RICO – Civil & Criminal – How to navigate this minefield

George Mason Inn of Court Presentation

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I. RICO Overview – 18 U.S.C. § 1961 - 68

 A. Purpose

 1. Original purpose was to combat organized crime.

2. Reaches broad range of misconduct, while certain types of crimes are excluded.

a. § 1961(1) identifies the crimes that constitute “racketeering activity”

i. traditional state crimes – murder, kidnapping, gambling, arson, dealing in controlled drugs

ii. approximately 150 federal statutes, including mail fraud, wire fraud, financial institution fraud, immigration fraud, bankruptcy fraud, money laundering, media and computer program counterfeiting

 b. Certain predicate crimes specifically excluded from RICO

e.g. conduct that would have been actionable as fraud in the purchase or sale of securities (§ 1964(c))

c. Courts are cautious in allowing RICO claims based solely on predicate crimes of mail fraud and wire fraud. *See* *GE Inv. Private Placement Partners v. Parker,* 247 F.3d 543, 549 (4th Cir. 2001).

3. Focus is on individuals who regularly and over a period of time commit crimes using formal or informal organizations

 B. Provides for both criminal and civil penalties

 1. USDOJ may prosecute either criminally or civilly

 2. Criminal penalties – up to 20 years’ incarceration, forfeiture of

property acquired or maintained in violation of RICO, fines of $250,000 per offense ($500,000 per offense for an organization)

 3. Private right of action exists for civil claims. §1964(c).

 4. Successful civil plaintiff is awarded treble damages plus attorney’s

 fees;

5. Civil plaintiff must prove elements of the respective predicate racketeering offenses only to a preponderance, not beyond a reasonable doubt

6. Open question as to whether private plaintiffs can obtain other equitable remedies available to the government in a civil RICO case, such as divestiture of funds, dissolution or reorganization of corporations or other business structures, and restrictions on future activities

 C. RICO prohibits four types of conduct:

 1. § 1962(a) - investing proceeds from a pattern of racketeering

activity in an enterprise

(The enterprise is the ill-gotten gain of racketeering.)

2. § 1962 (b) - acquiring or maintaining control over an enterprise through a pattern of racketeering activity

(The enterprise is the victim.)

3. § 1962 (c) – any person employed by or associated with an enterprise conducting or participating in such enterprise’s affairs through a pattern of racketeering activity

(The enterprise is a criminal agent, the most common type of civil RICO claim.)

 4. § 1962 (d) - conspiring to do any of the above.

 D. Pattern of racketeering activity

1. A pattern of racketeering activity is at least two acts of racketeering activity occurring within a ten-year time period.

2. Acts must be related to each other.

3. Acts must demonstrate continuity:

 a. extending over a substantial period of time;

 -- or –

b. extending over a short period of time if there is a threat of future criminal conduct.

4. Civil plaintiff must show injury to his business or property by reason of a RICO violation (proximate causation).

 E. The Enterprise

1. The RICO litigant, like Captain Kirk, must have command of the enterprise (at least as a legal concept)

2. The enterprise can be:

 a. the proceeds of racketeering activity

 b. the victim of racketeering activity

 c. the perpetrator of racketeering activity

3. The enterprise can be:

 a. an individual

 b. partnership, corporation, association or other legal entity

c. any union or group of individuals *associated in fact* although not a legal entity.

 4. The enterprise must be distinct from the defendant

F. Recurring Issues in RICO Litigation

1. Is there a pattern of racketeering activity?

2. Is there a RICO enterprise?

3. Is the enterprise distinct from the defendant? (§ 1962(c) claims only)

4. Was the racketeering activity the proximate cause of plaintiff’s injury?

G. Other issues

 1. Standing to sue

2. Limitations period, accrual, tolling

II. Pattern of Racketeering Activity

 A. *H.J. Inc. v. Northwestern Bell Telephone Co*., 492 U.S. 229 (1989).

 1. Facts:

Class action brought by customers alleging that over at least a 6 year period, Northwestern paid bribes to multiple members of the state Public Utilities Commission to obtain higher rates. The district court dismissed the complaint finding that plaintiff’s failed to show a pattern of racketeering activity. The Eighth Circuit affirmed. SCOTUS reversed.

