

# **USING RICO AS AN ADDITIONAL REMEDIAL STRATEGY AGAINST UNFAIR DEBT COLLECTION PRACTICES/ACTS**

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## **I. INTRODUCTION**

The purpose of this article is to proffer the application of provisions of the Racketeer Influenced and Corrupt Organizations Act<sup>1</sup> (RICO) as an additional remedial strategy against debt collectors who engage in unfair or deceptive debt collection practices/acts. The objective of this article is to stimulate the adversarial propensity of targets and victims of unfair or deceptive debt collection practices/acts for the purpose of becoming more creative advocates. This article attains its purpose and objective by initially identifying provisions of the Fair Debt Collection Practices Act<sup>2</sup> (FDCPA) and the Fair Credit Reporting Act<sup>3</sup> (FCRA) as those provisions are commonly invoked by targets and victims of unfair or deceptive debt collection practices/acts. But the FDCPA and the FCRA have limitations. As an additional remedial strategy, RICO is proffered as providing enhanced sanctions. First, within a summary context, the RICO penal prohibitions are reviewed. From this summary review, the elements of a particular RICO cause of action are identified and analyzed in detail. Namely, an action under 18 U.S.C. § 1962(c), which makes it unlawful for any person, through a pattern of racketeering activity or through collection of an unlawful debt, to conduct or participate in the conduct of the affairs of an enterprise engaged in or affecting interstate commerce. Finally, the RICO penal prohibition of 18 U.S.C. § 1962(c) is illustrated by applying various RICO provisions to a factual setting dealing with unfair and deceptive debt collection practices/acts. In this manner RICO's remedial nature is demonstrated within a case study approach.

## **II. PROBLEM POSED/ISSUE**

### **A. FAIR DEBT COLLECTION PRACTICES ACT**

The Federal Trade Commission (FTC) is responsible for enforcement of the FDCPA, since a violation of the FDCPA is deemed to be either an unfair or deceptive act/practice

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<sup>1</sup> Title IX of the Organized Crime Control Act of 1970, Pub. L. No. 91-452, 84 Stat. 922 (1970) (codified as amended at 18 U.S.C. § § 1961-1968 (1994)).

<sup>2</sup> Pub. L. No. 95-109, 91 Stat. 874 (1977) (codified as amended at 15 U.S.C. § § 1692-1692o (1994)).

<sup>3</sup> Pub. L. No. 91-508, 84 Stat. 1128 (1970) (codified as amended at 15 U.S.C. § 1681 (2000)).

in or affecting commerce in violation of the Federal Trade Commission Act.<sup>4</sup> In 1977 Congress enacted the FDCPA as part of the Consumer Credit Protection Act because it found:

- Abundant evidence of the use of abusive, deceptive, and unfair debt collection practices by many debt collectors, where such practices contributed to (i) the number of personal bankruptcies, (ii) marital instability, (iii) the loss of jobs, and (iv) invasions of individual privacy.<sup>5</sup>
- Existing laws were inadequate to protect consumers.<sup>6</sup>

The stated objectives of the FDCPA include eliminating abusive debt collection practices by debt collectors, while insuring that debt collectors who do not engage in abusive debt collection practices are not competitively disadvantaged.<sup>7</sup> The FDCPA accomplishes its objectives by indirectly regulating debt collectors through the direct regulation of communications between a debt collector and a consumer (or third party). Within this system of indirect regulation:

- Communications are transmissions that convey information about a debt.<sup>8</sup>
- A debt collector (or any employee of a debt collector) is a person who uses any instrumentality of interstate commerce or the mails in any business, the principal purpose of which is the collection of any debt, or who regularly collects or attempts to collect a debt owed or due or asserted to be owed or due another person.<sup>9</sup>
- A consumer is any natural person obligated or allegedly obligated to pay a debt.<sup>10</sup>
- A debt is any obligation or alleged obligation of a consumer to pay money arising out of a transaction, where money, property, insurance, or services are the subject of the transaction and are acquired primarily for personal, family, or household purposes.<sup>11</sup>

In particular, the policy objectives of the FDCPA are accomplished in two steps. In the first step, the FDCPA places a variety of restrictions on the transmission and content of communications between a debt collector and a consumer (or third party). For example, the debt collector is proscribed from:

- Communicating with a consumer if the consumer, in writing, has either refused to pay the debt or requested no further contact.<sup>12</sup>
- Harassing, oppressing, or abusing any person in pursuit of collection. (e.g., threat of harm to either personal or business reputation and property, the publication of the consumer's name as a delinquent debtor to other than to a consumer reporting agency, and repeated or continuous calling to annoy, abuse, and harass).<sup>13</sup>

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<sup>4</sup> 15 U.S.C. § 45 (1994).

<sup>5</sup> *Id.* § 1692a.

<sup>6</sup> *Id.* § 1692b.

<sup>7</sup> *Id.* § 1692e.

<sup>8</sup> *Id.* § 1692a(2).

<sup>9</sup> *Id.* § 1692a(6).

<sup>10</sup> *Id.* § 1692a(3).

<sup>11</sup> *Id.* § 1692a(5).

<sup>12</sup> *Id.* § 1692c(c).

<sup>13</sup> *Id.* § 1692d.

- Using false, deceptive, or misleading representations (e.g. about the character, amount, or legal status of the debt).<sup>14</sup> A non-exhaustive list of examples includes (i) implying affiliation with a governmental agency (e.g., I.R.S.), (ii) threatening arrest, imprisonment, property seizure or wage garnishment, unless lawful and intended, and (iii) threatening any illegal or unintended action.<sup>15</sup>
- Using unfair or unconscionable means to secure collection (e.g., collecting more than authorized by the debt agreement).<sup>16</sup>

In the second step, there is private enforcement (in addition to enforcement of the FDCPA by the FTC).<sup>17</sup> In other words, actions against debt collectors may be asserted by individual persons for (i) harassment or abuse,<sup>18</sup> (ii) false or misleading representations,<sup>19</sup> or (iii) unfair practices<sup>20</sup>. These actions may be brought in the judicial district where the consumer resides.<sup>21</sup> To ensure that the FDCPA protects all consumers [i.e., the consumers of below-average sophistication (or intelligence) as well as those consumers who are knowledgeable (or sophisticated)], in determining whether a communication is unfair or deceptive, an objective standard is employed. This objective standard is manifested in the formulation of the hypothetical, unsophisticated consumer, whose reasonable perceptions and basic level of understanding are applied to determine if collection messages are deceptive or misleading under the FDCPA.<sup>22</sup>

