

Racketeer Influenced and Corrupt Organizations (RICO)

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6.18.1962C RICO – Conducting or Participating in the Conduct of the Affairs of an Enterprise Through a Pattern of Racketeering Activity; Elements of the Offense (18 U.S.C. § 1962(c))

Count (*no.*) of the indictment charges defendant (*name*) with violating the Racketeer Influenced and Corrupt Organizations Act, also known as RICO. Under this statute, it is a federal crime for any person who is employed by or associated with an enterprise that is engaged in or affects interstate or foreign commerce, to conduct or to participate in the conduct of the affairs of that enterprise through a pattern of racketeering activity.

In order to find (*name*) guilty of this offense, you must find that the government proved each of the following five elements beyond a reasonable doubt:

First: The existence of an enterprise;

Second: That the enterprise was engaged in or its activities affected interstate or foreign commerce;

Third: That (*name*) was employed by or associated with that enterprise;

Fourth: That (*name*) knowingly conducted that enterprise's affairs or that (*name*) knowingly participated, directly or indirectly, in the conduct of that enterprise's affairs; and

Fifth: That (*name*) knowingly (*conducted*) (*participated, directly or indirectly, in the conduct of*) that enterprise's affairs through (*a pattern of racketeering activity*) (*the collection of an unlawful debt*), as alleged in the indictment.

I will now explain the law that applies to these elements.

Comment

See Kevin F. O'Malley, Jay E. Grenig, & Hon. William C. Lee, 1A *Federal Jury Practice and Instructions* (5th ed. 2000) [hereinafter O'Malley et al.] § 56.03; Hon. Leonard Sand, John S. Siffert, Walter P. Loughlin, Steven A. Reiss & Nancy Batterman, *Modern Federal Jury Instructions - Criminal* (2003) [hereinafter, Sand et al.] 52-19. For variations in other Circuits, see Fifth Circuit § 2.78; Seventh Circuit § 1962(c); Eighth Circuit § 6.18.1962A; Ninth Circuit §§ 8.129-30; Eleventh Circuit § 71.1.

18 U.S.C. § 1962(c) provides:

(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

In *United States v. Irizarry*, the Third Circuit quoted its precedent in stating, “[t]o establish a §1962(c) RICO violation, the government must prove the following four elements: ‘(1) existence of an enterprise affecting interstate commerce; (2) that the defendant was employed by or associated with the enterprise; (3) that the defendant participated, either directly or indirectly, in the conduct or the affairs of the enterprise; and (4) that he or she participated through a pattern of racketeering activity.’” *United States v. Irizarry*, 341 F.3d 273, 285 (3d Cir. 2003), quoting *United States v. Console*, 13 F.3d 641, 652-53 (3d Cir. 1993), and *United States v. Riccobene*, 709 F.2d 214, 222 (3d Cir. 1983), *overruled on other grounds by Griffin v. United States*, 502 U.S. 46, 112 (1991). See also *United States v. Fattah*, 902 F. 3d 197, 246-252 (3d Cir. 2018); *United States v. Bergrin*, 650 F.3d 257, 265-266 (3d Cir. 2011) and *United States v. Parise*, 159 F.3d 790, 794 (3d Cir. 1998). Although the Third Circuit cases do not discuss a “knowingly” state of mind as to the fourth and fifth elements, other model instructions include it. See, e.g., O'Malley § 56.03. For the definition of knowingly, see Instruction 5.02 (Knowingly).

Pattern of Racketeering Activity; Collection of Unlawful Debt. This instruction charges participation in the conduct of an enterprise's affairs “through a pattern of racketeering activity.” An offense under section 1962(c) may also rest on participation in an enterprise's affairs “through the collection of unlawful debt.” If that is the nature of the offense charged, the instructions should be modified accordingly.

Definitions of Elements. Instructions 1962C-1 through 1962C-9 define the elements of a section 1962(c) offense. Even when a section 1962(c) substantive offense is not charged, the court may need to give the definitional instructions when the defendant is charged with a section 1962(d) conspiracy whose objective is a section 1962(c) offense. See Instruction 6.18.1962D (RICO Conspiracy; Elements of Offense).

The trial judge may consider it advisable, in some cases, to admonish the jury that the word “racketeering” is simply a term used by Congress in the statute and its use in the trial should not influence the jury.

Other RICO Offenses. In addition to the offense covered by this instruction, 18 U.S.C. § 1962 defines three other RICO offenses. Section 1962(d) (RICO conspiracy) is covered by Instruction 6.18.1962D. The other two subsections of 18 U.S.C. §1962 provide in pertinent part:

(a) It shall be unlawful for any person [1] who has received any income derived, directly or indirectly, from [2] a pattern of racketeering activity or through collection of an unlawful debt [3] in which such person has participated as a principal, . . . [4] to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, [5] any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce. . . .

(b) It shall be unlawful for any person [1] through a pattern of racketeering activity or through collection of an unlawful debt [2] to acquire or maintain, directly or indirectly, any interest in or control of [3] any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

18 U.S.C. § 1962(a) & (b) (numbers added in brackets to indicate the elements of the offenses). If the defendant is charged with violating section 1962(a) or (b), the trial judge should modify this section 1962(c) instruction, by describing the appropriate violation in the first paragraph and then instructing on the elements of section 1962(a) or (b).

Guilt of RICO Offense by Aiding and Abetting. A defendant may be guilty of a substantive RICO offense by aiding and abetting under 18 U.S.C. § 2. If that basis of responsibility is charged, the court should also give Instruction 7.02 (Accomplice Liability; Aiding and Abetting). Also, where there is an alleged conspiracy to commit the RICO offense, a defendant need not personally commit all the elements of the offense; some or all of the elements may be committed by a co-conspirator. These instructions only refer to the defendant (*name*) in discussing the person who is alleged to have committed the elements, but in some cases it may be the defendant or another person for whom the defendant is responsible through aiding and abetting or conspiracy. Therefore, trial judge may need to be careful to modify the instructions as appropriate in view of the government’s theory and the allegations of the indictment.

RICO Criminal Forfeiture of Property. If the indictment contains notice that the government will seek forfeiture of property as part of sentencing, in accordance with 18 U.S.C. § 1963, and if a party requests a jury determination that the property is subject to forfeiture under Fed. R. Crim. P. 32.2(b)(4), then the trial court will need to give Instruction 6.18.1963 (RICO – Criminal Forfeiture of Property (18 U.S.C. § 1963)).

6.18.1962C-1 RICO – “Enterprise” Defined Generally

The first element that the government must prove beyond a reasonable doubt for the offense charged in Count (no.) is the existence of an “enterprise,” as alleged in the indictment. An enterprise may be: (1) a legal entity, such as a corporation or partnership (or sole proprietorship) (or association); or (2) a (union or) group of individuals associated in fact although not a legal entity. In this case, the enterprise alleged in the indictment is (describe the type of enterprise and the specific enterprise alleged in the indictment).

The term enterprise includes both legitimate enterprises and also illegitimate or completely illegal enterprises. Thus, the enterprise need not have a purpose other than the commission of or facilitating the commission of the racketeering activity alleged in the indictment.

[Although the government must prove that (name) was employed by or associated with the enterprise, the enterprise must itself be an entity separate and distinct from the defendant.]

Comment

See 2B O’Malley et al, supra, § 56.04; Sand et al, supra, 52-20, 52-29. For variations in other Circuits, see Eighth Circuit § 6.18.1962D.

The **RICO Act defines** an "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." 18 U.S.C. §1961(4). Although the government is not required to prove the existence of an enterprise engaged in or affecting interstate or foreign commerce for a section 1962(d) RICO conspiracy to violate section 1962(c), in most cases the government will do so. *See Comment to Instruction 6.18.1962C.* Therefore, ordinarily the trial judge should give this and the other relevant enterprise instructions when the defendant is charged with a substantive

section 1962(c) offense, or with a section 1962(d) conspiracy, or both. See Instructions 6.18.1962-2; 6.18.1962-3.

Legal Entity Enterprise. A “legal entity” type of enterprise is generally self-explanatory and may include, besides corporations and partnerships, sole proprietorships, labor unions and their benefit plans, and governmental entities. See, e.g., *United States v. Parise*, 159 F.3d 790, 795 (3d Cir. 1998); *United States v. McDade*, 28 F.3d 283, 295-96 (3d Cir. 1994). See Sand, Comment to Instruction 52-20. When the enterprise alleged in the indictment is a “union or group of individuals associated in fact although not a legal entity” (an “association in fact enterprise”), Instruction 6.18.1962-2 (RICO – “Enterprise;” Association in Fact Defined) should be given.

With respect to the second paragraph of this instruction, see *United States v. Turkette*, 452 U.S. 576 (1981) (holding that an enterprise may be a legitimate organization or a completely illegal organization) and the Comment to Instruction 6.18.1962-2.

Distinctness Principle. The requirement that the enterprise and the defendant (the RICO “person”) must be separate and distinct (the “distinctness” principle) was accepted by the Supreme Court in *Cedric Kushner Promotion Ltd. v. King*, 533 U.S. 158, 161, 166 (2001), where the Court held that “the need for two distinct entities is satisfied . . . when a corporate employee unlawfully conducts the affairs of the corporation of which he is the sole owner. . . .” See also *United States v. Bergrin*, 650 F.3d 257, 269 (3d Cir. 2011). In most cases this will not be an issue, but if it is, the bracketed final paragraph should be given.

(Revised 11/2018)

6.18.1962C-2 RICO – “Enterprise;” Association in Fact Defined

The indictment alleges that the enterprise in this case was a *(union or)* group of individuals *[a group of separate legal entities] [a group of individuals and legal entities]* associated together in fact although not *[itself]* a legal entity. As I already told you, an enterprise need not be a formal business entity such as a corporation, but may be merely an informal association of individuals *[or of separate legal entities] [or of individuals and legal entities]*. A group or association of individuals *[legal entities] [individuals and legal entities]* can be an enterprise if they have associated together for a common purpose of engaging in a course of conduct. This is referred to as an “association in fact enterprise.”

In order to find the existence of an “association in fact enterprise,” you must find that the government proved beyond a reasonable doubt each of the following:

First: That the *(union or)* group had a purpose(s) and longevity sufficient for the members of the *(union or)* group *(those associated with the (union or) group)* to pursue its purpose(s);

Second: That the *(union or)* group had an ongoing organization, formal or informal, with some sort of framework for carrying out its objectives;

Third: That there was a relationship(s) among the members of the *(union or)* group *(those associated with the (union or) group)* and that the members of the *(union or)* group *(those associated with the (union or) group)* functioned as a continuing unit to achieve a common purpose(s); and

Fourth: That the enterprise existed separate and apart from the alleged pattern of racketeering activity.

