The Honeymoon Is Definitely Over: The Use of Civil RICO in Divorce*

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I. INTRODUCTION

The Racketeer Influenced and Corrupt Organizations Act (RICO)¹ is perhaps America's most debated statute.² RICO allows the government

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2. Since 1998 over 400 law review articles and journals mention RICO. Search
to prosecute in both criminal and civil proceedings. A private party may also sue under the civil provisions of the statute. This Act has received vast amounts of attention; in fact, RICO is perhaps the most highly scrutinized piece of legislation that Congress has passed. RICO’s criminal provisions are celebrated as an effective piece of legislature that has accomplished its goal.

Quite a different story are the civil provisions of RICO which, in recent years, have troubled a number of courts. The same quality that makes the criminal application of RICO so successful—namely RICO’s far-reaching application—makes civil RICO quite troublesome. Critics have cried for reform for nearly two decades. However, their pleas have remained unanswered. As interpretations of RICO continue to grow, new applications, and new conflicts, are continually arising. Nontraditional use of civil RICO is becoming increasingly prevalent, and even family law has been introduced to civil RICO.

Within the field of family law, civil RICO is making an appearance in the aftermath of divorce cases. This statute appeals to both litigants and lawyers because of its generous civil provisions. Money is the motivating factor behind the use of civil RICO. Therefore, a vengeful ex-spouse, and his lawyer, have much to gain from pursuing RICO allegations.

RICO is but one tool that creative lawyers may use to sanction an ex-spouse for torts committed during the marriage. With the abandonment of the interspousal immunity doctrine, husbands and wives are free to sue each other for tortious conduct that occurred during marriage. Increasingly, tort claims are added to claims of divorce to further

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3. This is commonly referred to as criminal RICO.
4. This component of RICO is referred to as civil RICO. For a complete discussion of RICO, see generally DOUGLAS E. ABRAMS, THE LAW OF CIVIL RICO (1991).
5. See id. at 12-13.
7. Civil RICO Reform is such a popular statute that one district judge commented: "Would any self-respecting plaintiffs' lawyer omit a RICO charge these days?" Papagiannis v. Pontikis, 108 F.R.D. 177, 179 n.1 (N.D. Ill. 1985).
9. This Comment uses the masculine pronoun for simplicity; there is no gender bias intended.
10. Interspousal tort immunity is a doctrine that prohibits husbands and wives from suing one another for personal injuries. The doctrine developed during the 1820s and has become a minority rule since 1970. See Carl Tobias, Interspousal Tort Immunity in America, 23 GA. L. REV. 359 (1989) (providing a complete discussion of the erosion of the doctrine in America).
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The number of physical and psychological spousal abuse claims is on the rise. To accommodate this trend, family lawyers must be increasingly aware of the potential for such tort claims, or risk malpractice.

The majority of marital torts, an estimated seventy-five percent, stems from assault and battery cases. However, a bitter ex-spouse may also recoup the cost of his mental anguish by suing his former lover for intentional or even negligent infliction of mental distress. Perhaps splitting spouses feel that only a large settlement will right the wrongs inflicted upon them. Innovative lawyers have also litigated divorce cases based upon claims such as fraudulent inducement to marry, tortious transmission of venereal disease, false imprisonment, wiretapping, child-napping, fraudulent dissipation of marital assets, fraud, and even conspiracy. The borders of this new area of law are beginning to define themselves and a new frontier is emerging within the divorce battlefield.

13. See Smith, supra note 11, at 31. This estimation was made by the former committee chair of the Marital Torts Committee of the A.B.A.'s Family Law Section, Robert G. Spector. See id.
14. See Doe v. Doe, 712 A.2d 132 (Md. Ct. Spec. App. 1998). In this case a husband filed a complaint against his wife for divorce alleging, among other things, intentional infliction of emotional distress. See id. at 135. The lower court dismissed the claim for intentional infliction of emotional distress for failure to state a claim on policy grounds. See id. at 137. The appellate court reversed the lower court decision, finding that given the abrogation of the interspousal immunity doctrine, public policy did not prevent the husband from bringing forth his claim. See id. at 139; see also McPherson v. McPherson, 712 A.2d 1043, 1045 (Me. 1998) (holding that a cause of action exists for negligent transmission of sexually transmitted disease); Bland v. Hill, 735 So. 2d 414 (Miss. 1999). In Bland, a former husband filed a complaint against his ex-wife's new husband for loss of affections of his wife, and for negligent and intentional infliction of emotional distress. See id. at 415. The court declined to abolish the tort of alienation of affections on the ground that to do otherwise would send out the message that they were "devaluing the marriage relationship." Id. at 418.
16. See Smith, supra note 11, at 31 (listing claims that spouses frequently allege during divorce proceedings).
One case illustrates RICO’s appearance in the divorce arena particularly well. This case is the only civil RICO case to date that has overcome the hurdle of summary judgment motions. The bitter irony of this case is particularly apparent because the named defendant is a prominent divorce attorney. In *Perlberger v. Perlberger*, a wife brought civil RICO charges against her former husband. Messody Perlberger alleged that her ex-husband misrepresented his true income, by means of a fraudulent scheme, to both her and the court during divorce proceedings. The alleged scheme was devised by Mr. Perlberger to hide his true income during divorce proceedings. While he was still married he became involved with a client he represented in a divorce action. As their relationship developed, Mr. Perlberger moved in with Ms. Strausser and filed for divorce. With the help of his new girlfriend, Mr. Perlberger was allegedly able to maintain his “lavish lifestyle” while representing a diminished personal income.

Mr. Perlberger allegedly coerced his accountants to fraudulently misrepresent his true assets in exchange for a large sum of money. When Mr. Perlberger’s relationship with his first girlfriend ended, a new woman replaced her, both as a girlfriend and as his means to hide his true income. Defendant Rothenberg, an attorney, allegedly assisted Perlberger by “holding” cases for him that had ample settlement value. Also named in the lawsuit was Mr. Perlberger’s law firm, the attorney defendants. This fraudulent scheme was perpetuated by conversations on the telephone and by mail. Due to these transactions, Mrs. Perlberger was able to bring suit under RICO for violations of 18 U.S.C.

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17. See id. at 30.
21. See id. at *2.
22. Id. at *3.
23. Perlberger’s accountants were also named as defendants in the action. See *Perlberger I*, 1997 WL 597955, at *1.
24. See id. at *1-2.
26. See id. This had the effect of sheltering Mr. Perlberger’s assets.
28. See id.
§§ 1341 and 1343, predicate acts under RICO.\textsuperscript{29}

As a result of Mr. Perlberger’s action, Mrs. Perlberger and her two children were allegedly awarded much smaller sums of child support and alimony. In fact, she asserted that his income was misrepresented by more than half.\textsuperscript{30} Though the court granted summary judgment in favor of the accountant defendants,\textsuperscript{31} defendant Rothenberg, and defendant Brennen,\textsuperscript{32} Mrs. Perlberger’s case has survived motions by the remaining attorney defendants for summary judgment.\textsuperscript{33} Time will tell if Mrs. Perlberger’s allegations pass the test of litigation.

This case represents a small, but growing, handful of cases that are using civil RICO in the divorce context.\textsuperscript{34} Though no ex-spouse has prevailed on the merits for RICO violation to date, the possibility of treble damages and attorneys’ fees assures that we have not seen the end of RICO accusations in this context.\textsuperscript{35} This use of RICO is an innovative

\begin{footnotesize}
\begin{enumerate}
\item See Perlberger v. Perlberger (Perlberger I), No. CIV.A.97-4105, 1997 WL 597955, at *1 (granting motion to dismiss for failure to state a claim upon which relief can be granted in part and granting leave to amend complaint).
\item See Perlberger v. Perlberger (Perlberger IV), 32 F. Supp. 2d 197, 210 (E.D. Pa. 1998), vacated in part, modified in part by Perlberger v. Perlberger (Perlberger V), 34 F. Supp. 2d 282 (E.D. Pa. 1998) (finding that non-lawyer parent Mrs. Perlberger cannot represent child as pro se litigant; motion to dismiss vacated as it pertains to minor child Laura E. Perlberger).
\item See Perlberger v. Perlberger (Perlberger II), No. CIV.A.97-4105, 1998 WL 76310, at *6 (E.D. Pa. Feb. 24, 1998) (holding that plaintiffs alleged a distinct enterprise); Perlberger v. Perlberger (Perlberger VI), No. CIV.A. 97-4105, 1999 WL 79503, at *2 (E.D. Pa. Feb. 12, 1999). In Perlberger VI, the attorney defendants again alleged that “there is no separateness between Norman Perlberger and his law firm” and therefore there is no RICO violation. Id. The court rejected this logic for the second time. See id. at *3.
\item The statute states in part: “Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate
\end{enumerate}
\end{footnotesize}
application of a popular statute, and it will not be long before an ex-spouse prevails on a RICO theory of liability.

