**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(a) 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(b) of RICO prohibits acquisition through a pattern of racketeering activity of interest in an enterprise involving interstate commerce. *See also Pelletier v. Zweifel*, 921 F.2d 1465, 1489 (11th Cir. Ga. 1991) (“Section 1962 imposes criminal liability on anyone who ‘through a pattern of racketeering activity acquire[s] or maintain[s], directly or indirectly, any interest in or control of any enterprise… engaged in… interstate… commerce.’”) (quoting 18 U.S.C. § 1962; *Avirgan v. Hull*, 691 F. Supp. 1357, 1361 (S.D. Fla. 1988) (“A defendant violates § 1962 by acquiring or maintaining through a pattern of racketeering activity any interest in or control of any enterprise which is engaged in or the activities of which affect interstate commerce.”).

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*. 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.

This instruction differs from the instruction for § 1962 in that it requires a plaintiff to establish that a defendant acquired, maintained an interest in, or obtained control over an enterprise, through a pattern of racketeering activity. *See Pelletier*, 921 F.2d at 518 (discussing necessity of nexus between racketeering activities and acquisition of interest in or control of enterprise and finding that the plaintiff’s complaint failed to indicate how the defendant acquired or maintained a partnership interest in the enterprise at issue through a pattern of racketeering activity); *Johnson Enters. of Jacksonville v. FPL Group*, 162 F.3d 1290, 1317 (11th Cir. 1998) (finding “no evidence that any of the defendants ‘acquired or maintained, directly, or indirectly, an interest in or control of [the enterprise at issue] through a pattern of racketeering activity.’”) (quoting U.S.C. § 1962(b)).

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.

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 attorney’s fee. *See, Fuller v. Home Depot Servs., LLC*, 512 F. Supp. 2d 1289, 1294 (N.D. Ga. 2007) (“Just as § 1962 requires an investment injury, § 1962 requires an acquisition injury.”). 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.

There is a split within the circuit regarding this injury causation issue. However, the prevailing (and more recent) authority establishes that the plaintiff’s injury must have resulted from the acquisition itself. *Compare: Fuller v. Home Depot Servs., LLC*, 512 F. Supp. 2d 1289, 1294 (N.D. Ga. 2007) (finding injury from predicate acts insufficient when injury did not result from alleged acquisition); *Smart Sci. Labs., Inc. v. Promotional Mktg. Servs., No. 8:07-CV-1554-T-24EAJ*, 2008 U.S. Dist. LEXIS 118270, at \*20 (M.D. Fla. June 27, 2008) (“[Plaintiff] fails to allege injury by reason of [Defendant’s] acquisition or control of an enterprise through a pattern of racketeering activity.”); *Design Pallets, Inc. v. Grayrobinson, P.A.*, 515 F. Supp. 2d 1246, 1255 & n.2 (M.D. Fla. 2007) (dismissing § 1962 as duplicative of § 1962 claim when plaintiff failed to explain what additional injury resulted from defendant’s interest or control of enterprise) (citing *Lightning Lube v. Witco Corp.*, 4 F.3d 1153 (3rd Cir. 1993)); and *Club Car, Inc. v. Club Car (Quebec) Import, Inc.*, 276 F. Supp. 2d 1276, 1288 (S.D. Ga. 2003) (concluding § 1962 claim fails when injury did not result from acquisition of enterprise) with: *In re Sahlen & Assoc., Sec. Litig.*, 773 F. Supp. 342, 369 (S.D. Fla. 1991) (“[Defendants] contend that Plaintiffs’ claims are deficient in that they fail to allege an injury caused by either the use of income derived from racketeering activity or by the acquisition or maintenance of an interest in a RICO enterprise. Unlike the additional causation connection necessary to state a cause of action under § 1962, however, § 1962( does not require such a nexus.”); *Avirgan*, 691 F. Supp. at 1362 (“The causation link of § 1962 is direct. The plaintiff must be injured by the defendant’s pattern of racketeering activity, that was used to either acquire or maintain any interest in or control of, any enterprise. Accordingly, the plaintiff must be injured by the pattern of racketeering activity committed by the defendant.”); *Marshall v. City of Atlanta (In re Air Terminal Enters.)*, 1995 Bankr. LEXIS 1248, at \*18 (Bankr. N.D. Ga. June 20, 1995) (“Unlike Section 1962, a claim may be made under Section 1962(b) by alleging that the injury occurred as a result of the pattern or racketeering activity that was used to acquire an interest in or control of such an enterprise, as opposed to the acquisition itself.”).

The majority position in other jurisdictions accords with the conclusion that an “acquisition injury” is required. *See, e.g., Advocacy Org. for Patients & Providers v. Auto Club Ins. Ass’n*, 176 F.3d 315, 330 (6th Cir. 1999) (“[I]njury from the racketeering acts themselves is not sufficient; rather, a plaintiff must plead facts tending to show that the acquisition or control of an interest injured plaintiff.”); *Discon, Inc. v. NYNEX Corp.*, 93 F.3d 1055, 1062-63 (2nd Cir. 1996) *rev’d on other grounds*, 525 U.S. 128 (1998); *Compagnie De Reassurance D’Ile De Fr. v. New Eng. Reinsurance Corp.*, 57 F.3d 56, 92 (1st Cir. 1995); *Old Time Enters. V. Int’l Coffee Corp.*, 862 F.2d 1213, 1218 (5th Cir. 1989); *In re Nat’l Western Life Ins. Deferred Annuities Litig.*, 467 F. Supp. 2d 1071, 1084 (S.D. Cal. 2006); *NL Industries, Inc. v. Gulf & Western Industries, Inc.*, 650 F. Supp. 1115, 1127-28 (D. Kan. 1986).