the result in *Robinson v. City Colleges of Chicago*.<sup>40</sup> Plaintiff, through his corporations, provided food and cleaning services to the defendant college until his services were dispensed with. His RICO action against the college involved two discrete episodes separated by a five-year period. First, he alleged that in 1981 the defendant wrongfully rejected his bid to provide janitorial services. Next, he alleged that in 1986 the defendant wrongfully rejected his bid to provide food services.<sup>41</sup> The court dismissed the complaint for failure to plead a RICO "pattern."

Having asserted multiple predicates underlying the 1986 event, Robinson first argued that this alone constituted a "pattern." The court correctly held otherwise because of the absence of continuity, a result that would have been reached under the "multiple schemes" test and the intermediate approach, with this court adopting the former:

[T]he allegedly wrongful mailings occurred within a short period of about four months and all closely related to the manual and vending food services contract. If fraud was involved, it occurred

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same circumscribed criminal episode, with the result that the suit is also dismissed for lack of continuity.

<sup>39</sup> See *Papagiannis v. Pontikis*, 108 F.R.D. 177 (N.D. Ill. 1985) ("[E]ach victim can sue the RICO violator, adducing evidence of the offense against the other victim to meet the proof requirements of the statute as to a 'pattern'") (emphasis in original omitted); *Lipin Enters., Inc.*, 803 F.2d at 324 (suggesting that plaintiffs could plead a pattern had they alleged that the defendants defrauded other victims in a similar fashion); *King v. E.F. Hutton & Co., Inc.*, RICO Bus. Disp. Guide (CCH) ¶ 6578, 6836 (D. D.C. 1987); *McLendon v. Continental Group, Inc.*, RICO Bus. Disp. Guide (CCH) ¶ 6146, 6310 (D. N.J. 1986); *Kearny v. Hudson Meadows Urban Renewal Corp.*, 829 F.2d 1263 (3d Cir. 1987). The case law suggests, but does not clearly hold, that the RICO pattern may be based in part on predicates that caused injury to persons other than plaintiff. Thus, while plaintiff's recovery of damages would be limited by the injury he alone suffered, the "pattern" may be proved through evidence of acts that harmed others. Nonetheless, plaintiff must be directly injured by at least one of the alleged predicates since a civil RICO action may not be based entirely on third party standing. Until this is clarified in reported decisions, however, it would not necessarily be frivolous for a defendant to move to dismiss on the ground that some of the predicates underlying the alleged pattern caused injury to persons other than plaintiff.

<sup>40</sup> 656 F. Supp. 555 (N.D. Ill. 1987).

<sup>41</sup> *Id.* at 557.

within a quick time frame, and embraced a single transaction. Plaintiffs' pleadings merely break down the alleged fraud in connection with the awarding of the contract into its component parts. Such allegations clearly fail to plead the requisite continuity of criminal activity.<sup>42</sup>

Robinson next sought to combine the 1981 and 1986 events. The court rejected this argument as well, discerning neither continuity *nor* relationship between the two sets of activities:

A different Board was involved, a different type of service contract was involved, and different corporations were the alleged victims. Moreover, the five-year period between the episodes is substantial and indicates the episodes were distinct incidents.<sup>43</sup>

While the court was correct about the absence of continuity (and therefore in dismissing the complaint), it adopted an unduly narrow approach on the relationship issue, given that the same plaintiff owned both service corporations and, although each corporation provided a different service, they both provided services to the same institution and were terminated under similar circumstances.

*Robinson* exemplifies the difficulty plaintiffs may face in their efforts to successfully plead a RICO pattern. At least in some jurisdictions, a pattern will be sustained only if the pleading creates the inference that the defendant has repeatedly—perhaps uninterrupted—engaged in the same type of proscribed behavior over a significant period of time, whether directed against plaintiff alone or plaintiff and others. In sum, plaintiff must plead that defendant is an habitual criminal.<sup>44</sup>

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<sup>42</sup> *Id.* at 559.

<sup>43</sup> *Id.*; see also *Conan Properties, Inc. v. Mattel, Inc.*, 619 F. Supp. 1167, 1171 (S.D.N.Y. 1985)(court refused to combine an unrelated 1970's securities fraud predicate with several related 1980's wire and mail fraud predicates); *United States v. Computer Sciences Corp.*, 689 F.2d 1181, 1189 (4th Cir. 1982), *cert. denied*, 459 U.S. 1105 (1983)("We entertain some doubt that Congress ever contemplated the extension of the RICO statute to include a situation where one of the predicate offenses, separated in character and by a long time period, could combine with a set of closely related wire fraud and mail fraud claims essentially representing subdivisions of a single on-going illegal act to meet the predicate requirements of so serious a statute").

<sup>44</sup> As strictly formulated, the "pattern" tests do not account for certain scenarios that evidence habitual criminality. For instance, if a person continuously victimizes others but never uses the same method of commission more than once, he will not be liable under a strict application of prevailing views because of the absence of relationship. Similarly, if a defendant uses many different methods to victimize many unrelated persons at the same time, there will be an absence of both continuity and relationship and therefore an absence of RICO liability under prevailing standards. When these cases are adjudicated, it seems likely that the court will relax the standards, or interpret the criteria in the disjunctive rather than conjunctive, with the result that RICO liability will be imposed under such

When plaintiff alleges unrelated episodes separated in time, dismissal for failure to allege a pattern is not only mandated by the standards now in effect, but is also appropriate. Such a plaintiff is simply alleging that the defendant was "bad" on more than one occasion. As the above discussion demonstrates, "badness" is not the test for determining whether a "pattern" has been pled or whether RICO liability should be imposed. RICO is not a recidivist statute designed to punish people who have manifested unseemly or even criminal behavior on more than one occasion.<sup>45</sup> Rather, the statute affords private relief to plaintiffs who have been injured in their business or property by a "pattern" of racketeering activity. In the absence of a pattern (i.e., without continuity *and* relationship), plaintiff has no right to recover under RICO and is appropriately relegated to whatever other remedies may exist under state or federal law.<sup>46</sup>

### III. "PERSON" VERSUS "ENTERPRISE"

The activities proscribed by RICO are set forth in the four subsections of 18 U.S.C. section 1962. Plaintiffs typically proceed under subsections (a) and (c). Subsection (c) provides in 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 . . . .

The vast majority of courts hold that the "person" contemplated by section 1962(c) must be separate and distinct from the section 1962(c)

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circumstances. Like most other tests, the "pattern" test will develop flexibility as a function of age.

<sup>45</sup> Bennet v. Berg, 685 F.2d 1053, 1060 (8th Cir. 1982), *cert. denied sub nom*, Prudential Ins. Co. v. Bennett, 464 U.S. 1008 (1983); United States v. Bledsoe, 674 F.2d 647, 659 (8th Cir.), *cert. denied sub nom* Phillips v. United States, 459 U.S. 1040 (1982); John Peterson Motors, Inc. v. General Motors Corp., 613 F. Supp. 887, 899-900 (D. Minn. 1985).

<sup>46</sup> What might be termed a fourth approach had been tentatively suggested by a panel of the Third Circuit. In Petro-Tech, Inc. v. Western Co. of N. Am., 824 F.2d 1349 (3d Cir. 1987), the court expressly refused to define a RICO "pattern" (*Id.* at 1351), but expressed doubt whether the pattern question could ever be properly resolved at the pleading stage rather than on a full record. *Id.* at 1355-56. This was certainly one way of avoiding the fracas. The Third Circuit seemed particularly fearful of being pinned down since a year earlier, another panel also expressly refused to take a position on the post-*Sedima* meaning of "pattern." See Malley-Duff & Assocs. v. Crown Life Ins. Co., 792 F.2d 341, 353 n.20 (3d Cir. 1986), *aff'd sub nom*, Agency Holding Corp. v. Malley-Duff & Assocs., Inc., 107 S. Ct. 2759 (1987). When the court finally directly addressed the question in Barticheck v. Fidelity Union Bank, No. 86-5870 (3d Cir. Oct. 29, 1987) (WESTLAW, CTA database) (to be reported at 832 F.2d 36), it opted for a case-by-case approach that was so individualized as to be almost useless for purposes of prediction.

