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THE "ENDS OF JUSTICE" REVISED: HOW TO INTERPRET RICO'S PROCEDURAL PROVISION, 18 U.S.C. § 1965

Benjamin Rolf*

INTRODUCTION

RICO's procedural provision, 18 U.S.C. § 1965, causes great confusion in the courts. This section generates significant disagreements on two interpretation issues. First, the circuits are split on which subsections of § 1965 authorize national service of process. Second, § 1965(b) allows national service of process and makes the court a proper venue for additional defendants only if the "ends of justice" so require. The courts have interpreted this "ends of justice" requirement in many different ways but have failed to take account of the term's origin in the antitrust statutes and the meaning given to the language in the antitrust context.

I. RICO BACKGROUND

A. Purpose and Legislative History of RICO

Congress enacted the Racketeer Influenced and Corrupt Organizations Act (RICO)1 in 1970 to "provide new weapons of unprecedented scope for an assault upon organized crime and its economic roots."2 RICO is not limited to "just mobsters"; it applies in other contexts as well.3 Many have argued Congress did not intend the harsh

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punishment of white-collar crime that results under RICO, but like many statutes, the original purpose for its passage does not limit the application of its text.

Essentially, RICO punishes "enterprise criminality", that is, patterns of racketeering activity committed by, through, or against an enterprise. An enterprise is defined to include "any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity." Racketeering activity is defined to include numerous crimes, and a pattern exists when at least two racketeering acts occur within a ten-year span. RICO does not criminalize any behavior that was not already criminal. Rather, it acts as a sentencing enhancement for defendants committing a pattern of racketeering crimes through, by, or against enterprises.

RICO violations may be prosecuted as criminal offenses punishable by up to twenty years in jail and forfeiture of assets. Congress also provided a civil cause of action in RICO. It allows private plaintiffs to sue defendants who violate RICO when the violation injures

4 Blakey & Cessar, supra note 3, at 576 n.217 (citing articles arguing that RICO was over-inclusive and arguments that RICO was meant to apply to businesses engaging in mobster-type activities).

5 Id. at 567 n.189 (citing Act of April 20, 1871, ch. 22, § 1, 17 Stat. 13 (codified as amended at 42 U.S.C. § 1983 (2000)), which was passed to aid Reconstruction and to give the federal government control over non-complying state officials, as an example of a statute that has been applied beyond its original limited purpose because of the statute's broad, general language).

6 Id. at 529; see 18 U.S.C. § 1962 (2000). The statute states that the following activities are violations of RICO:

(a) using or investing income derived from a pattern of racketeering activity to acquire any interest in, or the establishment or operation of an enterprise which is engaged in, or the activities of which affect, interstate commerce;

(b) acquiring or maintaining any interest or control, through a pattern of racketeering activity in an enterprise that is engaged in, or the activities of which affect, interstate commerce;

(c) conducting the affairs of an enterprise through a pattern of racketeering activity that is engaged in, or the activities of which affect, interstate commerce; and

(d) conspiracy to violate (a) through (c).


8 Id. § 1961(1).

9 Id. § 1961(5).

10 One element of a RICO claim is that racketeering activity was committed, which is defined by the violation of one of a list of offenses. Id. §§ 1961, 1962. Thus, to violate RICO, one must necessarily violate one of the other predicate offenses.

11 Id. § 1963.
the plaintiffs' "business or property" and allows recovery of treble damages and attorney's fees.\textsuperscript{12} RICO also expands jurisdiction and venue requirements, making it easier for plaintiffs to file civil RICO suits.\textsuperscript{13} These procedural provisions, civil suit provisions, and remedies were taken directly from the antitrust statutes and integrated into RICO.

\section*{B. Interpreting RICO}

The Supreme Court has taken many opportunities to interpret RICO. The principles promulgated by these precedents prescribe how RICO's broad language must be interpreted. Most important, of course, is to look at the plain language of the statute\textsuperscript{14} and its structure.\textsuperscript{15} The statute itself states that RICO is to "be liberally construed to effectuate its remedial purposes."\textsuperscript{16} The court looks to legislative history to interpret ambiguous language in RICO.\textsuperscript{17} The purpose of the statute is to stop the infiltration of legitimate business by organized crime, but the application of RICO is not limited by its purpose.\textsuperscript{18} The legislative history and textual comparisons show clearly that RICO was based on antitrust statutes, and RICO ought to be inter-

\begin{itemize}
\item \textsuperscript{12} Id. § 1964(c). The statute states that "[a]ny 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." \textit{Id.}
\item \textsuperscript{13} Id. § 1965.
\item \textsuperscript{15} \textit{Russello}, 464 U.S. at 22–23; \textit{Turkette}, 452 U.S. at 581, 587.
\item \textsuperscript{16} Organized Crime Control Act of 1970, Pub. L. No. 91-452, § 904(a), 84 Stat. 941, 947. The statute provides: "(a) The provisions of this title shall be liberally construed to effectuate its remedial purposes." \textit{Id.} See \textit{Sedima, S.P.R.L. v. Imrex Co.}, 473 U.S. 479, 491 n.10, 497–98 (1985); \textit{Russello}, 464 U.S. at 21; \textit{Turkette}, 452 U.S. at 587, 593. However, the Supreme Court has also said that liberal interpretation, while it seeks to ensure that an overly narrow interpretation is avoided, is not an invitation to apply RICO beyond the purposes that Congress intended. \textit{Reves v. Ernst & Young}, 507 U.S. 170, 183 (1993).
\item \textsuperscript{17} Nat'l Org. for Women, Inc. v. Scheidler, 510 U.S. 249, 261 (1994) (citing \textit{Reves}, 507 U.S. at 177; \textit{Turkette}, 452 U.S. at 580); \textit{Sedima}, 473 U.S. at 486, 489; \textit{Turkette}, 452 U.S. at 586, 589.
\item \textsuperscript{18} Caplin & Drysdale v. United States, 491 U.S. 617, 630 (1989); \textit{Russello}, 464 U.S. at 28 (citing \textit{Turkette}, 452 U.S. at 591); \textit{Turkette}, 452 U.S. at 591. The statute is not limited to the infiltration of legitimate business by organized crime. \textit{Sedima}, 473 U.S. at 495, 499; \textit{Russello}, 464 U.S. at 28; \textit{Turkette}, 452 U.S. at 590–91.
\end{itemize}
interpreted in light of this fact. When Congress includes limiting language in a statute, the presumption is that Congress intends to give effect to this language.

II. Obtaining Venue and Jurisdiction Over Civil RICO Defendants

A. Overview of RICO’s Provisions Expanding Venue and Personal Jurisdiction

Section 1965 expands venue and jurisdiction in a rather complicated fashion. An initial summary of §1965 might be helpful. Section 1965(d) authorizes national service of process, including summons, and thus personal jurisdiction over any RICO defendant if served in a judicial district in which the defendant “resides, is found, has an agent, or transacts his affairs.” Venue for these defendants must be satisfied by the requirements of the general venue statute or §1965(a). Once a RICO defendant is within a court’s jurisdiction and venue, §1965(b) allows a court to serve process on, and be a proper venue for, any other RICO defendant if the charges against the additional defendants are connected to the case against the first defendant and the case against the first defendant cannot be fully adjudicated without the presence of the additional defendants.

1. Personal Jurisdiction

A court obtains personal jurisdiction over a defendant by service of process delivered in accordance with constitutional and statutory requirements. Personal jurisdiction is based on the premise that a court only has power to punish a defendant who has some relationship to the territory in which the court sits and the government that gives the court its power. A defendant’s citizenship, presence, or sufficient contacts within the forum give the forum court personal jurisdiction. The doctrine is enshrined in Fourteenth Amendment due process for state courts and in Fifth Amendment due process for federal courts. The personal jurisdiction of a court is also limited by

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20 See Russello, 464 U.S. at 23–24; Turkette, 452 U.S. at 581.

21 2 JAMES WM. MOORE ET AL., MOORE’S FEDERAL PRACTICE ¶ 4.02[1], at 4-44.17 (3d ed. 2002).


statute. For federal courts, personal jurisdiction must satisfy the requirements of Federal Rule of Civil Procedure 4(k).  

Rule 4(k) limits personal jurisdiction of federal courts to those defendants “who could be subjected to the jurisdiction of a court of general jurisdiction in the state in which the district court is located.”  

Thus, a federal court’s personal jurisdiction generally is no greater than the courts of the state in which the federal court sits. Rule 4(k) also gives a federal court personal jurisdiction over defendants “when authorized by a statute of the United States.”  

Thus, Congress can allow courts to exercise personal jurisdiction over defendants located anywhere in the nation, so long as Fifth Amendment due process is not violated.  

