The Rico Report

S02 Ep06 – RICO Pattern Element

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[CAL STEIN]

Hello, and thank you for joining me on this installment of the RICO Report where we're going to be talking about arguably the most famous and most litigated element of RICO, the pattern element. My name is Cal Stein and I'm a partner in the white collar and litigation practice groups at Troutman Pepper. I represent clients in white collar criminal and government investigation matters as well as in complex civil lawsuits and in RICO cases. I am very pleased to have two of my colleagues here with me today, Chris Carlson and Mary Grace Metcalfe. Chris and Mary Grace, you guys are two of my absolute favorite attorneys to work with, so I am just delighted to have you here with me today to discuss the RICO pattern element. We've worked together before and know each other pretty well, but why don't each of you introduce yourself. Chris, do you want to go first?

[CHRIS CARLSON]

Absolutely. Longtime listener, first time caller. Glad to be here. I am in the Regulatory Investigation Strategy Enforcement Group at Troutman Pepper. I have been at the firm since 2018 and before then worked in the West Virginia Attorney General's Office. I have the blessing of having worked with you on a number of cases and calling Richmond home with Mary Grace.

[CAL STEIN]

Thanks, Chris. Mary Grace, you want to introduce yourself?

[MARY GRACE METCALFE]

I'm also an attorney with the Regulatory Investigation Strategy and Enforcement Group. I split my time between the New York and the Richmond offices. And before joining Troutman, I worked for a securities litigation boutique.

[CAL STEIN]

Thank you both, again, and welcome to the podcast. Today, we're going to be talking about the pattern element of RICO. As we know, RICO has a handful of basic elements including the existence of an enterprise and the RICO conduct, both of which we've already discussed on previous episodes of this podcast. But the element that really has become somewhat synonymous with RICO litigation is that of the pattern of racketeering activity.

Now, we are going to have an entirely separate episode dedicated to the concept of "racketeering activity" and what qualifies and what does not. So today, we are going to focus

solely on the first part of that element that of the pattern. And let's start with something of a history lesson regarding the pattern element of RICO. The pattern element has proven somewhat elusive for courts to truly define. And this difficulty has led the Supreme Court to twice attempt to provide clarity on what is necessary to establish a pattern.

But before we get to those cases, I want to start where we often start when talking about RICO with the statute itself. The statute provides a definition of what constitutes a pattern. That definition is ultimately the subject of the cases we will be discussing. But Mary Grace, why don't you start us off by talking about what the statute itself says about the pattern element.

[MARY GRACE METCALFE]

If we look at the statute itself, the elements of a pattern of racketeering activity are set out in 18 USC 1961 5 as follows. A pattern of racketeering activity requires at least two acts of racketeering activity in one of which occurred after the effective date of this chapter., And the last of which occurred within 10 years, excluding any period of imprisonment after the commission of a prior act of racketeering activity.

So again, that means we need at least two acts of racketeering activity, which we see laid out in a nice long list in 18 USC 1961 1, and as Cal just said, a future podcast episode, so do tune in, one of the acts must have occurred after the effective date of the chapter. And since that was over half century ago on October 15th, 1970, we don't really see this as much of a litigated issue in recent cases.

The act must then also have occurred within 10 years after the prior commission of a racketeering act. So here we see the first instance of what I expect to be one of our themes today, namely that there's a temporal scope that matters in establishing a pattern of racketeering activity under RICO.

For a nice concrete discussion of the 10-year rule, I'd like to direct the listeners to *US v. Pungitore* Which is 910 F2d 1084, a mafia shakedown case in which the court explored the 10-year requirement saying the plain language of this provision does not establish a statute of limitations, time barred certain predicates. Rather it signifies that the pattern of racketeering activity is not established if the predicate acts occurred more than 10 years apart.

So again, it could be two separate and entirely actionable acts of react hearing activity. But if there isn't that 10-year period, it's not a pattern under RICO.