An action against a debt collector for a violation of the FDCPA may result in civil liability with respect to three types of damage claims: (1) actual damages, (2) statutory damages, and (3) reasonable attorney fees.<sup>23</sup> In particular, an award of statutory damages is limited to a maximum of \$1,000 and the amount of such award depends on the frequency, persistence, and nature of the debt collector's noncompliance as well as the extent to which such noncompliance was intentional.<sup>24</sup> Generally, the debt collector is held to a standard of strict liability with respect to a violation of the FDCPA, unless he or she is able to demonstrate, by a preponderance of the evidence, that his or her violation was unintentional and caused by a bona fide error.<sup>25</sup>

## B. FAIR CREDIT REPORTING ACT

In 1970 Congress enacted the FCRA as part of the Consumer Credit Protection Act because it found abuses in the reporting of credit information.<sup>26</sup> A policy objective of the

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<sup>14</sup> *Id.* § 1692e.

<sup>15</sup> *Id.*

<sup>16</sup> *Id.* § 1692f.

<sup>17</sup> *Id.* § 1692i.

<sup>18</sup> *Id.* § 1692d.

<sup>19</sup> *Id.* § 1692e.

<sup>20</sup> *Id.* § 1592f.

<sup>21</sup> *Id.* § 1692i.

<sup>22</sup> *Gammon v. G.C. Services Ltd. P'ship*, 27 F.3d 1254, 1257 (7<sup>th</sup> Cir. 1994).

<sup>23</sup> 15 U.S.C. § 1692k(a).

<sup>24</sup> *Id.* § 1692k(b).

<sup>25</sup> *Id.* § 1692k(c).

<sup>26</sup> *St. Paul Guardian Ins. Co. v. Johnson*, 884 F.2d 881, 882 (5<sup>th</sup> Cir.1989).

FCRA is to protect a consumer from the transmittal of incorrect information regarding the consumer.<sup>27</sup> The FCRA accomplishes this objective through the indirect regulation of the information reporting industry by assuring the accuracy and integrity of reported credit information. In particular, the accuracy and integrity of reported credit information is assured in two steps. In the first step, the FCRA places prohibitions on the reporting of inaccurate credit information. For example, it is a violation of the FCRA<sup>28</sup> to knowingly and intentionally furnished false, inaccurate information to consumer reporting agencies.<sup>29</sup> In the second step, a private right of action is established. An individual has a cause of action under the FCRA if either the information provider or the information user willfully or negligently fails to comply with the protective measures of the FCRA.<sup>30</sup> Thus, under the FCRA, even a person who is not a consumer-reporting agency (e.g., a debt collector), such person has an obligation to report accurate, updated information to a consumer-reporting agency.<sup>31</sup>

Because a debt collector is a person who furnishes or supplies information to credit reporting agencies,<sup>32</sup> such person has a duty to an individual debtor under the FCRA to report accurate, updated information to a consumer-reporting agency. If a debt collector violates this duty, such debt collector may be liable to such individual debtor for (i) actual damages, (ii) punitive damages, and (iii) costs and attorney's fees.<sup>33</sup>

### III. PRESUMPTION

Even with the enactment of FDCPA and FCRA, in 1998 most of the complaints received by the FTC were concerned with (i) credit bureaus and (ii) debt collectors.<sup>34</sup> Based upon this empirical evidence, this paper presumes the following:

***Debt collectors continue to use abusive, deceptive, and unfair debt collection practices and continue to engage in abusive, deceptive, and unfair debt collection acts.***

Often, a consequence that flows from the collection activity of a debt collector is a negative consumer credit report. When errors are contained in an individual debtor's credit report (e.g., falsely identifying such debtor as being delinquent or in default), these errors can have a damaging effect on the individual's business and personal reputation (or property). For example, an error-filled credit report identifying an individual debtor as being delinquent (or in default) may foreclose the individual from obtaining a low-interest loan, purchasing expensive durables, or earning a reasonable wage. More importantly, when these errors result from the intentional communication of false

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<sup>27</sup> Kates v. Crocker Nat'l Bank, 776 F.2d 1396, 1397 (9<sup>th</sup> Cir.1985).

<sup>28</sup> Specifically, 15 U.S.C. §§ 1681s-2(a).

<sup>29</sup> *Id.* § 1681c.

<sup>30</sup> *Id.* § 1681n-o.

<sup>31</sup> *Id.* § 1681a(c).

<sup>32</sup> *Id.*

<sup>33</sup> 15 U.S.C. §§ 1681n(1)(A), (B)(2), and (B)(3).

<sup>34</sup> FEDERAL TRADE COMMISSION (FTC), TWENTY-FIRST ANNUAL REPORT TO CONGRESS PURSUANT TO SECTION 815(A) OF THE FAIR DEBT COLLECTION PRACTICES ACT (Mar. 19, 1999).

information, the information provider (e.g., the debt collector) has engaged in criminal, tortious, and fraudulent conduct that should not and cannot be ignored.

#### **IV. ADDITIONAL REMEDIAL STRATEGY**

In this paper, RICO is proffered as an additional remedial strategy that provides enhanced sanctions:

- to stimulate the adversarial propensity of victims and targets of unfair or deceptive debt collection practices/acts, and
- to allow such victims and targets to become more creative advocates.

The balance of this article demonstrates these features of RICO by (i) reviewing the RICO penal prohibitions within a summary context, (ii) analyzing the elements of a particular RICO cause of action, and (iii) providing examples of such a cause of action within a specific factual setting dealing with unfair and deceptive debt collection practices/acts. More specifically, the requirements of a RICO violation under 18 U.S.C. § 1962(c) are analyzed, wherein: “It is unlawful --- for any person --- through a pattern of racketeering activity or through collection of an unlawful debt --- to conduct or participate --- in the conduct of the affairs of an enterprise engaged in or affecting interstate commerce.” Finally, the RICO penal prohibition of 18 U.S.C. § 1962(c) is exemplified by applying various RICO-related provisions to a fact setting dealing with unfair and deceptive debt collection practices/acts. In this manner RICO’s remedial nature is demonstrated by use of a case study approach.