RICO contains two provisions that expand personal jurisdiction. First, § 1965(d) allows national service of process over defendants, so long as service is given within the “judicial district in which such person resides, is found, has an agent, or transacts his affairs.” Second, if a court has jurisdiction over one RICO defendant, then § 1965(b)
allows national service of process over other related RICO defendants to the extent allowed by Fifth Amendment due process if the "ends of justice" also allow it. Because Rule 4(k)(1)(D) allows Congress to override the default personal jurisdiction requirements for federal courts, § 1965(b) or (d) and Fifth Amendment due process are the only requirements that must be met for a court to have personal jurisdiction over a RICO defendant.

2. Venue

Venue is a statutory requirement designed to ensure that the forum in which the case is heard is convenient for the resolution of the case. The "purpose of statutory venue provisions 'is to protect the defendant against the risk that a plaintiff will select an unfair or inconvenient place of trial.'" The general venue statute is 28 U.S.C. § 1391. Venue is proper under this statute if the case is brought either in the district in which a substantial part of the acts giving rise to the claim occurred or in a district in which a defendant lives if all of the defendants live in the same state. If either of these options is unavailable, venue is proper in any judicial district in which a defendant is found.

Congress may supplement or limit the basic venue statute by enacting special venue provisions. Usually, special venue provisions add to the general venue statute, and venue can be obtained under the general venue statute or the special venue statute unless there is legislative intent to limit the number of forums having proper venue. The Supreme Court made this clear in Pure Oil Co. v. Suarez, when it considered whether the special venue provision of the Jones Act lim-

30 Id. § 1965(b).
31 Friedenthal et al., supra note 22, § 2.15, at 79.
33 28 U.S.C. § 1391(b) governs venue in federal question cases. It states that venue is proper for federal question cases only when the case is brought in
   (1) a judicial district where any defendant resides, if all defendants reside in the same State, (2) a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated, or (3) a judicial district in which any defendant may be found, if there is no district in which the action may otherwise be brought.
35 Id.
ited which forums had proper venue under the standard venue statute, 28 U.S.C. § 1391. Because the intent behind the addition of a special venue provision to the Jones Act was to expand the number of forums with proper venue, a forum could have proper venue under either the venue provisions of the Jones Act or the standard venue statute. 38

RICO has special venue provisions in § 1965(a) and (b). Section 1965(a) makes a court a proper venue when it sits in a district "in which [a defendant] resides, is found, has an agent, or transacts his affairs." 39 Congress intended this venue provision to expand the number of forums with proper venue. 40 Thus, a court will have proper venue either under RICO's venue provision or the standard venue provision, § 1391. 41 Once a court is a proper venue for one RICO defendant, § 1965(b) makes the court a proper venue for all "other" RICO defendants if the "ends of justice" require it. Thus, a court will be a proper venue for a RICO defendant if the requirements of 28 U.S.C. § 1965(a), (b), or 28 U.S.C. § 1391 are satisfied.

B. Obtaining Personal Jurisdiction over the Initial RICO Defendant: § 1965(d)

Section 1965(d) states simply that "[a]ll other process in any action or proceeding under this chapter may be served on any person in any judicial district in which such person resides, is found, has an agent, or transacts his affairs." 42 An analysis of all of § 1965 is necessary to see that national service of a summons is included in "all other process."

Section 1965(a) expands venue and does not authorize the service of any process. Section 1965(b) grants national service of process and makes a court a proper venue for RICO defendants if at least one related RICO defendant has been brought under the court's jurisdiction and venue under another section and the "ends of justice" allow

38 Id. at 207 (holding that because the intent of the venue provision in the Jones Act was to expand venue, venue is not improper under § 1391).
41 See Dickerson, supra note 40, at 498 n.109 (citing cases).
it. Section 1965(b) says nothing about service of process over a defendant when no RICO defendant is within the court's jurisdiction. Section 1965(c) grants special subpoena power for witnesses. Section 1965(d) allows "all other process" to be served wherever the defendant "resides, is found, has an agent, or transacts his affairs." Section 1965(d)'s "other process" includes any process not allowed under § 1965(a), (b), or (c). Summons of a defendant when no other defendant is within a court's jurisdiction is not covered in any other section, so § 1965(d)'s "other process" includes service of process on defendants generally.

Note also that § 1965(d) allows national service of process only if the process is served where the defendant "resides, is found, has an agent, or transacts his affairs." This is the same as the venue limitations in § 1965(a). Thus, under § 1965(d), national service of process is effective only if it is served in a judicial district in which the plaintiff could have had venue over the defendant under § 1965(a). Section 1965(a) and (d) operates in conjunction to give a court jurisdiction (§ 1965(d)) and venue (§ 1965(a)). Section 1965(b) comes in only when venue or jurisdiction is unavailable for a defendant under § 1965(a) or (d) and the court already has jurisdiction over at least one related RICO defendant. This interpretation gives meaning to both § 1965(b) and (d).

Federal courts have split over whether both § 1965(b) and § 1965(d) authorize national service of process. The Fourth and the Eleventh Circuits have held that § 1965(d) authorizes national service of process. Other circuits have not considered § 1965(d) to be a grant of national service of process. The two leading cases from the Seventh and Ninth Circuits, Lisak v. Mercantile Bancorp, Inc. and Butcher's Union Local No. 498 v. SDC Investment, Inc., viewed § 1965(b) as RICO's sole grant of national service of process. The Second Circuit in PT United Can Co. v. Crown Cork & Seal Co. explicitly rejected the view that § 1965(d) allows national service of process, arguing that only § 1965(b) allows national service of process. Federal district courts in other circuits continue to puzzle over which § 1965 subsec-

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43 Id.
44 ESAB Group, Inc. v. Centricut, Inc., 126 F.3d 617, 627 (4th Cir. 1997) (citing H. REP. No. 91-1549, at 4 (1970)); Panama v. BCCI Holdings, 119 F.3d 935, 942 (11th Cir. 1997) ("Section 1965(d) of the RICO statute provides for service in any judicial district in which the defendant is found.").
45 834 F.2d 668 (7th Cir. 1987).
46 788 F.2d 535 (9th Cir. 1986).
47 Id. at 539.
48 138 F.3d 65, 71 (2d Cir. 1998).
tion authorizes national service of process. In *Multi-Media International, LLC v. Promag Retail Services, LLC*, a Kansas district court overruled its previous position that § 1965(d) authorized national service of process and adopted the *PT United Can* approach.\(^{50}\)

The Fourth Circuit in *ESAB Group, Inc. v. Centricut, Inc.* held that § 1965(d) conferred personal jurisdiction over a defendant in a RICO case so long as Fifth Amendment due process is not violated.\(^{51}\) The case involved a South Carolina corporation suing New Hampshire defendants in South Carolina federal court.\(^{52}\) The plaintiff asserted that § 1965(b) allowed for jurisdiction over the New Hampshire defendants even though it had not established venue or personal jurisdiction over any of the defendants.\(^{53}\) The court held that § 1965(d), not § 1965(b), allowed for national service of process over all defendants, because the defendants had “been served with process in a judicial district where they respectively reside, are found, or transact their affairs.”\(^{54}\) The court then remanded the case to the district court to determine whether venue was present under § 1965(a) or (b).\(^{55}\)

The district court in *Bridge v. Invest America, Inc.*\(^{56}\) offered an excellent discussion of the issue. The court in *Bridge* held that both § 1965(b) and (d) conferred national service of process, though § 1965(b) could only be used when one defendant was within the court’s proper venue.\(^{57}\) Thus § 1965(d) allowed for national service of process without an “ends of justice” determination.

