



1997

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Recommended Citation

DeKrey, Alana (1997) "Racketeer Influence and Corrupt Organizations Act - Civil RICO: Stating a Claim in North Dakota," *North Dakota Law Review*. Vol. 73: No. 4, Article 4.

Available at: <https://commons.und.edu/ndlr/vol73/iss4/4>

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RACKETEER INFLUENCE AND CORRUPT ORGANIZATIONS ACT—CIVIL RICO: STATING A CLAIM IN NORTH DAKOTA

Rolin Mfg., Inc. v. Mosbrucker, 544 N.W.2d 132 (N.D. 1996)

I. FACTS

In 1992, Rolin Manufacturing, Inc. (Rolin Manufacturing), a New Salem, North Dakota manufacturing company, filed a complaint against Jim Mosbrucker, a Mandan, North Dakota farmer and rodeo operator, and Bank Center First (the Bank).¹ The complaint alleged that on January 21, 1992, Mosbrucker paid Rolin Manufacturing with three checks drawn on his account at the Bank for a trailer and work done on rodeo equipment.² Rolin Manufacturing agreed to hold the checks for payment until after two rodeos, when Mosbrucker promised he would have money in the account to cover them.³ When Rolin Manufacturing presented the checks, they were returned for nonsufficient funds.⁴

After discovery, Rolin Manufacturing amended their complaint, claiming Mosbrucker had violated North Dakota's Racketeer Influenced and Corrupt Organizations⁵ (RICO) statute by illegally controlling or conducting a criminal enterprise, thus entitling Rolin Manufacturing to treble damages and attorneys' fees.⁶ During discovery, Rolin Manufacturing had found that Mosbrucker not only had a history of financial problems, but also that his current financial situation was "hopeless."⁷

1. See Appellee Bank Center First's Reply Brief at 2, *Rolin Mfg., Inc. v. Mosbrucker*, 544 N.W.2d 132 (N.D. 1996) (No. 95-0107).

2. *Rolin Mfg., Inc. v. Mosbrucker*, 544 N.W.2d 132, 134 (N.D. 1996). The checks were in the amount of \$5,000.00, \$3,396.75, and \$3,396.75. *Id.* The \$5,000.00 check was eventually paid, but the lawsuit continued based on the two remaining checks. *Id.* at 134 n.1.

3. See Appellant's Brief at 7, *Rolin Mfg.* (No. 95-0107).

4. See *Rolin Mfg.*, 544 N.W.2d at 134. Rolin Manufacturing presented the checks for payment before Mosbrucker's rodeos occurred. Appellee Bank Center First's Reply Brief at 1, *Rolin Mfg.* (No. 95-0107). Rolin Manufacturing also presented the checks to the Bank on several occasions after that, but each time the checks were returned for nonsufficient funds. *Id.*

5. N.D. CENT. CODE § 12.1-06.1-01 (Supp. 1995). North Dakota's Racketeer Influenced and Corrupt Organizations (RICO) statute allows a plaintiff to recover treble damages and costs of the suit for injury caused by a pattern of racketeering activity. N.D. CENT. CODE §§ 12.1-06.1-05(d), (e) (Supp. 1995). A pattern of racketeering activity requires the commission of two predicate criminal acts. See *id.* § 12.1-06.1-01(d).

6. See *Rolin Mfg.*, 544 N.W.2d at 135. Rolin Manufacturing also alleged that Mosbrucker was liable for the amounts of the two outstanding checks and had committed deceit. See *id.* at 136.

7. Appellant's Brief at 7-8, *Rolin Mfg.* (No. 95-0107). In conducting discovery, Rolin Manufacturing's attorney was fined \$250 for misuse of a subpoena duces tecum when Rolin Manufacturing issued a subpoena to the Bank without notice to Mosbrucker. *Rolin Mfg.*, 544 N.W.2d at 139. Despite this setback, Rolin Manufacturing went on to discover that Mosbrucker had failed to disclose that he was a Chapter 12 debtor. *Id.* at 134. Further, Rolin Manufacturing found that Mosbrucker's liabilities totaled nearly \$900,000 while his disposable income was only expected to be \$11,610, and that Mosbrucker knew it would be impossible to comply with the Chapter 12 plan and pay Rolin Manufacturing's checks. See *id.* at 136.

Rolin Manufacturing alleged that in the year and two months before Mosbrucker had written the three checks, 115 of his checks had been returned by the Bank for nonsufficient funds and another 619 overdrafts were honored by the Bank, which led to \$8,357 in overdraft fees.⁸ Furthermore, from January through May of 1993, Mosbrucker issued an additional 31 nonsufficient funds checks and 687 overdrafts, which resulted in another \$10,635 in overdraft fees.⁹ Rolin Manufacturing claimed Mosbrucker's actions constituted a pattern of racketeering and that Mosbrucker had "illegally controlled or conducted a criminal enterprise, especially one fed and supported by his pattern of NSF and overdraft checks."¹⁰

In addition to Mosbrucker's financial woes, Rolin Manufacturing also learned Mosbrucker had judgments entered against him for conversion, which Rolin Manufacturing claimed constituted the crime of theft and established a predicate act under RICO.¹¹ Rolin Manufacturing further asserted that while the trailer and rodeo equipment were in their possession, they had a perfected security interest in the items.¹² Thus, when Mosbrucker induced Rolin Manufacturing to give up possession of these items by giving Rolin Manufacturing the bad checks, Mosbrucker defrauded a secured creditor, a second predicate act.¹³

Rolin Manufacturing's amended complaint also added the Bank as a defendant and claimed that the Bank also violated RICO.¹⁴ The Bank was a bankruptcy creditor in one of Mosbrucker's Chapter 12 actions and had allowed Mosbrucker to accumulate over \$18,000 in overdraft fees.¹⁵ Because of the inevitable knowledge the Bank's officers and employees had to have, Rolin Manufacturing alleged that the actions of the Bank constituted a combination described in the RICO statute.¹⁶

On May 3, 1994, the trial court granted the Bank's motion to dismiss and awarded costs of \$50 and fees of \$1000 after finding the

8. *Rolin Mfg.*, 544 N.W.2d at 135.