#### **V. A RICO Cause of Action**

##### **A. INTRODUCTION**

As an additional remedial strategy, the victim or target of unfair or deceptive debt collection practices/acts should consider bringing a civil action against the tortfeasor under RICO, in addition to the FDCPA and FCRA. RICO was enacted to seek the eradication of organized crime within the United States by (i) strengthening the legal tools in the evidence-gathering process, (ii) establishing new penal prohibitions, and (iii) providing enhanced sanctions and new remedies to deal with the unlawful activities of those engaged in organized crime.<sup>35</sup> In part, RICO establishes a broad, civil enforcement scheme (i.e. civil RICO) that includes a private right of action. This private right of action is designed to encourage private lawsuits in an effort to fill prosecutorial gaps due to the scarcity of governmental resources. In a civil RICO lawsuit under 18 U.S.C. § 1964(c) (1994), the private plaintiff can seek to recover treble compensatory damages, along with costs, interest and reasonable attorneys’ fees, for the defendant’s violation of a RICO prohibited act.

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<sup>35</sup> Statement of Finding and Purpose, Racketeer Influenced and Corrupt Organizations Act (RICO), enacted as Title IX of the Organized Crime Control Act of 1970, Pub. L. No. 91-452, 84 Stat. 922, 923 (1970).

To add more fuel to the fire, with the effect of broadening RICO's breadth, Congress mandated that RICO be liberally construed to effectuate its remedial purpose.<sup>36</sup> In addition, the United States Supreme Court has held that lower courts should not restrict RICO's application.<sup>37</sup> Accordingly, RICO has applications beyond organized crime to legitimate businesses<sup>38</sup> where RICO prohibitions apply to a broad range of criminal activity.<sup>39</sup> Such activity includes acts indictable under selected (1) federal criminal statutes, including mail and wire fraud and Hobbs Act extortion, attempted extortion and conspiracy to extort and (2) state criminal statutes, including theft and embezzlement. Such acts are easily comprehended as occurring within the context of unfair and deceptive debt collection practices and acts.

## B. STANDING

A person has standing to sue if such person has a sufficient interest in an otherwise justiciable controversy so that such person may obtain judicial resolution of the controversy.<sup>40</sup> Under civil RICO, any person injured in his or her business or property by reason of a violation of 18 U.S.C. § 1962 has standing to establish a cause of action in a United States District Court.<sup>41</sup> This section prohibits any person from:

- using income received from a pattern of racketeering activity/collection of an unlawful debt to acquire any interest in or to establish or operate any enterprise which is engaged in, or the activities of which affect, interstate commerce;<sup>42</sup>
- acquiring or maintaining through a pattern of racketeering activity/collection of an unlawful debt an interest in and/or control of an enterprise, which is engaged in or the activities of which affect interstate commerce;<sup>43</sup>
- conducting or participating in the conduct of the affairs of an enterprise engaged in interstate commerce or affecting interstate commerce through a pattern of racketeering activity or through a pattern of collection of unlawful debt];<sup>44</sup> or
- conspiring to violate 18 U.S.C. § 1962(a)-(c).<sup>45</sup>

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<sup>36</sup> Pub. L. No. 91-452, 84 Stat. 922, 947 (1970).

<sup>37</sup> United States v. Turkette, 452 U.S. 576, 587 (1981).

<sup>38</sup> Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479 (1985).

<sup>39</sup> H.J., Inc. v. Northwestern Bell Tel. Co., 492 U.S. 229, 248 (1989).

<sup>40</sup> BLACK'S LAW DICTIONARY 1405 (6<sup>th</sup> Edition 1990).

<sup>41</sup> 18 U.S.C. § 1964(c).

<sup>42</sup> *Id.* § 1962(a).

<sup>43</sup> *Id.* § 1962(b).

<sup>44</sup> *Id.* § 1962(c).

<sup>45</sup> *Id.* § 1962(d).

## C. JURISDICTION

Jurisdiction speaks to the legal right (i.e., power) of a court to adjudicate a matter in controversy (i.e., find facts, apply the law, make decisions and declare judgment).<sup>46</sup> A court's adjudicative right or power may be based on several overlapping types of jurisdiction, including federal question jurisdiction, diversity of citizenship jurisdiction, and personal jurisdiction.

### 1. FEDERAL QUESTION JURISDICTION

A United States District Court has federal question jurisdiction over all civil actions arising under RICO.<sup>47</sup> Federal question jurisdiction is conferred on the federal district courts without regard to the amount in controversy or citizenship of the parties.

### 2. DIVERSITY OF CITIZENSHIP JURISDICTION

In the alternative, a federal district court can have diversity of citizenship jurisdiction over a RICO cause of action, if (i) the plaintiff and defendant are residents of different states and (ii) the dispute involves, exclusive of interest and costs, an amount in excess of \$75,000.<sup>48</sup>

### 3. PERSONAL JURISDICTION

Moreover, a United States district court has personal jurisdiction over a particular defendant in a multi-defendant, civil RICO lawsuit in the following situations: If either (i) such defendant has an agent or transacts his, her or its affairs within such district or (ii) such defendant satisfies the nationwide service of process requirement of minimum contacts with the forum district.<sup>49</sup>

Factors suggesting that minimum contacts of the defendant exist in the forum district<sup>50</sup> include whether:

- The litigation in the forum state was reasonably expected and foreseeable, based upon the level of defendant's activities within that forum state.
- The defendant's burden in litigating the controversy in the forum state is not unduly burdensome. (However, defendant's burden in litigating in a foreign state carries significantly less weight if the defendant intentionally engaged in conduct that had a substantially harmful effect on a resident of said foreign state.)
- The forum state has a significant interest in having the U.S. district court within such forum state adjudicate the controversy.

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<sup>46</sup> BLACK'S LAW DISCITONARY 853 (6<sup>th</sup> ed. 1990).

<sup>47</sup> 28 U.S.C. § 1331.

<sup>48</sup> *Id.* § 1332.

<sup>49</sup> 18 U.S.C. § 1965(d).

<sup>50</sup> *Wichita Fed. Sav. & Loan Ass'n v. Landmark Group, Inc.*, 674 F. Supp. 321 (D.C. Kan. 1987).

