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Stephen D. Brown

Alan M. Lieberman

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1990]

## RICO BASICS: A PRIMER

STEPHEN D. BROWN  
ALAN M. LIEBERMAN\*

## I. INTRODUCTION

**V**IRTUALLY every federal litigator has run into the Racketeer Influenced and Corrupt Organizations Act (RICO)<sup>1</sup> since it became a popular tool in civil litigation about ten years ago. Whether you are pro-RICO<sup>2</sup> or anti-RICO,<sup>3</sup> the statute is a fact of life in today's complex, federal litigation. It has been used in wrongful discharge cases,<sup>4</sup> against pro-life activists,<sup>5</sup> in securities cases<sup>6</sup> and virtually every other area of litigation.<sup>7</sup> Therefore, today's federal litigator must be familiar with RICO.

RICO is a criminal statute with a private right of action. Even when RICO is used for civil redress, a plaintiff must prove a crime.

The original purpose of RICO was to afford federal law enforcement a broad and far-reaching tool to root out organized crime from legitimate business and to prevent the infiltration of legitimate business by organized crime.<sup>8</sup>

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\* Stephen D. Brown (B.A., 1971, Williams College; J.D., 1976, Villanova University School of Law) and Alan M. Lieberman (A.B., 1968, Franklin & Marshall College; J.D., 1971, Villanova University School of Law) are partners in the Litigation Department of Schnader, Harrison, Segal & Lewis, who specialize in federal white collar criminal defense, civil RICO and complex litigation. The authors express their appreciation to Theresa Loscalzo and Dorothy Attwood for their invaluable assistance in preparing this article.

1. 18 U.S.C. §§ 1961-1968 (1988).

2. Goldsmith, *Civil RICO Abuse: The Allegations in Context*, 1986 B.Y.U. L. REV. 55, 103.

3. Rehnquist, *Get RICO Cases Out of My Courtroom*, Wall St. J., May 19, 1989, at A14, col. 4.

4. *See, e.g.*, *Shearin v. E.F. Hutton Group, Inc.*, 885 F.2d 1162 (3d Cir. 1989).

5. *See, e.g.*, *Northeast Women's Center, Inc. v. McMonagle*, 868 F.2d 1342 (3d Cir.), *cert. denied*, 110 S. Ct. 261 (1989).

6. *See, e.g.*, *Sheridan v. Weinberger*, 687 F. Supp. 152 (M.D. Pa. 1987); *Gilbert v. Prudential-Bache Sec., Inc.*, 643 F. Supp. 107 (E.D. Pa. 1986).

7. *See, e.g.*, *Environmental Tectonics v. W.S. Kirkpatrick, Inc.*, 847 F.2d 1052 (3d Cir. 1988) (commercial bribery), *aff'd*, 110 S. Ct. 701 (1990); *Saporito v. Combustion Eng'g Inc.*, 843 F.2d 666 (3d Cir. 1988) (ERISA), *vacated and remanded for reconsideration*, 109 S. Ct. 1306 (1989); *B.F. Hirsch v. Enright Ref. Co.*, 751 F.2d 628 (3d Cir. 1984) (breach of contract).

8. *United States v. Turkette*, 452 U.S. 576, 591 (1981) ("[T]he major pur-

The development of RICO as a private civil cause of action has taken the statute far beyond its original purposes. The basic elements of the statute define organized crime. Yet this definition is not limited to the traditional concept of the gangster or the mob involved in narcotics, prostitution, illegal gambling, extortion, contract murder, contract arson and similar conduct associated with traditional organized criminal elements in the United States. RICO defendants can be a Fortune 100 company and its CEO just as easily as Nicky Scarfo and La Cosa Nostra.

This article will attempt to introduce the reader to the basic concepts and issues necessary to develop a working knowledge of RICO. The article is divided into three parts. The first section outlines the definitions and elements of the statute. The second section delves into issues which frequently arise in RICO litigation, such as what constitutes a pattern, statutes of limitations and the enterprise requirement. The third section will discuss the advantages and disadvantages of including a RICO claim in your complaint.

The article is not intended to make you a RICO expert. The article will provide the reader with a fundamental understanding of the statute and its applications so that he or she is able to make informed decisions in bringing and defending RICO claims.

## II. RICO IS A STATUTE

RICO is not a common law creature—it is a statute.<sup>9</sup> If you have a working knowledge of the statute, you will have a working knowledge of RICO.

### A. *The Private Cause of Action*

Subsection (c) of section 1964 provides a civil cause of action for a substantive violation of RICO. Section 1964(c) reads:

(c) Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit including a reasonable attorney's fee.<sup>10</sup>

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pose of Title IX is to address the infiltration of legitimate business by organized crime.”); *see also* *Russello v. United States*, 464 U.S. 16, 26-28 (1983).

9. *Russello*, 464 U.S. at 20; *Turkette*, 452 U.S. at 580.

10. 18 U.S.C. § 1964(c) (1988).

