

U.S. Fifth Circuit "Pattern Jury Instructions" for civil RICO

This is Section 8 from U.S. Fifth Circuit "Pattern Jury Instructions" (available at their web site). Numbered issues are "issues of fact" to be found by jury to make the ultimate finding of a violation of RICO by saying "YES" to SPECIAL ISSUE 5 and finding a dollar figure for SPECIAL ISSUE 6. (near end of these pattern jury instructions)

EMPHASIS ADDED BY UNDERLINE AND BOLDFACE.
DEFINITIONS IN THESE INSTRUCTIONS ARE IN SECTION 1962(a)
THE VIOLATION ALLEGED, HOWEVER, IS ONLY 1962(c)
ALSO NOTE CAREFULLY FOOTNOTE 31 AND 32 (at end)

8. RICO

8.1

RICO CLAIMS

The plaintiff has brought claims against each defendant for alleged violations of the Racketeer Influenced and Corrupt Organizations Act, commonly referred to as RICO. Specifically, the plaintiff claims that each defendant violated Section 1962 [(a) (b) (c) or (d)] of RICO.

The plaintiff must establish by a preponderance of the evidence every element of a RICO claim. You should consider each and every element of a RICO cause of action only in the precise way that I will define them in these instructions. You must avoid confusing any of the elements of a RICO claim with your prior conceptions of the meaning of the terms that are used to describe the elements of a RICO claim.

SECTION 1962(a)

I. The plaintiff has alleged that each defendant violated Section 1962(a) of the RICO Act. To establish that a defendant violated Section 1962(a), the plaintiff must prove by a preponderance of the evidence each of the following four elements:

1. That there was an "enterprise";
2. That the enterprise engaged in or had some effect "on interstate commerce";
3. That the defendant derived income, directly or indirectly, from a "pattern of racketeering activity"; and
4. That some part of that income was used in acquiring an interest in or operating the enterprise.

A "**person**" under the law includes but is not limited to any person or entity that is capable of holding a legal or beneficial interest in property. A corporation is a legal entity that, like a person, is capable of holding a legal or beneficial interest in property.

The term "**enterprise**" includes any individual, partnership, corporation, association, or other legal entity. An enterprise "affects interstate and foreign commerce" if the enterprise either engages in, or has an effect on commerce between the states or between the states and foreign countries.

A "**racketeering activity**" means an act in violation of [(the federal mail fraud statute) (the federal wire fraud statute) (securities fraud statutes).] You will be instructed on the law pertaining to this (these) statute(s) to guide you in determining whether the plaintiff proved by a preponderance of the evidence that a defendant committed one or more violations of these statutes. A "racketeering activity" may also be referred to as a "predicate offense".

A "**pattern of racketeering activity**" requires that the plaintiff prove that **a defendant** committed at least **two acts of "racketeering activity"** within ten years of each other [and that both of the acts occurred after October 15, 1970.] The proof of two or more predicate acts does not in and of itself establish a "pattern" under RICO. The two acts need not be of the same kind. For example, the acts may be one act of mail fraud and one act of wire fraud. However, you must find by a preponderance of the evidence that the **two acts** occurred within the time specified and that each was **connected** with the other by some common **scheme**, plan or motive so as to constitute a "pattern". A series of wholly separate, isolated or disconnected acts of racketeering activity does not constitute a pattern.

In other words, two or more otherwise unrelated acts of "racketeering activity" do not constitute a "pattern" of racketeering activity under RICO unless the acts all relate to a common scheme by the defendant to continually conduct the affairs of the alleged enterprise for illicit personal benefit, whether monetary or otherwise, for himself or for another, by committing the predicate offenses.

