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BUSINESS LITIGATION 2016, IS THERE ROOM FOR CIVIL RICO?

David J. Stander, Esq.*

The U.S. Supreme Court has consistently recognized the importance of the civil private RICO action.¹ In fact, the Court has consistently stated that victims of racketeering activity are to be turned into “private attorney generals.”² The Supreme Court, as noted above, in particular has emphasized the broad application and extraordinary purposes the RICO statute has meant to serve.³

So, how feasible is it for plaintiffs’ attorneys to act as “private attorney generals” so that they cannot effectively do their job like prosecutors? The answer is-- with great difficulty, as only competent and experienced counsel can successfully tread through the many requirements necessary to bring a successful civil RICO action. Moreover, because a civil RICO action requires proof of serious criminal behavior, and it carries a stigma,⁴ the courts are particularly reluctant to allow civil RICO actions to proceed.⁵ The impediments to plaintiffs’ attorneys successfully serving as ‘private attorney generals,’ as envisioned by the framers of the statute, and the Supreme Court, are described below.

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¹ See *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 489 (1985) (holding that the RICO statute is to be liberally construed).

² *Rotella v. Wood*, 528 U.S. 549, 557 (2000); see also *Agency Holding Corp. v. Malley-Duff & Assocs. Inc.*, 483 U.S. 143, 150 (1987).

[I]n rejecting a significantly different focus under RICO, therefore, we are honoring an analogy that Congress itself accepted and relied upon, and one that promotes the objectives of civil RICO as readily as it furthers the objects of the Clayton Act. Both statutes share a common congressional objective of encouraging civil litigation to supplement Government efforts to deter and penalize the respectively prohibited practices. *The object of civil RICO is thus not merely to compensate victims but to turn them into prosecutors, “private attorneys general,”* dedicated to eliminating racketeering activity. *Rotella*, 528 U.S. at 557 (emphasis added).

³ *Boyle v. United States*, 556 U.S. 938, 944 (2009) (“The statute does not specifically define the outer boundaries of the ‘enterprise’ ...”; *Sedima, S.P.R.L.*, 473 U.S. at 497 (“RICO is to be read broadly”); *Anza v. Ideal Steel Supply Corp.*, 547 U.S. 451, 479 (2006) (Breyer, J., concurring in part and dissenting in part) (“RICO essentially seeks to prevent organized criminals from taking over or operating legitimate businesses. Its language, however, extends its scope well beyond those central purposes.”); *Sedima S.P.R.L.*, 473 U.S. at 500 (“The ‘extraordinary’ uses to which civil RICO has been put appear to be primarily the result of the breadth of the predicate offenses, in particular the inclusion of wire, mail, and securities fraud, and the failure of Congress and the courts to develop a meaningful concept of ‘pattern.’”).

⁴ “Civil RICO is an unusually potent weapon—the litigation equivalent of a “thermonuclear device,” and “stigmatizing.” *Miranda v. Ponce Federal Bank*, 948 F.2d 41, 44 (1st Cir. 1991); *DLJ Mortg. Capital, Inc. v. Kontogiannis*, 726 F. Supp. 2d 225, 236 (E.D.N.Y. 2010).

⁵ See discussion and cases below.

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I. SUMMARY OF ARGUMENT

The following are the principal, but not the only, bases on which civil RICO cases are dismissed. These issues are further discussed in this article.

A. Failure to Meet Rule 8(a) Plausibility Standard

In the wake of *Twombly v. Bell Atlantic Corp.* and *Ashcroft v. Iqbal*,⁶ courts demand, even before there is any discovery, that the RICO claims be pleaded with “facial plausibility,” which allows the court to reasonably infer that the defendant is liable for what is alleged.⁷ This is certainly a tall order given the complexity of a potential case and the fact that many victims do not have the financial resources to invest significant amounts of monies to diligently investigate every potential claim.⁸ Compare the typical private plaintiff to the U.S Department of Justice (“DOJ”), which utilizes professional investigators (FBI) and highly trained and seasoned prosecutors to litigate their criminal RICO and governmental civil RICO cases (e.g., the civil RICO against the tobacco companies).⁹

B. Failure to File a “Short and Plain” Statement as Required by Fed. R. Civ. P. 8(a)

Rule 8(a) requires a “short and plain statement of the claim showing that the pleader is entitled to relief.”¹⁰ The typical civil RICO case is a complex fraud case with not only RICO claims, but typically, unjust enrichment, breach of contract, and common law fraud claims.¹¹ Unlike the criminal RICO indictments, which are sometimes over *hundreds of pages* long, courts sometimes order plaintiffs to reduce the length of the complex civil complaints so that the claim is “short and plain.”¹² This makes the plaintiffs’ attorneys job even more difficult in explaining the circumstances of the alleged violation so that it appears ‘plausible’ to the court.

Moreover, the criminal RICO indictment, upon which is are usually no word or page limitation, is subject to a lesser standard at the pleading stage, *i.e.*, the indictment must only plead the elements of the offense.¹³ Courts have rejected routinely civil RICO complaints when they have only recited the elements of the offense without more.¹⁴

⁶ *Twombly v. Bell Atlantic Corp.*, 550 U.S. 544 (2007); *Ashcroft v. Iqbal*, 556 U.S. 662 (2009).

⁷ *Twombly*, 550 U.S. at 556.

⁸ *Miller UK Ltd. v. Caterpillar, Inc.*, 17 F. Supp. 3d 711, 718 (N. D. Ill. 2014) (stating “...the costs inherent in major litigation can be crippling, and a plaintiff, lacking the resources to sustain a long fight, may be forced to abandon the case or settle on distinctly disadvantageous terms.”).

⁹ *Id.* at 718.

¹⁰ Fed. R. Civ. P. §8(a).

¹¹ FEDERAL JUDICIAL CENTER, MANUAL FOR COMPLEX LITIGATION 381 (3d ed. 1995) (hereinafter “MANUAL FOR COMPLEX LITIGATION”).

¹² Fed. R. Civ. P. §8(a).

¹³ DEP’T OF JUSTICE, U. S. ATTORNEYS’ CRIMINAL RESOURCE MANUAL, § 222, <http://www.justice.gov/usam/criminal-resource-manual-222-elements-offense>.

¹⁴ MANUAL FOR COMPLEX LITIGATION, *supra* note 11, at 381-391.