This Comment analyzes the validity of civil RICO claims used in the divorce context. With RICO’s turbulent history, it is not surprising that this popular litigation tool is popping up in an arena worlds away from its original purposes. Part II of this Comment reviews RICO’s legislative history, the statutory construction, and the continual expansion of the statute by the courts. Part III analyzes nontraditional uses of RICO, specifically attempts to use RICO in the divorce context and the shortcomings of each attempt. Part IV concludes with a determination that divorce is a legitimate use of civil RICO. Given the broad construction of RICO, the courts’ refusal to limit RICO’s application, and Congress’s failure to revise the statute, this Comment argues that civil RICO is a proper tool for family lawyers to employ on the divorce battlefield.

II. AN UNDERSTANDING OF RICO

The legislative history of RICO illustrates that Congress intended to create a broad statute that would effectively destroy organized crime. However, RICO was never intended to be used in other arenas. Given Congress’s goal to create such a powerful statute, RICO was written to include a broad class of plaintiffs and defendants. Furthermore, judicial interpretation has gone even farther to broaden the scope of RICO.

A. Legislative History

From 1967 through 1970 Congress discussed creating a tool with a broad enough scope to eradicate the mob, hitting them where it hurt most—their wallets. Congress was responding to a growing public concern about organized crime. The public’s fears were validated in 1950, when the Kefauver Committee noted the increasing problem of encroachment of lawful business by organized crime. In 1967, in

United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney’s fee.” 18 U.S.C. § 1964(c) (Supp. IV 1998).


response to issues highlighted by the Kefauver Committee, a presidential committee recommended that regulatory measures be implemented to control organized crime infiltration into legitimate businesses. The 90th Congress proposed two bills to provide relief for the government and third parties for injuries to legitimate business by organized crime.

The 91st Congress continued to work on creating a statute that would eradicate Mafia infiltration. Its goal was realized in 1970 when the Racketeer Influenced and Corrupt Organizations Act was enacted as Title IX of the Organized Crime Control Act. While the Organized Crime Control Act was intended as a complete attack on organized crime, RICO's specific role was to eliminate the mob's invasion of legal businesses.

Congress was aware that focusing the bill on one group of citizens, specifically mobsters of Italian decent, could create constitutional problems. To achieve the goal of targeting organized crime, the statute is broadly construed to focus on predicate acts that establish a "pattern of racketeering." Another way Congress strengthened RICO was by providing both civil and criminal provisions. In frequently cited language, the Senate Report that accompanied RICO broadly stated that the purpose of the act was "the elimination of the infiltration of organized crime and racketeering into legitimate organizations operating

39. See id. at 1005 (discussing S. 2048, 90th Cong. (1967), a proposed amendment to the Sherman Act, and S. 2049, 90th Cong. (1967), which mimicked the Sherman Act but was separate from it.
40. For a complete discussion of action the 91st Congress took in creating the bill which became RICO, see Harper, 545 F. Supp. at 1005.
42. See Rakoff & Goldstein, supra note 41, at 1-4.
43. For a review of constitutional problems associated with suspect classifications, see generally Geoffrey R. Stone et al., Constitutional Law 495-743 (1996).
in interstate commerce.\textsuperscript{46} This statement has been interpreted by litigators to mean that Congress envisioned civil RICO being used in a wide variety of situations.\textsuperscript{47} Without clearly specifying the scope of the civil provisions, Congress created a tool that would strike a deadly blow against the Mafia.\textsuperscript{48}

What makes RICO such an appealing statute are the civil provisions, which allow a plaintiff to receive both treble damages and attorneys’ fees.\textsuperscript{49} It is interesting that the very provisions that make RICO the subject of numerous civil suits were not intended to have this dramatic effect.\textsuperscript{50} Since Congress did not anticipate the effect of these provisions, it did nothing to “curtail the predictable expansion of civil litigation associated with the creation of a private treble-damages remedy.”\textsuperscript{48} One member of the House Committee on the Judiciary for the 91st Congress felt that the severity of the financial consequence that would follow any racketeering activity intensified the power of the statute.\textsuperscript{51} This lack of foresight about the potential scope of the civil provisions has led to a great overuse of the civil provisions of RICO, with nothing to stop the reach of the statute.

Due to the timing of the bill, RICO was passed in an expedited manner, with perhaps a less than thorough review of the terms.\textsuperscript{52} With the lucrative civil provisions, the intentional broadness of the statute, and no measures to curtail the potential scope, it is no surprise that RICO is straying far from its original aim.\textsuperscript{53}

\textsuperscript{46} COMMITTEE ON THE JUDICIARY, UNITED STATES SENATE, ORGANIZED CRIME CONTROL ACT OF 1969, S. REP. NO. 91-617, at 76 (1969). Congress discussed the advantages of civil RICO, such as a lessened standard of proof and less stringent discovery procedures. See id. at 82-83.
\textsuperscript{47} See BATISTA, supra note 36, at 17.
\textsuperscript{50} BATISTA, supra note 36, at 18.
\textsuperscript{52} With the national elections only a month away and the congressional session almost over, the Senate did not seek conference before accepting the bill as proposed. See ABRAMS, supra note 4, at 32. Immediately after this acceptance, the House passed and adopted the bill. See id. Three days later, President Nixon signed the bill bringing RICO to life. See id.
\textsuperscript{53} The “Statement of Findings and Purpose” of RICO states:

It is the purpose of [RICO] to seek the eradication of organized crime in the United States by strengthening the legal tools in the evidence-gathering process, by establishing new penal prohibitions, and by providing enhanced sanctions and new remedies to deal with the unlawful activities of those engaged in organized crime.

B. Statutory Integrity of RICO

To completely comprehend the force given to RICO, it is necessary to analyze the various components of the statute. RICO is located in 18 U.S.C. § 1961 through § 1968. Section 1961 defines the terms used in the statute, and offers basic definitions for most of the elements. Section 1962 describes four types of prohibited conduct in subsections (a), (b), (c), and (d). The requisite conduct includes: (a) using or investing income received from a pattern of racketeering activity to acquire an interest in any enterprise that is engaged in, or affects, interstate commerce; (b) acquiring or maintaining through a pattern of racketeering activity any interest in an enterprise that is engaged in, or affects, interstate commerce; (c) conducting or participating in the conduct, through a pattern of racketeering activity, of an enterprise that is engaged in, or affects, interstate commerce; and (d) conspiring to violate sections (a), (b), and (c) of this section. A RICO violation can be based on the occurrence of any one of these four prohibited activities.

To show a RICO violation, a plaintiff must allege that it endured "(1) injury in its business or property because the defendant, (2) while involved in one or more enumerated relationships with an enterprise, (3) engaged in a pattern of racketeering activity or collected an unlawful debt." Once all of the elements are proven, 18 U.S.C. § 1964 prescribe sanctions including treble damages and attorneys' fees.

The first prong of a civil RICO violation is located at 18 U.S.C. § 1964(c), which requires some injury to either a business or property. This section is written in the disjunctive, which means plaintiffs may show an injury either to their business or to their property. Within the statute, a "person" includes any individual or entity capable of holding a legal or beneficial interest in property. The class of potential plaintiffs is therefore broad.

57. See id.
RICO requires that the defendant has invested in, participated in, or maintained an interest in an enterprise. The definition of enterprise includes both "legal entit[ies]" and "associat[ions] in fact," which makes the class of potential defendants equally broad. According to the statute, an enterprise "includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity." A RICO violation is based on a number of federal or state crimes, deemed predicate acts by the statute. Once the predicate acts are proven, they must somehow further an enterprise.

To sustain the enterprise relationship, 18 U.S.C. § 1962 requires proof that the defendant committed a "pattern of racketeering activity" or "collect[ed] . . . unlawful debt." A pattern of racketeering activity is much easier to prove, which means that most civil RICO claims assert a pattern rather than a collection of an unlawful debt. Racketeering activity is described by the statute to consist of the commission of two or more predicate acts listed in section 1961(1) within a ten-year period.

RICO bases federal jurisdiction on the requirement that the enterprise engages in or affects interstate commerce. Since Congress has exclusive control over the regulation of interstate commerce, the requirement that the illicit act implicate commerce gives the federal government exclusive control over RICO violations.

