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COMMENT

RICO CONSPIRACY: THE NINTH CIRCUIT DISTINGUISHES ITSELF FROM THE RISING COSTS OF GUILTY THOUGHTS

INTRODUCTION

In July of 2002, minority partners of the Montreal Expos filed charges against Major League Baseball commissioner Bud Selig.¹ The suit seeks \$100 million in punitive damages and unspecified compensatory damages.² Surprising to most, the suit is not based on claims arising from disputes over labor, salary caps or rules and regulations. Rather, the plaintiffs claim that Selig and his co-defendants actively plotted to eliminate baseball in Montreal. Their cause of action is based on the Racketeering and Corrupt Organization Act.

The Racketeering and Corrupt Organization Act, commonly referred to by its acronym, RICO, was enacted over thirty years ago, in 1970.³ The statute is part of the Organized Crime Control Act, which, as the title suggests, sought “the eradication of organized crime in the United States.”⁴ While the Organized Crime Control Act created RICO to “combat the infiltration into and corruption of America’s legitimate business community by organized crime,” it is only occasionally put to these ends in civil cases today.⁵ In fact, despite its legislative intent, “RICO has become one of the most free-

¹ *BMO Nesbitt Burns et al. v. Loria et al.*, No. 1:02cv22061 (S.D. Fla. Filed July 16, 2002), available at <http://news.findlaw.com/hdocs/docs/sports/bmoexpos71602cmp.pdf>.

² *Id.*

³ Organized Crime Control Act of 1970, Pub. L. No. 91-452, § 1, 84 Stat. 922 (1970).

⁴ GREGORY P. JOSEPH, CIVIL RICO: A DEFINITIVE GUIDE 3 (American Bar Association) (2000).

⁵ *Id.* at 3.

wielding clubs of our time.”⁶ As a result, RICO suits like that against Selig are increasingly common. For this reason, some commentators have concluded that RICO “is very possibly the single worst piece of legislation on the books.”⁷

Part I of this Comment briefly surveys the legislative development of the RICO statute.⁸ It discusses the elements of a RICO cause of action and disputes that have arisen among the circuit courts over its interpretation.⁹ Part II of this Comment examines the development of civil liability for conspiring to participate in a RICO enterprise.¹⁰ It focuses on cases that have significantly shaped civil RICO conspiracy liability throughout the circuit courts. Part III explores the split that has developed among the circuits over the definition of RICO conspiracy liability, specifically, the difference between the Ninth Circuit’s definition and that of the majority.¹¹ This discussion also considers the Congressional intent that shaped the RICO statute, policy aims of the statute and implications arising from the different standards of liability.

I. BACKGROUND

The RICO statute can be found at 18 U.S.C. §§ 1961-68.¹² Section 1964(c) of the statute creates the civil RICO cause of action, which states, in pertinent part, “Any person injured in his business or property by reason of a violation of § 1962 . . . may sue therefore . . . and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney’s fee . . .”¹³ This single sentence has led to a flood of litigation.¹⁴ Originally, the statute limited civil remedies to

⁶ Lawrence Morahan, *Use of Racketeer Statute to Sue Catholic Church Draws Fire*, CNSNews.com at

<http://www.cnsnews.com/Nation/Archive/200203/NAT20020325b.html>

⁷ *Second Thoughts on RICO*, WALL ST. J., REVIEW & OUTLOOK (Editorial), May 19, 1989.

⁸ See *infra* notes 12-35 and accompanying text.

⁹ See *infra* notes 12-35 and accompanying text.

¹⁰ See *infra* notes 36-128 and accompanying text.

¹¹ See *infra* notes 129-150 and accompanying text.

¹² Organized Crime Control Act of 1970, Pub. L. No. 91-452, § 1, 84 Stat. 922 (1970).

¹³ Gregory P. Joseph, *Civil Rico Conspiracy*, available at http://www.josephnyc.com/article_11.htm.

¹⁴ JOSEPH, *supra* note 4, at 1.

injunctive actions brought by the United States. Just before the statute's enactment, however, Congress added a civil remedy not confined to governmental plaintiffs.¹⁵ As a result, RICO has become a formidable weapon for plaintiffs in civil litigation.¹⁶

One primary factor driving RICO suits is the lucrative damages it awards. Although the original RICO bill that passed the Senate did not include treble damages to those injured by racketeering activities, this clause was added to give those "wronged by organized crime access to a legal remedy."¹⁷ The bill's Senate sponsor stated that the treble damages would be "a major new tool in extirpating the baneful influence of organized crime in our economic life."¹⁸ Another factor contributing to the increase of RICO suits is the broad language of the statute. Even though the bill's express purpose was to wipe out organized crime in the United States, the statute does not specifically identify organized crime as a target. This is partly due to the difficulty of defining organized crime and, partly, because of the belief that requiring proof that a defendant falls within such a definition would thwart efforts to achieve the remedial objectives of the law.¹⁹ Accordingly, the legislature drafted the statute in general terms to allow for flexible application.²⁰

RICO suits have also increased because of broader interpretations of liability under the statute. During the past decade, several important holdings have lowered the threshold that successful plaintiffs must meet. Consequently, the use of RICO has spread to a range of scenarios well beyond organized crime.

A. ELEMENTS OF A RICO CAUSE OF ACTION

Typically, civil liability resulting from a substantive violation of RICO requires the defendant to engage in a "pattern of racketeering activity." "Racketeering activity" is

¹⁵ *Id.* at 2-3.

¹⁶ Frederick B. Lacey, *Civil RICO Update*, SE99 ALI-ABA 301, at 304 (2000).

¹⁷ William H. Rehnquist, *Get RICO Out of My Courtroom*, WALL ST. J., May 19, 1989, at A14.