 2. Holding:

“[T]o prove a pattern of racketeering activity a plaintiff or prosecutor must show that the racketeering predicates are related *and* that they amount to or pose a threat of continued criminal activity.” *Id*. at 239. The allegations in the complaint sufficiently alleged relatedness and continuity to prove a pattern of racketeering activity.

 3. Relatedness

Is present if the “criminal acts … have the same or similar purposes, results, participants, victims or methods of commission, or otherwise are interrelated by distinguishing characteristics and are not isolated events.” *Id*. at 240.

 4. Continuity may be either closed-ended or open-ended or both.

 a. Closed-ended continuity

1. refers to a closed period of repeated conduct

2. shown by “proving a series of related predicates extending over a substantial period of time.” *Id.* at 242.

3. “[p]redicate acts extending over a few weeks or months … do not satisfy this requirement.” *Id*.

 b. Open-ended continuity

1. refers to past conduct that by its nature projects into the future with a threat of repetition

2. shown by a “distinct threat of long-term racketeering activity, either implicit or explicit”, such as

 a. a “specific threat of repetition” *Id*.

b. “showing that the predicate acts … are part of an ongoing entity’s regular way of doing business.” *Id*.

 c. Examples

1. *United States v. Bergrin*, 650 F.3d 257 (3rd Cir. 2011).

Defendant, an attorney and former federal prosecutor, was indicted for using his law firm to commit numerous crimes including murder, attempted murder, bribery, prostitution, money laundering and mortgage fraud, over a period of more than six years. The Court found that the common purpose was promoting the Defendant’s law firm and enriching its leaders, members and associates. Closed end continuity was shown because the acts occurred over six years. Open-ended continuity was shown because of the law firm’s willingness to engage in criminal acts to aid its clients posed a threat of continuing criminal activity.

2. *Foster v. Wintergreen Real Estate Co.*, 363 Fed. Appx. 269 (4th Cir. 2010).

Plaintiff investment purchasers of resort lots sued Wintergreen for failing to disclose that there was a noisy stump grinder operating next to Plaintiffs’ properties and for failing to market the properties for sale, committing wire and mail fraud. Fourth Circuit found no pattern to exist.

3. *Whitney, Bradley & Brown, Inc. v. Kammermann*, 436 Fed. Appx. 257 (4th Cir. 2011).

 Plaintiff claimed that the defendant, a manager in its employ formed and worked for a competing business, and committed a § 1962(c) violation “from at least March 2008 to December 2008” by submitting false time entry and expense reports. Fourth Circuit holds that this “exemplifies the situation of a RICO plaintiff who seeks to transform an ordinary commercial fraud scheme into a RICO claim, something we are loath to approve.” *Id*. at 264.

 4. Single scheme may be sufficient to show continuity

a. Express rejection of the multiple scheme requirement

b. But circuit courts of appeal are reviving this concept

 (see B.2., below).

 B. Application of *H.J. Inc.* by the lower federal courts.

1. The duration of the alleged racketeering activity generally is determinative.

 a. Two years or less in duration unlikely to be found to satisfy closed-ended continuity.

b. Absent explicit threats of future racketeering activity unlikely to be found to satisfy open-ended continuity.

 2. Existence of Multiple Schemes

a. If not required, helpful to establish a threat of future racketeering activity. Constitutes a case within a case for purposes of discovery and proof.

b. *See, e.g.* *Bixler v. Foster,[[2]](#footnote-2)* dismissing claim partly because of a lack of continuity. The Court stated that the plaintiff alleged only a single scheme to accomplish a discrete goal and thus failed to show any threat of future criminal conduct.

3. Other factors to be considered:

 a. Number and variety of predicate acts

 b. Number of victims

c. *See e.g. Whitney, Bradley & Brown, Inc. v. Kammermann.[[3]](#footnote-3)*

4. Practical effect is to weed out the less serious, garden-variety state cases that should not be brought under RICO, thus preventing abuse of the statute. *See Menasco, Inc. v. Wasserman*.[[4]](#footnote-4)

III. RICO Enterprise

 A. There are two types of RICO enterprises

 1. Formal – e.g. corporation, partnership or other legal entity

2. Association In Fact – any union or group of individuals who come together without formal structure

 B. Proving the existence of an Association In Fact Enterprise

 1. *Boyle v. United States*, 556 U.S. 938 (2009).