To find that the enterprise was an entity separate and apart from the alleged pattern of racketeering activity, you must find that the government proved that the enterprise had an existence beyond what was necessary merely to commit the charged racketeering activity. However, the government does not have to prove that the enterprise had some function wholly unrelated to the racketeering activity; the enterprise may be formed solely for the purpose of carrying out a pattern of racketeering activity. The existence of an association-in-fact enterprise is often proved by what it does[, rather than by abstract analysis of its structure]. Evidence that shows a pattern of racketeering activity may be considered in determining whether the government has proved the existence of an enterprise beyond a reasonable doubt, and proof of a pattern of racketeering activity may be sufficient for you to infer the existence of an association-in-fact enterprise. Also, evidence showing the oversight or coordination of the commission of several different racketeering acts and other activities on an ongoing basis may be considered in determining whether the enterprise had a separate existence.

To prove an association-in-fact enterprise, the government need not prove that the group had a hierarchical structure or a chain of command; decisions may be made on an ad hoc basis and by any number of methods. The government also need not prove that members of the group had fixed roles; different members may

perform different roles at different times. The government need not prove that the group was a business-like entity, or that it had a name, or regular meetings, or established rules and regulations, or the like. An enterprise is also not limited to groups whose crimes are sophisticated, diverse, complex, or unique.

Comment

See 2B O'Malley et al, supra, § 56.04; Sand et al, supra, 52-20, 52-29.

“Association in Fact Enterprise” as Defined by Supreme Court and Third Circuit.

The Supreme Court, in *United States v. Turkette*, 452 U.S. 576 (1981), explained with respect to a so-called “association-in-fact enterprise” that, “[t]he enterprise is an entity, for present purposes a group of persons associated together for a common purpose of engaging in a course of conduct.” The existence of this type of enterprise “is proved by evidence of an ongoing organization, formal or informal, and by evidence that the various associates function as a continuing unit.” 452 U.S. at 583. See also *United States v. Fattah*, 902 F.3d 197, 247-248 (3d Cir. 2018); *United States v. Bergrin*, 650 F.3d 257, 265-66 (3d Cir. 2011), and *United States v. Irizarry*, 341 F.3d 273, 285-86 (3d Cir. 2003). The Supreme Court in *Turkette* also made it clear that “[t]he ‘enterprise’ is not the ‘pattern of racketeering activity’; it is an entity separate and apart from the ‘pattern of racketeering activity’ in which it engages. The existence of an enterprise at all times remains a separate element. . . .” The Court also recognized, however, that “the proof used to establish these separate elements may in particular cases coalesce, [but] proof of one does not necessarily establish the other.” *Turkette*, 452 U.S. at 583. See also *United States v. Bergrin*, 650 F.3d 257, 269 (3d Cir. 2011); *United States v. Console*, 13 F.3d 641, 650 (3d Cir. 1993). The Third Circuit has acknowledged that, in the right circumstances, the existence of an enterprise may be inferred from proof of a pattern of racketeering activity. See, e.g., *United States v. Irizarry*, 341 F.3d at 286; *United States v. Console*, 13 F.3d at 650 n.5; *United States v. Pelullo*, 964 F.2d 193, 212 (3d Cir. 1992).

In *United States v. Irizarry*, the Third Circuit quoted its earlier decision in *United States v. Riccobene*, where it “construed *Turkette* to require proof of each of the three sub-elements . . . , thus requiring the Government to prove: (1) that the enterprise is an ongoing organization with some sort of framework for making or carrying out decisions; (2) that the various associates function as a continuing unit; and (3) that the enterprise is separate and apart from the pattern of activity in which it engages.” 341 F.3d at 286, quoting *United States v. Riccobene*, 709 F.2d 214, 222 (3d Cir. 1983), *overruled on other grounds by Griffin v. United States*, 502 U.S. 46, 112 (1991). In *Riccobene*, the Third Circuit stated that “[e]ach of the elements enumerated by the Supreme Court describes a separate aspect of the life of the enterprise,” and that these three requirements are questions of fact for the jury. 709 F.2d at 222; see *Irizarry*, 341 F.3d at 286.

In *Boyle v. United States*, 556 U.S. 938, 129 S.Ct.2237 (2009), the Supreme Court resolved a conflict among the Circuits by holding that, although an association in fact enterprise must have a structure, it need not have an “ascertainable structure” beyond that inherent in the pattern of racketeering activity in which it is engaged, and the trial court need not use the word “structure” in its instructions to the jury. In so doing, the Court implicitly rejected parts of the Third Circuit’s definition of the elements of an association-in-fact enterprise. See, e.g., *Riccobene*, 709 F.2d at 222 (suggesting that the government must prove that there was some mechanism for controlling and directing the affairs of the group on an on-going basis, that some sort of structure existed within the group for making decisions, whether based on a hierarchy or consent of the members, that the members performed roles in the group consistent with the group’s organizational structure, and that there was a shared organizational pattern and a system of authority).

The Court in *Boyle* concluded that “an association-in-fact enterprise must have a structure;” it “must have at least three structural attributes: a purpose, relationships among those associated with the enterprise, and longevity sufficient to permit these associates to pursue the enterprise’s purpose.” 556 U.S. at 946, 129 S.Ct. at 2244, citing *Turkette*. However, the Court continued, “Although an association-in-fact enterprise must have these structural features, it does not follow that a district court must use the term ‘structure’ in its jury instructions,” 556 U.S. at 946, and stated that telling the jury that the structure must be ascertainable would be “redundant and potentially misleading.” 556 U.S. at 947, 129 S.Ct. at 2245. The Court rejected the defense argument that the enterprise “must have at least some additional structural attributes:”

Such a group need not have a hierarchical structure or a ‘chain of command;’ decisions may be made on an ad hoc basis and by any number of methods. . . . Members of the group need not have fixed roles; different members may perform different roles at different times. The group need not have a name, regular meetings, dues, established rules and regulations, . . . While the group must function as a continuing unit and remain in existence long enough to pursue a course of conduct, nothing in RICO exempts an enterprise whose associates engage in spurts of activity punctuated by periods of quiescence. Nor is the statute limited to groups whose crimes are sophisticated, diverse, complex, or unique; for example, a group that does nothing but engage in extortion through old-fashioned, unsophisticated, and brutal means may fall squarely within the statute’s reach.

556 U.S. at 948, 129 S.Ct. at 2245-46. Similarly, the Court rejected the assertion of the dissenting justices in *Boyle* “that the definition of a RICO enterprise is limited to ‘business-like entities.’” 556 U.S. at 945, 129 S.Ct. at 2243. Finally, the *Boyle* Court reaffirmed what it had said in *Turkette*, that it is “it is incorrect” to say “that the existence of an enterprise may never be inferred from the evidence showing that persons associated with the enterprise engaged in a pattern of racketeering activity. . . .” 556 U.S. at 947, 129 S.Ct. at 2245, citing *Turkette* at 583.

In *Boyle*, the Court held that the trial judge correctly instructed the jury that:

[I]n order to establish the existence of such an enterprise, the Government had to prove that: “(1) There [was] an ongoing organization with some sort of framework, formal or informal, for carrying out its objectives; and (2) the various members and associates of the association function[ed] as a continuing unit to achieve a common purpose.” Over petitioner’s objection, the court also told the jury that it could “find an enterprise where an association of individuals, without structural hierarchy, form[ed] solely for the purpose of carrying out a pattern of racketeering acts” and that “[c]ommon sense suggests that the existence of an association-in-fact is oftentimes more readily proven by what it does, rather than by abstract analysis of its structure.”

556 U.S. at 942, 129 S.Ct. at 2242. The trial judge also correctly refused a defense request to instruct “that the Government was required to prove that the enterprise ‘had an ongoing organization, a core membership that functioned as a continuing unit, and an ascertainable structural hierarchy distinct from the charged predicate acts.’” 556 U.S. at 943. The trial court adequately instructed the jury that the enterprise needed to have the structural attributes that may be inferred from the statutory language in telling the jury that the government was required to prove that there was “an ongoing organization with some sort of framework, formal or informal, for carrying out its objectives” and that “the various members and associates of the association function[ed] as a continuing unit to achieve a common purpose.” Finally, the Court said the trial judge did not err in instructing the jury that “the existence of an association-in-fact is oftentimes more readily proven by what it does, rather than by abstract analysis of its structure.” . . . This instruction properly conveyed the point we made in *Turkette* that proof of a pattern of racketeering activity may be sufficient in a particular case to permit a jury to infer the existence of an association-in-fact enterprise.” 556 U.S. at 951, 129 S.Ct. at 2247. See also *United States v. Fattah*, 902 F.3d 197, 247-8 (3d Cir. 2018) and *U.S. v. Cooper*, 343 Fed.Appx. 830, 832 (3d Cir. 2009) (non-precedential).

When the alleged association-in-fact enterprise consists of a group of not only individuals, but a group of legal entities or a group of legal entities and individuals, the bracketed language in the first paragraph should be used. See, e.g., *United States v. Aimone*, 715 F.2d 822, 828 (3d Cir. 1983) (a RICO enterprise may be a legal entity, or a group of individuals or a combination of legal entities and individuals associated in fact), citing *United States v. Thevis*, 665 F.2d 616, 625-26 (5th Cir. 1979), and *United States v. Huber*, 603 F.2d 387, 393-94 (2d Cir. 1979).

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**6.18.1962C-3 RICO – “Engaged In, or the Activities of Which Affect, Interstate
or Foreign Commerce” Defined**

The second element the government must prove beyond a reasonable doubt for the offense charged in Count (*no.*) is that the enterprise was engaged in interstate (*or foreign*) commerce, or that the enterprise’s activities affected interstate (*or foreign*) commerce. This means the government must prove that the enterprise was involved in or affected in some way trade, or business, or travel between two or more states (*between a state and a foreign country*).

An enterprise is engaged in interstate (*or foreign*) commerce when it is itself directly engaged in the production, distribution, or acquisition of services, money, goods, or other property in interstate (*foreign*) commerce.