\(^{50}\) *Id.* at 1029–31.
\(^{51}\) *ESAB Group, Inc. v. Centricut, Inc.*, 126 F.3d 617, 626 (4th Cir. 1997).
\(^{52}\) *Id.* at 621.
\(^{53}\) *Id.* at 625–27.
\(^{54}\) *Id.* at 627.
\(^{55}\) *Id.* (“The district court may ultimately have to decide whether venue is proper, either under 18 U.S.C. § 1965(a) or (b), or under general venue statutes. . . . Because service was accomplished on the defendants where they were found, personal jurisdiction was established.”).
\(^{57}\) *Id.* at 951. The court stated that “[s]ection 1965(b) does contain a provision for nationwide service of process, and thus authorizes personal jurisdiction as well as venue,” but that it only applies when there is venue for the RICO claim for at least one defendant. *Id.* The court went on to hold that “section 1965(d) authorizes personal jurisdiction over [the defendant], without regard to an ‘ends of justice’ determination under section 1965(b).” *Id.* at 952. The court cited various district court cases holding § 1965(d) to be the general national service of process statute, including *Michelson v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 709 F. Supp. 1279, 1285 (S.D.N.Y. 1989), *United States v. International Brotherhood of Teamsters*, 708 F. Supp. 1388, 1402 (S.D.N.Y. 1989), *Rolls-Royce Motors, Inc. v. Charles Schmitt & Co.*, 657 F. Supp. 1040, 1055 (S.D.N.Y. 1987), *McIntyre’s Mini Computer Sales Group, Inc. v. Creative Synergy*
The Second Circuit rejected the analysis of ESAB Group in PT United Can Co. v. Crown Cork & Seal Co., and found § 1965(b) to be RICO's sole national service of process provision. The Second Circuit disagreed with many of its district courts, which had been allowing national service of process under § 1965(d). The court's argument hinged on its view of § 1965(b). To determine whether § 1965(d)'s "other process" includes summons and establishes personal jurisdiction, the court rightly thought that whatever process is not listed in previous sections falls into the "other process" category of § 1965(d). The court held that because § 1965(b) applied to summons in one situation, § 1965(d)'s "other process" did not include summons at all, even where § 1965(b) did not allow national service of process. Basically, the court read § 1965(d) to state that all other types of process may be served nationally, and that this excluded summons because summons was the type of process authorized by § 1965(b).

The only other commentator to consider the issue, Professor A. Darby Dickerson, agreed with PT United Can and argued that § 1965(d) does not provide for national service of process because such an interpretation of § 1965(d) would make § 1965(b)'s national service of process meaningless. Professor Dickerson argued that if.

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[58] 138 F.3d 65, 71 (2d Cir. 1998).  


[60] PT United Can, 138 F.3d at 71 ("[W]e find these sections to be equally important to a coherent understanding of the meaning and functioning of the statute, particularly for the purpose of interpreting the terms 'other parties' and 'other process' in §§ 1965(b) and (d), respectively.").  

[61] Id. at 72 ("Thus, § 1965(d)'s reference to 'all other process,' means process other than a summons of a defendant.").  


[63] Id. Another reason why she interprets § 1965(b) in this manner is that she disagrees with the policy of having broad venue and service of process provisions, fearing unfairness toward defendants. Id. at 480-82. This Note does not attempt to determine what the best or fairest policy is. Attempts by courts to limit RICO's broad language based on policy views have been repeatedly rejected by the Supreme Court. See, e.g., H.J. Inc. v. Northwestern Bell Tel. Co., 492 U.S. 229, 249 (1989) ("If plaintiffs' ability to use RICO against businesses engaged in a pattern of criminal acts is a defect, we said, it is one 'inherent in the statute as written,' and hence beyond our power to correct." (citing Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 499 (1985))); Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 491 n.10, 499-500 (1985) ("It is not for the judici
§ 1965(d) allowed national service of process, no plaintiff would "ever rely on 1965(b), when that section requires them to establish venue over at least one other RICO defendant under 1965(a) and to pass the 'ends of justice' test." 64

Professor Dickerson is incorrect in saying § 1965(b) would be meaningless under the ESAB Group interpretation. Section 1965(b) is the catch-all provision and is far from meaningless under the ESAB Group interpretation. Section 1965(b) is broader than § 1965(d) and allows service of process where § 1965(d) does not. Recall that § 1965(d) allows service of process on defendants only within a district that could be a proper venue under § 1965(a), because both sections contain the identical limiting language. 65 In the context of § 1965(a), a district in which a defendant is "found" has been interpreted to mean a district in which a defendant is present and engaging in continuous activities. 66 Section 1965(b)’s only limitation on where summons may be served is that it must be within a district of the United States. A defendant could not be served process in any district under § 1965(d) as he could be under § 1965(b). Section 1965(b) also expands venue to include defendants served under § 1965(b). Defendants served under § 1965(d) must still satisfy the venue requirements of § 1965(a).

The interpretation of § 1965(d) offered by the Second Circuit in PT United Can and by Professor Dickerson is reasonable but ultimately incorrect. Their view fails to consider how the liberal construction clause should affect the interpretation of § 1965. The Supreme Court held that courts must give effect to the liberal construction clause, especially for RICO’s remedial provisions. 67 Section 1965’s grant of national service of process is remedial, as it gives the plaintiff a greater number of forums in which to sue, making it easier for the plaintiff to obtain a remedy. By limiting national service of process to § 1965(b), the PT United Can interpretation would deny plaintiffs national service of process against many defendants. This limits a plaintiff’s ability to obtain a remedy by restricting the number of courts in which the plaintiff may bring a case. Thus, RICO’s liberal interpretation clause

ary to eliminate the private action in situations where Congress has provided it simply because plaintiffs are not taking advantage of it in its more difficult applications.”).

64 Dickerson, supra note 40, at 514–15.
65 See supra note 43 and accompanying text.
66 See infra notes 73–75 and accompanying text.
67 See Sedima, 473 U.S. at 492 n.10 (“[I]f Congress’ liberal-construction mandate is to be applied anywhere, [it is to be applied] where RICO’s remedial purposes are most evident.”).
requires the adoption of the *ESAB Group* interpretation, which expands the plaintiff's choice of forum.

C. Obtaining Venue over the Initial RICO Defendant: § 1965(a)

Eighteen U.S.C. § 1965(a) is RICO's general venue provision. Congress intended § 1965(a) to supplement the standard venue provision, allowing venue to be established for a RICO defendant through 28 U.S.C. § 1391 or RICO's venue provision. Congress imported § 1965(a)'s language directly from the antitrust statutes. Both RICO and antitrust venue provisions allow for a plaintiff to bring suit and for the court to have proper venue in any district in which a defendant "resides, is found, has an agent, or transacts his affairs."\(^{70}\)

The term "resides" in a supplemental venue provision is interpreted to be synonymous with the meaning of "resides" in the general venue statute, § 1391. A corporation's residence is not defined in the same way as an individual's residence. A corporation is said to reside in any district in which the district court could exercise personal jurisdiction over the corporation.\(^{72}\)

A person is "found" within a judicial district when he is present within the district and engages in continuous activities within the dis-

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69 28 U.S.C. § 1391(b) (2000). Section 1391(b) states:

A civil action wherein jurisdiction is not founded solely on diversity of citizenship may, except as otherwise provided by law, be brought only in: (1) a judicial district where any defendant resides, if all defendants reside in the same State, (2) a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated, or (3) a judicial district in which any defendant may be found, if there is no district in which the action may otherwise be brought.

Id.


72 28 U.S.C. § 1391(c). Section 1391(c) states that "a defendant that is a corporation . . . shall be deemed to reside in any judicial district in which it is subject to personal jurisdiction at the time the action is commenced." Id.
For a corporation to be "found" within a judicial district, "it must be present [there] by its officers and agents carrying on the business of the corporation."

Occasional presence within a district is insufficient to find that the defendant is "found" in the district.

If a defendant "has an agent" within a judicial district, venue is proper as to the defendant. In *Payne v. Marketing Showcase, Inc.*, the plaintiff alleged that defendants "had agents" within the judicial district because they had a business relationship with a corporation within the district. The court held that one does not have an agent in a district within the "has an agent" standard simply because of a business relationship with a party within a district.

Courts are divided on whether a co-conspirator may be considered an agent of a defendant. The better argument seems to be that a co-conspirator is not an agent, as antitrust law does not recognize a co-conspirator as an agent under its "has an agent" standard, and RICO's language is based on the antitrust provisions. However, under various other venue provisions, a co-conspirator has been held to be an agent, making venue proper for the person for whom the "agent" is acting.

"Transacts his affairs" is equivalent to and ought to be interpreted similarly to "transacts business" in the antitrust statute's venue provi-
The test for the antitrust term "transacts business" is the "practical, everyday business or commercial concept of doing or carrying on business 'of any substantial character.'"83 A corporation is transacting its affairs within a forum when it engages in business of a substantial and continuing character.84

Generally, a person is not "transacting his affairs" when he is acting on behalf of his employer.85 A person is transacting his affairs only when the business is personal. This "fiduciary shield doctrine" prevents a court from finding a person has transacted his affairs within a district if he is acting as a fiduciary on behalf of another. The doctrine is accepted in some jurisdictions but not all.86

Making venue proper within a district in which a defendant transacts his affairs is the greatest extension of venue beyond § 1391. Some courts have stated that they will narrowly construe § 1965(a), as § 1391 is also available.87 However, narrowly construing RICO sections that expand venue conflicts with RICO's liberal interpretation clause.