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

defined as the commission of any number of state and federal offenses enumerated in Section 1961(1), such as: mail fraud, wire fraud, drug trafficking, murder, arson, gambling, bribery, extortion, or embezzlement.²¹ At least one of these offenses must be committed through a pattern to sustain a RICO claim. These acts are called “predicate acts” of racketeering.²² A “pattern of racketeering activity” requires at least two related acts of racketeering activity within a ten-year period.²³

A showing of racketeering activity alone, however, will not support a plaintiff’s suit. A civil RICO plaintiff must demonstrate that the defendant committed the racketeering activity in connection with the affairs of an “enterprise” engaged in or affecting interstate commerce in a manner that violates one of the four subsections of Section 1962.²⁴ An “enterprise” is any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated-in-fact, although not a legal entity.²⁵ Traditionally, the enterprise requirement is broadly interpreted and requires a common purpose and “some structure...but there need not be much.”²⁶

There are three substantive violations and one conspiracy violation under RICO.²⁷ Accordingly, a person can violate RICO by:

(1) Investment: Under Section 1962(a), it is unlawful to invest any income derived from a pattern of racketeering activity (or through collection of an unlawful debt) to acquire any interest in, or to establish or operate, any enterprise that is engaged in or affects interstate or foreign commerce.

(2) Acquisition: Under Section 1962(b), it is unlawful to acquire or maintain any interest in, or control of, any enterprise that is engaged in or affects interstate or foreign commerce through a pattern of racketeering activity or collection of an unlawful debt.

²¹ Lacey, *supra* note 12, at 304 (quoting 18 U.S.C. § 1962).

²² *Id.* at 304.

²³ *Id.* (quoting 18 U.S.C. § 1962(5)).

²⁴ *Id.* at 304.

²⁵ *Id.* at 305 (quoting 19 U.S.C. § 1961(4)).

²⁶ *Id.* at 305 (quoting *Burdett v. Miller*, 957 F.2d 1375, 1379 (7th Cir. 1992)).

²⁷ *Id.* at 304.

(3) Participation: Under Section 1962(c), it is unlawful for any person to conduct or participate in the conduct of the affairs of an enterprise that is engaged in or affects interstate or foreign commerce through a pattern of racketeering activity or collection of an unlawful debt.²⁸

The fourth type of violation under RICO Section 1962 is conspiracy to commit a substantive RICO offense.²⁹ Consequently, one violates the RICO statute when he conspires to commit a substantive RICO offense.³⁰

B. INTERPRETIVE DISPUTES AMONG THE CIRCUITS

The United States Supreme Court has addressed several issues that have grown out of disputes over interpretive differences of the RICO statute, although only a handful of these issues were addressed in the first years after RICO's enactment. In fact, for years after its enactment, civil RICO had little effect on organized crime or racketeering within organizations because few civil suits were filed.³¹ Then, in the 1980's, the number of civil suits filed under the statute flourished because of coverage afforded to civil RICO actions by the national media, legal publications and continuing legal education programs.³² Private plaintiffs awoke to the lucrative treble damages available under civil RICO and the number of civil RICO cases filed in federal courts rapidly multiplied.³³ As a result, federal courts are burdened with traditional state court actions, like divorce, trespass, professional malpractice, inheritance disputes, employment benefits, and sexual harassment, which have been recast as RICO claims.³⁴

One area of interpretive dispute that plagues the RICO statute, and that places the Ninth Circuit at odds with the

²⁸ Joseph, *supra* note 14, at 1-2.

²⁹ 18 U.S.C. § 1962(d).

³⁰ Yvette M. Mastin, *RICO Conspiracy: Dismantles the Mexican Mafia & Disables Procedural Due Process*, 27 WM. MITCHELL L. REV. 2295, 2309 (2001), (quoting 18 U.S.C. 1962(a-d)).

³¹ *Id.* at 2312 (quoting Douglas E. Abrams, *Crime Legislation and the Public Interest: Lessons from Civil RICO*, 50 SMU L. REV. 33, 51 (1996)).

³² *Id.* at 2312 (quoting Robert E. Wood, *Civil RICO—Limitations in Limbo*, 21 WILLAMETTE L. REV. 683, 684 (1985); William H. Rehnquist, *Get RICO Out of My Courtroom*, WALL ST. J., May 19, 1989, at A14).

³³ Rehnquist, *supra* note 4, at A14.

³⁴ *Id.*

majority of circuits, is RICO's "conspiracy" provision, Section 1962(d). At issue is its interplay with RICO's "participation" provision, Section 1962(c). Alleged violations of RICO's participation provision are the basis of most civil actions under RICO.³⁵

The split among the circuits regarding a defendant's liability for conspiring to participate in a RICO enterprise stems from two key issues. The first issue is the level of participation a defendant must have in the RICO enterprise. The second is what standard of conspiracy governs the civil RICO statute, general conspiracy law or civil conspiracy law. To better understand the circuits' split over the interpretation of liability under RICO's conspiracy section, the next section reviews pertinent decisions that have shaped RICO conspiracy law.

II. CASE HISTORY

A. THE REVES DECISION

In 1993, the United States Supreme Court handed down its decision in *Reves v. Ernst & Young*.³⁶ At issue in *Reves* was whether a defendant must participate in the operation or management of the RICO enterprise to be liable under the RICO participation provision. The participation provision makes it illegal "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 . . ."³⁷

In this case, the plaintiffs, purchasers of demand notes from a farmer's cooperative, brought securities fraud and RICO participation actions against the cooperative's accountants.³⁸ The plaintiffs alleged that the defendant accounting firm

³⁵ Lee Applebaum, *Case Law May Open Door for RICO Plaintiffs: Statute Could Allow Avoidance of Reves Test*, THE LEGAL INTELLIGENCER, Mar. 15, 2001, available at WL 3/15/2001 TLI 5.

³⁶ *Reves v. Ernst & Young*, 507 U.S. 170 (1993).

³⁷ *Id.* at 172 (quoting U.S.C. §§ 1962(c)).