C. Judicial Interpretation of RICO

Despite generous civil provisions, civil RICO was not often used

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67. See id.
69. See ABRAMS, supra note 4, at 21-22. The pattern element is much broader and therefore easier to prove. See id.
70. See 18 U.S.C. § 1961(5) (1994). The predicate criminal acts are defined as acts "indictable" or "punishable" under a variety of federal laws, and acts "chargeable" under numerous state laws. 18 U.S.C. § 1961(1) (Supp. IV 1998). The section lists specific crimes as well as more general criminal laws (e.g., all state felonies "involving murder"). Id. Though this section lists a variety of offenses, the most commonly plead predicate acts are mail and wire fraud, and fraud in the sale of securities. See BATISTA, supra note 36, at 13.
72. See U.S. CONST. art. I, § 8, cl. 3.
during the first ten years of its creation.\textsuperscript{73} During this time, the vast number of RICO cases tried were criminal prosecutions brought by the Department of Justice.\textsuperscript{74} However, in 1980 the number of civil RICO cases increased dramatically. They have been on the rise ever since, with the majority of cases targeting "garden variety" business frauds.\textsuperscript{75}

Lower courts' attempts to limit the application of the Act have had little success.\textsuperscript{76} Though ultimately futile, lower courts and litigators have required: the enterprise to be a legitimate business;\textsuperscript{77} an organized crime element;\textsuperscript{78} a competitive injury;\textsuperscript{79} that the defendant has been convicted of a prior predicate act;\textsuperscript{80} racketeering activity;\textsuperscript{81} and proof of an economic motive.\textsuperscript{82} As the lower courts imposed restrictions on civil RICO, the Supreme Court continued to broaden its scope to the extent that none of these restrictions remain in force today.

\textsuperscript{73} For a discussion of the growth of civil RICO cases in this era, see Batista, \textit{supra} note 36, at 4-6 (discussing the variety of claims asserted in this time period); see also Abrams, \textit{supra} note 4, at 1-10 (discussing the possible causes of the explosion in the number of cases and judicial reaction to the deluge).

\textsuperscript{74} See Christopher W. Madel, \textit{The Modern RICO Enterprise: The Inoperation and Mismanagement} of Reeves v. Ernst \& Young, 71 Tul. L. Rev. 1133, 1136 (1997).

\textsuperscript{75} See Batista, \textit{supra} note 36, at 4; see also Abrams, \textit{supra} note 4, at 4 (commenting that the first time the Supreme Court addressed civil RICO was 15 years after its creation in the decision \textit{Sedima, S.P.R.L} v. Imrex Co., 473 U.S. 479 (1985)). According to the Ad Hoc Civil RICO Task Force of the ABA Section of Corporation, Banking, and Business Law of the American Bar Association, 40% of the cases involved allegations of securities fraud and 37% alleged common law fraud in a commercial or business setting, while only 4% were antitrust or unfair competition and bribery. \textit{See id.} at 5-6 (discussing ABA Task Force Report).


\textsuperscript{77} See United States v. Turkette, 452 U.S. 576, 590 (1981) (abolishing the requirement of lower courts that the "enterprise" operate in a legitimate capacity). This aspect will be further discussed \textit{infra} Part II.C.1.


\textsuperscript{79} See, e.g., North Barrington Dev., Inc. v. Fanslow, 547 F. Supp. 207, 211 (N.D. Ill. 1980) (dismissing RICO allegations for failure to show how alleged violations injured plaintiff's property or business); Bankers Trust Co. v. Feldesman, 566 F. Supp. 1235, 1241-42 (S.D.N.Y. 1983) (dismissing RICO allegations because the creditor had not been damaged "by reason" of the RICO violation).


\textsuperscript{81} See id.

\textsuperscript{82} See United States v. Ivic, 700 F.2d 51, 60 (2d Cir. 1983). This requirement was abolished in \textit{National Organization for Women, Inc. v. Scheidler}, 510 U.S. 249, 262 (1994).
An understanding of RICO’s current application is best learned through a look at judicial interpretation. Courts have affected the growth of RICO in several categories: the enterprise requirement, the pattern of racketeering activity, and abstention. Though courts have struggled with the far-reaching impact of RICO, Congress has ignored the plea for reform.

1. Enterprise

One of the elements of RICO that lower courts attempted to limit was the enterprise prong. For a RICO claim to be successful, the statute requires that the defendant participated in an enterprise. The definition of enterprise has been supplemented and further clarified by judicial interpretation. One major case that affected how plaintiffs may assert RICO violations is United States v. Turkette. In this case, the U.S. Supreme Court adopted an expansive interpretation of the criminal RICO statute.

In Turkette, the defendant was charged with the commission of crimes associated with the distribution of narcotics as well as several counts of insurance fraud. This pattern of activity was committed by the defendant and twelve others, satisfying the requirement of an enterprise. The defendant argued that RICO was designed to protect legitimate businesses, and that because his criminal activities did not attempt to infiltrate any legitimate business there was no RICO violation.

The Court did not agree with this limited interpretation of RICO. Though the Court acknowledged that the original intent of the drafters was to combat infiltration of legitimate enterprises by organized crime, the majority felt that this did not prevent RICO from applying when the enterprise was illegal. The Court stated that any other reading of the

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83. See 18 U.S.C. § 1962 (1994). This section prohibits a defendant from engaging in a “pattern of racketeering activity” or the “collection of an unlawful debt” while the defendant is involved in an “enterprise.” Id. Enterprise is defined as “includ[ing] 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) (1994).
85. See id. at 593.
86. See id. at 579.
87. See id. at 578-79. The enterprise was described as “a group of individuals associated in fact for the purpose of illegally trafficking in narcotics and other dangerous drugs.” Id. at 579.
88. See id. at 579-80.
89. See id.
90. See id. at 577.
statute would result in an "incongruous position." Given the broad construction of the statute and the intent of Congress, the Court found the additional requirement of a legitimate enterprise unnecessary.

In Sedima, S.P.R.L. v. Imrex Co., the Supreme Court reiterated its decision in Turkette and gave civil RICO an equally broad interpretation. The majority concluded that since "[t]he language of RICO gives no obvious indication that a civil action can proceed only after a criminal conviction," the trend of the lower courts to limit RICO’s scope should be terminated. Specifically, the Court eliminated the requirement that civil RICO could be violated only by a person involved in organized crime. The rationale was that section 1962 is broadly targeted at "any person"—not just mobsters. However, the Court recognized that "in its private civil version, RICO is evolving into something quite different from the original conception of its enactors."

The Sedima majority requested that Congress amend RICO to better align it with the legislation’s original intent. However, Congress has largely ignored this request. In a stinging dissent, Justice Powell warned that "Today’s opinion inevitably will encourage continued expansion of resort to RICO in cases of alleged fraud or contract violation rather than to the traditional remedies available in state court... It defies rational belief, particularly in light of the legislative history, that Congress intended this far-reaching result." As the number of civil RICO cases continues to grow, the fears of the dissenting Justices are being realized.

Other requirements have been imposed on the enterprise prong of

91. Id. at 587.
92. See id. at 589-93.
94. See id. at 488. In this case, Sedima and Imrex entered into a joint venture where the buyer would order parts through Sedima and Imrex would supply them. See id. at 483-84. Convinced that Imrex was illegally inflating the bills to cheat them out of proceeds, Sedima filed suit for RICO violations in the Federal District Court for the Eastern District of New York. See id. at 484.
95. Id. at 488 (dismissing the Second Circuit’s added requirement that a civil RICO suit can proceed only after a criminal conviction).
96. See id. at 492.
97. Id. at 495.
98. Id. at 500.
99. See id.
100. See RAKOFF & GOLDSMITH, supra note 41, at 1-7 (discussing Congress’s failure to meaningfully amend RICO).
RICO. Lower courts debated whether the requirement of an economic motive is necessary for a successful claim. Prior to 1994, RICO was interpreted to apply solely to organizations in operation for economic motives. This requirement was abolished by the decision in National Organization for Women, Inc. v. Scheidler. The plaintiff, a women's rights organization, alleged the defendants belonged to a coalition of antiabortion groups that planned to illegally shut down abortion clinics. The plaintiff claimed that members of the antiabortion group committed predicate acts under RICO in their quest to shut down abortion clinics. These actions both injured and violated a property interest of the clinics' business. The district court dismissed the case for failure to state a claim and the Supreme Court reviewed the validity of this decision.