D. Obtaining Venue and Personal Jurisdiction over "Other" RICO Defendants: § 1965(b)

Once a court has obtained jurisdiction and venue over one RICO defendant, there may be other defendants who cannot be brought before the court, either due to lack of venue under § 1391 or

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82 Payne, 602 F. Supp. at 659 (holding that the phrase "transacts his affairs" is equivalent to the phrase "transacts business" in the antitrust statute (quoting Bulk Oil v. Sun Oil Trading Co., 584 F. Supp. 36, 39 (S.D.N.Y. 1983))).
84 Payne, 602 F. Supp. at 659 ("[A] corporation 'transacts business' within a forum when 'substantial business activity is done within the forum with continuity of character.'" (quoting CCP Corp. v. Wynn Oil Co., 354 F. Supp. 1275, 1278 (N.D. Ill. 1973))).
85 Id. ("'[T]ransacts his affairs' refers to their personal affairs, not the affairs they may have transacted on behalf of their employer.").
86 Compare Anchor Glass Container Corp. v. Stand Energy Corp., 711 F. Supp. 325, 329–330 (S.D. Miss. 1989) (holding that transacting business on behalf of one's employer or acting as the fiduciary of another does not count as doing business for purposes of § 1965(a), as defendants can only be considered to be transacting business if it is personal business), with Abeloff v. Barth, 119 F.R.D. 315, 328 (D. Mass. 1988) ("'[T]he term 'transacts his affairs' as used in § 1965(a) does not mean that venue of an individual defendant is restricted to a district in which the individual defendant conducts his affairs.").
87 See, e.g., Medoil Corp. v. Clark, 753 F. Supp. 592, 598–99 (W.D.N.C. 1990) (narrowly construing § 1965(a) because venue can also be established by § 1391); King v. Vesco, 342 F. Supp. 120, 122 (N.D. Cal. 1972) (relying on differences between the Clayton Act venue provisions and § 1965(a) to construe the language in § 1965(a) narrowly).
§ 1965(a), or due to an inability to serve process on the defendants under § 1965(d) or Rule 4(k). Section 1965(b) is a catch-all provision allowing a court to overcome remaining venue or jurisdiction issues that prevent additional defendants from being brought before the court.

Section 1965(b) states:

In any action under section 1964 of this chapter in any district court of the United States in which it is shown that the ends of justice require that other parties residing in any other district be brought before the court, the court may cause such parties to be summoned, and process for that purpose may be served in any judicial district of the United States, by the marshal thereof.\(^8\)

Professor Blakey stated that “[s]ection 1965(b) is one of the most potentially far-reaching procedural devices of the RICO statute. It authorizes the court, if the interests of justice require, to serve and join parties over whom the court would not ordinarily have personal jurisdiction and where venue would normally be improper.”\(^9\) Because service of process is the means by which a court obtains personal jurisdiction,\(^9\) and § 1965(b) authorizes service of process nationwide, the statute allows a court to exercise personal jurisdiction over defendants who would not otherwise be within the personal jurisdiction of the court. Section 1965(b) allows a court to issue summons in any judicial district of the United States.\(^9\)

Section 1965(b) expands venue by stating that the court may require that “other parties residing in any other district be brought before the court.”\(^9\) It would not be possible for the “other parties” to be brought before the court unless the statute made the court a proper venue for these “other parties.” Without an expansion of both venue and personal jurisdiction, § 1965(b) would not allow “other parties” to be brought before the court. Section 1965(b) thus expands both personal jurisdiction and venue.

The use of § 1965(b) is limited, however. If the plaintiff cannot obtain personal jurisdiction and venue over any RICO defendants in the chosen forum, the inquiry ends and § 1965(b) has no effect. As Professors Blakey and Gettings noted, “[t]he suit need only be

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\(^9\) Pennoyer v. Neff, 95 U.S. 714, 724 (1877) ("Jurisdiction is acquired . . . as against the person of the defendant by the service of process . . . .")
\(^9\) Id.
brought in a proper court for at least one defendant."93 Read to-
gether with § 1965(a), which allows "a civil action [under RICO] 
against any person" to be instituted in any district court that has 
proper venue,94 "other parties" refers to other defendants.95 By using 
the word "other," the statute assumes that one defendant is properly 
before the court before "other" defendants are brought in under 
§ 1965(b).96

The second requirement compels the plaintiff to show that the 
"ends of justice" require bringing the "other" defendants before the 
court. Courts have had great difficulty interpreting this requirement. 
What they have missed is that the "ends of justice" language comes 
directly from antitrust statutes and has been interpreted by the Su-
preme Court.97 No court has yet interpreted the "ends of justice" test 
in accord with the relevant antitrust precedents and RICO’s liberal 
construction clause. In fact, no court has yet tied the "ends of justice" 
requirement to its origin in 15 U.S.C. § 5. The "ends of justice" lan-
guage is sometimes read to require an initial finding that no other 
court can exercise jurisdiction over all of the defendants before jurisd-
iction may be exercised. Other times, the "ends of justice" is held to 
require an inquiry involving factors identical to those used in due pro-
Nearly all of the requirements courts have read into the "ends of jus-
tice" test for RICO have been rejected in the antitrust context.98 The 
interpretation required by antitrust precedents and supported by the 
liberal interpretation clause is that the "ends of justice" allow a plain-
tiff to bring in all "other" defendants if the additional defendants are 
related to the RICO claim and trying all of the defendants together in 
one forum is necessary for the full adjudication of the RICO claim.

93 Blakey & Gettings, supra note 89, at 1039.
95 See PT United Can Co. v. Crown Cork & Seal Co., 138 F.3d 65, 71 (2d Cir. 
1998) ("[Section] 1965(b) provides for nationwide service and jurisdiction over 
'other parties' not residing in the district, who may be additional defendants of any 
kind, including co-defendants, third party defendants, or additional counter-claim 
defendants.").
96 Id.

[Section] 1965(a) grants personal jurisdiction over an initial defendant in a 
civil RICO case to the district court for the district in which that person 
resides, has an agent or transacts his or her affairs. In other words, a civil 
RICO action can only be brought in a district court where personal jurisdic-
tion based on minimum contacts is established as to at least one defendant.

Id.
97 See infra note 118 and accompanying text.
98 See infra note 138–40 and accompanying text.
1. Current Approaches to Interpreting the "Ends of Justice" Clause

The Ninth Circuit in *Butcher's Union Local No. 498 v. SDC Investments*, Inc. held that the "ends of justice" prevented the plaintiffs from using § 1965(b) unless there was no other forum into which all the defendants could be brought. Other courts have followed *Butcher's Union* and held that § 1965(b) applies only when all of the RICO defendants could not be brought before any other court.

The court in *Butcher's Union* was correct in noting that "Congress intended the 'ends of justice' provision to enable plaintiffs to bring all members of a nationwide RICO conspiracy before a court in a single trial," but there is no justification for the view that Congress intended to provide plaintiffs with only one court in which to bring RICO charges against all RICO defendants.

Other courts have used this no-other-possible-forum test as only one factor to take into consideration. The court in *Miller Brewing Co. v. Landau* stated that "[w]hile the standards for determining whether an 'ends of justice' finding should be made have not been well defined, at least one factor that should be considered is whether an alternative forum exists where venue would be proper as to all defendants." Even though all of the defendants were subject to the jurisdiction of a New York court, the *Miller* court held that this fact "should not be the sole consideration, especially where transferring the case would result in extraordinary delay or some other extreme prejudice against the plaintiff's interests." The court reached its result by weighing the inconvenience to the defendants with the potential harm transferring the case would have caused to plaintiffs. Other courts have followed this approach, judging the alternative forum test to be one factor when weighing whether to exercise jurisdiction under § 1965(b).