³⁸ *Id.* at 176.

prepared annual financial audits that knowingly overvalued the principal asset of the cooperative.³⁹

In its analysis, the Court rejected the plaintiffs' argument that the word "conduct" in Section 1962(c) should be read as "carry on," stating that if this were the interpretation, then "any involvement in the affairs of an enterprise would satisfy the 'conduct or participate' requirement."⁴⁰ Conversely, the Court agreed with the defendant and found that the word "conduct" requires some degree of direction, and "participate" requires some part in that direction.⁴¹ Thus, the Court held that to conduct or participate, directly or indirectly, in the conduct of an enterprise's affairs, a defendant must participate in the operation or management of the enterprise.⁴² Therefore, "[a] person cannot be liable under section 1962(c) unless he or she participated in the operation or management of the alleged RICO enterprise."⁴³ This standard of liability is commonly referred to as the *Reves* "operation or management" test.⁴⁴ Based on this reasoning, the Court found that the defendant's actions in *Reves* – preparing the cooperative's financial statements – did not give rise to liability under the participation provision.⁴⁵

B. THE ANTAR DECISION

Although *Reves* clarified the level of participation a defendant must embrace in a RICO enterprise to be liable for violating the RICO participation provision, its holding defined the initial contours of a split between the federal courts over

³⁹ *Id.*

⁴⁰ *Id.* at 179.

⁴¹ *Id.*

⁴² *Id.* at 185.

⁴³ *Id.* at 176. In deciding *Reves*, the Court relied on the "operation or management test" articulated in *Bennett v. Berg*, 710 F.2d 1361, 1364. In that case, former and present residents of a retirement community alleged that the defendants participated, and conspired to participate, in a pattern of racketeering through mail fraud. In reviewing the plaintiff's complaint, the court stated that mere participation in the predicate offenses listed in RICO, even in conjunction with a RICO enterprise, may be insufficient to support a RICO cause of action. Rather, a defendant's participation must be in the conduct of the affairs of a RICO enterprise, which ordinarily will require some participation in the operation or management of the enterprise itself.

⁴⁴ *Reves*, at 186.

⁴⁵ *Id.*

the applicability of its operation or management test with regard to the RICO conspiracy provision.

In 1995, the Third Circuit faced two criminal defendants charged with conspiring to participate in a RICO enterprise, based on predicate acts of securities fraud, mail fraud and falsification of financial statements.⁴⁶ In *United States v. Antar*, one defendant argued that since he “opted-out” of the conspiracy some five years prior to the RICO conspiracy charge, he could not be guilty of violating the participation provision under the *Reves* operation or management test.⁴⁷ In addition, he claimed that since he could not be guilty of violating the participation provision, he could not alternatively be guilty for conspiring to violate that same provision.⁴⁸ The defendant asserted that “courts risk eviscerating *Reves* by blanketly approving conspiracy convictions when substantive convictions under section 1962(c) are unavailable.”⁴⁹ Indeed, one commentator remarked that “if Congress’ restriction of section 1962(c) liability to those who operate or manage the enterprise can be avoided simply by alleging that a defendant aided and abetted or conspired with someone who operated or managed the enterprise, then *Reves* would be rendered almost nugatory.”⁵⁰

While the *Antar* court acknowledged that this argument could have merit if *Reves* were interpreted broadly, it crafted a distinction:

[W]e believe that a distinction can be drawn between, on the one hand, conspiring to operate or manage an enterprise, and, on the other, conspiring with someone who is operating or managing the enterprise. Liability would be permissible under the first scenario, but, without more, not under the second.⁵¹

The court reasoned that in the first scenario, the defendant is conspiring to do something for which, if successful, he would

⁴⁶ *United States v. Antar*, 53 F.3d 568, 572 (3rd Cir. 1995).

⁴⁷ *Id.* at 580.

⁴⁸ *Id.*

⁴⁹ *Id.* at 581.

⁵⁰ *Id.*, quoting David B. Smith & Terrance G. Reed, *Civil RICO*, § 5.04 at 5-39 (1994).

⁵¹ *Antar*, 53 F.3d at 581.

be liable under the substantive participation provision; whereas in the second, the defendant is not conspiring to do something for which he could be liable under that same substantive provision.⁵² Therefore, the court held that conspiracy liability cannot stand unless a defendant conspires to operate or manage a RICO enterprise.⁵³ Aside from this reasoning, the court found that *Reves* and its policies did not conflict with the conspiracy charge because the defendant in *Antar* did not properly withdraw from the conspiracy. Thus, the court refused to dismiss the conspiracy charge.⁵⁴

Effectively, this holding mapped the participation requirements of Section 1962(c) onto Section 1962(d). It required that a RICO plaintiff establish all of the participation elements to make a claim for conspiring to participate in a RICO enterprise.⁵⁵ This holding is based on the reasoning that it would not make sense to exclude a class of people from a participation violation, only to make those same people liable for conspiring to violate that section.⁵⁶ The court did not want RICO's conspiracy section to find a person liable for conspiring to commit an act that was impossible for that person to substantively commit.⁵⁷ The *Antar* court wanted to ensure that defendants were not held liable for substantive RICO violations through the statute's back-door conspiracy provision when substantive-provision violations could not be proven; thus, the court sought to close the door that *Reves* left open. As a result, the *Antar* holding left the Third Circuit at odds with the Eleventh, Second, Seventh -- and later on the Fifth -- Circuits, which hold that the *Reves* operation or management test does not apply to Section 1962(d) convictions.⁵⁸ In these circuits, judicial interpretation concludes that since *Reves* did not specifically address Section 1962(d), it has no influence over

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.* at 581.

⁵⁵ Applebaum, *supra* note 35.