Alternatively, an enterprise’s activities affected interstate (*foreign*) commerce if its activities in any way interfered with, changed, or altered the movement or transportation or flow of goods, merchandise, money, or other property between or among two or more states (*between a state and a foreign country*). The government must prove that the enterprise’s activities had some effect on commerce, no matter how minimal or slight. The government need not prove that (*name*) knew that the enterprise would engage in, or that the enterprise’s activities would affect, interstate (*foreign*) commerce. The government also need not prove that (*name*) intended to obstruct, delay or interfere with interstate (*foreign*) commerce, or that the purpose of the alleged crime generally was to affect interstate (*foreign*) commerce. [May be

given if relevant: Moreover, you do not have to decide whether the effect on commerce was harmful or beneficial.]

In addition, the government does not have to prove that the pattern or the individual acts of racketeering activity themselves affected interstate (*or foreign*) commerce. Rather, it is the enterprise and its activities considered as a whole that must be shown to have that effect. On the other hand, this effect on interstate (*or foreign*) commerce may be established through the effect caused by the pattern or the individual acts of racketeering activity.

Comment

See 2B O'Malley et al, *supra*, § 56.05; Sand et al, *supra*, 52-21, 52-30. *See, e.g., United States v. Robertson*, 514 U.S. 669 (1995).

6.18.1962C-4 RICO – “Employed by or Associated with Any Enterprise”

Defined

The third element that the government must prove beyond a reasonable doubt for the offense charged in Count *(no.)* is that *(name)* was either “employed by” or “associated with” the enterprise. The government need not prove both.

If you find that *(name)* was employed by the enterprise, that is enough to satisfy this element. You should give the phrase “employed by” its common, ordinary meaning. For example, a person is employed by an enterprise when he or she is on the payroll of the enterprise, or performs services for the enterprise, or holds a position in the enterprise.

Alternatively, you may find that *(name)* was “associated with” the enterprise, if you find that the government proved that *(he) (she)* was aware of the general existence and nature of the enterprise, that it extended beyond *(his) (her)* individual role, and with that awareness participated in, aided, or furthered the enterprise’s activities *[or had an ownership interest in the enterprise]*.

It is not required that *(name)* be employed by or associated with the enterprise for the entire time the enterprise existed. The government also is not required to prove that *(name)* had a formal or managerial position in the enterprise, or participated in all the activities of the enterprise, or had full knowledge of all the activities of the enterprise, or knew about the participation of all the other members of the enterprise. What the government must prove beyond a reasonable doubt is

that at some time during the existence of the enterprise as alleged in the indictment, (name) was employed by or associated with the enterprise within the meaning of those terms as I have just explained.

To prove that (name) was either employed by or associated with an enterprise, the government must prove beyond a reasonable doubt that (name) was connected to the enterprise in some meaningful way, and that (name) knew of the existence of the enterprise and of the general nature of its activities.

Comment

See Sand et al, supra, 52-22, 52-31; Seventh Circuit § 1962(c)

In *United States v. Parise*, the Third Circuit stated that “[f]or the purposes of RICO, the threshold showing of ‘association’ is not difficult to establish; it is satisfied by proof that the defendant was ‘aware of at least the general existence of the enterprise named in the indictment.’ *United States v. Eufrasio*, 935 F.2d 553, 577 n. 29 (3d Cir.1991) (quoting *United States v. Castellano*, 610 F.Supp. 1359, 1401-02 (S.D.N.Y.1985)); *see also Console*, 13 F.3d at 653. That is, a defendant must be aware of the general nature of the enterprise and know that the enterprise extends beyond his individual role. *See United States v. Rastelli*, 870 F.2d 822, 828 (2d Cir.1989).” 159 F.3d 790, 796 (3d Cir. 1998). With respect to whether a defendant was “employed by” the enterprise, *see United States v. Console*, 13 F.3d 641, 654 (3d Cir. 1993).

In *United States v. Urban*, 404 F.3d 754, 769-70 (3d Cir. 2005), the Third Circuit recounted:

“[O]ne need not hold a formal position within an enterprise in order to ‘participate’ in its affairs.” *United States v. Parise*, 159 F.3d 790, 796 (3d Cir.1998) (citing *Reves*, 507 U.S. at 179, 113 S.Ct. 1163). Moreover, “the ‘operation or management’ test does not limit RICO liability to upper management because ‘an enterprise is operated not just by upper management but also by lower-rung participants in the enterprise who are under the direction of upper management.’” *Parise*, 159 F.3d at 796 (quoting *Reves*, 507 U.S. at 184, 113 S.Ct. 1163) (internal quotation marks omitted). *Reves* thus “made clear that RICO liability may extend to those who do not hold a managerial position within an enterprise, but who do nonetheless knowingly further the illegal aims of the enterprise by carrying out the directives of those in control.” *Id.*

**6.18.1962C-5 RICO – “Conduct or Participate, Directly or Indirectly, in the
Conduct of Such Enterprise’s Affairs” Defined**

The fourth element that the government must prove beyond a reasonable doubt for the offense charged in Count *(no.)* is that *(name)* knowingly conducted the affairs of the enterprise or that *(he)* *(she)* knowingly participated, directly or indirectly, in the conduct of the affairs of the enterprise. In order to prove this element, the government must prove a connection between *(name)* and the conduct of the affairs of the enterprise. The government must prove that *(name)* took some part in the operation or management of the enterprise or that *(he)* *(she)* had some role in directing the enterprise’s affairs.

Evidence that *(name)* held a managerial position within the enterprise or exerted control over the enterprise’s operations is enough to prove this element, but is not required. You may find that *(name)* participated, directly or indirectly, in the conduct of the affairs of the enterprise if you find that *(he)* *(she)* was a lower level participant who acted under the direction of upper management, knowingly furthering the aims of the enterprise by implementing management decisions or carrying out the instructions of those in control, or that *(name)* knowingly performed acts, functions, or duties that were necessary to, or helpful in, the operation of the enterprise.

Comment

See 2B O'Malley et al, supra, § 56.08; Sand et al, supra, 52-25. For variations in other Circuits, see Seventh Circuit §1962(c); Eighth Circuit § 6.18.1962E.

Operation or Management Test. In *United States v. Parise*, 159 F.3d 790, 796 (3d Cir. 1998), the Third Circuit recognized that:

Our analysis of this claim must begin with an examination of the definition of “participation” under § 1962(c) as clarified by the Supreme Court in *Reves v. Ernst & Young*, 507 U.S. 170, 113 S.Ct. 1163, 122 L.Ed.2d 525 (1993). In *Reves*, the Court endorsed the “operation or management” test to determine whether a defendant participated in the conduct of an enterprise's affairs. *Id.* at 184, 113 S.Ct. 1163. According to *Reves*, “[i]n order to ‘participate, directly or indirectly, in the conduct of such enterprise's affairs,’ one must have some part in directing those affairs.” *Id.* at 179, 113 S.Ct. 1163. However, one need not hold a formal position within an enterprise in order to “participate” in its affairs. *Id.* at 179, 113 S.Ct. 1163. Further, the “operation or management” test does not limit RICO liability to upper management because “an enterprise is ‘operated’ not just by upper management but also by lower-rung participants in the enterprise who are under the direction of upper management.” *Id.* at 184, 113 S.Ct. 1163. In so holding, the Court made clear that RICO liability may extend to those who do not hold a managerial position within an enterprise, but who do nonetheless knowingly further the illegal aims of the enterprise by carrying out the directives of those in control.

In *Parise*, the Third Circuit reasoned that the purpose of the operation or management test was to limit RICO liability under §1962(c) to those situations in which the government can demonstrate a nexus between the person and the conduct of the affairs of the enterprise. 159 F.3 at 795. See also *U.S. v. Urban*, 404 F.3d 754, 769-70 (3d Cir. 2005).

Defendant Charged Not as Principal But as Aider or Abettor or with *Pinkerton* Liability. The operation or management test addresses the liability of a principal in a section 1962(c) offense. If the government alleges that the defendant is guilty of violating section 1962(c) as an aider or abettor (accomplice) under 18 U.S.C. § 2, then the government would not need to prove that the defendant was personally involved in the operation or management of the enterprise. The government would simply need to prove that he or she aided or abetted another person who was involved in the operation or management of the enterprise. The Third Circuit has not decided a criminal case in which the defendant was charged with aiding and abetting a RICO section 1962(c) violation, but it has discussed aiding and abetting in a civil RICO case. In *Rolo v. City Investing Co. Liquidating Trust*, 155 F.3d 644, 656-57 (3d Cir. 1998), the Third Circuit held that a private, civil cause of action for aiding and abetting a RICO violation cannot be sustained. Relying on *Central Bank of Denver v. First Interstate Bank of Denver*, 522 U.S. 164 (1994) (holding that private aiding and abetting suits were not authorized by section 10(b) of the Securities Act of 1934), the Third Circuit distinguished civil from criminal RICO actions:

Section 1964(c) establishes a civil remedy in favor of “[a]ny person injured in his business or property by reason of a violation of section 1962.” Like § 10(b), the text of § 1962 itself contains no indication that Congress intended to impose private civil aiding and abetting liability under RICO. Criminal liability for aiding and abetting a violation of § 1962 is imposed by reference to the general aiding and abetting statute, 18 U.S.C. § 2. This provision has no application to private causes of action. *See Central Bank of Denver*, 511 U.S. at 181-82, 114 S.Ct. 1439. Thus, reference to 18 U.S.C. § 2 cannot provide the basis for the imposition of civil liability for aiding and abetting a RICO violation.

155 F.3d at 657. If the defendant is charged with aiding and abetting a section 1962(c) offense, the trial judge should give Instruction 7.02 (Accomplice Liability; Aiding and Abetting).

The “operation or management” test would also not limit liability for a section 1962(d) RICO conspiracy to commit a section 1962(c) violation, or for *Pinkerton* liability for the substantive 1962(c) offense committed by a co-conspirator of the defendant. *See* the Comment to Instruction 6.18.1962D (RICO – Conspiracy; Elements of the Offense (18 U.S.C. §1962(d))). If the defendant is charged with a section 1962(c) offense committed by a co-conspirator, the trial judge should give 7.03 (Responsibility for Substantive Offenses Committed by Co-Conspirators (*Pinkerton* Liability)).

(Revised 11/2018)

6.18.1962C-6 RICO – “Through a Pattern of Racketeering Activity” Defined

The fifth element that the government must prove beyond a reasonable doubt for the offense charged in Count *(no.)* is that *(name)* knowingly conducted the enterprise’s affairs or knowingly participated, directly or indirectly, in the conduct of the enterprise’s affairs “through a pattern of racketeering activity.”