99 788 F.2d 535 (9th Cir. 1986).
100 Id. at 539.
101 E.g., *PT Can United*, 138 F.3d at 71-72 ("[T]he first preference, as set forth in § 1965(a), is to bring the action where suits are normally expected to be brought. Congress has expressed a preference in § 1965 to avoid, where possible, haling defendants into far flung fora."); *Lisak v. Mercantile Bancorp, Inc.*, 834 F.2d 668, 672 (7th Cir. 1987).
102 *Butcher's Union*, 788 F.2d at 539.
104 Id. at 1290.
105 Id.
106 Id. at 1291.
107 See *United Power Ass'n, Inc. v. L.K. Comstock & Co.*, No. 3-89 Civ. 766, 1992 U.S. Dist. LEXIS 18874, at *9 (D. Minn. Oct. 27, 1992) ("The lack of an alternative forum is an important factor in determining whether the 'ends of justice' require
The court in *Southmark Prime Plus, L.P. v. Falzone*\(^{108}\) adopted a similar factor-based approach, considering three factors that ultimately weighed in favor of finding that the "ends of justice" gave the court jurisdiction to hear the case.\(^{109}\) First, it considered whether other districts would have proper venue and personal jurisdiction over all of the defendants. The court determined it was possible but did not determine whether there was another such forum.\(^{110}\) Second, it considered whether defendants would be inconvenienced by defending in the current forum. Third, the court considered whether judicial economy warranted exercising jurisdiction.\(^{111}\) Other courts have considered other factors,\(^{112}\) including the location of related cases,\(^{113}\) the location of the majority of witnesses and evidence,\(^{114}\) the location of the district with the most contacts with the RICO claim,\(^{115}\) and the state whose laws will govern supplemental claims.\(^{116}\)

2. Interpreting the "Ends of Justice" Clause in Light of Its Antitrust Origins and the Liberal Interpretation Clause

Section 1965(b) states that national service of process is allowed in "any action under section 1964 of this chapter in any district court of the United States in which it is shown that the 'ends of justice' require that other parties . . . be brought before the court."\(^{117}\) Two factors must guide the interpretation of § 1965(b)'s "ends of justice" requirement: the antitrust precedents interpreting the original "ends of justice" clause, and RICO's liberal interpretation clause.

a. Antitrust Precedents

The "ends of justice" requirement comes directly from 15 U.S.C. § 5, which states:

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109 Id. at 491–92.

110 Id.

111 Id.

112 See Dickerson, *supra* note 40, at 519–21 (listing numerous factors with citations, including factors listed here).


Whenever it shall appear to the court before which any proceeding under section four of this Act may be pending, that the ends of justice require that other parties should be brought before the court, the court may cause them to be summoned, whether they reside in the district in which the court is held or not; and subpoenas to that end may be served in any district by the marshal thereof.\textsuperscript{118}

The purpose of the provision in RICO is the same as in the antitrust context: to give the plaintiff a choice of forum and to bring all of the defendants connected to the alleged illegal transaction within a single forum.

It is not necessary to examine the legislative history to see that the antitrust provisions were the basis for RICO's "ends of justice" requirement, but examining it adds additional proof. The Senate report states that "[s]ection 1965 contains broad venue provisions and process powers. They are modeled on present antitrust legislation."\textsuperscript{119} It goes on to say that "[t]he committee believes that these broad provisions are required by the nationwide nature of the activity of organized crime."\textsuperscript{120} The House report is nearly identical.\textsuperscript{121}

The Supreme Court has often looked to the antitrust statute when interpreting ambiguities in the RICO statute\textsuperscript{122} and has only refused to incorporate antitrust concepts when doing so would not make sense in a RICO context.\textsuperscript{123} Here, the language and purpose of the antitrust counterpart to § 1965(b) is identical, and the "ends of

\textsuperscript{118} 15 U.S.C. § 5 (2000). Section 4 charges U.S. Attorneys to bring suits in their districts to prevent and restrain antitrust violations, id. § 4, and thus § 5 applies only to cases in which the United States brings the case. This restriction on the use of national service of process was not incorporated into RICO.

\textsuperscript{119} S. REP. No. 91-617, at 160 (1969).

\textsuperscript{120} Id. at 161.


\textsuperscript{122} Rotella v. Wood, 528 U.S. 549, 559-60 (2000) (refusing to alter the statute of limitations from the antitrust model because "neither the RICO pattern requirement nor the occurrence of fraud in RICO patterns is a good reason to ignore the Clayton Act model"); Agency Holding Corp. v. Malley-Duff & Assocs., Inc., 483 U.S. 143, 150-52 (1987) (noting that antitrust practices were extensively incorporated into RICO and holding that this justifies using the antitrust statute of limitations of four years for RICO).

\textsuperscript{123} See Shearson/Am. Express, Inc. v. McMahon, 482 U.S. 220, 242 (1987) (holding that, unlike antitrust claims, RICO claims may be made arbitrable by contract because the "private attorney general role for the typical RICO plaintiff is simply less plausible than it is for the typical antitrust plaintiff" since it is more likely that an antitrust case will be have a widespread benefit on society); Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 498-99 (1985) (holding that the fact that an antitrust civil plaintiff
justice" test employed by courts in the antitrust setting would work just as well for § 1965(b). Thus, lower courts should interpret § 1965(b) in a similar fashion as the Supreme Court has interpreted 15 U.S.C. § 5.

In Standard Oil Co. v. United States, the Supreme Court held that the "ends of justice" required national service on "other" defendants under § 5 even though the case was brought in Missouri where only one of the seventy-one defendant corporations and none of the seven individual defendants were otherwise within the circuit court's jurisdiction.124 Many of these defendants could have been brought within the jurisdiction of a New York court without national service of process.125 Standard Oil makes it clear that the "ends of justice" allow a court to exercise jurisdiction even where other forums may have jurisdiction without national service of process.

The lower court in Standard Oil dealt with the "ends of justice" requirement in depth. The defendants argued that the "ends of justice" do not require national service of process because the New York district would have venue and jurisdiction over most of the defendants. The court rejected this argument outright, stating that "[t]he question presented [was] not in which court the ends of justice required the complainant to choose to institute its suit, but whether or not in this suit the ends of justice required that the nonresident defendants should be brought in."126 Thus, the "ends of justice test" is not a license for the court to determine whether other courts would be better, but only whether the defendants are sufficiently connected to the current case against the resident defendants. The court further held:

Congress did not confer jurisdiction, in this class of cases, upon the Circuit Court in whose district the largest number of conspirators resided, but upon every Circuit Court in whose district a resident conspirator could be found and served with process. It did not grant to any of the Circuit Courts the power to select the court in which the [complainant] should institute its suit. If it had done so,
each court might have selected another. It left the complainant free to commence its suit in any Circuit Court in which it could find and serve a resident conspirator. It instituted its suit in this court and invoked its exercise of its power to acquire jurisdiction of the defendants by the issue and service of its process.\textsuperscript{127}

This argument applies with equal force to RICO, as Congress could have chosen many other ways of allowing national service of process but instead incorporated the antitrust language presumably knowing how broadly it had been interpreted. Thus, the requirement stated in \textit{Butcher's Union}, Lisak, and \textit{PT United Can} that the “ends of justice” test prohibits national service of process and venue when another court could have jurisdiction over the defendants is simply wrong. There is no such requirement.

The \textit{Standard Oil} defendants also argued that the “ends of justice” are not met when the defendant already within the court’s jurisdiction is not a part of the entire antitrust conspiracy alleged against the “other” defendants. The court rejected this argument, holding the “ends of justice” do not prevent national service of process against “other” defendants even when the initial defendant has but a minor role in the antitrust charges. The court stated:

\begin{quote}
Congress has unlimited discretion here. It might have conditioned this authority by rank, by the power, or by the degree of participation in the conspiracy of the resident defendant. The fact that it failed to do so raises a persuasive presumption that it never intended to impose any condition or limitation of this nature.\textsuperscript{128}
\end{quote}

The “ends of justice” requirement, then, does not limit the plaintiff’s choice of forum to only those where the major players in the conspiracy are within the court’s jurisdiction and venue. Suit may be brought and “other” defendants brought in where the court has initial jurisdiction and venue over only a minor player.\textsuperscript{129} Applying the antitrust holding to RICO means that if a court has jurisdiction over the RICO defendant with the most minor role, the § 1965(b) “ends of justice” test does not prohibit bringing in the “other” defendants.

Finally, the \textit{Standard Oil} defendants argued that the government’s request to bring them in under the jurisdiction and venue of the court could not have been filed until the court had jurisdiction over the

\textsuperscript{127} \textit{Id.}

\textsuperscript{128} \textit{Id.} at 294.

\textsuperscript{129} \textit{Id.} The court went on to say that “[p]erhaps none of the alleged conspirators participates in every part of the conception and of the work of the combination, but every one of them takes his part in the plan or in its execution, a part promotive of its purpose, the restraint and monopolization of commerce.” \textit{Id.}
The court could find “no sound reason” to require the initial defendant to be served first. The court held that for the government to show the “ends of justice” required national service of process, the government only had to name all of the alleged conspirators as defendants, state their connection to the conspiracy, and list the places where the “other” defendants may be served.\textsuperscript{131}

The court then argued that it had a duty to hear the entire case as to all the defendants in one hearing, stating:

> [I]n every suit in which the power to acquire jurisdiction of the subject-matter and of the parties is conferred upon the court, the duty is imposed upon it, if its discharge is invoked by the complainant, to summon and hear, before every decision, not only every indispensable party, but every necessary party within reach of its process, every party who has an interest in the controversy, and who ought to be made a party to the suit in order that the court may finally adjudicate the whole matter, although if he were not amenable to process, final justice might be administered between the other parties without his presence.\textsuperscript{132}

The “ends of justice” requirement in an antitrust determination is viewed as doing justice to the parties by ensuring that all the defendants needed for a full and just adjudication are present. The RICO “ends of justice” requirement serves the same purpose.