- The plaintiff's interest in complete and effective relief is unduly burdensome.
- Litigation within the forum state is not inconsistent with the federal judicial system's interest in efficiently resolving controversies.

If (i) the ends of justice require that such defendant, residing in another district, be brought before such district and (ii) there is no other district in which a court would have personal jurisdiction over all defendants.<sup>51</sup>

#### D. VENUE

In common law pleading and practice venue refers to the particular geographical area in which a court with jurisdiction may adjudicate a controversy (e.g., the venue of the action refers to the county within which the injury was done).<sup>52</sup> In a civil RICO lawsuit, venue is proper in a particular district of the federal district courts:

- If at least one defendant (i) resides, (ii) has an agent or (iii) transacts his/her/its affairs within such district (e.g., the formation of a contract between plaintiff and defendant occurred within such district).<sup>53</sup> Here, a corporate defendant transacts its affairs within a particular district if such defendant's contacts have been repeated, substantial and continuous.<sup>54</sup>
- If such district (1) is the judicial district where any defendant resides, if all defendants reside in the same State, (2) a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated, or (3) a judicial district in which any defendant may be found, if there is no district in which the action may otherwise be brought, as long as jurisdiction is not founded solely on diversity of citizenship.<sup>55</sup>

In particular, the current statutory language of the general venue provision of 28 U.S.C. § 1391(b)(2) focuses not on whether a defendant has made a deliberate contact with the forum court, a factor relevant in the analysis of personal jurisdiction, but on the location where events giving rise to the claim occurred. Under this language, a court must determine only whether a substantial part of the events giving rise to the claim occurred in a plaintiff's chosen forum. Accordingly, it is a misapplication of the general venue provision of 28 U.S.C. § 1391(b)(2) and the federal common law underlying such provision to look at a single "triggering event" prompting the action, rather than to the entire sequence of events underlying the claim.<sup>56</sup>

For example, in cases where a plaintiff is alleging violations under the FDCPA, courts have found venue to lie based on:

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<sup>51</sup> 18 U.S.C. § 1965(b).

<sup>52</sup> BLACK'S LAW DICTIONARY 1557 (6<sup>th</sup> ed. 1990).

<sup>53</sup> 18 U.S.C. § 1965(a) (RICO venue provision).

<sup>54</sup> *Abeloff v. Barth*, 119 F.R.D. 315 (D.C. Mass. 1988).

<sup>55</sup> 28 U.S.C. § 1391(b) (general venue provision).

<sup>56</sup> *First of Michigan Corp. v Bramlet*, 141 F.3d 260, 263 (6<sup>th</sup> Cir. 1998).

a. A single act directed by the defendant/creditor to plaintiff's state of residence.<sup>57</sup> In *Bates v. C&S Adjusters, Inc.*, a collection letter forwarded to plaintiff's new state of residence was held to be a substantial part of the events giving rise to the claim.

b. The fact that many of the defendant's communications reached the plaintiffs offices in New York through Connecticut brokers. In *U.S. Titan v. Guangzhou Zhen Hua Shipping Co.*,<sup>58</sup> the defendant was found to have directed communications to New York and accordingly venue was proper in New York.

c. Calls or letters from a distant collection agency received within the forum district, when such calls/letters are allegedly illegal under the FDCPA. In *Vlasak v. Rapid Collection Systems, Inc.*,<sup>59</sup> the court stated: "[I]t makes sense to permit the individual to file suit where he receives the communications. . . It is nonsensical to permit the defendant-debt collectors to engage in practices that may violate the FDCPA and harass persons in other districts, and then force such persons to come to the defendants' district to bring action against them, where the activities that transpired in the district were not insubstantial in relation to the totality of events giving rise to the plaintiff's grievance."<sup>60</sup>

d. One act involving the use of mail or telephone, if it is part of a scheme or artifice to defraud under alleged violations of the mail and wire fraud statutes.<sup>61</sup>

#### E. STATUTE OF LIMITATIONS

The statute of limitations is a legislative enactment setting forth the maximum time period during which a particular action (or actions) may be brought or rights enforced.<sup>62</sup> There is no statute of limitations period expressly provided in RICO for civil actions. However, the U.S. Supreme Court has held that the statute of limitations for civil RICO actions is four years.<sup>63</sup> Moreover, the Supreme Court has held that this limitation period will begin to run from the time of the discovery of the injury.<sup>64</sup>

#### F. PLEADING REQUIREMENTS

A civil RICO action is commenced by the filing of a complaint. This complaint must contain (a) a short and plain statement of the grounds upon which the court's jurisdiction depends, (b) a short and plain statement of the claim showing that the plaintiff is entitled to relief and (c) a demand for judgment for the relief the plaintiff seeks.<sup>65</sup> However, relief in the alternative may be demanded.<sup>66</sup> Further, each claim founded on a separate

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<sup>57</sup> *Bates v. C&S Adjusters, Inc.*, 980 F.2d 865, 868 (2<sup>nd</sup> Cir. 1992).

<sup>58</sup> 241 F.3d 135, 153 (2<sup>nd</sup> Cir. 2001).

<sup>59</sup> 962 F. Supp. 1096, 1102 (7<sup>th</sup> Cir. 1997).

<sup>60</sup> *Id.*

<sup>61</sup> *United States v. Hartbrodt*, 773 F. Supp 1240 (S.D. Iowa 1991).

<sup>62</sup> BLACK'S LAW DICTIONARY 927 (6<sup>th</sup> ed. 1990).

<sup>63</sup> *Agency Holding Corp. v. Malley-Duff & Assoc., Inc.*, 483 U.S. 143, 156 (1987).

<sup>64</sup> *Rotella v. Wood*, 528 U.S. 549, 145 L. Ed. 2d 1047, 120 S. Ct. 1075, 1079 (2000).

<sup>65</sup> FED. R. CIV. P. 8(a).