"enterprise."<sup>47</sup> This conclusion is based on a combination of the statutory language and presumed congressional intent. Subsection (c) requires that the person be "employed by or associated with" the enterprise. The majority view finds that this language will not countenance identity between the "person" and the "enterprise," since it is not logical to speak of a "person" being employed by or associated with himself or itself. As to legislative intent, the courts reason that the principal purpose for enacting RICO, and for distinguishing the "person" from the "enterprise," is to prevent the takeover of legitimate businesses by criminals. While punishing the infiltrating criminals (i.e., the "persons") serves this purpose, punishing the "enterprise"—the innocent victim of the racketeering activity—would be to punish the very entity the statute was designed to protect.

On occasion, of course, the organization itself is a participant in the criminal activity, rather than simply the victim, prize, or infiltrated innocent. In this event, there is nothing inequitable in holding the "enterprise" liable along with the "persons." The decision to apply the enterprise/person distinction across the board rather than on a case-by-case basis reflects the courts' implicit conclusion that it is preferable to allow some criminal enterprises to escape liability than to risk the imposition of liability on innocents. This comports with the rule that criminal statutes must be strictly construed against imposition of punishment. However, as will be seen below, a number of courts have in effect undermined this rule by allowing the same entity to be both the person and the enterprise under 18 U.S.C. section 1962(a).

Whether the plaintiff has alleged a "person" distinct from an "enterprise" will in most cases be evident from the face of the complaint, as when plaintiff alleges that the enterprise is a corporation and the persons are individuals. An exception is when the plaintiff conclusorily asserts that the "enterprise" is an association-in-fact composed of two or more "persons."<sup>48</sup> To prove the existence of a RICO enterprise, plaintiff must

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<sup>47</sup> See, e.g., *Petro-Tech, Inc.*, 824 F.2d 1349; *Bennett v. United States Trust Co. of N.Y.*, 770 F.2d 308 (2d Cir. 1985), *cert. denied*, 106 S. Ct. 800 (1986); *B.F. Hirsch v. Enright Refining Co.*, 751 F.2d 628, 633 (3d Cir. 1984); *United States v. Computer Sciences Corp.*, 689 F.2d 1181, 1190 (4th Cir. 1982), *cert. denied*, 459 U.S. 1105 (1983); *Bennett v. Berg*, 685 F.2d 1053, 1062-63, *cert. denied sub nom.*, *Prudential Inc. Co. of Am. v. Bennett*, 464 U.S. 1008 (1983); *Medallion TV Enters. v. SelecTv of Cal., Inc.*, 627 F. Supp. 1290, 1295 (C.D. Cal. 1986); *McLendon v. Continental Group, Inc.*, 602 F. Supp. 1492, 1517 (D.N.J. 1985); *Kirschner v. Cable/Tel Corp.*, 576 F. Supp. 234, 243 (E.D. Pa. 1983); *Grant v. Union Bank*, 629 F. Supp. 570, 574-75; *Rush v. Oppenheimer & Co.*, 628 F. Supp. 1188, 1194 (S.D.N.Y. 1985); *H.J. Inc. v. Northwestern Bell Tel. Co.*, 648 F. Supp. 419, 426-28 (D. Minn. 1986); *Bruss Co. v. Allnet Communication Servs., Inc.*, 606 F. Supp. 401, 406-07 (N.D. Ill. 1985); *Color Sys., Inc. v. Meteor Photo Reprographic Sys., Inc.*, No. 86-2516 (D.D.C. May 8, 1987)(WESTLAW, DCT database).

<sup>48</sup> 18 U.S.C. § 1961(4)(1982) provides that an enterprise may be an association in fact.



establish: (i) that the enterprise is an ongoing organization with a framework for making and carrying out decisions; (ii) that the members of the enterprise function as a continuing unit; and (iii) that the enterprise has an existence separate and apart from the pattern of racketeering activity through which its affairs are conducted.<sup>49</sup> In some jurisdictions, these elements must be pled as well as proven.<sup>50</sup> In others, they need only be proven, and the pleading will suffice if it merely identifies the enterprise rather than describes its attributes.<sup>51</sup> In jurisdictions where the enterprise's attributes must be pled, either as part of a RICO pleading requirement or pursuant to the specificity mandate of Federal Rule of Civil Procedure 9(b), the pleading will necessarily satisfy the burden of distinguishing between the person and the enterprise. If the pleading fails in this respect, alternative grounds should be cited in support of a motion to dismiss: failure to plead an enterprise; failure to plead a RICO "person" distinct from the RICO "enterprise"; and failure to plead with particularity under Rule 9(b).

The most equivocal scenario is when plaintiff has conclusorily alleged an association-in-fact enterprise in a jurisdiction in which only the identity of the enterprise need be pled. For instance, plaintiff alleges that defendants A and B are RICO persons who operated through an association-in-fact enterprise created by and consisting of themselves. If the A-B enterprise is the same as, and no more than, A and B, then plaintiff has failed to plead, and cannot prove, the person/enterprise distinction required by section 1962(c). However, if A and B have created an association that is more than the sum of themselves (*i.e.*, an ongoing organization separate from the alleged racketeering activity), then the A-B enterprise would be distinct from A and B as persons, and the person/enterprise distinction may be sustained. From the face of the complaint, it will be impossible to determine which is the case, but as far as enterprise pleading is concerned, plaintiff has satisfied the jurisdiction's threshold requirements.

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See *United States v. Turkette*, 452 U.S. 576 (1981); *United States v. Local 560, Int'l Bhd. of Teamsters*, 581 F. Supp. 279, 330 (D.N.J. 1984), *aff'd*, 780 F.2d 267 (3d Cir. 1985), *cert. denied*, 106 S. Ct. 2247 (1986); *In re Energy Systems Equip. Leasing Sec. Litig.*, 642 F. Supp. 718, 740 (E.D.N.Y. 1986); *Haroco, Inc. v. American Nat'l Bank & Trust Co.*, 747 F.2d 384, 401 (7th Cir. 1984), *aff'd*, 473 U.S. 606 (1985); *Fustok v. Conticommodity Servs., Inc.*, 618 F. Supp. 1074, 1076 (S.D.N.Y. 1985).

<sup>49</sup> *United States v. Riccobene*, 709 F.2d 214, 221-24 (3d Cir.), *cert. denied*, 464 U.S. 849 (1983); *United States v. DeRosa*, 670 F.2d 889 (9th Cir.), *cert. denied*, 459 U.S. 993 (1982).

<sup>50</sup> See *Hanline v. Sinclair Global Brokerage Corp.*, 652 F. Supp. 1457, 1462 (W.D. Mo.); *appeal dismissed*, 815 F.2d 713 (8th Cir. 1987); *Otto v. Variable Annuity Life Ins. Co.*, 611 F. Supp. 83, 89 (N.D. Ill. 1985), *rev'd in part on other grounds*, 814 F.2d 1127 (7th Cir. 1986); *Laterza v. American Broadcasting Co.*, 581 F. Supp. 408, 414 (S.D.N.Y. 1984); *Khaimi v. Schonenberger*, 664 F. Supp. 54 (E.D.N.Y. 1987).

<sup>51</sup> See *Seville Indus. Mach. Corp. v. Southmost Mach. Corp.*, 742 F.2d 786, 790 (3d Cir. 1984), *cert. denied*, 469 U.S. 1211 (1985).

Under such circumstances, the defendant should move to dismiss for failure to plead a person separate from an enterprise.<sup>52</sup> Although the jurisdiction may not require that an enterprise be pled beyond identification, it is required that the pleading make it evident that the person is distinct from the enterprise. To satisfy this latter requirement, it may not be necessary to plead all the attributes of the enterprise that must be proven to recover RICO damages. However, it should be necessary to supply enough information at least to raise the inference that the alleged enterprise is distinct from the alleged persons. Were it otherwise, the requirement that plaintiff plead a person distinct from an enterprise under section 1962(c) could be automatically satisfied in virtually every RICO lawsuit, since any plaintiff may conclusorily allege an association-in-fact enterprise composed of any two or more defendants or of one defendant along with one or more non-parties. This would render the requirement superfluous. It would also be incompatible with principles of judicial economy, since actions that could never proceed to trial would be allowed to continue through a substantial amount of pretrial discovery before it became evident that the persons and the enterprise were one.