9. *Id.*

10. Amended Complaint at ¶ 39, *Rolin Mfg.* (No. 95-0107).

11. See Appellant's Brief at 9, *Rolin Mfg.* (No. 95-0107).

12. Amended Complaint at ¶ 30, *Rolin Mfg.* (No. 95-0107).

13. See Appellant's Brief at 17, *Rolin Mfg.* (No. 95-0107).

14. See Amended Complaint at ¶ 40, *Rolin Mfg.* (No. 95-0107). Rolin Manufacturing also claimed the Bank had been negligent in allowing Mosbrucker's account to remain open and had acted as a partner by estoppel with Mosbrucker. See *Rolin Mfg.*, 544 N.W.2d at 136, 137. Partnership by estoppel was the term used under North Dakota law describing the situation where a person represents themselves as a partner when in fact they are not. N.D. CENT. CODE § 45-06-08 (Supp. 1995). The partnership by estoppel statute was repealed effective January 1, 1997, but a similar statute appears in section 45-15-08 of the North Dakota Century Code, which became effective on January 1, 1996. *Id.*

15. See *Rolin Mfg.*, 544 N.W.2d at 135.

16. Amended Complaint at ¶ 40, *Rolin Mfg.* (No. 95-0107).

amended complaint to be frivolous.¹⁷ On January 27, 1995, the complaint against Mosbrucker was also dismissed.¹⁸ The issues on appeal were whether the dismissals and awards of fees were proper.¹⁹ The North Dakota Supreme Court reversed in part, affirmed in part, and remanded, *holding* that a claim was stated against Mosbrucker, that no claim had been stated against the Bank, and that the trial court had not abused its discretion in awarding fees and costs and in imposing sanctions.²⁰

Although *Rolin Manufacturing, Inc. v. Mosbrucker* contained several issues, this comment will focus on the civil RICO claim because it is an issue of first impression in North Dakota. *Rolin Manufacturing* is the first case explaining what is required to state a claim under the North Dakota RICO statute.²¹

II. LEGAL BACKGROUND

Congress passed the Racketeer Influenced and Corrupt Organizations Act as an attempt to eradicate organized crime by providing more legal tools for gathering evidence, establishing new penal prohibitions, and enhancing sanctions and remedies for dealing with organized crime.²² Soon after, many state legislatures passed their own RICO statutes patterned after the federal statute.²³ Because of the similarities to the federal law, some state courts look to federal precedent

17. Appellant's Brief at 5, *Rolin Mfg.* (No. 95-0107).

18. *Id.* at 5-6. In his three line order, the judge stated it was "time for the crusade and vendetta to end." Order, *Rolin Mfg.* (95-0107) app. at 38.

19. See Appellant's Brief at 6, *Rolin Mfg.* (95-0107).

20. *Rolin Mfg.*, 544 N.W.2d at 139. The scope of this comment is limited to the RICO claims alleged against the Bank and Mosbrucker although *Rolin Manufacturing* alleged several other claims against each. See *id.* at 135.

21. See *id.* at 138.

22. 18 U.S.C. § 1961 (1994) (referring to § 906 of Title V., Pub. L. No. 91-452, which is the Congressional Statement of Findings and Purpose). Congress also provided that the statute should be liberally construed to effect its remedial purpose. *Id.*

23. Several states have enacted RICO statutes that allow for civil recovery. See, e.g., ARIZ. REV. STAT. ANN. § 23-2314 (West Supp. 1995); CAL. PENAL CODE §§ 186.1 to .6 (West 1988); COLO. REV. STAT. § 18-17-106 (1986); CONN. GEN. STAT. ANN. § 53-393 (West 1986); DEL. CODE ANN. tit. 11 § 1505 (1974); FLA. STAT. ANN. § 895.05 (West 1994); GA. CODE ANN. § 16-14-6 (Harrison 1994); HAW. REV. STAT. § 842-8 (1993); IDAHO CODE § 18-7805 (1987); IND. CODE ANN. § 34-4-30.5-1 (Michie 1986); LA. REV. STAT. ANN. § 15:1356 (West 1992); MINN. STAT. ANN. § 609.911 (1994); MISS. CODE ANN. § 97-43-9 (6) (1972); N.J. STAT. ANN. § 2C: 41-4 (West 1995); N.M. STAT. ANN. § 30-42-6 (Michie Repl. Pamphlet 1989); OHIO REV. CODE ANN. § 2923.34 (Anderson 1993); OKLA. STAT. ANN. tit. 22, § 1409 (West Supp. 1996); 23 PA. CONN. STAT. ANN. § 911 (West 1983); R.I. GEN. LAWS § 7-15-4(c) (1992); TENN. CODE ANN. § 39-12-206 (1991); UTAH CODE ANN. § 76-10-1605 (1995); WASH. REV. CODE ANN. § 9A.82.100 (West Supp. 1996); WIS. STAT. ANN. § 946.87 (West 1996).

in interpreting their state statutes.²⁴ Thus, in tracing the requirements of stating a RICO claim in North Dakota, it is helpful to begin with federal court precedent, including the guidance provided by the United States Supreme Court.²⁵ Next, it is useful to examine the pleading requirements under other states' RICO statutes which are similar to North Dakota's statute.²⁶ Finally, the North Dakota statute itself will be discussed.