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C. Failure to Meet the Particularity Provision of Federal Rule 9(b)

The most common plaintiff failure (because the typical civil RICO alleges fraud) is to plead the circumstances of the fraud with particularity under Federal Rules of Civil Rule §9(b).¹⁵ Cases analyzing Rule 9(b) are discussed at length below.

D. Failure to Plead a Pattern (“Garden-Variety” Fraud)

Courts also dismiss civil RICO cases based on fraud finding that a pattern of racketeering activity (PORA) has not been alleged when the court views the claim as merely a ‘garden-variety’ fraud claim (“single-scheme, discreet goal”).¹⁶ This is despite the Supreme Court’s express finding that RICO does *not* require the pleading or proving of ‘multiple schemes’ to have a pattern of racketeering.¹⁷ Thus, as described below, many of the lower courts have found there is insufficient evidence of continuity of the racketeering activity to support a finding of a “pattern of racketeering,”¹⁸ while, on the other hand, there are lower courts (both circuit and district) which do not ascribe to this strict view of PORA.¹⁹

E. Incorrect Application of Civil RICO Conspiracy Provision

Courts still, amazingly, reflexively dismiss civil RICO conspiracy claims when they have found the section 1962(c)²⁰ substantive provisions not adequately pleaded.²¹ These

¹⁵ Fed. R. Civ. P. 9(b). “In alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake. Malice, intent, knowledge, and other conditions of a person’s mind may be alleged generally.” *Id.*

¹⁶ See, e.g., *Jackson v. BellSouth Telecommunications*, 372 F.3d 1250, 1266 (11th Cir. 2004) (citing to *Efron v. Embassy Suites (P.R.), Inc.*, 223 F.3d at 18) (noting that “the fact that a defendant has been involved in only one scheme with a singular objective and a closed group of targeted victims” supports the conclusion that there is no continuity); *Edmondson & Gallagher v. Alban Towers Tenants Ass’n*, 48 F.3d 1260, 1265 (D.C.Cir.1995) (noting that predicate acts occurring over a three-year period are insufficient to allege pattern of racketeering when the complaint alleged a single scheme with a single goal); see also *Vicom, Inc. v. Harbridge Merchant Servs.*, 20 F.3d 771, 780 (7th Cir.1994) (stating that various factors besides temporal span should be considered in assessing continuity, including the number of victims, the presence of separate schemes, and the occurrence of distinct injuries); *Resolution Trust Corp. v. Stone*, 998 F.2d 1534, 1543 (10th Cir.1993) (explaining that, in addition to duration, weighing “extensiveness” of the RICO scheme, including number of victims, number and variety of racketeering acts, whether the injuries caused were distinct, the complexity and size of the scheme, and the nature or character of the enterprise or the unlawful activity); *U.S. v. Pelullo*, 964 F.2d 193, 208 (3^d Cir.1992) (“We have eschewed the notion that continuity is solely a temporal concept, though duration remains the most significant factor.”); *U.S. Textiles, Inc. v. Anheuser–Busch Cos.*, 911 F.2d 1261, 1269 (7th Cir.1990) (“[I]t is not irrelevant, in analyzing the continuity requirement, that there is only one scheme.” (internal quotation marks and citation omitted)).

¹⁷ See *H.J. Inc. v. Northwestern Bell Tel. Co.*, 492 U.S. 229, 240-241 (1989) (holding definitively that proof of multiple schemes is not necessary to establish a RICO pattern of racketeering.).

¹⁸ See cases in discussion below.

¹⁹ See cases in discussion below.

²⁰ 18 U.S.C. §1962.

²¹ See, e.g., *D. Penguin Bros. Ltd., H.T.A. Equities, Inc. v. City Nat’l Bank, NBUF Dev. Ltd.*, 587 Fed.Appx. 663, 669 (2^d Cir. 2014) (citing to *First Capital Asset Mgmt., v. Satinwood Inc.*, 385 F.3d 159, 182 (2^d Cir. 2004)).

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Courts are not considering the Supreme Court's views in *Salinas*,²² and as described below are in error.

II. DETAILED ANALYSIS

As listed above, many civil RICO cases are dismissed at the pleadings stage for failure to (1) plead fraud with particularity²³; (2) a finding that the claims are merely "garden-variety claims," and thus do not support closed-ended continuity and a finding of pattern of racketeering²⁴; and (3) the RICO conspiracy provision is inadequately applied.²⁵ Cases analyzing these issues will be discussed below:

A. Fed. Rule 9(b)

The lower courts have been particularly receptive to dismissing civil RICO fraud cases for failure to comply with Rule 9(b)'s "particularity" standard.²⁶ The circuit courts have followed the literal language of Rule 9(b) and stated that a plaintiff may plead *generally* the defendants' state of mind or intent to deceive or defraud, but must make "particularized allegations [regarding] the factual circumstances of the fraud itself" when pleading mail or wire fraud as a predicate act.²⁷

Many circuit courts require plaintiffs to identify specific examples of the fraud while pleading the overall nature of the fraud generally.²⁸ In *Burgess v. Religious Technology College*, the Eleventh Circuit affirmed the dismissal of a Georgia RICO claim and federal civil RICO claim finding that the plaintiffs have not sufficiently pleaded their fraud claims with specificity.²⁹ The Court found that Rule 9(b) was not satisfied when the time period of the alleged misrepresentations was not identified, and the specific fraudulent statements the defendants made were not alleged, requiring:

- (1) precisely what statements or omissions were made in which documents or oral representations;
- (2) the time and place of each such statement and the person responsible for making (or, in the case of omissions, not making) them;
- (3) the content of such statements and the manner in which they misled the plaintiff; and
- (4) what the defendant obtained as a consequence of the fraud.³⁰

²² See *Salinas v. United States*, 522 U.S. 52 (1997).

²³ Fed. R. Civ. P. 9(b).

²⁴ See *supra* note 16.

²⁵ There are of course many other legal grounds for dismissing civil RICO claims, such as failure to prove an enterprise; failure to prove the defendant conducted the affairs of the enterprise through a pattern of racketeering activity; failure to allege direct injury and concrete losses. Another common ground of dismissal is failure to allege distinctness between the RICO person and the enterprise. See *Cruz v. FX DirectDealer, LLC.*, 720 F.3d 115, 121 (2d Cir. 2013); *In re ClassicStar Mare Lease Litig.*, 727 F.3d 473, 483, 84 (6th Cir. 2013).