The Court held that according to the statutory construction of RICO, no economic motive is required for a successful RICO claim. The Court pointed out that "[n]owhere in either [section] 1962(c) or the RICO definitions in [section] 1961 is there any indication that an economic motive is required." This decision marked the abandonment of efforts by lower courts and litigators to impede the reach of RICO. With the removal of this requirement, RICO's scope is broader than ever.

Courts have also struggled with how an enterprise must be structured to fall within the ambit of the Act. The dichotomy between enterprise and person has been particularly troublesome. To bring forth a successful claim, the enterprise must be a separate entity from the RICO defendant. This is difficult to do, considering the Supreme Court's


103. See Scheidler, 510 U.S. at 252-54. Plaintiffs alleged that defendants were members of "a coalition of antiabortion groups called the Pro-Life Action Network (PLAN) ... and other individuals," id. at 252, who were part "of a nationwide conspiracy to shut down abortion clinics through a pattern of racketeering activity." Id. at 253.

104. See id. at 252-53. Petitioner alleged that respondents engaged in actions such as extortion in violation of RICO. See id. Additionally, they alleged that the anti-abortion group "conspired to use threatened or actual force, violence, or fear to induce clinic employees, doctors, and patients to give up their jobs, give up their economic right to practice medicine, and give up their right to obtain medical services at the clinics." Id.

105. See id. at 253-54.

106. See id. at 254.

107. See id. at 261.

108. Id. at 257. The Court stated that "the statutory language is unambiguous" and that it cannot be construed otherwise to include an economic motive requirement. Id. at 261.

109. See BATISTA, supra note 41, at 114.
limited and complex guidelines set forth in Turkette. The Turkette Court noted that while the pattern of racketeering must be proved by evidence illustrating the appropriate number of predicate acts, the enterprise element can be inferred from showing that these acts "function as a continuing unit." This explanation did little to help future courts distinguish the element of enterprise from the pattern.

The dilemma of separating the enterprise from the entity performing the predicate act has not yet been settled. To clarify the guidelines set forth in Turkette, various circuits have created their own standards. The majority of courts, and the Second and Eleventh Circuits in particular, find that proof of an enterprise shows the existence of a pattern. This perspective is supported by dicta in Turkette that notes that proof of pattern and proof of enterprise may sometimes "coalesce." The minority position prefers a more narrow construction of the statute and requires a separate showing of the pattern and the enterprise.

In United States v. Bledsoe, the Eighth Circuit created a three-prong test to determine if the enterprise element of RICO is met. This view rejected the holding of other courts that any alliance of two people constitutes an enterprise. Following Turkette, the court in Bledsoe required that the enterprise have both: (1) a "common... purpose" which "function[s] as a continuing unit", and (3) an "ascertainable structure" that differs from "that inherent in the conduct of a pattern of

110. See BATISTA, supra note 41, at 116. In Turkette, the Court held that both legitimate and illegitimate activities constitute enterprises. See Turkette, 452 U.S. 576, 583 (1981).
111. Turkette, 452 U.S. at 583.
112. See supra text accompanying notes 93-101.
113. See BATISTA, supra note 41, at 117.
114. 452 U.S. at 583; see Gail A. Feichtinger, Note, RICO's Enterprise Element: Redefining or Paraphrasing to Death?, 22 WM. MITCHELL L. REV. 1027, 1036-37 (1996) (discussing the application of Turkette).
115. See Feichtinger, supra note 114, at 1038.
117. See id. at 665-66.
118. Id. at 665.
119. Id. at 665 (quoting United States v. Turkette, 452 U.S. 576, 582 (1981)) (emphasis omitted). The court found that the distinguishing characteristic of a RICO enterprise is that "there is some continuity of both structure and personality." Id. This means that the people who run an enterprise may change as long as the "various roles which the old and new individuals perform remain the same. But if an entirely new set of people begin to operate the ring, it is not the same enterprise as it was before." Id.
racketeering activity."  

The view of the Eighth Circuit was followed by the Third Circuit in United States v Riccobene. The Fourth Circuit also follows this view, although generally finding the existence of an independent enterprise. This confusion among the circuits illustrates the need for legislative action to clarify the requirements of the statute.

2. Pattern of Racketeering Activity

Another point of great conflict in RICO is the language in section 1962(c). RICO requires that a pattern of predicate acts affect an enterprise. However, section 1962(c) states that these provisions only apply to "any person employed or associated with any enterprise." A "person" is defined by section 1961(3) as "any individual or entity capable of holding a legal or beneficial interest in property." This language has led the majority of courts to conclude that a person and entity must be separate and distinct from each other. However, the circuits remain divided on this issue as well.

RICO requires the existence of a pattern of racketeering activity that is founded on "at least two acts of racketeering activity." The statute lists nine state offenses and more than thirty federal offenses as racketeering activity. The variety of federal offenses listed as predicate offenses illustrates the expansiveness of RICO. Included in the offenses listed are mail and wire fraud, obstruction of justice, and

120. Id.
122. See, e.g., United States v. Griffin, 660 F.2d 996, 998 (4th Cir. 1981) (analyzing the existence of an associated-in-fact enterprise for a criminal defendant). The court in Griffin followed the logic from Turkette and found that the defendant’s enterprise fulfilled the requirements of RICO even though it was created solely for the purpose of carrying forth an illegitimate scheme. See id. at 998; see also United States v. Gray, 137 F.3d 765, 772 (4th Cir. 1998) (finding that there was sufficient evidence to prove that the enterprise existed separate and apart from the association).
125. See RAKOFF & GOLDSTEIN, supra note 41, at 1-57. The majority view is stated in Haroco, Inc. v. American National Bank & Trust Co., 747 F.2d 384, 402 (7th Cir. 1984) (holding that section 1962(c) requires the person and enterprise to be separate for a RICO violation).
127. See 18 U.S.C. § 1961(1) (Supp. IV 1998). The state offenses include murder, kidnapping, gambling, arson, robbery, bribery, extortion, dealing in obscene matter, or dealing in narcotics. The statute further requires that the state offense is punishable under state law by imprisonment of more than one year. See id.
128. These offenses are listed in 18 U.S.C. § 1961(1). The definition lists both the statutory number of the offense and a brief discussion of the illicit conduct. See id.
certain drug offenses. For RICO violations based on state offenses, it is not necessary that the state crime be titled exactly as the statute defines. Procedural problems that may bar the state claim from being brought will not hinder a federal suit alleging RICO.

The Supreme Court has attempted to clarify the necessary elements of a pattern. In *H.J., Inc. v. Northwestern Bell Telephone Co.*, the Supreme Court determined that the pattern of racketeering element of RICO required both a relationship and continuity of the predicate acts. This test is referred to as the "continuity plus relationship" test. Continuity can be achieved by proving either that the acts occurred over a substantial amount of time or that the acts demonstrated a threat of continued racketeering activity. If a predicate act lasts only a few weeks and creates no fear of future criminal activity, the requisite pattern is not established. However, in the case of a predicate act that lasts a few weeks but evidences a "specific threat of repetition extending indefinitely into the future" the continuity requirement is satisfied.

The Court recognized that whether or not a pattern exists will depend on the facts of the case. In *H.J., Inc.*, the Court acknowledged that it was impossible for it to clearly define the specific requirements necessary for a pattern of racketeering activity to exist under RICO. The Court stated that future cases would further clarify the test, unless Congress "revisit[ed] RICO to provide clearer guidance as to the Act’s intended scope."

Even with the guidelines set by the Court in *H.J., Inc.*, appellate courts disagreed over what specific facts would constitute a pattern under RICO. Furthermore, lower courts have come to different conclusions.
about the specific requirements of the "continuity plus relationship" test.\(^{140}\) Neither the Supreme Court nor Congress has clarified the qualifications of this test, further evidencing the need for reform of RICO.

3. Abstention

RICO claims may also bring up questions of abstention.\(^{141}\) The Supreme Court has accepted that in some cases properly before the federal courts, the federal system should defer to the state courts as a matter of policy.\(^{142}\) One situation in which abstention is appropriate is when it is used to defer to complicated state administrative procedures.\(^{143}\) Federal courts can abstain for this reason by using the *Burford* abstention doctrine.\(^{144}\) *Burford* abstention is used in RICO cases when a complex state administrative scheme exists to properly address the matter.