There are two key provisions in section 1964(c): who or what is a person and what type of injury gives rise to a cause of action. First, the term "person" is defined in section 1961(3) to mean "any individual or entity capable of holding a legal or beneficial interest in property."<sup>11</sup> Therefore, a RICO plaintiff can be a partnership, corporation, individual or other organization.<sup>12</sup> Second, RICO only provides relief for persons injured in their "business or property." RICO does not provide relief for personal injuries.<sup>13</sup>

Another issue which frequently arises under section 1964(c) is causation. Only that person injured by the violation of section 1962 can sue. Therefore, if a business is damaged by section 1962, the stockholders or the creditors of the business which lose money as a result of the damage done to the business cannot sue under RICO.<sup>14</sup> The business is the only "person" injured "by reason of" the violation. Therefore, the stockholders or creditors do not have standing to sue under section 1964(c).

#### B. *The Key Definitions—Section 1961*

Section 1962 outlines four specific substantive violations of RICO.<sup>15</sup> There are four key definitions contained in the RICO definitional section which are common to all four substantive violations. A firm grasp of these definitional sections is essential to working with the statute. The application of each of the four causes of action under RICO turns on the relationship between these four key definitions.

The four key terms are:

1. "Racketeering activity" (sometimes referred to as "predicate acts");<sup>16</sup>
2. "Person" (most significant as the defining term for the

11. *Id.* § 1961(3).

12. *See, e.g.*, *Shearin v. E.F. Hutton Group, Inc.*, 885 F.2d 1162 (3d Cir. 1989) (individual); *Swistock v. Jones*, 884 F.2d 755 (3d Cir. 1989) (individual, partnership and corporation); *Fiorentino v. Converse*, 705 F. Supp. 253 (E.D. Pa.), *aff'd*, 884 F.2d 1383 (3d Cir. 1989) (individual); *Environmental Tectonics v. W.S. Kirkpatrick, Inc.*, 847 F.2d 1052 (3d Cir. 1988) (corporation).

13. *Zimmerman v. HBO Affiliate Group*, 834 F.2d 1163, 1169 (3d Cir. 1987).

14. *Carol Cable Co. v. Koffler*, No. 89-1657 (E.D. Pa. Sept. 15, 1989) (LEXIS, Genfed library, Dist file); *John L. Motley Assoc. v. Rumbaugh*, No. 86-73 (E.D. Pa. Sept. 1, 1989) (LEXIS, Genfed library, Dist file); *Blue Line Coal Co. v. Equibank*, No. 87-6150 (E.D. Pa. June 12, 1989) (LEXIS, Genfed library, Dist file).

15. 18 U.S.C. § 1962 (1988).

16. *Id.* § 1961(1).

defendant);<sup>17</sup>

3. "Enterprise";<sup>18</sup> and

4. "Pattern of racketeering activity".<sup>19</sup> Each of these will be discussed briefly below.

First, "racketeering activity" includes a series of specific federal and state statutes which Congress decided were most characteristic of organized crime. Not all criminal activity, however, falls within RICO as a predicate offense. Only the criminal statutes specifically designated in the definition of racketeering activity may serve as a predicate act constituting a "pattern." The most commonly asserted predicate offenses because of their breadth are mail fraud<sup>20</sup> and wire fraud.<sup>21</sup> Mail [or wire] fraud is simply the execution or attempted execution of a scheme or artifice to defraud in which the United States mail is utilized to transmit matter integral to the scheme.<sup>22</sup>

Second, the definition of "person" is the same definition as discussed above.<sup>23</sup> Third, "enterprise" is defined in section 1961(4)<sup>24</sup> and is key because it is the enterprise concept which, in part, makes RICO unique. Under RICO law, enterprises may be lawful, unlawful or passive; they may be culpable or non-culpable.<sup>25</sup> "Enterprise" is defined as "any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity."<sup>26</sup> "Enterprise" encompasses both wholly illegitimate (such as the Mafia or LaCosa Nostra) as well as legitimate enterprises.<sup>27</sup>

The fourth key definition is "pattern of racketeering activ-

17. *Id.* § 1961(3).

18. *Id.* § 1961(4).

19. *Id.* § 1961(5).

20. *Id.* § 1341.

21. *Id.* § 1343. In *Taffin v. Levitt*, the United States Supreme Court noted that "54.9% of all RICO cases after *Sedima* involved 'common law fraud' and another 18.0% involved either 'nonsecurities fraud' or 'theft or conversion.'" 110 S. Ct. 792, 799 (1990) (citing 2 Civil RICO Rep. (BNA) No. 44, at 7 (Apr. 14, 1987)).

22. *Schmuck v. United States*, 109 S. Ct. 1443, 1447 (1989). The elements of the wire fraud statute are identical to those in the mail fraud statute except that the defendant must cause the use of interstate wire communications rather than the mails. *United States v. Lemire*, 720 F.2d 1327, 1334 n.6 (D.C. Cir. 1983), *cert. denied*, 467 U.S. 1226 (1984); *United States v. Calvert*, 523 F.2d 895, 903 (8th Cir. 1975), *cert. denied*, 424 U.S. 911 (1976).

23. *See supra* note 11 and accompanying text.

24. 18 U.S.C. § 1961(4) (1988).

25. *See Rose v. Bartle*, 871 F.2d 331 (3d Cir. 1989).

