Chapter 1

Introduction*

§ 1. Four Causes of Action

The civil Racketeer Influenced and Corrupt Organizations Act (RICO) cause of action is created by 18 U.S.C. § 1964(c):

> Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefore in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorneys fee, except that no person may rely upon any conduct that would have been actionable as fraud in the purchase or sale of securities to establish a violation of section 1962. The exception contained in the preceding sentence does not apply to an action against any person that is criminally convicted in connection with the fraud, in which case the statute of limitations shall start to run on the date on which the conviction becomes final.

The first sentence of this provision has generated an avalanche of litigation. The reference to § 1962 incorporates four separate causes of action arising out of various aspects of racketeering activity (statutorily labeled "prohibited activities").

* Earlier editions of this treatise are cited as **Treatise** throughout this book.

- **Investment.** Under § 1962(a), it is unlawful to invest any income derived from a pattern of racketeering activity (or through collection of an unlawful debt)[1] to acquire any interest in, or to establish or operate, any enterprise that is engaged in or affects interstate or foreign commerce.[2]
- **Acquisition.** Under § 1962(b), it is unlawful to acquire or maintain any interest in, or control of, any enterprise that is engaged in or affects interstate or foreign commerce through a pattern of racketeering activity or collection of an unlawful debt.[3]
- **Participation.** Under § 1962(c), it is unlawful for any person to conduct or participate in the conduct of the affairs of an enterprise that is engaged in or affects interstate or foreign commerce through a pattern of racketeering activity or collection of an unlawful debt.[4]
- **Conspiracy.** Under § 1962(d), it is unlawful for any person to conspire to violate any of the provisions of § 1962(a)–(c).[5]

An extensive body of law has grown up around the questions of standing,[6] injury and damages,[7] equitable relief,[8] causation,[9] and a

1. Allegations of the "collection of unlawful debt" are rare in civil RICO cases. This subject is discussed primarily in § 11(E) *infra*. Throughout this book the emphasis is placed on the "pattern of racketeering activity" jurisprudence.
2. *See* §§ 6–7 *infra* for a discussion of standing to sue under § 1962(a) and § 12 *infra* for the elements of a cause of action under that provision.
3. *See* §§ 6 and 8 *infra* for a discussion of standing to sue under § 1962(b) and § 13 *infra* for the elements of a cause of action under that provision.
4. *See* §§ 6 and 9 *infra* for a discussion of standing to sue under § 1962(c) and § 14 *infra* for the elements of a cause of action under that provision.
5. *See* §§ 6 and 10 *infra* for a discussion of standing to sue under § 1962(d) and § 15 *infra* for the elements of a cause of action under that provision.
6. *See* chapter 3 for a general discussion of standing under § 1964. Note that the Supreme Court has indicated that the phrase "statutory standing" is misleading because it "does not implicate subject-matter jurisdiction," Lexmark Int'l, Inc. v. Static Control Components, Inc., 134 S. Ct. 1377 (2014), but it is used in this book as a convenient shorthand for the zone-of-interests and proximate cause requirements because many of the cases use that terminology. *See* generally § 6 *infra*.
7. *See* §§ 6(A)(2)–(3), 18–19 *infra*.
8. *See* § 20 *infra*.
9. *See* § 6(A)(4) *infra*.

variety of pleading and practice issues.[10] The question of constitutionality is not yet definitively resolved,[11] and complicated questions involving aider and abettor liability and vicarious liability exist.[12]

§ 2. History and Purpose

RICO was enacted as Title IX of the Organized Crime Control Act of 1970.[13] Originally, the Senate bill[14] limited civil remedies to injunctive actions brought by the United States, but the House added a treble-damages remedy modeled on section 4 of the Clayton Act.[15] The Senate acquiesced in this amendment.[16] Due to this Clayton Act pedigree, the courts frequently turn to Clayton Act case law for guidance in construing RICO.[17]