The situation is less clear with respect to 18 U.S.C. section 1962(a), which provides in 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, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise. . . .

Section 1962(a), like section 1962(c), refers to a "person" committing an unlawful act in connection with, but distinct from, an "enterprise." For this reason, many courts have found that the language of section 1962(a) also evidences a Congressional intent to distinguish the "person" from the "enterprise."<sup>53</sup> Other courts hold that the person and enterprise may be the same under section 1962(a) on the ground that the provision contemplates the enterprise using the proceeds of its own pattern of racketeering activity (i.e., deriving the funds illegally and then investing them in itself).<sup>54</sup> Legislative history sheds little light on the subject, and both judicial views are equally plausible.

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<sup>52</sup> See *Klapper v. Commonwealth Realty Trust*, 657 F. Supp. 948, 954-57 (D. Del. 1987).

<sup>53</sup> See, e.g., *United States v. Computer Sciences Corp.*, 689 F.2d 1181, 1190-91 (4th Cir. 1982), cert. denied, 459 U.S. 1105 (1983); *McMurtry v. Brasfield*, 654 F. Supp. 1222, 1226-27 (E.D. Va. 1987); *Williamette Sav. & Loan v. Blake & Neal Fin. Co.*, 577 F. Supp. 1415, 1426-27 (D. Or. 1984); *H.J. Inc. v. Northwestern Bell Tel. Co.*, 648 F. Supp. 419, 428 (D. Minn. 1986); *Rush v. Oppenheimer & Co., Inc.*, 628 F. Supp. 1188, 1197 (S.D.N.Y. 1985).

<sup>54</sup> See e.g., *Petro-Tech, Inc. v. Western Co. of N. Am.*, 824 F.2d 1349 (3d Cir. 1987); *Haroco, Inc. v. American Nat'l Bank & Trust Co. of Chicago*, 747 F.2d 384 (7th Cir. 1984),

The view that the person and enterprise may be the same under subsection (a) is the majority view. Nonetheless, given the absence of meaningful legislative history, the courts should place greater emphasis on the facial language and structure of the law in divining the intent of Congress. Since all subsections of section 1962 distinguish between person and enterprise, such emphasis should lead to the conclusion that the person and enterprise must be different. Therefore, even in jurisdictions following the majority approach, a defendant should consider moving to dismiss a section 1962(a) claim if the person and enterprise are the same or the pleading fails to reveal whether they are different. Federal Rule of Civil Procedure 11 should pose no obstacle since the defendant can make a good faith argument for the reversal of existing law in a jurisdiction that does not require the distinction. Such a motion is advisable where the jurisdiction's court of appeals has yet to adopt a position on the issue.<sup>55</sup>

#### IV. THE STANDING REQUIREMENTS

RICO's civil liability provisions are afforded to plaintiffs injured in their business or property by the defendant's racketeering activity.<sup>56</sup> Many courts hold that such injury must be sustained by plaintiff himself and that a party may not sue to redress injuries sustained as an unintended consequence of defendant's act.<sup>57</sup> Two discrete rules of

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*aff'd on other grounds*, 473 U.S. 606 (1985); *B.F. Hirsch, Inc. v. Enright Refining Co.*, 617 F. Supp. 49 (D.N.J. 1985); *Schreiber Distrib. Co. v. Serv-Well Furniture Co.*, 806 F.2d 1393, 1398 (9th Cir. 1986); *Schofield v. First Commodity Corp. of Boston*, 793 F.2d 28, 31 (1st Cir. 1986); *United States v. Freshie Co.*, 639 F. Supp. 442 (E.D. Pa. 1986); *United States v. Yonan*, 622 F.Supp. 721 (N.D. Ill. 1985); *Bruss Co. v. Allnet Communication Servs., Inc.*, 606 F. Supp. 401, 407 (N.D. Ill. 1985); *Rhoades v. Powell*, 644 F. Supp. 645, 671 (E.D. Cal. 1986); *Abelson v. Strong*, 644 F. Supp. 524, 534 (D. Mass. 1986); *DeMuro v. E.F. Hutton & Co.*, 643 F. Supp. 63 (S.D.N.Y. 1986); *Vietnam Veterans of Am., Inc. v. Guerdon Indus., Inc.*, 644 F. Supp. 951, 958 (D. Del. 1986); *Pennsylvania v. Derry Constr. Co.*, 617 F. Supp. 940, 943 (W.D. Pa. 1985). *Cf. Klapper v. Commonwealth Realty Trust*, 657 F. Supp. 948, 954-57 (D. Del. 1987); *Roche v. E.F. Hutton & Co.*, 658 F. Supp. 315, 320-21 (M.D. Pa. 1986), which are hybrids of a sort, holding that the person and enterprise may be the same under § 1962(a), but only if the enterprise was neither the victim nor the prize of the proscribed activities.

<sup>55</sup> 18 U.S.C. § 1962(b)(1984), rarely invoked, makes it unlawful for a person to acquire or maintain an interest in an enterprise through a pattern of racketeering activity. Since its structure more closely parallels § 1962(a) than § 1962(c), it is reasonable to assume that a jurisdiction would treat it in the same way it treats § 1962(a).

<sup>56</sup> 18 U.S.C. § 1964(c)(1984).

<sup>57</sup> *See, e.g., Grant v. Union Bank*, 629 F. Supp. 570, 573 (D. Utah 1986) ("Only the corporation in its own name [not a shareholder] can bring an action under section 1964 for injuries allegedly caused it under section 1962"); *Warren v. Mfrs. Nat'l Bank of Detroit*, 759 F.2d 542 (6th Cir. 1985); *Garbade v. Great Divide Mining & Milling Corp.*, 645 F. Supp. 808, 815-16 (D. Colo. 1986); *Conan Properties, Inc. v. Mattel, Inc.*, 619 F. Supp. 1167, 1171; *Kearny v. Hudson Meadows Urban Renewal Corp.*, 648 F. Supp. 1412, 1418; *Morast v.*

standing are involved. The first precludes third party standing and is exemplified by cases holding that a shareholder may not commence a RICO action to redress injuries to the corporation.<sup>58</sup> This standing rule does not require that all alleged predicates must have caused injury to plaintiff, but rather that plaintiff himself must have been injured by some part of the pattern.<sup>59</sup>

The rule forbidding third party standing is well established and is supported by the language and structure of the statute. Congress divided deterrent functions between the government and private citizens, and RICO therefore distinguishes between criminal prosecutions and private actions.<sup>60</sup> When the government prosecutes, there is no standing requirement comparable to that imposed on private litigants by 18 U.S.C. section 1964(c). Rather, an indictment or information may be based on proscribed conduct injuring *any* person. By contrast, when a private party commences a RICO action, at least some of the alleged actionable conduct must have caused injury to *their* business or *their* property. To argue otherwise is to disregard the fundamental criminal/civil bifurcation in the RICO statute and the congressional intent on which it is based. In sum, a RICO plaintiff may not act exclusively as a private attorney general, though a lawsuit may have such collateral impact. Any other result would be absurd, as the only realistic relief afforded by RICO to a private plaintiff is money damages, and an uninjured plaintiff has no damages to treble.

The second rule precludes a RICO suit when the causal connection between plaintiff's injury and defendant's act is insufficiently proximate. Although the plaintiff has been injured, he is not among the class of persons for whom RICO provides a remedy. The proximate cause rule is exemplified by *Cenco Inc. v. Seidman & Seidman*,<sup>61</sup> where purchasers of securities commenced a RICO action against the issuer, alleging fraudulent inflation of the price of the stock. Plaintiffs also sued the issuer's independent auditors, claiming they failed to detect the fraud. The auditors cross-claimed against the issuer under RICO on the ground that being joined as defendants was an injury that would not have been

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Lance, 631 F. Supp. 474 (N.D. Ga. 1986), *aff'd*, 807 F.2d 926 (11th Cir. 1987); *Maryville Academy v. Loeb Rhoades & Co.*, 530 F. Supp. 1061 (N.D. Ill. 1981); *Icon Group, Inc. v. Mahogany Run Dev. Corp.*, 112 F.R.D. 201, 205-06 (D.V.I. 1986); *Levey v. E. Stewart Mitchell, Inc.*, 585 F. Supp. 1030, 1034-35 (D. Md. 1984), *aff'd without op.*, 762 F.2d 998 (4th Cir. 1985). *But see Alexander Grant & Co. v. Tiffany Indus., Inc.*, 563 F.Supp. 35, 36-37 (E.D. Mo. 1982), *rev'd*, 742 F.2d 408 (8th Cir. 1984), *aff'd*, 473 U.S. 606 (1985).