26. 18 U.S.C. § 1961(4) (1988).

27. *United States v. Turkette*, 452 U.S. 576, 580-81 (1981).

ity.” It is the “pattern” along with the enterprise requirement which distinguishes RICO from single episode criminal conduct or “garden variety” fraud. The use of pattern was intended to make sure that RICO does not cover isolated criminal conduct, but rather criminal conduct which has some relationship and a threat of continuity.<sup>28</sup> Section 1961(5) defines pattern of racketeering activity as:

[A]t least two acts of racketeering activity [as defined in section 1961(1)], one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity.<sup>29</sup>

The concept of pattern of racketeering activity will be touched on more below.

### C. *The Elements of a Cause of Action*

Once one understands the definitions covered above, the next step is to understand what RICO was designed to prohibit. RICO was designed to prevent organized crime from:

1. Investing in or acquiring legitimate businesses with criminal money;
2. Maintaining or acquiring businesses through criminal activity; or
3. Operating businesses through criminal activity.<sup>30</sup> Each of these three goals is fulfilled by a specific subsection of section 1962.

Section 1962(a) fulfills the first goal.<sup>31</sup> Section 1962(a) prohibits a person from investing criminally obtained money acquired through a pattern of racketeering activity into a legitimate business. The specific elements of section 1962(a) are:

1. A defendant person;
2. *Received income derived from*;
3. A pattern of racketeering activity;
4. *Investing the racketeering income or its proceeds*;

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28. *H.J. Inc. v. Northwestern Bell Tel. Co.*, 109 S. Ct. 2893 (1989); see *Marshall-Silver Constr. Co. v. Mendel*, 894 F.2d 593 (3d Cir. 1990).

29. 18 U.S.C. § 1961(5) (1988).

30. *Id.* § 1962.

31. *Id.* § 1962(a).

5. *In the acquisition of an interest in or the establishment or operation of;*
6. Any enterprise;
7. Engaged in, or the activities of which affect, interstate or foreign commerce.<sup>32</sup>

Standing is a significant issue under section 1962(a). Section 1962(a) prohibits investment of racketeering income or its proceeds—it does not prohibit engaging in mail fraud or predicate acts themselves. Therefore, a victim of the predicate acts under section 1962(a) does not have standing under RICO because that person has not been hurt by a violation of section 1962(a) but merely by the pattern of racketeering activity.<sup>33</sup>

The essential elements of section 1962(b) are:

1. A defendant person;
2. *Acquiring or maintaining* any interest in or control of;
3. An enterprise (engaged in, or the activities of which affect, interstate or foreign commerce);
4. *Through* a pattern of racketeering activity.<sup>34</sup> Thus, subsection (b) differs from subsection (a) in that subsection (b) requires the purpose of the pattern to be to *acquire* or *maintain* an interest in an enterprise, whereas (a) uses the pattern of racketeering activity to generate income, which is subsequently *invested* in an enterprise.

The essential elements of section 1962(c) are:

1. A defendant person;
2. Employed by or associated with;
3. An enterprise (engaged in, or the activities of which affect, interstate or foreign commerce);
4. Who conducts or participates in the conduct of the affairs of the enterprise;
5. *Through* a pattern of racketeering activity.<sup>35</sup> It is important to note that section 1962(c) adds a new element—that is, the defendant person must be employed by or associated with the enterprise.

Once again, under subsection (c), it is important to read the

32. *Id.*

33. *Rose v. Bartle*, 871 F.2d 331, 357-58 (3d Cir. 1989); *see also* *Carol Cable Co. v. Koffler*, No. 89-1657 (E.D. Pa. Sept. 15, 1989) (LEXIS, Genfed library, Dist file); *John L. Motley Assoc. v. Rumbaugh*, No. 86-73 (E.D. Pa. Sept. 1, 1989) (LEXIS, Genfed library, Dist file).

34. 18 U.S.C. § 1962(b) (1988).

35. *Id.* § 1962(c).

statute carefully because it defines who can be a proper defendant. Because of the addition of the requirement that the person be associated with or employed by the enterprise, the United States Court of Appeals for the Third Circuit has held that the “‘person’ charged with [violating section 1962(c)] cannot be the same entity as the ‘enterprise’.”<sup>36</sup> Therefore, a plaintiff must be careful in distinguishing between the person and the enterprise when pleading a claim under section 1962(c).<sup>37</sup>

Some plaintiffs have argued successfully that where the enterprise consists of a group of entities, of which the defendant is only a part, it is not the *same* entity as the defendant corporation standing alone.<sup>38</sup> Thus, the “person” and “enterprise” are distinct entities.

The final subsection under section 1962 makes it a crime to conspire to violate any of the previous three subsections.

The essential elements of section 1962(d) are:

1. A defendant person;
2. Who agreed to violate any of the substantive provisions of section 1962(a), (b) or (c).<sup>39</sup>

Interestingly enough, the Third Circuit has held that claims potentially barred by the standing requirements of subsections (a), (b) or (c) may be permitted under (d). In *Shearin v. E.F. Hutton Group, Inc.*,<sup>40</sup> Chief Judge Gibbons held that although the plaintiff-employee lacked standing to pursue a substantive civil RICO remedy, she did have standing to bring an action for con-

36. *B.F. Hirsch v. Enright Ref. Co.*, 751 F.2d 628, 633 (3d Cir. 1984).