²⁶ See, e.g., *H&Q Properties, Inc. v. Doll*, 793 F.3d 852, 857 (8th Cir. 2015).

²⁷ See *Odom v. Microsoft*, 486 F.3d 541, 554 (2007).

²⁸ See *Burgess v. Religious Technology College*, 600 Fed.Appx. 657 (11th Cir. 2015).

²⁹ *Id.* at 665.

³⁰ *Id.* at 662 (citing to *Findwhat InvestorGrp. v. FindWhat.com*, 658 F.3d 1282, 1296 (11th Cir. 2011)).

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The *Burgess* court noted that when there are “prolonged multi-act schemes,” there is a *relaxed standard* which permits a plaintiff to plead the overall nature of the fraud and then to allege with particularity one or more illustrative instances of the fraud.³¹ “Even under the relaxed requirement, however, a plaintiff is still required to allege at least some particular examples of fraudulent conduct to lay a foundation for the rest of the allegations of fraud.”³²

Other circuits have also affirmed the dismissal of civil RICO actions based on failure to comply with Rule 9(b)’s particularity standard. In *H & Q Properties, Inc. v. Doll*, the court affirmed dismissal of civil RICO finding inadequate pleading of fraud.³³ In *Eclectic Properties East LLC v. Marcus Millichap*, the court affirmed the lower court’s decision to grant a motion to dismiss a RICO and RICO complaint finding that complaint was found to not contain adequate factual allegations to plausibly infer that defendants specifically intended to defraud, and therefore did not show a plausible entitlement to relief.³⁴

Circuits have found sufficient allegations of fraud when specific instances of fraud are adequately alleged.³⁵

1. District Courts

Numerous district courts have dismissed civil RICO cases for failure to plead particularity as required by Rule 9(b).³⁶ These decisions are ‘facts and circumstances’ determinations, and do not necessarily present splits of opinion rather than how strictly the law is interpreted.³⁷ A sampling of recent decisions is instructive as to the rationale for dismissing these cases.

The Southern District Court of New York dismissed a civil RICO complaint finding that the fraudulent intent and particularity requirements were lacking.³⁸ The court discussed in detail the requirements to meet Rule 9(b), depending upon whether the mailings themselves contain the fraudulent misrepresentations, as opposed to when the mailings are merely an incident to the scheme.³⁹

The District of Nebraska dismissed a civil RICO claim alleging bank fraud, mail fraud, and wire fraud.⁴⁰ The court found that the complaint failed to comply with Rule 9(b) as it provided insufficient notice to defendants of their individual roles in perpetrating the alleged acts of fraud.⁴¹

³¹ *Id.* at 662-663.

³² *Id.* at 663. See also *U.S. ex rel. Karvelas v. Melrose-Wakefield Hosp.*, 360 F.3d 220, 229 (1st Cir. 2004) (relaxing Rule 9(b) standards “because of the apparent difficulties in specifically pleading mail and wire fraud as predicate acts”).

³³ *See H&Q Properties, Inc. v. Doll*, 793 F.3d 852, 857 (8th Cir. 2015).

³⁴ *See Eclectic Properties East LLC v. Marcus Millichap*, 751 F.3d 990, 999 (9th Cir. 2014).

³⁵ *See, e.g., Bible v. United Student Aid Funds, Inc.*, 799 F.3d at 661. The court in *Bible* reversed the district court’s decision dismissing the action finding that a borrower adequately alleged a civil RICO violation in connection with fraudulent loan practices. *Id.*

³⁶ See cases in discussion below.

³⁷ See cases in discussion below.

³⁸ *See Sanchez v. ASA College Inc.*, 2015 WL 3540836, at *13 (S.D.N.Y., June 5, 2015).

³⁹ *Id.* at 11.

⁴⁰ *See H&Q Properties, Inc. v. Doll*, 2014 WL 2919139, at *10 (D. Neb., June 26, 2014).

⁴¹ *Id.* at *4, *7

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A judge in the District of New Jersey granted the defendant's motion for summary judgment on a civil RICO claim alleging fraud stating that at this stage of the litigation more than allegations and arguments are required.⁴²

A judge in California found that the plaintiff's mere listing of such alleged crimes, without supporting, particularized factual pleadings as required under Rule 9(b), is not enough to survive a motion to dismiss.⁴³

A judge the S.D. Florida granted a motion to dismiss when the plaintiffs merely alleged that a defendant -U.S. Bank- was lumped with other defendants in a vague and conclusory statement.⁴⁴ The Court found this allegation was wholly inadequate to assert a cause of action for a RICO violation.⁴⁵

2. Decisions Upholding Pleadings Under Rule 9(b)

These recent decisions highlight that a well-pleaded civil RICO complaint, along with good facts, can result in a successful pleading and survive Rule 9(b).

In *Rothstein v. GMAC Mortgage LLC*, the Southern District Court of New York rejected the defendant's argument that the alleged RICO and RICO conspiracy claims (Counts One and Two) based on mail fraud violations should be dismissed for failure to state a claim upon which relief can be granted (Rule 12(b)(6) motion).⁴⁶ The plaintiffs satisfied the standards of Rule 9 (b) for pleading with particularity, and adequately pleaded facts which showed (1) the defendants had the requisite intent to defraud; and (2) the defendants knowingly participated in the scheme as they had the motive for committing fraud and the opportunity to do so.⁴⁷ *This decision provides an excellent blueprint for analyzing a RICO claim consisting of predicate acts of mail and wire fraud.*

In *Seikaly & Stewart v. Fairley*, the court found sufficient material misrepresentations to support the claim at the pleading stage.⁴⁸

In *Llewellyn-Jones v. Metro Prop*, the court upheld a RICO complaint based on fraud predicates finding sufficient relatedness and continuity.⁴⁹ The predicate acts of mail and wire fraud alleged there were based on false and fraudulent purchase agreements, loan applications, verification of deposit, lease agreements, and statements of income; use of the telephone to disseminate fraudulent information to financial institutions and the plaintiffs; and the transfer of funds to the plaintiffs.⁵⁰ The court found even if the allegations of continuing misconduct are insufficient, the plaintiffs alleged a pattern of misconduct involving nearly a

⁴² See *Franco v. Connecticut General Life Ins. Co.*, 2014 WL 2861428, at *22 (D.N.J., June 24, 2014).