<sup>66</sup> *Id.*

transaction or occurrence must be stated in a separate count, whenever such presentation will facilitate a clearer presentation of the matters set forth.<sup>67</sup>

A plaintiff need not set out in detail the facts upon which the plaintiff's claim is based.<sup>68</sup> However, special matters (e.g., capacity, fraud, *scienter*, conditions precedent, time and place, and special damages) must be pled with particularity.<sup>69</sup> With respect to fraud, a plaintiff must plead with particularity the circumstances of the alleged fraud for purposes of (a) placing the defendants on notice of the precise misconduct for which they are charged and (b) safeguarding defendants against spurious charges of fraudulent behavior.<sup>70</sup> In particular, defendants must be advised of (a) what statements were made, (b) when and by whom they were made, (c) in what manner a fraud was perpetrated upon the plaintiff, and (d) what the defendant obtained as a consequence.<sup>71</sup> Accordingly, there are limits to liberal pleading in alleging civil RICO claims and plaintiffs must anchor their complaints in a bed of facts, not bold, stigmatizing assertions of alleged racketeering.<sup>72</sup>

#### G. ELEMENTS OF A CAUSE OF ACTION UNDER CIVIL RICO – OVERVIEW

As noted above, RICO provides a private right of action (civil RICO), where civil RICO's standing provision provides that any person [as defined] injured in his business or property by reason of a violation of 18 U.S.C. § 1962 may bring a civil action under RICO. Integrating civil RICO's standing provision with the burden of proof associated with a violation of 18 U.S.C. § 1962 requires that a Plaintiff must show that:

- a *person* (Plaintiff);
- was *injured* in his *business or property*;
- by reason of another person's (defendant's) violation of either 18 U.S.C. § 1962(a), (b), (c) or (d).

Civil RICO's broad scope and harsh penalties have resulted in its frequent invocation by plaintiffs. In response to what courts have perceived as an overuse and/or misuse of civil RICO by plaintiffs, courts have tried to limit civil RICO's application through a variety of interpretative means. For example, in order to withstand a motion to dismiss for failure to state a claim, elements (or aspects of elements of a RICO cause of action) must be supported with certain facts and conclusions of facts that are stated with particularity. As noted above under pleading requirements, a complaint alleging a civil RICO violation must be pled precisely. Accordingly, a RICO claim must allege that:

- A particular section under RICO was violated<sup>73</sup> as well as the underlying criminal activity supporting the allegation.<sup>74</sup> Thus, a mere allegation or

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<sup>67</sup> *Id.* 10(a).

<sup>68</sup> *Conley v. Gibson*, 355 U.S. 41 (1957).

<sup>69</sup> FED. R. CIV. P. 9.

<sup>70</sup> *Id.* 9(b).

<sup>71</sup> *Id.*

<sup>72</sup> *Miranda v. Ponce Fed. Bank*, 948 F.2d 41 (CA1 Puerto Rico 1991).

<sup>73</sup> *Reynolds v. East Dyer Dev. Co.*, 882 F.2d 1249 (7<sup>th</sup> Cir. 1989)

<sup>74</sup> *Babst v. Morgan Keegan & Co.*, 687 F. Supp. 255 (E.D. La. 1988).

conclusion of law of a RICO violation, without supporting facts, fails to state a RICO claim.<sup>75</sup>

- A particular defendant is liable for a violation of RICO, but merely alleging that such defendant with other defendants collectively engaged in a pattern of racketeering activity or collection of unlawful debt is insufficient to state a claim under RICO.<sup>76</sup>
- Defendant's RICO violation was the proximate cause of plaintiff's injury to her business or property.<sup>77</sup> Further, such injury must be pled with sufficient specificity to demonstrate proprietary damage.<sup>78</sup>

#### H. BURDEN OF PROOF - VIOLATION OF 18 U.S.C. § 1962(c)

Specifically, for example, under 18 U.S.C. § 1962(c), it is unlawful --- for any person --- through a pattern of racketeering activity or through collection of an unlawful debt --- to conduct or participate --- in the conduct of the affairs of an enterprise engaged in interstate commerce or affecting interstate.

Accordingly, the burden of proof associated with a defendant's violation of 18 U.S.C. § 1962(c) requires that the plaintiff allege and prove that:

1. through the defendant's commission of two or more predicate acts of racketeering activity,
2. which constitutes either a pattern of racketeering activity or collection of an unlawful debt,
3. the defendant, as a person,
4. conducted or participated in the conduct of the affairs of an enterprise,
5. engaged in interstate commerce or affecting interstate, and
6. the plaintiff was injured in his business or property as a result.

#### 1. TWO OR MORE PREDICATE ACTS

The first element of a RICO violation under 18 U.S.C. § 1962(c) requires that plaintiff allege and prove defendant's commission of two or more predicate acts of racketeering or collection of unlawful debt occurring within ten years of each other, which include:

- acts that are chargeable or indictable under state criminal statutes and punishable by imprisonment for more than one year (including theft and embezzlement)<sup>79</sup> and
- acts that are chargeable or indictable under certain criminal provisions of Title 18 of the United States Code.<sup>80</sup>

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<sup>75</sup> *Waldo v. North Am. Van Lines, Inc.*, 102 F.R.D. 807 (W.D. Pa. 1984).

<sup>76</sup> *Wichita Fed. Sav. & Loan Ass'n v. Landmark Group, Inc.*, 674 F. Supp. 321 (D.C. Kan. 1987).

<sup>77</sup> *Lazzaro v. Manber*, 701 F. Supp. 353 (E.D.N.Y. 1988).

<sup>78</sup> *Rodonich v. House Wreckers Union, Local 95 of Laborers' Int'l Union of N. Am.*, 627 F. Supp. 176 (S.D.N.Y. 1985).

<sup>79</sup> 18 U.S.C. § 1961(1)(A).

<sup>80</sup> *Id.* § 1961(1)(B).

## 2. PATTERN

The second element of a RICO violation under 18 U.S.C. § 1962(c) requires that plaintiff allege and prove that the defendant's commission of two or more predicate acts of racketeering or collection of unlawful debt occurring within ten years of each other constitutes either a pattern of racketeering activity or collection of unlawful debt. In this manner, RICO applies if and only if the defendant's commission of two predicate acts constitutes a pattern. Moreover, such pattern must be pled with sufficient specificity.<sup>81</sup>

But for this pattern requirement, the mere commission of any two predicate acts would be proscribed under RICO. In this case, a RICO violation would coalesce with a variety of proscriptions related to state or federal law. Such an overlapping result is undesirable. For example, assume two occurrences of either federal mail or wire fraud that necessarily coalesce with the federal mail fraud or federal wire fraud statutes proscribing mail fraud and wire fraud, respectively. Here, absent the pattern requirement, RICO provisions would merely proscribe the same conduct as the federal mail fraud or federal wire fraud statutes, resulting in needless duplication.