37. It is unclear whether the Third Circuit undercut *B.F. Hirsch* in *Rose v. Bartle*, 871 F.2d 331 (3d Cir. 1989). The Third Circuit in *Rose* distinguished its *B. F. Hirsch* decision on the basis that its holding in *B.F. Hirsch* (requiring defendant person and enterprise to be separate) governed instances where the enterprise was innocent of wrongdoing, passive or victimized by the RICO persons. *Rose*, 871 F.2d at 358-59. For purposes of determining whether an enterprise can also be a defendant person under § 1962(c), the issue is whether the enterprise participated in racketeering activity or benefited from it consciously.

38. Compare *Morgan v. Staats*, No. 84-2765 (W.D. Pa. Jan. 22, 1988) (LEXIS, Genfed library, Dist file); *Moravian Dev. Corp. v. Dow Chem. Co.*, 651 F. Supp. 144, 147 (E.D. Pa. 1986) (corporate entity named as “person” separate and distinct from association-in-fact consisting of group of corporations including “person”); *Temple Univ. v. Salla Bros.*, 656 F. Supp. 97 (E.D. Pa. 1986) and *Wright v. Everett Cash Mut. Ins. Co.*, 637 F. Supp. 155, 156-57 (W.D. Pa. 1986) (insurer and insurance agent not same entity; insurer and claims agent separate entities) with *Sheridan v. Weinberger*, 687 F. Supp. 152, 157-58 (M.D. Pa. 1987) (defendant “person” may not even be *part* of enterprise).

39. 18 U.S.C. § 1962(d) (1988).

40. 885 F.2d 1162, 1169-70 (3d Cir. 1989).



spiracy in violation of subsection (d).<sup>41</sup> In that case, the plaintiff alleged that her employer had terminated her to prevent her from disclosing alleged illegal activities by her employer.<sup>42</sup> Indeed, in *Shearin* the Third Circuit held that under section 1962(d), the plaintiff need not show injury flowing from the substantive violation.<sup>43</sup> Rather, the plaintiff need only show injury arising from an act predicate to the conspiracy itself, even if that act is distinct from the racketeering acts listed in section 1961(1).<sup>44</sup> “[E]ither racketeering activity or classic overt conspiracy acts may qualify as ‘predicate acts’ to a RICO violation that causes injury.”<sup>45</sup>

Some courts have held that a corporation cannot conspire with its agents, employees or officers unless corporate outsiders are also involved in the agreement.<sup>46</sup>

### III. TYPICAL ISSUES

#### A. *Jurisdiction*

State and federal courts have concurrent jurisdiction over RICO claims.<sup>47</sup>

#### B. *Statute of Limitations*

The Clayton Act’s four-year statute of limitations for civil enforcement actions applies to RICO cases.<sup>48</sup> There are two other key issues with respect to the statute of limitations on RICO claims. The first is when the statute of limitations starts to run and, second, whether a plaintiff is barred from recovering for injuries occurring outside of the four-year limitation. The Third Circuit has answered each of these questions as follows:

[T]he limitations period for a civil RICO claim runs from the date the plaintiff knew or should have known that the elements of the civil RICO cause of action existed unless, as a part of the same pattern of racketeering activity, there is further injury to the plaintiff or further

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41. *Id.*

42. *Id.* at 1164.

43. *Id.* at 1168-70.

44. *Id.*

45. *Id.* at 1169 (emphasis added).

46. *See, e.g.,* McLendon v. Continental Group, Inc., 602 F. Supp. 1492, 1512 & n.15 (D.N.J. 1985).

47. Taffin v. Levitt, 110 S. Ct. 792, 794-95 (1990).

48. Agency Holding Corp. v. Malley-Duff & Assoc., 483 U.S. 143, 156 (1987).

predicate acts occur, in which case the accrual period shall run from the time when the plaintiff knew or should have known of the last injury or the last predicate act which is part of the same pattern of racketeering activity. The last predicate act need not have resulted in injury to the plaintiff but must be part of the same pattern. If the complaint was filed within four years of the last injury or the last predicate act, the plaintiff may recover for injuries caused by other predicate acts which occurred outside an earlier limitations period but which are part of the same "pattern".<sup>49</sup>

### C. *Pleading Requirements*

If the complaint alleges RICO claims arising out of fraud, the scheme must be pled with particularity according to Rule 9(b) of the Federal Rules of Civil Procedure.<sup>50</sup> The Third Circuit has construed this requirement very liberally.<sup>51</sup>

Rule 9(b) does not require allegations of date, time or place, but the plaintiffs must use some "means of injecting precision and some measure of substantiation into their allegations of fraud."<sup>52</sup> The complaint is sufficient if it describes the nature and subject of the alleged misrepresentations.<sup>53</sup>

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49. *Keystone Ins. Co. v. Houghton*, 863 F.2d 1125, 1125-31 (3d Cir. 1988); see also *T.R. Whitelyn Holstein Breeder Assoc. v. Whitelyn Farms, Inc.*, No. 86-6738 (E.D. Pa. Dec. 16, 1988) (LEXIS, Genfed library, Dist file).

