THE FRONTIER OF RICO STANDING: INTERPRETING RICO'S CONSPIRACY PROVISION TO REALIZE CONGRESS' GOAL OF CREATING A POWERFUL CRIME-FIGHTING WEAPON

I. INTRODUCTION

In 1970, Congress passed the Racketeer Influenced and Corrupt Organizations Act (RICO) as Title IX of the Organized Crime Control Act.[1] RICO constituted responsive legislation to serious societal concerns: organized crime had become increasingly sophisticated, diversified and prevalent, and annually drained billions of dollars from the American economy.[2] Also, organized crime generated money and power that infiltrated and corrupted legitimate businesses and labor unions.[3]

To combat these societal ills, RICO not only provides harsh criminal penalties, but it also permits a private, civil cause of action for persons injured in their business or property because of a RICO violation. In this sense, RICO is like a double-barreled shotgun aimed at criminal enterprises; the government keeps a finger on on the criminal trigger, and private plaintiffs stand ready to shoot with the civil trigger. Although RICO has proven to be a powerful tool for civil litigation, its strength has been restrained by statutory interpretation problems.

One controversial issue among the circuits is "standing" under § 1964(c) to sue civilly for a violation of RICO's conspiracy provision, § 1962(d). Specifically, the courts are divided as to what type of act a private plaintiff must allege for standing purposes. Some courts hold that the plaintiff must allege injury by a "predicate act" of racketeering in furtherance of the conspiracy to violate RICO. Other courts confer standing to a claimant who alleges merely an "overt act" in furtherance of the conspiracy. This article will conclude that "overt act," rather than a "predicate act," should be the requirement to have standing for civil RICO conspiracy claims, and this article will suggest an amendment to clarify Congress' intent.

RICO has four subsections, 18 U.S.C. § 1962(a)-(d), which outline the acts it proscribes.[4] Subsections § 1962(a)-(c) of RICO prohibit three types of substantive offenses. In *Moss v. Morgan Stanley, Inc.*[5] the Second Circuit accurately merged the elements of (a)-(c) into one convenient list of seven elements. The defendant violates RICO if: (1) the defendant (2) through the commission of two or more acts (3) con-

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1. Pub. L. No. 91-452, § 1, 84 Stat. 922 (1970) (codified as amended in scattered sections of 18, 28 U.S.C.) According to the Statement of Findings and Purpose, the goal of RICO was "to seek the eradication of organized crime in the United States by strengthening the legal tools in the evidence-gathering process, by establishing new penal prohibitions, and by providing enhanced sanctions and new remedies to deal with the unlawful activities of those engaged in organized crime."

2. Id.

3. Id.

4. 18 U.S.C. § 1962 (1988).

5. Moss v. Morgan Stanley, Inc., 719 F.2d 5, 17 (2d Cir. 1983), *cert. denied*, 465 U.S. 1025 (1984).

stituting a "pattern"[6] (4) of "racketeering activity"[7] (5) directly or indirectly invests in, or maintains an interest in, or participates in (6) an "enterprise"[8] (7) the activities of which affect interstate or foreign commerce.

Section 1962(d) provides that "[i]t shall be unlawful for any person to conspire to violate any of the provisions of subsections (a), (b), or (c) of this section." A private plaintiff injured by such a conspiracy can recover civil remedies from the conspirators.[9] However, under what circumstances a private plaintiff has standing to sue under RICO has been debated by the circuits. The courts disagree on whether a claimant can allege injury by any overt act intended to further the enterprise, or whether the claimant must allege injury from a predicate act of racketeering. A "predicate act" must be one of the specifically identified acts of racketeering listed in § 1961.[10] An "overt act" can be a predicate act, or any other act in furtherance of the conspiracy to violate RICO. Thus, alleging an overt act encompasses a broader range of activities that can give rise to standing.

The First, Second, Eighth, and Ninth Circuits construe § 1962(d) narrowly with regard to its standing requirements. These courts have decided that to have standing to bring a civil RICO conspiracy claim, the plaintiff must allege injury directly caused by a predicate act of racketeering.

