

**1881 RACKETEERING ACTIVITY — USING PROCEEDS OF A PATTERN OF RACKETEERING ACTIVITY TO ESTABLISH OR OPERATE AN ENTERPRISE — § 946.83(1)**

**Statutory Definition of the Crime**

Engaging in racketeering activity, as defined by § 946.83(1) of the Criminal Code of Wisconsin, is committed by one who has received any proceeds with knowledge that they were derived, directly or indirectly, from a pattern of racketeering activity and uses or invests them directly or indirectly, to establish or operate an enterprise.<sup>1</sup>

**State's Burden of Proof**

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following four elements were present.

**Elements of the Crime That the State Must Prove**

1. The defendant received proceeds that were derived from a pattern of racketeering activity.

"Pattern of racketeering activity" means that at least three interrelated felonies occurred within a seven-year period and that these felonies amounted to, or posed a threat of, continued criminal activity.<sup>2</sup>

Felonies are "interrelated" if they have the same or similar intents, results, accomplices, victims or methods of commission, or share other distinguishing characteristics.<sup>3</sup>

Felonies amount to or show a threat of continued criminal activity if they have been or will be a part of a regular way of doing business.<sup>4</sup>

In this case, it is alleged that the proceeds were derived, directly or indirectly, from the following felonies: (name the felonies - at least three - they must be listed in sec. 946.82(4)). Each of the felonies will be defined at the end of this instruction.

2. The defendant knew that the proceeds were derived from a pattern of racketeering activity.
3. The defendant used any of the proceeds to (establish) (operate) (name of alleged enterprise).<sup>5</sup>
4. (Name of alleged enterprise) was an enterprise.

#### **Meaning of "Enterprise"**

"Enterprise" means any [(sole proprietorship) (partnership) (corporation) (business trust) (union) organized under the laws of this state] [(legal entity) (union) not organized under the laws of this state] [association or group of individuals associated in fact although not a legal entity].<sup>6</sup>

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[DEFINE THE ELEMENTS OF EACH OF THE CRIMES.]<sup>7</sup>

Before you may return a verdict of guilty, all 12 jurors must be satisfied beyond a reasonable doubt that the defendant committed at least three predicate felonies as charged in the information. All 12 jurors must also be satisfied beyond a reasonable doubt that the defendant committed the same three predicate felonies.<sup>8</sup>

### **Deciding About Knowledge**

You cannot look into a person's mind to find knowledge. Knowledge must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon knowledge.

### **Jury's Decision**

If you are satisfied beyond a reasonable doubt that all four elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

### **COMMENT**

Wis JI-Criminal 1881 was originally published in 1990. This revision was approved by the Committee in October 2007 and involved adoption of a new format and nonsubstantive changes to the text.

This instruction is for a charge under § 946.83(1). Subsections (2) and (3) are addressed by Wis JI-Criminal 1882 and 1883, respectively. These are the primary criminal provisions of the Wisconsin Organized Crime Control Act, which is modeled after the federal Racketeer Influenced and Corrupt Organizations Act. The latter is commonly referred to as "RICO" and is found at 18 U.S.C. §§ 1961-1968. The federal RICO statute has both criminal and civil provisions, as does the Wisconsin counterpart. There has been extensive litigation under the federal statute, some of which is relevant to interpreting the Wisconsin statute. The Wisconsin Court of Appeals has recognized that "the voluminous federal law concerning RICO may be persuasive authority as to the interpretation of" the Wisconsin Act. State v. Judd, 147 Wis.2d 398, 401, 433 N.W.2d 260 (Ct. App. 1988).

1. This instruction addresses one type of violation of subsection (1) of § 946.83(1) – investing the proceeds of racketeering activity in an enterprise. Another type of violation is also prohibited but is not

addressed by the instruction – using proceeds "in the acquisition of any title to, or any right, interest, or equity in, real property."

2. The requirement of three interrelated felonies in a seven-year period is based on the statutory definition of "pattern of racketeering activity" in § 946.82(3):

"Pattern of racketeering activity" means engaging in at least three incidents of racketeering activity that have the same or similar intents, results, accomplices, victims or methods of commission or otherwise are interrelated by distinguishing characteristics, provided at least one of the incidents occurred after April 27, 1982 and that the last of the incidents occurred within 7 years after the first incident of racketeering activity. Acts occurring at the same time and place which may form the basis for crimes punishable under more than one statutory provision may count for only one incident of racketeering activity.

The requirement that the felonies amount to or pose a threat of continued criminal activity is based on the decision in H. J., Inc. v. Northwestern Bell, 492 U.S. 229 (1989), where the United States Supreme Court interpreted the "pattern" requirement under the federal RICO statute. The Court held that Congress had a "natural and commonsense approach to RICO's pattern element in mind, intending a more stringent requirement than proof simply of two predicates, but also envisioning a concept of sufficient breadth that it might encompass multiple predicates within a single scheme that were related to and that amounted to, or threatened the likelihood of, continued criminal activity." 492 U.S. 229, 237.

The Court relied on the plain meaning of the word "pattern" to conclude that more than "just a multiplicity of racketeering predicates" is required:

A "pattern" is an "arrangement or order of things or activity," 11 Oxford English Dictionary 357 (2d ed. 1989), and the mere fact that there are a number of predicates is no guarantee that they fall into any arrangement or order. It is not the number of predicates but the relationship that they bear to each other or to some external organizing principle that renders them "ordered" or "arranged."