50. FED. R. CIV. P. 9(b).

51. See generally *Swistock v. Jones*, 884 F.2d 755 (3d Cir. 1989).

52. *Seville Indus. Mach. Corp. v. Southmost Mach. Corp.*, 742 F.2d 786, 791 (3d Cir. 1984), cert. denied, 469 U.S. 1211 (1985).

53. See *id.* (list attached to complaint identifying with specificity each piece of machinery that was subject of alleged fraud, and identifying which pieces of machinery were the subject of which alleged fraudulent transactions is sufficient); *A Pocono Country Place, Inc. v. Peterson*, 675 F. Supp. 968, 973 (M.D. Pa. 1987) (list of allegedly fraudulent documents, date they were executed and properties to which they applied is sufficient); *Temple Univ. v. Salla Bros.*, 656 F. Supp. 97, 104 (E.D. Pa. 1986) (allegation that "from 1971 until 1984 the defendants unlawfully used the mail to send 'false and fraudulent bids, invoices and bills' to the plaintiff" is sufficient); *LSC Assoc. v. Lomas & Nettleton Fin. Corp.*, 629 F. Supp. 979, 983 (E.D. Pa. 1986) (description of scheme to defraud and statements or omissions made to effect that scheme is sufficient).

In the following cases, the allegations were found insufficient to comport with the *Seville* standard: *Saporito v. Combustion Eng'g Inc.*, 843 F.2d 666, 675 (3d Cir. 1988), vacated and remanded for reconsideration on other grounds, 109 S. Ct. 1306 (1989) (complaint alleging general content of misrepresentations, but failing to indicate who speakers were ["defendants and/or persons acting under their direction and control"] or who received information ["certain . . . employees other than plaintiffs"]) is insufficient); *Philadelphia TMC, Inc. v. AT&T Infor-*

D. *Standard of Proof*

Although the RICO statute is criminal in nature, the plaintiff must only prove its claim by a preponderance of the evidence, rather than beyond a reasonable doubt.<sup>54</sup>

E. *Pattern*

We will not discuss the pattern requirement at length here except to discuss briefly the latest Third Circuit cases decided after the most recent decision of the United States Supreme Court addressing the pattern requirement, *H.J. Inc. v. Northwestern Bell Telephone Co.*<sup>55</sup> In *H.J. Inc.*, the United States Supreme Court recently held that the hallmarks of a "pattern" for purposes of section 1961(5) are continuity and relationship.<sup>56</sup> A single scheme may satisfy the pattern requirement if it encompasses multiple predicate acts that relate to and amount to, or threaten the likelihood of, continued criminal activity.<sup>57</sup>

The relatedness requirement is satisfied if the criminal acts have "the same or similar purposes, results, participants, victims, or methods of commission, or otherwise are interrelated by

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mation Sys., 651 F. Supp. 169, 174 (E.D. Pa. 1986) (complaint alleging subject of alleged fraud and general nature of misrepresentations but failing to allege nature of fraudulent statements and context in which they were made is insufficient); *Moravian Dev. Corp. v. Dow Chem. Co.*, 651 F. Supp. 144, 148-49 (E.D. Pa. 1986) (complaint alleging defendants manufactured, marketed, sold product, that they misrepresented same, and that "on numerous occasions" defendant caused letters to be mailed and information to be transmitted by wire containing false information is insufficient); *McLendon v. Continental Group, Inc.*, 602 F. Supp. 1492, 1509 (D.N.J. 1985) (pleadings must allege all five elements of common law fraud—plaintiff must detail with specificity false misrepresentations upon which mail fraud claim is based); *see also Odesser v. Vogel*, No. 85-6931 (E.D. Pa. Apr. 10, 1986) (1986 WL 4463) (allowing plaintiffs leave to amend *fourth* version of complaint to try to reallege activities "that plausibly could have involved the use of mails or wires" but that failed to provide addresses or even names of recipients).

54. *See Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 491 (1985) ("[N]o indication that Congress sought to depart from [preponderance standard in private civil actions]."); *see, e.g., United States v. Local 560 of Int'l Bhd. of Teamsters*, 780 F.2d 267 (3d Cir. 1985), *cert. denied*, 476 U.S. 1140 (1986); *Kimmel v. Peterson*, 565 F. Supp. 476 (E.D. Pa. 1983). But the elements of the offense of claim are the same whether the case is civil or criminal. *Eisenberg v. Gagnon*, 564 F. Supp. 1347, 1342 (E.D. Pa. 1983), *vacated in part, rev'd in part, aff'd in part*, 766 F.2d 770 (3d Cir.), *cert. denied*, 474 U.S. 946 (1985); *see also Gilbert v. Prudential-Bache Sec., Inc.*, 769 F.2d 940 (3d Cir. 1985); *Eaby v. Richmond*, 561 F. Supp. 131 (E.D. Pa. 1983).

55. 109 S. Ct. 2893 (1989).

56. *Id.* at 2900.