[CAL STEIN]

Thank you so much, Mary Grace. So with that, let's now get into the cases. And against that foundation, as I mentioned before, the Supreme Court has twice tried to provide clarity on this definition and what it really means. The first of those attempts occurred way back in 1985 and a case titled *Sedima, SPRL v. Imrex Co., Inc.* And while federal jurisprudence on the pattern element has evolved quite a bit since that decision, I still think it's helpful to our understanding of the element and helpful context for our discussion to look at what the Supreme Court said about

the pattern element the first time it analyzed it. So, Chris, the *Sedima* case is one that I know you're familiar with. Can you take us through the highlights?

[CHRIS CARLSON]

I think we have all read the infamous footnote 14, but reading the whole case just puts a different perspective on it. So let me start with the facts. The case arose because Sedima Corporation contracted with Imrex and other corporation to provide electronic components to a Belgian international firm. The companies agreed to split the net proceeds, but Sedima filed the RICO claim alleging that Imrex inflated bills for non-existent purposes and doing so diminishing the net proceeds that Sedima would be receiving.

Reading the opinion as a whole and still as a reminder that RICO is always been a quandary for courts. I would direct listeners to footnotes five and six. There's a long legislative history of courts struggling with a number of facts that make the RICO report and Cal's participation in this space so necessary.

Prior to *Sedima*, lower courts had developed restrictions on how broadly RICO could be read such as requiring a defendant to have been convicted of predicate acts or requiring a plaintiff to suffer a racketeering injury. The *Sedima* ruling rejected such attempts. But while clarifying the broad application of RICO, *Sedima* suggested in dicta that courts may have overlooked this pattern requirement.

Specifically, the Supreme Court emphasized the word requires, and the pattern element is not synonymous with the word means. Thus, while two acts are necessary, they may not be sufficient. I think we've all looked at this footnote and all have cited this footnote in RICO's legislative history in that footnote. But I want to be clear *Sedima* didn't create new law, it just emphasized that legislative history and put it front and center for courts that were very often overlooking this point. Cal, as you know well, if the Supreme Court and *Sedima* intended to provide clarity by defining the word pattern, it failed.

[CAL STEIN]

Right you are, Chris. I do think the Supreme Court took up the *Sedima* case genuinely to clarify the pattern element. But as you noted and as is often the case, the Supreme Court's ruling in particular, the concepts conveyed in the footnote triggered many different interpretations from federal court all over the country. Many of them did conflict. Mary Grace and Chris, I know this was something that we were all pretty interested in when we first began preparing for this podcast. All of the different tests for establishing a pattern that evolved after the Supreme Court's ruling in *Sedima*.

[CAL STEIN]

Generally, as we discussed there were three different types of tests that emerged all from the *Sedima* decision. So let's talk about those now. And I want to start with one that's sprouted from *Sedima*, but has since been debunked. So we're not going to spend a ton of time on it, but this is the so-called multiple schemes test.

Humming out of *Sedima*, some federal courts interpreted the opinion as requiring RICO defendants to have engaged in multiple schemes. The reasoning of these courts varied, but really it came down to their belief that the continuity prong of the pattern element, which we'll discuss in more detail later, but the continuity prong was the prong that was intended to be more limiting. And by that, what I mean is that courts viewed the continuity requirement as a way to limit or narrow the scope of cases that fell within RICO's ambit.

And one way to do that was to require multiple schemes as opposed to just multiple racketeering acts. Put another way, these courts were concerned that if two racketeering acts, if that is all that was required to constitute a pattern, that was going to sweep in the great majority of fraud cases. And that was not the intent of the RICO statute.

For example, the *Fourth Circuit*, which actually never formally adopted the multiple schemes test, famously noted that, "It will be the unusual fraud that does not enlist the mails and wires in its service at least twice." Basically courts that advocated for the multiple schemes test wanted to ensure the integrity of the pattern element and ensure that it was preserved.

Of course, only the *Eighth Circuit* formally adopted the multiple schemes test. Most of the other courts that considered it and even found some logic in its rationale, ultimately determined that requiring multiple schemes was too limited, i.e., it would allow defendants who had committed a lengthy single scheme that they acknowledge should fall within the ambit of RICO to evade liability.