As the title of the statute suggests, the Organized Crime Control Act of 1970 sought "the eradication of organized crime in the United States" by providing enhanced and novel legal tools, including RICO.[18] Apart from governmental applications, civil RICO cases rarely have anything to do with these ends. The eleventh-hour addition of a civil remedy not confined to governmental plaintiffs may help to explain the volume of issues that Congress never expected or considered.[19] While RICO is designed to combat the infiltration

10. *See* generally chapter 7 *infra.*
11. *See* chapter 10 *infra.*
12. *See* chapter 5 *infra.*
13. Pub. L. No. 91-452, 84 Stat. 922, 941 (1970).
14. S. 30, 91st Cong., 2d Sess. (1970).
15. H.R. 1549, 91st Cong., 2d Sess., 116 Cong. Rec. 35,363–64 (1970).
16. 116 Cong. Rec. 36,296 (1970).
17. *See, e.g.*, Agency Holding Corp. v. Malley-Duff & Assocs., Inc., 483 U.S. 143 (1987); Shearson/Am. Express, Inc. v. McMahon, 482 U.S. 220 (1987); Holmes v. Sec. Investor Prot. Corp., 503 U.S. 258, 268 (1992); *cf.* Comment, Holmes v. Securities Investor Protection Corp., 18 Del. J. Corp. L. 923, 927 (1993) (citing **Treatise**). *But see* RJR Nabisco, Inc. v. European Cmty., 136 S. Ct. 2090, 2109–10 (2016) (rejecting interpretation of § 1964(c) as "cover[ing] foreign injuries just because the Clayton Act does so").
18. Statement of Findings and Purpose, Pub. L. No. 91-452, 84 Stat. 922 (1970), *reprinted in* 1970 U.S. Code Cong. & Admin. News 1073.
19. *Cf. Kurzweil, Criminal & Civil RICO: Traditional Canons of Statutory Interpretation and the Liberal Construction Clause*, 30 Colum. J.L. & Soc. Probs. 41, 60 (1996) (quoting **Treatise**); Note, *RICO*, 17 U. Ark. Little Rock L.J. 343, 353 (1995) (citing **Treatise**).

into and corruption of America's legitimate business community by organized crime,[20] it is only occasionally put to these ends in civil cases today.

§ 3. Liberal Construction

Section 904(a) of the Organized Crime Control Act of 1970 expressly provided that "[t]he provisions of this title [RICO] shall be liberally construed to effectuate its remedial purposes."[21] This admonition has been taken to heart by the courts, particularly the Supreme Court.[22]

There is always tension between a liberal construction of a statute and a tendency to overextend it to accomplish ends that the statute was never designed to achieve.[23]

Few courts would disagree with the proposition that "the general principle that RICO is to be accorded a liberal interpretation cannot justify expanding [the statute] beyond the limits of [its] own language,"[24] or that to do so would sometimes "permit abrogation of the explicit words of the statute."[25] The problem is always

20. Pub. L. No. 91-452, 84 Stat. at 943.

21. 1990 U.S. Code Cong. & Admin. News 1104.

22. *See, e.g.*, Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479 (1985) ("if Congress' liberal-construction mandate is to be applied anywhere, it is in § 1964, where RICO's remedial purposes are most evident"; rejecting attempts to engraft certain procedural limitations on civil RICO actions); Tafflin v. Levitt, 493 U.S. 455 (1990) (applying a liberal construction in endorsing concurrent state court jurisdiction over civil RICO claims); Boyle v. United States, 556 U.S. 938 (2009) (applying liberal construction in defining the "structure" required of associated-in-fact enterprises).