⁴³ See *Mohebbi v. Khazan*, 50 F.Supp. 3d 1234, 1255 (N.D. Cal., June 23, 2014) (citing to *Cf. Andrews Farms v. Calcot, Ltd.*, 527 F. Supp. 2d 1239, at 1255) (quoting *Odom v. Microsoft*, 486 F.3d at 554).

⁴⁴ See *U.S. Bank Nat'l Ass'n. v. Capparelli*, 2014 WL 2807648, at *8-9 (S.D. Fla., June 20, 2014).

⁴⁵ *Id.* at *8.

⁴⁶ See *Rothstein v. GMAC Mortgage LLC*, 2013 WL 5437648, at *16, *19 (S.D.N.Y., Sept. 30, 2013), *rev'd on other grounds*, *Rothstein v. Balboa Ins. Co.*, 794 F.3d 256 (2d Cir. N.Y. 2015).

⁴⁷ *Id.* at *13-15. See also *Marrero-Rolon v. Autoridad de Energia Electrica, P.R.*, 2015 WL 5719801 (D.P.R., Sept. 29, 2015) (denying a motion to dismiss on Rule 9(b) particularity grounds).

⁴⁸ See *Seikaly & Stewart v. Fairley*, 18 F.Supp.3d 989, 996 (D. Ariz., May 14, 2014).

⁴⁹ See *Llewellyn-Jones v. Metro Prop*, 22 F.Supp.3d 760, 793 (E.D. Mich. May 27, 2014).

⁵⁰ *Id.* at 791-793.

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dozen properties over a long period of time, thus satisfying the closed-ended continuity requirement, and finding the RICO count pleaded adequately.⁵¹

In *Santos v. Carrington Mortgage Services*, the court denied the defendant's Rule 12(b)(6) motion to dismiss a civil RICO claim brought by a New Jersey homeowner against his mortgage loan servicer and several insurers, alleging a kickback scheme involving "force-placed hazard insurance."⁵² The court noted that the alleged facts and legal arguments mirror those in several other actions across the country, and some district courts have dismissed similar actions for failure to state a claim upon which relief can be granted.⁵³

In *Alkhatib v. New York Motor Group, LLC*, the court denied in part defendant's motion to dismiss plaintiff's civil RICO claims finding particularity met under Rule 9(b) when the Plaintiffs described in exhaustive detail a sophisticated scheme pursuant to which the dealership defendants lure customers in with low advertised prices, use aggressive sales tactics and false promises to induce customers to enter into onerous financing agreements, and fraudulently conceal from customers that the documents presented to them contain undisclosed charges.⁵⁴ Plaintiffs identified the particular individuals who made statements to them, what statements they made, and why the statements were part of a fraudulent scheme.⁵⁵

In *State Farm Mut. Auto Ins. Co. v. Pointe Physical Therapy, LLC*, in denying defendant's motion to dismiss, the court stated that when faced with a motion to dismiss for failure to plead fraud 'with particularity' as required by Rule 9(b), "a court must factor in the policy of simplicity in pleading which the drafters of the Federal Rules codified in Rule 8."⁵⁶ The court concluded that "[w]hen read against the backdrop of Rule 8, it is clear that the purpose of Rule 9 is not to reintroduce formalities to pleading, but is instead to provide defendants with a more specific form of notice as to the particulars of their alleged misconduct."⁵⁷ "So long as [the plaintiff] pleads sufficient detail—in terms of time, place and content, the nature of a defendant's fraudulent scheme, and the injury resulting from the fraud—to allow the defendant to prepare a responsive pleading, the requirements of Rule 9(b) will generally be met."⁵⁸ The court continued to state that

in complex civil RICO actions involving multiple defendants, Rule 9(b) does not require that the 'temporal or geographic particulars of each mailing made in furtherance of the fraudulent scheme be stated with particularity, but only that the plaintiff delineate, with adequate particularity in the body of the complaint, the specific circumstances constituting the overall fraudulent scheme.⁵⁹

⁵¹ *Id.* at 793.

⁵² See *Santos v. Carrington Mortgage Services*, 2015 WL 4162443, at *11-12 (D.N.J. July 8, 2015).

⁵³ *Id.* at *10-11.

⁵⁴ See *Alkhatib v. New York Motor Group, LLC*, 2015 WL 3507340, at *12-13 (E.D.N.Y. June 3, 2015).

⁵⁵ *Id.* at *12.

⁵⁶ See *State Farm Mut. Auto Ins. Co. v. Pointe Physical Therapy, LLC*, 2015 WL 3403359, at *10 (E.D. Mich. May, 27, 2015).

⁵⁷ *Id.* at *10 (quoting *Coffey v. Foamex L.P.*, 2 F.3d 157, 162 (6th Cir.1993)).

⁵⁸ *Id.* at *10 (quoting *United States ex rel. SNAPP, Inc. v. Ford Motor Co.*, 532 F.3d 496, 504 (6th Cir.2008)).

⁵⁹ *Id.* at *11.

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In *Sussenbach Family Ltd. Partnership v. Access Midstream Partners, L.P.*, the court denied the defendant's motions to dismiss a RICO claim based on property mail and wire fraud finding the predicate acts were not isolated events, but were related acts aimed at the common purpose and goal of defrauding lessors to pay and incur the falsely inflated, unauthorized charges with respect to oil and gas leases and thereby enable defendants to reap illicit profits.⁶⁰ Defendants were common participants in the predicate acts and their activities amounted to a common course of conduct, with similar pattern and purpose, intended to deceive lessors.⁶¹

B. Pattern of Racketeering Activity ("Garden-Variety Fraud")

1. Circuit Courts

It must be stated at the onset that a successful pleading of "open-ended" continuity will usually obviate the closed-ended "ordinary business dispute" defense argument.⁶² This is because in an open-ended scheme, by its very nature, there must be a "threat of continuing criminal activity," which limits the open-ended analysis to usually those factual situations involving serious crimes, not mere single-issue business disputes.⁶³

In *Kalitta Air, LLC v. GSB Associates*, the Sixth Circuit reversed the lower court's dismissal of a civil RICO complaint for failure to state a claim finding that the plaintiff (Kalitta Air) had adequately alleged a pattern of racketeering under the "open-ended" or "threat of continuity" prong.⁶⁴ The court found there was a threat of continuing criminal activity beyond the period during which the predicate acts were performed by "showing that the predicate acts or offenses are part of an ongoing entity's regular way of doing business."⁶⁵ The amended complaint pleaded factual allegations of the same predicate acts being used on another victim (Arrow Air) of a very similar scheme;⁶⁶ and the participant defendants were still operational and because of its "regular way of doing business" the defendants remained a threat to others and could have even continued to keep the scheme going against the plaintiff.⁶⁷ Thus, when there are allegations beyond those asserting a mere contract dispute, a scheme which involved multiple victims, and did not involve a single scheme with a finite end-point, an open-ended pattern of racketeering activity can be found.⁶⁸

⁶⁰ See *Sussenbach Family Ltd. Partnership v. Access Midstream Partners, L.P.*, 2015 WL 1470863, *9 (M.D. Pa. Mar. 31, 2015).