The Supreme Court ultimately struck down the multiple scheme standards, which we'll discuss in a few moments. But I first want to move to the other tests that federal courts applied post-*Sedima*. And let's start with the one that has been called the multiple acts test. Mary Grace, can you take us through that one?

[MARY GRACE METCALFE]

Sedima was handed down in July of 1985. And then in October 1985, we saw *RAGS Couture, Inc. v. Hyatt*, a *Fifth Circuit* case, which is generally pointed to as one of the best examples of this multiple acts test. In the *RAGS Couture*, we see the court wrestle with the language from *Sedima* and the concern of the pattern element requiring only proof of two racketeering acts.

We see the court deal with this in the context of one of the many arguments defendants made against summary judgment in this case where they were accused of participating in mail fraud. And the court summarized defendant's arguments as follows that these were two acts of mail fraud and these were not sufficient to constitute a pattern of racketeering activity because these were only two acts, whereas the language of the statute requires at least two acts.

They'd relied heavily on the then recent language in *Sedima* in making that argument. The court, however, in reviewing this said, "Quite frankly, we are not persuaded by the defendant's argument." The Supreme Court in *Sedima* implied that two "isolated" acts would not constitute a pattern. In this case, however, the alleged acts of mail fraud are related.

So here we see the *Fifth Circuit* reading into the *Sedima* case, a relatedness component between the acts and distinguishing them from what might be isolated acts of racketeering activity. It's worth noting that the court in RAGS was concerned with exactly what you mentioned earlier, Cal, the idea that interpreting a pattern of racketeering activity to include such a small number of acts would sweep in a large number of run-of-the-mill fraud cases. And they noted as much including the case. They said, "The scope of the civil RICO statute is breathtaking. An allegation of fraud in the contract action can transform an ordinary state law claim into a federal racketeering charge. It may be unfortunate for federal courts to be burdened with this kind of case, but it's not for this court to question the policies decided by Congress and upheld by the Supreme Court."

The broad language of the statute and the *Sedima* decision provide us with clear guidance. So here, it's really more of, there's not a reason why, there's but to do, and in this case, try, I suppose.

[CAL STEIN]

Thanks, Mary Grace. And not just for that *Charge of the Light Brigade* reference. Though I do think we all enjoyed it.

[MARY GRACE METCALFE]

You know my fondness for Tennyson.

[CAL STEIN]

Indeed I do. So we've talked now about two of these post-*Sedima* tests, the first being the multiple schemes test and the second being the multiple acts test that Mary Grace just took us through. But there also developed a sort of middle ground test that sought to look at the pattern element more on a case by case basis. Chris, you want to tell us about that one?

[CHRIS CARLSON]

The final test is the multi-factors test. It doesn't take a rocket scientist to guess whether this is a bright line test or a multi-factor test. And it doesn't also take a rocket scientist to guess what circuit brought this out. This is the *Seventh Circuit* that pioneered this case in a case called *Morgan v. Bank of Waukegan* that also as Mary Grace noted happened almost immediately after *Sedima* in 1985. As you can see, the courts are grappling with what the Supreme Court thought footnote 14 would make clear and certainly did not.

In true *Seventh Circuit* fashion, the court explained how we got here. They noted the circuit courts were split, but then they emphasized emphasis and original, though not this court inappropriately sought to limit RICO. Then post-*Sedima* certain courts were still in a quandary. But again, in the end quotes, not this court.

For the Morgan court, the answer was easy. Requiring both continuity and relationship for the pattern requirement to be met is a sound theoretical concept that is not easily accomplished in

practice. I'm sure trial courts were thrilled when they were told that this theoretical concept would be on their plates for them to decide and left with this multi-factor test, there were seven factors for trial courts to engage in.

The number of predicate acts, the variety of predicate acts, the length of time over which predicate acts are committed, the number of victims, the existence of separate schemes, and finally the last factor, occurrence of distinct injuries. And the *Seventh Circuit* was not going to let trial courts off the hook. It ended its opinion by saying, "We recognize by adopting this factually oriented standard as opposed to a hard and fast set rule.