To establish this element, the government must prove each of the following beyond a reasonable doubt:

First: That *(name)* committed at least two of the acts of racketeering activity alleged in the indictment and that the last act of racketeering activity occurred within ten years [*X years, if the time is extended by *(name)*’s period of imprisonment*] after the commission of a previous act of racketeering activity;

Second: That the acts of racketeering activity were related to each other, meaning that there was a relationship between or among the acts of racketeering activity [*referred to as the “relatedness” requirement*];

Third: That the acts of racketeering activity amounted to or posed a threat of continued criminal activity [*referred to as the “continuity” requirement*]; and

Fourth: That *(name)* conducted or participated, directly or indirectly, in the conduct of the enterprise’s affairs “through” the pattern of racketeering activity.

With respect to the second requirement, acts of racketeering activity are “related” if the acts had the same or similar purposes, results, participants, victims

or methods of commission, or were otherwise interrelated by distinguishing characteristics. Acts of racketeering activity are not related if they are disconnected, sporadic, or widely separated and isolated acts.

As to the third requirement, the government must prove that the racketeering acts themselves amounted to continuing racketeering activity or that the acts otherwise posed a threat of continuing racketeering activity. Continuing racketeering activity may be proved by evidence showing a closed period of repeated racketeering activity; that is, by evidence of a series of related racketeering acts committed over a substantial period of time. *[Acts of racketeering activity committed over only a few weeks or months and which do not threaten future criminal conduct do not satisfy this requirement.] Continuing racketeering activity or a threat of continuing racketeering activity may also be proved by evidence showing past racketeering activity that by its nature projects into the future with a threat of repetition; for example, when the acts of racketeering activity are part of a long-term association that exists for criminal purposes or when the acts of racketeering activity are shown to be the regular way of conducting the affairs of the enterprise.*

[In deciding whether the government proved a pattern of racketeering activity, you may consider evidence regarding the number of acts of racketeering activity, the length of time over which the acts were committed, the similarity of the acts, the number of victims, the number of perpetrators, and the character of the unlawful activity.]

[You may find that separately performed, functionally different, or directly unrelated acts of racketeering activity form a pattern of racketeering activity if you find that the government proved beyond a reasonable doubt that they were all undertaken in furtherance of one or another of the purposes of the enterprise.]

To prove the fourth requirement, that (name) conducted or participated in the conduct of the enterprise’s affairs “through” a pattern of racketeering activity, the government must prove that the acts of racketeering activity had a relationship or a meaningful connection to the enterprise. This relationship or connection may be established by evidence that (name) was enabled to commit the racketeering activity by virtue of (his) (her) position with or involvement in the affairs of the enterprise, or by evidence that (name’s) position with or involvement in the enterprise facilitated (his) (her) commission of the racketeering activity, or by evidence that the racketeering activity benefitted the enterprise, was authorized by the enterprise, promoted or furthered the purposes of the enterprise, or was in some other way related to the affairs of the enterprise.

Comment

See 2B O’Malley et al, supra, § 56.07; Sand et al, supra, 52-23. For variations in other Circuits, see Seventh Circuit § 1962(c); Eighth Circuit § 6.18.1962F; Ninth Circuit § 8.126.

Statutory Requirement. In order to satisfy the statutory requirement of 18 U.S.C. § 1962 that the defendant’s participation must be “through a pattern of racketeering activity,” section 1961(5) “requires at least two acts of racketeering activity, one of which occurred after the effective date of [the RICO act] and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity.”

If there is evidence that the ten year period, within which the racketeering acts must occur, should be extended because the defendant was in prison, this could raise a jury question. However, because of the sensitivity of evidence that the defendant was in prison, the extension of the time period is usually stipulated.

Relatedness and Continuity. Proof of two acts of racketeering activity without more does not, however, establish a pattern of racketeering activity. The Supreme Court in *H.J. Inc. v. Northwestern Bell Telephone Co.*, 492 U.S. 229 (1989), interpreted RICO as requiring that “to prove a pattern of racketeering activity a plaintiff or prosecutor must show that the racketeering predicates are related *and* that they amount to or pose a threat of continued criminal activity.” 492 U.S. at 239. The Court noted that the “relatedness” and “continuity” requirements were flexible and fact-specific, and it defined these requirements no more explicitly than what is articulated in this instruction. See also *United States v. John-Baptiste*, 747 F.3d 186, 207 (2014); *United States v. Bergrin*, 650 F.3d 257, 267 (3d Cir. 2011); *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 496 n. 14 (1985); *United States v. Pelullo*, 964 F.2d 193, 207 (3d Cir. 1992) (holding that the trial court erred when it failed to include the continuity requirement in its jury instruction on the pattern of racketeering element).

In *United States v. Bergrin*, the Third Circuit explained:

Crimes can be “interrelated by [a] distinguishing characteristic []” when they are “committed pursuant to the orders of key members of the enterprise in furtherance of its affairs.” *United States v. Pungitore*, 910 F.2d 1084, 1104 (3d Cir.1990). “Continuity” includes “both a closed and open-ended concept, referring either to a closed period of repeated conduct, or to past conduct that by its nature projects into the future with a threat of repetition.” *H.J., Inc.*, 492 U.S. at 241, 109 S.Ct. 2893. “Closed-ended continuity” can be established “by proving a series of related predicates extending over a substantial period of time.” *Id.* at 242, 109 S.Ct. 2893. A finding of “open-ended continuity,” on the other hand, “depends on whether the *threat* of continuity is demonstrated.” *Id.* (emphasis in original). Although “[f]or analytic purposes [relatedness and continuity] ... must be stated separately, ... in practice their proof will often overlap.” *Id.* at 239, 109 S.Ct. 2893.

650 F.3d at 267. See also *United States v. Fattah*, 902 F. 3d 197, 251-252 (3d Cir. 2018).

With respect to “**closed-ended continuity**,” the Supreme Court in *H.J.Inc.* stated only that the evidence must prove “a series of related predicates extending over a substantial period of time” and that acts “extending over a few weeks or months and threatening no future criminal conduct do not satisfy this requirement.” 492 U.S. at 242. In *Pelullo*, the Third Circuit concluded that evidence of racketeering activity that extended over a period of 19 months would be sufficient to support a finding of closed-ended continuity, noting that, “[w]hile declining to define with precision the meaning of a “substantial period of time,” we have never found such a period to exist where the racketeering activity occurred over a period of one year or less. See *Hughes v.*

Consol-Pennsylvania Coal Co, 945 F.2d 594, 610-11 (3d Cir. 1991) (12 months; collecting cases); *Hindes v. Castle*, 937 F.2d 868, 875 (3d Cir. 1991) (eight months); *Kehr Packages, Inc. v. Fidelcor, Inc.*, 926 F.2d 1406, 1418-19 (3d Cir. 1991) (eight months); *Banks v. Wolk*, 918 F.2d 418, 423 (3d Cir. 1990)(eight months); *Marshall-Silver Constr. Co. v. Mendel*, 894 F.2d 593, 597 (3d Cir. 1990) (seven months).” *Pelullo*, 964 F.2d at 209. The court also observed that in *Swistock v. Jones*, 884 F.2d 755 (3d Cir.1989), it had indicated that 14 months might be sufficient duration, but that later cases had limited *Swistock* because that case also included allegations of open-ended continuity. 964 F.2d at 210. Also *see, e.g., Tabas v. Tabas*, 47 F.3d 1280, 1293-94 (3d Cir. 1995) (scheme lasting over three years covered substantial period for closed-ended continuity).

“Barticheck Factors.” In *Pelullo*, the Third Circuit also stated that, “[a]dditionally, the factors identified in *Barticheck v. Fidelity Union Bank/First Nat’l State*, 832 F.2d 36, 39 (3d Cir.1987), ‘the number of unlawful acts, the length of time over which the acts were committed, the similarity of the acts, the number of victims, the number of perpetrators, and the character of the unlawful activity,’ remain relevant after *H.J. Inc.* ‘as they bear upon the separate questions of continuity and relatedness.’ *Banks v. Wolk*, 918 F.2d 418, 423 (3d Cir.1990).” 964 F.2d at 208.

Whether and to what extent the *Barticheck* factors are still relevant is unclear, however, as the result of the Third Circuit’s divided *en banc* decision in *Tabas v. Tabas*, 47 F.3d 1280 (3d Cir. 1995). Accordingly, this instruction includes these factors as optional language that may be given by the trial judge in an appropriate case.

The lead opinion in *Tabas* (representing the views of three members of the court) concluded that continuity had been shown sufficiently by the substantial duration of the racketeering acts and by evidence that those acts were a regular way of doing business and, therefore, it was not necessary to use the *Barticheck* factors. However, the opinion stated that these factors might be relevant in different, less clear cases, noting, “the *Barticheck* factors are best viewed as analytical tools available to courts when the issue of continuity cannot be clearly determined under either a closed- or open-ended analysis.” 47 F.3d at 1296 n. 21 (opinion by Roth, J, joined by Mansmann & Lewis, JJ).

One concurring opinion in *Tabas* (joined by three judges) noted that although “the six *Barticheck* factors. . . have been at the heart of this court's civil RICO jurisprudence for the past seven years,”

[T]he *Barticheck* factors fail to provide the needed guidance, and any attempt to use all six in continuity analysis, in my view, is destined for failure, in part because these factors were not originally intended to govern the continuity inquiry. Rather, they originated as an attempt to distill our case law on the RICO pattern requirement, simpliciter, not as an explication of separate relatedness and continuity requirements. . . . Some of the *Barticheck* factors are relevant to this general notion of pattern. Once “pattern” is analytically severed into “relatedness” and “continuity,” however, there is no reason to insist that all six of the factors will logically bear on both continuity and relatedness.

Barticheck did not do so. Rather, it discussed the various factors and concluded simply that the plaintiffs had adequately alleged a RICO pattern. *See id.* at 39.

47 F.3d at 1298-99 (Becker, J, concurring, joined by Stapleton & McKee, JJ). The second concurring opinion stated simply that the *Barticheck* factors should not be considered except to the extent that they logically bear on relatedness and continuity. 47 F.3d at 1302 (Alito, J).

Finally, the dissenting opinion in *Tabas* (representing the views of six members of the court), noted first that, “we decided *Barticheck* before the Supreme Court's decision in *H.J. Inc.* Nevertheless, we have noted in post-*H.J. Inc.* cases that the *Barticheck* factors are still relevant and must be considered “as they bear upon the separate questions of continuity and relatedness.” *Hindes*, 937 F.2d at 873 (quoting *Banks*, 918 F.2d at 423).” 47 F.3d at 1305 (Greenberg, J, joined by Sloviter, C.J., Hutchinson, Scirica, Cowen, & Nygaard, JJ). The dissent concluded that the *Barticheck* factors should be used in all cases, not only those in which continuity is unclear; “While I do not doubt that in practice the *Barticheck* factors cannot be applied with mathematical precision, at least the factors are guidelines in determining whether the plaintiff has demonstrated continuity and relatedness.” 47 F.3d at 1304. The dissent then conducted a detailed analysis of the factors as applied to the facts of the case, concluding that relatedness had been proven but not continuity. 47 F.3d at 1305-10.