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Neibel v. Transworld Assurance Co.*, 108 F.3d 1123, 1128 (9th Cir. 1997) (citing *United States v. Castro*, 89 F.3d 1443, 1452 (11th Cir. 1996) cert. denied, 519 U.S. 1118 (1997)).

conspiracy claims, even if the conspiracy is to violate Section 1962(c).⁵⁹

C. THE NEIBEL DECISION

In March of 1997, the Ninth Circuit recognized the existing split between the circuits regarding whether the *Reves* operation or management test applies to Section 1962(d) claims based on allegations of conspiracy to violate RICO's participation provision. It chose to follow the Third Circuit's holding in *Antar*, concluding that the *Reves* test applies to conspiracy claims where the object of the conspiracy is to violate RICO through participating in a RICO enterprise.⁶⁰

In *Neibel v. Transworld Assurance Company*, the defendant insurance company appealed a district court judgment where it was found liable for conspiracy under RICO.⁶¹ In this case, the defendant argued that there was insufficient evidence for the jury to find that it violated Section 1962(d).⁶² The appellate court, finding that "the Third Circuit's opinion in *Antar* best comports with our post-*Reves* case law," held that in order to "participate, directly or indirectly, in the conduct of such enterprise's affairs," one must have some part in directing those affairs.⁶³ Concluding that the jury properly found the defendant's activities supported an agreement to have some part in directing the enterprise's affairs, the court held that the plaintiffs' conspiracy claim was valid.⁶⁴

The defendant in *Neibel* further argued that the district court's directed verdict on the RICO participation claim prevented the plaintiffs from succeeding on the conspiracy claim.⁶⁵ The appellate court found, however, that the defendant inaccurately relied on an interpretation of an earlier Ninth Circuit case in its argument.⁶⁶ In that earlier case, *Religious Technology Center v. Wollersheim*, the court held that since the plaintiff "failed to allege the requisite substantive

⁵⁹ JOSEPH, *supra* note 4, at 127.

⁶⁰ *Westways World Travel v. AMR Corp*, 182 F. Supp. 2d 952, 962 (9th Cir. 2001).

⁶¹ *Neibel*, 108 F.3d at 1122.

⁶² *Id.* at 1128.

⁶³ *Id.*

⁶⁴ *Id.* at 1129.

⁶⁵ *Id.* at 1127.

⁶⁶ *Id.* at 1128.

elements of RICO, the conspiracy cause of action cannot stand.”⁶⁷ The *Neibel* court specified that what the court meant in *Wollersheim* was that if the participation claim does not state a cause of action upon which relief could *ever* be granted, regardless of evidence, then the conspiracy claim cannot stand.⁶⁸ Clarifying this holding, the court stated that “[a] lack of evidence may render the substantive claim deficient, but it does not render it legally impossible.”⁶⁹ In such situations, therefore, a conspiracy claim may proceed to the jury despite a directed verdict on participation claims.⁷⁰ Consequently, the court rejected the defendant’s argument.⁷¹

Accordingly, *Neibel* defines the Ninth Circuit’s interpretation of conspiracy to violate RICO’s participation provision as “an agreement to conduct or participate in the affairs of an enterprise and an agreement to the commission of at least two predicate acts.”⁷² In addition, it graphs the *Reves* operation or management test onto its definition so that there must be substantial evidence that the defendant agreed to have some part in directing the RICO enterprise.⁷³

D. THE SALINAS DECISION

In 1997, the Supreme Court handed down another important decision that furthered the conflict among the circuit courts regarding RICO conspiracy law. Prior to *Salinas v. United States*, the circuits were split as to whether the agreement to commit the predicate acts must be an agreement on the part of the defendant personally to commit two acts of racketeering activity.⁷⁴ In this criminal case, the plaintiff was charged with participation and conspiracy violations.⁷⁵ At trial, a jury acquitted the defendant of the participation count

⁶⁷ *Neibel*, 108 F.3d at 1127 (citing *Religious Technology Center v. Wollersheim*, 971 F.2d 364, 367 n. 8 (9th Cir. 1992)).

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.* at 1128 (citing *Baumer v. Pachl*, 8 F.3d 1341, 1346 (9th Cir. 1993), (quoting *United States v. Neapolitan*, 791 F.2d 489, 499 (7th Cir.1986), cert. denied, 479 U.S. 939, 940).

⁷³ *Id.* at 1128.

⁷⁴ *Salinas v. United States*, 52 U.S. 61 (1997).

⁷⁵ *Id.* at 55

because he had not personally committed that Section's requisite minimum two predicate acts, but it convicted him of the conspiracy count.⁷⁶ The Supreme Court affirmed the trial court's decision and reasoned that even if the plaintiff did not accept or agree to commit the predicate acts (in this case, accepting bribes) personally, there was ample evidence that his co-conspirator committed at least two predicate acts and that the plaintiff knew about and agreed to facilitate the scheme.⁷⁷ The Supreme Court concluded that such knowledge and intent is sufficient to support the defendant's conspiracy conviction.⁷⁸

Accordingly, the Court held that a defendant need not personally commit two predicate acts to be liable for conspiracy.⁷⁹ It asserted that general conspiracy law governs Section 1962(d) and consequently, a conspiracy may exist even if a conspirator does not agree to commit or facilitate each substantive offense.⁸⁰ Therefore, conspirators are liable for the acts of their co-conspirators when each agrees to pursue the same criminal objective.⁸¹

While the *Salinas* holding resolved the conflict among the circuits regarding whether a defendant must personally commit two predicate acts to be liable for RICO conspiracy, its broad wording furthered the confusion among the circuits concerning the standard to use in determining conspiracy liability under RICO. In its holding, the *Salinas* court said to be liable for conspiring to participate in a RICO enterprise, "a conspirator must intend to further an endeavor which, if completed, would satisfy all of the elements a substantive offense, but it suffices that he adopt the goal of furthering or facilitating the criminal endeavor."⁸² In consequence, a conspirator may violate RICO's participation provision in any number of ways short of agreeing to undertake all of the acts necessary for the crime's completion.⁸³ Moreover, the Court explained that, "[a] person may be liable for conspiracy even though he was incapable of committing the substantive

⁷⁶ *Id.* at 63.

⁷⁷ *Id.* at 66.

⁷⁸ *Id.*

⁷⁹ *Id.* at 65.

⁸⁰ *Id.* at 63.

⁸¹ *Id.*

⁸² *Id.* at 65.

⁸³ *Id.*

offence.”⁸⁴ Therefore, conspiracy liability may attach without the need to prove that a defendant committed an overt act.