A. STATING A CLAIM UNDER CIVIL RICO

1. 18 U.S.C. § 1961, the Federal RICO Statute

The federal RICO statute makes it unlawful for any person who has received income from a pattern of racketeering activity to use such income in any enterprise engaged in interstate commerce.²⁷ RICO also prohibits a person from using a pattern of racketeering activity to control an enterprise engaged in interstate commerce.²⁸ Furthermore, it is unlawful for any person employed by or associated with an enterprise to conduct its affairs through a pattern of racketeering activity.²⁹ Finally, it is unlawful to conspire to violate the statute.³⁰ Any person injured by a violation of § 1962 can recover treble damages and the cost of the suit, including reasonable attorneys' fees.³¹

Under the federal law, a *pattern* of racketeering requires the commission of at least two acts of racketeering activity, called predicate acts, one of which must occur after the effective date of the statute and the last of

24. See, e.g., *Grove Holding v. First Wis. Nat. Bank*, 803 F. Supp. 1486, 1503 (E.D. Wis. 1992) (stating that requirements under the federal law will apply unless the legislature has expressly chosen an alternative); *Schnitzer v. Oppenheimer & Co.*, 633 F. Supp. 92, 99 (D. Or. 1985) (stating an intent to interpret Oregon's statute in the same way the federal statute is interpreted); *Rosier v. First Fin. Capital Corp.*, 889 P.2d 11, 15 (Ariz. Ct. App. 1994) (stating because Arizona's statute so closely resembles the federal statute, the legislature intended for it to have similar requirements).

25. The North Dakota Supreme Court has explained that when the legislature adopts a federal statute it can be presumed that the legislature intended to accomplish the same purposes and objectives as Congress. *State v. Wells*, 276 N.W.2d 679, 691 (N.D. 1979). Where such a statute has already been construed by the federal court systems, it is also presumed that the legislature adopted any construction the federal courts placed on the statute. *Id.* Finally, if the statute had not been interpreted by the federal courts before the legislature adopted it, subsequent interpretation by federal courts will not be controlling, but may be persuasive. *Id.*

26. See *J.P. Furlong Enter., Inc., v. Sun Expl. & Prod. Co.*, 423 N.W.2d 130, 138 n.27 (N.D. 1988) (noting that consideration of similar statutes of other states and the court decisions interpreting them is appropriate and relevant).

27. 18 U.S.C. § 1962(a) (1994).

28. *Id.*

29. 18 U.S.C. § 1962(b) (1994). A violation of this subsection also requires that the enterprise affect interstate or foreign commerce. *Id.*

30. 18 U.S.C. § 1962(d) (1994).

31. 18 U.S.C. § 1964(c) (1994).

which must have occurred within ten years.³² *Racketeering* activity includes “any act or threat involving murder, kidnapping, gambling, arson, robbery, bribery, extortion, dealing in obscene matter, or dealing in a controlled substance . . . chargeable under State law and punishable by imprisonment for more than one year.”³³ An *enterprise* is defined as any individual, corporation, partnership, or other legal entity, as well as any group of individuals associated in fact even if they are not a legal entity.³⁴

The Supreme Court has interpreted federal RICO on several occasions, emphasizing its broad scope,³⁵ holding that it reaches beyond organized crime to both legitimate and illegitimate businesses,³⁶ and finding that it is not necessary for the racketeering activity to be motivated by an economic purpose.³⁷ The Court has also required a showing by the plaintiff that the injury complained of be proximately caused by the violation of the statute.³⁸ More specifically, the Court has clarified the definitions of both *pattern*³⁹ and *enterprise*.⁴⁰

2. ‘Pattern’ as defined by the Supreme Court

In *Sedima v. Imrex Co.*,⁴¹ the Supreme Court first tackled the issue of what Congress meant by a “pattern of racketeering activity.”⁴² The Court noted that a pattern may require more than a simple allegation of two predicate acts.⁴³ Quoting a Senate report, the Court noted that

32. 18 U.S.C. § 1961(5) (1994).

33. *Id.* Racketeering activity also includes many other acts which are indictable under certain other federal laws. *Id.*

34. 18 U.S.C. § 1961(4) (1994).

35. *Sedima v. Imrex Co.*, 473 U.S. 479, 497 (1985) (stating “RICO is to be read broadly”).

36. *See id.* at 499.

37. *See* National Org. for Women, Inc. v. Scheidler, 510 U.S. 249, 252 (1994).

38. *See* Holmes v. Securities Investor Protection Corp., 503 U.S. 258, 268 (1992). Proximate cause, rather than “but for” causation, is appropriate because: (1) the less direct the injury, the harder it is to prove how much of the plaintiff’s damages are attributable to it; (2) if claims were allowed for indirect injuries, courts would have to use complicated rules to distribute damages among plaintiffs; and (3) plaintiffs who were directly injured will likely bring claims to vindicate the law which makes the need to help those injured more remotely less compelling. *Id.* at 269-70.

39. *See, e.g.*, H.J. Inc., v. Northwestern Bell Tel. Co., 492 U.S. 229, 239 (1989); *Sedima*, 473 U.S. at 497.

40. *See* *Reves v. Ernst & Young*, 507 U.S. 170, 177 (1993).

41. 473 U.S. 479 (1985).

42. *Sedima*, 473 U.S. at 496 n.14. *Sedima* is also important for its finding that it is not necessary to show a prior conviction to recover civil damages. *See id.* at 493. The Court does not answer the question of the standard of proof required for the predicate acts, but states that it does not believe it is proof beyond a reasonable doubt. *See id.* at 491. Also, the Court settled in the negative the argument among the circuits about whether a plaintiff needed to allege a separate “racketeering injury.” *See id.* at 495.

