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United States Court of Appeals,
Fifth Circuit.
ST. PAUL MERCURY INSURANCE CO., Plaintiff-Counter Defendant-Appellee,
v.
Robert T. WILLIAMSON; Sonya Williamson; Arlone Belaire, Defendants-Counter Claimant-Appellants,
v.
Richard Vale; Haynes Best Western of Alexandria, Inc.; H.L. Haynes; Mrs. H.L. Haynes; Best Western International, Inc.; American General Fire and Casualty Co.; Maryland Casualty Co., Counter Defendants-Appellees.
Robert T. Williamson; Sonya Williamson; Arlone Belaire, Plaintiffs-Appellants,
v.
Richard Vale; et al., Defendants,
Richard Vale; Haynes Best Western of Alexandria; Best Western International, Inc.; H.L. Haynes; H.L. Haynes; American General Fire and Casualty; Maryland Casualty Co.; St. Paul Mercury Insurance Company; H.L. & H. Holding Co.; Defendants-Appellees.
St. Paul Mercury Insurance Company, Plaintiff-Appellant,
v.
Robert T. Williamson; et al., Defendants,
Robert T. Williamson; Arlone Belaire; Sonya J. Williamson, Defendants-Appellees.
Robert T. Williamson; Sonya Williamson; Arlone Belaire, Plaintiffs-Appellees,
v.
Richard Vale; et al., Defendants,
St. Paul Mercury Insurance Company, Defendant-Appellant.
St. Paul Mercury Insurance Co.; Haynes Best Western of Alexandria, Inc.; Best Western International, Inc.; H.L. Haynes; H.L. Haynes, Mrs.; H & L Holding Co.; American General Insurance Co.; Richard S. Vale; Maryland Casualty Co., Plaintiffs-Appellees,
v.
Sonya Williamson, Individually and on behalf of her minor children, Robert T. Williamson, Individually and on behalf of his minor children; Lawrence J. Smith, Defendants-Appellants.

Nos. 97-31143, 98-30001 and 98-31243.
Aug. 17, 2000.

DeMOSS, Circuit Judge:

In these three consolidated appeals, we confront a convoluted set of facts and issues arising from the unfortunate litigiousness of the parties involved. Despite hopes that the cycle of litigation would end here today, we must conclude that the district court erred in various aspects of its rulings and that resolution of these cases must await another time.

I. BACKGROUND

In March of 1990, Sonya Williamson ("Sonya") individually and Robert Williamson ("Robert"), on behalf of their children, filed suit in state court against various individuals and entities including St. Paul Mercury Insurance Company ("St.Paul") (collectively the "insurance parties") for injuries suffered by Sonya at the Haynes Best Western of Alexandria. On September 26, 1994, the jury in this state case returned two findings: (1) Sonya had sustained injuries at the motel on July 21, 1989; and (2) the insurance parties had proved by a preponderance of the evidence that the incident of July 21, 1989, was a result of a staged accident or fraud. Judgment was entered in favor of the insurance parties. On January 29, 1997, the Louisiana Fourth Circuit Court of Appeal affirmed the jury's verdict. *See* *Williamson v. Haynes Best Western*, 688 So.2d 1201 (La.Ct.App.1997). The Louisiana Supreme Court denied the Williamsons' applications for writs on June 20, 1997. *See* *Williamson v. Haynes Best Western*, 695 So.2d 1355 (La.1997).

On November 4, 1993, during the pendency of the state trial, St. Paul filed suit in federal court against Robert, Arlone Belaire,[FN1] and Seahorse Farms (collectively with Sonya and with or without Seahorse Farms as the "Williamsons"), alleging violations of the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §§ 1961-68, and state law claims for fraud and conspiracy. St. Paul later amended the complaint on December 12, 1994, to include Sonya as a defendant. The complaint essentially alleged that the Williamsons have a lengthy history of making fraudulent insurance claims and that they staged the electrocution that supposedly injured

Sonya at the motel.

> FN1. Arlone Belaire is Robert Williamson's mother.

On September 25, 1996, the Williamsons counterclaimed and simultaneously initiated an action in the same federal district court, which was ultimately consolidated ***433** with St. Paul's suit. They asserted various RICO and state law claims against the insurance parties. In general, their counterclaims alleged that the fraud defense asserted by the insurance parties in Sonya's state court personal injury trial, and which ultimately formed the basis for recovery in St. Paul's federal suit, was itself fraudulent.