The legal test is necessarily less than precise. And then compared this test with Justice Stewart's off-quoted test for pornography. I know it when I see. Cal, this left a hole for the Supreme Court to "fill." And I think that's up to you to explain where we are now.

[CAL STEIN]

Thanks, Chris. And yeah, we'll all explain that. Coming out of *Sedima*, it's pretty easy to see how the Supreme Court's ruling really did not have the intended effect of creating a clarified rule. So four years after *Sedima*, the Supreme Court steps back into the batter's box again to try to clarify the pattern element. And it does so in the now famous or perhaps infamous, depending on who you asked, case of *HJ Inc. v. Northwestern Bell Telephone Company*.

Now, I say perhaps infamous case because it is very debatable whether the Supreme Court was any more successful at clarifying the pattern element this second time around. Many have criticized *HJ Inc.* as really not providing any more concrete guidance than *Sedima* did. And as a result, many federal courts still apply the type of *pre-HJ Inc*. Multi-factor tests that Chris just told us about.

But *HJ Inc.* is still a Supreme Court case, so it's important for us to talk about. Notably, this case came to the Supreme Court from the *Eighth Circuit* where the court had applied the multiple schemes test. And if you were paying attention earlier, you know what is coming. This is where the Supreme Court strikes down that test finding that neither the statutory language of RICO, nor it's legislative history supported the requirement the *Eighth Circuit* tried to impose of multiple schemes.

Technically speaking, the Supreme Court's holding in *HJ Inc.* was limited to overruling the multiple schemes test. But the opinion discussed much, much more, including some detail about the dual concepts of relatedness and continuity, both of which remain keys to pleading and establishing the pattern element today. As you may have heard, the test for establishing a RICO pattern in today's world is sometimes called relationship plus continuity.

So let's talk about those concepts in *HJ Inc*. And how they have developed since that decision. And let's start with the concept of relatedness. Mary Grace, take us through the concept of relatedness and how it plays into the pattern element.

[MARY GRACE METCALFE]

In the words of the *Second Circuit*, and this is coming straight out of *Reich v. Lopez*, 858 F.3d 55, because RICO does not apply to isolated or sporadic criminal acts, it has a relatedness requirement in addition to the continuity requirement. Relatedness is the less frequently litigated of the two concepts and it can be in the *Second Circuit*, at least bifurcated into two different categories.

One, horizontal relatedness pursuant to which predicate crimes must be related both to each other. And then vertical relatedness where the predicate crimes must be related to the enterprise as a whole. And like I said, in the *Second Circuit*, at least, both are generally required that we do see the *Second Circuit* provide itself with a little bit of wiggle room, recognizing that in "certain cases" the court has relaxed the requirement of horizontal relatedness and held that proof of vertical relatedness alone can also serve as proof of the horizontal relation.

And we'll get to that in a little bit. But for the meantime, we see that vertical relatedness boils down to whether or not the defendant in question was enabled to commit the offense solely because of his or her position in the enterprise or his or her involvement or control over the enterprise's affairs or because the offense related to the activities at the enterprise. So where this issue is litigated, we see vertical relatedness fail most frequently where there isn't a sufficient link between the act an individual defendant has committed and the enterprise itself.

And for a good discussion of that, we can see the *Halvorssen v. Simpson* case at the *Second Circuit*, which is 807 F appendix 26. Horizontal relatedness, like we said, depends upon the predicate acts being related to each other. So in *Reich v. Lopez*, the *Second Circuit* laid out two different ways of establishing that when dealing with "an enterprise whose business is racketeering activity such as an organized crime family, horizontal relatedness can be established simply by linking each act the enterprise. When dealing with an enterprise that is primarily a legitimate business, however, courts must determine whether there's a relationship between the predicate crimes themselves."