<sup>58</sup> *Grant*, 629 F. Supp. at 573; *Warren*, 759 F.2d at 544.

<sup>59</sup> *See Marshall & Isley Trust Co. v. Pate*, 819 F.2d 806 (7th Cir. 1987).

<sup>60</sup> Compare 18 U.S.C. § 1963 with 18 U.S.C. § 1964. *See Blakey & Gettings, Racketeer Influenced And Corrupt Organizations (RICO): Basic Concepts-Criminal and Civil Remedies*, 53 TEMP. L.Q. 1009 (1980).

<sup>61</sup> 686 F.2d 449 (7th Cir.), *cert. denied*, 459 U.S. 880 (1982).

sustained but for the issuer's racketeering activity. Dismissing the RICO cross-claim because the auditors were not *directly* injured by the racketeering activity, the court noted that Congress did not intend "to create in the wake of every RICO violation waves of treble-damage suits by all who may have suffered indirectly from the violation."<sup>62</sup> Similarly, plaintiffs have been non-suited when they allege injury caused by their resignation or termination after having discovered that their employers were engaged in activities proscribed by RICO.<sup>63</sup> It thus appears that the only proper RICO plaintiff is someone whom the defendant intended to harm by his racketeering activity, or whose injury was a reasonably foreseeable and direct consequence of such activity.

There is dispute surrounding the rule that plaintiff must be *directly* injured by the alleged racketeering activity, and a number of courts have held that no such proximate causation is needed.<sup>64</sup> While this view is presently in the minority, it is supported by the fact that 18 U.S.C. section 1964(c), on its face, requires only injury to plaintiff's business or property by reason of a violation of section 1962. It makes no reference to such injury being "direct." Were courts to grant standing to "bystanders" indirectly harmed by alleged racketeering activities, the increase in sustainable RICO actions would nearly offset the decrease occasioned by the restrictive interpretation of the "pattern" requirement ushered in by *Sedima*.

For the present, a defendant should move to dismiss a RICO claim if it appears that: (i) none of the alleged injuries were sustained by plaintiff; or, (ii) the injury sustained by plaintiff was not a proximate result of the defendant's alleged racketeering activity.

#### V. INJURY "BY REASON OF" A VIOLATION OF 18 U.S.C. SECTION 1962(A)

RICO affords a private right of action to a person injured "by reason of" a violation of section 1962 of the statute.<sup>65</sup> Section 1962(c) makes it unlawful for a person to conduct the affairs of an enterprise through a pattern of racketeering activity. Injury "by reason of" a violation of section 1962(c) is therefore the same as injury caused by the underlying racketeering activity. This was one of the principal holdings in *Sedima*, which rejected the requirement of a section 1962(c) injury other than that

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<sup>62</sup> *Id.* at 457.

<sup>63</sup> *Nodine v. Textron, Inc.*, 819 F.2d 347 (1st Cir. 1987); *Todd v. Bio-Scientific Clinical Laboratory, Inc.*, No. 85-C-9163 (N.D. Ill. April 15, 1986)(WESTLAW, DCT database).

<sup>64</sup> *See, e.g., Acampora v. Boise Cascade Corp.*, 635 F. Supp. 66, 69 (D.N.J. 1986)(discharged employee stated RICO claim when she was harassed and then fired as a result of discovering her employer's RICO activities); *Rodonich v. House Wreckers Union, Local 95*, 627 F. Supp. 176 (S.D.N.Y. 1985).

<sup>65</sup> 18 U.S.C. § 1964(c).

resulting from the RICO predicates, variously characterized as a "racketeering enterprise" injury or a "competitive" injury.<sup>66</sup>

The situation is different under section 1962(a), which makes it unlawful for a person who has received income from a pattern of racketeering activity to *invest such income* in the operation of an enterprise.<sup>67</sup> In order for a plaintiff to establish injury "by reason of" a violation of section 1962(a), he must prove that the injury was caused by the defendant's *investment* of ill-gotten gains in an enterprise, rather than by the racketeering activity through which the funds were initially obtained.<sup>68</sup> Some courts, however, apparently overconstruing *Sedima's* comments directed to section 1962(c), have held that a section 1962(a) violation may be established by proving injury from the racketeering activity alone.<sup>69</sup>

The better view is that a section 1962(a) injury must flow from the act of investing in an enterprise. To hold otherwise is to read section 1964(c)'s "by reason of" language out of the statute and thus dispense with the congressionally intended distinction between section 1962(a) and section 1962(c). Such a major revision should emanate from Congress rather than from the courts.<sup>70</sup> This is not inconsistent with *Sedima*, since the Supreme Court addressed only section 1962(c), and with respect to all subsections of section 1962, the Court noted that "the plaintiff only has standing if . . . he has been injured in his business or property by the conduct constituting the violation."<sup>71</sup> The conduct constituting the viola-

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<sup>66</sup> 473 U.S. 479 (1985).

<sup>67</sup> See Note, *Investigating Dirty Money: Section 1962(a) of the Organized Crime Control Act of 1970*, 38 YALE L.J. 1491 (1974).

<sup>68</sup> In re Gas Reclamation, Inc. Sec. Litig., 659 F. Supp. 493 (S.D.N.Y. 1987); Gilbert v. Prudential Bache Sec., Inc., 643 F. Supp. 107, 109 (E.D. Pa. 1986); Kirschner v. Cable/Tel Corp., 576 F. Supp. 234, 242 (E.D. Pa. 1983); Heritage Ins. Co. v. First Nat'l Bank of Cicero, 629 F. Supp. 1412, 1417 (N.D. Ill. 1986); Eastern Corporate Fed. Credit Union v. Peat, Marwick, Mitchell & Co., 639 F. Supp. 1532, 1536-37 (D. Mass. 1986); DeMuro v. E.F. Hutton & Co., 643 F. Supp. 63 (S.D.N.Y. 1986); Cincinnati Gas & Elec. Co. v. General Elec. Co., 656 F. Supp. 49, 82-84 (S.D. Ohio 1986); Prodex, Inc. v. Legg Mason Wood Walker, Inc., No. 86-1950 (E.D. Pa. Feb. 6, 1987)(WESTLAW, DCT database); Huntsman-Christensen Corp. v. Mountain Fuel Supply Co., No. C86-0530G (D. Utah Nov. 24, 1986)(WESTLAW, DCT database); Waldschmidt v. Crosa, 177 Ga. App. 707, 340 S.E.2d 664, 667 (1986); Roche v. E.F. Hutton & Co., 658 F. Supp. 315, 321-22 (M.D. Pa. 1986)(grudgingly upholding the requirement).

<sup>69</sup> See, e.g., Haroco, Inc. v. American Nat'l Bank & Trust Co., 647 F. Supp. 1026, 1033 (N.D. Ill. 1986); Louisiana Power & Light Co. v. United Gas Pipe Line Co., 642 F. Supp. 781, 805-07 (E.D. La. 1986); King v. E.F. Hutton & Co., RICO Bus. Disp. Guide (CCH) ¶ 6578, 6840 (D.D.C. 1987). Suggesting but not expressly holding the same result are B.F. Hirsch, Inc. v. Enright Refining Co., 617 F. Supp. 49 (D.N.J. 1985); Vietnam Veterans of Am., Inc. v. Guerdan Indus., Inc., 629 F. Supp. 983 (N.D. Ill. 1986); Pennsylvania v. Derry Constr. Co., 617 F. Supp. 940 (W.D. Pa. 1985).

<sup>70</sup> Bankers Trust Co. v. Feldesman, 648 F. Supp. 17, 24-26 (S.D.N.Y. 1987).