57. *Id.* at 2899.

distinguishing characteristics and are not isolated events.’”<sup>58</sup> Continuity is a temporal concept which can be either closed-ended or open-ended, referring either to a closed period of repeated conduct, or to past conduct that by its very nature contemplates a threat of repetition in the future.<sup>59</sup>

Before *H.J. Inc.*, the Third Circuit had developed a multiple factor test to determine whether a pattern existed. In *Barticheck v. Fidelity Union Bank/First National State*,<sup>60</sup> the Third Circuit held that in assessing whether a pattern exists, a district court should consider the following factors: “the number of unlawful acts, the length of time over which the acts were committed, the similarity of the acts, the number of victims, the number of perpetrators, and the character of the unlawful activity.”<sup>61</sup> A substantial body of law was developed applying the *Barticheck* factor test.

In its first RICO decision after *H.J. Inc.*, the Third Circuit held that a scheme extending from February 1987 to April 8, 1988 to remove assets from a company and, therefore, render it insolvent did not satisfy the “continuity component of the pattern requirement.”<sup>62</sup> The court stated:

58. *Id.* at 2901 (citation omitted).

59. *Id.* at 2902.

60. 832 F.2d 36 (3d Cir. 1987).

61. *Id.* at 38, 39 (citations omitted); see also *United States v. Zauber*, 857 F.2d 137 (3d Cir. 1988), cert. denied, 109 S. Ct. 1340 (1989); *Environmental Tectonics v. W.S. Kirkpatrick, Inc.*, 847 F.2d 1052 (3d Cir. 1988), aff'd, 110 S. Ct. 701 (1990); *Saporito v. Combustion Eng'g Inc.*, 843 F.2d 666 (3d Cir. 1988), vacated and remanded for reconsideration, 109 S. Ct. 1306 (1989); *Paradise Hotel Corp. v. Bank of Nova Scotia*, 842 F.2d 47 (3d Cir. 1988); *Marshall-Silver Constr. Co. v. Mendel*, 835 F.2d 36 (3d Cir. 1987), vacated and remanded for reconsideration, 109 S. Ct. 3233 (1990). District courts applying the “multiple factor” test announced in *Barticheck* focused in particular on the number of victims, number of perpetrators and extent of injury factors, and dismissed RICO complaints that alleged single victim, close-ended, “one-shot” fraudulent schemes. See, e.g., *Central Beef Co. v. Compas*, No. 89-2627 (E.D. Pa. June 27, 1989) (1989 WL 71591) (dismissed RICO action for failure to allege pattern as case involved only a single victim, a single injury, and a single short-lived scheme); *Szegda v. Swedeland Road Corp.*, No. 89-1767 (E.D. Pa. June 13, 1989) (1989 WL 64302) (granted motion to dismiss RICO complaint on basis that single, limited scheme involving two perpetrators, single injury and single victim did not constitute pattern of racketeering activity); *Forum Publications, Inc. v. P.T. Publishers, Inc.*, 700 F. Supp. 236 (E.D. Pa. 1988) (held complaint did not allege pattern sufficient to support RICO claim as case involved relatively simple scheme, few perpetrators and only one victim); *Goldstein v. Schenk*, No. 86-7396 (E.D. Pa. May 16, 1988) (1988 WL 48545) (dismissed RICO complaint as only one victim and one injury alleged), aff'd, 865 F.2d 250 (3d Cir. 1988).

62. *Fiorentino v. Converse*, No. 89-1169, slip op. at 5 (3d Cir. Aug. 14, 1989).

At the very least, . . . plaintiffs must establish a threat of long-term criminal conduct.

We conclude that the complaint in this case alleges only isolated, short-term conduct on the part of the defendants. The sole purpose of the alleged predicate acts was to evade a single debt owed to Fiorentino and that narrow purpose limited the scope of the alleged criminal activity. As soon as that purpose was accomplished, the activity could be expected to, and did, cease. *The objective was allegedly accomplished in a period of only about a year and the nature of the conduct was such that there was no threat of continuing criminal activity when the period was over.* The defendants' alleged activity, while illegal, simply did not pose the kind of societal threat that was the target of RICO.<sup>63</sup>

Therefore, the Third Circuit affirmed the district court's dismissal of the plaintiff's complaint.

The Third Circuit's recent decision in *Swistock v. Jones*,<sup>64</sup> however, renders reliance on the *Bartichuck* multiple factor analysis questionable. In *Swistock*, the plaintiff alleged fraudulent misrepresentations with respect to the signing of a mineral lease.<sup>65</sup> Specifically, the complaint alleged six acts of mail fraud and eight acts of wire fraud by defendants over a period of approximately fourteen months "for the purposes of inducing plaintiffs to enter into the leasing transaction and to induce plaintiffs to continue making monthly payments under the lease."<sup>66</sup> The district court dismissed the case, relying upon *Bartichuck* because "the objective of the . . . predicate acts . . . was limited to the infliction of a single harm on a limited number of victims, and . . . plaintiffs would therefore be unable to prove the existence of a pattern."<sup>67</sup>

While acknowledging that "the degree of concrete guidance provided by *H.J. Inc.* is open to debate,"<sup>68</sup> the court reversed. The court concluded that "[a]lthough we also may have concluded in the pre-*H.J. Inc.* period that plaintiffs pled at most a state law fraud case, we are now bound to give the allegations a

63. *Id.* at 4 (emphasis added).