a. Facts:

Defendant and associates committed an extensive series of bank thefts across four states during the 1990’s. The group was comprised of several ‘core’ members, and was supplemented with additional recruits from time to time. The group would meet beforehand to “plan the crime, gather tools, […] and assign the roles that each participant would play.” *Id*. at 941.

 b. Holding:

Boyle was part of an association in fact enterprise even though

i. the group “was loosely and informally organized”

ii. lacked a leader or hierarchy

iii. had no long-term master plan or agreement

iv. functioned only sporadically

 c. Reasoning and analysis:

i. “nothing in RICO exempts an enterprise whose associates engage in spurts of activity punctuated by periods of quiescence.” *Id*. at 948.

 ii. Association in fact enterprise

(a) is a “continuing unit that functions with a common purpose” *Id*.

(b) has “at least three structural features: a purpose, relationships among those associated with the enterprise, and longevity sufficient to permit these associates to pursue the purpose.” *Id*. at 946.

iii. the racketeering activity itself may prove the existence the association in fact enterprise more readily than an analysis of its structure

2. Supreme Court consistently interprets RICO enterprise broadly. “[T]here is no restriction upon the associations embraced by the definition [of enterprise].” *U.S. v. Turkette*, 452 U.S. 576, 580 (1981).

a. The Supreme Court rejected pre-*Boyle* tests imposed by lower federal courts requiring association in fact enterprises to be “business-like entities” or have other features such as chain of command, professionalism, sophisticated organization, membership dues, rules and regulations, disciplinary system, regular meetings, a name, induction or initiation ceremonies or rituals.

b. The existence of these features would be helpful

C. Distinctness requirement for § 1962(c) actions

1. When making a § 1962(c) claim -- that a defendant who is employed by or associated with an enterprise conducted or participated in the affairs of an enterprise through a pattern of racketeering activity – the defendant must be distinct from the enterprise.

2. Rationale: the identity of an agent or employee of an entity merges with the entity.

3. Issues of identity, ownership, control, agency must be considered pre-complaint.

4. Distinctness scenarios

a. Allegations involving individual member, officer, employee, agent, or owner of a formal entity as either defendants or the enterprise

 1. Member, officer, employee, or agent

a) No distinctness where the defendant is the individual authorized to act on behalf of a formal entity and the enterprise is the formal entity

b) Likewise, no distinctness where defendant is the formal entity and the enterprise is the individual authorized to act on behalf of the formal entity.

 2. Owner of a formal entity

Distinctness exists due to the fact of incorporation which created a legal entity distinct from its owners, creators or employees.

Thus the defendant can be an owner of the formal entity and the enterprise can be the formal entity.[[5]](#footnote-5)

b. Allegations involving a legal entity as a participant in an enterprise

1. Distinctness exists where the defendant is the legal entity and the enterprise consists of the legal entity plus a number of other members of the enterprise

2. *E.g. Cullen v. Margiotta*, 811 F.2d 698 (2nd Cir. 1987).

Plaintiff named multiple entities as defendants while

the enterprise was identified as various combinations

of two or more defendants.

 c. Allegations involving a legal entity and its subsidiaries and

 subdivisions as either defendants or the enterprise

 1. SCOTUS has not addressed this scenario

2. *Cedric Kushner Promotions, supra* *n. 5,* suggests that distinctness exists between a parent and its incorporated subsidiaries and subdivisions.

3. Circuit Courts have found that a parent and subsidiary are not distinct for § 1962(c) purposes even if they are separate legal entities.[[6]](#footnote-6)

a) corporate structure should not determine RICO liability

b) RICO was designed to combat organized crime and not corporate frauds

c) means of disfavoring RICO litigation by excluding related corporate defendants and enterprises.

4. Defensive corporate veil-piercing.[[7]](#footnote-7)

If a corporation ignored the corporate forms of its subsidiary, the corporate veil is pierced and the entities merge, resulting in no distinctness.

 d. Allegations involving a legal entity and its attorneys.