Federal courts can also abstain due to the presence of concurrent state proceedings.\(^{145}\) The Supreme Court discussed this type of abstention in

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\(^{140}\) The First Circuit and the Third Circuit have been lenient regarding the relationship prong. *See Feinstein*, 942 F.2d at 44; United States v. Eufrasio, 935 F.2d 553, 565 (3d Cir. 1991) (holding that one act of collecting unlawful debt is necessary to establish predicate acts and the relationship requirement of RICO is necessary to prevent RICO from being used against a series of unconnected acts). The Second Circuit has stated that proof of two acts of racketeering activity is not, in itself, sufficient to create a pattern. *See United States v. Coiro*, 922 F.2d 1008, 1017 (2d Cir. 1991) (stating a RICO pattern requires proof of multiple racketeering predicate acts); United States v. Long, 917 F.2d 691, 697 (2d Cir. 1990) (noting the government must prove two racketeering acts related to each other). However, the Eighth Circuit has stated that what constitutes a pattern is a question of fact. *See Diamonds Plus, Inc. v. Kolber*, 960 F.2d 765, 769 (8th Cir. 1992).

\(^{141}\) Abstention is a means by which federal courts, due to compelling state interests, defer to state courts even though diversity jurisdiction is proper. *See ERWIN CHEMERINSKY, FEDERAL JURISDICTION* 735-834 (3d ed. 1999).

\(^{142}\) *See Lisa Pritchard Bailey et al., Racketeer Influenced and Corrupt Organizations, 36 AM. CRIM. L. REV. 1035, 1067 (1999).*

\(^{143}\) *See CHEMERINSKY, supra* note 141, at 754.

\(^{144}\) *See id.* This doctrine is named for the landmark case *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943). Sun Oil brought an action in federal district court attacking an order by the Texas Railroad Commission that granted Burford a permit to drill oil wells in an oil field in East Texas. *See id.* at 316-17. Though diversity jurisdiction was proper, the Supreme Court felt that the federal district court should have dismissed the case based on unclear state law and the presence of a complex state administrative scheme. *See id.* at 327-28, 331. When *Burford* abstention is used, the federal district court should dismiss the case. *See id.* at 334.

\(^{145}\) *See CHEMERINSKY, supra* note 141, at 813-34 (discussing the problem of duplicative litigation and abstention as a solution).
Colorado River Water Conservation District v. United States. In that case, the Court held that a federal court can abstain because of the presence of a concurrent state court claim only when there are "exceptional circumstances."

Abstention can have serious implications for plaintiffs in RICO suits. Even if all of the elements of a RICO violation are present, the court can abstain from deciding the case merely because it implicates a matter for which there is a complex administrative scheme. Divorce is an area where states have created advanced procedures, and state courts are better able to understand the state procedure than a federal court. Additionally, if the divorce is ongoing, Colorado River abstention will be appropriate. Abstention can be properly applied to RICO cases where federal jurisdiction would otherwise be appropriate.

However, the lower courts' attitudes toward using Burford abstention in divorce cases have recently changed. This likely stems from the Supreme Court decision in New Orleans Public Service, Inc. v. Council of the City of New Orleans. The Court determined that federal courts should use Burford abstention only when there are "difficult questions of state law bearing on policy problems of substantial public import whose importance transcends the result in the case then at bar" or when the "exercise of federal review of the question in a case and in similar cases would be disruptive of state efforts to establish a coherent policy."

Another case that affected federal courts' willingness to abstain on Burford grounds is Ankenbrandt v. Richards. In Ankenbrandt the Supreme Court analyzed the domestic relations exception to federal diversity jurisdiction. The Court held that this exception only applies in cases where there are "exceptional circumstances" exist for abstention to be appropriate. See CHEMERINSKY, supra note 141, at 822.

The unique application of abstention in RICO cases in the divorce arena will be further discussed infra Part III.B.1.

146. 424 U.S. 800 (1976). In this case, the United States brought an action in federal court, with more than 1000 defendants named, seeking a declaration of water rights. See id. at 805. One defendant filed a motion in state court concerning the same water rights. See id. at 806. The Supreme Court recognized that only under exceptional circumstances may a federal court abstain to avoid duplicate state litigation. See id. at 818.

147. See id. There remains confusion in the circuits regarding when the requisite "exceptional circumstances" exist for abstention to be appropriate. See CHEMERINSKY, supra note 141, at 822.

148. The unique application of abstention in RICO cases in the divorce arena will be further discussed infra Part III.B.1.


150. Id. at 361 (quoting Colorado River, 424 U.S. at 814).


152. See id. at 700-01.
to domestic situations that seek the granting of a divorce or alimony decree. The Court went on to analyze the appropriateness of Burford abstention in domestic relations cases. The Court determined that when the status of the domestic relationship is settled under state law (i.e., the divorce is final), and does not affect the underlying torts alleged, Burford abstention is not appropriate. This holding cautions federal courts against using Burford abstention in all domestic relations cases.

The numerous problems associated with a RICO suit illustrate the need for reform. Though litigators and courts have continuously struggled with RICO, Congress has ignored their pleas to rewrite the statute. Failed attempts at improvement, coupled with the far-reaching congressional mandate of RICO, force one to assume that Congress accepts the extraordinary applications of civil RICO and that current use of RICO is in line with Congressional intent. As RICO becomes even more expansive, numerous possibilities for its use arise. Though RICO's application in the divorce context may seem like an absurd use of the statute, it is actually an apt use—given the trend.

III. UNIQUE USES OF RICO: MOVING INTO THE DIVORCE ARENA

This section looks at prior nontraditional uses of RICO, illustrating how RICO allegations have been pled in the divorce arena. Given prior unique applications of RICO, divorce is a natural extension of the statute’s reach. Though most plaintiffs using RICO in divorce have been unsuccessful, it is possible for a RICO action to be successfully litigated in this area of law.

A. Prior Attempts

The far-reaching application of RICO is evidenced by the wide variety of cases alleging RICO violations. RICO has been used in situations ranging from assertions against tobacco companies to challenging the distribution of an estate. Due to the broad application of RICO, it is

153. See id. at 701-02.
154. See id. at 705-06.
155. See id. at 701-02.
156. For example, in Sedima S.P.R.L v. Imrex Co., 741 F.2d 482 (2d Cir. 1984), rev’d, 473 U.S. 479 (1985), the court listed specific problems with RICO and called for legislative change. See id. at 300. Also, in H.J., Inc. v. Northwestern Bell Telephone Co., 492 U.S. 229 (1980), the Court noted that “RICO may be a poorly drafted statute; but rewriting it is a job for Congress, if it is so inclined, and not for this Court.” Id. at 249.
157. See infra text accompanying notes 160-63.
158. See Tabas v. Tabas, 47 F.3d 1280 (3d Cir. 1995); infra text accompanying notes 169-72.
only natural that plaintiffs in divorce litigation are testing the statute.

1. Other Nontraditional Uses of RICO

With its broad language and potential for large payout, divorce is not the only nontraditional use of civil RICO. Recently, the government filed a massive lawsuit alleging civil RICO violations against the country's largest tobacco companies. In a 131-page complaint, the government asserted that cigarette companies and their public relations and research departments have engaged in a conspiracy for almost half a century to mislead, defraud, and lie to citizens about the harmful effects of smoking and tobacco's addictive qualities. The government sought reimbursement for money spent treating people with cigarette-related diseases and also sought crucial changes in industry behavior. A tobacco spokesperson asserted that this claim has no "valid basis in fact or law."

There seems to be no end to applications of civil RICO. A disgruntled employer asserted RICO claims against a former employee for a breach of contract. A professional hockey player employed RICO when he was unhappy with bargaining done by the hockey league and the player union's executive director. In the area of family law, lawyers are also finding creative applications of RICO. For example, in *Strain v.*

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159. See, e.g., Religious Tech. Ctr. v. Wollersheim, 796 F.2d 1076 (9th Cir. 1986). In this case, a Church of Scientology brought a RICO claim against another church alleging theft of spiritual items. See id. at 1077.


161. See id.

162. See id.


164. See Saine v. National Health Ins. Co., 582 F. Supp. 1299, 1302 (D. Colo. 1984). In this case, an employer counterclaimed when the defendant alleged that it had not paid him his commissions with RICO allegations for breach of contract. The defendant asserted that the plaintiff entered into negotiations with a competitor (in violation of contract) and that the third party defendant company had entered into an illicit scheme involving fraudulent representations against him. See id. These allegations were dismissed due to improper pleading. See id. at 1310.

165. See Forbes v. Eagleson, 19 F. Supp. 2d 352, 355 (E.D. Pa. 1998). In this case, a former professional hockey player alleged RICO violations against the league for collusive, quid pro quo arrangements between the league defendants and the player union's executive director. See id. at 355. RICO allegations were barred by the statute of limitations. See id. at 377.
Kaufman County District Attorney’s Office, a father and grandmother of a minor child who were subject to both criminal and civil proceedings for alleged child abuse brought RICO charges against state and county departments and officials. The court found that the plaintiff’s RICO allegations lacked merit for failure to plead a pattern of racketeering activity.