And that requires a look at [inaudible 00:21:05] whether the crimes share purposes, results, participants, victims, or methods of commission. From a historical standpoint, this is actually a really interesting distinction. In the early days of RICO, Congressman Biaggi had proposed an amendment that sought to limit the application of RICO to mafia and organized crime family organizations. And you can see that in the 1970 congressional record. The amendment was really strongly opposed on constitutional grounds and there were concerns that this would create a status offense where simply one's identity in committing some of these acts, trigger the application of a harsher law and potentially harsher punishment.

While the legislative history establishes that this distinction was specifically rejected, we see the after effect of that in cases to this day. And for an exploration of what I just described, I highly recommend that readers take a look at the Moss case, which is *Moss v. Morgan Stanley*, 1983 case out of the *Second Circuit*.

But then also more recently, we see it here, again, in *Reich v. Lopez* where effectively it's more difficult to establish and requires more details to establish the existence of horizontal

relatedness when a legitimate business is involved versus when there's an actual organized crime enterprise.

This distinction and this level of bifurcation that we see in the *Second Circuit* isn't necessarily present across the country. We can see, for example, in the *Ninth Circuit* explicit rejection of the *Second Circuit*'s "precise formulation with two different prongs". The *Ninth Circuit* in *US v. Bingham* noted however that those components would be satisfied by evidence that a predicate act is related to the activities of criminal enterprise again.

And again, in all of these cases, we see the circuit courts relying on the *HJ* decision and not to pile on *HJ* too much, but one more point going back to the *RAGS Couture* case in 1989, in the wake of *HJ*, the *Fifth Circuit* noted explicitly in *Smith v. Cooper/T Smith Corp.*, and that's 88 F.2d 755 that their "interpretation of the pattern requirement is different from the one given in *RAGS Couture* and explicitly recognizing the obligation of *RAGS* in light of the *HJ* case." So, Cal, with all of those tangents and side effects, back over to you.

[CAL STEIN]

Thanks, Mary Grace. I want to pivot from that excellent legal discussion, more to the practical. As Mary Grace alluded to, in some cases it can be a challenge to defeat a RICO claim based on the relatedness prong, but it absolutely does has happen. Chris, let's talk about a couple of those examples.

[CHRIS CARLSON]

One area where defendants have had success is the nexus between the related acts. Some courts have held that two big of a nexus is just insufficient. One of those cases is *Heller Financial*. It's out of the *Fifth Circuit* and held the allegations that related X were related to the general goal of maximizing profits or protecting a scheme from discovery are not sufficient. Before I move to a different nexus for kicking a case on relatedness, Cal, you have more experience here. Do you think this is a lack of pleading issue or is this really something that's going to be just positive of a case?

[CAL STEIN]

Typically, I think it's more of a lack of a pleading issue. You don't see it very frequently for a reason, I think, and courts, I think, have been largely pretty deferential to that pleading.

[CHRIS CARLSON]

That's very helpful, Cal. The second issue that courts have found is when defendants are able to point out that the schemes at issue are in conflict with each other. While that may be rare, it is something that defendants can really try to start pointing at. I think just based on my experience, this is rare, but out of the *Sixth Circuit*, there's a case *Vild*, V-I-L-D where the allegations of two underlying frauds had counter purposes with one another.

Defendants certainly could look for this if the related acts conflict with each other. But again, I don't want to be too bullish on this. As Cal noted, here courts are willing to give deference.

[CAL STEIN]

You're quite right, Chris. But at the same time, it's worth noting those because sometimes a creative motion or a creative argument can be just what the doctor ordered in a RICO case. I do think it's always helpful to go back to the practical because that's really what we as lawyers care about. Using the RICO laws that exist to help our clients often at the motion to dismiss or the summary judgment stage.

And, as we said, it can be challenging in some cases to defeat a RICO claim based on relatedness, but it does for sure happen. So we should be looking and we should be thinking creatively. So let's switch now to the other prong, continuity. This prong is far more frequently litigated and defendants have largely had more success attacking the continuity prong than the relatedness prong. This was the other concept discussed in the *HJ Inc*. case. And in that case, the court specifically acknowledged that continuity could be established in two ways. Closed-ended continuity and open-ended continuity. Let's take each of those individually. Mary Grace, why don't you start us off with a discussion of closed-ended continuity?