The Third and Seventh Circuits interpret RICO more broadly with regard to standing. These courts hold that alleging injury from an overt act that furthers a RICO conspiracy is sufficient to confer standing, even if the overt act is not a predicate act of racketeering. For example, claimants could sue under RICO if they could allege that their wrongful discharge was their employer's overt act to cover-up a RICO conspiracy, despite the fact that wrongful discharge is *not* one of the enumerated predicate acts of racketeering. These claimants would not have to further allege that a defendant engaged in extortion, or any other predicate act under RICO; the overt act of wrongful discharge is enough to confer standing.

The effects of this circuit split are substantial and far-reaching for claimants, defendants, and courts.[11] For claimants, having standing under civil RICO makes them potential recipients of substantial and sometimes astronomical judgments, as section 1964 (c) allows courts to grant treble damages and attorney fees.[12] For defendants,

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6. A "pattern" of racketeering activity "requires at least two acts of racketeering activity, 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." 18 U.S.C. § 1961 (5)(1988 & Supp. 1991).

7. "Racketeering activity" (also referred to as a "predicate act of racketeering") includes "any act or threat involving murder, kidnaping, gambling, arson, robbery, bribery, extortion, or dealing in narcotic or other dangerous drugs, which is chargeable under State law and punishable by imprisonment for more than one year," as well as specified federal offenses such as bribery, counterfeiting, theft from interstate shipment, fraud in the sale of securities, or drug activity. 18 U.S.C. § 1961(1) (1988 & Supp. 1991).

8. An "enterprise" includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity. 18 U.S.C. § 1961(4) (1988 & Supp. 1991).

9. Establishing a violation of § 1962 will allow a claimant to recover civil remedies under 18 U.S.C. § 1964(c).

10. *See supra* note 7.

11. The circuit split is not limited to courts mentioned in this article. The Tenth and District of Columbia Circuits impose perhaps the strictest requirement to have standing for a violation of § 1962(d). These circuits contend that a claimant must have independent standing to sue for injury under § 1962(a), (b), or (c) before he or she may sue for violation of § 1962(d).

12. *See, e.g.*, Williams v. Hall, 683 F. Supp. 639 (E.D. Ky. 1988). In Williams, two former vice-

attacking a claimant's standing is an important defense strategy. For courts, the circuit split creates confusion and a nonuniform manner of applying the statute. Considering these factors and First Circuit Judge Selya's comments that "[c]ivil RICO is an unusually potent weapon—the litigation equivalent of a thermonuclear device," the perniciousness of the circuit split is clear.[13]

Although this circuit split is well-entrenched, the United States Supreme Court has denied certiorari to decide the issue of standing for a § 1962(d) violation.[14] The Court has ruled, however, on other standing issues under RICO. For example, in *Sedima, S.P.R.L. v. Imrex Co.*,[15] the Supreme Court decided an issue of standing under subsection 1962(c).[16] However, in *Sedima* the court only went as far as it needed to decide the case and did not impose a general standing limitation that applied to § 1962(c)-(d).

The Court also dealt with standing under RICO in *Holmes v. Securities Investor Protection Corp.*[17] There, the court held that a plaintiff must establish that the defendant, by violating RICO, proximately caused the plaintiff's injuries.[18] *Holmes*, by providing that there must be a direct relation between the alleged injury and the RICO violation, somewhat limited the scope of standing provided under *Sedima*. However, *Holmes* still did not provide a comprehensive guide for standing. Therefore, when a plaintiff has standing to sue under § 1962(d) remains an unresolved issue.