 1. SCOTUS has not addressed this scenario

 2. Split of authority involving identical facts

a) Florida’s state and federal courts have found that outside counsel is like an employee or agent of the client, and therefore there is no distinctness. *See* *Florida Evergreen Foliage v. E.I. DuPont de Nemours & Co.[[8]](#footnote-8);* *Palmas Y Bambu. S.A. v. E.I. DuPont de Nemours & Co.* (applying Florida’s RICO equivalent).[[9]](#footnote-9)

b) one court found that outside counsel is distinct from its client. *Matsuura v. E.I. DuPont de Nemours & Co.[[10]](#footnote-10)*

5. Before filing a complaint, counsel must carefully analyze all of the possible permutations of defendants and enterprises together with risks and benefits of each combination.

IV. Proximate Cause

 A. Basics principles

1. Applies to civil cases only. In a criminal case, the Government is not required to prove proximate cause.

2. Arises out of the language in §1964(c) creating the private right of action for RICO violations: “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 . . .”

 B. Guidance from SCOTUS

 1. *Holmes v. SIPC*, 503 U.S. 258 (1992).

a. Facts:

SIPC manages a fund to pay losses to customers of broker-dealers who fail to meet their obligations to customers. SIPC sued Holmes and 75 others alleging that the defendants engaged in a fraudulent stock manipulation scheme that led to the bankruptcy of two broker dealers, causing SIPC to pay $13 million in claims.

 b. Holdings:

1. A civil plaintiff must prove proximate causation, not “but for” causation.

2. A civil plaintiff must prove “some direct relation between the injury asserted and the injurious conduct alleged.” *Id*. at 268.

3. Injuries indirectly caused by the RICO violation are not compensable.

 c. Application:

The nexus between SIPC’s loss and the alleged stock fraud was too remote and involved too many links in the causal chain. The direct victims were the broker dealers who went bankrupt.

 2. *Anza v. Ideal Steel Supply Co.*, 547 U.S. 451 (2006).

a. Facts:

Ideal Steel owned two retail stores in NYC selling steel mill products. Joseph and Vincent Anza owned National Steel Supply, Ideal’s major competitor. Ideal claimed that the Anzas failed to collect state sales tax on cash sales, thereby gaining sales and market share at Ideal’s expense in violation of § 1962(c). Ideal also claimed that the Anzas used funds generated by the fraudulent scheme to open another retail location in the Bronx near Ideal’s in violation of § 1962 (a).

 b. Holdings:

1. Ideal’s § 1962(c) claim was too attenuated. Ideal’s lost sales could have resulted from many possible factors too intricate and uncertain for RICO litigation. Ideal was not the direct victim of the sales tax scheme; rather the State of New York was.

2. Ideal’s § 1962(a) claim – regarding investing proceeds of racketeering activity to establish a geographically close retail competitor – made them a direct victim of the RICO violation, which was the investing in a competitor rather than the racketeering acts themselves.

3. *See also* *Hemi Group, LLC v. City of New York, N.Y.[[11]](#footnote-11)* (failure of seller to file tax reports re: cigarette sales was not the proximate cause of NYC’s inability to collect taxes from purchasers; New York State was the direct victim)

V. Standing

 A. Closely related to proximate cause analysis

1. “[P]laintiff only has standing if, and can only recover to the extent that, he has been injured in his business or property by the conduct constituting the [RICO} violation.” *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 496 (1985)

2. Those whose injuries are directly caused by the RICO violation have standing to raise a claim. Those whose injuries are indirectly caused by the RICO violation do not have standing. *See Holmes v. SIPC[[12]](#footnote-12), supra.*

3. *Holmes* rationale for requiring direct injuries for RICO claim to proceed:

 a. Difficulty in determining the cause of injuries which are

 indirectly caused by RICO violation.

 b. Compensating less direct injuries would require courts to

adopt complex recovery formulas to avoid multiple recoveries.

c. Directly injured victims reliably will raise RICO claims making it unnecessary for indirectly injured parties to sue to achieve RICO’s policy goals.

 4. Practice Note

Other than *Holmes*, SCOTUS has not provided guidance on standing issues. There are numerous circuit splits regarding the tests to be applied to determine standing for the different types of RICO violations. It is beyond the scope of this outline to detail the various formulations.

B. Lack of RICO standing is raised by a Motion to Dismiss under Rule 12(b)(6), not Rule 12(b)(1).

 1. RICO standing requirements are viewed as questions regarding the

adequacy of the pleadings, rather than as questions of subject matter jurisdiction.