On October 22, 1997, the district court granted summary judgment in favor of St. Paul and the other counter-defendants on the Williamsons' counterclaims. *See St. Paul Mercury Ins. Co. v. Williamson*, 986 F.Supp. 409 (W.D.La.1997). It further dismissed St. Paul's RICO claims against the Williamsons on October 30, 1997.

Subsequent to the district court's dismissal of St. Paul's RICO claims, St. Paul orally dismissed Robert, Arlone, and Seahorse Farms from the lawsuit at the final pretrial conference, held on October 31, 1997. With those dismissals, the only remaining matters were St. Paul's state law claims for fraud and conspiracy against Sonya. At the pretrial conference, the district court appeared to conclude that the state court jury finding of fraud was res judicata as to St. Paul's state law fraud claim.[FN2] It induced Sonya's counsel to admit that with the dismissal of the other Williamson litigants, there existed the requirements for res judicata under Louisiana law.

> FN2. But the district court reserved the right to make a final written ruling, which was never issued.

Sonya's counsel, however, contended that the fraud and conspiracy claims had prescribed. He was given the opportunity to file a motion for summary judgment on that issue, which he did on November 5, 1997. St. Paul responded to that motion on November 7, 1997, six days prior to trial. That response for the first time specifically mentioned a malicious prosecution claim. Sonya filed a reply to the response on the same day.

On November 11, 1997, the district court denied Sonya's motion for summary judgment based on prescription. But instead of addressing whether the fraud and conspiracy claims had prescribed, the district court's order focused on whether St. Paul's complaint provided Sonya with notice of the operative facts underlying a malicious prosecution claim. While acknowledging that St. Paul did not expressly allege the legal theory of malicious prosecution, the district court found that St. Paul's complaint gave adequate notice of that claim for purposes of Rule 8 of the Federal Rules of Civil Procedure.

Thereafter, on November 13, 1997, the district court ruled that the trial would proceed solely on the issue of damages. Sonya objected and asked for a continuance, which was denied. The jury returned a damages award against Sonya in the amount of $411,166.56.

While the federal suit was proceeding before the district court, Sonya and her children, through their father Robert, filed a petition in state court in November 1995, to nullify the prior state court judgment finding that Sonya's injuries were the result of a staged accident or fraud pursuant to Louisiana Code of Civil Procedure article 2004.[FN3] The petition alleged ill practices by the insurance parties in concealing the defects on the motel's premises and in presenting false testimony from motel employees regarding the condition and alteration of the electrical fixtures. The nullification case sat dormant during the pendency of the federal suit initiated by St. Paul. But in March of 1998, Sonya and the children filed a third supplemental and amending petition in state court, reviving the nullification suit.

> FN3. Article 2004 states that "[a] final judgment obtained by fraud or ill practices may be annulled."

On September 9, 1998, St. Paul and the other insurance parties filed a complaint in federal court to enjoin the nullification action. They argued that Sonya and the ***434** children's nullification petition was an attempt to relitigate the prior federal court judgment dismissing the Williamsons' counterclaims. Among the counterclaims had been allegations concerning the condition of the electrical fixtures and the insurance parties' representations of the motel's premises. A

hearing was held on the injunction on October 5, 1998. On October 16, 1998, the district court preliminarily enjoined Sonya, Robert, their children, and their attorney Lawrence J. Smith, from pursuing the nullification action in state court, pending the resolution of the appeal of the federal case.

II. DISCUSSION

In these consolidated appeals, the various parties raise an assortment of issues. In appeal No. 97-31143, the Williamson litigants challenge the district court's apparent directed verdict/summary judgment order concluding that the state court jury finding of fraud was res judicata as to the liability portion of St. Paul's malicious prosecution claim, its decision to strike all of Sonya's defenses to that malicious prosecution claim, the sufficiency of the evidence to support the jury's damages verdict, certain evidentiary rulings by the district court, and its summary judgment order dismissing their counterclaims. In appeal No. 98-30001, St. Paul contests the district court's summary judgment order dismissing its RICO claims against the Williamsons. And in appeal No. 98-31243, Sonya, Robert, their children, and their attorney Smith assert that the district court erred in enjoining the nullification suit pending in Louisiana state court. We review each of these appeals in turn.