<sup>71</sup> 473 U.S. 479 (1985).

tion of section 1962(a) is "investing."<sup>72</sup> Nor is it inequitable to impose such a standing requirement under section 1962(a). If the plaintiff has sustained injury from a pattern of racketeering activity, he will be able to recover treble damages under section 1962(c).<sup>73</sup> The only plaintiffs who will be deprived of relief are those who must allege that the person and enterprise are the same in a jurisdiction that allows this under section 1962(a) only. Such plaintiffs will have no recourse to section 1962(c), and this is as it should be.

Many RICO plaintiffs will have difficulty alleging injury resulting from the defendant's investment in an enterprise. A plaintiff alleging securities fraud, for example, will have lost a sum certain paid in exchange for securities. Since plaintiff's injury resulted from racketeering activity that culminated in the sale of securities, whether the defendant thereafter invested the purchase price in an enterprise cannot be causally related to plaintiff's injury. Under such circumstances, a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) is in order.

## VI. PLEADING FRAUD WITH PARTICULARITY

Federal Rule of Civil Procedure 9(b) requires that fraud be pled with particularity. This requirement is designed to accomplish three purposes: (i) to provide a defendant with adequate notice of the charges levelled against him so that the defendant will be able to prepare an adequate answer and defense; (ii) to eliminate complaints that seek to obtain discovery of unknown fraud; and, (iii) to protect a defendant from injury to his reputation from frivolous or unfounded charges of wrongdoing.<sup>74</sup> Since the label "racketeer" attaches to a RICO defendant from the moment the action is filed, the third criterion is particularly important in the RICO context. Many plaintiffs rely on the stigma associated with

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<sup>72</sup> The same result should obtain under 18 U.S.C. § 1962(b), where the conduct constituting the violation is the acquisition or maintenance of an interest in, or control of, an enterprise. See *supra* note 55.

<sup>73</sup> See *Gilbert v. Prudential Bache Sec., Inc.* No. 83-1513, slip op. at 2-3 (E.D. Pa. May 7, 1986)(WESTLAW, DCT database):

It is argued that, unless persons like this plaintiff are accorded "standing" to pursue civil claims based upon violations of § 1962(a), there can be no civil liability for violating that section. Even if this were correct, it would not justify disregarding the plain language of § 1964(c) and § 1962(a). The RICO statute, after all, is primarily a criminal statute; and I know of no universal legal principle to the effect that every criminal offense must give rise to a corresponding civil action for damages. But I believe the premise is flawed: using the proceeds of racketeering activities to infiltrate legitimate businesses can obviously cause damage to many persons, who would have a perfect right to sue. It just happens that plaintiff is not among them, in my view.

<sup>74</sup> *Grant v. Union Bank*, 629 F. Supp. 570, 575; *Crystal v. Foy*, 562 F. Supp. 422, 424 (S.D.N.Y. 1983).

RICO to orchestrate early settlements of claims that are meritless. For the defendant, the motion to dismiss is the only way to oppose such efforts at their inception.

Rule 9(b) applies to any RICO claim based on allegations of fraud,<sup>75</sup> and most RICO complaints allege securities, wire, or mail fraud. Some courts have gone further, applying Rule 9(b)'s specificity mandate to all RICO claims, including those that are not predicated on fraud.<sup>76</sup> In any event, moving to dismiss for failure to particularize is more likely to lead to emendation of the pleading than to outright dismissal. Dismissal will occur only if, after several rounds of motion practice, plaintiff has persistently refused to obey court orders requiring greater specificity in his pleading. Even then, it is rare for a RICO complaint to be dismissed solely because of plaintiff's failure to particularize the underlying facts. Failure to comply with Rule 9(b) is more likely to be cited as an alternative basis for dismissal.

Jurisdictions are divided on just what must be particularized and with what degree of specificity. Among the allegations that must be particularized in some jurisdictions are the following: the enterprise; the distinction between the enterprise and the racketeering activity; the predicate acts; probable cause that the predicate acts were committed; willfulness or intent underlying commission of the predicates, when these are elements of the underlying offenses; and a distinction between the acts taken by different defendants.<sup>77</sup>

For purposes of Rule 9(b), the underlying predicate acts are of greatest significance since the manner in which they are pled will largely determine whether the defendant is adequately apprised of the charges. Plaintiffs often have been required to plead the time, place and manner of each alleged fraudulent communication.<sup>78</sup> This requirement has been relaxed by some courts to allow for substitute means of specifying conduct, particularly when the alleged fraud is complex, involves many

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<sup>75</sup> See *Mauriber v. Shearson/American Express, Inc.*, 546 F. Supp. 391, 394 (S.D.N.Y. 1982).

<sup>76</sup> See, e.g., *Taylor v. Bear Stearns & Co.*, 572 F. Supp. 667, 682 (N.D. Ga. 1983).

<sup>77</sup> See *Acampora v. Boise Cascade Corp.*, 635 F. Supp. 66, 68 (D.N.J. 1986)(predicate acts); *Sims v. Faestel*, 638 F. Supp. 1281, 1284 (E.D. Pa. 1986), *aff'd without op.*, 813 F.2d 399 (3d Cir. 1987)(fraudulent concealment); *Satellite Fin. Planning Corp. v. First Nat'l Bank of Wilmington*, 633 F. Supp. 386, 402-05 (D. Del. 1986), *modified*, 643 F. Supp. 449 (D. Del. 1986); *McLendon v. Continental Group, Inc.*, 602 F. Supp. 1492, 1509 (D.N.J. 1985)(knowledge and intent underlying alleged mail fraud); *Alfaro v. E.F. Hutton & Co.*, 606 F. Supp. 1100 (E.D. Pa. 1985)(probable cause); *Kalmanovitz v. G. Heileman Brewing Co.*, 595 F. Supp. 1385, 1401 (D. Del. 1984), *aff'd*, 769 F.2d 152 (3d Cir. 1985); *Bruss Co. v. Allnet Communication Servs., Inc.*, 606 F. Supp. 401, 405 (N.D. Ill. 1985)(distinguishing among acts of multiple defendants); *Medallion TV Enters., Inc. v. SelecTV of Cal., Inc.*, 627 F. Supp. 1290, 1294 (C.D. Cal. 1986)(enterprise).

<sup>78</sup> See, e.g., *McGinty v. Beranger Volkswagon, Inc.*, 633 F.2d 226, 228 (1st Cir. 1980); *Cash v. Frederick & Co., Inc.*, 57 F.R.D. 71, 77 (E.D. Wis. 1972).



persons or occurs over a substantial period of time.<sup>79</sup> This trend is particularly evident in the Third Circuit by virtue of the 1984 decision in *Seville Industrial Machinery Corp. v. Southmost Machinery Corp.*<sup>80</sup>

In *Seville*, plaintiff alleged that the defendant had violated RICO by committing multiple frauds in a series of transactions spanning nearly two years and involving over 700 pieces of equipment.<sup>81</sup> The District Court dismissed the complaint for failure to describe the date, time or place of the phone calls and letters through which the fraudulent schemes were allegedly accomplished. The Third Circuit reversed on the ground that “[p]laintiffs are free to use alternative means of injecting precision and some measure of substantiation into their allegations of fraud.”<sup>82</sup> Plaintiff had done this by annexing to the complaint exhibits that identified “with great specificity” which pieces of equipment were the subject of which alleged fraudulent transactions.<sup>83</sup>

Some courts have interpreted *Seville* as generally displacing the requirement that the time and place of each fraudulent incident must be set forth in the pleading. Others have held that the alternative means of alleging fraud recognized in *Seville* are confined to cases where the underlying transactions are so complex that traditional means are unsuitable.<sup>84</sup> Where the number of parties is limited and the alleged predicates are temporally and geographically circumscribed, a defendant should argue that traditional particularity requirements should not be displaced. In any event, even under *Seville* and decisions like it, the requirement of specificity is not eliminated; rather, the means by which it may be satisfied are expanded. If specificity is not pled by traditional or alternative means, defendant should move to dismiss.