To summarize the Standard Oil holding, as affirmed by the Supreme Court, the “ends of justice” do not prohibit national process and venue if there is another forum in which all defendants can be brought, and even the defendant with the most minor part in the antitrust violation can be the basis for the court bringing in the “other” defendants. To meet the “ends of justice” requirement, the plaintiff must simply state the defendants, state their connection to the violation, and state where the “other” defendants are located; if the “other” defendants are necessary for the full adjudication of the antitrust charges, the court will find that the “ends of justice” require bringing the defendants before the court.

This has remained the standard for antitrust “ends of justice.” In United States v. National City Lines, Inc.,\textsuperscript{133} a district court suggested that the “ends of justice” requirement was evidence that Congress did not intend to leave the choice of forum entirely up to the plaintiff and that forum non conveniens doctrine could be exercised by the courts

\textsuperscript{130} Id.
\textsuperscript{131} Id. at 295–96.
\textsuperscript{132} Id.
\textsuperscript{133} 7 F.R.D. 456 (S.D. Cal. 1947).
to refuse jurisdiction when the defendants could also be brought before a more convenient forum.\textsuperscript{134} However, the Supreme Court overruled the lower court, holding that if jurisdiction was proper as to the defendants under § 5 and § 12 of the Sherman Act and they were properly before the court, the court could not decline to exercise its jurisdiction through the forum non conveniens doctrine even if the court believed other forums were more convenient.\textsuperscript{135} Interestingly, Justice Jackson agreed that forum non conveniens could not be used to dismiss an antitrust case, but argued that the court could decline jurisdiction over the "other" defendants if it thought the forum to be inconvenient under the "ends of justice" requirement; however, he was alone in this opinion.\textsuperscript{136} Thus, a court has little discretion to decline jurisdiction over the "other" defendants under the "ends of justice" requirement if the defendants are necessary to the full adjudication of the case.

There have been few other antitrust cases involving an "ends of justice" inquiry.\textsuperscript{137} It has been held that notice of hearing and formal

\textsuperscript{134} Id. at 464. The court did not hold that the "ends of justice" did not require the defendants to be brought before the court, but that the court could refuse to hear the case entirely under forum non conveniens. The "ends of justice" requirement was cited as evidence that Congress did not mean to make the plaintiff's choice of forum absolute in response to the plaintiff's assertion that Standard Oil required the court to hear the case. Id.


\textsuperscript{136} Id. at 598–99 (Jackson, J., concurring). Justice Jackson stated:

In this case, the defendants, who might be entitled to urge the doctrine, have not resisted or contested the order bringing them into the suit. It was by so doing that they could have shown that the ends of justice would not be served by such action. Instead, they desire to submit to being brought in and then use their position to throw the whole case out.

\textit{Id.} (Jackson, J., concurring).

\textsuperscript{137} See United States v. Cent. States Theatre Corp., 187 F. Supp. 114, 143 (D. Neb. 1960) (holding that upon motion by plaintiffs, a nonresident defendant was properly brought within the court's jurisdiction because "it appear[ed] that the ends of justice require[d] that the [defendant] be brought before this court"); United States v. Gen. Instrument Corp., 87 F. Supp. 157, 163 (D.N.J. 1949) ("Since [resident defendants] are found to be within the District of New Jersey, it was proper to bring in a nonresident defendant pursuant to Section 5 of the Sherman Act . . ."); United States v. Forestal Land, Timber & Rys., 89 F. Supp. 316, 316–17 (S.D.N.Y. 1945) (holding that because the "ends of justice" impose the only requirement for adding additional parties under § 5 and because it "would be desirable and just that [the other defendant] be brought into the instant action," the court could bring the "other" defendant before it); United States v. Nat'l Malleable & Steel Castings Co., 6 F.2d 40, 40–42 (N.D. Ohio 1924) (holding that § 5 allows for national service of process when one member of an antitrust conspiracy is properly before the court in a case involving fifty-two corporate defendants and forty-nine individual defendants).
hearings are not prerequisites for a finding that the "ends of justice" require national service of process,\(^1\)\(^{138}\) that "other" defendants may be added by a supplemental complaint under § 5 after the commencement of the action,\(^1\)\(^{139}\) and that a court does not have venue or personal jurisdiction to hear cross-claims between defendants by operation of § 5.\(^1\)\(^{140}\) There do not appear to be any cases finding that the "ends of justice" do not allow a court to exercise jurisdiction over a defendant.

To conclude, the antitrust cases interpreting the "ends of justice" clause held the test only to require that the plaintiff show the "other" defendants to be connected to the suit and that a full adjudication of the case would require the presence of the "other" defendants before the court. Because RICO incorporated this "ends of justice" requirement and there is a definitive interpretation of the "ends of justice" clause in the antitrust context, the "ends of justice" interpretation that is settled law in the antitrust context ought to be definitive for the RICO "ends of justice" test.

b. Liberal Interpretation Clause

RICO itself specifies how it ought to be interpreted. It states that "[t]he provisions of this Title shall be liberally construed to effectuate its remedial purposes."\(^1\)\(^{141}\) The Supreme Court has relied on this clause to strike down attempts by lower courts to improperly restrict RICO's broad reach.\(^1\)\(^{142}\)

A liberal interpretation of § 1965(b)’s "ends of justice" requirement would not add additional strict requirements to the exercise of national service of process when other less stringent and justifiable interpretations are available, such as the interpretation offered here. A strict requirement that there be no other court before which all the

\(^{138}\) Cent. States Theatre, 187 F. Supp. at 144 ("[I]t is simply recalled that notice of hearing and formal hearing are not made prerequisites to such an order or finding [that the ends of justice require national service of process].").

\(^{139}\) Forestal Land, 89 F. Supp. at 316–17 (S.D.N.Y. 1945) (holding that because the "ends of justice" was the only requirement to adding additional parties under § 5, and the court thought it would be beneficial to add the "other" defendant to the case, it made no difference that the events for which the "other" defendant was being called happened before the commencement of the suit).

\(^{140}\) United States v. Krasnov, 109 F. Supp. 143, 147 (E.D. Pa. 1952) ("The section, 15 U.S.C.A. § 5, under which these three defendants were summoned into this district confers jurisdiction on this Court, as I read the statute, only for the purpose of preventing and restraining violations of the Sherman Anti-Trust Act.").


\(^{142}\) See supra note 16 and accompanying text.
defendants may be brought or a multi-factor test inquiring into the balance of burdens and judicial economy add additional hurdles a plaintiff must overcome before obtaining his remedy. The liberal interpretation clause exists to prevent and clear away such restrictive interpretations of the statute that create obstacles the plaintiff must overcome before having his day in court. These tests imposed on plaintiffs prior to bringing in the “other” defendants cannot be justified in light of the liberal interpretation clause.

c. Potential Objections

The only commentator to consider how to interpret the “ends of justice” test argued that the test was not restrictive enough. Professor Dickerson argued that the “ends of justice” test intended to limit the use of expanded venue and jurisdiction but she did not consider the antitrust precedents or the liberal interpretation clause. The jist of her argument is that national service of process can result in defendants being forced to litigate in inconvenient forums often against frivolous RICO charges, and because this result is unfair and contrary to Congress’s intention, the “ends of justice” ought to incorporate much more stringent requirements. She notes:

[J]udicial confusion about when and how to apply 1965(b) has encouraged some plaintiffs to add questionable RICO claims to draw multiple defendants into a forum in which some have no contacts. To make matters worse, when a defendant attempts to eliminate the RICO claim through an early motion to dismiss for lack of personal jurisdiction or for improper venue, courts typically refuse to examine whether the plaintiff has stated a valid RICO claim. . . . For years, litigants have manipulated § 1965 in ways Congress never envisioned nor intended.

Professor Dickerson, however, offers nothing other than her own policy views to support her claim that Congress intended § 1965 to be

143 See supra notes 103–15 and accompanying text.
144 See supra notes 99–102 and accompanying text.
146 Dickerson, supra note 40, at 481–82.
147 Id.
interpreted narrowly. She creates her own four-prong test to determine whether national service of process should be allowed under § 1965(b) and a two-prong test to determine whether venue should be proper under § 1965(b). The four-prong test incorporates a due process examination of contacts to the United States, considers due process fairness concerns, examines the merits of the RICO claim, and takes into account whether an alternative forum exists. The two-prong venue approach requires another balancing test weighing the merits of trying the case in the current venue. Her goal with the separate tests is to "separate the venue analysis from the personal jurisdiction analysis under 1965(b); ensure all parties a fair forum; discourage plaintiffs from adding RICO claims merely to gain a forum advantage; abide by the legislative intent; and bring some degree of uniformity and consistency to the venue determinations under civil RICO." 