⁶¹ *Id.*

⁶² *Kalitta Air, LLC v. GSB Associates*, 591 Fed.Appx. 338, 342 (6th Cir. 2014).

⁶³ *Id.*

⁶⁴ *Id.* at 347.

⁶⁵ *Id.* at 342 (citing to *H.J. Inc. v. Northwestern Bell Telephone Co.*, 492 U.S. 229, 242 (1989)).

⁶⁶ *Id.* at 346-347.

⁶⁷ *Id.*, at 345-346.

⁶⁸ *Kalitta Air, LLC*, 591 Fed.Appx. at 347.

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a. Closed-Ended Continuity

As discussed in the cases below, there is a split in the circuits developing involving this issue.⁶⁹ Many circuits have stated that where the RICO allegations concern only a *single scheme with a discrete goal*, a closed-ended pattern of racketeering has not been alleged even when the scheme took place over a longer period of time.⁷⁰ Courts have also stated that “the fact that a defendant has been involved in only one scheme with a singular objective and a closed group of targeted victims” supports the conclusion that there is no continuity.⁷¹ The Second Circuit also follows this view.⁷²

Now, to the issue of the developing split. In *Tabas v. Tabas*, contradicted in part by the Third Circuit’s view in *Kolar v. Preferred Real Estate Investments*,⁷³ the Third Circuit explicitly recognized the liberal construction of civil RICO, consistent with the holding in *Sedima*⁷⁴, despite its severe penalties, to “garden variety” fraud cases.⁷⁵ However, the Ninth Circuit in *Kearny*, takes issue with the majority of the circuits.⁷⁶

2. Strict View of First Circuit

The First Circuit continues the hard-line against finding a PORa based upon a closed-ended continuity analysis even when the activities occurred over a period of years.⁷⁷ In *Home Orthopaedics Corp., v. Rodriguez*, the court dismissed a civil RICO complaint finding the Complaint inadequately alleged a pattern of racketeering activity, *i.e.*, by failing to adequately allege either closed-ended or open-ended continuity when the action evolved from a business transaction which only harmed one party, even though multiple instances of *extortionate* threats were made over a period of years, and the defendant sought to destroy the Plaintiffs’ business when Plaintiff refused to pay the Defendant.⁷⁸ The court found that Home Orthopaedics failed to adequately allege that defendants Raúl, Linares, and Pino engaged in a “pattern of racketeering activity,” as all of their actionable racketeering acts “relate[d] to a single transaction”—the signing of a 2005 Letter of Agreement—“aimed to extort” Home Orthopaedics.⁷⁹

⁶⁹ See cases below.

⁷⁰ See *Jackson v. BellSouth Telecommunications*, 372 F.3d 1250, 1267 (11th Cir. 2004).

⁷¹ See *Efron v. Embassy Suites (P.R.), Inc.*, 223 F.3d 12, 18 (1st Cir. 2000). See also *Edmondson & Gallagher v. Alban Towers Tenants Ass’n*, 48 F.3d 1260, 1265 (D.C.Cir.1995) (holding predicate acts occurring over *three year period* insufficient to allege pattern of racketeering when complaint alleged a single scheme with a single goal) (emphasis added); *U.S. Textiles, Inc. v. Anheuser-Busch Co.*, 911 F.2d 1261, 1269 (7th Cir. 1990) (“[I]t is not irrelevant, in analyzing the continuity requirement, that there is only one scheme.”) (internal quotation marks and citation omitted).

⁷² See *Crawford v. Franklin Credit Management Corp.*, 758 F.3d 473, 488-489 (2d Cir. 2014) (“RICO claims premised on mail or wire fraud must be particularly scrutinized because of the relative ease with which a plaintiff may mold a RICO pattern from allegations that, upon closer scrutiny, do not support it.”) (citing to *Efron*, 223 F.3d 12, at 20).

⁷³ See *Kolar v. Preferred Real Estate Investments*, 361 Fed.Appx. 354, 363(3rd Cir. 2010).

⁷⁴ See *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 498 (1985).

⁷⁵ See *Tabas v. Tabas*, 47 F.3d 1280, 1296-1297 (3d Cir.1995) (*en banc*).

⁷⁶ See *Kearny v. Foley & Lardner*, 607 Fed.Appx. 757, 759 (9th Cir. 2015).

⁷⁷ See *Home Orthopaedics Corp., v. Rodriguez*, 781 F.3d 521, 530-531 (1st Cir. 2015).

⁷⁸ See *id.* at 530-531.

⁷⁹ *Id.* at 531.

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The Court explained that this case fell in the “squishy” area, as the making of multiple threats to a plaintiff over a period of years, stemmed from a single contract breach.⁸⁰ The court thus looked to other “indicia of continuity,”⁸¹ for instance, whether the defendants were involved in multiple schemes, as opposed to “one scheme with a singular objective”⁸²; whether the scheme affected many people, or only a “closed group of targeted victims”⁸³; and whether the scheme had the potential to last indefinitely, instead of having a “finite nature.”⁸⁴ In not finding closed-ended or open-ended continuity, the court stated that even if the defendants committed numerous crimes to try to collect this specific sum of money, all of these unlawful acts “have their origin in,” a single event” or a “single “transaction.”⁸⁵ The court also found that the Complaint also failed under ‘open-ended’ continuity because there was no showing that the “scheme” to collect money would continue into the indefinite future, nor had Home Orthopedics attempted to show that the defendants’ alleged racketeering acts were part of their regular way of doing business.⁸⁶

Thus, this decision reflects the reluctance of courts to get involved in single business dispute, even when there is extortionate activity, *a serious racketeering predicate offense*.