43. *Id.* at 496 n.14.

RICO's target was not sporadic activity and recognized that a pattern would require "continuity plus relationship."⁴⁴

Four years later, the Court ruled squarely on this issue in *H.J. Inc. v. Northwestern Bell Telephone Co.*⁴⁵ In *H.J. Inc.*, the Court interpreted § 1961(5) as merely setting the minimum number of predicate acts required to show a pattern.⁴⁶ What emerged from *H.J. Inc.* was a two pronged requirement for establishing a pattern: first, the predicate acts must be related; and second, the acts must amount to a threat of continued criminal activity.⁴⁷ To show relatedness, the Court looked to the Organized Crime Control Act,⁴⁸ which defines a pattern as "criminal acts that have the same or similar purposes, results, participants, victims, or methods of commission, or otherwise are interrelated by distinguishing characteristics and are not isolated events."⁴⁹ The continuity requirement is basically a temporal concept which can be demonstrated by proving a series of related predicate acts over a substantial period of time.⁵⁰

3. Enterprise

If a plaintiff seeks to recover in a civil action under RICO, the plaintiff must establish that the defendant substantively violated the RICO statute by committing one of the prohibited activities and that she or he was injured by defendant's conduct.⁵¹ Conducting an enterprise through a pattern of racketeering is one such prohibited activity.⁵² In pleading a violation involving an enterprise, the plaintiff must show several things, including "1) conduct 2) of an enterprise 3) through a pattern 4) of racketeering activity."⁵³

The Supreme Court in *Reves v. Ernst & Young*⁵⁴ resolved the meaning of the phrase "to conduct or participate, directly or indirectly, in the conduct of an enterprise's affairs."⁵⁵ The Court defined *conduct* as leading, running, managing, or directing, and defined *participate* as to

44. *Id.* (quoting S. REP. NO. 91-617, at 158 (1969)).

45. 492 U.S. 229 (1989).

46. *See* *H.J. Inc. v. Northwestern Bell Tel. Co.*, 492 U.S. 229, 238 (1989).

47. *See id.* at 239. The Court noted the two prongs must be stated separately, though in practice proof of the two will often overlap. *Id.*

48. Organized Crime Control Act of 1970, Pub. L. No. 91-452, 84 Stat. 922 (codified in sections of 18 U.S.C.).

49. *H.J. Inc.*, 492 U.S. at 240 (quoting from Title X of the Organized Crime Control Act of 1970, Pub. L. No. 91-452, 84 Stat. 922 (codified at 18 U.S.C. § 2516)).

50. *Id.* at 242. Predicate acts occurring over a few weeks or months that pose no threat of future criminal conduct will not satisfy the continuity requirement. *Id.*

51. *See* 18 U.S.C. § 1964 (1994).

52. *See* 18 U.S.C. § 1962.

53. *Sedima v. Imrex Co.*, 473 U.S. 479, 496 (1985).

54. 507 U.S. 170 (1993).

55. *See* *Reves v. Ernst & Young*, 507 U.S. 170, 177 (1993) (quoting 18 U.S.C. § 1962(c)).

take part in.⁵⁶ Looking at the two in context, the Court concluded that the phrase requires the defendant to have some part in directing the enterprise's affairs.⁵⁷ This construction led the Court to adopt the operation or management test, which determines liability based on whether the person has participated in the "operation or management of the enterprise itself."⁵⁸

In conclusion, for a plaintiff to properly plead a civil RICO claim, she or he must allege injury as a result of a violation of § 1962⁵⁹ and that the injury was proximately caused by the violation.⁶⁰ In establishing a pattern of racketeering activity, the plaintiff must allege at least two predicate acts and show both relatedness between the two and a likelihood of continued criminal activity.⁶¹ If the plaintiff is alleging unlawful control of an enterprise, she or he must allege participation in the enterprise by the defendant, using the operation or management test as a framework for establishing the necessary facts.⁶²

4. *Stating a Claim in Federal Court*

Though the Supreme Court has offered guidance in interpreting the statute, the circuit courts continue to refine the pleading requirements of RICO.⁶³ More specifically, the circuit courts require that civil RICO claims be pled with particularity,⁶⁴ and that the enterprise be shown to be

56. *See id.* at 177-79.

57. *Id.* at 179.

58. *Id.* at 183. Thus liability is not limited to upper management, since the enterprise will be operated by lower rung participants as well. *Id.* at 184.

59. 18 U.S.C. § 1964 (1994). It is also a violation of the statute to acquire control of an enterprise through the collection of an unlawful debt. 18 U.S.C. § 1962 (1994).

60. *See Holmes v. Sec. Investor Protection Corp.*, 503 U.S. 258, 268 (1992).

61. *See H.J. Inc. v. Northwestern Bell Tel. Co.*, 492 U.S. 229, 239 (1989).

62. *See Reeves*, 507 U.S. at 183.

63. Albert D. Spalding, Jr., *How to Start a Civil RICO Lawsuit*, PRAC. LAW., Oct. 1992, at 75-76 (noting the standing requirements developed by the federal judiciary are difficult to overcome).