“Through” a Pattern of Racketeering Activity. With respect to the Fourth requirement, that the defendant conduct or participate in the conduct of the affairs of the enterprise “*through*” a pattern of racketeering activity, there can be no RICO violation where the defendant's predicate acts of racketeering activity are unrelated to the enterprise. *United States v. Provenzano*, 688 F.2d, at 200 (citing *United States v. Scotto*, 641 F.2d 47 (2d Cir. 1980), cert. denied, 452 U.S. 961 (1981)). A violation of Section 1962(c) requires a connection between the defendant, the enterprise, and the pattern of racketeering activity. 688 F.2d at 200. The Third Circuit has approved instructions on how this can be shown. *United States v. Irizarry*, 341 F.3d 273, 304 (3d Cir. 2003). *See also United States v. Fattah*, 902 F. 3d 197, 246-252 (3d Cir. 2018) and *United States v. Bergrin*, 650 F.3d 257, 267 (3d Cir. 2011) (“We have also noted that ‘RICO's pattern requirement ensures that separately performed, functionally diverse and directly unrelated predicate acts and offenses will form a pattern under RICO, as long as they all have been undertaken in furtherance of one or another varied purposes of a common organized crime enterprise,’ *Eufrasio*, 935 F.2d at 566.”)

(Revised 11/2018)

6.18.1962C-7 RICO – “Racketeering Activity” Defined

“Racketeering activity,” as defined by the RICO statute *[federal law]*, includes any acts that involve or that may be charged as any of a wide range of crimes under state or federal law. Count *(no.)* of the indictment alleges that *(name)* committed the following *(state number of)* acts of racketeering activity: *(describe each act of racketeering activity alleged in the indictment)*.

The *(first)* act of racketeering activity *(describe the first act of racketeering activity alleged)* alleged in Count *(No.)* contains several elements. In order to find that *(name)* committed this act of racketeering activity, you must find that the government proved beyond a reasonable doubt that *(name)*: *(For each alleged act of racketeering activity, state the elements and any appropriate definitions or explanations of those elements.)*

Comment

See 2BO’Malley et al, supra, § 56.06; Sand et al, supra, 52-24. For variations in other Circuits, see Seventh Circuit § 1962(c); Ninth Circuit § 8.125.

Statutory Definition. 18 U.S.C. § 1961(1) defines “racketeering activity” by setting forth a wide range of predicate criminal acts under state and federal law. 18 U.S.C. §1961 (1)(A) includes “any act or threat involving a variety of crimes “chargeable under State law and punishable by imprisonment for more than one year.” 18 U.S.C. §1961(1)(B) includes “any act which is indictable under any of” a number of provisions of Title 18 of the United States Code. 18 U.S.C. § 1961(1)(C) - (G) include within the meaning of “racketeering activity” “any act which is indictable under” specified provisions of Titles 11 and 29 of the United States Code, and under the Currency and Foreign Transactions Reporting Act, the Immigration and Nationality Act, and 18 U.S.C. § 2332(g)(5)(B) (relating to terrorism).

Alternative Ways of Committing Racketeering Acts. The indictment may allege that some or all of the racketeering acts have two components or “sub-sets;” that is, two different or alternative ways of committing the same alleged racketeering act. In such a case, to find that act

of racketeering activity, the jury must agree unanimously on at least one of the alternative ways in which the racketeering act was committed. The trial judge should explain these alternatives to the jury when he or she describes the alleged acts of racketeering activity and should also tell the jury what these alternatives mean with respect to the jury's findings. If special interrogatories are provided to the jury with the verdict form (*see* Instruction 6.18.1962-9), the interrogatories should list the alternative ways of committing the acts of racketeering activity and should ask the jury to indicate whether it finds one alternative, both, or neither.

Criminal Conspiracy as Racketeering Act. In *United States v. Irizarry*, 341 F.3d 273, 301 (3d Cir. 2003), the Third Circuit noted that in addition to those substantive offenses listed in section 1961(5), a criminal conspiracy to commit one of those offenses may also be a predicate act of racketeering activity: "Thus, if the predicate conspiracy relates to the affairs of a RICO enterprise, it can be charged as part of that enterprise's pattern of racketeering activity in a RICO prosecution even though not all co-conspirators are actually members of the charged RICO enterprise. *See [United States v.] Pungitore*, 910 F.2d at 1134-35." *Id.* at 296. The court also noted:

Moreover, a RICO enterprise may engage in a pattern of racketeering activity that consists of separate and distinct conspiracies. *United States v. Pungitore*, 910 F.2d 1084, 1099-1101, 1134-35 (3d Cir.1990). The government can prosecute a series of different conspiracies in a single RICO count so long as all of the different conspiracies relate to the affairs of a single enterprise. *Riccobene*, 709 F.2d at 224-25. As we have said, "Congress intended that a series of agreements that under pre RICO law would constitute multiple conspiracies could under RICO be tried as a single enterprise conspiracy if the defendants have agreed to commit a substantive RICO offense." *Id.* (citation and internal quotations omitted); *see also United States v. Ruggiero*, 726 F.2d 913, 923 (2d Cir.1984) ("[A] RICO conspiracy under 18 U.S.C. § 1962(d), supported by predicate acts of racketeering activity that in themselves are conspiracies" does not "violate the principle of *Kotteakos v. United States*, 328 U.S. 750, 66 S.Ct. 1239, 90 L.Ed. 1557 (1946), which prohibits conviction of multiple conspiracies under an indictment charging a single conspiracy.").

Id. at 293 n. 7. The Third Circuit in *Irizarry* distinguished conspiracy as predicate racketeering activity under section 1962(c) and the separate RICO conspiracy offense under section 1962(d), noting, "[h]owever, 'the RICO conspiracy and the predicate conspiracy are distinct offenses with entirely different objectives.' *Pungitore*, 910 F.2d at 1135." *Id.* For a discussion of the RICO conspiracy offense under 18 U.S.C. §1962(d), *see* Instruction 6.18.1962D (RICO Conspiracy – Elements of the Offense (18 U.S.C. § 1962(d))).

6.18.1962C-8 RICO – Unanimity as to Acts of Racketeering Activity

The indictment alleges that *(name)* committed *(state number of)* acts of racketeering activity. As I have instructed, you must find that the government proved beyond a reasonable doubt that *(name)* at least two of the alleged acts of racketeering activity within the prescribed time period.

You must unanimously find that the government proved beyond a reasonable doubt that *(name)* committed each of at least two of the same particular acts of racketeering activity alleged. It is not enough that some members of the jury find that *(name)* committed two of the particular racketeering acts alleged while other members of the jury find that *(name)* committed different racketeering acts. In order for you to find *(name)* guilty, there must be at least two specific racketeering acts that all of you find were committed by *(name)*.

Comment

See Sand et al, supra, 52-7.

The jury must unanimously agree that the defendant committed at least two of the same acts of racketeering activity. *United States v. Merlino*, 310 F.3d 137 (3d Cir. 2002). In *United States v. Brown*, 583 F.2d 659 (3d Cir.1978), *cert. denied*, 440 U.S. 909 (1979), the jury was presented with four acts set forth as predicate offenses in a RICO conspiracy; each act also formed the basis for a separate substantive offense charged against the defendant. The jury convicted on all counts. On appeal, the Third Circuit overturned the convictions on two of the substantive counts, finding that the conduct charged in those counts did not, as a matter of law, constitute mail fraud. Then, because the court had no way of ascertaining which of the substantive offenses the jury had relied upon to satisfy the requirement of two predicate racketeering acts for the RICO conspiracy, it overturned the conviction on that count as well, even though two of the potential predicate offenses could still have constituted valid bases for the verdict. To avoid this problem, the trial judge should provide special interrogatories for the jury to answer after it has agreed on a guilty verdict, to establish on which of the predicate offenses the jury relied. *See further*

discussion in the Comment to Instruction 6.18.1962-10 (RICO – Verdict Form and Special Interrogatories).

6.18.1962C-9 RICO – “Unlawful Debt” Defined

The term “unlawful debt,” as used in these instructions, means a debt that (1) was incurred or contracted in gambling activity in violation of federal, state or local law [or which was unenforceable in whole or in part under federal or state law because of the laws relating to usury], or (2) was incurred in connection with the business of gambling in violation of federal, state, or local law [or the business of lending money or any thing of value at a rate that was usurious under federal or state law, where the rate was at least twice the legally enforceable rate].

[Usury is the lending of money at an illegally high rate of interest. In (jurisdiction), the legally enforceable rate of interest is __ %; any higher rate of interest is illegal.]

Comment

“Unlawful debt” is defined in 18 U.S.C. § 1961(6). If it is alleged that the debt was unenforceable because of the laws relating to usury, the trial judge should consider defining usury and telling the jury the usury rate that applies. *See Goldenstein v. Repossessors Inc.*, 815 F.3d 142, 148 (3d Cir. 2016) (“the prohibition on the ‘collection of unlawful debt’ under the [RICO] statute encompasses efforts to collect on a usurious loan, without distinguishing whether the collection is cash or collateral; in either case the defendants' actions effect the collection of the unlawful debt.”)

(Revised 11/2018)

**6.18.1962C-10 RICO – Verdict Form with Special
Interrogatories**

I have now instructed you on the elements of the Racketeer Influenced and Corrupt Organizations Act (*RICO*) offense(s) charged in Count (*no.*) of the indictment. A verdict form has been prepared for you to use to record your verdict(s) on these count(s).

As I explained to you, the indictment alleges that the pattern of racketeering activity in this case included (*state number*) acts of racketeering activity. As I also explained, to find a pattern of racketeering activity, you must unanimously agree that the government proved beyond a reasonable doubt that (*name*) committed each of at least two of the same particular acts of racketeering activity alleged.

The verdict form includes a series of interrogatories for you to answer to indicate which acts of racketeering activity, if any, you unanimously find. Do not answer these interrogatories until after you have reached your verdict. If you decide that the government has not proved (*name*) guilty of the Racketeering Influenced and Corrupt Organization Act (*RICO*) offense(s) charged in Count (*No.*), then you do not need to answer these interrogatories. However, if you find unanimously that the government proved each of the elements of this (*these*) offense(s) beyond a reasonable doubt then, after you have reached and recorded that verdict on the verdict form, you should answer the interrogatories with respect to the

acts of racketeering activity. You must decide whether *(name)* is guilty of this *(these)* offense(s) first, before answering the interrogatories.