3. Ninth Circuit Is More Favorable to Plaintiffs

In contrast to the First Circuit’s view, the Ninth Circuit has looked more favorably finding a pattern based on closed-ended continuity, even involving fraud, when there is only a “single-scheme, discrete goal.”⁸⁷ In *Kearny v. Foley & Lardner*, the Ninth Circuit held that the district court erred in dismissing Kearney’s RICO claim for insufficiently alleging a pattern of racketeering activity.⁸⁸ The court allegations involved a series of related *fraudulent* predicate acts that began in April 2000 and ended, at the earliest, in November 2002.⁸⁹ The court found that more than two years amounted to a substantial period of time to satisfy the closed-ended continuity requirement.⁹⁰

Because Kearney alleged that the predicate acts amounted to a substantial period of time, she was not required to allege that the acts posed a threat of continued criminal activity.⁹¹ Additionally, Kearney was *not* required to show multiple schemes and multiple victims to demonstrate a pattern of racketeering activity.⁹² The court stated that a “pattern” does not require multiple schemes “so long as the predicate acts involved are not isolated or

⁸⁰ *Id.* at 529.

⁸¹ *Id.*

⁸² *Home Orthopaedics Corp.*, 781 F.3d 521.

⁸³ *Id.*

⁸⁴ *Id.* (citing to *Efron v. Embassy Suites (P.R.), Inc.*, 223 F.3d 12, 18-19 (1st Cir. 2000)).

⁸⁵ *Id.* at 530 (quoting *Efron*, 223 F.3d at 19, “[o]ur own precedent firmly rejects RICO liability where the alleged racketeering acts ..., taken together, ... comprise a single effort to facilitate a single financial endeavor.”).

⁸⁶ *Id.* at 531.

⁸⁷ *Kearny v. Foley & Lardner*, 607 Fed.Appx. 757, 758 (9th Cir. 2015).

⁸⁸ *Id.* at 759.

⁸⁹ *Id.*

⁹⁰ *Id.* at 758.

⁹¹ *Id.* at 759.

⁹² *Id.*

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sporadic.”⁹³ The acts there were not isolated or sporadic; they occurred consistently, without break, for two years.⁹⁴ Thus, the takeaway here is that skilled counsel is necessary to effectively argue the “pattern” requirement in a civil RICO case, given the wide range of views by the circuits.

4. District Courts- Closed Ended Continuity

Many district courts have dismissed civil RICO claims based upon fraud predicates and situations involving “single schemes with a discrete goal,” but others have not.⁹⁵ Those cases dismissing civil RICO claims include *Yesko v. Fell*,⁹⁶ where the court, in dismissing a RICO complaint, reiterated the narrow stance of the Fourth Circuit, expressed in *Flip Mortgage Corp. v. McElhone*, specifically stating that “[T]his circuit will not lightly permit ordinary business contract or fraud disputes to be transformed into federal RICO claims.”⁹⁷ In *Mineo v. McEachern*, the court refused to allow the entry of a default judgment finding the plaintiff did not adequately plead the RICO “sub-element” of continuity when the plaintiff was allegedly defrauded on one occasion by an attorney as part of a complex fraud scheme.⁹⁸

Moreover, judges dismiss civil RICO claims arising out of contracts finding the plaintiff must sufficiently plead fraudulent acts independent of the breach of contract.⁹⁹

District courts have continued in recent cases to take the “hard-line” on what they perceive as “ordinary business disputes” and thus rule against plaintiffs finding that a PORA has not been adequately alleged.¹⁰⁰ In *Lu v. Lezell*, the court stated that although relatedness and continuity have become the *sine qua non* of a RICO case, the D.C. Circuit “continues to endorse a case-by-case, fact-specific approach” that is “fluid, flexible, and commonsensical, rather than rigid or formulaic.”¹⁰¹ This approach to the pattern requirement “helps to prevent ordinary business disputes from becoming viable RICO claims.”¹⁰² The court stated that if courts were to recognize a RICO claim based on simple business fraud, “the pattern requirement would be rendered meaningless.”¹⁰³ The court in *Lu* stated that Congress was concerned in RICO with long-term criminal conduct.¹⁰⁴ As a result, “if a plaintiff alleges

⁹³ *Keamy v. Foley & Lardner*, 607 Fed.Appx. 757, 759 (9th Cir. 2015) (citing *Sun Sav. And Loan Ass’n v. Dierforff*, 825 F.2d 187, 191-94 (9th Cir. 1987)).

⁹⁴ *Id.*

⁹⁵ See cases below.

⁹⁶ See *Yesko v. Fell*, 2014 WL 4406849 (D. Md. Sept. 5, 2014).

⁹⁷ See *Flip Mortgage Corp. v. McElhone*, 841 F.2d 531, 538 (4th Cir. 1988).

⁹⁸ See *generally* *Dewitt Insurance, Inc. v. Horton*, 2014 WL 2208073 (E.D. Mo. May 28, 2014).

⁹⁹ See *Sivak v. United Parcel Service Company*, 2014 WL 2938088, at *725 (E.D. Mich. July 1, 2014) (granting a motion to dismiss a civil RICO claim when the alleged “fraudulent activity” was derived solely from an interpretation of a shipping contract); see also *Kolar v. Preferred Real Estate Investments*, 361 Fed.Appx. 354, 363-364, 366 (3rd Cir. 2010) (affirming the dismissal of a civil RICO claim for failure to state a claim when the plaintiff brought an action alleging mail and wire fraud predicates which was based upon breach of contract).

¹⁰⁰ See *Lu v. Lezell*, 45 F.Supp.3d 86, 97 (D.D.C. 2014).

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ *Id.* at 98.