The multi-prong tests incorporate into their analysis due process, forum non conveniens, and § 1404 transfer factors. The factors suggested by Dickerson are applied no matter what the interpretation of § 1965(b) when the defendant raises due process, § 1404 transfer, or forum non conveniens challenges. Including them in § 1965(b) is duplicative. There is nothing to suggest that Congress intended such a complex and superfluous interpretation, and Dickerson does not state how these multi-step tests "abide by the legislative intent."

Fairness to the defendant and prevention of forum shopping are two factors that Professor Dickerson's test surely promotes. It is true that RICO provides large incentives for frivolous allegations, including favorable venue and jurisdictional provisions. It is also true that the Supreme Court held that RICO's remedial purposes are flouted by interpretations that "open the door" to frivolous suits. The Supreme Court has also stated that abuse of RICO is not justification for interpreting RICO's terms in an unduly narrow fashion and that though RICO may be used in ways Congress did not foresee, Congress may limit RICO if it is misused.

The interpretation of § 1965(b) offered here, however, does not "open the door" to frivolous suits. Congress, the Constitution, and the courts protect a defendant's convenience by providing for a change of venue statute, due process, and forum non conveniens. Good faith plaintiffs bringing RICO actions would gain little by bring-

148 Id. at 531–38.
149 Id. at 538.
150 See infra note 158 and accompanying text.
151 See infra note 159 and accompanying text.
ing cases in forums knowing the case would be transferred under § 1404 or due process. Bad faith plaintiffs seeking to abuse RICO’s broad procedural provisions can be punished by the courts under Federal Rule of Civil Procedure 11. However, the fact that some inconvenience would result for defendants is not an argument against interpreting RICO broadly. Congress surely knew that § 1965 would cause inconvenience to RICO defendants, but favored the convenience of plaintiffs with RICO claims. The purpose of the liberal interpretation clause and Congress’s intent in adding the “ends of justice” requirement is to benefit plaintiffs.

III. Ways in Which Civil RICO Defendants May Defeat Plaintiffs’ Choice of Forums

Courts’ interpretations of the “ends of justice” test have often occurred in a vacuum, as though no other protection for defendants’ convenience or fairness exists. These ad hoc determinations of what justice requires have often mimicked tests for personal jurisdiction under due process, forum non conveniens determinations, or the § 1404 change of venue test. All of these doctrines aim to protect the interests of courts and society in ensuring litigation takes place in a manner and location that is fair and convenient to defendants, witnesses, and the court system itself.


Congress has given courts the power to transfer cases for the convenience of parties and witnesses to any other district where the case might be brought in the interest of justice. The § 1404 “interest of justice” test has nothing to do with the “ends of justice” test and ought to be interpreted in the context of its own wording, purpose, and legislative history.

154 Fed. R. Civ. P. 11. Rule 11 states that by “presenting to the court ... a pleading, written motion, or other paper, an attorney or unrepresented party is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances” that the pleading “is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.” Id. Rule 11 also prohibits frivolous claims. Id.

155 Sedima, 473 U.S. at 498 (noting “Congress’ self-consciously expansive language and overall approach” and RICO’s “express admonition that RICO is to ‘be liberally construed to effectuate its remedial purposes,’ ” and stating that the “statute’s ‘remedial purposes’ are nowhere more evident than in the provision of a private action for those injured by racketeering activity”).

Congress passed § 1404 to reflect the doctrine of forum non conveniens as it existed at that time for the purpose of ensuring that trials occur in a location that is convenient to parties and witnesses.\textsuperscript{157} Either party can move to transfer, and the moving party bears the burden of showing both that it would increase the convenience to the parties and witnesses and be in the interest of justice. When a court considers whether to transfer the case, it considers numerous factors, including the plaintiff's choice of forum and whether it involved forum shopping, convenience to the witnesses, the materiality of the witnesses' testimony, pending similar or related cases and their locations, ability of litigants to bear the cost in a particular forum, the location of the event giving rise to the cause of action, possible delay in transferring the case, and other factors depending on the facts of the case.\textsuperscript{158} One can see in the § 1404 transfer factors many of the same factors wrongly and duplicatively used by courts interpreting RICO's "ends of justice" test.\textsuperscript{159}

B. Violation of Due Process Rights

A defendant may always challenge a court's exercise of personal jurisdiction as an unconstitutional violation of the defendant's due process rights. When Rule 4(k) applies to limit the federal court's jurisdiction to that of the courts in the state in which the federal court sits, the Fourteenth Amendment limits the federal court's jurisdiction through Rule 4(k). Fourteenth Amendment due process allows a state court to exercise personal jurisdiction if the defendant is present in the state, a citizen of the state, has an agent in the state, or has minimum contacts with the state. \textit{International Shoe Co. v. Washington}\textsuperscript{160} created the minimum contacts test, stating:

Due process requires only that in order to subject a defendant to a judgment \textit{in personam}, if he be not present within the territory of the


\textsuperscript{159} See supra notes 103-16 and accompanying text.

\textsuperscript{160} 326 U.S. 310 (1945).
The *International Shoe* minimum contacts test has developed into a complicated two-tiered test, first ensuring that the defendant has minimum contacts with the forum state and second determining whether allowing the state to exercise personal jurisdiction would violate "traditional notions of fair play and substantial justice."  

The first prong looks only into the relationship between the defendant and the state. Each case is very fact specific, and factors cited in *International Shoe* and later cases for determining whether the minimum contacts test is met include the quality of defendant's contacts with the forum, the quantity of defendant's contacts with the forum, the foreseeability by the defendant that suit would be brought in the state, the benefits and protections the defendant received from the state, the extent to which the defendant's activities have had an effect in the state, and the degree to which the defendant's connection to the state is willful.

The second prong of the *International Shoe* test is a fairness test. If defending in a forum is burdensome on the defendant and the bur-

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161 *Id.* at 316 (quoting Milliken v. Meyer, 311 U.S. 457, 463 (1940)).  
162 Friedenthal et al., *supra* note 22, ¶ 3.10, at 124–29 (detailing the various factors used to determine whether minimum contacts are present and whether "traditional notions of fair play and substantial justice" are violated).  
163 *Int'l Shoe*, 326 U.S. at 319 ("Whether due process is satisfied must depend rather upon the quality and nature of the activity . . . .").  
164 *Id.* at 320 (holding that "systematic and continuous" activities in a state suggest the minimum contacts test was satisfied).  
165 World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297 (1980) ("[T]he foreseeability that is critical to due process analysis is . . . that the defendant's conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there.").  
166 *Int'l Shoe*, 326 U.S. at 319 ("[T]he extent to which a corporation exercises the privilege of conducting activities within a state, it enjoys the benefits and protection of the laws of that state.").  
168 Hanson v. Denckla, 357 U.S. 235, 253 (1958) ("The unilateral activity of those who claim some relationship with a nonresident defendant cannot satisfy the requirement of contact with the forum State.").  
169 Burger King Corp. v. Rudzewicz, 471 U.S. 462, 476 (1985) ("Once it has been decided that a defendant purposefully established minimum contacts within the forum State, these contacts may be considered in light of other factors to determine whether the assertion of personal jurisdiction would comport with 'fair play and substantial justice.'").
den cannot be justified by other factors, due process forbids the exercise of personal jurisdiction through the minimum contacts approach. Determining this involves considering a variety of factors, including "‘the burden on the defendant,' ‘the forum State's interest in adjudicating the dispute,' ‘the plaintiff's interest in obtaining convenient and effective relief,' ‘the interstate judicial system's interest in obtaining the most efficient resolution of controversies,' and the ‘shared interest of the several States in furthering fundamental substantive social policies.'"170

One question that remains is whether the fairness factors apply when personal jurisdiction is not based on minimum contacts but on presence or citizenship. The Supreme Court split when determining whether the fairness factors applied when a defendant was served while briefly within the forum state. Justice Scalia wrote for four justices to argue that service within the territory of the government is always fair under due process.171 Justice Brennan wrote for four justices arguing that in such situations due process requires an application of the fairness prong of the minimum contacts test.172 Justice Stevens did not join either opinion.173 If Justice Scalia is correct, the fairness test created to ensure that defendants are not forced to defend in an inconvenient forum does not apply when personal jurisdiction is established by service on a party within the state. If Justice Brennan is correct, no matter where a defendant is served an examination must be made into whether it is fair to force the defendant to defend the case in a particular forum. It does seem that in an almost all cases, however, service in a state will meet due process requirements under either test.