II. DISCUSSION OF THE CIRCUIT SPLIT

A. The First, Second, Eighth, and Ninth Circuits: For Standing, Plaintiff Must Allege Injury from a Specified Predicate Act of Racketeering

In *Miranda v. Ponce Federal Bank*, the First Circuit Court of Appeals set forth its restrictive rule regarding a claimant's standing to sue for a violation of § 1962(d). Clarissa Miranda Rodriguez ("Miranda"), an employee of the Ponce Federal Bank, helped federal officials investigate a money-laundering scheme within the bank. Tempting Miranda with possible promotions and stressing loyalty to the bank, the bank officers encouraged her to mislead federal investigators. However, she refused, and eventually the bank dismissed her. A federal court subsequently convicted the Ponce Federal Bank of numerous currency-reporting violations.[19]

Miranda sued the bank and several of its officers for wrongful discharge, and invoked § 1962(c) and (d) of RICO. However, the court found that "[i]nsofar as [Miranda's] suit named the Bank as a RICO defendant, it was clearly

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presidents of an oil company refused to participate in an illegal bribery scheme and were dismissed as a result. They sued under RICO, and the jury awarded them $69.5 million in damages.

13. Miranda v. Ponce Fed. Bank, 948 F.2d 41, 44 (1st Cir. 1991).

14. Bowman v. Western Auto Supply, et al., 985 F.2d 383, *cert. denied* 113 S. Ct. 2459 (1993). Justice White dissented, believing that they should grant certiorari to resolve this split.

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

16. In Sedima, the court held that a private plaintiff could sue for treble damages even before a court criminally convicted the defendant of any RICO predicate act or racketeering charge, and even if the injury was caused by a particular predicate act, rather than a "racketeering injury."

17. Holmes v. Securities Investor Protection Corp., 112 S. Ct. 1311 (1992).

18. *Id.* at 1317.

19. *See* United States v. Ponce Fed. Bank, 883 F.2d 1 (1st Cir. 1989) (per curiam).

unsupportable."[20] The court considered her pleadings to be "vague and inexplicit."[21]

Although the court acknowledged RICO's liberal construction directive,[22] the court concluded that Congress intended to dictate a limited scope for RICO's conspiracy provision. The court reasoned that RICO's main purpose is to prevent racketeering activity, and thus only plaintiffs who allege injury from the commission of such acts shall have standing under RICO.[23] Miranda's case failed in this respect, because she alleged injury from wrongful discharge, which is not one of the enumerated predicate acts of racketeering.

The Second,[24] Eighth,[25] and Ninth[26] Circuits have also construed § 1962(d) narrowly, denying standing to sue in other cases where plaintiffs file a RICO claim based on alleged wrongful discharge. Another significant proponent of this viewpoint is the American Bar Association (ABA) House of Delegates, which at the 1993 ABA Annual Convention, recommended that Congress amend RICO's conspiracy provision to read in this narrow fashion.[27]

B. The Third and Seventh Circuits: For Standing, Plaintiff May Allege Injury From Any Overt Act in Furtherance of the Conspiracy to Violate RICO

The Seventh Circuit, in *Schiffels v. Kemper Financial Services, Inc.*,[28] maintained that to establish standing to sue for a violation of § 1962(d), a plaintiff must allege that the defendant's overt act in furtherance of the RICO conspiracy injured the plaintiff's business or property. However, this act need not be one of the predicate acts of racketeering under § 1961(1).

Carolyn Schiffels was a stock options trading assistant for Kemper Financial Services. Schiffels alleged that her supervisor as well as several other Kemper officials conducted a fraudulent stock options trading operation, and subsequently conspired to cover up the scheme when she discovered it. Both the defendants' acts would violate RICO. Schiffels reported the scheme to her superiors, resulting in her dismissal, which she claimed was an effort by the defendants to further the cover-up. She then sued, claiming that her retaliatory discharge violated state law and civil RICO.