“A motion to dismiss under Rule 12(b)(6) for lack of RICO standing is distinct from a motion to dismiss under Rule 12(b)(1) for lack of constitutional standing.” *Walter v. Palisades Collection LLC.*, 480 F.Supp.2d 797, 804, n.10 (E.D.Pa.2007) (internal citations omitted).

2. Court must determine whether complaint states a “plausible claim for relief.” *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009).

3. Dismissal is not appropriate if proof of facts alleged seem improbable or that success is unlikely. *Bell Atlantic Corp. v. Twombly*, 550 U.S. at 556 (2007).

C. Case specific examples

1. Corporate shareholder claims.

Shareholders of corporations that are RICO victims lack standing to sue under RICO because their claims are derivative and not direct. See, e.g. *Penn Mont Securities v. Frucher*., 502 F.Supp.2d 443, 466 (2007).

2. Estate beneficiaries

 Beneficiary of estate lacked standing to sue under RICO, because beneficiary had not suffered direct injury; rather it was estate that lost value due to fraudulent activities. *Schrager v. Aldana*, 2013 U.S. App. LEXIS 19313, August 22, 2013, (3rd Cir.).

VI. Limitations on Actions

 A. Limitations period is 4 years.

 1. RICO does not contain an express limitations period

2. SCOTUS selected 4 years as the most appropriate limitations period. *Agency Holding Corp. v. Malley-Duff & Associates, Inc.,* 483 U.S. 143, 156 (1987).

 3. Limitations period borrowed from the Clayton Act.

 B. Accrual of claims

 1. RICO does not include a provision regarding accrual of claims.

 2. SCOTUS has not adopted a rule, but has provided guidance.

a. *Klehr v. A.O. Smith Corp.,* 521 U.S. 179 (1997).

1. Rejects a “last predicate act rule” under which a claim accrues on the date the plaintiff knew or should have known of the last injury or predicate act which is part of the same pattern of racketeering activity.

a) this rule extends limitations period too long because a pattern of racketeering activity can extend indefinitely.

b) this rule would allow plaintiffs to sit on their rights, contrary to the purpose of limitations periods.

c) this rule is inconsistent with the Clayton Act rule where limitations period begins to run from the date of injury.

2. *Klehr* does not adopt the Clayton Act rule or any other rule.

 b. *Rotella v. Wood,* 528 U.S. 549 (2000)

1. Rejects the “injury and pattern discovery rule” under which a claim accrues when the plaintiff discovers or reasonably should have discovered both the existence and source of his injury and that the injury is part of a pattern.

a. this rule extends the limitations period well beyond the time when the cause of action is complete.

b. this rule is an unjustifiable extension of the discovery rule which requires only a discovery of injury, not the other elements of a claim.

c. this rule is inconsistent with the Clayton Act rule.

2. *Rotella* does not expressly adopt a rule.

3. Fourth Circuit applies the Discovery Rule[[13]](#footnote-13)

1. This is the default federal accrual rule usually applied when a statute does not specify when a cause of action accrues.

2. A claim accrues when the plaintiff knows, or should have known, of the injury on which the claim is based.

3. Some circuits have applied this rule as a rule of separate accrual, that for each new and independent injury suffered, a separate cause of action accrues.

 *See Bankers Trust Co. v. Rhoades*, 859 F.2d 1096 (2nd Cir. 1988).

4. Discovery rule problems

 a. does not account for RICO pattern requirement

thus limitations period can begin to run before the requisite number of acts establishing a pattern are committed.

b. discovering the pattern and the persons responsible is often complex and difficult

 C. Tolling the limitations period

Counsel facing a limitations period problem should be prepared to argue for tolling based upon common law tolling rules that often apply to continuing violations, including equitable estoppel (due to the defendant’s actions) and equitable tolling (where plaintiff was unable to obtain information on the existence of a claim through no fault of her own). The Clayton Act provides for tolling, which could be applied to RICO. *See Klehr, supra* (Scalia, J. dissenting) (the Supreme Court should apply all of the limitations period rules of the Clayton Act, including accrual rules).