This creatively used statute has also been used to contest distribution of an estate. When Charles Tabas died, the income from the partnership he and his brother formed was to be split between his brother and his estate. The plaintiff estate alleged that Tabas’s brother continuously and falsely represented the partnership’s worth to the estate and diverted funds from the partnership for his own personal expenses. This case withstood summary judgment and is an apt example of nontraditional use of RICO.

In a case heard by the Court of Appeal for the Fifth Circuit, Calcasieu Marine National Bank v. Grant, a former wife brought an action against her former husband asserting unfair trade practices, fraud, negligence, and tort claims. This case failed on the merits, but it was not barred by policy reasons. Similarly, in a case heard by the Court of Appeals for the Ninth Circuit, Grimmett v. Brown, a former wife brought RICO allegations against her ex-husband’s bankruptcy estate. Her RICO claim was based on his attorney’s actions to conceal her ex-husband’s stake in a medical practice to defeat her community property interest. The court dismissed this case as barred by the applicable statute of limitations, but it did not reject it on policy grounds.

2. Policy Considerations for RICO Applied in Divorce

Considering the great variety of cases that use civil RICO, and the courts’ acceptance of such claims, RICO’s debut in the field of divorce

167. See id. at 688. In this case, accusations of physical abuse led to civil and criminal proceedings that were eventually resolved through mediation. See id. at 689.
168. See id. at 695.
169. See Tabas v. Tabas, 47 F.3d 1280 (3d Cir. 1995).
170. See id. at 1282.
171. See id. at 1286.
172. See id. at 1281 (reversing the district court’s grant of summary judgment and remanding for further proceedings).
173. 943 F.2d 1453 (5th Cir. 1991).
174. See id. at 1455.
175. See id. at 1455-56.
176. 75 F.3d 506 (9th Cir. 1996).
177. See id. at 508.
178. See id. at 509.
179. See id. at 517.
is no surprise. RICO has been properly applied in the field of family law and divorce is merely a subset of this type of law. The nontraditional use of RICO sets the stage for new and innovative uses.

The judge in **Perlberger** recognized this when Mrs. Perlberger brought her RICO allegations against her errant ex-husband. In a motion to dismiss during litigation, the judge was unpersuaded by the defendant’s argument that RICO “was not enacted to provide a federal forum to an individual dissatisfied with a divorce decree.” The judge refused to dismiss Mrs. Perlberger’s claims on policy grounds. The court noted that civil RICO’s “broad sweep . . . has been the subject of much debate and criticism by commentators and jurists alike.”

Despite the criticism surrounding the statute, the court found that case law supported RICO claims that are based on acts outside of the range of organized crime.

The defendants in **Perlberger** further asserted that since RICO had not ever been used to contest a divorce decree—or even to attack a child support order or alimony award—the court should not extend RICO to this new area of law. Though the defendants correctly stated that no Pennsylvania cases had used RICO in this way, the court looked to other civil RICO claims that relate to family law issues.

Specifically, the court in **Perlberger** was persuaded by the willingness of the Fifth and Ninth Circuits to hear cases that used RICO in family law matters. The court recognized the holding from **Tabas**, which found that even if the alleged illicit scheme can be described as “garden variety fraud,” it is not lethal to the RICO claim. Based on this case, and prior cases tolerating RICO’s use in family law cases, the court

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180. For an introductory discussion of the **Perlberger** litigation, including the six decisions to date, see supra notes 18-33 and accompanying text.


182. **Id.**

183. **Id.**

184. **See id.**

185. **See id.**

186. **See Perlberger II**, 1998 WL 76310, at *4. The court was persuaded by the willingness of the Fifth Circuit, in **Calcasieu Marine National Bank v. Grant**, 943 F.2d 1453 (5th Cir. 1991), and the Ninth Circuit, in **Grimmett v. Brown**, 75 F.3d 506 (9th Cir. 1996), to hear civil RICO claims dealing with family law issues. **See Perlberger II**, 1998 WL 76310, at *4. These cases were not barred by policy reasons and are discussed infra Part III.B.

187. **Tabas v. Tabas**, 47 F.3d 1280, 1290 (3d Cir. 1995); see supra text accompanying notes 169-72.
found that policy reasons did not preclude Mrs. Perlberger's action from proceeding.\textsuperscript{188} Other cases using RICO in the divorce context have not been able to properly plead all elements under RICO as the plaintiff did in \textit{Perlberger}.\textsuperscript{189}

\textbf{B. Why Past RICO Cases in Divorce Have Failed}

Creative litigators have attempted to use RICO in the divorce arena. However, prior cases have failed for seven reasons: (1) abstention was appropriate;\textsuperscript{190} (2) the action was res judicata to state proceedings;\textsuperscript{191} (3) failure to plead facts to sufficiently illustrate predicate acts;\textsuperscript{192} (4) failure to show a pattern of racketeering activity;\textsuperscript{193} (5) failure to prove that defendants conducted an enterprise;\textsuperscript{194} (6) failure to show that plaintiffs were injured in their business or property;\textsuperscript{195} and (7) the action was barred by the statute of limitations.\textsuperscript{196} To completely understand how these RICO allegations have failed on the divorce battlefield, it is necessary to look at the specific facts of the cases.

\textbf{1. Abstention and Res Judicata}

A case in the divorce forum that failed due to abstention is \textit{DuBroff v. DuBroff}.\textsuperscript{197} In \textit{DuBroff}, an ex-wife brought RICO violations against her ex-husband, his business associates, and lawyers due to alleged fraud during divorce proceedings.\textsuperscript{198} Mrs. DuBroff alleged mail, wire, and

\begin{itemize}
\item \textsuperscript{188} See \textit{Perlberger II}, 1998 WL 76310, at *4.
\item \textsuperscript{189} See id. at *5-7.
\item \textsuperscript{190} See \textit{DuBroff v. DuBroff}, 833 F.2d 557, 561 (5th Cir. 1987); Dibbs v. Gonsalves, 921 F. Supp. 44, 51 (D.P.R. 1996);\textsuperscript{infra} Part III.B.1.
\item \textsuperscript{191} See Evans v. Dale, 896 F.2d 975, 978 (5th Cir. 1990);\textsuperscript{infra} Part III.B.1.
\item \textsuperscript{194} See Reynold v. Condon, 908 F. Supp 1494, 1512 (N.D. Iowa 1996);\textsuperscript{infra} Part III.B.3.
\item \textsuperscript{196} In \textit{Grimmett v. Brown}, 75 F.3d 506 (9th Cir. 1996), an ex-wife's RICO allegations were barred by the four-year statute of limitations. See id. at 508. Joanne Siragusa and Tom Grimmett, the bankruptcy trustee of Joanne's ex-husband's estate, brought RICO allegations against the ex-husband's attorney. See id. The plaintiffs alleged that Ms. Brown masterminded a fraudulent scheme to conceal her ex-husband's property interest, which resulted in a smaller settlement. See id. Though this case was brought against an attorney, it represents an important point: if the four-year statute of limitations has run, the case will be dismissed without a decision on the merits.
\item \textsuperscript{197} 833 F.2d 557 (5th Cir. 1987).
\item \textsuperscript{198} See id. at 557.
\end{itemize}
state-law fraud as predicate acts.199 She settled with all defendants except her ex-husband's lawyers.200 This case displayed state law problems because the alleged racketeering activity took place while divorce proceedings ensued.201 Additionally, the court in DuBroff based its holding on the view that "there is perhaps no state administrative scheme in which federal court intrusions are less appropriate than domestic relations law."202 Abstention was found appropriate because of the "novel and dubious questions of state family law."