64. Any time fraud is alleged as a predicate act, it must be pled particularly. FED. R. CIV. P. 9. However, some circuits have required all civil RICO complaints to be pled with particularity. *See, e.g., Jennings v. Emry*, 910 F.2d 1434, 1438 (7th Cir. 1990) (noting that pleading predicate acts with conclusory allegations is of no consequence if they are unsupported by factual allegations); *Lally v. Crawford County Trust & Sav. Bank*, 863 F.2d 612, 613 (8th Cir. 1988) (requiring a complaint to contain specific facts supporting its conclusions in a debt collection case); *Old Time Enter., Inc. v. International Coffee Corp.*, 862 F.2d 1213, 1217-18 (5th Cir. 1989) (stating a RICO plaintiff must plead specific facts to establish an enterprise distinct from the corporation). One court explained the need for all complaints to be pled particularly, not only fraud, as due to the statute's complexity. *See Jennings*, 910 F.2d at 1435-36. Pleading with particularity helps the court or the opposing party understand whether a valid claim has been alleged and if so, what the claim is. *Id.* at 1436.

distinct from the racketeering activity.⁶⁵ Further, to establish the continuity requirement of a pattern, the plaintiff must show either a threat of continued activity that may occur in the future (open ended continuity) or related predicates extending over a substantial period of time (close ended continuity).⁶⁶

The Eighth Circuit has followed the trend of requiring carefully and precisely pleaded RICO complaints.⁶⁷ The Eighth Circuit recognizes the person-enterprise rule, which prevents the plaintiff from alleging that the person named as the defendant also constitutes the enterprise.⁶⁸ Further, the Eighth Circuit will require that the plaintiff show an enterprise based on three things: (1) a common or shared purpose; (2) some continuity of structure and personnel; and (3) an ascertainable structure distinct from the pattern of racketeering.⁶⁹

5. *Stating a Claim in State Courts*

Although a framework interpreting the federal RICO statute has developed in the federal court system, state courts are still left to interpret certain aspects of their RICO statutes and may choose not to follow federal precedent.⁷⁰ However, a look at jurisdictions with statutes very similar to North Dakota's illustrates that even when there is no explicit reliance on federal precedent, state courts tend to follow the pattern set out by the Supreme Court decisions.⁷¹ More commonly, state courts

65. See *Jennings*, 910 F.2d at 1440. The court in *Jennings* explained an enterprise as an ongoing structure of persons associated through time, joined in purpose, and organized in a manner allowing for consensual decision making. *Id.* The enterprise must be distinct and separate from the pattern of racketeering activity; the pattern of racketeering may be the means through which the enterprise interacts with society, but it is not the enterprise itself. *Id.* Rather "an enterprise is defined by what it is, not what it does." *Id.*

66. A pattern of racketeering activity arises when there is continuity plus relationship in the predicate acts. *Lange v. Hocker*, 940 F.2d 359, 361 (8th Cir. 1991). Continuity can be shown either by closed ended continuity or open ended continuity. *Id.*

67. See *Lally*, 863 F.2d at 613 (requiring a RICO litigant to allege time, place, and content of the misrepresentations the action is based on); see also *Federal Land Bank v. Gibbs*, 809 F.2d 493, 496 (8th Cir. 1987) (finding dismissal proper when a complaint is vague and conclusory).

68. *Atlas Pile Driving Co. v. Dicon Fin. Co.*, 886 F.2d 986, 995 (8th Cir. 1989).

69. *Id.*

70. See *Tonnemacher v. Sasak*, 859 F. Supp. 1273, 1279 (D. Ariz. 1994) (noting that Arizona state courts had declined to follow the developing federal precedent requiring a separate racketeering injury when it was still an issue in the federal circuits).

71. For example, Nevada state courts have acknowledged that their state statute is not identical to the federal statute, and thus have sought to answer the questions of a prior criminal conviction and separate racketeering injury independently of federal law. See *Hale v. Burkhardt*, 764 P.2d 866, 868 (Nev. 1988). Their results, nonetheless, mirrored those of the Supreme Court. See *id.* (holding that there is no requirement under Nevada law for a plaintiff to allege a separate racketeering injury and likewise no requirement that predicate acts be shown by a prior conviction). Similarly, Idaho has required that a plaintiff allege a pattern of racketeering activity by showing the predicate acts constitute a threat of continuing activity without relying on federal precedent. *Spence v. Howell*, 890 P.2d 714, 726 (Idaho 1995) (citing the Idaho RICO statute and Idaho case law). The court did not

specifically state their intention to look to the federal courts in interpreting their own RICO statutes.⁷²

B. CIVIL RICO IN NORTH DAKOTA

North Dakota adopted its RICO statute in 1983.⁷³ The law was based on an Arizona statute, which in turn was patterned after the federal law.⁷⁴ North Dakota's RICO statute, like many other similar state statutes,⁷⁵ contains a civil component that allows for those injured by a pattern of racketeering activity to recover treble damages and costs.⁷⁶ The North Dakota legislature amended the statute twice, bringing the statute even closer in form to the federal RICO statute.⁷⁷

The North Dakota RICO statute allows for a plaintiff to recover in two ways: first, if a plaintiff sustains "injury" because of a "pattern of racketeering;" and second, if a plaintiff is injured when a person, through a pattern of racketeering, "acquires . . . control of any enterprise."⁷⁸ A "pattern of racketeering" requires at least two predicate acts, one occurring after July 8, 1987, and the last occurring within ten years after commission of the first predicate act.⁷⁹ Predicate acts can be

articulate the second part of the federal test, however, requiring relatedness. *Id.*; see also *H.J. Inc. v. Northwestern Bell Tel. Co.*, 492 U.S. 229, 239 (1989) (requiring continuity plus relationship).

72. See *Rosier v. First Nat'l Fin. Capital Corp.*, 889 P.2d 11, 15 (Ariz. Ct. App. 1994) (stating that since the Arizona statute is patterned after the federal RICO statute, the legislature must have intended that the two should have similar proximate cause pleading requirements); *New Crawford Valley, Ltd. v. Benedict*, 877 P.2d 1363, 1370-71 (Colo. Ct. App. 1993) (noting that if Colorado adopts a statute from another jurisdiction, then cases interpreting that statute are presumptive of legislative intent).