VII. Ethical Issues

A. Criminal RICO prosecutions must be approved by DOJ Criminal Division Organized Crime and Gang Section which applies detailed written guidelines for initiating a RICO prosecution. According the U.S. Attorneys’ Manual, “not every proposed RICO charge that meets the technical requirements of a RICO violation will be approved. Further, the Criminal Division will not approve ‘imaginative’ prosecutions under RICO which are far afield from the congressional purpose of the RICO statute” USAM § 9.110.200. The Manual directs U.S. Attorneys not to seek a RICO indictment unless one or more of the following factors are present:

1. RICO is necessary to ensure that the indictment adequately reflects the nature and extent of the criminal conduct involved in a way that prosecution only on the underlying charges would not;

2. A RICO prosecution would provide the basis for an appropriate sentence under all the circumstances of the case in a way that prosecution only on the underlying charges would not;

3. A RICO charge could combine related offenses which would otherwise have to be prosecuted separately in different jurisdictions;

4. RICO is necessary for a successful prosecution of the government's case against the defendant or a codefendant;

5. Use of RICO would provide a reasonable expectation of forfeiture which is proportionate to the underlying criminal conduct;

6. The case consists of violations of State law, but local law enforcement officials are unlikely or unable to successfully prosecute the case, in which the federal government has a significant interest;

7. The case consists of violations of State law, but involves prosecution of significant or government individuals, which may pose special problems for the local prosecutor.

The United States Attorneys’ Manual is available at:

**http://www.justice.gov/usao/eousa/foia\_reading\_room/usam/**

B. Initiation of Civil RICO cases by the federal government are also subject to detailed guidelines and review by DOJ Organized Crime and Racketeering Section. Civil RICO: 18 U.S.C. §§ 1961-1968 A Manual for Federal Attorneys (October 2007) available at: [**http://www.justice.gov/usao/eousa/foia\_reading\_room/usam/title9/civrico.pdf**](http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/civrico.pdf)

Government attorneys are directed to “weigh the sufficiency of the evidence, the likelihood of success at trial and the consequences of a finding of liability.” Government attorneys also must consider the following list of non-exclusive factors in determining whether to bring a civil RICO lawsuit:

1. the nature and seriousness of the predicate racketeering offenses;

2. whether the predicate racketeering offenses were committed over a

substantial period of time, and/or pose a threat of continuing

unlawful activity;

3. whether an organized crime group participated in any of the

predicate racketeering offenses or exercised corrupt influence over

any proposed enterprise, defendant or related entity;

4. whether there is a reasonable likelihood that the defendant will

commit unlawful activity in the future;

5. the pervasiveness of wrongdoing within a collective entity that is a

proposed defendant, including the complicity in, or condonation of,

the wrongdoing by the collective entity’s officers and management

 6. the defendant’s history of similar unlawful conduct, including prior

criminal, civil or regulatory enforcement actions against it;

 7. whether the defendant has derived unlawful proceeds from his

RICO violation that are subject to disgorgement;

8. the defendant’s timely and voluntary disclosure of wrongdoing and

his/her or its willingness to cooperate with the authorities to

eliminate corruption involving the defendant or related entities;

9. the existence and adequacy of a collective entity’s compliance

program and other remedial actions;

10. collateral consequences, including harm, if any, to innocent third

parties, including a collective entity’s shareholders, employees, or

union members;

 11. whether and to what extent the sought remedies are likely to be

effective; and

12. the availability and adequacy of other remedies.

Id. at 4-5.

C. There is no prior approval or vetting required before commencement of a civil RICO case by a private injured party. Civil RICO litigation advantages -- federal jurisdiction, treble damages, attorney’s fees – plus the liberal construction of RICO as directed by Congress and SCOTUS increase the risk of abusive civil RICO filings.

D. Effect of rigorous pre-screening on success rates:

 One study of appellate cases found that from 2005 to 2011 the prosecution won in 69 out of 70 criminal cases (99%), whereas the defense won in 131 out of 157 civil cases (83%). Pierson, Pamela Bucy, *Article: RICO Trends: From Gangsters To Class Actions*, 65 S.C. L. Rev. 213 (Autumn 2013).

D. Rule 11 limitations on RICO

 Significant problems exist for limiting abusive RICO filings under Rule 11

1. Numerous legal uncertainties remain with respect to RICO, therefore many things will be warranted by existing law or by a non-frivolous argument for extending, modifying, or reversing existing law or for establishing new law, thus rendering Rule 11 sanctions unavailable.

