**ANNOTATIONS AND COMMENTS**

The Eleventh Circuit held in *United States v. Pepe*, 747 F.2d 632, 675-76 (11th Cir. 1984) that “a plain reading of the statute indicates that RICO does not contain any separate *mens rea* or scienter elements beyond those encompassed in its predicate acts.” As a result, in a § 1962 case, the only relevant mental state is that necessary to commit the predicate acts. *See, e.g., Edwards v. Prime, Inc.*, 602 F.3d 1276, 1292-97 (11th Cir. 2010) (analyzing different knowledge and intent requirements of specific categories of predicate offenses). This is in contrast to a RICO conspiracy, which requires the additional element of agreement. *United States v. Martino*, 648 F.2d 367, 383 (5th Cir. 1981).

The Eleventh Circuit’s treatment of this issue is, however, not completely consistent. For example, in *Pepe*, the court affirmed where a Defendant had been acquitted of RICO conspiracy but found guilty of a § 1962 violation, noting that the evidence was sufficient to permit the jury to find that the Defendant engaged in racketeering activity and was an active participant in the enterprise, which was characterized as “knowing participant in the enterprise.” 747 F.2d at 665. As between these two, the requirement that the Defendant be an active participant seems to be more appropriate but this is not a completely settled area of law in this circuit. Accordingly, current case activity should be researched before this instruction is used to determine if more recent circuit authority on this issue is available.

This instruction assumes a single plaintiff suing a single defendant. It needs to be modified if there are multiple parties.

In *Beck v. Prupis*, 162 F.3d 1090, 1095 n.8 (11th Cir. 1998), the Eleventh Circuit noted that § 1962 of RICO prohibits the investment of income derived from a pattern of racketeering activity in any enterprise involving interstate commerce. See also *Pelletier v. Zweifel*, 921 F.2d 1465, 1489 (11th Cir. Ga. 1991) ("Section 1962 makes it a crime for anyone who has derived income from ‘a pattern of racketeering activity… in which such person has participated as a principal… to use or invest, directly or indirectly, any part of such income… in acquisition of any interest in, or the establishment or operation of, any enterprise… engaged in… interstate… commerce.") (quoting 18 U.S.C. § 1962); *Club Car, Inc. v. Club Car (Quebec) Import, Inc.*, 276 F. Supp. 2d 1276, 1288 (S.D. Ga. 2003) ("Section 1962 has two components: receiving income from a pattern of racketeering activity, and investing that income in an enterprise.") (quoting *Georgia v. Dairymen, Inc.*, 813 F. Supp. 1580, 1584 (S.D. Ga. 1991)).

The definition of “predicate act” comes from *Williams v. Mohawk Indus., Inc.*, 465 F.3d 1277, 1283 (11th Cir. 2006) (quoting *Maiz v. Virani*, 253 F.3d 641, 671 (11th Cir. 2001)). "A ‘pattern' of racketeering activity is shown when a racketeer commits at least two distinct but related predicate acts." *Id*. (quoting *Maiz v. Virani*, 253 F.3d at 671). In *Williams*, the Court affirmed denial of the defendant's Rule 12 motion to dismiss the RICO claims, finding that the plaintiff's allegations that the defendant had "committed hundreds, even thousands, of violations of federal immigration laws" were sufficient to plead a "pattern of racketeering activity." *Id*.

The continuity and relationship elements are derived from *United States v. Browne*, 505 F.3d 1229, 1257 (11th Cir. 2007) (noting that to establish a pattern of predicate acts, the plaintiff must prove that the predicate acts relate to each other and have continuity). In defining how “the predicate acts must relate to each other,” the Eleventh Circuit has stated this “the predicate acts must ‘have the same or similar purposes, results, participants, victims, or methods of commission, or otherwise [be] interrelated by distinguishing characteristics and… not [be] isolated events.'") *Id*. (quoting *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 496, n.14 (1985)); *United States v. Starrett*, 55 F.3d 1525, 1543 (11th Cir. 1995) (same). In *Starrett*, the court found that the evidence that the defendant used a communication facility in the perpetration of a felony, transported an individual across state lines for the purpose of prostitution, and intended to distribute cocaine and marijuana supported a finding that the defendant's predicate acts were related. *Id*. at 1547. Specifically, the court found that "[f]our of the [defendant's] predicate acts shared the purpose of facilitating illegal prostitution, and the other four predicate acts share the purpose of furthering narcotics distribution." Id.