The court interpreted § 1962(d) broadly, holding that injury from the discharge gave Schiffels standing to sue. The court gave two main reasons for its holding. First, the court refused to place "a limitation on RICO standing that RICO does not itself impose."[29] Since § 1962(d) does not require that a predicate act actually be committed, it follows that the act causing claimant's injury does not need to be a predicate act of racketeering. In the court's view, a "person directly injured by an overt act in fur-

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20. *Miranda*, 948 F.2d at 44.
21. *Id.* at 45.
22. 84 Stat. 941 (1970). RICO is to be liberally construed to effectuate its remedial purposes.
23. *Miranda* at 48. ("Congress painstakingly enumerated a complete list of predicate acts in 18 U.S.C. § 1961 (1). For judges, under a conspiracy rubric, to allow RICO damages for an injury caused other than by an enumerated predicate offense would be tantamount to rewriting the statute . . . . There are bounds to interpretive liberality.")
24. Hecht v. Commerce Clearing House, Inc., 897 F.2d 21 (2d Cir. 1990).
25. *Bowman*, 985 F.2d 383.
26. Reddy v. Litton Indus., Inc. 912 F.2d 291 (9th Cir. 1990), cert. denied, 112 S. Ct. 332 (1991).
27. 62 U.S.L.W. 2095-97 (1993).
28. Schiffels v. Kemper Financial Services, Inc., 978 F.2d 344 (7th Cir. 1992).
29. *Id.* at 346.

therance of a RICO conspiracy has been injured 'by reason of' the conspiracy," and thus should have standing to sue.[30]

Second, the court said that interpreting § 1962(d) in this manner was consistent with common law concepts of conspiracy.[31] The court cited *United States v. Neapolitan*, which said that "a conspiracy to violate RICO should not require anything beyond that required for a conspiracy to violate any other crimes."[32] Thus, "while a conspiracy to violate RICO requires an agreement to commit a pattern of predicate acts, it does not require that any predicate acts actually be committed."[33] The Third Circuit[34] has echoed the Seventh Circuit on this issue.

III. RESOLVING THE CIRCUIT SPLIT

Each side of the circuit split argues that its stance follows the purpose and language of the statute. However, the Third and Seventh Circuits adhere closest to the original intent of § 1962(d). By conferring standing to sue based on injury from overt acts, rather than the more circumscribed predicate acts, these circuits permit § 1962(d) to fulfill its purpose as an independent RICO provision.

The First, Second, Eighth, and Ninth Circuits put forth several arguments, each of which may be refuted based on a careful review of the legislative history.[35] First, these circuits argue that Congress, by enacting RICO, sought to prevent the predicate acts of racketeering. Therefore, to allow standing to sue for an injury based on an overt act would "expand dramatically the scope of RICO far beyond the racketeering acts that [Congress] painstakingly enumerated."[36] Commentators warn that if RICO is not limited to the racketeering predicate acts, then claimants could sue for any torts injuring one's business or property.[37]

However, while it is true that Congress targeted racketeering activity, that was not RICO's sole purpose. The enterprise element of a RICO violation cannot be overlooked. Congress intended RICO to be an entirely new crime-fighting concept, one which sought to prevent unlawful activity in the context of an organization, be it a legitimate corporation, or an organized crime family.[38]

Before RICO, prosecuting a conspiracy was difficult. Counsel could only make piece-meal attacks on isolated segments of the organization as they engaged in single criminal or tortious acts, which often meant that the overall picture could not be shown in a single case. RICO freed the government from the constraints of the multiple conspiracy doctrine[39] and allowed the joint trial of many people accused of diversified

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30. *Id.* at 349.

31. *See* Halberstam v. Welch, 705 F.2d 472, 477 (D.C. Cir. 1983). Under common law, liability for a conspiracy requires an agreement between two or more people to participate in unlawful behavior that results in injury caused by an unlawful overt act performed by one of the parties to the agreement, pursuant to or in furtherance of the agreement.

32. United States v. Neapolitan, 791 F.2d 489, 497 (7th Cir. 1986).

33. *Schiffels*, 978 F.2d at 348.

34. Shearin v. E.F. Hutton Group, 885 F.2d 1162 (3rd Cir. 1989).

35. *See* Donald W. Cassidy, Note, *Turning RICO on Its Head: Schiffels v. Kemper Financial Services, Inc. and the Need to Limit Standing Under 1962(d) to Plaintiffs Who Allege Injuries From Racketeering Act*, 78 MINN. L. REV. 467 (1993).