2. Rule 11(c)(2) Safe Harbor provision allows a party 21 days to withdraw a pleading without risking sanctions. Court may on its own impose sanctions upon issuing a rule to show cause, without affording an opportunity to withdraw the pleading.

3. Courts may be reluctant to impose sanctions that may inure to the benefit of defendants who have committed criminal acts, albeit ones that fall short of RICO

1. The presenters wish to acknowledge that this outline draws heavily from the scholarship of Professor Pamela Bucy Pierson and her articles *RICO Trends: From Gangsters to Class Actions*, 65 S.C. L. Rev. 213 (Autumn 2013) and *RICO, Corruption and White-Collar Crime,* 85 Temp. L. Rev. 523 (Spring 2013) as well as the following scholarly works: McNeill, Carli*, Note: Seeing the Forest: A Holistic View of the RICO Statute of Limitations*, 85 Notre Dame L. Rev. 1231 (March 2010); Murphy, Kevin, *Note: The Resurrection of the “Single Scheme” Exclusion to RICO’s Pattern Requirement*, 88 Notre Dame L. Rev. 1991 (April 2013); Nybo, Nicholas L., *Note and Comment: A Three-Ring Circus: The Exploitation of Civil RICO, How Treble Damages Caused It and Whether Rule 11 Can Remedy the Abuse*, 18 Roger Williams U. L. Rev. 19 (Spring 2013).

 [↑](#footnote-ref-1)
2. 596 F.3d 751 (10th Cir. 2010). [↑](#footnote-ref-2)
3. 436 Fed. Appx. 257 (4th Cir. 2011). [↑](#footnote-ref-3)
4. 886 F.2d 681, 684 (4th Cir. 1989). [↑](#footnote-ref-4)
5. *Cedric Kushner Promotions*, *Ltd. v. King*, 533 U.S. 158 (2001). [↑](#footnote-ref-5)
6. E.g., *Brannon v. Boatmen's First Nat'l Bank of Okla.*, 153 F.3d 1144, 1147-48 (10th Cir. 1998); *Khurana v. Innovative Health Care Sys.*, 130 F.3d 143, 155 (5th Cir. 1997), vacated as moot, 164 F.3d 900 (5th Cir. 1999); *Discon, Inc. v. NYNEX Corp.*, 93 F.3d 1055, 1063-64 (2d Cir. 1996); *Odishelidze v. Aetna Life & Cas.*, 853 F.2d 21, 23-24 (1st Cir. 1988); *NCNB Nat'l. Bank of N.C. v. Tiller*, 814 F.2d 931, 936 (4th Cir. 1987), overruled by *Busby v. Crown Supply Inc.*, 896 F.2d 833, 840-41 (4th Cir. 1990); cf. *Brittingham v. Mobil Corp.*, 943 F.2d 297, 302-03 (3d Cir. 1991) (holding that parent and subsidiary are not distinct for §1962(c) purposes where the “person” alleged is the parent corporation and the “enterprise” is “affiliated entities”), abrogated by *Jaguar Cars Inc. v. Royal Oaks Motor Car Co.*, 46 F.3d 258, 263 (3d Cir. 1995). [↑](#footnote-ref-6)
7. *See* *RICO, Corruption and White-Collar Crime,* 85 Temp. L. Rev. 523 (Spring 2013) at Note 210. [↑](#footnote-ref-7)
8. 336 F. Supp. 2d 1239 (S.D. Fla. 2004), aff'd, 470 F.3d 1036 (11th Cir. 2006). [↑](#footnote-ref-8)
9. 881 So. 2d 565 (Fla. Dist. Ct. App. 2004). [↑](#footnote-ref-9)
10. 330 F. Supp. 2d 1101 (D. Haw. 2004). [↑](#footnote-ref-10)
11. 559 U.S. 1 (2010). [↑](#footnote-ref-11)
12. 503 U.S. 258 (1992). [↑](#footnote-ref-12)
13. E.g. *Dickerson v. TLC The Laser Eye Ctr. Inst., Inc.*, 493 Fed. Appx. 390 (2012), *citing Rotella v. Wood, supra.*  [↑](#footnote-ref-13)