

Podcast: *RICO Report*

Episode: Agreeing to the Plan: Understanding RICO Conspiracy Under Section 1962(d)

Host: Cal Stein

Recorded: September 29, 2026

Aired: October 20, 2026

Cal Stein (00:04):

Hello, and thank you for joining me on this installment of the [RICO Report](#). My name, of course, is Cal Stein, and I'm a partner in the white collar and litigation practice groups at Troutman Pepper Locke. I represent clients in white collar criminal and government investigation matters, as well as in complex civil lawsuits and in RICO litigation all over the country.

(00:25):

Today we're going to be talking about a piece of the RICO statute that we have touched on before but have never really given its own dedicated episode to, and that is RICO conspiracy under section 1962(d). Now, longtime listeners of the *RICO Report* will remember that early on we did an overview of the RICO conduct that violates the statute. And in that episode we covered all four subsections of section 1962: A, B, C, and D. And we have since gone deep on the enterprise requirements, the pattern of racketeering activity, the racketeering elements themselves, and the person-enterprise distinction that governs 1962(c) claims, among many other topics. But what we haven't done is spend a full episode on section 1962(d). And I think that's a mistake, because at least in my experience, conspiracy claims come up in almost every piece of civil RICO litigation that I am involved in. So, today we're going to fix that and we're going to cover section 1962(d) soup to nuts.

(01:31):

So let's start where we always start on this podcast with the statutory text. Section 1962(d) of RICO provides, "It shall be unlawful for any person to conspire to violate any of the provisions of subsection (a), (b), or (c) of this section." On its face, that looks like a fairly ordinary conspiracy provision. You need an agreement to violate one of the substantive RICO subsections. But as with so much of the RICO statute, the simplicity of the text conceals a good deal of complexity that's lurking underneath. And the reason this matters so much in practice is that a conspiracy theory successfully pleaded and proved can allow a plaintiff or a prosecutor on the criminal side to reach defendants, to reach individual defendants who never personally committed a predicate act and never personally conducted the affairs of the enterprise, but who nonetheless agreed that someone would.

(02:38):

Now, it's important to note that this is different from ordinary aiding and abetting liability, and it's different from the vicarious liability concepts that we also discussed on an earlier episode. A section 1962(d) conspiracy is its own distinct claim with its own distinct elements, and it can expose a much broader universe of defendants than the underlying substantive violation would reach on its own. Now, the seminal case when we're talking about RICO conspiracy, and really, you can't talk about this subsection of RICO without starting with this case, is the 1997 U.S. Supreme Court decision in *Salinas v. United States*. In *Salinas*, the defendant was a sheriff who had accepted bribes in exchange for allowing a prisoner special visitation privileges. And he was convicted of RICO conspiracy. And he argued on appeal that he could not be guilty because the government had never shown that he personally committed or personally agreed to commit two predicate acts himself. It went all the way up to the Supreme Court, which rejected that argument. And in doing so, it made two points that have shaped every 1962(d) RICO conspiracy case since. First, the Supreme Court held that RICO conspiracy does not require proof of an overt act. Unlike the general federal conspiracy statute, 18 U.S.C. Section 371, which does require an overt act in furtherance of the conspiracy. Justice Kennedy, who wrote for a unanimous Supreme Court, explained that Congress modeled RICO's conspiracy provision on the Sherman Act, not the general conspiracy statutes. And the Sherman Act has never required an overt act either.

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Second, and this is the part that really opened the door for civil plaintiffs and prosecutors, in *Salinas*, the court held that a defendant can be guilty of RICO conspiracy even if he or she did not agree to personally commit two predicate acts, so long as the individual agreed to the overall objective of the conspiracy, knowing that one or more conspirator would commit those predicate acts. This is a critical distinction. Basically, what the Supreme Court said in *Salinas* is to be guilty of a RICO conspiracy, you don't need to be a shooter, so to speak, to be a conspirator, you just need to agree to the plan to shoot.

(05:20):

So, if you don't need an overt act and you don't need to personally agree to commit predicate acts, what do you actually need to plead and then prove? And this is where things, as you might imagine, get a little bit complicated and where I think a lot of RICO conspiracy claims, particularly on the civil side, get pled too loosely. Courts have generally required that a plaintiff show the defendant knew about and agreed to facilitate the scheme. And that means that a defendant was aware of the essential nature and scope of the enterprise and intended to participate in it.

(06:01):

A conclusory allegation in a complaint, for example, that a defendant "conspired with others" without more is typically not enough. And this is the place where I have

personally had some success getting civil RICO conspiracy claims dismissed even at the Rule 12(b)(6) stage. Because plaintiffs often plead conspiracy as an afterthought, almost as a backstop to their substantive claims, without giving it the same factual specificity that they give to the underlying RICO claims. I'll also flag something else here that practitioners should watch out for. Because section 1962(d) incorporates subsections (a), (b), and (c) by reference, a conspiracy claim has to identify which of those subsections the defendant allegedly conspired to violate. And the elements of that underlying subsection still frame the analysis, particularly at the Rule 12 stage. You still need an enterprise, you still need a pattern, even though you don't need the defendant to have personally satisfied every element himself or herself.

