**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. It also assumes that a single enterprise is at issue, and will need to be modified if multiple enterprises are at issue.

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, Sedima, S.P.R.L.*, 173 U.S. at 496. 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.

“To establish a violation of 18 U.S.C. § 1962, [a plaintiff] must prove: the existence of an enterprise; that the enterprise affected interstate commerce; that the defendants were employed by or associated with the enterprise; that the defendants participated, either directly or indirectly, in the conduct of the affairs of the enterprise; and that the defendants participated through a pattern of racketeering activity.” *United States v. Starrett*, 55 F.3d 1525, 1543 (11th Cir. 1995) (citing *United States v. Kotvas*, 941 F.2d 1141, 1143-44 (11th Cir. 1991); *United States v. Young*, 906 F.2d 615, 618-29 (11th Cir. 1990); *United States v. Russo*, 769 F.2d 1443, 1455 (11th Cir. 1986)).

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 at 1543 (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.

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.

A claim under § 1962, requires a plaintiff to establish that the defendant[s] “conduct[ed] or participate[d], directly or indirectly, in the conduct of [an] enterprise’s affairs though a pattern of racketeering activity.” 18 U.S.C. 1962. The Supreme Court has defined this term as meaning that a defendant “participate in the operation or management of the enterprise itself.” *Reeves v. Ernst & Young*, 507 U.S. 170, 184 (1993). In *Reeves*, the defendant accounting firm performed financial audits for a cooperative that issued notes to individuals. The defendant’s audits indicated its doubt about whether a certain investment was recoverable, but the condensed financial statement distributed at the cooperative’s annual meeting omitted this information. The Supreme Court held that the defendant’s failure to tell the cooperative’s board about the investment was insufficient to constitute participation in the operation or management of the cooperative to give rise to § 1962 liability.