64. 884 F.2d 755 (3d Cir. 1989).

65. *Id.* at 756.

66. *Id.* at 759.

67. *Id.* at 757-58.

68. *Id.* at 757.

broader interpretation.”<sup>69</sup> The Third Circuit reasoned that, because the Supreme Court could have, but did not, address as relevant the number of victims and number of perpetrators involved in the alleged scheme, these factors could no longer be considered dispositive of the pattern inquiry. Accordingly, the court explicitly held that “[a]lthough this [district court’s] result may have been consistent with the law of this circuit as it stood at the time the district court decided the matter, it is no longer tenable in light of *H.J. Inc.*”<sup>70</sup>

The court further noted that, as a result of *H.J. Inc.*, two circuit court decisions, including *Marshall-Silver Construction Co.*, which had applied the single injury, single victim rationale to dismiss RICO claims, and on which the district court in *Swistock* relied, had been remanded and vacated by the Supreme Court for further consideration. The court declared that “[a]lthough the vacation of these decisions does not of its own force mandate a reversal in this case, the underpinnings of the district court’s decision have been shaken.”<sup>71</sup> Finally, in applying the “teachings” of *H.J. Inc.* to the facts of the case, the *Swistock* court found the complaint’s allegations sufficient to withstand a motion to dismiss.<sup>72</sup> It reasoned:

Treating all the allegations in the pleadings as true, as we must at this juncture, plaintiffs may be able to establish either the existence of a closed-end period of repeated conduct of sufficient length or a threat of continuity “by showing that the predicate acts . . . are part of an ongoing entity’s regular way of doing business,” . . . to satisfy the requirements of *H.J. Inc.*<sup>73</sup>

To be sure, the court in *Swistock* rejected the argument that a motion to dismiss could never be granted in this context, concluding that “*H.J. Inc.* does not foreclose the possibility that, in a given case, it may be proper to dismiss a RICO complaint on Rule 12(b)(6) grounds for failing to allege a pattern of racketeering activity as a matter of law . . . .”<sup>74</sup> Nevertheless, the court conceded that “it does appear . . . that in many cases plaintiffs will be able to withstand a facial attack on the complaint and have the opportu-

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69. *Id.* at 758.

70. *Id.*

71. *Id.* (citation omitted).

72. *Id.* at 759.

73. *Id.* (citation omitted).

74. *Id.* at 758.

nity to have their pattern allegations threshed out in discovery.”<sup>75</sup>

Finally, the court left open the possibility that some form of single victim, single injury analysis may ultimately survive *H.J. Inc.* by declaring that “[w]hatever vitality the single victim, single injury approach may have after *H.J. Inc.* awaits further case development.”<sup>76</sup> Interestingly enough, the Third Circuit never mentioned the *Fiorentino* case, decided only a month before.

Even more recently, in *Marshall-Silver Construction Company, Inc. v. Mendel*,<sup>77</sup> the Third Circuit had a unique opportunity to decide whether *Bartichек* was still good law after *H.J. Inc.* Before *H.J. Inc.*, the Third Circuit affirmed a dismissal of the plaintiff’s RICO claim in *Marshall-Silver*.<sup>78</sup> Applying the *Bartichек* factor test, the Third Circuit held that the plaintiff’s allegations did not pass the *Bartichек* test because they lacked the requisite continuity in that the alleged criminal activity “involved [only] ‘a single victim, a single injury, and a single short-lived scheme with only two active perpetrators.’”<sup>79</sup> The plaintiff alleged that the defendants threatened to drive it out of business and subsequently seven months later filed a bankruptcy petition knowing that it was false.<sup>80</sup>

After the Supreme Court vacated the Third Circuit’s judgment in *Marshall-Silver*, the court decided on remand that, at least on the facts of this case, *H.J. Inc.* did not change the result.<sup>81</sup> The court specifically stated that Congress’s “common sense approach to RICO’s pattern” was “entirely consistent with our approach in *Bartichек* and our prior opinion in this case.”<sup>82</sup> The court conceded that *H.J. Inc.* might arguably require adjustment in the Third Circuit’s prior treatment of continuity.<sup>83</sup> The court, however, refused to accept (as appeared to have been done by *Swistock*) that “‘continuity’ is solely a ‘temporal concept’ and that inquiry into the extent of the criminal activity (e.g., the number of victims, the number of schemes, etc.) is relevant only as it bears on the duration or threatened duration of the repeated criminal

75. *Id.*

76. *Id.*

77. 894 F.2d 593 (3d Cir. 1990) (*Marshall-Silver II*).

78. *Marshall-Silver Constr. Co. v. Mendel*, 835 F.2d 63 (3d Cir. 1987) (*Marshall-Silver I*), vacated and remanded for reconsideration, 109 S. Ct. 3233 (1989):

79. *Marshall-Silver II*, 894 F.2d at 595 (quoting *Marshall-Silver I*, 835 F.2d at 67).