492 U.S. 229, 238.

The court noted that the text of the statute fails to identify any "forms of relationship or external principles" to be used to determine whether a "pattern" exists. Given the legislative purpose of the RICO statutes, however, the Court concludes that a flexible approach is to be used: ". . . a pattern might be demonstrated by reference to a range of different ordering principles or relationships between predicates." This relationship between predicates requires that the predicates be related and that they amount to or pose a threat of continued criminal activity. "It is this factor of continuity plus relationship which combines to produce a pattern." 492 U.S. 229, 239, citing S. Rep. No. 91-617 at 158. The Court elaborated on the "continuity" requirement:

"Continuity" is both a closed- and open-ended concept, referring either to a closed period of repeated conduct, or to past conduct that by its nature projects into the future with a threat of repetition. See Bartcheck v. Fidelity Union Bank/First National State, 832 F.2d 36, 39 (CA3 1987). It is, in either case, centrally a temporal concept – and particularly so in the RICO context, where what must be continuous, RICO's predicate acts or offenses,

and the relationship these predicates must bear one to another, are distinct requirements. A party alleging a RICO violation may demonstrate continuity over a closed period by proving a series of related predicates extending over a substantial period of time. Predicate acts extending over a few weeks or months and threatening no future criminal conduct do not satisfy this requirement: Congress was concerned in RICO with long-term criminal conduct. Often a RICO action will be brought before continuity can be established in this way. In such cases, liability depends on whether the threat of continuity is demonstrated. See S.Rep. No. 91-617, at 158.

Whether the predicates proved establish a threat of continued racketeering activity depends on the specific facts of each case. Without making any claim to cover the field of possibilities – preferring to deal with this issue in the context of concrete factual situations presented for decision – we offer some examples of how this element might be satisfied. A RICO pattern may surely be established if the related predicates themselves involve a distinct threat of long-term racketeering activity, either implicit or explicit. Suppose a hoodlum were to sell "insurance" to a neighborhood's storekeepers to cover them against breakage of their windows, telling his victims he would be reappearing each month to collect the "premium" that would continue their "coverage." Though the number of related predicates involved may be small and they may occur close together in time, the racketeering acts themselves include a specific threat of repetition extending indefinitely into the future, and thus supply the requisite threat of continuity. In other cases, the threat of continuity may be established by showing that the predicate acts or offenses are part of an ongoing entity's regular way of doing business. Thus, the threat of continuity is sufficiently established where the predicates can be attributed to a defendant operating as part of a long-term association that exists for criminal purposes. Such associations include, but extend well beyond, those traditionally grouped under the phrase "organized crime." The continuity requirement is likewise satisfied where it is shown that the predicates are a regular way of conducting defendant's ongoing legitimate business (in the sense that it is not a business that exists for criminal purposes), or of conducting or participating in an ongoing and legitimate RICO "enterprise."

The limits of the relationship and continuity concepts that combine to define a RICO pattern, and the precise methods by which relatedness and continuity or its threat may be proved, cannot be fixed in advance with such clarity that it will always be apparent whether in a particular case a "pattern of racketeering activity" exists. The development of these concepts must await future cases, absent a decision by Congress to revisit RICO to provide clearer guidance as to the Act's intended scope.

492 U.S. 229, 241-243.

In justifying its conclusion about the "continuity" requirement, the Court relied on the text of the federal statute which, in defining the pattern requirement, states that a pattern "requires" at least two predicate acts. The Court emphasized the significance of the use of "requires" rather than "means" in concluding that the presence of the two predicate acts is the minimal requirement: "it assumes that there is something to a RICO pattern beyond simply the number of predicate acts involved." 492 U.S. 229, 238. The Wisconsin definition of "pattern," however, does use the word "means" where the federal statute uses "requires." This may offer a basis for interpreting the Wisconsin pattern requirement

differently than the United States Supreme Court interpreted the federal definition in Northwestern Bell. But in the absence of direct authority for doing so, the Committee decided that the Northwestern Bell definition should be used as a guide for this instruction.

The definition of "pattern of racketeering activity" in § 948.82(3) is not unconstitutionally vague. State v. O'Connell, 179 Wis.2d 598, 615, 508 N.W.2d 23 (Ct. App. 1993).

3. This is based on § 946.82(3), see note 2, supra.

4. This is based on H. J., Inc. v. Northwestern Bell, cited in note 2, supra.

5. The instruction is drafted on the assumption that the "enterprise" will be a legitimate or regular business and therefore will have a name that can be used to identify it. If that is not the case, substitute a description of the enterprise for the name.

6. The definition of "enterprise" is taken from the statutory definition found in § 946.82(2). Parentheses are added on the assumption that only the alternatives supported by the evidence will be presented to the jury. In State v. Judd, 147 Wis.2d 398, 433 N.W.2d 260 (Ct. App. 1988), the court of appeals held that a one-man corporation could be an "enterprise," at least for purposes of a charge under subsec. (3) of § 946.83. While the "person" who conducts the pattern of racketeering activity through the enterprise must be separate from the enterprise, that test is met where the "one-man band" has incorporated. The act of incorporation forms the enterprise. Also see, State v. O'Connell, 179 Wis.2d 598, 508 N.W.2d 23 (Ct. App. 1993).

7. The Committee assumes that all the elements of the crimes alleged to be the three interrelated felonies must be proved. There are suggested uniform instructions for most of the felonies listed in § 946.82(4).

8. This addition is based on Richardson v. United States, 526 U.S. 813 (1999). Richardson held that unanimous agreement on the predicate acts was required in prosecutions under a "continuing criminal enterprise" statute which is separate from, but similar to, the RICO statute. Adding it here is by analogy to that situation. The 7th Circuit uniform jury instructions require unanimity under the federal RICO statute. See, <http://www.ca7.uscourts.gov/Rules/pjury.pdf>.