[MARY GRACE METCALFE]

You can think of closed-ended continuity as really a hard cap on the duration of a scheme. And the *Second Circuit* has come the closest to creating a pure temporal cap suggesting repeatedly. In fact, explicitly pulled repeatedly that a scheme of under two years in duration doesn't really rise to the level of pattern that would make something a RICO pattern of racketeering activity. And you can see this in *Spool v. World Child International Adoption Agency* in 2008 and *Grace International Assembly of God v. Festa* in 2019, where the court uses almost the exact language.

"We have never found predicate acts spanning less than two years to be sufficient to constitute close-end continuity. And we have never held a period of less than two years to constitute a substantial period of time." The *Second Circuit* has also identified other limiting factors that could defeat continuity, but these factors go beyond the two-year minimum and they must exist beyond the two-year period, otherwise they don't qualify as a short scheme.

The 3rd Circuit has some similar poll dates you can see in *Tavis v. Tavis* in 1995, they've put in a one year limit as the temporal cap for closed-ended continuity, but we can see the longer two-year period in the *Second Circuit* as being yet another instance of courts trying to differentiate between run-of-the-mill fraud cases and the sort of broad sweeping patterns of racketeering activity that prompted the enactment of RICO in the first place.

[CAL STEIN]

The hard caps on the timing are great. We should be clear that they're not typically the majority position, certainly the *Second Circuit* and the 3rd Circuit as Mary Grace mentioned, but many,

many courts still apply all of the factors, all of the multi-factors that Chris talked about earlier, and they don't give the length of time factor dispositive weight the way the *Second Circuit* does.

For these courts, as the *Sixth Circuit* had said a pattern is the sum of various factors, including, but not limited to duration. So we do want to make that clear. But Chris, why don't you talk to us about those courts and how they addressed closed ended-continuity.

[CHRIS CARLSON]

Multiple courts have adopted a two-step approach requiring that sufficient duration that Mary Grace mentioned, plus additional requirements. And I'll go back to the *Seventh Circuit*. I can hear them in opinions after the *Morgan* case that I noted earlier in 1985, just stomping their foot and saying, "We got this right in the first place. Look to our seven factor test." That said even the *Seventh Circuit* has recognized the most important element of RICO continuity is that temporal aspect that Mary Grace mentioned.

[CAL STEIN]

So now let's switch and talk about the other type of continuity as contemplated by the Supreme Court in *HJ, Inc.* and by many other courts thereafter that have open-ended continuity. Open-ended continuity refers to past conduct that by its nature projects into the future with the threat of repetition. The key to open-ended continuity is that it relieves the plaintiffs from alleging and establishing a substantial period of time, that component that we've mentioned. Typically, plaintiffs will use open-ended continuity when they're trying to establish continuity over a shorter period of time.

So for example, a period of time that is under two years in the *Second Circuit*. The key for any open-ended continuity argument is the threat that the conduct will recur in the future. And there are three ways to prove a threat of repetition. One, that there's a specific threat of repetition that exists in the conduct.

The second is that the conduct is a regular way that a defendant conducted an ongoing legitimate business. And the third is that the conduct can be attributed to a defendant operating as part of a long term association that exists for criminal purposes.

And like we did before, I want to ground this very legal discussion in the practical. I want to talk about some ways that litigants can and have attack the concept of open-ended continuity if they're facing a RICO claim that is based on it.

One argument I have made in my career with some success is that open-ended continuity is not satisfied where the RICO plaintiff alleges only a single scheme aimed at a limited number of people. There is a lot of law that says those types of allegations do not constitute open-ended continuity. Mary Grace, what can you tell us about that and the reasoning for those decisions?

[MARY GRACE METCALFE]

One of the ways that courts have found that there's no open-ended continuity is if there's a discreet scheme that only has a few potential or actual victims. And the reasoning here is really the theme that we've gone back to, again and again, a single scheme with just a few victims is not really likely to be the sort of pattern repeated in the future.

