

Preface

This book is designed to provide a concise and readable analysis of the major legal issues arising in civil actions litigated under the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961–1968. Principal attention is focused on opinions of the U.S. Supreme Court and federal courts of appeals. Whether the law is clear or the circuits are in conflict, the primary authorities are reported and analyzed with minimal editorial comment. To the extent that any suggestions are offered toward resolving open issues, they are clearly indicated to be just that.

The courts daily wrestle with a fundamental problem: “When a statute [specifically, RICO] is broadly worded in order to prevent loopholes from being drilled in it by ingenious lawyers, there is a danger of its being applied to situations absurdly remote from the concerns of the statute’s framers.” *Fitzgerald v. Chrysler Corp.*, 116 F.3d 225, 226 (7th Cir. 1997). Virtually every issue discussed in this book manifests this concern—and the parallel concern that too stinting a civil reading could restrict intended criminal applications.

The late Justice Scalia once observed that, with Supreme Court guidance, one discrete aspect of RICO law (the pattern requirement) “produced the widest and most persistent Circuit split on an issue of federal law in recent memory.” *H.J. Inc. v. Nw. Bell Tel. Co.*, 492 U.S. 229, 251 (1989) (Scalia, J., concurring). Much has changed in the ensuing decades, but the judicial wariness of the RICO statute that generated that circuit split persists. The enhanced pleading requirements erected by the Supreme Court in the first decade of this century afford judges gatekeeping powers paralleling those they employ with expert witnesses, and judges employ them vigorously. *See, e.g., Aliev v. Borukhov*, 2016 U.S. Dist. LEXIS 88856, at *13–14 (E.D.N.Y. July 8, 2016) (“Courts apply the [pleading] requirements

rigidly because a RICO complaint is the ‘litigation equivalent of a thermonuclear device.’”). It is not uncommon to see RICO cases decided on the basis that: “There is a plausible claim that something odd was going on Oddity alone won’t support a RICO claim.” *Jupiter Aluminum Corp. v. Sabaitis*, 2016 U.S. Dist. LEXIS 123843, at *24, 2016 WL 4764951, at *8 (N.D. Ind. Sept. 13, 2016).

The goal of this book is to identify the salient issues to facilitate clarity in the analysis and resolution of RICO disputes by identifying those issues that are settled, segregating those that are not, and addressing practical problems posed by the lingering uncertainty of outcome-determinative legal standards. At the end of the day, one might still be tempted to join in the observation of the court in *Mayfield SWD, LLC v. Blevins*, 2011 U.S. Dist. LEXIS 5617, at *11 n.9 (W.D. Okla. Jan. 19, 2011): “It is sometimes difficult to envision how, even after a detailed and thorough explanation of the fine points of RICO’s ‘enterprises,’ ‘patterns,’ and the like, a properly instructed jury’s reaction could be other than a blank stare.”