As I instructed you, "**racketeering activity**" means an act in violation of [the mail fraud and/or wire fraud and/or securities fraud

statutes.] However you may not consider just any racketeering act allegedly committed by **a defendant** in violation of one of these statutes as bearing on the question of whether a defendant has committed two or more predicate offenses **as a pattern of racketeering activity**. In making this determination, you are to consider only those specific racketeering acts alleged by the plaintiff against a **particular** defendant. Furthermore, you cannot find that the defendant has engaged in a "pattern of racketeering activity" unless you unanimously agree to which of the alleged predicate offenses, if any, make up the pattern. Thus, it would not be sufficient if some of you should find that a defendant committed a violation of two or more predicate offenses under one particular statute as a pattern and the rest of you should find that a defendant committed a violation of two or more predicate acts under another statute as a pattern. In other words, you may not find that the defendant has engaged in a **pattern of racketeering activity** unless you [1] find a "pattern" of predicate offenses and [2] find that the plaintiff has proved by a preponderance of the evidence that a defendant committed each of the two or more predicate offenses that you find are necessary to make up the pattern.

You should note that the pattern must be one in which the defendant has participated as a "principal." Thus in order to satisfy the second element, the plaintiff must prove the defendant was a "principal" by showing by a preponderance of the evidence:

1. That the defendant knowingly and willfully committed, or knowingly and willfully aided and abetted in the commission of two or more alleged predicate offenses that constitute the alleged pattern of racketeering activity, and
2. That the defendant knowingly and willfully received income derived, directly or indirectly, from that alleged pattern of racketeering activity.

The word "**knowingly**," as that term has been used in these instructions, means that the action was done voluntarily and intentionally and not because of mistake or accident.

The word "**willfully**," as that term has been used in these instructions, means that the action was committed voluntarily and purposely, with the specific intent to do something the law forbids. The action must be done with a bad purpose: either to disobey or disregard the law.

The plaintiff has alleged that each of the defendants has committed two or more predicate acts including violations of the **mail fraud** and wire fraud statutes. It is your function to decide whether the plaintiff has proved by a preponderance of the evidence as to each defendant whether that defendant violated either or both of those statutes on one or more occasions, if at all. To establish that mail fraud has been committed, the plaintiff must prove each of the following by a preponderance of the evidence as to each defendant so charged:

1. Some person or persons willfully and knowingly devised **a scheme or artifice to defraud**, or a scheme for obtaining money or property by means of false pretenses, representations or promises, and
2. **Some person** or persons **used the United States Postal Service** by mailing, or by causing to be mailed, some matter or thing **for the purpose of executing** the scheme to defraud.

To act with "**intent to defraud**" means to act knowingly and with the specific intent to deceive. The words "**scheme**" and "**artifice**" in the **mail fraud statute** include **any plan or course of action intended to deceive others**, and to obtain property by false or fraudulent pretenses, representations, or promises, from the persons so deceived.

A statement or representation is "false" or "fraudulent" within the meaning of the mail fraud statute if it relates to a material fact and is known to be untrue or is made with reckless indifference as to its truth or falsity, and is made or caused to be made with intent to defraud. A statement or representation may also be "false" or "fraudulent" if it constitutes a half truth, or effectively conceals a material fact, with intent to defraud. A material fact is a fact that would be important to a reasonable person in deciding whether to engage in a particular transaction.

Good faith constitutes a complete defense to mail fraud. Good faith means the actor had a genuine belief that the information which was sent or given was true.

The plaintiff must **prove** by a preponderance of the evidence that one or more of the defendants knowingly and willfully **devised or intended to devise a scheme** to defraud which was substantially the same as the one alleged by the plaintiff and that the use of the United States Mail was closely related to the scheme in that one or more of the defendants either **mailed something** or caused it to be mailed in an attempt to execute or carry out the scheme. One causes the mails to be used if he does an act with knowledge that the use of the mails will follow in the ordinary course of business, or if he can reasonably foresee such use.

To establish that wire fraud has been committed, the plaintiff must prove by a preponderance of the evidence that the defendant used the telephone (telegraph) for the purpose of executing the scheme to defraud.

To establish wire fraud, it must be found that when the defendant performed an act, he knew, or reasonably could foresee, that the telephone or telegraph would be used to further a scheme or artifice to defraud.