The Court in DuBroff discussed two reasons why judges in divorce cases using RICO abstain in favor of state courts:204 (1) the possibility of a state procedure available to challenge the divorce action due to fraud, and (2) the general tendency of federal courts to allow state courts to deal with divorce actions due to their greater understanding of the state system.205

The primary reason the court abstained in DuBroff was that it was unclear whether a state procedure could be utilized to challenge the divorce settlement. This confusion exists because some states have an independent action for fraud, while in other states there is statutory authority for opening up divorce judgments based on hidden assets.206 If such a state procedure exists, then a state administrative system would be compromised if the federal court proceeded with the RICO allegations. The second reason that the DuBroff court abstained is that

199. See id. at 558.
200. See id.
201. See id.
202. Id. at 561.
203. Id. at 562.
204. See id. at 561-62. The court stated that it was unclear whether the Texas state court would "allow an independent action for fraud and conspiracy in the property settlement." Id. at 562. Relying on Colorado River Water and the Burford abstention doctrine, the court found that to hear the case would be disruptive to the state administrative scheme. See id. at 561-62.
205. See id.
206. Prior to the decision in Ankenbrandt v. Richards, 504 U.S. 689 (1992), the federal circuit courts had frequently deferred to state courts in cases involving application of the domestic relations exception to federal jurisdiction based on diversity. See, e.g., Thompson v. Thompson, 798 F.2d 1547, 1558 (9th Cir. 1986) (citing cases in support of the contention that federal courts decline to hear disputes that would deeply involve them in domestic matters); Ingram v. Hayes, 866 F.2d 368, 370 (11th Cir. 1988) (holding that domestic relations exception applies to a tort action for intentional infliction of emotional distress); Bennett v. Bennett, 682 F.2d 1039, 1042-43 (D.C. Cir. 1982). The original authority for this stemmed from the Supreme Court decision in Barber v. Barber, 62 U.S. 582 (1859), which held that federal courts do not have jurisdiction over suits for divorce or the allowance of alimony. See id. at 584.
federal courts have a general dislike of becoming involved in matters of family law, specifically divorce cases. The *DuBroff* court recognized the strong administrative scheme in place at the state level to handle divorce actions. Tampering with the divorce action would be disruptive to this state scheme.

However, the attitude of the court in *DuBroff* has changed and subsequent courts have been less willing to use *Burford* abstention in RICO actions. In *Dibbs v. Gonsalves*, an ex-wife brought suit against her ex-husband under RICO based on a fraudulent scheme that denied her marital assets. In a concurrent action, the parties were undergoing litigation regarding community property in the local court. The case was defective on other grounds, but in dicta the judge noted that if the case were successful on the merits, abstention would be appropriate. To properly decide this case, it would be necessary for the court to “disrupt the authority and rulings of the Puerto Rico Superior Court in the liquidation of conjugal assets proceedings which . . . dealt with plaintiff[s]' . . . litigation abuse in that action.” Since this case raised questions of family law, the court felt that to hear it in federal court would undermine the local court’s authority.

However, in *Calcasieu Marine National Bank v. Grant* the court distinguished *DuBroff*. In *Grant*, a former wife brought RICO allegations against her former husband, claiming he engaged in a fraudulent scheme that resulted in an injury to a shared business interest. The divorce action had terminated in its entirety.

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207. See, e.g., *Thompson*, 798 F.2d at 1556 (recognizing that “domestic relations questions . . . have traditionally and exclusively been reserved to state courts, which have developed an expertise in such matters”); *Solomon v. Solomon*, 516 F.2d 1018, 1021-22 (3d Cir. 1975) (stating that the federal courts are reluctant to hear cases about domestic relations law since this is an area of state expertise); *Magaziner v. Montemuro*, 468 F.2d 782, 787 (3d Cir. 1972) (noting federal courts’ reluctance to hear domestic relations cases).

208. See *DuBroff*, 833 F.2d at 561-62.

209. See id.

210. See Bailey et al., supra note 142, at 1068.


212. See id. at 46-47.

213. See id. at 49.

214. See id. at 52.

215. Id.

216. See id.; see also *Farkas v. D'Oca*, 857 F. Supp. 300 (S.D.N.Y. 1994). In *Farkas*, a wife brought RICO allegations against her husband’s girlfriend alleging that the girlfriend engaged in a fraudulent scheme to divert the wife’s marital assets. See id. at 301. The court held that it would abstain based on the wife’s state divorce claim and stay the RICO action. See id. at 303.

217. 943 F.2d 1453 (5th Cir. 1991).

218. See id. at 1456.

219. See id. at 1458.
held that because the divorce action had concluded, the RICO action did not implicate any state court issue of "child custody, alimony, visitation rights, separation or divorce which could involve a federal court in such state affairs." Since the current action was a RICO violation with pendent state claims of fraud and negligence, it did not implicate the "domestic law snares" seen in DuBroff.

In another case, Evans v. Dale, the wife claimed RICO violations occurred based on the misrepresentation of stocks that were subject to community property laws. These allegations were also dismissed because they were precluded by res judicata to divorce proceedings. In Dale the court questioned the DuBroff court's logic with respect to abstention; the court stated that the analysis relied on a decision that was later reversed by the Supreme Court.

The shift in lower courts' attitudes is likely due to the Supreme Court decisions in Ankenbrandt and New Orleans Public Service. Taken together, these decisions make it less likely that federal courts will abstain in civil RICO actions. However, neither the Supreme Court nor Congress has definitively articulated when abstention in civil RICO suits is appropriate.

2. Failure to Prove Predicate Acts and Establish a Pattern of Racketeering Activity

Other cases have failed to establish predicate acts. In Streck v.

220. Id.
221. Id.
222. 896 F.2d 975 (5th Cir. 1990).
223. See id. at 976.
224. See id. at 978. The court noted that the DuBroff court's decision to abstain on Burford grounds relied on the subsequently overruled case New Orleans Public Service v. City of New Orleans, 798 F.2d 858 (5th Cir. 1986), rev'd, 491 U.S. 350 (1989). See Evans, 896 F.2d at 978. The Court in Evans noted that "[w]hile Burford is concerned with protecting complex state administrative processes from undue federal interference, it does not require abstention whenever there ... is a "potential for conflict" with state regulatory law or policy." Id. at 979 (quoting New Orleans Public Service, 491 U.S. at 362 (quoting Colorado River Water Conservation Dist. v. United States, 424 U.S. 800, 815-16 (1976))). This reversal makes it unlikely that other courts will follow DuBroff.
225. See id. at 978. The Second and Eleventh Circuits also have been less willing to abstain on Burford grounds since the DuBroff decision, largely due to the Supreme Court's decision in New Orleans Public Service. See Bailey et al., supra note 142, at 1068.
226. For a detailed discussion of these cases, see supra Part II.C.3.
227. See Streck v. Peters, 855 F. Supp. 1156, 1164 (D. Haw. 1994); see also Smith
Peters, the plaintiff’s allegations failed because his perjury and fraud allegations did not constitute predicate acts under RICO. Additionally, because all of the alleged predicate acts arose from one event, they failed to constitute a pattern of racketeering under RICO.

In Hibbard v. Benjamin, an ex-husband and minor child brought RICO proceedings against an ex-wife for an alleged illicit scheme during divorce that resulted in lessered alimony payments and child custody. This RICO claim failed because the plaintiff failed to show a pattern of racketeering activity.

3. Failure to Prove the Existence of an Enterprise

In Reynolds v. Condon an ex-husband brought a civil RICO action against his former wife, her father, his ex-wife’s attorney, and the attorney’s law firm for violations of RICO. Mr. Reynolds alleged that his ex-wife extorted a favorable divorce settlement by threatening to bring criminal action against him for sexually abusing a minor. The court found that though the law firm met the requirement of an enterprise under RICO, the plaintiff failed to show that the defendants conducted the enterprise in a manner necessary for the RICO violation to withstand summary judgment proceedings.

4. Failure to Prove Injury to Business or Property

Another reason divorce-related RICO actions have failed is an inability to show injury to business or property. In DeMauro v.
DeMauro, Annette and Joseph DeMauro underwent a bitter divorce. To add to the turbulence, Mr. DeMauro frequently failed to show up for court and when present invoked his Fifth Amendment right to resist discovery. The court found Mr. DeMauro in contempt of court. While divorce proceedings went forward, Mrs. DeMauro filed suit, claiming RICO violations stemming from Mr. DeMauro's alleged scheme to conceal separate and marital property during divorce. The court found that Mrs. DeMauro's alleged interest in this property was speculative because the property still belonged to her husband and her actual award in a divorce settlement was unknown.

Though each of these RICO claims failed for one reason or another, the underlying policy allowing RICO to be used in this context has not been questioned. The court in Perlberger specifically addressed this issue and found that public policy does not prevent RICO's use in the divorce arena. Prior attempts, though unsuccessful, have set the stage for valid RICO claims in this forum.

C. A Successful RICO Claim in Divorce

As previously mentioned, at least one court has decided not to reject a RICO claim used in divorce proceedings on policy grounds. Though most RICO allegations in the divorce context have not withstood summary judgment, the reasons for the failures are primarily procedural in nature. These cases do not pose impossible bars to a successful claim. As an increasing number of ex-spouses use this litigation tool, it is important to understand how a claim is successfully pled.