In discussing the characteristics of a pattern of racketeering, the Supreme Court has made the following interpretive points of law.

- A pattern consists of continuity plus relationship, not isolated predicate acts.<sup>82</sup> Further, by referring to statutory language in another code section,<sup>83</sup> the Court found a definition of pattern, consistent with the intent of RICO. As such, the Court held that criminal conduct forms a pattern if it embraces criminal acts that have the same or similar purposes, results, participants, victims, or methods of commission, or otherwise are interrelated by distinguishing characteristics.<sup>84</sup>
- The mere commission of two predicate acts may not be sufficient to establish a RICO violation. Rather, to allege and prove a pattern of racketeering activity for RICO purposes, the plaintiff must establish both (a) relationship between and (b) continuity of the predicate acts.<sup>85</sup>
  - Relationship Requirement: To establish the connection among a defendant's criminal acts in terms of pattern factors (e.g., similar purpose, results, participants, victims, methods, commission and other interrelated distinguishing characteristics that define relationship).<sup>86</sup>
  - Continuity Requirement: To establish either (a) a series of related predicates extending over a substantial period of time or (b) an open-ended threat of continued racketeering activity in the future.<sup>87</sup>

Within the United States system of governance, the United States Supreme Court is the ultimate arbiter of controversy and interpreter of law. To identify how the various

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<sup>81</sup> West Mountain Sales, Inc. v. Logan Mfg. Co., 718 F. Supp. 1084 (N.D.N.Y. 1989).

<sup>82</sup> Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479 (1985).

<sup>83</sup> 18 U.S.C. § 3575(e) (repealed 1984).

<sup>84</sup> *Id.*

<sup>85</sup> H.J., Inc. v. Northwestern Bell Tel. Co., 492 U.S. 229, 230 (1989).

<sup>86</sup> *Id.* at 240.

<sup>87</sup> *Id.* at 242.

circuit courts within the United States Circuit Court of Appeals have responded to the Supreme Court holdings in the two bell weather cases, *Sedima v. Imrex Co.*<sup>88</sup> and *H.J., Inc. v. Northwestern Bell Telephone Co.*,<sup>89</sup> the response of the Seventh Circuit Court of Appeals can be viewed as representative.

For purposes of establishing the pattern element of a RICO violation, the Seventh Circuit invoked a multi-factor test - the continuity plus relationship test.<sup>90</sup> Under this test, a pattern of racketeering activity presumes the commission of at least two acts of racketeering activity within ten years of each other, where such acts are (1) related and (2) either closed-ended (constituting established criminal activity) or open-ended (constituting threatening and continuing criminal activity).<sup>91</sup>

In addition, the Seventh Circuit has made the following interpretive points of law regarding various aspects of the continuity plus relationship test:

- Pattern factors include the number and variety of predicate acts and length of time over which such acts were committed, number of victims, presence of separate schemes and occurrence of distinct injuries.<sup>92</sup>
- Continuity encompasses either a lengthy period of completed racketeering activity or a threat of continued criminal activity.<sup>93</sup>
- Alleging two predicate acts is necessary, but generally not sufficient, to establish a pattern of racketeering activity. Also, a plaintiff must allege that such acts are (1) related and (2) either amount to or threaten continuing criminal activity.<sup>94</sup>
- To establish a RICO pattern involving mail and wire fraud, merely alleging the commission of a number of predicate acts is insufficient to establish a pattern of racketeering activity.<sup>95</sup>

### 3. DEFENDANT - A PERSON

The third element of a RICO violation under 18 U.S.C. § 1962(c) requires that the plaintiff allege and prove that the defendant is a person. Here, the term “person” includes any individual or entity capable of holding a legal or beneficial interest in property.<sup>96</sup> For example, a person includes a corporation.<sup>97</sup> Further, under 18 U.S.C. § 1962(c), a RICO person and a RICO enterprise must be separate and distinct persons.<sup>98</sup>

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<sup>88</sup> 473 U.S. 479.

<sup>89</sup> 492 U.S. 229.

<sup>90</sup> *Corley v. Rosewood Care Ctr., Inc.*, 142 F.3d 1041, 1048 (7<sup>th</sup> Cir. 1998).

<sup>91</sup> *United States v. Palumbo Bros., Inc.*, 145 F.3d 850, 877 (7<sup>th</sup> Cir. 1998).

<sup>92</sup> *Gagan v. Am. Cablevision, Inc.*, 77 F.3d 951, 962 (7<sup>th</sup> Cir. 1996).

<sup>93</sup> *East Ohio Ltd. P'ship v. Cocose*, 980 F.2d 1122, 1124 (7<sup>th</sup> Cir. 1992).

<sup>94</sup> *Shields Enter., Inc. v. First Chicago Corp.*, 975 F.2d 1290, 1294 (7<sup>th</sup> Cir. 1992).

<sup>95</sup> *Ashland Oil, Inc. v. Arnett*, 875 F.2d 1271, 1278 (7<sup>th</sup> Cir. 1989).

<sup>96</sup> 18 U.S.C. § 1961(3).

<sup>97</sup> *Liquid Air Corp. v. Rogers*, 834 F.2d 1297, 1306 (7<sup>th</sup> Cir. 1987).

<sup>98</sup> *Id.*

#### 4. CONDUCTED/PARTICIPATED IN CONDUCT OF AFFAIRS OF ENTERPRISE

The fourth element of a RICO violation under 18 U.S.C. § 1962(c) requires that, for example, a plaintiff allege and prove that the defendant conducted or participated in the conduct of the affairs of an enterprise through a pattern of racketeering activity and/or collection of unlawful debt.

##### *a. Conducted/Participated in Conduct of Affairs of Enterprise*

Within the context of a RICO violation under 18 U.S.C. § 1962(c), the proscribed activity (e.g., conduct or participation in the conduct of the affairs of an enterprise through a pattern of racketeering activity) is the focus of the statute.