With respect to the fourth element of Section 1962(a) of the RICO Act—use of income to acquire an interest in, establish or operate an enterprise—you must decide whether a defendant, directly or indirectly, used any part of the income derived from a pattern of racketeering activity to acquire an interest in, to establish, or to operate the alleged enterprise. The plaintiff must prove by a

preponderance of the evidence that a defendant, or any of them, invested income in a specific enterprise and that income was acquired through the scheme in which they illegally used the mails (telephone) with respect to that particular alleged enterprise.

The plaintiff claims that each of the following is an enterprise which affects interstate or foreign commerce, and that each defendant participated in each alleged enterprise through a separate and distinct pattern of racketeering activity:

[Describe enterprise allegations here]

SECTION 1962(b)

II. The plaintiff also claims that the defendants have violated Section 1962(b) of RICO. To establish a violation of Section 1962(b), the plaintiff must prove by a preponderance of the evidence each one of the following four elements:

1. That an enterprise existed;
2. That the enterprise engaged in or had some effect upon interstate or foreign commerce;
3. That the defendant engaged in a pattern of racketeering activity; and
4. That through the pattern of racketeering activity the defendant acquired or maintained an interest in, or controlled the alleged enterprise.

[I have already instructed you about the first three elements of Section (b) in the previous discussion of Section (a). If you find that the alleged enterprise existed and engaged in or had some effect upon interstate or foreign commerce, and that the defendant engaged in a pattern of racketeering activity, then you must consider the fourth element.]

This fourth element that plaintiff must prove by a preponderance of the evidence is that the defendants, or any of them, through the pattern of racketeering activity, acquired or maintained an interest in, or control of one or more of the alleged enterprises. To find that the plaintiff established this fourth element, you must find by a preponderance of the evidence not only that the defendants, or any of them, had some interest in or control over one or more of the alleged enterprises, but also that this interest or control was associated with or connected to the pattern of racketeering activity.

SECTION 1962(c)

III. The plaintiff also has alleged that defendants have violated Section 1962(c) of RICO. To establish that the defendant has violated Section 1962(c), the plaintiff must prove each of the following five elements by a preponderance of the evidence:

1. That an "enterprise" existed; (footnote 31)

2. That the enterprise engaged in, or had some effect upon, interstate or foreign commerce;

3. That the defendant was employed by or associated with the alleged enterprise;

4. That the defendant knowingly and willfully conducted or participated, directly or indirectly, in the conduct of the affairs of the alleged enterprise; and

5. That the defendant did so knowingly and willfully through a pattern of racketeering activity.

"Employed by or associated with" means some minimal association with the alleged enterprise. The defendant must know **something** about the alleged enterprise's activities as they relate to the racketeering activity.

The **fourth and fifth elements** require that the plaintiff prove by a preponderance of the evidence that the defendant knowingly and willfully conducted or participated in the conducting of the affairs of the alleged enterprise through a pattern of racketeering activity. The plaintiff must prove by a preponderance of the evidence a sufficient connection between the enterprise, the defendant, and the alleged pattern of racketeering activity. In order to establish a sufficient connection between the enterprise, the defendant and the alleged pattern of racketeering activity, the plaintiff must prove by a preponderance of the evidence:

1. That the defendant participated in the operation or management of the enterprise itself in such a way, directly or indirectly, as to have played some part in directing the affairs of the enterprise. (footnote 32)

2. That the defendant in fact engaged in the pattern of racketeering activity as the plaintiff claims;

3. That the defendant's association with or employment by the enterprise facilitated his commission of the racketeering acts; and

4. That the commission of these predicate acts had some direct or indirect effect on the alleged enterprise.

A person does not violate the law by merely associating with or being employed by an otherwise lawful enterprise the affairs of which

are being conducted by others through a pattern of racketeering activity in which he is not personally engaged.

SECTION 1962(d)

IV. Plaintiff also claims that the defendants violated Section 1962(d) of RICO because the defendants agreed or conspired to violate the RICO law.

A "conspiracy" in this sense is a combination or agreement of two or more persons to join together to accomplish an offense which would be in violation of Section 1962(a), (b), and/or (c) under the law that I have given you with respect to those sections.