*Starrett* also discussed examples of how the two required predicate acts need not be the same type of acts to be related. *Id*. (finding that the evidence that the defendant used a communication facility in the perpetration of a felony, transported an individual across state lines for the purpose of prostitution, and intended to distribute cocaine and marijuana supported a finding that the defendant's predicate acts were related).

As for continuity, “[p]redicate acts demonstrate continuity if they are either ‘a closed period of repeated conduct,’ or ‘past conduct that by its nature projects into the future with a threat of repetition.’” *Id*. at 1543 (quoting *H.J., Inc. v. NW Bell Tel. Co.*, 492 U.S. 229 (1989)). *See also,* *Browne*, 505 F.3d at 1257. The continuity of predicate acts was found to be satisfactorily alleged where defendants “had agreed to a scheme whereby [one] would supply [the other] with cocaine on an on-going basis.” *Starrett*, 55 F.3d at 1547.

The second element requires a plaintiff to establish that the defendant “participated as a principal.” Courts have interpreted 18 U.S.C. § 2 and as permitting plaintiff to satisfy this element by establishing that a defendant either: aided, abetted, counseled, commanded, induced, or procured the commission of two or more alleged predicate offenses that constitute the pattern of racketeering activity ; or willfully caused acts to be done which if directly performed by him would constitute the commission of two or more alleged predicate offenses that constitute the pattern of racketeering activity. *See, e.g., In re Sahlen & Assoc., Sec. Litig.*, 773 F. Supp. 342, 368 (S.D. Fla. 1991) (aiding and abetting); *Grimsley v. First Alabama Bank, No. 88000113*, 1988 U.S. Dist. LEXIS 16042, at \*3 (S.D. Ala. 1988). Also premised on 18 U.S.C. § 2 is that a defendant must have intent or knowledge in order to act as a principal. *Id*. (“One cannot aid, abet, counsel, command, induce, willfully cause or perform without knowledge or intent.”).

An example of the third element - that “some part of the income or proceeds of that income derived from the racketeering activity was used to acquire, maintain an interest in, or operate and enterprise” - was discussed in *In re Sahlen*. 773 F. Supp at 366 (finding that the plaintiffs had sufficiently alleged a violation of 1962 by alleging that the defendants had derived income as officers and directors of a company through fraudulent securities offerings and sales of stock and then invested this income back into the company to continue the scheme and guarantee the company’s growth and increased value, to the detriment of the investing public).

18 U.S.C. 1961 provides the definition of enterprise as “any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity.” For discussion regarding the definitions of individual or entity enterprise or association-in-fact enterprise, *see Starrett*, 55 F.3d at 1541 (the South Florida Chapter of the Outlaw Motorcycle Club constituted an enterprise under 18 U.S.C. § 1961); *Williams*, 465 F.3d at 1284 (“[T]he definitive factor in determining the existence of a RICO enterprise is the existence of an association of individual entities, however loose or informal, that furnishes a vehicle for the commission of two or more predicate crimes, that is, the pattern of racketeering activity.”) (quoting *United States v. Goldin Industries, Inc.*, 219 F.3d 1271, 1275 (11th Cir. 2000)). In *Williams*, the Court found that the plaintiff’s allegations that the defendant corporation worked with third-party temp agencies/recruiters to bring illegal workers into this country for the defendant’s benefit were sufficient to allege an “enterprise” under this section.