VERDICT FORM with SPECIAL INTERROGATORIES

**COUNT NO. ____ (Conducting or Participating in the Conduct of the Affairs of an
Enterprise Through a Pattern of Racketeering Activity)**

_____ **Guilty**

_____ **Not Guilty**

If you find *(name of defendant)* not guilty of conducting or participating in the conduct of the affairs of an enterprise through a pattern of racketeering activity, as charged in Count No. __, please proceed to the next count; do not answer the jury interrogatories. If you find *(name)* guilty of conducting or participating in the conduct of the affairs of an enterprise through a pattern of racketeering activity, as charged in Count No. __, please answer the following jury interrogatories before proceeding to the next count:

JURY INTERROGATORIES COUNT NO. __:

Do you unanimously find that the government proved beyond a reasonable doubt that the pattern of racketeering activity included the following acts of racketeering activity, as alleged in Count No. __?

Racketeering Act Number 1 *(state the racketeering act as alleged in the indictment)*

_____ **Yes**

_____ **No**

Racketeering Act Number 2 (*state the racketeering act as alleged in the indictment*)

_____ **Yes**

_____ **No**

Racketeering Act Number 3 (*state the racketeering act as alleged in the indictment*)

_____ **Yes**

_____ **No**

[Include each of the racketeering acts alleged in the indictment.]

COUNT NO. __ (Conspiracy to Conduct or to Participate in the Conduct of the Affairs of an Enterprise Through a Pattern of Racketeering Activity)

_____ **Guilty**

_____ **Not Guilty**

If you find (*name of defendant*) **not guilty of conspiracy to conduct or to participate in the conduct of the affairs of an enterprise through a pattern of racketeering activity, as charged in Count No. __, do not answer the jury interrogatories. If you find** (*name*) **guilty of conspiracy to conduct or to participate in the conduct of the affairs of an enterprise through a pattern of racketeering activity, as charged in Count No. __, please answer the following jury interrogatories:**

JURY INTERROGATORIES COUNT NO. __:

Do you unanimously find that the government proved beyond a reasonable doubt that the pattern of racketeering activity included the following acts of racketeering activity, as alleged in Count No. __?

Racketeering Act Number 1 (*state the racketeering act as alleged in the indictment*)

_____ **Yes**

_____ **No**

Racketeering Act Number 2 (*state the racketeering act as alleged in the indictment*)

_____ **Yes**

_____ **No**

Racketeering Act Number 3 (*state the racketeering act as alleged in the indictment*)

_____ **Yes**

_____ **No**

[Include each of the racketeering acts alleged in the indictment.]

Comment

See Eighth Circuit § 6.18.1962G.

This special verdict form should not be used if the indictment charges that the defendant conducted or participated in the conduct of the enterprise's affairs through the collection of an unlawful debt, rather than through a pattern of racketeering activity.

Special Interrogatories Generally Disfavored; When Used, Only Answered after Jury Finds Guilt. As explained in the Comment to Instruction 3.18 (Special Verdict Form; Special Interrogatories), special interrogatories are disfavored in criminal cases, but may be used in the discretion of the trial court. In *United States v. Console*, 13 F.3d 641, 663-64 (3d Cir. 1993), and *United States v. Riccobene*, 709 F.2d 214, 227-28 (3d Cir. 1985), the Third Circuit concluded that the district court's refusal to submit special interrogatories to the jury in RICO cases was not an abuse of discretion. The Third Circuit noted in *Riccobene*, "however, that in the present case the questions were to have been submitted *after* the verdict had been returned and the jury polled. Thus, the dangers usually involved in the use of jury interrogatories in a criminal case were not present here." 709 F.2d at 228 n. 19. Also, see, e.g., *United States v. Irizarry*, 341 F.3d 273, 301 (3d Cir. 2003) (jury returned a special verdict sheet finding defendant guilty on all counts and also finding that the government had proven twelve of the thirteen racketeering acts charged); *United States v. Console*, 13 F.3d at 664 (trial court instructed the jury to specify which of the racketeering acts it found to constitute a pattern of racketeering only if it found defendant guilty of a RICO count).

Unanimous Agreement on Same Acts. To find that the defendant committed a pattern of racketeering activity, the jury must unanimously agree on at least two of the same acts of racketeering activity. See, e.g., *United States v. Merlino*, 310 F.3d 137 (3d Cir. 2002), *United States v. Riccobene*, 709 F.2d at 227-28; *United States v. Brown*, 583 F.2d 659 (3d Cir. 1978), *cert. denied*, 440 U.S. 909 (1979). Therefore, the trial judge is advised to submit special interrogatories to the jury to establish, after the jury agrees to a guilty verdict, which of the alleged predicate acts of racketeering activity the jury agreed on in support of its verdict. If special interrogatories are used, the trial court should give this instruction explaining the special interrogatories and making it clear that the jury should answer the special interrogatories only after it has found the defendant guilty.

Alternative Ways of Committing a Racketeering Act. If the indictment alleges that any of the racketeering acts have two components or "sub-sets" (that is, two different or alternative ways of committing the same alleged racketeering act (see the Comment to Instruction 6.18.1962-8)), the special interrogatories should list the alternatives and ask the jury to indicate whether it finds one alternative, both, or neither.

Special Interrogatory in Light of *Apprendi* Where Penalty Increased Beyond Twenty Year Maximum. A special interrogatory may be required in light of *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000), for both RICO conspiracy and substantive offenses, where the sentence is increased above the general maximum of 20 years imprisonment. *Apprendi* held that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." RICO's penalty provision, 18 U.S.C. § 1963(a), provides in pertinent part that upon conviction a defendant "shall be. . . imprisoned not more than 20 years (or for life if the violation is based on racketeering activity for which the maximum penalty includes life imprisonment)."

The increased punishment provision would apply, for example, if a predicate charge of murder in the first degree under a particular state's law requires proof of "premeditation and deliberation" and carries a life sentence, whereas murder in the second degree requires proof of only "malice" and carries a 20 year prison sentence. In order to allow a life sentence under the RICO penalty provision, the jury would have to find beyond a reasonable doubt that the murder racketeering act at issue was committed with "premeditation and deliberation." This additional finding should be made by the jury through special interrogatories after it has found the defendant guilty of the RICO substantive or conspiracy offense, because the additional facts necessary for the life sentence would not have to be found for the RICO conviction.

6.18.1962D RICO Conspiracy – Elements of the Offense (18 U.S.C. §1962(d))

Count (no.) of the indictment charges that (name) agreed or conspired with one or more other person(s) to conduct or to participate in the conduct of an enterprise's affairs through a pattern of racketeering activity, as I (have explained) (will shortly explain) to you. [If the object of the alleged conspiracy is the violation of 18 U.S.C. § 1962(a) or (b), state the substance of that violation.]

It is a federal crime for two or more persons to agree or conspire to commit any offense against the United States, even if they never actually achieve their objective. A conspiracy is a kind of criminal partnership.

In order for you to find (name) guilty of conspiracy to conduct or to participate in the conduct of an enterprise's affairs through a pattern of racketeering activity [if the object of the conspiracy charged is the violation of 18 U.S.C. § 1962(a) or (b), state the substance of that violation], you must find that the government proved beyond a reasonable doubt each of the following three (3) elements:

First: That two or more persons agreed to conduct or to participate, directly or indirectly, in the conduct of an enterprise's affairs through a pattern of racketeering activity [if the object of the conspiracy charged is the violation of 18 U.S.C. § 1962(a) or (b), state the substance of that violation];

Second: That (name) was a party to or member of that agreement; and

Third: That (name) joined the agreement or conspiracy knowing of its objective to conduct or participate, directly or indirectly, in the conduct of an

enterprise's affairs through a pattern of racketeering activity (*if the object of the conspiracy charged is the violation of 18 U.S.C. § 1962(a) or (b), state the substance of that violation*) **and intending to join together with at least one other alleged conspirator to achieve that objective; that is, that** (*name*) **and at least one other alleged conspirator shared a unity of purpose and the intent to achieve the objective of conducting or participating in the conduct of an enterprise's affairs through a pattern of racketeering activity** (*if the object of the conspiracy charged is the violation of 18 U.S.C. § 1962(a) or (b), state the substance of that violation*).

The meanings of the elements “enterprise,” “employed by or associated with,” “conduct or participate, directly or indirectly, in the conduct of that enterprise’s affairs,” and “through a pattern of racketeering activity” are the same as I have just explained to you with respect to the RICO offense charged in Count (*no.*). However, the RICO conspiracy charged in Count (*no.*) is a distinct offense from the RICO offense charged in Count (*no.*). There are several important differences between these offenses.

One important difference is that, unlike the requirements to find (*name*) guilty of the RICO offense charged in Count (*No.*), in order to find (*name*) guilty of the RICO conspiracy charged in Count (*No.*) the government is not required to prove that the alleged enterprise actually existed, or that the enterprise actually engaged in or its activities actually affected interstate or foreign commerce. Rather, because an

agreement to commit a RICO offense is the essence of a RICO conspiracy, the government need only prove that *(name)* joined the conspiracy and that if the object of the conspiracy was achieved, the enterprise would be established and the enterprise would be engaged in or its activities would affect interstate or foreign commerce.

Similarly, unlike the requirements to find *(name)* guilty of the RICO offense, in order to find *(name)* guilty of the RICO conspiracy charged in Count *(No.)* the government is not required to prove that *(name)* was actually employed by or associated with the enterprise, or that *(name)* agreed to be employed by or to be associated with the enterprise. Nor does the RICO conspiracy charge require the government to prove that *(name)* personally participated in the operation or management of the enterprise, or agreed to personally participate in the operation or management of the enterprise. Rather, you may find *(name)* guilty of the RICO conspiracy offense if the evidence establishes that *(name)* knowingly agreed to facilitate or further a scheme which, if completed, would constitute a RICO violation involving at least one other conspirator who would be employed by or associated with the enterprise and who would participate in the operation or management of the enterprise.

Finally, in order to find *(name)* guilty of the RICO conspiracy charged in Count *(No.)* the government is not required to prove that *(name)* personally committed or agreed to personally commit any act of racketeering activity.