73. *Racketeer Influence and Corrupt Organizations Act*, ch. 163, 1983 N.D. Laws 422-32. Initial proponents of the legislation pointed out that it would hit the crooks where it hurt—their pocketbooks. *RICO: Hearings on SB 2402 before the House Judiciary Comm.*, 48th Legis. (N.D. 1983) (statement of John Jacobson, Assistant Attorney General). Opposition to the Act focused mainly on its sweeping scope coupled with the feeling that laws already existed to deal with such problems. *Id.* (statements of Representative Gates and Meiers).

74. *RICO: Hearings on SB 2402 before the House Judiciary Comm.*, 48th Legis. 2005 (N.D. 1983) (statement of Senator Christensen); *RICO: Hearings on SB 2402 Before the Senate Judiciary Comm.*, 48th Legis. 1 (N.D. 1983) (statement of Chief of Police). The Arizona statute was amended in 1993 and no longer parallels North Dakota's statute. See *ARIZ. REV. STAT. ANN.* § 13-2314 (West Supp. 1995) (listing the prior language of the statute in the historical and statutory notes section). The Arizona statute changed from allowing an individual to bring suit to allowing for the attorney general or county attorney to file an action on behalf of the person injured. *Id.*

75. See *supra* note 23 (citing other state RICO statutes).

76. *N.D. CENT. CODE* § 12.1-06.1-05 (1) (Supp. 1995). The statute also allows for recovery if there is a violation of section 12.1-06.1-03, which criminalizes controlling an enterprise through a pattern of racketeering activity. See §§ 12.1-06.1-05, -03.

77. The 1987 amendments began as an attempt to repeal the statute, but resulted instead in bringing the statute more in line with the federal statute by requiring two predicate acts within 10 years. *RICO: Hearings on SB 2449 before the House Judiciary Comm.*, 50th Legis. 1 (N.D. 1987) (statement of Tom Kelsch, representing the North Dakota Banker's Association). Again, the statute remained little used and was superficially amended further in 1995. *Racketeer Influence and Corrupt Organizations Act*, ch. 124, 1995 N.D. Laws 414. The 1995 amendments were part of the resulting legislation promulgated by the Juvenile Justice Task Force and among other small changes, replaced the words "criminal syndicate" with "criminal association." *Id.* at 415-18.

78. *N.D. CENT. CODE* § 12.1-06.1-05, -03.

79. *N.D. CENT. CODE* § 12.1-06.1-01(2)(d) (Supp. 1995).

any of a laundry list of acts, including conspiracy and attempt, chargeable under the laws of the state in which the act occurred.⁸⁰ An enterprise is “any corporation, limited liability company, association, labor union, or other legal entity or any group of persons associated in fact although not a legal entity.”⁸¹ Control is defined as “the possession of a sufficient interest to permit substantial direction over the affairs of an enterprise.”⁸² The statute requires the civil action to be brought within seven years of discovery of the violation.⁸³ The standard of proof is a preponderance of the evidence.⁸⁴

Prior to *Rolin Manufacturing*, only the Federal District Court for the District of North Dakota had interpreted the North Dakota RICO statute.⁸⁵ In *Meyer v. First National Bank & Trust Co.*,⁸⁶ the plaintiff alleged both federal and state RICO claims.⁸⁷ The federal district court found that since the complaint stated a claim under the federal statute, it

80. *Id.* The full text defining predicate acts states:

“Racketeering” means any act including any criminal attempt, facilitation, solicitation, or conspiracy, committed for financial gain, which is chargeable or indictable under the laws of the state in which the Act occurred and, if the act occurred in a state other than this state, would be chargeable or indictable under the laws of this state had the act occurred in this state and punishable by imprisonment for more than one year, regardless of whether such act is charged or indicted, involving:

- (1) Homicide.
- (2) Robbery.
- (3) Kidnapping.
- (4) Forgery.
- (5) Theft.
- (6) Bribery.
- (7) Gambling.
- (8) Usury.
- (9) Extortion.
- (10) Unlawful delivery of controlled substances.
- (11) Trafficking in explosives, weapons, or stolen property.
- (12) Leading a criminal association.
- (13) Obstructing or hindering criminal investigations or prosecutions.
- (14) Asserting false claims including, but not limited to, false claims asserted though fraud or arson.
- (15) Fraud.
- (16) Sale of unregistered securities or real property securities and transactions involving such securities by unregistered dealers or salesmen.
- (17) Obscenity.
- (18) Child Pornography.
- (19) Prostitution.

Id.

81. *Id.*

82. *Id.*

83. *See id.* § 12.1-06.1-05(7).

84. *Id.* § 12.1-06.1-05(9).

85. *See Meyer v. First Nat'l Bank & Trust Co.*, 698 F. Supp. 798, 800 (D.N.D. 1987).

86. 698 F. Supp. 798 (D.N.D. 1987).