To establish a violation of Section 1962(d), the plaintiff must prove by a preponderance of the evidence:

1. That two or more persons in some way or manner came to a mutual understanding to attempt to accomplish a common and unlawful plan, that is that while being employed by or associated with an enterprise, they engaged in activities which affected interstate or foreign commerce, or conducted the affairs of the alleged enterprise through a pattern of racketeering activity, in the manner charged; and
2. That the defendant knowingly and willfully became a member of a conspiracy by objectively indicating, through his words or actions, his agreement to conduct or participate, directly or indirectly, in the conduct of the affairs of an enterprise through a pattern of racketeering activity; and
3. That at least one of the conspirators committed at least one overt act during the existence of a conspiracy in an effort to accomplish some object or purpose of the conspiracy.

The definitions and instructions that I gave to you earlier as to "enterprise," "racketeering activity," "pattern of racketeering activity," "conduct through a pattern of racketeering activity" and "engaged in, or the activities of which affect, interstate or foreign commerce" apply here.

In regard to the first element of the claim of conspiracy, the evidence in the case need not show that the alleged members of the conspiracy entered into any express or formal agreement, or that they directly stated between themselves the details of the scheme and its object or purpose or the precise means by which the object or purpose was to be accomplished. Similarly, the evidence in the case need not establish that all of the means or methods alleged were in fact set forth in the indictment wherein fact agreed upon to carry out the alleged conspiracy, or that all of the means or methods which were agreed upon were actually used or put into operation. The plaintiff is not required to prove that all of the persons charged with being members of the conspiracy were such or that the alleged conspirators actually succeeded in accomplishing their unlawful objectives.

On the other hand, it is not enough if the evidence shows only that the alleged conspirators agreed to commit the acts of racketeering alleged by the plaintiff, without more, or that they agreed merely to participate in the affairs of the same alleged enterprise. Instead, the plaintiff must prove by a preponderance of the evidence that the alleged conspirators agreed to conduct or participate in the conduct of the affairs of the alleged enterprise and that they further agreed that their individual participations would be through two or more racketeering acts in furtherance of the affairs of the alleged enterprise. It does not matter that the alleged conspirators participated in the conduct of the affairs of the alleged enterprise through different, dissimilar or otherwise unrelated acts of racketeering activity, so long as the alleged racketeering acts would, if they were actually committed, create a "pattern of racketeering activity" as I defined that phrase to you.

As to the second element of the alleged conspiracy violation—knowing and willful membership in the conspiracy—the plaintiff must prove by a preponderance of the evidence:

1. That the defendant knew that the basic object of the alleged conspiracy was conducting the alleged enterprise through a pattern of racketeering activity;
2. That the defendant knowingly and willfully agreed to personally commit, or aid and abet the commission of at least two acts of racketeering as a "pattern of racketeering activity" as I have defined it; and
3. That the defendant knowingly and willfully agreed to conduct or participate in the conduct of the affairs of the alleged enterprise through this pattern of racketeering activity.

One may become a member of a conspiracy without full knowledge of all of the details of the unlawful scheme or without knowledge of the names and identities of all of the other alleged conspirators. If the plaintiff proves by a preponderance of the evidence that the particular defendant has knowingly and willfully joined the alleged conspiracy under the three standards I have just set forth, it does not matter that the defendant may not have participated in the earlier stages of the alleged conspiracy or scheme.

However, mere presence at the scene of some transaction or event, or mere similarity of conduct among various persons and the fact

that they may have associated with each other, and may have assembled together and discussed common aims and interests, does not necessarily prove the existence of a conspiracy. Also, a person who has no knowledge of a conspiracy, but who happens to act in a way which advances some object or purpose of a conspiracy, does not thereby become a conspirator.

The plaintiff need not prove that the defendant actually committed any of the acts that he may have agreed to commit in order to establish his membership in the conspiracy. You may consider only those racketeering acts alleged against the particular defendant by the plaintiff in determining whether that defendant has agreed to commit two acts of racketeering activity as a "pattern of racketeering activity." [These alleged racketeering acts are outlined as to each defendant on pages ___ of these instructions.]