Indeed, it is not necessary for you to find that the objective or purpose of the conspiracy was achieved at all. However, the evidence must establish that the (name) knowingly agreed to facilitate or further a scheme which, if completed, would include a pattern of racketeering activity committed by at least one other conspirator.

In short, to find (name) guilty of the RICO conspiracy charged in Count (No.) of the indictment, you must find that the government proved beyond a reasonable doubt that (name) joined in an agreement or conspiracy with another person or persons, knowing that the objective or purpose was to conduct or to participate, directly or indirectly, in the conduct of the affairs of an enterprise through a pattern of racketeering activity, and intending to join with the other person or persons to achieve that objective.

[If applicable: The indictment need not specify the predicate racketeering acts that (name) agreed would be committed by some member of the conspiracy in the conduct of the affairs of the enterprise. The indictment alleges that (name) agreed that multiple racketeering acts would be committed. You are not limited to considering only the specific racketeering acts alleged in Count (No.) of the indictment (the RICO substantive count). Rather, you may also consider the evidence presented of other racketeering acts committed or agreed to be committed by any co-conspirator in furtherance of the enterprise's affairs, including racketeering acts for which (name) is not charged in Count

(No.) (the RICO substantive count), to determine whether (name) agreed that at least one member of the conspiracy would commit two or more racketeering acts.

Moreover, in order to convict (name) of the RICO conspiracy offense, your verdict must be unanimous as to which type or types of racketeering activity (name) agreed would be committed; for example, at least two acts of extortion, or robbery, or drug trafficking, or one of each, or any combination thereof. (Note use examples that apply)].

Comment

See 2B O'Malley et al, supra, § 56.11; Sand et al, supra, 52-28. For variations in other Circuits, see Seventh Circuit § 1962(d); Eighth Circuit § 6.18.162B; Eleventh Circuit § 71.2.

18 U.S.C. §1962(d) provides:

[I]t shall be unlawful for any person to conspire to violate any of the provisions of subsections (a), (b), or (c) of this section [1962].

This Instruction and Comment focus on a conspiracy to violate section 1962(c), and should be modified if a conspiracy to violate section 1962(a) or (b) is charged.

RICO § 1962(d) Conspiracy and RICO § 1962(c) Offense. The main element that the government must prove to establish a §1962(d) conspiracy to violate section 1962(c) is a voluntary agreement to participate in an enterprise through a pattern of racketeering activity. See *United States v. Riccobene*, 709 F.2d 214, 224 (3d Cir. 1983). In *United States v. John-Baptiste*, 747 F.3d 186 (3d Cir. 2014), citing *Riccobene*, the Third Circuit stated “to establish a conviction for a RICO conspiracy, the government must show: (1) that two or more persons agreed to conduct or to participate, directly or indirectly, in the conduct of an enterprise's affairs through a pattern of racketeering activity; (2) that the defendant was a party to or member of that agreement; and (3) that the defendant joined the agreement or conspiracy knowing of its objective to conduct or participate, directly or indirectly, in the conduct of an enterprise's affairs through a pattern of racketeering activity.” 747 F.3d at 931. See also *United States v. Fattah*, 902 F.3d 197, 246-252 (3d Cir. 2018).

The Supreme Court held in *Salinas v. United States*, 522 U.S. 52 (1997), that section 1962(d) does not require that a defendant must personally commit or agree to personally commit the substantive RICO offense, or any specific element of that offense including the racketeering activity. Also, see, e.g., *United States v. Pungitore*, 910 F.2d 1084, 1130 (3d Cir. 1990).

Precisely, the Court in *Salinas* held that the statute and traditional conspiracy law would “not permit us to excuse from the reach of the conspiracy provision an actor who does not himself commit or agree to commit the two or more predicate offenses requisite to the underlying offense,” but its reasoning was broader: “If conspirators have a plan which calls for some conspirators to provide support, the supporters are as guilty as the perpetrators.” Based on *Salinas*, the Third Circuit has joined a majority of courts of appeals in holding that the defendant need not personally participate or agree to personally participate in the conduct of the affairs of the enterprise to be guilty of a section 1962(d) conspiracy or of a section 1962(c) substantive offense committed by a co-conspirator.

Thus, in *Smith v. Berg*, 247 F.3d 532, 536 (3d Cir. 2001), the Third Circuit agreed with the majority of other circuits that “*Reves* [interpreting the participate in the conduct of the enterprises’ affairs element of Section 1962(c)] is not a conspiracy decision; its holding focuses solely on what is required to violate § 1962(c) *Reves* says nothing about the scope of § 1962(d). . . . *Salinas* makes ‘clear that § 1962(c) liability is not a prerequisite to § 1962(d) liability.’ ” In view of *Salinas*, the Third Circuit in *Smith v. Berg* also rejected a distinction it had suggested earlier in *United States v. Antar*, 53 F.3d 568 (3d Cir 1995), in an attempt to resolve a perceived tension between *Reves* and the other circuits’ decisions:

[T]he Supreme Court did not confine its discussion in *Salinas* to the element of predicate acts, in which event it might be “harmonized” with *Antar*’s discussion of requirements as to levels of participation; rather, the Court expressed its analysis in broad terms, defining an interpretation of conspiracy liability directly at odds with Defendants’ reading of *Antar*. We therefore hold that any reading of *Antar* suggesting a stricter standard of liability under section 1962(d) is inconsistent with the broad application of general conspiracy law set forth in *Salinas*. In accord with the general principles of criminal conspiracy law, a defendant may be held liable for conspiracy to violate section 1962(c) if he knowingly agrees to facilitate a scheme which includes the operation or management of a RICO enterprise [regardless of whether the defendant actually operates or manages the enterprise].

247 F.3d at 538. The Third Circuit in *Smith v. Berg* also noted that *Salinas* stated, “A conspirator must intend to further an endeavor which, if completed, would satisfy all of the elements of a substantive criminal offense, but it suffices that he adopt the goal of furthering or facilitating the criminal endeavor. He may do so in any number of ways short of agreeing to undertake all of the acts necessary for the crime’s completion. One can be a conspirator by agreeing to facilitate only some of the acts leading to the substantive offense.” 522 U.S. at 65, quoted in 247 F.3d at 537 n. 9.

In many cases, the defendant will be charged with both the section 1962(d) conspiracy to violate section 1962(c) and the substantive section 1962(c) offense itself. In those cases the trial judge will instruct on the elements of both section 1962(c) and section 1962(d), and will also give Instructions 6.18.1962C-1 through 6.18.1962C-8 defining the elements of section 1962(c). This instruction assumes such a case, and the last four paragraphs explain important differences

between what the government must prove for the substantive RICO offense and what it must prove for the RICO conspiracy charge. The differences explained in these paragraphs may not all be relevant on the facts of a specific case, and the trial judge should modify these paragraphs accordingly.

Where the defendant is only charged with a RICO conspiracy to violate section 1962(c), and is not also charged with the substantive offense, the trial judge will need to give the relevant definitional instructions (as modified for the conspiracy alleged) and also to modify this instruction to explain the differences from the conspiracy offense that are relevant based on the nature of the conspiracy alleged and the defendant's alleged role in it.

No Overt Act Requirement; Other Traditional Conspiracy Principles. Unlike the general federal conspiracy offense under 18 U.S.C. § 371, a RICO conspiracy under section 1962(d) does not include an overt act element. *See, e.g., Salinas v. United States*, 522 U.S. 52, 63 (1997). In other respects, however, the federal courts apply traditional conspiracy principles to section 1962(d) RICO conspiracies. *See, e.g., Salinas v. United States*, 522 U.S. at 63; *United States v. Pungitore*, 910 F.2d at 1148. The Third Circuit observed, “in enacting §1962(d), Congress did not radically alter traditional conspiracy law except to the extent that it proposed a dramatically new conspiratorial objective.” 910 F.2d at 1148 citing *United States v. Riccobene*, 709 F.2d at 224. Thus, when the defendant is charged with an 18 U.S.C. § 1962(d) RICO conspiracy, the trial judge should also give the applicable instructions with respect to conspiracy generally. *See* Instructions 6.18.371C - L.

If the defendant asserts that he or she withdrew from the RICO conspiracy and then the statute of limitations ran before his / her indictment, Instruction 6.18.371J-2 (Withdrawal as a Defense to Conspiracy Based on the Statute of Limitations) should be given. That instruction reflects the Supreme Court's decision in *Smith v. United States*, 568 U.S. 106, 133 S. Ct. 714 (2013) (holding that the defendant has the burden of proving withdrawal from a RICO conspiracy as a statute of limitations defense).

Also, RICO conspiracy law includes the notion that proof of a RICO conspiracy agreement may be established through circumstantial evidence to the same extent permitted in traditional conspiracy cases. *Riccobene*, 709 F.2d at 225. Furthermore, RICO conspiracy law includes the traditional principle that “one conspirator need not know the identities of all his co-conspirators, nor be aware of all the details of the conspiracy in order to be found to have agreed to participate in it.” 709 F.2d at 225.

RICO § 1962(d) Conspiracy and Conspiracies as Predicate Acts. A RICO conspiracy under 18 U.S.C. §1962(d) may be supported by predicate acts of racketeering activity that are themselves conspiracies. *See* Instruction 6.18.1962-7 Comment. This is proper under *Kotteakos v. United States*, 328 U.S. 750 (1946), where the Supreme Court prohibited a conviction of multiple conspiracies under an indictment charging a single conspiracy. *See, e.g., United States v. Irizarry*, 341 F.3d, 273, 292 n.7 (3d Cir. 2003) (citing *United States v. Rugerrio*, 726 F.2d 913, 923 (2d Cir. 1984); *United States v. Pelullo*, 964 F.2d 193, 207 (3d Cir. 1992)). The Third Circuit

has allowed a conspiracy predicate to support a RICO conspiracy because “the RICO conspiracy and the predicate conspiracy are distinct offenses with entirely different objectives.” *United States v. Irizarry*, 341 F.3d at 292 n.7 (citing *United States v. Pungitore*, 910 F.2d 1084, 1135 (3d Cir. 1990)).

It is not enough for the government to show that a defendant merely participated in the same enterprise as another individual. Furthermore, an agreement to merely commit the predicate racketeering offenses is not sufficient to support a conviction under §1962(d). See *United States v. Riccobene*, 709 F.2d at 224. “This is so because, under RICO, it is an agreement ‘to conduct or participate . . . in the conduct of [an] enterprise’s activities’ through the commission of predicate offenses that is prohibited, not an agreement to commit a pattern of racketeering activity alone.” 709 F.2d at 224 However, the Third Circuit has recognized that “a series of agreements that under pre-RICO law would constitute multiple conspiracies could under RICO be tried as a single enterprise conspiracy if the defendants have agreed to commit a substantive RICO offense.” 709 F.2d at 224-25. See also *United States v. Fattah*, 902 F.3d 197, 246-252 (3d Cir. 2018).