Given that the particularity test is amorphous, almost every RICO defendant will be in a position to move for dismissal under Rule 9(b). The likelihood that such a motion will be necessary is increased by plaintiffs’ awareness that (i) failure to plead with adequate particularity will at worst result in an order requiring an amended pleading; and, (ii) in many

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<sup>79</sup> See, e.g., *Seville Indus. Mach. Corp. v. Southmost Mach. Corp.*, 742 F.2d 786 (3d Cir. 1984), cert. denied, 469 U.S. 1211 (1985); *Tomera v. Galt*, 511 F.2d 504, 508 (7th Cir. 1975); *Micro-Medical Indus., Inc. v. Hatton*, 607 F. Supp. 931, 936-37 (D.P.R. 1985); *Verges v. Babovick*, 644 F. Supp. 150, 155 (E.D. La. 1986); *Systems Research, Inc. v. Random, Inc.*, 614 F. Supp. 494, 497-500 (N.D. Ill. 1985).

<sup>80</sup> 742 F.2d 786 (3d Cir. 1984), cert. denied, 469 U.S. 1211 (1985).

<sup>81</sup> *Id.* at 787.

<sup>82</sup> *Id.* at 791.

<sup>83</sup> *Id.*

<sup>84</sup> See, e.g., *Alfaro v. E.F. Hutton & Co.*, 606 F. Supp. 1100 (E.D. Penn. 1985) where 80 plaintiffs sought class certification to prosecute claims arising in many parts of the country. The court held it would be unduly burdensome to require plaintiffs to plead the time, place and manner of each alleged misrepresentation. *Id.* at 1108. It noted, however, that if the class was not certified, the two representative plaintiffs would be required to particularize their allegations in the traditional manner. *Id.* at 1109 n.3.

cases, specificity will render plaintiff more vulnerable to dismissal on other grounds. Plaintiffs will therefore withhold information from their initial pleadings on the theory that there is no downside to doing so. If no Rule 9(b) motion is made, the plaintiff has succeeded in increasing the defendant's burden on discovery. If such a motion is made, the plaintiff may amend his pleading and will in the meantime have imposed an additional burden on the defendant by forcing him to make the motion.

## VII. THE STATUTE OF LIMITATIONS

### A. *The Limitations Period*

The limitations period governing civil RICO claims has until recently been the subject of controversy. The statute itself does not provide for a limitations period. Its only reference to time, in a civil context, is the definition of a "pattern of racketeering activity," which requires that one of the predicate acts occur after the effective date of the statute (October 13, 1970), and that the last predicate act occur within ten years of a prior act, excluding periods of imprisonment.<sup>85</sup>

The search for an applicable limitations period begins with the Rules of Decision Act, which provides:

The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the United States, in cases where they apply.<sup>86</sup>

The Supreme Court has interpreted this statute as requiring that in the absence of a federal limitations period, a federal court must apply the statute of limitations of the most analogous state cause of action, barring a determination that Congress, despite its silence, intended otherwise.<sup>87</sup> Relying on this statute, federal courts seeking a statute of limitations for RICO claims initially turned to the law of the forum.

Prior to 1985, most courts adopted a "case-specific" approach, borrowing the limitations period for the state action most analogous to the alleged predicate acts underlying the RICO claim being analyzed.<sup>88</sup> A RICO claim based on securities fraud would be governed by the limitations period of the forum's blue sky law, while a RICO claim based on

<sup>85</sup> 18 U.S.C. § 1961(5).

<sup>86</sup> 28 U.S.C. § 1652. See Hill, *State Procedural Law In Federal Nondiversity Litigation*, 69 HARV. L. REV. 66 (1955); Mishkin, *The Variousness of "Federal Law": Competence And Discretion In The Choice of National and State Rules For Decision*, 105 U. PA. L. REV. 797 (1957).

<sup>87</sup> See *Holmberg v. Armbrrecht*, 327 U.S. 392, 395 (1946); *Del Costello v. International Bhd. of Teamsters*, 462 U.S. 131, 158-59 (1983).

<sup>88</sup> See, e.g., *Polite v. Diehl*, 507 F.2d 119 (3d Cir. 1974).

embezzlement of pension funds might be governed by the forum's limitations period for conversion. The list could go on almost endlessly, since the statute references a large number and wide variety of predicate acts.<sup>89</sup>

Not surprisingly, many problems arose from this application. Given that a RICO plaintiff must allege at least two acts of racketeering in order to arguably plead a "pattern" of racketeering activity,<sup>90</sup> a complaint will often allege two or more *different* predicate acts rather than two or more repetitions of the same predicate act. The result was that different predicates might be governed by different state limitations periods. Assuming that these predicates could otherwise combine to form a pattern of racketeering activity, the pattern might be destroyed if the RICO claim were time-barred by the shortest state limitations period analogous to one of the predicates.

Another problem was that the court in each case was required to spend an inordinate amount of time determining which state cause of action was most analogous to the RICO claim and then which limitations period governed that action. The "case-specific" approach also led to inequitable results. Within each state, certain RICO plaintiffs were deprived of their claims simply because the defendant's acts were most analogous to state actions commanding a shorter limitations period. But RICO nowhere suggested that the appropriateness of treble damage awards should vary from predicate to predicate based on the fortuity of state limitations periods. Similarly, RICO plaintiffs in different states fared differently based on the fortuity of living in a jurisdiction with a longer or shorter limitations analogue, and this resulted in forum shopping. In sum, the "case-specific" approach led to confusion, inequity, and a strain on judicial resources and was thus destined to be replaced.

Prior to 1985, a similarly particularized approach was used to determine the state statute of limitations to be applied by a federal court to claims arising under 42 U.S.C. section 1983 which, like RICO, did not have its own limitations period. This practice came to an end in 1985 with the Supreme Court's decision in *Wilson v. Garcia*,<sup>91</sup> where the Court held that interests in "uniformity, certainty and the minimization of unnecessary litigation" required rejection of the "case specific" approach and adoption within each state of a uniform limitations period.<sup>92</sup>

Lower federal courts immediately applied *Wilson's* reasoning to civil RICO cases. They now searched for the state cause of action most analogous to a *generic* RICO claim, rather than to the predicate acts underlying any particular RICO claim. Among the candidates were: (i)

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<sup>89</sup> 18 U.S.C. § 1961(1).

<sup>90</sup> 18 U.S.C. § 1961(5).

<sup>91</sup> 471 U.S. 261 (1985).

<sup>92</sup> 471 U.S. at 273.

the limitations period governing common law fraud, since although not all predicates related to fraud, the most commonly alleged predicate acts were mail, wire, and securities fraud; (ii) the limitations period governing a state's anti-racketeering statute, if it had one; (iii) the limitations period governing a state's statutory action for civil penalties or forfeitures; and, (iv) the catchall limitations period covering claims for which no limitations period was otherwise provided.<sup>93</sup> It was also occasionally argued that federal courts should turn away from state law and borrow a uniform limitations period from an analogous federal statute, such as the Clayton Act's four-year limitations period for private treble damage antitrust suits, or criminal RICO's five-year limitations period.<sup>94</sup>

Different courts resolved the matter differently, and during the two years following *Wilson*, there was a trend toward achieving uniformity of RICO limitations periods *within each state*. However, there was no interstate uniformity, and judicial resources were still being depleted in an effort to discern the state cause of action most analogous to *all* RICO claims and the limitations period governing that cause of action. The strain on judicial economy was lessened, however, since once an appellate court determined the appropriate RICO limitations period for a particular state, the district courts in that state would follow suit. But until this occurred, district courts in the same state would frequently disagree, and the interstate disparity still led plaintiffs to shop for the best RICO forum.<sup>95</sup>

Then the United States Supreme Court decided *Agency Holding Corp. v. Malley-Duff & Associates, Inc.*,<sup>96</sup> holding that *all* civil RICO claims would be governed by the four-year limitations period of the Clayton Act,

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<sup>93</sup> See, e.g., *Malley-Duff & Assocs., Inc. v. Crown Life Ins. Co.*, 792 F.2d 341 (3d Cir. 1986), *aff'd on other grounds*, 107 S. Ct. 2759 (1987) (adopting Pennsylvania's six-year catchall limitations period); *Durante Bros. & Sons, Inc. v. Flushing Nat'l Bank*, 755 F.2d 239 (2d Cir.), *cert. denied sub nom. Durante Bros. & Sons, Inc. v. National Bank of N.Y.C.*, 473 U.S. 906 (1985) (adopting New York's three-year period for actions to recover upon a liability, penalty or forfeiture created by statute). See also Note, *Civil RICO: Searching for the Appropriate Statute of Limitations in Actions Under Section 1964(c)*, 14 Loy. U. CHI. L.J. 765 (1983).