(07:11):

Now, here's where I want to spend some real time, because there is a genuine circuit split on whether a personal agreement to the predicate acts is necessary. And this circuit split, in my view, doesn't really get enough attention. Some circuits have interpreted the Supreme Court decision in *Salinas* to mean that a defendant only needs to agree that the enterprise's affairs will be conducted through a pattern of racketeering activity generally. Okay? Whereas other circuits have layered on additional requirements, for example, holding that a defendant must have agreed personally to facilitate at least a portion of the scheme, or the defendant must have known about and agreed to the specific type of predicate acts that are at issue even if he didn't commit them himself. And the practical effect of this split is quite significant. In circuits with the more permissive reading of *Salinas*, a fairly peripheral defendant, someone who provided some service to an enterprise, who was aware in a general sense that something unlawful was going on, can be swept into a conspiracy claim. Whereas in circuits with the stricter reading of *Salinas*, plaintiffs have to allege something closer to what I would call specific knowledge of the racketeering scheme's contours. And if you're defending a RICO conspiracy claim, the very first thing you should do is figure out which version of this standard governs in your circuit, which side of the circuit split you're on, because it can be outcome determinative at the motion to dismiss stage.

(08:50):

Now, there is one more structural issue that becomes enormously important in the type of large, multi-defendant RICO conspiracy cases you often see. And that is, has the civil plaintiff or the government actually shown one overarching conspiracy, or is the plaintiff/government relying on several smaller and separate conspiracies? And once again, this is a real distinction. It's not just academic. If the proof really shows separate agreements, a defendant should not be held responsible for predicate acts or damages caused by people in a conspiracy that he or she never joined. And when an indictment or a complaint alleges one big conspiracy, but the proof actually shows there are several, the defense may have a prejudicial variance argument. And this comes up in organized crime and racketeering indictments, of course, but it also comes up in sprawling civil RICO cases that involve a company, outside vendors, professionals, and multiple alleged victims or transactions.

(09:54):

The classic general conspiracy cases supply two useful pictures or paradigms. A chain conspiracy involves participants at different stages of a single scheme. Think of a drug or a fraud distribution chain, a supplier, a middleman, a distributor, and a retailer all in a row. Those people may never meet or know about one another, but they can still be part of one conspiracy if each understands the general scope of the scheme and that his role fits into a larger enterprise. The success of the supplier, for example, depends on the distributor, and the success of the distributor depends on the retailer, and so on, and they function like links in a chain as part of an integrated whole.

(10:40):

A hub-and-spoke arrangement is different, however. The hub is a central defendant or group of defendants, and it deals separately with several people or entities, i.e., the spokes. Now, the critical question here is whether there is what has been referred to as a rim connecting those spokes. If the spokes share a common purpose and are interdependent, the arrangement may be a single conspiracy. But if each spoke simply has its own independent deal with the hub, with no awareness of or stake in the other spokes' dealings, the evidence may then show several separate hub-and-spoke conspiracies. Put simply, though, a hub alone is not necessarily enough. The evidence has to connect the spokes in a meaningful way.

(11:31):

Courts generally evaluate this question through a practical and often fact-intensive consideration. Was there a common goal? Did the nature of the scheme contemplate broad participation by different actors? Did their roles overlap such that the success of one participant's activity depended on the success of the whole? In a criminal case, that is usually a jury question, and a single versus multi-conspiracy instruction can be very important. In a civil RICO case with many defendants, it can be a substantial summary judgment or trial issue. Now, from my perspective, this is especially consequential in RICO cases for at least three reasons.

(12:15):

First, the answer affects the scope of exposure for predicate acts and damages attributed to co-conspirators a defendant may never have interacted with. Second, it bears on whether joinder of many defendants in a single indictment or a single lawsuit is proper in the first place. And then third, it can preserve a serious appellate issue where the proof at trial drifts away from the single conspiracy theory that was charged or pled. When I see a sweeping RICO conspiracy allegation, I always take a moment to try to map each alleged agreement, each participant's knowledge, and the claimed connection, to the extent there is one, among all of the different spokes. That exercise, I found, often reveals whether there is really one enterprise-wide plan or merely a collection of separate relationships gathered under a RICO label.

(13:14):

I want to close with one final point that actually surprises a lot of people, including, in my experience, some very experienced litigators. And the point that I think causes this surprise is as follows, a RICO conspiracy claim is not automatically dismissed every time the substantive RICO claim to which it is tied gets dismissed. Importantly, several courts have held that a conspiracy claim can survive independently because the gravamen of a conspiracy claim is the agreement itself, it is not the completed substantive violation. So even where a plaintiff has failed to adequately plead, for example, the pattern element, right? They haven't sufficiently pled a pattern of racketeering activity that would be sufficient to sustain a Section 1962(c) RICO claim, there are some courts out there who will still allow that plaintiff to proceed on a Section 1962(d) conspiracy claim if the complaint plausibly alleges the other elements that we've talked about, namely an agreement to engage in that underlying conduct, in the violation, in my example, of 1962(c).

(14:35):

That said, this is not universal, and there is real disagreement among district courts. And I'd argue this is a disagreement that stems from unresolved tension in how strictly courts have read and interpreted the Supreme Court's decision in *Salinas*. From a defense perspective, my approach has always been to attack the conspiracy claim on two fronts, not only as failing because it depends on an insufficiently pled underlying RICO violation, but also because it fails on its own terms. As a defense attorney, you never want to just assume that the 1962(d) RICO conspiracy claim will just automatically fail if you are successful in getting the underlying RICO claim dismissed. Sometimes that will happen, but not always. So it's important to make your argument specifically to the agreement element and not just to rely on arguments that there is no valid underlying violation, including that the plaintiff has not necessarily pleaded sufficiently all of the underlying RICO elements: pattern, racketeering activity, enterprise, things like that.

(15:55):

And with that, I think we're out of time here today for this episode, so I do want to bring this discussion to a conclusion. If anyone has any thoughts or any comments about this series or about today's episode on RICO conspiracy, I do invite you to contact me directly at callan.stein@troutman.com. You can subscribe and listen to other Troutman Pepper Locke podcasts wherever you listen to podcasts, including on Apple and Spotify. Thank you all. Thank you all for listening and stay safe.

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