The statutory language under 18 U.S.C. § 1962(c) mandates that predicate acts covered by such section include direct or indirect participation in conduct of the enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt. Moreover, the terms "employed by" and "associated with" appear to contemplate a person distinct from the enterprise.<sup>99</sup> In *Haroco, Inc. v. American National Bank & Trust Co.*, the court concluded: "[I]f Congress had meant to permit the same entity to be the liable person and the enterprise, it would have required only a simple change in language to make that intention crystal clear."<sup>100</sup> Neither a firm and its employees, nor a parent and its subsidiaries, constitute an enterprise separate from the firm under 18 U.S.C. § 1962(c).<sup>101</sup>

##### *b. Requirement of a RICO Enterprise*

RICO proscribes certain conduct with an organizational nexus. This organizational nexus is manifested in an enterprise concept. The existence of a RICO enterprise must be pled with sufficient specificity.<sup>102</sup> Within the context of a RICO violation under 18 U.S.C. § 1962(c), a plaintiff must establish the existence of a RICO enterprise that has:

- a structure that is distinct from the pattern of racketeering activity that is identified in the particular RICO violation,
- a common or shared purpose, and
- continuity of structure and personnel.

In terms of who or what can constitute a RICO enterprise, there is no restriction upon the associations embraced by the definition of a RICO enterprise.<sup>103</sup> If the RICO enterprise is a legal person, the existence of such enterprise is generally presumed. In contrast, alleging and proving the existence of an association-in-fact RICO enterprise is much more difficult and requires alleging and proving that a group of persons associated

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<sup>99</sup> *Haroco, Inc. v. Am. Nat'l Bank & Trust, Co.*, 747 F.2d 384, 400 (7<sup>th</sup> Cir. 1984), *aff'd*, 473 U.S. 606 (1985).

<sup>100</sup> *Id.*

<sup>101</sup> *Id.* at 400.

<sup>102</sup> *Anisfeld v. Cantor Fitzgerald & Co., Inc.*, 631 F. Supp. 1461 (S.D.N.Y. 1986).

<sup>103</sup> *United States v. Turkette*, 452 U.S. 576, 580 (1981).

together for a common purpose of engaging in a particular course of conduct.<sup>104</sup> Accordingly, the existence of a RICO enterprise is alleged and proven by stating and providing evidence of both (a) the existence of an ongoing organization, formal or informal, and (b) the manner in which various associates function as a continuing unit.<sup>105</sup>

In order to state a RICO claim, a plaintiff must allege and prove (i) the existence of a RICO enterprise and (ii) a pattern of racketeering activity, as separate elements.<sup>106</sup> However, these elements do not have to be proven by providing separate evidence. The proof used to establish these separate elements of a RICO violation may, in particular cases, coalesce, but proof of one element does not necessarily establish the other element.<sup>107</sup>

To identify how the various circuit courts within the United States Circuit Courts of Appeals have responded to the Supreme Court holding in *United States v. Turkette*,<sup>108</sup> reference is again made to the Seventh Circuit as being representative. The Seventh Circuit has made the following interpretive points of law regarding various aspects of alleging and proving the existence of a RICO enterprise:

- A RICO enterprise is more than a group of persons who conspire to commit a pattern of racketeering activity; it requires structure.<sup>109</sup>
- A mere conspiracy does not necessarily suggest a RICO enterprise.<sup>110</sup>
- The enterprise concept contemplates informal as well as formal organizations.<sup>111</sup>
- The enterprise concept contemplates legitimate as well as illegitimate organizations. Accordingly, requiring proof that the enterprise had an unlawful purpose other than committing the predicate acts associated with the RICO violation would be absurd.<sup>112</sup>
- A RICO enterprise is defined as an ongoing structure of persons, associated through time, joined in purpose, and organized in a manner amenable to hierarchical or consensual decision-making.<sup>113</sup> Further, with respect to informal organizations, little structure is necessary; rather, differentiation among roles will suffice.<sup>114</sup>
- Proof of an association-in-fact RICO enterprise may not be inferred from proof of racketeering activity, but it would be nonsensical to require proof that a RICO enterprise had purposes or goals separate and apart from the pattern of racketeering activity.<sup>115</sup>

In addition, the Seventh Circuit has made the following interpretive points of law regarding who or what can constitute a RICO enterprise:

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<sup>104</sup> *Id.* at 583.

<sup>105</sup> *Id.*

<sup>106</sup> *Id.*

<sup>107</sup> *Id.*

<sup>108</sup> *Id.*

<sup>109</sup> *Gagan v. Am. Cablevision, Inc.*, 77 F.3d 951, 964 (7<sup>th</sup> Cir. 1996).

<sup>110</sup> *Bachman v. Bear, Stearns & Co., Inc.*, 178 F.3d 930, 932 (7<sup>th</sup> Cir. 1999).

<sup>111</sup> *Id.*

<sup>112</sup> *United States v. Rogers*, 89 F.3d 1326, 1337 (7<sup>th</sup> Cir. 1996).

<sup>113</sup> *Id.*

<sup>114</sup> *Id.*

<sup>115</sup> *Id.*

- public and private entities, as well as governmental agencies,<sup>116</sup>
- county prosecutors' offices,<sup>117</sup> and
- an association in fact consisting of a group of individuals, of corporations, or of various different entities.<sup>118</sup>

### *5. Interstate Commerce*

The fifth element of a RICO violation under 18 U.S.C. § 1962(c) requires that the plaintiff allege and prove that the enterprise is engaged in interstate commerce or activities of which affect interstate commerce.<sup>119</sup> It is not necessary to allege and prove that every enterprise activity substantially affects interstate commerce.<sup>120</sup> However, the effects of enterprise activities on interstate commerce must be pled with sufficient specificity.<sup>121</sup> Proof of an effect on interstate commerce by an enterprise's activities may be demonstrated by probable or potential impact. Further, an enterprise's activities may impact interstate commerce indirectly by impacting the victim.

### *6. Injury*

The sixth element of a RICO violation under 18 U.S.C. § 1962(c) requires that the plaintiff allege and prove injury to plaintiff's business or property. In general, there must be a nexus between the claimed RICO violation and the injury suffered by the plaintiff. Within the context of a RICO violation under 18 U.S.C. § 1962(c), the plaintiff must allege and prove a nexus between the plaintiff's injury and the defendant's conduct or participation in the conduct of the affairs of an enterprise through a pattern of racketeering activity. Because the essence of the violation of 18 U.S.C. § 1962(c) is the commission of the predicate acts in connection with the conduct of an enterprise, the plaintiff's injury in his business or property necessarily must be the harm that is proximately caused by those predicate acts, sufficiently related to constitute a pattern.<sup>122</sup>

## **VI. SUMMARY EXAMPLE**

### **A. FACTUAL BACKGROUND**

For more than two years, plaintiff, J, has been a target and victim of defendants' criminal and tortious schemes and artifices to defraud plaintiff of plaintiff's property.