First, in order to prove a RICO violation, an injury to either plaintiff's business or plaintiff's property must be shown. To fulfill this requirement, an ex-spouse must prove that divorce proceedings were undertaken in a manner that injured either his business or his property,

239. 115 F.3d 94 (1st Cir. 1997).
240. See id. at 95.
241. See id.
242. See id.
243. See id.
244. See id. at 98-99.
246. See id. The court's analysis is discussed supra Part III.A.2.
247. See supra Part III.B.
or both. In the divorce context, this can be done by demonstrating that the defendant conducted a fraudulent scheme that decreased the divorce settlement. It is important that plaintiff alleges injury to an interest that would certainly be awarded to her in divorce and not one that is purely speculative. Messody Perlberger fulfilled this RICO requirement by alleging that her ex-husband decreased her potential alimony and child support settlement by hiding his assets.

Next, a plaintiff must show that the alleged injury arose while the defendant acted as part of an enterprise. The Supreme Court held that even illegitimate associations or entities fulfill the enterprise requirement. Therefore, a plaintiff may show that the enterprise in question was created solely to further the defendant’s illegitimate act of hiding assets to minimize divorce settlement. In the divorce context a plaintiff will likely allege that the enterprise consisted of the defendant and her lawyer, law firm, or perhaps a new love interest. In Perlberger the enterprise consisted of Mr. Perlberger and his law firm.

The defendant in a RICO action also must have engaged in a pattern of racketeering activity. To fulfill this requirement, RICO lists a variety of predicate acts in section 1961(1). For a valid RICO claim, there must be either multiple violations of the same predicate act, or the

249. See DeMauro v. DeMauro, 115 F.3d 94 (1st Cir. 1997). The court dismissed RICO allegations since “[n]o one knows what [plaintiff] will be awarded in the divorce action.” Id. at 97. Since her property interest was merely speculative, her RICO allegations were invalid. See id.; see also discussion supra notes 239-44 and accompanying text.


251. See United States v. Turkette, 452 U.S. 576, 582 (1981); see also discussion supra Part II.C.1.

252. See, e.g., United States v. Griffin, 660 F.2d 996, 999 (4th Cir. 1982) (discussing the application of Turkette to show that defendant’s illegitimate enterprise fulfilled the requirements of RICO).

253. See, e.g., Reynolds v. Condon, 908 F. Supp. 1494, 1512, (N.D. Iowa 1995) (holding that a law firm is an enterprise under RICO); Handeen v. Lemaire, 112 F.3d 1339, 1349 (8th Cir. 1997) (holding that appellant alleged facts to state a RICO claim against a law firm); Napoli v. United States, 32 F.3d 31, 36 (2d Cir. 1994) (finding a law firm properly comprised an enterprise); Tribune Co. v. Purcigliotti, 869 F. Supp. 1076, 1098 (S.D.N.Y. 1994) (holding that individual lawyers properly make up “the relevant enterprises’ affairs”).


255. See 18 U.S.C. § 1962(c) (1994). This section gives a plaintiff the option of proving either that defendant engaged in a “pattern of racketeering activity or collection of unlawful debt.” Id. Since “pattern of racketeering” is broader and easier to prove, the vast majority of civil RICO claims use this provision. See ABRAMS, supra note 4, at 22.

commission of more than one predicate act. The predicate act most commonly used to bring forth a RICO claim in the divorce arena is mail fraud. A successful plaintiff must show that the alleged predicate acts arose from more than one event to prove the pattern requirement. Though the pattern element is relatively straightforward, prior cases have failed by neglecting to plead facts sufficient to support allegations of predicate acts.

Even if all of the elements of a RICO violation are successfully pled, a plaintiff still has one more major pitfall to avoid. If the case is res judicata to state proceedings, or if the court stays the case due to abstention, the plaintiff will be unable to plead her case. For example, in one case charges were dismissed based on the federal court’s desire to abstain in favor of state courts. If the issue involves a substantial state interest, the court will be compelled to abstain. However, it is unlikely that this will happen given the subsequent decline in courts’ willingness to abstain in RICO actions.

Additionally, recent Supreme Court decisions are helpful to plaintiffs using civil RICO in divorce because they caution federal courts against using Burford abstention in domestic relations cases. If divorce proceedings have concluded and there is not a state procedure to attack the divorce, the plaintiff’s situation will be distinguishable from DuBroff. However, plaintiffs must check on the law specific to the state they are in to determine whether a state action exists to rectify the situation. If the state law is clear and there is no confusion as to the lack

258. See 18 U.S.C. § 1961(1); DeMauro v. DeMauro, 115 F.3d 94, 95 (1st Cir. 1997) (alleging mail fraud as a predicate act); Perlberger II, 1998 WL 76310, at *1 (alleging RICO violations based on mail and wire fraud); Condon, 908 F. Supp. at 1500 (alleging that defendants “repeatedly caused letters and other matters and things to be delivered by the United States Postal Service”).
261. See DuBroff v. DuBroff, 833 F.2d 557, 563 (5th Cir. 1987).
262. See Evans v. Dale, 896 F.2d 975, 978-79 (5th Cir. 1990); see also supra Part III.B.1.
264. See Ankenbrandt, 504 U.S. at 706 (holding that Burford abstention is not appropriate in domestic cases when “the status of the domestic relationship has been determined as a matter of state law, and . . . has no bearing on the underlying torts alleged”).
265. See DuBroff, 833 F.2d at 562 & n.4.
of a potential state action to reopen divorce proceedings, the federal court will not abstain. If plaintiff can overcome all other procedural hurdles, such as meeting the statute of limitations, the case will be properly heard in federal court.

IV. CONCLUSION

Given the continual expansion of various elements of RICO and the broad congressional mandate evidenced in the statute, divorce is an apt forum for civil RICO suits. One by one, requirements imposed by lower courts were removed by the Supreme Court, thereby strengthening and expanding the scope of RICO. Since its enactment, RICO’s application has crossed into almost all areas of the law, and new uses for RICO are continually being explored.

As RICO becomes more commonly used in the field of family law, there appears to be no limit to its potential reach. The courts’ message is clear: without action by Congress they will continue to uphold the broad scope of RICO. Congress has refused to amend RICO in any way that significantly changes this scope, even after a specific request by the U.S. Supreme Court. With this history, there is no choice but to infer that Congress agrees with the trend to use RICO in new and innovative ways. Congress sends the message that it is sticking with its original goal to make RICO broad, which is what makes it such a powerful litigation tool.

Courts have determined that RICO’s application in family law is not barred by policy. This, coupled with judicial tolerance of RICO allegations that consist of “garden variety” fraud claims, leaves no barrier to RICO’s use in cases such as Perlberger. Although divorce may seem an absurd forum for this litigation tool, there is nothing in the statute itself or in judicial commentary suggesting that this use is impermissible. When looking over the necessary requirements for RICO in a divorce-related action, a plausible set of facts exists to prove a case, as illustrated by Messody Perlberger’s cause of action. Major litigation between spouses over settlements is becoming more common, and RICO

266. See supra Part II.C.
267. See Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 499 (1985); see also supra Part II.C. Perhaps Congress’s refusal to amend RICO is based on the political unattractiveness of appearing “soft on organized crime.”
270. See supra Part III.A.2.
is not the only tool being used in this fight. In these circumstances, RICO is yet another way to further the conflict.

There is no end to potential uses of RICO. Though these uses of RICO seem impossibly far from the congressional intent to fight organized crime, with the current scope of RICO these new uses quite possibly may flourish. Additionally, if the facts are there to support RICO allegations, there is no reason that the courts should dismiss the case on policy grounds. The message is clear: without statutory revision RICO will continue to grow, and the courts are either unable or unwilling to stop this growth.

It is unlikely that the original drafters of RICO predicted such far-reaching use of the Act. The courts have recognized the problems they are experiencing with the troublesome statute. However, Congress either is satisfied with RICO’s current application or feels that RICO was intended to have such an expansive scope. Though technically a correct use of the Act, this overuse of RICO is clogging the court system and generating large damages awards where not really appropriate. As a statute designed to stop Mafia infiltration, divorce is not really a proper use of RICO. However, unless Congress takes an active role and rewrites the statute, there is no end in sight to possible applications of RICO. All that can be done now is to watch creative lawyers come up with even more bizarre uses of RICO. Until Congress changes its message, courts are compelled to comply.

ERIN ALEXANDER

271. See supra notes 11-16 and accompanying text.