RICO Criminal Forfeiture of Property. If the indictment contains notice that the government will seek forfeiture of property as part of sentencing in accordance with 18 U.S.C. § 1963, and if a party requests a jury determination that the property is subject to forfeiture under Fed. R. Crim. P. 32.2(b)(4), the trial court should give Instruction 6.18.1963 (RICO – Criminal Forfeiture of Property (18 U.S.C. § 1963)).

(Revised 11/2018)

6.18.1963 RICO – Criminal Forfeiture of Property (18 U.S.C. § 1963)

[If the indictment contains notice that the government will seek forfeiture of property as part of sentencing in accordance with 18 U.S.C. § 1963 and, if a party requests a jury determination under Fed. R. Crim . P. 32.2(b)(4) that the property is subject to forfeiture, the trial court should instruct the jury regarding this matter at three points during the trial proceedings.

First, when the court instructs the jury at the end of trial with respect to its deliberations and the trial verdict, the court should alert the jury that:

Depending on the verdict you reach, there may be a brief additional proceeding after you have returned your verdict.

Second, if the jury has returned a guilty verdict, at the outset of the forfeiture proceeding before the jury, the trial court should explain preliminarily the nature and purpose of the forfeiture proceeding that is about to take place, as follows:

You have found (name) guilty of (state the offense(s)), as charged in Count(s) (No.) of the indictment. You will now need to consider a further question regarding property that the indictment alleges is subject to forfeiture by (name) to the government. Forfeiture means that (name) would lose any ownership or interest (he) (she) has or claims to have in the specified property, as a part of the penalty for engaging in criminal activity. After the parties have presented any additional evidence on this subject, I will instruct you further on the law with respect to forfeiture. In considering whether the property is subject to forfeiture,

you should consider the evidence you have already heard and any additional evidence presented by the parties. You should evaluate that evidence and its credibility as I explained to you earlier in my instructions.

Third, at the end of the forfeiture proceeding, the trial court should give the instruction below.]

You have found (name) guilty of (state the offense(s)), as charged in Count(s) (No.) of the indictment. You now need to consider a special verdict concerning property that the indictment alleges is subject to forfeiture by (name) to the government. Forfeiture means that (name) would lose any ownership or interest (he) (she) has or claims to have in the specified property (any interest in any enterprise) (any security of any enterprise) (any claim against any enterprise) (any property or contractual right of any kind affording a source of influence over any enterprise), as a part of the penalty for engaging in criminal activity. I instruct you that you are bound by your previous finding that (name) is guilty of (state the offense(s)).

Under federal law, any person convicted of (state the offense(s)) shall forfeit to the government any property that is, or was derived from, any proceeds which the person obtained, directly or indirectly, from the offense (any interest the person has acquired or maintained as a result of the offense) ((any interest in any enterprise) (any security of any enterprise) (any claim against any enterprise) (any property or contractual right of any kind affording a source of influence over any enterprise) that the person

established, operated, controlled, conducted, or participated in the conduct of as part of the offense).

In deciding whether property is subject to forfeiture, you should not concern yourself with or consider whether any other person may own or have an interest in the property. I will resolve any such claims. Similarly, you are not to consider whether the property is presently available. Your only concern is whether the government has proven the required connection between the property and the offense(s) for which you have found (name) guilty.

Count (no.) allege(s) that *(describe the particular property alleged to be subject to forfeiture) (describe the interest (name) acquired or maintained that is alleged to be subject to forfeiture) (describe (name's) interest in, security of, claim against, property or contractual right affording a source of influence over an enterprise that is alleged to be subject to forfeiture)* **should be forfeited because of the connection between this property (interest) (security) (claim) (contractual right) and (name's) commission of** *(state offense(s) asserted as the basis for forfeiture).* *[Describe as to each count for which there has been a conviction, the specific property (interest) (security) (claim) (contractual right) alleged to be subject to forfeiture].*

This property is subject to forfeiture if you find that the government has proved beyond a reasonable doubt that the property is, or was derived from, any proceeds (name) obtained, directly or indirectly, as a result of the offense(s) for which you have found (him) (her) guilty.

(This interest is subject to forfeiture if you find that the government has proved beyond a reasonable doubt that (name) acquired or maintained the interest as a result of the offense(s) for which you have found (him) (her) guilty.)

(This (interest in) (security of) (claim against) (property or contractual right affording a source of influence over) an enterprise is subject to forfeiture if you find that the government has proved beyond a reasonable doubt that name (established) (operated) (controlled) (conducted) (participated in the conduct of) the enterprise as part of the offense for which you have found (him) (her) guilty.)

Property is “proceeds” of an offense if the property was obtained directly or indirectly, as a result of the offense. Property “was derived” from the proceeds of an offense if the property was obtained, directly or indirectly, using money or any other source of wealth gained as a result of the commission of the offense.

In making this determination, you should consider all of the evidence presented on the subject during this proceeding and during the trial, regardless of who offered it. All of my previous instructions continue to apply, and you should evaluate the evidence and its credibility according to the instructions I gave you earlier.

A Special Verdict Form has been prepared for your use. With respect to each item of property (interest) (security) (claim) (contractual right), you are asked to decide whether it is subject to forfeiture to the government, based on the reasons I have explained to you. Your decision must be unanimous. Indicate on the verdict form

whether you find that the property listed is subject to forfeiture, and then the foreperson should sign and date the form.

SPECIAL VERDICT FORM

We, the Jury, return the following Special Verdict as to the defendant (*name's*) interest in each item of property alleged in Count(s) (*insert count number(s)*) to be subject to forfeiture by (*name*) to the United States:

(Insert dollar amount in United States currency and description of real property or other tangible or intangible personal property (interest) (security) (claim) (contractual right) as alleged in the indictment.)

Do you unanimously find by a preponderance of the evidence that this property (*interest*) (*security*) (*claim*) (*contractual right*) is subject to forfeiture?

YES _____

NO _____

This _____ **day of** _____, **20**_____.

Foreperson

Comment

See Sand et al, supra, 52.33 (RICO Forfeiture). See, e.g., Russello v. United States, 464 U.S. 16 (1983); United States v. Ofchinick, 883 F.2d 1172 (3d Cir. 1989).

This instruction addresses criminal forfeiture after a conviction for a RICO violation, under 18 U.S.C. § 1963 (Criminal penalties), which provides in pertinent part:

(a) Whoever violates any provision of section 1962 of this chapter shall be fined under this title or imprisoned not more than 20 years (or for life if the violation is based on a

rackeering activity for which the maximum penalty includes life imprisonment), or both, and shall forfeit to the United States, irrespective of any provision of State law—

(1) any interest the person has acquired or maintained in violation of section 1962;

(2) any—

(A) interest in;

(B) security of;

(C) claim against; or

(D) property or contractual right of any kind affording a source of influence over;

any enterprise which the person has established, operated, controlled, conducted, or participated in the conduct of, in violation of section 1962; and

(3) any property constituting, or derived from, any proceeds which the person obtained, directly or indirectly, from racketeering activity or unlawful debt collection in violation of section 1962.

The court, in imposing sentence on such person shall order, in addition to any other sentence imposed pursuant to this section, that the person forfeit to the United States all property described in this subsection. In lieu of a fine otherwise authorized by this section, a defendant who derives profits or other proceeds from an offense may be fined not more than twice the gross profits or other proceeds.

* * *

The alternatives in the instruction cover the different bases for forfeiture under section 1963(a). The court should include the alternatives that fit the case.

Other Criminal Forfeiture Statutes. Congress enacted RICO forfeiture provision in 1970, the same year it enacted the controlled substances forfeiture provision (18 U.S.C. § 1963), which is the subject of Instruction 6.21.853 (Criminal Forfeiture of Property (Controlled Substances)). Since 1970, Congress has expanded the availability of criminal forfeiture to other federal criminal offenses, as discussed in the Comment to Instruction 6.21.853.

The RICO forfeiture provision is broader than the controlled substances provision with respect to the property subject to forfeiture. The RICO provision does not provide the rebuttable presumption set forth in the controlled substances provision. *See* 21 U.S.C. § 853(d).

Notice and Jury Determination. Where criminal forfeiture is authorized by statute, a judgment of forfeiture can be considered in a particular case only when “the indictment or information contains notice to the defendant that the government will seek the forfeiture of property as part of any sentence in accordance with the applicable statute.” Fed. R. Crim. P. 32.2(a). A jury determination that property is subject to forfeiture is required when a party requests it under Fed. R. Crim. P. 32.2(b)(4), which provides:

(4) Jury Determination. Upon a party's request in a case in which a jury returns a verdict of guilty, the jury must determine whether the government has established the requisite nexus between the property and the offense committed by the defendant.

Rule 32.2 and the relevant statutes also provide that issues with respect to third party claims of ownership of or an interest in the property subject to forfeiture are to be determined by the trial judge on the petition of the third party, in an ancillary proceeding without a jury. *See, e.g.*, Fed. R. Crim. P. 32.2(c); 21 U.S.C. § 853(n).

Burden of Proof. Criminal forfeiture is part of the sentence authorized after conviction; it is not an element of the offense. *See, e.g., United States v. Libretti*, 516 U.S. 29, 41, 49 (1995) (holding, because forfeiture is not an element of the offense, there is no constitutional right to a jury determination of the issues relevant to forfeiture). As a result, there is no constitutional requirement that the issues with respect to forfeiture must be proved by the government beyond a reasonable doubt, and under most criminal forfeiture provisions, the government's burden of proof is a preponderance of evidence. *See* Comment to Instruction 6.21.853 (Criminal Forfeiture of Property (Controlled Substances) (21 U.S.C. § 853)).

Nevertheless, the Third Circuit has interpreted the RICO forfeiture statutory provision as imposing on the government the burden of proof beyond a reasonable doubt. *See, e.g., United States v. Pelullo*, 14 F.3d 881, 902-06 (3d Cir. 1994) (distinguishing cases applying the preponderance of evidence burden of proof for other forfeiture provisions); *United States v. Voight*, 89 F.3d 1050 (3d Cir. 1996) (noting that the RICO provision was the most far reaching federal criminal forfeiture provision and, therefore, the beyond a reasonable doubt standard was appropriate to insure a greater degree of fact finding accuracy).