Defendant, S, as a debt collector, services loans of J. Arising from a mistake made by S, J and S entered into discussions concerning a graduated repayment schedule relative to

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<sup>116</sup> Jennings v. Emry, 910 F.2d 1434, 1440 (7<sup>th</sup> Cir. 1990).

<sup>117</sup> United States v. Goot, 894 F.2d 231, 239 (7<sup>th</sup> Cir. 1990).

<sup>118</sup> United States v. Balzano, 916 F.2d 1273, 1289 (7<sup>th</sup> Cir. 1990).

<sup>119</sup> United States v. Nerone, 563 F.2d 836, 854 (7<sup>th</sup> Cir. 1977).

<sup>120</sup> United States v. Maloney, 71 F.3d 645, 663 (7<sup>th</sup> Cir. 1995).

<sup>121</sup> Weft, Inc. v. G.C. Inv. Assoc., 630 F. Supp. 1138 (E.D.N.C. 1986).

<sup>122</sup> Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 497 (1985).

the loans of J that S services. These discussions culminated in the formation of a unilateral contract, whereby, in exchange for an advance payment by J, S promised to change J's repayment schedule to a graduated repayment schedule. Subsequently, S fully performed on its promise by changing J's repayment schedule to said graduated repayment schedule. However, one year later, S unilaterally changed J's graduated repayment schedule and demanded \$100 per month more than the amount identified under the unilateral contract formed one year earlier.

When J did not pay the increased amount, S engaged in criminal and tortious conduct (including libel, slander, embezzlement, attempted extortion, extortion, mail fraud and wire fraud) for the purpose of defrauding J of J's property. For a time, J continued not to pay and objected to S's criminal and tortious conduct. At several points, J yielded to threats of harm made by S (and paid S the increased amount) hoping that S would cease and desist. S did not cease and desist. Instead, S threatened J with increased force and intensity.

At some point, when S determined its singular efforts to have been unsuccessful in defrauding J of J's property, it elicited the assistance of Defendant T and Defendant O, guarantors of J's indebtedness. Together (S,T&O), with a common purpose and a shared goal (to defraud J of J's property) they each engaged in criminal and tortious schemes and artifices, including libel, slander, embezzlement, conspiracy to commit extortion, attempted extortion, extortion, mail fraud and/or wire fraud. The criminal and tortious conduct of defendants over more than a 2-year period has caused J hundreds of thousands of dollars in damages.

## B. APPLICATION OF A RICO CAUSE OF ACTION UNDER 18 U.S.C. § 1962(C)

### 1. TWO OR MORE PREDICATE ACTS

S has engaged in acts of wire fraud, mail fraud, extortion, attempted extortion, conspiracy to extort, and embezzlement. Each of such acts constitute a predicate act, since each of such acts is either chargeable or indictable under either:

- a state criminal statute and punishable by imprisonment for more than one year (including theft and embezzlement), or
- a criminal statute under Title 18 of the United States Code.

Accordingly, S has engaged in two or more predicate acts of racketeering or collection of unlawful debt that occurred within ten years of each other.

### 2. PATTERN

The predicate acts of S noted above are characteristic of a pattern, since such acts:

- are interrelated in that they are executed (a) for purposes of effectuating schemes and artifices with an ultimate view toward defrauding J of his property and (b) by embracing similar purposes, results, participants, and method of commission (Relatedness Test), and
- pose an open-ended threat (substantial likelihood) of continued criminal racketeering activity in the future (Continuity Test).

3. DEFENDANT - A PERSON

S is a person, since S is a legal entity.

4. CONDUCTED/PARTICIPATED IN CONDUCT OF AFFAIRS OF ENTERPRISE

*a. Requirement of a RICO Enterprise*

As an association in fact, S, T & O constitute members of an association-in-fact enterprise (the S, T & O Enterprise) that exhibits (a) an ascertainable structure, (b) a common or shared purpose, and (c) continuity of structure and personnel.

*b. Conducted/Participated in Conduct of Affairs of Enterprise*

S conducted or participated in the conduct of the affairs of the S, T & O Enterprise through a pattern of racketeering activity, where S is a person distinct from the S, T & O Enterprise. Here, S executed various schemes and artifices to defraud J of his property. More specifically, S was employed by or associated with the S, T & O Enterprise, where S participated in the conduct or affairs of such enterprise by engaging in the predicate acts of (1) wire fraud; (2) mail fraud; (3) extortion, attempted extortion, and conspiracy to extort; and (4) embezzlement constituting (a) a pattern of racketeering activity, as defined in 18 U.S.C. § 1961(5), and (b) a pattern of collection of unlawful debt, as defined in 18 U.S.C. § 1961(6), where such acts have a common purpose of furthering a continuing criminal enterprise (i.e., engaging in a series of communications for the purpose of devising, fostering and/or creating a fraudulent pretext upon which to declare J's loans delinquent and/or in default and thereby deny J of his property and what was owed to J).

5. INTERSTATE COMMERCE

S's enterprise activities affect interstate commerce, since such activities involve the interstate collection of debt.

6. INJURY

Resulting from S's commission of the predicate acts in connection with the conduct of S, T & O Enterprise, J's injury in his business and property necessarily is the harm that is proximately caused by those predicate acts, where (i) such acts are sufficiently related to constitute a pattern of racketeering activity and/or collection of unlawful debt and (ii) such injury occurred through a natural and continuous sequence of events unbroken by any effective intervening cause, thereby establishing S's commission of said predicate acts as the proximate cause of J's injuries.

C. CONCLUSION – SUMMARY EXAMPLE

J, as plaintiff, may bring a private (civil RICO) cause of action arising under 18 U.S.C. Section 1964(c) and state law, where in bringing such cause of action, J will seek to recover treble compensatory damages, along with the costs, and reasonable attorneys' fees for S's violation of 18 U.S.C. Section 1962(c), in that S, through a pattern of racketeering activity or through collection of an unlawful debt, conducted or participated in the conduct of the affairs of the S, T & O Enterprise, engaged in interstate commerce or affecting interstate.