Because the Fourteenth Amendment Due Process Clause by its terms only applies to states, when Congress authorizes national service of process to allow a federal court to serve a defendant anywhere within the United States, the Fourteenth Amendment does not apply. Rather, the Fifth Amendment Due Process Clause applies.174 However, the analysis created under the Fourteenth Amendment to apply

170 Id. at 477 (quoting World-Wide Volkswagen, 444 U.S. at 292).
171 Burnham v. Superior Court, 495 U.S. 604, 619 (1990) ("[J]urisdiction based on physical presence alone constitutes due process because it is one of the continuing traditions of our legal system that define the due process standard of 'traditional notions of fair play and substantial justice.'").
172 Id. at 629 (Brennan, J., concurring).
173 Id. at 640 (Stevens, J., concurring).
to states has been applied to the federal system under the Fifth Amendment.\textsuperscript{175}

When Congress authorizes national service of process, defendants can be served anywhere in the nation and forced to defend in the plaintiff's chosen forum. It is beyond question that Congress has such authority.\textsuperscript{176} The difficult question is determining what limits Fifth Amendment due process puts on the exercise of personal jurisdiction in such cases.

Some courts adopt the Fourteenth Amendment fairness factors to determine whether "the combination of the federal interest in furthering fundamental social policies, the judicial system's interest in the efficient resolution of controversies, the particular forum's interest in adjudicating the dispute, and the plaintiff's interest in obtaining convenient and effective relief outweigh the burden on the defendant."\textsuperscript{177}

Other courts only inquire into whether the defendant has national contacts with the United States without examining the fairness of exercising jurisdiction. This approach somewhat follows Justice Scalia's argument in \textit{Burnham}. More precisely, according to Justice Scalia's opinion in \textit{Burnham}, assuming Fifth and Fourteenth Amendment due process requirements are identical, mere United States citizenship or presence within the United States satisfies Fifth Amendment due process because those are traditional justifications for a court's exercise of jurisdiction. Whether personal jurisdiction based on presence within the forum court's territory will alone satisfy due process is unresolved. However, it is still clearly the case that states have personal jurisdiction under the Fourteenth Amendment over all citizens of that state.\textsuperscript{178} If the Fifth Amendment is to be interpreted the same way, citizens of the United States may be brought

\textsuperscript{175} 4 Charles Alan Wright & Arthur Miller, Federal Practice & Procedure § 1068.1, at 625 (3d ed. 2002).

\textsuperscript{176} Miss. Pub. Corp. v. Murphree, 326 U.S. 438, 442 (1946) ("Congress could provide for service of process anywhere in the United States."); Robertson v. R.R. Labor Bd., 268 U.S. 619, 622 (1925) ("Congress clearly has the power, likewise, to provide that the process of every district court shall run into every part of the United States."); Lisak v. Mercantile Bancorp, Inc., 834 F.2d 668, 671 (7th Cir. 1987) ("[T]here is no constitutional obstacle to nationwide service of process in the federal courts in federal-question cases.").

\textsuperscript{177} 4 Wright & Miller, supra note 175, § 1068.1, at 625; see, e.g., Peay v. Bellsouth Med. Assistance Plan, 205 F.3d 1206, 1212 (2000) (holding that Fifth Amendment due process requires that the fairness prong of the minimum contacts test apply even when the defendant is served within the United States).

\textsuperscript{178} Milliken v. Meyer, 311 U.S. 457, 462 (1940); 4 Wright & Miller, supra note 175, § 1065, at 347.
before any United States court in civil cases without violating due process. This is not currently how most courts approach the issue, however.

Without straightening out the muddle that is personal jurisdiction, it is enough to say that a defendant will have a difficult time defeating plaintiff’s choice of forum through appeals to due process. Congress’s decision to allow national service of process is given deference, and it is rare for a forum to be so burdensome that it will trigger due process fairness problems. Those most likely to benefit from the due process requirements of the Fifth Amendment will be foreign defendants.

C. Forum Non Conveniens

The doctrine of forum non conveniens still has some application even though 28 U.S.C. § 1404 codified a provision allowing courts to transfer cases when the forum is unfair to defendants or inconvenient. The two biggest differences are that forum non conveniens requires a greater showing of inconvenience and injustice than does a motion for transfer under § 1404, and a successful forum non conveniens motion allows the court to dismiss the case rather than transfer the case as a court must do under § 1404.¹⁷⁹ Forum non conveniens is basically the only way for a defendant to obtain a change of venue when a foreign court is preferable; the doctrine is most often used in that context.

When a defendant moves for forum non conveniens, he must show first that there is an alternative forum in which the suit may be brought and that the forum has an adequate remedy available to the plaintiff. The court will not dismiss a suit for inconvenience if doing

¹⁷⁹ Norwood v. Kirkpatrick, 349 U.S. 29, 31 (1955). The court stated that the forum non conveniens doctrine is quite different from Section 1404(a). That doctrine [forum non conveniens] involves the dismissal of a case because the forum chosen by the plaintiff is so completely inappropriate and inconvenient that it is better to stop the litigation in the place where brought and let it start all over again somewhere else. It is quite naturally subject to careful limitation for it not only denies the plaintiff the generally accorded privilege of bringing an action where he chooses, but makes it possible for him to lose out completely, through the running of the statute of limitations in the forum finally deemed appropriate. Section 1404(a) avoids this latter danger. 

Id. (quoting All States Freight v. Modarelli, 196 F.2d 1010, 1011 (3d Cir. 1952)).
so would withhold all remedy from a plaintiff. Second, the defendant must show that a balance of all factors weigh in favor of dismissal.\textsuperscript{180}

The Supreme Court in \textit{Gulf Oil Corp. v. Gilbert}\textsuperscript{181} laid out the factors that courts must weigh in a determination of whether a suit should be dismissed under forum non conveniens. Factors relating to convenience of the party include:

- ease of access to sources of proof;
- availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing, witnesses;
- possibility of view of premises, if view would be appropriate to the action; and
- all other practical problems that make trial of a case easy, expeditious and inexpensive.\textsuperscript{182}

When determining whether an alternative forum exists, the court must also examine whether that forum has an adequate remedy available for the plaintiff.\textsuperscript{183} The Supreme Court held in \textit{Piper Aircraft Co. v. Reyno} that a forum was adequate even if the liability theory is different or if the remedy was not as great unless there is danger that the plaintiff will be treated unfairly or deprived of all remedy.\textsuperscript{184} It has been held numerous times that the fact that RICO-type claims cannot be brought in a foreign jurisdiction does not defeat forum non conveniens if the plaintiff could recover some remedy there.\textsuperscript{185} Most jurisdictions prohibit the type of offenses RICO makes predicate to a RICO claim, and thus plaintiffs with a RICO claim are rarely without a remedy in foreign courts. Thus RICO defendants may defeat plaintiff's choice of forum if they are able to convince the court that forum non conveniens requires the court to dismiss.

\textsuperscript{180} Panama v. BCCI Holdings (Lux.) S.A., 119 F.3d 935, 951 (11th Cir. 1997) ("A party moving to dismiss on the basis of forum non conveniens must demonstrate: (1) that an adequate alternative forum is available; and (2) that the private and public interest factors weigh in favor of dismissal."); Lockman Found. v. Evangelical Alliance Mission, 930 F.2d 764, 767 (9th Cir. 1991) (holding that forum non conveniens requires that: (1) there be an alternative forum, (2) the balance of factors weigh in favor of inconvenience and (3) the alternative forum's remedy would not be inadequate).

\textsuperscript{181} 330 U.S. 501 (1947).

\textsuperscript{182} Id. at 508.


\textsuperscript{184} Id. at 247. The Court stated that "[t]he possibility of a change in substantive law should ordinarily not be given conclusive or even substantial weight in the forum non conveniens inquiry." \textit{Id.}

CONCLUSION

RICO's complex procedural provisions have caused great confusion; however, a straightforward interpretation of the text guided by the liberal construction clause and the antitrust precedents provides clear answers. Section 1965(a) expands venue for courts hearing RICO cases and § 1965(d) expands personal jurisdiction. If at least one RICO defendant can be brought before the court under these provisions, but other RICO defendants cannot be brought before the court, § 1965(b) allows the court to exercise personal jurisdiction and venue over these "other" defendants if the "ends of justice" require it. Following the antitrust interpretations of the "ends of justice," the court will require the defendants to appear if the court determines that the presence of the defendants is reasonably necessary for the adjudication of the RICO claim. Defendants then may exercise one of the various means the law provides to change the forum if it is inconvenient for them. Following these suggestions can help to sort out the mess § 1965 interpretation has become.