<sup>94</sup> See *Malley-Duff & Assoc. Inc.*, 792 F.2d at 350 n.17; Note, *Civil RICO: A Call For A Uniform Statute of Limitations*, 13 FORDHAM URBAN L.J. 205 (1985); Note, *Limitation Borrowing In Federal Courts*, 77 MICH. L. REV. 1127 (1979).

<sup>95</sup> There was an additional complicating factor in that the courts recognized that no matter how analogous a state action might be to RICO, its limitations period would be ineligible if it was so short as to contravene federal policies underlying RICO. *Malley-Duff & Assoc.*, 792 F.2d at 347 n.13. Thus, merely locating the cause of action most analogous to RICO would not necessarily solve the problem. What was needed was the state action *with a sufficiently long limitations period* that was most analogous to RICO. This increased the judicial burden even more since it was never clear just what length of time would suffice. See, e.g., *Electronics Relays (India) Private Ltd. v. Pascente*, 610 F. Supp. 648 (N.D. Ill. 1985) (holding two-year period adequate); *Malley-Duff & Assoc. Inc.*, 792 F.2d at 351-52 (suggesting that one year would be too short).

<sup>96</sup> 107 S. Ct. 2759 (1977).

thus side-stepping the usual practice of looking to state law and going even further than it had two years earlier in *Wilson*, where the uniformity was only intra-state. Adopting the ABA's characterization of the then-current state of RICO limitations law as "confused, inconsistent, and unpredictable,"<sup>97</sup> the Court concluded as a matter of policy that only a nationally uniform period could avoid such intolerable uncertainty and time-consuming litigation.<sup>98</sup> Finding that RICO was more analogous to the Clayton Act's private treble damage action for antitrust violations than to any state law alternative, the Court borrowed the four-year limitations period provided by 15 U.S.C. section 15b.<sup>99</sup>

When the last predicate act alleged in a RICO complaint occurred more than four years before the lawsuit was filed and the plaintiff has failed to allege fraudulent concealment of that act by the defendant, a RICO action is now time-barred and may be dismissed pursuant to motion under Federal Rule of Civil Procedure 12(b)(6) or 56. The defense will be more complicated if the plaintiff alleges fraudulent concealment since the federal equitable tolling doctrine provides that the statute of limitations does not begin to run until plaintiff knows or with due diligence should know the material facts underlying his cause of action.<sup>100</sup>

### B. *Fraudulent Concealment*

Fraudulent concealment may be active or passive. Active or affirmative concealment occurs when, after commission of the underlying offense, the defendant takes affirmative steps to conceal from plaintiff the existence of the underlying facts. The underlying offense may, but need not be, fraud. Passive concealment occurs only when the underlying offense is fraud. Here, the misrepresentation that is a necessary element of the underlying fraud also acts to conceal the fraud from plaintiff. The defendant does nothing other than commit the initial offense.

Some courts require active fraudulent concealment as a basis for equitably tolling the applicable statute of limitations.<sup>101</sup> Others will toll on the basis of passive concealment (i.e., underlying fraud), if it prevents the plaintiff from discovering the fraud despite due diligence.<sup>102</sup> In any

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<sup>97</sup> *Id.* at 128.

<sup>98</sup> *Id.* at 129.

<sup>99</sup> *Id.* at 134.

<sup>100</sup> See *Biggans v. Bache Halsey Stuart Shields, Inc.*, 638 F.2d 605, 608 n.3 (3d Cir. 1980). Even before *Agency Holding Corp.*, 107 S. Ct. at 2754, when state law provided the limitations period for a RICO claim, it was the federal law of equitable tolling that determined when the limitations period began to run on a federal claim. *Alfaro v. E.F. Hutton & Co.*, 606 F. Supp. 1100, 1106 (E.D. Pa. 1985).

<sup>101</sup> See, e.g., *Volk v. D.A. Davidson & Co.*, 816 F.2d 1406 (9th Cir. 1987).

<sup>102</sup> See, e.g., *Hauptmann v. Wilentz*, 570 F. Supp. 351 (D.N.J. 1983), *aff'd*, 770 F.2d 1070 (3d Cir. 1985), *cert. denied*, 106 S. Ct. 887 (1986).

event, most jurisdictions require that fraudulent concealment be pled with particularity, a requirement derived from the conjunction of Federal Rule of Civil Procedure 9(b) and the federal equitable tolling doctrine itself.<sup>103</sup>

Although Rule 9(b) has been applied less than vigorously in the RICO context, the equitable tolling doctrine will insure that fraudulent concealment is specifically pled. This is appropriate given the circumstances surrounding a claim of fraudulent concealment and the fundamentality of a statute of limitations. The issue arises only when it appears from the face of the complaint that the action is time-barred. Since it is the plaintiff who is filing an action after the statute of limitations has presumptively expired, plaintiff should bear the burden of establishing why equity should toll the limitations period.

The threshold question for defense counsel is whether plaintiff has properly pled fraudulent concealment. Generally, a plaintiff is required to specifically plead and thereafter prove the following four elements:<sup>104</sup> (i) that the defendant wrongfully concealed the basic facts disclosing the existence of the action; (ii) that the plaintiff remained ignorant of the facts; (iii) that the plaintiff made diligent efforts to discover the facts; and, (iv) the reasons why such diligent efforts did not result in and could not have resulted in earlier discovery of the facts.<sup>105</sup> If the RICO complaint fails to plead these elements, defendant should, in lieu of answering, move to dismiss under Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim upon which relief may be granted. Since such a motion is not deemed a responsive pleading under Federal

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<sup>103</sup> See, e.g., *Corson v. First Jersey Sec., Inc.*, 537 F. Supp. 1263, 1268 (D.N.J. 1982); *Campbell v. Upjohn Co.*, 498 F. Supp. 722, 727 (W.D. Mich. 1980), *aff'd*, 676 F.2d 1122 (6th Cir. 1982); *Kroungold v. Triester*, 407 F.Supp. 414, 419 (E.D. Pa. 1975).

<sup>104</sup> See, e.g., *Hupp v. Gray*, 500 F.2d 993, 996 (7th Cir. 1974); *Kroungold*, 407 F. Supp. at 419.

<sup>105</sup> Some courts dispense with the requirement of due diligence if there has been affirmative fraudulent concealment. Thus, the limitations period would begin to run upon plaintiff's actual discovery of the facts regardless of when a reasonably diligent person should have discovered the facts. See, e.g., *Tomera v. Galt*, 511 F.2d 504 (7th Cir. 1975). The majority of courts do not carve out this exception. See *Campbell v. Upjohn Co.*, 676 F.2d 1122, 1128 (6th Cir. 1982); *Ohio v. Peterson*, 651 F.2d 687 (10th Cir.), *cert. denied*, 454 U.S. 895 (1981); *Plain v. Flicker*, 645 F. Supp. 898, 902 (D.N.J. 1986); *Hill v. Equitable Bank Nat'l Assn.*, 599 F. Supp. 1062, 1076 n.16 (D. Del. 1984). It has been noted that if affirmative concealment eliminates the requirement of diligence, the policy of repose underlying statutes of limitations would be thwarted since the statute would be tolled indefinitely "while evidence stales, memories fade and courts and adversaries wait, until the plaintiff at his leisure alleges actual discovery, despite the avalanche of evidence that would put all but the most diligent plaintiffs on notice of a cause of action." *Campbell*, 676 F.2d at 1128. Even in a jurisdiction where affirmative concealment overrides the necessity of due diligence, a defendant should move to dismiss if plaintiff has failed to plead with particularity acts of affirmative concealment.

Rule of Civil Procedure 15(a),<sup>106</sup> plaintiff will have the opportunity to amend his pleading as of right to conform to the aforesaid requirements. Nonetheless, if the conclusory assertion of fraudulent concealment was spurious to begin with, the motion to dismiss may eliminate the RICO claim in its entirety.