Since this 1997 verdict, federal courts have continually struggled with *Salinas* and its application to civil RICO conspiracy claims.⁸⁵ The resulting decisions are perplexing and uncertain.⁸⁶ The holding has strained the circuits’ attempts to reconcile the scope of *Reves* operation or management test, that test’s applicability to Section 1962(d) and the level of knowledge and participation an alleged conspirator must embrace. What specifically, then, is required to conspire to violate the substantive provisions of the RICO statute? The Supreme Court has yet to address this question.

E. THE BROUWER DECISION

In January of 2000, “at the risk of splitting hairs that are already split,” the Seventh Circuit sought to reconcile *Salinas* and *Reves* and explain whether a party must agree to personally participate in the operation, management, or conduct of the RICO enterprise for a conspiracy violation to exist under Section 1962(d).⁸⁷ In *Brouwer v. Raffensperger*, the plaintiffs alleged that both an underwriting firm and a law firm conspired to violate the RICO statute through a Ponzi scheme created to raise capital and simultaneously conceal the undercapitalized condition of the bankrupt issuer.⁸⁸ The plaintiffs argued that pursuant to *Salinas*, the general law of conspiracy applies to Section 1962(d) and, therefore, it is wrong to require personal participation in the conduct of the affairs of the RICO enterprise.⁸⁹ Based on this reasoning, the plaintiffs also argued that, under a RICO conspiracy claim, if it is sufficient that a conspirator agree that someone else commit the predicate acts, then it should also be sufficient that a

⁸⁴ *Id.* at 64.

⁸⁵ Dean Browning Webb & John Clinton Geil, *Judicial Implausibility: Beck Severely Restricts Salinas in Civil RICO Conspiracy Litigation*, 16 No. 10 Andrews Civ. RICO Litig. Rep. 13 (June 2000), available at WL 16 No. 10 ANCLRLR 13.

⁸⁶ *Id.*

⁸⁷ *Brouwer v. Raffensperger, Hughes & Co*, 199 f.3d 961, 967 (7th Cir. 2000). The court’s full statement says: At the risk of splitting hairs that are already split, we will attempt to make sense out of all of this, reconcile *Salinas* and *Reves*, and explain the kind of personal participation we hold is necessary to violate subsection (d). *Id.* at 967.

⁸⁸ *Id.* at 963.

⁸⁹ *Id.* at 964.

conspirator agree that someone else should conduct the affairs of the RICO enterprise.⁹⁰

In considering the plaintiffs' arguments, the appellate court acknowledged that it has consistently required some degree of personal participation for a defendant to be liable for conspiring to violate the participation provision.⁹¹ Rather than abandon this principle of personal participation, and rather than adhere to the higher standard of participation spelled out by the Supreme Court in *Reves*, the Seventh Circuit compromised. It held that "one does not need to agree personally to be an operator or manager. One must knowingly agree to perform services of a kind which facilitate the activities of those who are operating the enterprise in an illegal manner."⁹² The *Brouwer* court found that it is an agreement, not to operate or manage the enterprise, but to facilitate personally the activities of those who do that stipulates liability for RICO conspiracy.⁹³

Agreeing with the plaintiffs that, per *Salinas*, general conspiracy law applies to Section 1962(d), the court found that it is not necessary that a defendant personally participate in the operation or management of the enterprise.⁹⁴ The court cautioned, however, "this is not a bright line, that district judges will have to evaluate whether what a defendant agreed to do is sufficient to bring his conduct within subsection (d)."⁹⁵

In their writ of certiorari to the Supreme Court, petitioners argued that the application of the *Reves* operation and management test to RICO conspiracy claims is a recurring issue on which the circuits are in conflict.⁹⁶ The Supreme Court, however, declined to review this ruling.⁹⁷

⁹⁰ *Id.*

⁹¹ *Id.* at 965.

⁹² *Id.* at 967.

⁹³ *Id.* at 967.

⁹⁴ *Id.* at 965-67.

⁹⁵ *Id.* at 967.

⁹⁶ *Supreme Court Denies Review of RICO Conspiracy Ruling*, 16 No. 10 Andrews Civ. RICO Litig. Rep.3 (June 2000), available at WL 16 No. 10 ANCLRLR 3.

⁹⁷ *Brouwer*, 530 U.S. 1243 (2000), cert. denied.

F. THE BECK DECISION

Three years after *Salinas* and four months after the Seventh Circuit's decision in *Brouwer*, the Supreme Court again sought to resolve a split between the circuits regarding the interpretation of civil RICO. In *Beck v. Prupis*, the Supreme Court decided the issue of whether a person injured by an overt act done in furtherance of a RICO conspiracy has a cause of action if the overt act is not an act of racketeering.⁹⁸

Beck is a whistle-blower case that involved a chief executive officer who was terminated after alerting regulators to the activities of his colleagues. He asserted that the company's officers and directors were engaged in racketeering activity and orchestrated his removal to further their illegal activities.⁹⁹ The defendants argued that employees who are terminated for refusing to participate in RICO activities, or who threaten to report RICO activities, do not have standing to sue under RICO for damages from their loss of employment.¹⁰⁰

The district court and the court of appeals agreed with the defendants' argument and the Supreme Court affirmed both lower courts' holdings. The Supreme Court concluded that relief arising from a RICO conspiracy claim must be proximately attributable to the commission of an overt act specifically identified by the RICO statute.¹⁰¹ Any overt act not statutorily listed under RICO precludes the required standing to advance such a claim.¹⁰²

In its analysis, the Supreme Court relied on the effect of combining Sections 1964(c) and 1962(d) of RICO, so that together the provisions provide a civil cause of action for conspiracy.¹⁰³ Where Section 1964(c) creates a cause of action available to anyone "injured ... by reason of a violation of section 1962," Section 1962(d) makes it unlawful for a person "to conspire to violate any of the provisions of subsection (a), (b), or (c) of this section."¹⁰⁴ "To define what it means to be

⁹⁸ *Beck v. Prupis*, 529 U.S. 494, 496 (2000).

⁹⁹ *Id.* at 498-99.