And this link is usually apparent to the case law. So you can see, for example, there's a *Sixth Circuit* case *Grubs v. Schuelke Group Inc.* in 2015 in which there was only one victim and the court held that a single terminable scheme with only one victim was by its nature not open-ended.

Similarly, you can see in *Gamboa v. Velez* which is one of my favorite cases discussing this. It's out of the *Seventh Circuit* in 2006, even if there were multiple victims, if those victims are part of an identifiable and unified group that isn't likely to be a test point or a pattern generator for future victims, it's not going to rise to the level of open-ended continuity.

So here, we have in Gamboa an amended complaint alleging that the wrongdoing despite it targeting multiple victims was limited to a one time endeavor to "wreak havoc" upon all matters linked to a single murder investigation. If you guys do have the chance to go back and read this case, the fact pattern is fascinating. The court then held that because the amended complaint explicitly presents a distinct and non-reoccurring scheme with a built-in termination point and a limited number of victims, it wasn't really likely that the detectives in question were going to engage in similar misconduct.

And again, here we see the court is concerned with distinguishing between fraud generally and a pattern that threatens to have repeated sets of victims. And the court said, "We don't intend to minimize Gamboa's case by labeling it 'garden variety'. It is not uncommon for criminal investigation to develop over the course of several years. Further, many investigations involve a variety of police activities and result in charges against multiple defendants. And they had concerns that under the district court's approach, the occurrences within the time period of a normal investigation could potentially rise to the level of a RICO claim if interpreted that properly. And they held. That's too broad a brush given RICO's limited concern of punishing organized and habitual criminal conduct. And again, you see us going back to that original purpose in enacting RICO half a century ago.

[CAL STEIN]

Thanks, Mary Grace. Yeah, you're right. That *Gamboa* case is pretty interesting. If there is such a thing as a must read RICO case, I think that probably qualifies.

Another argument that I have made in my career that open-ended continuity is not met is when the allegations are finite. And by that, I mean the allegations by their nature have a natural ending point such that the threat of recurrence or the threat of occurrence into the future is not likely to occur. Chris, I know you've seen some of those cases. What can you tell us about that argument.

[CHRIS CARLSON]

Courts have also dismissed RICO cases where allegations are clearly not likely to be repeated. I can't overstate that this is the key issue in establishing open-ended continuity. For the last time, for an example, I'll go back to the *Seventh Circuit*, there, the plaintiffs, the group of casinos alleged that the former Illinois governor conspired with horse race track executives to pass a bill that would require casinos to pay racetracks percentage of their profits in return for $100,000 bribe disguised as a campaign contribution.

The *Seventh Circuit* held that the alleged scheme did not exhibit closed-ended continuity because the relevant conduct was extremely limited to one series of activity. The payment of bribes followed by the passage of the bill. There was no open-ended continuity here because the scheme had a natural ending point. The court also rejected the plaintiff's argument that the governor's regular way of conducting business involved bribery and thus passing a new bill would have required additional bribes.

The *Seventh Circuit* denied that saying that's clearly too tangential and too much conjecture. The emphasis was once the bill has been signed, the scheme has a natural endpoint and therefore is incapable of repetition.

[CAL STEIN]

Thanks, Chris. And that's the *Empress Casino Joliet Corp*. case, which is a really interesting one for anyone who's interested. Chris and Mary Grace, we're about out of time here today. So I do want to bring this really interesting and relevant discussion of the pattern element to a conclusion. I want to thank both of you for joining me on this podcast. I also want to thank everyone for listening. I hope you will join us for our next scheduled installment in which we will begin our discussion of racketeering activity.

I think that one might take a couple episodes to get all the way through though. If you have any thoughts or any comments about this series, I invite you to contact me directly at callan.stein@troutman.com. And if you have any thoughts or comments about this episode, you can contact Chris directly at chris.carlson@troutman.com or Mary Grace directly at marygrace.metcalfe@troutman.com. You can subscribe and listen to other Troutman Pepper podcasts wherever you listen to podcasts including on Apple, Google, and Spotify. Thank you for listening and stay safe.