23. *See* Allen v. New World Coffee, Inc., 2002 U.S. Dist. LEXIS 4624, at *6, 2002 WL 432685, at *2 (S.D.N.Y. March 19, 2002) (citing and quoting **Treatise**); *see also* Geisler, *A Bridge to Somewhere: How a Bolder Causal Analysis Can Shape Civil RICO into the Ideal Free Market Safeguard*, 54 St. Louis L.J. 609, 614 & n.41 (2010) (citing and quoting **Treatise**); Herbst, *Injunctive Relief and Civil RICO: After* Scheidler v. National Organization for Women, Inc.*, RICO's Scope and Remedies Require Reevaluation*, 53 Cath. U. L. Rev. 1125, 1134 & n.56 (2004) (citing and quoting **Treatise**). *Compare, e.g.*, Grider v. Texas Oil & Gas Corp., 868 F.2d 1147 (10th Cir. 1989), and Ouaknine v. McFarlane, 897 F.2d 75 (2d Cir. 1990) (both rejecting the argument that the legislatively mandated liberal construction requires expansion of section 1962(a) beyond the "investment use" doctrine (discussed in § 7 *infra*)), *with* Busby v. Crown Supply, Inc., 896 F.2d 833 (4th Cir. 1990) (accepting the same argument).

24. *Grider*, 868 F.2d at 1150.

25. *Ouaknine*, 897 F.2d at 83.

determining when the expansion is undue and at what point the explicit words of the statute are effectively abrogated. As the Supreme Court observed in *Reves v. Ernst & Young*: "RICO's 'liberal construction' clause . . . seeks to ensure that Congress' intent is not frustrated by an overly narrow reading of the statute, but it is not an invitation to apply RICO to new purposes that Congress never intended. Nor does the clause help us to determine what purposes Congress had in mind."[26] As a consequence, "[t]he most liberal construction of RICO's language is not always the proper one."[27] The Tenth Circuit captured the competing considerations when it wrote: "[A]lthough we read the terms of the statute liberally in order to effectuate its remedial purposes, we must also exercise caution."[28] Many decisions make this point in various ways and in various contexts.[29]

26. 507 U.S. 170, 183–84 (1993).

27. Jackson v. Sedgwick Claims Mgmt. Servs., Inc., 731 F.3d 556, 569 (6th Cir. 2013).

28. US Airline Pilots Ass'n v. AWAPPA, LLC, 615 F.3d 312, 317 (4th Cir. 2010) (citation and internal quotation marks omitted). Courts from time to time express some frustration at the fact "that we have strayed a good distance from the original intent behind the RICO statute . . . and that the Supreme Court has to some extent validated this trend. Nonetheless, the Supreme Court has also made it clear that RICO's 'liberal construction' clause . . . is not a blank check for those who wish to advance novel interpretations of the statute." Emery v. Am. Gen. Fin., Inc., 71 F.3d 1343, 1349 n.1 (7th Cir. 1995).

29. *See, e.g.*, Boar, Inc. v. Cnty. of Nye, 499 F. App'x 713 (9th Cir. 2012) ("RICO was 'intended to combat organized crime, not to provide a federal cause of action and treble damages to every tort plaintiff'") (citation omitted); Jones v. Liberty Bank & Trust Co., 461 F. App'x 407 (5th Cir. 2012) ("[b]ankers do not become racketeers by acting like bankers" (quoting Sinclair v. Hawke, 314 F.3d 934, 943 (8th Cir. 2003)); RSM Prod. Corp. v. Freshfields Bruckhaus Deringer US LLP, 682 F.3d 1043, 1052 (D.C. Cir. 2012) ("we find it extremely difficult to fathom any scenario in which an attorney might expose himself to RICO liability by offering conventional advice to a client or performing ordinary legal tasks (that is, by acting like an attorney))" (citation and internal quotation marks omitted); Lundy v. Catholic Health Sys. of Long Island, Inc., 711 F.3d 106 (2d Cir. 2013) ("Federal courts are properly wary of transforming any civil FLSA violation into a RICO case"); Nowicki v. Delao, 506 F. App'x 514, 516 (7th Cir. 2013) ("civil RICO 'demands more than a straightforward case of malicious prosecution . . . to open up its window to treble damages'") (citation omitted); Whitney, Bradley & Brown, Inc. v. Kammermann, 436 F. App'x 257, 263 (4th Cir. 2011) ("if the pattern requirement of the civil RICO statute has any force whatsoever, it is to prevent ordinary commercial