36. *Miranda*, 948 F.2d at 48.

37. Cassidy, *supra* note 35, at 491.

38. *See* Thomas S. O'Neill, Note, *Functions of the RICO Enterprise Concept*, 64 NOTRE DAME L. REV. 646 (1989).

39. RICO's enterprise concept is distinct from the "wheel" and "chain" models of common law

crimes.

United States v. Elliot[40] is the seminal case which explains the rationale of RICO's enterprise conspiracy:

> [T]he object of a RICO conspiracy is to violate a substantive RICO provision . . . and not merely to commit each of the predicate crimes necessary to demonstrate a pattern of racketeering activity. The gravamen of the conspiracy charge in this case is not that each defendant agreed to commit arson, to steal goods from interstate commerce, to obstruct justice, and to sell narcotics, rather, it is that each agreed to participate, directly and indirectly, in the affairs of the enterprise by committing two or more predicate crimes.[41]

Elliot sheds light on the current standing controversy with § 1962(d). Reminded of RICO's purpose of eradicating unlawful activity in the context of an enterprise, it is reasonable to interpret § 1962(d) as defining a new substantive offense. Section 1962(d) does not depend on the defendants violating one of the predicate acts of racketeering. That they conspired to participate in an enterprise through a pattern of racketeering activity indicates that they violated § 1962(d), and any claimants injured in their business or property as a result of such a conspiracy should have standing to sue. With this interpretation, the courts may further the comprehensive and aggressive goals of RICO.

Furthermore, that violating § 1962(d) constitutes an independent substantive offense is evident from the language of the statute. Section 1962(d) prohibits a conspiracy to violate § 1962(a)-(c). Therefore, the substantive elements of RICO, not the predicate acts themselves, define the objective of a RICO conspiracy. Subsection (d) has its own purpose as RICO's conspiracy provision.

A second argument offered by the circuits requiring injury by a predicate act has to do with an analysis of consequences. These circuits predict that adverse consequences would result if they were to confer standing more liberally. Commentators supporting their view warn that because of RICO's enormous damage remedies, plaintiffs have *in terrorem* tactical advantages:[42]

> Many a prudent defendant, facing ruinous exposure, will decide to settle even a RICO case with no merit. It is thus not surprising that civil RICO has been used for extortive purposes, giving rise to the very evils that it was designed to combat.[43]

These circuits also suggest that without strict limits on standing to sue under RICO, state law will be encroached upon and federalized. The First Circuit noted in *Miranda* that RICO "is not entirely open-ended," and that it "cannot be used as a

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multiple conspiracy doctrine.

40. United States v. Elliot, 571 F.2d 880 (5th Cir.), *cert. denied*, 439 U.S. 953 (1978). Before RICO, the court would not have been able to try the *Elliot* defendants together under a single conspiracy count; they never agreed to commit any particular crime. However, with RICO, the court could try them together for a substantive offense, namely, that they agreed to participate in an enterprise through a pattern of racketeering activity.

41. *Elliot*, 571 F.2d at 902.

42. Michael P. Kenny, Note, *Escaping the RICO Dragnet in Civil Litigation: Why Won't the Lower Courts Listen to the Supreme Court?* 30 DUQ. L. REV. 257, 258 n.6 (1992). (citing Sedima, at 506. (Marshall, J. dissenting)).

43. *Id.* at 469.

surrogate for local law . . . ."[44] They argue that even if courts deny plaintiffs standing to sue for violations of § 1962(d), state law could provide compensatory remedies and punitive damages to adequately award the aggrieved. According to these circuits, allowing RICO claims which allege any overt act would thus unnecessarily duplicate and supplant state statutory and common law.