87. *Meyer v. First Nat'l Bank & Trust Co.*, 698 F. Supp. 798, 800 (D.N.D. 1987).

similarly was sufficient to state a claim under the state statute.⁸⁸ While persuasive, the court in *Meyer* applied federal law to get to its conclusion, thus the North Dakota statute remained unadjudicated until *Rolin Manufacturing*.⁸⁹

III. CASE ANALYSIS

In deciding whether Rolin Manufacturing had stated a claim against either Mosbrucker or the Bank under North Dakota's RICO statute, the court began by setting out the relevant statutory definitions of control, enterprise, and racketeering.⁹⁰ Next, the court determined that plaintiffs must show that their damages were proximately caused by the defendant's violation of a predicate RICO act.⁹¹ The court stated a RICO claim must be pled with the same particularity as a fraud claim and noted pleading with particularity means giving the dates, times, and places of the fraudulent statements.⁹²

The court next stated that predicate acts must be criminal acts, as shown either by a prior conviction or through probable cause.⁹³ The court explained further that every RICO claim must have an element of criminal activity and noted that the defendant's state of mind in a civil RICO action must be the same as that required in a criminal

88. *Id.* at 809. In finding that a federal claim had been stated, the court decided the plaintiff had alleged facts with the required particularity to establish a fraud violation. *Id.* at 802. Plaintiff also had standing based on allegations that the plaintiff's injuries had resulted from defendant's commission of a predicate act. *Id.* at 802, 803. Additionally, the plaintiff was required to allege a pattern of activity as shown by at least two predicate acts that were related and continued activity. *Id.* at 805. Finally, the court rejected a requirement of probable cause as being necessary for pleading the predicate acts. *Id.* at 807.

89. *See id.* at 809.

90. *Rolin Mfg., Inc. v. Mosbrucker*, 544 N.W.2d 132, 137-38 (N.D. 1996).

91. *Id.* at 138 (quoting from *Rosier v. First Fin. Capital Corp.*, 889 P.2d 11, 15 (Ariz. Ct. App. 1994)). The court relied on an Arizona case discussing the proximate cause requirement set out in *Holmes v. Securities Investors Protection Corp.*, 503 U.S. 258 (1992). The Arizona court held that because the Arizona RICO statute was patterned after the federal RICO statute, the Arizona legislature intended the state RICO statute to contain a proximate cause requirement as well. *Rosier v. First Fin. Capital Corp.*, 889 P.2d 11, 15 (Ariz. Ct. App. 1994).

92. *Rolin Mfg.*, 544 N.W.2d at 138 (quoting David G. Duggan, *Pleading a RICO Claim*, 78 ILL. B. J. 454, 457 (1990)). In the quotation used by the court, Duggan explained what to plead when the predicate acts arise out of the federal crimes of mail fraud, wire fraud, or fraud in the sale of securities. David G. Duggan, *Pleading a RICO Claim*, 78 ILL. B. J. 454, 457 (1990).

93. *Rolin Mfg.*, 544 N.W.2d at 138 (quoting *Taylor v. Bear Stearns & Co.*, 572 F. Supp. 667, 682-83 (N.D. Ga. 1983)). The *Taylor* case requires either a prior conviction or probable cause in establishing the predicate acts. *Taylor*, 572 F. Supp. at 682-83. However, two years later in *Sedima*, the Supreme Court ruled that it is not necessary to have a prior conviction to establish a predicate act. *Sedima v. Imrex Co.*, 473 U.S. 479, 493 (1985). In dicta, the Supreme Court further held that it is not necessary to establish the predicate acts beyond a reasonable doubt, but the Court did not decide the standard of proof required. *Id.* at 491. It is clear that half of the court's decision in *Taylor* was overruled; it is not necessary to have a conviction to establish a predicate act. *Id.* at 492.

prosecution.⁹⁴ The court ended its discussion of the applicable law by noting that a pattern of racketeering activity requires proof of two related predicate criminal acts.⁹⁵

In applying this law, the court noted that Rolin Manufacturing's complaint did not plead dates, times, or places of the fraudulent statements.⁹⁶ The complaint characterized events as criminal, but failed to allege any convictions or probable cause related to the alleged criminal acts.⁹⁷ The court also looked at the fact that the complaint did not allege any crime by the Bank.⁹⁸ The court concluded by stating that the complaint failed to plead criminal activity with the particularity required for a RICO claim and thus failed to state a claim.⁹⁹

IV. IMPACT

Rolin Manufacturing gave North Dakota's court its first chance to interpret the North Dakota civil RICO statute. Rather than explaining how a plaintiff could prevail and recover treble damages and attorneys' fees, the case ruled on the narrower, albeit crucial, question of what is required to state a claim. In finding that no RICO claim had been stated, and upholding sanctions against Rolin Manufacturing for a frivolous pleading, the court indicated it will follow other courts in holding plaintiffs to strict pleading requirements.¹⁰⁰ Rolin Manufacturing's precise impact is yet to be seen, and while it may give plaintiffs an advantage, it will leave both parties questioning where the court will look for precedent in interpreting the statute.

After *Rolin Manufacturing*, a plaintiff must plead a RICO claim with particularity and must base the alleged predicate acts on either probable cause or a prior conviction.¹⁰¹ Though an action based on fraud is always required to be pled with particularity,¹⁰² holding that all RICO

94. *Rolin Mfg.*, 544 N.W.2d at 138 (quoting *Babst v. Morgan Keegan & Co.*, 687 F. Supp. 255, 258 (E.D. La. 1988)).

95. *Id.* (quoting *Stiller v. Sumter Bank & Trust Co.*, 860 F. Supp. 835, 839 (M.D. Ga. 1994)).

96. *Id.*

97. *Id.*

98. *Id.*

99. *Id.*

100. See Spalding, *supra* note 63, at 75. Sanctions are mandatory only in the limited instance where a party has no reasonable expectation of prevailing. See N.D. CENT. CODE § 28-26-01 (1987). Sanctions are not usually applied to new areas of law because it is more likely that a party could reasonably expect to prevail. See *Soentgen v. Quain & Ramstad Clinic*, 467 N.W.2d 73, 85-6 (N.D. 1991). It is surprising that here the court was not more lenient because RICO law is unclear and has never been applied by this court.