In this respect, courts have not always sufficiently heeded the fact that the liberal construction called for in Section 904(a) is one that will "effectuate [RICO's] remedial purposes." Strictly speaking, these purposes—as set forth in the statement of findings of the statute—are primarily "the eradication of organized crime" because of the serious threat that it poses to American society.[30] Often, it is considered necessary to construe the statute liberally in cases not involving organized crime in order to effectuate the intended remedial purpose, since any stinting construction may also apply in organized crime prosecutions. However, not every civil case has criminal implications or requires a liberal construction to effectuate the statutory intent.[31]

There is, moreover, a salient statutory distinction between civil and criminal RICO actions—namely, § 1964(c). Section 1962 describes behavior that is considered dangerous to society in and of itself. For that reason, criminal penalties automatically attach. Section 1964(c), however, interposes a four-factor test before civil liability accrues for the same conduct.[32] The distinguishing function of § 1964(c)—and its injury and causation components—underlay numerous civil standing requirements unparalleled in the criminal law, such as the investment-injury requirement of § 1962(a),[33] the

fraud from being transformed into a federal RICO claim") (citation, internal quotation marks, brackets, and ellipsis omitted); Meier v. Musburger, 588 F. Supp. 2d 883 (N.D. Ill. 2008) ("Even though Congress never intended that the statute be employed to allow plaintiffs to turn garden-variety state law fraud and breach of fiduciary duty cases into RICO claims, from the beginning, the breadth of RICO's text and the lure of treble damages and attorneys' fees proved irresistible to those bent on federalizing such claims. . . . Thus, plaintiffs have tried—unsuccessfully—to wedge every manner of ordinary dispute into a RICO case. The reported cases run the gamut from a delivery of damaged furniture . . . to a breach of a computer leasing agreement . . . to poaching customers from a competitor . . . to—as here—a dispute over attorney's fees. . . . A few plaintiffs have trafficked in more exotic fare: a compulsive gambler complaining about a casino's promotional mailings . . . or a track star's dispute of a failed drug test.") (citations omitted).

30. 1970 U.S. Code Cong. & Admin. News 1073.

31. *Cf.* Shapiro, *Attorney Liability Under RICO § 1962(c) After* Reves v. Ernst & Young, 61 U. Chi. L. Rev. 1153, 1155 (1994) (citing **Treatise**).

32. *See* § 6 *infra.*

33. *See* § 7 *infra.*

acquisition-injury requirement of § 1962(b),[34] the proximate cause jurisprudence of § 1962(c),[35] and the requirement of injury from a predicate (overt) act under § 1962(d).[36] The significance of § 1964(c) for statutory construction purposes is not always considered as fully as it ought to be.[37]

There are also, since 2007, the stringent pleading requirements imposed by the Supreme Court's decisions in *Bell Atlantic Corp. v. Twombly*[38] and *Ashcroft v. Iqbal*.[39] Even before *Twombly* and *Iqbal*, the courts imposed strict pleading obligations on civil RICO plaintiffs. *Twombly* and *Iqbal* have intensified these requirements.[40]

34. *See* § 8 *infra*.
35. *See* § 6(A)(4) *infra*.
36. *See* § 10 *infra*.
37. *See* Beck v. Prupris, 162 F.3d 1090 (11th Cir. 1998) ("for a criminal conspiracy charge, there is no need to prove that the conspiracy led to an injury-causing criminal activity. In a civil context, however, the purpose of a conspiracy claim is to impute liability—to make X jointly liable with D for what D did to P. . . . Those courts that have recognized a [§ 1962(d) conspiracy] claim [where the injury was not the product of a predicate act] usually rely on criminal RICO cases, thus demonstrating a possible confusion about the separate functions of civil and criminal conspiracy claims"), *aff'd*, 529 U.S. 494 (2000).
38. 550 U.S. 544 (2007).
39. 129 S. Ct. 1937 (2009).
40. *See* § 23 *infra*.