Defendant should at the same time move for summary judgment, since it is well established that a motion to dismiss on limitations grounds may be styled as a motion for summary judgment.<sup>107</sup> Such a motion will increase plaintiff's responsive burden. In order to make such a motion, it is not necessary for the defendant to submit information or documentation refuting plaintiff's conclusory assertion of concealment. Since plaintiff has the burden of pleading, production and proof on this issue, and given that a defendant moving for summary judgment need not submit supporting affidavits,<sup>108</sup> defendant will have discharged his burden by noting that the complaint is time-barred on its face and fails to properly plead fraudulent concealment. However, if the complaint on its face *does* properly plead the elements of fraudulent concealment, the moving defendant will then bear the burden of producing evidence to affirmatively establish that no concealment took place.<sup>109</sup>

The summary judgment motion will shift the burden of production to plaintiff. A party opposing such a motion may not rest on his pleadings,<sup>110</sup> or on affidavits or counsel,<sup>111</sup> and may not avoid the issue until discovery or trial.<sup>112</sup> Plaintiff will therefore be required to submit an affidavit based on personal knowledge containing the information required to sustain a claim of fraudulent concealment. Technically, the burden will not shift until the court determines that fraudulent concealment has not been properly pled. However, since most plaintiffs will respond to the Rule 12(b)(6) and Rule 56 motions simultaneously, plaintiff is likely to generate affidavits even before the court has determined that there is a pleading defect.

In this scenario, there is no downside for the moving defendant. If the fraudulent concealment claim is genuine, the defendant will now know what plaintiff knows and thus obtain unilateral expedited discovery. If it is spurious, this is more likely to be revealed on a motion for summary judgment, since the party's fear of perjury will exceed his or her fear of Rule 11 sanctions for providing false information to the attorney to be

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<sup>106</sup> See *Schreiber Distrib. Co. v. Serv-Well Furniture Co.*, 806 F.2d 1393, 1401 (9th Cir. 1986).

<sup>107</sup> See, e.g., *Solinski v. General Elec. Co.*, 149 F. Supp. 784 (D.N.J. 1957).

<sup>108</sup> *Fed. R. Civ. P. 56(b)*; *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986).

<sup>109</sup> See *Richards v. Mileski*, 662 F. 2d 65, 71 (D.C. Cir. 1981).

<sup>110</sup> *Fed. R. Civ. P. 56(e)*; *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986); *Cowgill v. Raymark Indus., Inc.*, 780 F.2d 324, 329 (3d Cir. 1985); *United States v. Lattauzio*, 748 F. 2d 559, 561 (10th Cir. 1984).

<sup>111</sup> *United States v. Halpern*, 260 F. 2d 590, 591 (3d Cir. 1958).

<sup>112</sup> *Corson v. First Jersey Sec., Inc.*, 537 F. Supp. 1263, 1268-69 (D.N.J. 1982).

included in an unverified pleading. In other words, a meritless assertion of fraudulent concealment will be exposed if plaintiff fails to submit an affidavit opposing the defendant's motion for summary judgment.<sup>113</sup>

It will not always be apparent whether fraudulent concealment has been properly pled. The answer will be clear only at the extremes. If the complaint does not mention concealment or merely states in a conclusory fashion that as a result of fraudulent concealment, plaintiff did not discover the material facts until a particular date, the pleading will not be sustained. At the other extreme, a pleading will be sustained if the complaint specifically pleads each of the required four elements of fraudulent concealment, unless defendant can definitively establish that such allegations are false.

There is a substantial gray area in which plaintiff will probably be afforded the benefit of any doubt. After all, if defendant engaged in fraudulent concealment and did a good job of it, one would not expect plaintiff to be aware of all the surrounding circumstances without the benefit of discovery. Hence, if plaintiff has particularized two or more of the four required elements, and has pled the reasons for his inability to plead the other elements, the court in its discretion should either sustain the pleading on its face or require affidavits in order to confirm that plaintiff is justifiably unable to plead all the elements.

Where plaintiff sustains its burden and the motion for summary judgment is, or is about to be, denied, and the defendant firmly believes that no concealment took place, the defendant should request immediate discovery limited to the issue of fraudulent concealment. This will avoid costly litigation of an action that in fact turns out to be time-barred. Defendant may request that the court reserve decision on the motion until this discovery is completed or, if the motion has already been denied, may either move for reconsideration or notice a new motion for summary judgment, if the discovery reveals the absence of fraudulent concealment.

Defendant may wish to support the motion with materials outside the pleading.<sup>114</sup> This is likely to occur in RICO actions since the predicate offenses may have formed the basis for prior related actions between the

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<sup>113</sup> Astute counsel representing plaintiff should seek leave to refrain from opposing the summary judgment portion of the motion until the court determines that fraudulent concealment has not been properly pled. Even then, plaintiff's counsel should file an amended complaint and thereby seek to short-circuit the responsive burden placed on his client by a motion for summary judgment.

<sup>114</sup> If this occurs, it would seem that the motion would definitely be one for summary judgment rather than failure to state a claim since Fed. R. Civ. P. 12(b) provides that if the court considers matters outside the pleading in resolving a Rule 12(b)(6) motion, it shall be converted to a motion for summary judgment. In fact, the mere review of matters outside the pleading does not result in conversion. Only if the court finds such matters to be essential to its disposition will conversion take place. *Ellis v. Cassidy*, 625 F.2d 227, 229



parties or between the plaintiff and non-parties.<sup>115</sup> Since the plaintiff would have constructive knowledge of prior pleadings and other documents that were part of the record in a prior action, the moving defendant, by alerting the court to such materials, may establish that plaintiff was placed on notice of the material facts early enough to time-bar the RICO claim.

### VIII. CONCLUSION

It is impossible to set forth all grounds for dismissing every RICO complaint. The scope of this Article is to explore several grounds for dismissal that are likely to repeatedly arise. A minimum of six threshold inquiries should be made when reviewing a RICO complaint: (i) whether the plaintiff alleged sufficient continuity and relationship among predicate acts to establish a "pattern" of racketeering activity; (ii) whether the plaintiff alleged a RICO "person" that is distinct from the RICO "enterprise"; (iii) whether the plaintiff alleged that it was injured as a result of defendant's alleged conduct, and that such injury resulted directly from such conduct; (iv) whether the plaintiff, when proceeding under 18 U.S.C. section 1962(a), alleged injury by reason of defendant's investment in an enterprise; (v) whether the plaintiff particularized his or her allegations; and (vi) whether the last alleged predicate act occurred within four years of the commencement of the action, and if it did not, whether the plaintiff alleged fraudulent concealment with particularity. Provided that any one of these is answered in the negative, defendant, in lieu of filing an answer, should move to dismiss for failure to state a claim and/or for summary judgment under Federal Rule of Civil Procedure 12(b)(6) or 56, respectively.

Until Congress limits the scope of civil RICO, or the Supreme Court decides to elaborate upon *Sedima's* footnote, such motion practice is the best protection for non-racketeer civil defendants against lawsuits that are often no more than legalized forms of blackmail.

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(9th Cir. 1980); *Paul S. Mullin & Assoc., Inc. v. Bassett*, 632 F. Supp. 532, 534-35 N.1 (D. Del. 1986); *Angleton v. Pierce*, 574 F. Supp. 719, 723 N.1 (D.N.J. 1983), *aff'd without op.*, 734 F.2d 3 (3d Cir.), *cert. denied*, 469 U.S. 880 (1984). Moreover, if the matters outside the pleading consist of public records (e.g., pleadings or discovery filed in a prior related action), they may be judicially noticed in lieu of conversion. FED. R. EVID. 201; *Mack v. South Bay Beer Distribs., Inc.*, 798 F.2d 1279, 1282 (9th Cir. 1986); *Zahn v. Transamerica Corp.*, 162 F.2d 36, 48 n.20 (3d Cir. 1947); *Abernathy v. Erickson*, 657 F. Supp. 504 (N.D. Ill. 1987). Judicial notice would seem particularly appropriate under such circumstances since such records, in this context, will not be submitted to establish the truth of their contents but only to show when plaintiff was placed on notice of the facts underlying his RICO action.

<sup>115</sup> If there have been prior related actions between the parties and if the jurisdiction has a single or entire controversy rule, defendant should also move to dismiss on the ground that plaintiff failed to assert his RICO claim in the earlier action. However, where the prior action was in state court, this defense will succeed only in those few states where the courts have held that state courts have concurrent jurisdiction over RICO. *See supra* note 2.