To establish the third element, the plaintiff must prove by a preponderance of the evidence that at least one of the alleged conspirators committed at least one "overt act" during the existence of the alleged conspiracy. An "overt act" is a transaction or event, even one which may be entirely legal and innocent when considered alone, but which is knowingly committed by a conspirator in an effort to accomplish some object of the conspiracy. However, in accordance with my instructions during the trial, you may not consider any evidence of any alleged wrongful act, other than the alleged wrongful act which the plaintiff contends is a specific violation, as in any way bearing on the character of any defendant or as an indication that any defendant may have a propensity to commit any of the offenses charged.

In your consideration of this conspiracy claim, you should first determine whether the alleged conspiracy existed. If you conclude that a conspiracy did exist as alleged, you should next determine whether or not the defendant under consideration willfully became a member of that conspiracy.

In determining whether there was a conspiracy you may consider all the evidence in the case. If you find that there was a conspiracy then you may attribute the statements or acts of the _____, [insert names of co-conspirators] to the defendant. If you find that there was no conspiracy then you may not attribute the statements or acts of _____, [insert names of alleged co-conspirators] to the defendant.

If you find that no such conspiracy existed, then you must find for the defendants. However, if you are satisfied that such a conspiracy existed, you must determine who were the members of that conspiracy.

If you find that a particular defendant is a member of another conspiracy, but not the one charged by the plaintiff, then you must find for that defendant. In other words, you cannot find that a defendant violated Section 1962(d) unless you find that he was a member of the conspiracy charged, and not some other separate conspiracy.

CAUSATION

Finally, for the plaintiff to prevail under RICO, he must **prove** by a preponderance of the evidence that the defendant's RICO violations were the "proximate cause" of injury to the plaintiff's business or property. Therefore you must find that the plaintiff suffered an injury to his business or property and that the injury was caused by reason of the defendants' violation of RICO.

An injury or damage is **proximately caused** when the act played a substantial part in bringing about or actually causing injury or damage, and that the injury or damage was either a direct result or a reasonably probable consequence of the act.

A person is **injured in his business** when he suffers loss of money or profits or a reduction in the value or worth of his business.

A **finding** that the plaintiff was injured in his business or property because of the defendant's violation of RICO requires only that you find the plaintiff was harmed by the predicate acts.

However, to **find** that injury to the plaintiff's business or property was caused **by reason of** the defendants' violation of RICO, you must find that the injury to the plaintiff was caused by, and was a direct result of the defendants' violation of either Section 1962(a) or (b) or (c).

Therefore, you must **find** that the commission of the acts of racketeering, or the pattern of racketeering activity, or the conduct of the affairs of the enterprise through the pattern of racketeering activity directly resulted in the injury or played a substantial role in producing the injury.

In considering the issue of damages, if any, with respect to the RICO claims, you must assess the amount you find justified by a preponderance of the evidence as full, just and reasonable compensation for all of the damages to the plaintiff in his business or property. Damages may not be based on speculation because it is only actual damages (what the law calls compensatory damages) that you are to determine.

You should consider the amount of damages, if any, as to each defendant with respect to each RICO claim separately and independently from the amount of damages, if any, with respect to the other, non-RICO claims. For example, and by way of example only, if you determine that damages should be awarded to the plaintiff under his RICO claim, you should award full, just and reasonable compensation for damages under the RICO claim, without regard to the damages, if any, you might award under any other claim brought by the plaintiff.

The fact that I have given you instructions concerning the issue of the plaintiff's damages should not be interpreted in any way as an

indication that I believe that the plaintiff should or should not prevail in this case. The interrogatories which you will answer contain several questions about damages under different laws and different theories of recovery. You should not draw any inference from the fact that a damage question has been asked. You must answer each Interrogatory separately and award damages, if appropriate, independently of damages which you may award under any other interrogatory.

SUGGESTED RICO JURY INTERROGATORIES

NOTE: These special interrogatories for RICO claims are provided as illustrations and guidelines to assist in preparation of special interrogatories for other claims.