80. *Id.* at 594.

81. *Id.* at 597-98.

82. *Id.* at 596.

83. *Id.*

conduct.”<sup>84</sup> The court continued:

If the extent of the threatened societal injury is deemed irrelevant and we are to focus solely on the period of time over which the predicate acts occurred or the period during which any threatened criminal activity would be likely to last, “continuity” will be present in criminal conduct that clearly does not pose a societal threat worthy of the draconian penalties and remedies available under RICO. Virtually every garden-variety fraud is accomplished through a series of wire or mail fraud acts that are “related” by purpose and are spread over a period of at least several months. Where such a fraudulent scheme inflicts or threatens only a single injury, we continue to doubt that Congress intended to make the availability of treble damages and augmented criminal sanctions dependent solely on whether the fraudulent scheme is well enough conceived to enjoy prompt success or requires pursuit for an extended period of time. Given its “natural and common sense approach to RICO’s pattern element,” we think it unlikely that Congress intended RICO to apply in the absence of a more significant societal threat. Moreover, if the Court in *H.J. Inc.* intended that the *duration* of the predicate acts or the threat arising therefrom should be determinative without reference to whether the societal threat was limited to a single, one time injury, we would not have expected the Court to eschew providing a specific standard in favor of a fact oriented, case-by-case development.<sup>85</sup>

The Third Circuit noted finally that it did not have to resolve the issue of whether a single injury was sufficient to satisfy the continuity requirement.<sup>86</sup> Indeed, the court stated that its conclusion was in line with *Swistock* because in that case “(1) the predicate acts occurred over a span of more than a year, (2) the scheme lasted over two years, and (3) the defendant’s wrongdoing was part of a continuing business practice of such behavior that posed a threat to others.”<sup>87</sup> This distinction is not very con-

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84. *Id.* (emphasis in original).

85. *Id.* at 596-97 (emphasis in original).

86. *Id.* at 597.

87. *Id.*



vincing. Tension exists between *Marshall-Silver II* and *Swistock* which will only be resolved by future decisions.

#### F. *Injury and Pattern*

The Third Circuit has held that under section 1962(c) the plaintiff must plead that it suffered injury from only *one* of the predicate acts—it need not establish injury by the pattern of such acts.<sup>88</sup>

#### G. *Attorney's Fees*

The Third Circuit has held that there was no rule of proportionality in attorney's fees petitions under RICO cases.<sup>89</sup> Therefore, the court affirmed a district court's award of attorney's fees and costs in excess of \$60,000 after the plaintiff only recovered \$2,661 in damages.<sup>90</sup>

### IV. PROS AND CONS OF INCLUDING RICO IN YOUR COMPLAINT

As a plaintiff, even though you may be able to successfully plead a RICO claim within Rule 11 of the Federal Rules of Civil Procedure,<sup>91</sup> you must also decide whether it is prudent strategically. Therefore, it is essential to consider the practical pros and cons of including a RICO claim in your complaint.

Usually, the biggest benefit of a RICO claim is the possibility of treble damages and attorney's fees. There are a number of other additional benefits, however, which must be considered as follows:

1. Broad service of process and venue;<sup>92</sup>
2. Federal court jurisdiction, regardless of amount in controversy;<sup>93</sup>
3. A possible expansion of discovery by allowing the plaintiff to engage in discovery to prove a pattern, even though other predicate acts did not affect this particular plaintiff;
4. Avoidance of the limited reach of other federal and state statutes, e.g., securities law fraud requirement of "purchaser-

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88. *Town of Kearny v. Hudson Meadows Urban Renewal Corp.*, 829 F.2d 1263, 1268 (3d Cir. 1987).

89. *Northeast Women's Center v. McMonagle*, 889 F.2d 466, 471-75 (3d Cir. 1989).

90. *Id.* at 477.

91. FED. R. CIV. P. 11.

92. See 18 U.S.C. § 1965 (1988).

93. See *id.* § 1964(a).

seller”;<sup>94</sup> and

5. Enhanced settlement leverage if the case survived a motion for summary judgment.

Along with these increased benefits, however, come some increased risks. Obviously, a fraud case becomes much more complex and potentially confusing to a judge and jury when you include all the statutory requirements of RICO. In addition, there are a number of other potential disadvantages which plaintiff’s counsel must consider:

1. The increased cost of the motion practice, i.e., motion to dismiss and summary judgment, which is likely to accompany a RICO case;

2. A RICO claim alleging intentional conduct could preclude coverage under directors and officers and other insurance policies because many such policies disclaim coverage for intentional conduct; and

3. Many defendants are reluctant to settle RICO claims having been labeled a “racketeer.”

It is up to each attorney to evaluate these factors in their individual case. Within the boundaries of Rule 11, whether you include the RICO claim or not is up to you. The important point is to read the statute and then decide whether the pros outweigh the cons. Like the pattern requirement, the decision on whether to bring a RICO claim or how to defend against such a claim must be made on a case-by-case basis.

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94. Note, however, that a RICO claim cannot be used to avoid an arbitration clause in a securities case. *Shearson/American Express Inc. v. McMahon*, 482 U.S. 220, 239 (1987).