¹⁰⁰ *Id.* at 499.

¹⁰¹ *Id.*

¹⁰² *Id.* at 505.

¹⁰³ *Id.* at 500 n.6.

¹⁰⁴ *Id.* at 500.

injured ... by reason of a conspiracy," the Supreme Court relied on the common law definition of civil conspiracy.¹⁰⁵

In *Beck*, the Supreme Court looked to numerous holdings to support its finding and concluded, that:

[t]here is no civil action for conspiracy alone. It must be coupled with the commission of acts that damaged the plaintiff. Recovery may be had from parties on the theory of concerted action as long as the elements of the separate and actionable tort are properly proved.¹⁰⁶

The Court further stated the principle that "a civil conspiracy plaintiff must claim injury from an act of a tortious character was so widely accepted at the time of RICO's adoption as to be incorporated in the common understanding of civil conspiracy."¹⁰⁷ Thus, it concluded, Congress must have intended the cause of action to rest on the common law principles of civil conspiracy.¹⁰⁸

Therefore, while the *Beck* decision clarifies that a civil plaintiff does not have standing under RICO for an injury caused by a non-racketeering act, it fuels the confusion regarding the interpretation of RICO's conspiracy provision. Some practitioners argue that this holding is at direct odds with the Supreme Court's previous holding in *Salinas*.¹⁰⁹ There, the Court concluded that general conspiracy law governs Section 1962(d) and that an overt act is not necessary for a RICO conspiracy conviction, rather, it is only necessary to show that a conspirator intended to facilitate or further the criminal endeavor.¹¹⁰ Although *Salinas* is a criminal RICO case and *Beck* is a civil suit, the Beck Court notes in *Beck* that *Salinas* neither repudiates its holding regarding what constitutes a conspiracy violation nor indicates that the violation is different in a civil context.¹¹¹ How then, can *Beck* be reconciled with *Salinas*? The Third Circuit circumvented this question in *Smith v. Berg*.¹¹²

¹⁰⁵ *Id.* at 501.

¹⁰⁶ *Id.* at 1615 (citing *Halbertstam v. Welsch*, 705 F.2d 472 (C.A.D.C. 1983)).

¹⁰⁷ *Id.* at 504.

¹⁰⁸ *Id.*

¹⁰⁹ *Supreme Court Denies Review of RICO Conspiracy Ruling*, *supra* note 97.

¹¹⁰ *Salinas*, 522 U.S. at 63.

¹¹¹ *Beck*, 529 U.S. at 500 n.6.

¹¹² *Smith v. Berg*, 247 F.3d 532 (3rd Cir. 2001).

G. THE SMITH DECISION

The same circuit that authored the *Antar* holding in 1995 again faced the issue of civil RICO conspiracy liability in July of 2000. On the heels of the Supreme Court's decision in *Beck*, a Third Circuit district court issued its holding in *Smith v. Berg* and immediately certified its holding for appeal.¹¹³ In April of 2001, a three-judge federal appeals panel unanimously affirmed the district court's holding.¹¹⁴

In *Smith*, the plaintiffs alleged that one of the defendants, John G. Berg, misled them into purchasing homes they could not afford through fraudulent assertions.¹¹⁵ The plaintiffs further alleged that the other defendants, title insurance and lending companies, conspired with Berg to further his fraudulent enterprise by allowing him to assume many of his co-defendants' normal functions during the course of the transactions.¹¹⁶ The defendants, on the other hand, argued that the plaintiffs' claims failed because the defendants' conduct did not demonstrate that they managed or operated, or agreed to manage or operate, Berg's enterprise and therefore, they did not violate the RICO participation provision.¹¹⁷ The defendants based this argument on the Third Circuit's earlier ruling in *Antar*, where it found that a defendant must conspire to operate or manage a RICO enterprise to be liable under Section 1962(d).¹¹⁸ The court rejected the defendants' argument in light of the Supreme Court's decision in *Salinas*.

In short, the court found that *Salinas* "implicitly overruled our prior holding in *United States v. Antar*, and that, in accordance with *Salinas*, liability under Section 1962(d) is met by knowledge of the corrupt enterprise's activities and agreement to facilitate those activities."¹¹⁹ It held that a defendant need not operate or manage a RICO enterprise to be liable under Section 1962(d).¹²⁰ The court further stated that the distinction it crafted in *Antar* between conspiring to

¹¹³ *Id.* at 536.

¹¹⁴ *Id.* at 539.

¹¹⁵ *Id.* at 534.

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ *Id.* at 539.

¹¹⁹ *Id.* at 538.

¹²⁰ *Id.*

operate or manage an enterprise versus conspiring with someone who operates or manages the enterprise, was likewise unnecessary to the *Antar* holding because in that case, the defendant met both standards.¹²¹

Furthermore, the court noted that the majority of other circuits have not applied the *Reves* operation or management test to RICO conspiracy claims. It agreed with the majority of circuits that *Reves* addressed only the extent of conduct or participation necessary to violate the participation provision of the statute and that it did not address the principles of conspiracy law comprising Section 1962(d).¹²²

Therefore, the Third Circuit reconsidered the standard of conspiracy liability it crafted in *Antar* and held that “any reading of *Antar* suggesting a stricter standard of liability under section 1962(d) is inconsistent with the broad application of general conspiracy law set forth in *Salinas*.”¹²³ It stated that pursuant to general conspiracy law, a defendant may be held liable for conspiracy to violate the participation provision if he knowingly agrees to facilitate a scheme that includes the operation or management of a RICO enterprise.¹²⁴

Accordingly, the *Smith* court interpreted *Salinas* as broadening the scope of RICO conspiracy and implicitly rejected the limits it suggested earlier in *Antar*.¹²⁵ “The plain implication of the standard set forth in *Salinas* is that one who opts into or participates in a conspiracy is liable for the acts of his coconspirators which violate the participation provision even if the defendant did not personally agree to do, or to conspire with respect to, any particular element.”¹²⁶

Taking into consideration the impact of *Beck* on the issues in *Smith*, the district court concluded, “*Beck* did not affect the plaintiffs’ claims in this case because they, unlike *Beck*, allege direct injury as a result of the racketeering.”¹²⁷ Utilizing this

¹²¹ *Id.* at 536.