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only a single scheme, a single injury, and few victims it is ‘virtually impossible for plaintiffs to state a RICO claim.’”¹⁰⁵

In *Ixotic AG v. Kammer*, the Eastern District of New York has continued the hard-line against closed-ended continuity when the court viewed the legal dispute as “an ordinary business dispute” or “garden-variety fraud” even when the racketeering activity occurred over 34 months.¹⁰⁶ In *Ixotic*, the court adopted the findings of the magistrate judge who dismissed, *with prejudice*, the civil RICO complaint.¹⁰⁷ Plaintiffs had alleged that the defendants conducted a scheme by using a set of corporate identities that were either shells or did not exist at all, websites with plagiarized content, and corporate names and domain names that were confusingly similar to those of legitimate business entities to defraud the plaintiffs of many millions of dollars.¹⁰⁸ The plaintiffs further alleged how each of the parties may have known each other, where the various wire communications originated, and errors in the various agreements that should have alerted them to the alleged fraud.¹⁰⁹

Despite this particularity, the district court judge agreed with the magistrate that the plaintiffs failed to plead any viable RICO claim because they had not adequately alleged a pattern of racketeering activity.¹¹⁰ The *Ixotic* court considered only the time during which the defendants committed the predicate acts alleged to calculate the relevant time period.¹¹¹ The court further stated a period of racketeering activity lasting less than two years does not suffice to establish closed-ended continuity, and *even if the predicate acts span two years, such is insufficient, without more, to support a finding of a closed-ended pattern.* “[O]ther factors such as the number and variety of predicate acts, the number of both participants and victims, and the presence of separate schemes are relevant in determining whether closed-ended continuity exists.”¹¹²

Thus, the *Ixotic* court found that even though the period in which the plaintiffs alleged racketeering activity spanned 34 months, and thus *exceeded* the two years that has generally been considered the minimum needed to establish closed-ended continuity, the court found that continuity did not suffice because of other factors that weighed against such a finding; *i.e.*, the plaintiffs alleged only a single type of racketeering activity (wire fraud) targeting a single group of three victims (all of whom are essentially one for purposes of how the fraudulent scheme was allegedly executed) with a single goal of defrauding them of money in connection with a single matter.¹¹³

¹⁰⁵ *Id.* (citing *Menasco, Inc. v. Wasserman*, 886 F.2d 681, 684 (4th Cir.1989) (declining to extend RICO liability where defendants’ actions were “narrowly directed towards a single fraudulent goal” and “involved a limited purpose”).

¹⁰⁶ *See Ixotic AG v. Kammer*, 2015 WL 270028, at *11 (E.D.N.Y Jan. 21, 2015).

¹⁰⁷ *Id.* at 1.

¹⁰⁸ *Id.* at 7.

¹⁰⁹ *Id.*

¹¹⁰ *Id.* at 10

¹¹¹ *Id.* at 11; *see e.g.*, *Coquina Investments v. TD Bank, N.A.*, 760 F.3d 1300, (11th Cir. 2014).

¹¹² *Ixotic AG v. Kammer*, 2015 WL 270028, at *11 (E.D.N.Y Jan. 21, 2015).

¹¹³ *Id.* at 11 (citing *Ho Myung Moolson Co., Ltd. v. Manitou Mineral Water, Inc.*, 665 F.Supp.2d 239, 261 (S.D.N.Y. 2009) (“Courts have repeatedly held that a simple fraud scheme is insufficient to state a RICO violation.”); *see also* *PrevMED Inc. v. MNM-1997, Inc.*, 2015 WL 4162729 (N.D. Tex., July 10, 2015) (“[C]ontinuity cannot be established by multiple acts of fraud that are part of a single transaction.”).

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Other district courts have rejected the finding of closed-ended continuity, even when the predicate activity lasted for a long period of time.¹¹⁴ In *Puerto Rico Clean Energy Corp., v. Hatton-Gotry*, the court found that *twelve predicate acts over nine years* did not automatically compel a finding of closed-ended continuity. The court stated that other indicia of continuity may include whether the controversy involves multiple schemes (or just one scheme with a single objective), whether the scheme impacts many victims (or only a closed, targeted group of people), and whether the scheme has the potential to last indefinitely (or is instead of a finite nature).¹¹⁵

Despite the above, there are some district courts, however, which are finding that plaintiffs are adequately alleging closed-ended continuity, even when the facts are merely a “single-scheme, discrete goal.”¹¹⁶ A recent district court case, also arising in the 11th Circuit refutes the notion that continuity may *not* be found even when there is a “single-scheme, discrete goal.”¹¹⁷ These cases remain in the minority however, and practitioners are cautioned to try to find facts to support “open-ended continuity” when pleading their RICO complaint.¹¹⁸

C. CIVIL RICO CONSPIRACY PROVISION

The third issue being explored here is whether courts are in *error* when they dismiss RICO conspiracy claims based solely upon a finding that a substantive violation of RICO was not adequately pleaded.¹¹⁹ These decisions are wrongly decided. Courts must begin to take into account *Salinas*, and the circuits which have followed *Salinas* before reflexively dismissing RICO conspiracy section 1962(d) claims.¹²⁰

Two recent examples of circuit courts, wrongfully, dismissing section 1962(d) claims on the rationale that the section 1962(c) claims were not sufficiently pleaded come from the Second Circuit¹²¹ and the Fifth Circuit.¹²² In *D. Penguin Bros., Inc.*, the Second Circuit held that “the failure to state a claim for a substantive RICO violation, moreover, is

¹¹⁴ See cases discussed below.

¹¹⁵ See *Puerto Rico Clean Energy Corp. v. Hatton-Gotay*, 2015 WL 4481548, at *4 (D.P.R. July 23, 2015) (citing to *Home Orthopedics Corp. v. Rodriguez*, 781 F.3d 521, 529 (1st Cir. 2015)).

¹¹⁶ See *Lawrence Holdings, Inc. v. ASA Intern.; Ltd*, 2014 WL 5502464 (M.D. Fla. Oct. 30, 2014) (broadly construing civil RICO fraud claims, citing to *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 489 (1985)).

¹¹⁷ See *Chesapeake Employer’s Insurance Co., v. Eades et al.*, 77 F. Supp.3d 1241, 1255 (2015).

¹¹⁸ See *Alkhatib v. New York Motor Group, LLC*, 2015 WL 3507340, at *20-21 (E.D.N.Y. June 3, 2015) (not finding closed-ended continuity, but finding open-ended continuity when enterprise dealerships continued to operate their businesses).

¹¹⁹ See, e.g., *GT Roofing Co., Inc. LLC v. Killion*, 2015 WL 4255466, at *120 (E.D. Mo., July 13, 2015) (citing to *Beck v. Prupis*, 529 U.S. 494, 506-07 (2000)) (stating that in order to state a claim of RICO conspiracy under § 1962(d), a plaintiff must have sustained injury by “an overt act” that is “an act of racketeering or otherwise wrongful under RICO.”). This injury requirement is the only additional element which must be pleaded and proved in a civil RICO conspiracy claim as opposed to a criminal RICO conspiracy claim. See 18 U.S.C. section 1964(c).