SPECIAL ISSUE NO. 1

Do you find from a preponderance of the evidence that any defendant received any income derived, directly or indirectly, from a pattern of racketeering activity in which that defendant participated as a principal, and that the defendant used or invested, directly or indirectly, any part of that income, to acquire an interest in, establish, or operate an enterprise which is engaged in, or the activities of which affect, interstate commerce?

Answer as to each defendant and each enterprise.

SPECIAL ISSUE NO. 2

What sum of money, if any, do you find from a preponderance of the evidence would reasonably compensate the plaintiff for actual damages, if any, to his business or property proximately caused by the operation of an enterprise, if any you have so found, through a pattern of racketeering activity, if any you have so found?

Answer separately as to each defendant and enterprise.

SPECIAL ISSUE NO. 3

Do you find from a preponderance of the evidence that any defendant listed below, through a pattern of racketeering activity, acquired or maintained, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce?

Answer yes or no as to each defendant.

SPECIAL ISSUE NO. 4

What sum of money, if any, do you find from a preponderance of the evidence would reasonably compensate the plaintiff for actual damages, if any, to his business or property arising from any of the defendants' acquisition or maintenance of each enterprise?

Answer separately as to each defendant and enterprise.

SPECIAL ISSUE NO. 5

Do you find from a preponderance of the evidence that any defendant listed below was employed by or associated with an enterprise engaged in, or the activities of which affected, interstate or foreign commerce?

Answer as to each defendant and each enterprise.

SPECIAL ISSUE NO. 6

What sum of money, if any, do you find from a preponderance of the evidence would reasonably compensate the plaintiff for actual damages to his business or property arising from any defendant's employment by or association with each enterprise, if any you have so found?

Answer separately as to each defendant and each enterprise.

SPECIAL ISSUE NO. 7

Do you find from a preponderance of the evidence that any defendant entered into a conspiracy with any other person to accomplish any of the purposes described below?

Answer yes or no separately as to each category and defendant.

1. To receive income derived, directly or indirectly, from a pattern of racketeering activity in which at least one of the defendants participated as a principal, to use or invest, directly or indirectly any part of such income, or the proceeds of such income, in an acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in or the activities of which affects interstate or foreign commerce.

2. To acquire or maintain through a pattern of racketeering activity any interest in or control, directly or indirectly, of any enterprise which is engaged in, or the activities of which affects interstate or foreign commerce.
3. To conduct or participate, directly or indirectly, in the conduct of the affairs of an enterprise which is engaged in, or the activities of which affect, interstate commerce or foreign commerce through a pattern of racketeering activity, while employed by or associated with such enterprise.

31. ¹Under Section **1962(c)**, the RICO "person" and the RICO "enterprise" **cannot be one and the same**. However, under Sections **1962(a)** and (b), "enterprise" and "person" may be the same and **need not be separate and distinct**. In re Burzynski, 989 F.2d 733 (5th Cir.1993); Landry v. Air Line Pilots Association, et al., 901 F.2d 404 (5th Cir.1990). *See also*, Liquid Air Corporation v. Rogers, et al., 834 F.2d 1297 (7th Cir.1987); Petro-Tech, Inc. v. The Western Company of North America, 824 F.2d 1349 (3d Cir.1987); Haroco v. American National Bank and Trust Company of Chicago, et al., 747 F.2d 384 (7th Cir.1984); Bowman v. Western Auto Supply Company, et al., 773 F.Supp. 174 (W.D.Mo.1991); Harrison v. Dean Witter Reynolds, Inc., et al., 695 F.Supp. 959 (N.D.Ill.1988).

32. ²The United States Supreme Court adopted the "**operation and management**" test of the Eighth Circuit in defining the scope of the meaning of "to conduct or participate ... in the conduct of such enterprise's affairs through a pattern of racketeering activity." *Reves v. Ernst & Young*, 507 U.S. 170, 113 S.Ct. 1163, 122 L.Ed.2d 525 (1993).