¹²² *Id.* (quoting *United States v. Quintanilla*, 2 F.3d 1469, 1484-85 (7th Cir. 1993)).

¹²³ *Smith*, 247 F.3d at 538.

¹²⁴ *Id.*

¹²⁵ Shannon P. Duffy, *Narrowing Antar, 3rd Circuit Broadens Who Can Be ‘Conspirator’ in Rico Suit*, THE LEGAL INTELLIGENCER, Apr. 18, 2001, available at WL 4/18/2001 TLI 1.

¹²⁶ *Id.*

¹²⁷ *Smith*, 247 F.3d at 536.

distinction, the Third Circuit avoided the issue of reconciling the *Beck* and *Salinas* decisions.

III. DISCUSSION

Despite these Supreme Court and circuit court decisions, questions surrounding what is required to conspire to violate the RICO participation provision still linger. Specifically, the issues of whether conspiracy liability requires a defendant to conspire to operate or manage the RICO enterprise and whether that same liability requires an overt act in furtherance of the conspiracy remain.

Current Ninth Circuit law mandates that to be civilly liable for conspiring to violate the RICO participation provision, a defendant must (1) agree to participate in the affairs of the RICO enterprise; (2) agree to the commission of at least two predicate acts; and (3) participate in the operation or management of the enterprise.¹²⁸ This interpretation of the statute conflicts with the Second, Fifth, Seventh, Eleventh¹²⁹ and after *Smith*, the Third¹³⁰ Circuits' interpretation of the statute. The split stems from interpretive differences between the circuits' readings of *Salinas* in relation to *Reves* and *Salinas* in relation to *Beck*.

A. APPLICABILITY OF THE *REVES* OPERATION OR MANAGEMENT TEST

The Ninth Circuit requires a RICO plaintiff to show substantial evidence indicating that a defendant of a RICO conspiracy suit operated or managed (or agreed to operate or manage) a RICO enterprise. Otherwise, as the Seventh Circuit aptly states in *Brouwer*, "it seems wrong that a person could conspire to violate a law which does not apply to him."¹³¹ Yet, this is exactly what the Seventh and other circuits permit by not requiring that conspiracy defendants meet the *Reves* operation or management test.

¹²⁸ *Westways World Travel, v. AMR Corp.*, 182 F.Supp.2d 952, 962 (9th Cir. 2001).

¹²⁹ *Baker v. Stewart Title & Trust of Phoenix, Inc.*, 5 P.3d 249, 258 n. 6 (2000).

¹³⁰ *Smith*, 247 F.3d at 539.

¹³¹ *Brouwer*, 199 F.3d at 966.

In particular, the Third and Seventh Circuits rely on the Supreme Court's opinion in *Salinas* as grounds for not mandating defendants charged with conspiring to violate the participation provision to have operated or managed the RICO enterprise. This reliance, however, is misplaced. In *Smith* and *Brouwer*, Third and Seventh Circuit cases respectively, the courts reject the premise that the *Reves* operation or management test applies not only to Section 1962(c) of RICO, but also to Section 1962(d).

In *Smith*, the court reasons that because the *Salinas* court expresses its analysis of RICO's conspiracy section in broad terms, that "any reading of *Antar* suggesting a stricter standard of liability under section 1962(d) is inconsistent . . ." ¹³² Thus, the *Smith* court concludes that "[i]n accord with the general principles of criminal conspiracy law, a defendant may be held liable for conspiracy to violate section 1962(c) if he knowingly agrees to facilitate . . . a RICO enterprise." ¹³³

In *Brouwer*, the court correctly concludes that *Reves* holds defendants liable under Section 1962(c) when they participate in the conduct of the enterprise through a pattern of racketeering activity. ¹³⁴ Based on this conclusion, it crafts a special relationship between the RICO enterprise and the conspiracy to run it. ¹³⁵ The court postulates that an agreement to join a conspiracy is highly personal and similarly, an agreement to participate in the conduct of an enterprise is personal. But, it concludes, actually getting the job done is not necessarily personal. ¹³⁶ For that reason, the *Brouwer* court interprets the *Salinas* holding as requiring an analysis of the "level of personal participation" the defendant shared in the enterprise rather than whether the defendant participated in its operation or management. ¹³⁷

Both of these courts' decisions are misguided in as much as they strive to reconcile the Supreme Court's holding in *Salinas* with *Reves*. In these two cases, the courts were determining the liability of defendants, who, like the defendant in *Reves*,

¹³² *Smith*, 247 F.3d at 538.

¹³³ *Id.* at 538.

¹³⁴ *Brouwer*, 199 F.3d at 966.

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ *Id.*

were “outside” of the enterprise. That is, these defendants were not “employed by or associated with” the RICO enterprise and accordingly, they did not meet the operation or management test.¹³⁸

At issue in *Salinas*, contrary to *Reves*, is the liability of a defendant “inside” of the RICO enterprise. In *Salinas*, the court properly held that an “insider” defendant, whose actions are essential to the success of the enterprise, and who knowingly implements decisions of the enterprise’s management and thus enables the enterprise to achieve its goals, can be found liable under RICO’s conspiracy section independent of the *Reves* operation or management test. *Salinas*, in fact, portrays a typical scenario of organized crime that the statute aims to combat. The Supreme Court’s unanimous opinion that the defendant in *Salinas* was guilty of conspiring to violate RICO supports this contention.

It is, therefore, the inherent differences between *Reves* and *Salinas*, the former being a civil action concerning “outsider” liability and the latter a criminal case dealing with a racketeering enterprise “insider,” that run afoul the circuit courts’ attempts to reconcile them. The result of these attempts is an overly-broad interpretation of the RICO conspiracy provision that does not support the intent of the statute or the policy it reflects.