¹²⁰ See discussion that *Salinas v. United States*, 522 U.S. 52 (1997), applies in a civil RICO case in *State Farm Mut. Auto Ins. Co. v. CPT Medical Services, P.C.*, 375 F.Supp.2d 141, 150-151 (E.D.N.Y. 2004).

¹²¹ See *D. Penguin Bros. Ltd., v. City National Bank*, 587 Fed.Appx. 663, 669 (2d Cir. 2014).

¹²² See *North Cypress Medical Center Operating Co., Ltd. v. Cigna Healthcare*, 781 F.3d 182, 201-204 (5th Cir. 2015).

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fatal to plaintiffs' RICO conspiracy claim under § 1962(d)."¹²³ The court in *D. Penguin Bros.* curiously cited to *Beck v. Prupis* in which the Supreme Court stated that it had *not* resolved "whether an actionable violation under section 1962(c) is necessary to allege a section 1962(d) claim, or rather whether it is sufficient for there to be a mere agreement to complete a substantive violation and the commission of one racketeering act which causes injury."¹²⁴

Beck rightfully recognizes the civil RICO conspiracy injury requirement, a requirement not necessary in criminal RICO.¹²⁵ The Court in *Beck* specifically did not resolve the issue of whether a section 1962(d) claim must be predicated upon an actionable violation of section 1962(a)-(c).¹²⁶ The Supreme Court was much clearer three years earlier in *Salinas*, stating that it is not required to allege or prove the actual completion of a single racketeering act by the defendant or any other member of the conspiracy because completion of an overt act is not an element of the offense.¹²⁷ Moreover, the Supreme Court in *Salinas* specifically held that there is no requirement that the defendant "himself committed or agreed to commit the two predicate acts requisite for a substantive offense under section 1962(c)."¹²⁸ The Court in *Salinas* further stated that "[a] conspirator must intend to further an endeavor which, if completed, would satisfy all of the elements of a substantive criminal offense, but it suffices that he adopt the goal of furthering or facilitating the criminal endeavor."¹²⁹

As a result of *Salinas*, four circuits, including the Second Circuit, have held in criminal RICO cases, that the government is not required to allege or prove the actual completion of a single racketeering act by the defendant or any other member of the conspiracy.¹³⁰ The most recent case expressly following the dictates of *Salinas* has been *U.S. v. Cornell*, which, in agreement with the other circuits which have addressed the issue, concluded that the district court's instruction requiring unanimity as to the types of racketeering acts that members of the conspiracy agreed to commit was sufficient, and no instruction as to the commission of specific acts was required.¹³¹

Therefore, I posit that the proper test in civil RICO conspiracy claims is *Salinas, plus Beck*. Here, one circuit has specifically applied *Salinas*, to a civil RICO conspiracy claim, *i.e.*, *Smith v. Berg*, where the court specifically held that "*Salinas* makes 'clear that section 1962(c) liability is not a prerequisite to section 1962(d) liability.'"¹³² Recent district court decisions reiterate this principle.¹³³

But, the other circuit cases following *Salinas* are all criminal RICO actions. Thus, adoption of *Salinas* to civil RICO conspiracy must be modified by the *Beck* holding in which (1) an agreement to complete a substantive violation; and (2) the *commission* of at least one

¹²³ *D. Penguin Bros. Ltd.*, 587 Fed.Appx. at 669 (citing to *First Capital Asset Management Inc. v. Satinwood*, 385 F.3d 159, 182 (2d Cir. 2004)).

¹²⁴ *Beck v. Prupis*, 529 U.S. at 506.

¹²⁵ *Id.* at 119.

¹²⁶ *Id.*

¹²⁷ *Salinas v. United States*, 522 U.S. 52, 61-66 (1997).

¹²⁸ *Id.* at 61.

¹²⁹ *Id.* at 65, emphasis added.

¹³⁰ See cases discussed below.

¹³¹ See *U.S. v. Cornell*, 780 F.3d 616, 625 (4th Cir., 2015) (*petition for cert. docketed*).

¹³² See *Smith v. Berg*, 247 F.3d 532, 537-538 (3rd Cir. 2001).

¹³³ See also *State Farm Mut. Auto Ins. Co. v. CPT Medical Services, P.C.*, 375 F.Supp.2d 141, 150-151 (E.D.N.Y. 2005).

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act of racketeering [by a conspirator] which caused the plaintiff injury is required.¹³⁴ But, consistent with *Salinas*, the *Beck* court held a plaintiff could sue co-conspirators under section 1964(c) for a violation of section 1962(d) who might not themselves violated one of the substantive provisions of section 1962.¹³⁵

Therefore, I would contend that courts are in error in automatically finding a RICO conspiracy claim fatal when there has been a failure to adequately state a claim for a RICO substantive violation. To sustain a civil RICO conspiracy claim, a plaintiff must be able to plausibly allege that the defendant *agreed* to facilitate a scheme in which conspirators who are operators or managers would commit at least two acts in the furtherance of the affairs of the enterprise.¹³⁶ Failure to properly allege this agreement, plus the commission by a conspirator of at least one racketeering act which directly caused the plaintiff injury, is the only basis upon which a district court may correctly dismiss a civil RICO conspiracy claim.

D. CONCLUSION

Because there is no private right of action for criminal breaches like extortion, mail fraud and wire fraud, the civil RICO statute is sometimes the only way to present a large-scale fraud scheme involving many victims in federal court, absent persuading an overburdened DOJ into conducting a criminal investigation. The stringent conditions placed on plaintiffs' attorneys by the lower courts obviously compromise the role of plaintiffs as the "private attorneys generals" as envisioned by Congress and the Supreme Court.

¹³⁴ *Beck v. Prupis*, 529 U.S. 494, 506-07, n. 10 (2000) (emphasis added).

¹³⁵ *Id.* at 506-507.

¹³⁶ *See United States v. Fernandez*, 388 F.3d 1199, 1230 (9th Cir. 2004); *Smith v. Berg*, 247 F.3d 532, 538 (3rd Cir. 2001).