However, while these arguments have some merit, the Third and Seventh Circuits' position fosters the consequences Congress intended to bring about by enacting RICO. The goal of RICO is to develop a stronger weapon to combat illegal enterprises. RICO was necessary because Congress found that unlawful activity "continues to grow," partially "because the sanctions and remedies available to the government are unnecessarily limited in scope and impact . . . ."[45]

Congress intended for RICO to have harsh penalties for defendants. However, its framers did not draft RICO in a way which unfairly advantages a plaintiff who has standing. On the contrary, RICO requires that the claimant overcome many obstacles in establishing and then proving a case. Before obtaining treble damages and attorney's fees, the RICO plaintiff has the burden of establishing that the defendant proximately caused injury to business or property.[46] The circuit courts generally agree that "business or property" does not include injury to one's person.[47] Regarding § 1962(d) specifically, the plaintiff must show that the defendant "knowingly and intentionally joined the broad conspiracy to violate RICO."[48] Therefore, just because plaintiffs may have standing to sue for a violation of § 1962(d) does not mean that their battle is over, or even that they retain a litigation advantage over the defendant.

Concerning the issue of federalization of state law, it is notable that the Third and Seventh Circuits have not overstepped the constitutional bounds of conferring standing to sue in a federal court. In addition to judicial and statutory law, constitutional limitations define the scope of standing.[49] In *Warth v. Seldin*, the Supreme Court stated that while Congress may not "abrogate the Article III minima" of case or controversy, Congress "may, by legislation, expand standing to the full extent permitted by Article III" without regard to "prudential standing rules."[50]

Not only are the Third and Seventh Circuits able to confer standing as they have been, but they are wise in choosing to do so.[51] RICO does not federalize state law, but rather merely overlaps other statutes and remedies from federal, state, and other law.[52] Congress created RICO "in order to supplement, not to supplant, the available remedies since it thought those remedies offered too little protection for the victims."[53]

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44. *Miranda*, 948 F.2d at 49.

45. *Elliot*, 571 F.2d at 902.

46. *Holmes*, 112 S. Ct. 1311.

47. *See, e.g.*, Grogan v. Platt, 835 F.2d 844, 845-48 (11th Cir. 1988).

48. *Elliot*, 571 F.2d at 907. The court in *Elliot* reversed the defendant's conviction because the prosecution failed to present evidence that showed his intentional and knowing decision to join the conspiracy.

49. Gladstone Realtors v. Village of Bellwood, 441 U.S. 91, 99-100 (1979).

50. Warth v. Seldin, 422 U.S. 490, 501 (1975).

51. *See generally* G. Robert Blakey, *Tenth Annual Investigative Roundtable Conference on Traditional and Non-Traditional Organized Crime: The Racketeer Influenced and Corrupt Organizations Act (RICO)*, Sept. 27, 1994.

52. *Id.* at 6, n.26. Congress frequently enacts such overlapping statutes. *See, e.g.*, United States v. Batchelder, 442 U.S. 114, 118-21 (1979); United States v. Bishop, 412 U.S. 346, 350-61 (1973); United States v. Beacon Brass Co., 344 U.S. 43, 45-47 (1952); United States v. Guilliland, 312 U.S. 86, 95-96 (1941).

53. Haroco, Inc. v. American Nat'l Bank & Trust Co. of Chicago, 747 F.2d 384, 392 (7th Cir.

Having cumulative remedies advances remedial goals.[54]

Therefore, as a solution to the circuit split, the legislature should consider amending RICO to clarify its original language and purpose. A simple addition to 18 U.S.C. § 1964(c) could explain when courts should confer standing for a violation of § 1962(d). The subsection would read as follows, with the amendment in italics:

> 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; *injury from any overt act of any member of the enterprise, whether or not a predicate act enumerated in § 1961, is sufficient injury for purposes of standing.*

The goal in suggesting this amendment is to clarify the original intent of RICO as a powerful weapon for civil litigation. Such a legislative amendment will ensure that claimants will not be denied standing to sue for a violation of RICO where Congress deemed it appropriate.

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1984), *aff'd*, 473 U.S. 606 (1985). *See* Goldsmith, *Civil RICO Reform*, 71 MINN. L. REV. 827, 840-48 (1987).

54. Herman & MacLean v. Huddleston, 459 U.S. 375, 386 (1983).

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