101. See *Rolin Mfg.*, 544 N.W.2d at 138.

102. N.D. R. Civ. P. 9. The reason given for requiring fraud to be pled particularly is to give the defendant enough information to respond to and defend the charge. See *Miller Enter., Inc. v. Dog N' Cat Pet Ctr. of Am.*, 447 N.W.2d 639, 643 (N.D. 1989). This reasoning translates to requiring the same particularity in RICO—to apprise the defendant of what he or she must prepare to defend.

claims likewise must be pled with particularity requires more from a plaintiff than a "short and plain statement" that would normally suffice in a civil pleading.¹⁰³ Not only must the plaintiff plead with particularity, but the alleged predicate acts must be based on probable cause or a prior conviction.¹⁰⁴

Defendants are only somewhat protected from the sting of a civil RICO action by these heightened pleading requirements. Plaintiffs have a slight advantage since conviction of the defendant on a predicate act would require proof beyond a reasonable doubt, but a plaintiff could still prevail on a RICO claim should the plaintiff be able to plead the predicate acts to the lesser standard of probable cause.¹⁰⁵ Thus, while plaintiffs may fear the strict pleading requirements, a RICO claim may allow civil recovery where the evidence is too weak to provide a criminal conviction.

In addition to deciding RICO's pleading requirements, the court creates questions as to where it will turn for precedent in interpreting the statute in the future. The authority relied on by the court in *Rolin Manufacturing* is all directly or indirectly based on interpretation of the federal RICO statute.¹⁰⁶ This implies that the court will rely on federal precedent in interpreting the North Dakota statute, but unlike other courts, there is no explicit statement of this intent.¹⁰⁷ To further complicate matters, the court followed federal precedent when it required a showing of proximate cause,¹⁰⁸ but rejected federal precedent in requiring a prior conviction or probable cause to establish a predicate act.¹⁰⁹

In requiring a prior conviction or probable cause, the court cited a Georgia federal district court case decided in 1983, two years before the Supreme Court interpreted RICO as *not* requiring a prior conviction to

103. N.D. R. Civ. P. 8(a)(i).

104. See *Rolin Mfg.*, 544 N.W.2d at 138.

105. See N.D. CENT. CODE § 12.1-06.1-01 (Supp. 1995) (stating that racketeering will mean any act chargeable or indictable regardless of whether the act is charged or indicted).

106. See *Rolin Mfg.*, 544 N.W.2d at 138; see also *Stiller v. Sumter Bank & Trust Co.*, 860 F. Supp. 835, 836 (M.D. Ga. 1994) (interpreting the federal RICO statute); *Babst v. Morgan Keegan & Co.*, 687 F. Supp. 255, 256 (E.D. La. 1988) (interpreting the federal RICO statute); *Taylor v. Bear Stearns & Co.*, 572 F. Supp. 667, 680 (N.D. Ga. 1983) (interpreting the federal RICO statute); *Rosier v. First Fin. Capital Corp.*, 889 P.2d 11, 15 (Ariz. Ct. App. 1994) (interpreting the state RICO statute by looking to federal law for guidance); *Duggan*, *supra* note 92 (explaining how to plead a federal RICO violation).

107. *E.g.*, *Grove Holding v. First Wis. Nat. Bank*, 803 F. Supp. 1486, 1503 (E.D. Wis. 1992) (stating that requirements under the federal law will apply unless the legislature has expressly chosen an alternative); *Schnitzer v. Oppenheimer & Co.*, 633 F. Supp. 92, 99 (D. Or. 1985) (stating an intent to interpret Oregon's statute in the same way the federal statute is interpreted); *Rosier*, 889 P.2d at 15 (stating because Arizona's statute so closely resembles the federal statute, the legislature intended to it to have similar requirements).

108. *Rolin Mfg.*, 544 N.W.2d at 138. The proximate cause requirement was taken from *Rosier*, which adopted it after discussing the Supreme Court's holding in *Holmes*. *Rosier*, 889 P.2d at 14 (citing *Holmes v. Securities Investor Protection Corp.*, 503 U.S. 258 (1992)).

109. *Rolin Mfg.*, 544 N.W.2d at 138.

establish a predicate act.¹¹⁰ In choosing to rely on the 1983 Georgia case, the court rejected a precedent that has since clearly been settled in federal law.¹¹¹

The court also hinted at how it will define a pattern by stating, "[t]he pattern of racketeering activity requires proof of two related predicate criminal acts."¹¹² The United States Supreme Court has defined *pattern* as conduct satisfying the two pronged test of relatedness and continuity.¹¹³ However, in its choice of authority, the North Dakota Supreme Court only extracted the first half of this test, even though the case cited went on to apply both prongs of the test.¹¹⁴ The court's truncation of the pattern test may indicate an intention to only require relatedness in establishing a pattern, rather than the more common approach of requiring both continuity and relatedness.

As a result of their choice of precedent, the court makes it hard to predict where the court will look for guidance in interpreting North Dakota's law. Choosing an old case that has since been modified by a Supreme Court ruling and selecting half of a two prong test suggests that the court intends to start afresh in interpreting the North Dakota statute, rather than relying on the law as developed in other jurisdictions. Holding a plaintiff to strict pleading requirements and upholding Rule 11 sanctions further implies that the court may be attempting to limit the availability of civil RICO claims. Though the potential for recovering treble damages is very appealing, plaintiffs must first grapple with *Rolin Manufacturing*.

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110. *Sedima v. Imrex Co.*, 473 U.S. 479, 489 (1985) (explaining that no prior conviction is necessary). The Court refused to decide on the standard of proof required, but in dicta said it was not proof beyond a reasonable doubt. *Id.* at 491.

111. *See id.* at 489.

112. *Id.*

113. *H.J. Inc. v. Northwestern Bell Tel. Co.*, 492 U.S. 229, 239 (1989).

114. *See Stiller v. Sumter Bank & Trust Co.*, 860 F. Supp. 835, 839 (M.D. Ga. 1994).