In *Reves*, the Supreme Court defined the intent of the RICO participation provision as a means to find liability in defendants who conduct or participate in a RICO enterprise’s affairs through a pattern of racketeering activity.¹³⁹ There, the Court concluded that this section is properly interpreted to mean that only defendants who operate or manage the enterprise can be liable for violating it.¹⁴⁰ To make this point, the Court distinguishes the conspiracy provision from Sections 1962(a) and (b), the investment and acquisition provisions. The Court maintains that these provisions were constructed specifically to address the liability attributable to defendants

¹³⁸ See *Reves*, 507 U.S. 170, 185 (1993). The Court holds that to be “associated with” a RICO enterprise, a defendant must participate in the operation or management of that enterprise. *Id.* at 185.

¹³⁹ *Reves*, 507 U.S. at 185.

¹⁴⁰ *Id.*

“outsider” of the enterprise.¹⁴¹ Section 1962(d), on the other hand, was targeted specifically at defendants operating within the organization.¹⁴²

Consequently, if a defendant of a conspiracy to participate in a RICO enterprise is not held to the same standard as a defendant accused of participating in a racketeering enterprise, then the Court’s holding in *Reves* would be meaningless. Thus, even though the Supreme Court has not modified or reversed *Reves*, the majority’s interpretation of Section 1962(d) effectively eviscerates it and allows every failed participation claim to be recast as a conspiracy claim. The Ninth Circuit does not. Accordingly, its interpretation concurs with the Supreme Court’s.

B. NECESSITY OF AN OVERT ACT

Pursuant to the Supreme Court’s holding in *Salinas*, several circuit courts relaxed their standards of liability in claims for conspiring to violate RICO through racketeering activity. Not only did the majority of circuits disregard the application of the *Reves* operation or management test to conspiracy claims, but they also abandoned the civil conspiracy law principle that a conspirator agree to commit, or agree that another conspirator should commit, an overt act in furtherance of the conspiracy. Instead, these circuits merely require that conspirators share a common purpose.

In *Smith*, the Third Circuit analyzed the Supreme Court’s opinion in *Salinas* and determined that for conspiracy liability to attach, it is only necessary that defendant conspirators knowingly agree to facilitate the RICO enterprise.¹⁴³ Although the district court in *Smith* requested briefing from the parties on the import of the Supreme Court’s decision in *Beck*, it concluded that *Beck* did not affect the plaintiff’s claims because the *Smith* plaintiffs, unlike the *Beck* plaintiff, alleged direct injury as a result of racketeering.¹⁴⁴ The *Smith* appellate court also concluded that the *Beck* holding did not vitiate the *Smith* plaintiffs’ claims because it found that *Beck* did not alter the

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ *Smith*, 247 F.3d at 537.

¹⁴⁴ *Id.* at 536.

standard for determining liability under RICO's conspiracy section that the Supreme Court defined in *Salinas*.¹⁴⁵ In considering the significance of *Beck* in *Smith*, however, the Third Circuit misinterpreted the Supreme Court's reasoning and, consequently, it misconstrued the standard to which RICO conspiracy defendants should be held.

In footnote 6 of *Beck*, the Court plainly states that the common law of criminal conspiracy defines what constitutes a violation of RICO Section 1962(d) in criminal cases.¹⁴⁶ "We have turned to the common law of criminal conspiracy to define what constitutes a violation of § 1962(d), see *Salinas*."¹⁴⁷ When the issue, however, is what constitutes a civil cause of action for private injury by reason of such a violation, the Court says "[t]he obvious source in the common law . . . is the law of civil conspiracy."¹⁴⁸

Using civil conspiracy law to construe the requisite acts of a civil RICO conspiracy violation comports with the principles of civil law that were widely accepted at the time RICO was enacted. Those principles declare that there must be an act of tortious character to carry "[t]he mere common plan, design or even express agreement . . . into execution."¹⁴⁹ Further, because inchoate crimes are difficult to conceptualize under civil law, it follows that a conspiracy cannot be made the subject of a civil action without a concomitant tortious act, the damage from which a plaintiff can seek damages. Therefore, it is appropriate to distinguish between civil and criminal claims. Whereas the purpose of a civil claim is to impute liability for a specific injury, the purpose of a criminal claim is to redress the harm to society that a conspiracy as such represents.¹⁵⁰ The more convincing reading of the RICO conspiracy provision, then, mandates that an overt act (of racketeering) be committed in furtherance of the enterprise. The Ninth Circuit enforces this interpretation.

¹⁴⁵ *Id.* at 538-39.

¹⁴⁶ *Beck*, 529 U.S. at 501 n.6.

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ *Id.* at 501.

¹⁵⁰ JOSEPH, *supra* note 4, at 128.

CONCLUSION

Due to recent judicial holdings, the majority of circuit courts have allowed the net of liability for conspiring to participate in a RICO enterprise to expand. As a result, court dockets are becoming increasingly crowded and plaintiffs are reworking their traditional state court causes of action so that they may enjoy the lucrative returns of a successful RICO claim. More disturbing however, is the strong likelihood that defendants in these circuits will be found liable under the statute “through association” or for “conspiring to conspire.” In either case, the majority’s interpretation of the RICO conspiracy provision hands plaintiffs a powerful tool. It enables them to infringe upon RICO defendants’ First Amendment right of freedom of association and lets them punish RICO defendants for guilty thoughts. Conversely, the Ninth Circuit’s reading of RICO guards defendants against unjust RICO claims and prevents the statute from being employed beyond its intent and purpose. It is this trend, after all, that has led practitioners to conclude “RICO is very possibly the single worst piece of legislation on the books.”¹⁵¹ Thus, even though the Ninth Circuit’s interpretation of the RICO statute is at odds with the majority of circuits’, Supreme Court precedent, civil conspiracy law and legislative intent each advocate that confining liability to conspiring to operate or manage the enterprise makes sense. In conclusion, the Ninth Circuit’s interpretation of RICO’s conspiracy provision is the more persuasive.

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¹⁵¹ *Second Thoughts on RICO*, *supra* note 7.

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