In *Boyle v. United States*, 556 U.S. 938, 946-47, 129 S. Ct. 2237, 2244 (2009), the Supreme Court held that “an association-in-fact enterprise must have at least three structural features: a purpose, relationships among those associated with an enterprise, and longevity sufficient to permit these associates to pursue the enterprise’s purpose.”). *See also Williams*, 465 F.3d at 1284-85 (allegations that the defendant corporation worked with third-party temp agencies/recruiters to bring illegal workers into this country for the defendant’s benefit were sufficient to allege common purpose). In *Boyle*, the defendant was charged in connection with a series of bank thefts allegedly conducted by a group that was loosely organized and did not appear to have a leader or hierarchy. The Supreme Court ruled that although the three structural features set forth above were necessary for a finding of an association -in-fact enterprise, there are no additional structural features such as hierarchy or a chain of command required.

Section 1962 also requires that an enterprise have a property interest that can be acquired by the defendant. *See Nat’l Org. for Women v. Scheidler*, 510 U.S. 249, 259, 114 S. Ct. 798, 804 (1994) (“The ‘enterprise’ referred to in subsections and [of § 1962] is thus something acquired through the use of illegal activities or by money obtained from illegal activities. The enterprise in these subsections is the victim of unlawful activity and may very well be a ‘profit-seeking’ entity that represents a property interest and may be acquired. But the statutory language in subsections and does not mandate that the enterprise be a ‘profit-seeking’ entity; it simply requires that the enterprise be an entity that was acquired through illegal activity or the money generated from illegal activity. By contrast, the ‘enterprise’ in subsection [of § 1962] connotes generally the vehicle through which the unlawful pattern of racketeering activity is committed, rather than the victim of that activity… Consequently, since the enterprise in subsection is not being acquired, it need not have a property interest that can be acquired nor an economic motive for engaging in illegal activity; it need only be an association in fact that engages in a pattern of racketeering activity. Nothing in subsections and directs us to a contrary conclusion.”); *Lockheed Martin Corp. v. Boeing Co.*, 357 F. Supp. 2d 1350, 1368 (M.D. Fla. 2005) (“Unlike a § 1962 enterprise, which ‘generally connotes the vehicle through which the unlawful pattern of racketeering activity is committed, a 1962 enterprise is something acquired through the use of illegal activities or by money obtained from illegal activities. A § 1962 enterprise is, in other words, the victim of unlawful activity, not the vehicle through which that activity is committed. (citations and quotations omitted).

Pursuant to 18 U.S.C. 1964, [a]ny person injured in his business or property by reason of a violation of section 1962 . . . may sue . . . in any appropriate United States district court and may recover treble damages and a reasonable attorneys fee. However, 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. This exclusion concerning securities does not apply to an action against any person that is criminally convicted in connection with a securities fraud. 18 U.S.C. 1964. In contrast to the injury requirement under 1962, which my be satisfied by harm alleged to be the result of racketeering activity,, a majority of courts that have addressed the issue have determined that a claimant under 1962 must plead an injury which stems not from the racketeering predicate acts themselves but from the use or investment of . . . racketeering income.). *Id*. at 1369 (quoting *Fogie v. Thorn Ams., Inc.*, 190 F.3d 889, 895 (8th Cir. 1999) (adopting the majority position that limits standing only to plaintiffs who have suffered injury from the use or investment or racketeering income)); *Club Car, Inc.*, 276 F. Supp. 2d at 1288 (The plain language of Federal RICO shows that injury by reason of investment of racketeering income investment injury is required.) (quoting *Dairymen, Inc.*, 813 F. Supp. at 1584)). In *Club Car*, the court dismissed the plaintiffs 1962(a) claim for failure to allege any injury resulting from the investment of racketeering income, as opposed to injury from the underlying predicate acts. 276 F. Supp. 2d at 1288. *See also, Danielsen v. Burnside-Ott Aviation Training Center, Inc.*, 291 U.S. App. D.C. 303, 941 F.2d 1220, 1229 (D.C. Cir. 1991) (holding that injury to a plaintiff must flow from a Defendants use or investment of racketeering income.)