* * * *

With that standard in mind, we turn to the substance of the district court's summary judgment order and St. Paul's appeal. Of the three elements required of any RICO claim, the district court noted that the Williamsons in their summary judgment motion had not challenged whether St. Paul had asserted and/or provided evidence of a RICO person or a RICO enterprise. A RICO person is the defendant, while a RICO enterprise can be either a legal entity or an association-in-fact. *See* *Crowe v. Henry*, 43 F.3d 198, 204 (5th Cir.1995). If the alleged enterprise is an association-in-fact, the plaintiff ***441** must show evidence of an ongoing organization, formal or informal, that functions as a continuing unit over time through a hierarchical or consensual decision-making structure. *See* *Elliott v. Foufas*, 867 F.2d 877, 881 (5th Cir.1989). Here, St. Paul had identified Robert, Sonya, and Arlone as defendants and had pleaded, and apparently established, the RICO enterprise as Seahorse Farms, and/or an association-in-fact of Robert, Sonya, and Arlone, and/or an association-in-fact of Robert, Sonya, Arlone, and Seahorse Farms.

The Williamsons, however, did circuitously challenge the third element of a pattern of racketeering activity, contending that St. Paul had failed to show evidence of fraudulent insurance claims. A pattern of racketeering activity requires two or more predicate acts and a demonstration that the racketeering predicates are related and amount to or pose a threat of continued criminal activity. *See* *Word of Faith World Outreach Ctr. Church, Inc. v. Sawyer*, 90 F.3d 118, 122 (5th Cir.1996). By arguing that there were no fraudulent insurance claims, the Williamsons essentially challenged St. Paul's allegations of mail and wire fraud, the predicate acts asserted by St. Paul as the basis for a pattern of racketeering activity. Among other things, both RICO mail and wire fraud require evidence of intent to defraud, i.e., evidence of a scheme to defraud by false or fraudulent representations. *See* *Crowe v. Henry*, 115 F.3d 294, 297 (5th Cir.1997). After reviewing the pleadings and the evidence, the district court determined that there were genuine issues of material fact as to the existence of a scheme to defraud and, as a result, as to the existence of those predicate offenses.

Despite finding in favor of St. Paul on the three common elements of a RICO claim, the district court found summary judgment proper because St. Paul had failed to meet the substantive requirements of § 1962(a), (c), and (d). We review each of those subsections in turn.

1. *Section 1962(a)*

To establish a § 1962(a) violation, a plaintiff must prove 1) the existence of an enterprise, 2) the defendant's derivation of income from a pattern of racketeering activity, and 3) the use of any part of that income in acquiring an interest in or operating the enterprise. *Cf.* *United States v. Cauble*, 706 F.2d 1322, 1331 (5th Cir.1983) (reciting elements for a § 1962(a) criminal violation). Moreover, there must be a nexus between the claimed violation and the plaintiff's injury. *See* *Crowe v. Henry*, 43 F.3d 198, 205 (5th Cir.1995). In other words, for a viable § 1962(a) claim, any injury must flow from the use or investment of racketeering income. *See* *Parker & Parsley Petroleum Co. v. Dresser Indus.*, 972 F.2d 580, 584 (5th Cir.1992).

Here, the district court dismissed St. Paul's claim

because St. Paul failed to show that income from a pattern of racketeering activity was invested in or used to operate a RICO enterprise. The only predicate acts to form the basis of a pattern of racketeering activity were several counts of mail and wire fraud, which St. Paul explicitly stated in its complaint and RICO case statement.[FN9] From those specific predicate acts, the district court found that the only evidence of income was several checks from Insurance Company of North America ("CIGNA"). The district court ruled that the evidence did not establish that any of those checks ***442** were invested in or used to operate a RICO enterprise. It stated that St. Paul's unsubstantiated allegation that income from the predicate acts maintained the Williamsons during the prosecution of the state tort suit was insufficient to prove investment into a RICO enterprise. Although some evidence existed showing investment into the alleged RICO enterprise of Seahorse Farms, that investment was derived from income attributed to acts that were not alleged to have been predicate acts forming a pattern of racketeering activity.

> FN9. St. Paul contends that other predicate acts were stated in the complaint and the RICO case statement and that evidence was submitted, in the form of admissions, which revealed that income from those acts were received by the Williamsons or Seahorse Farms. Although both the complaint and the RICO case statement do refer generally to some comments about insurance fraud claims by the Williamsons, the complaint and the RICO case statement clearly state and list the predicate acts of mail and wire fraud from which the RICO claims emanate. All of them concern acts occurring between March 29, 1989, and October 22, 1993.

On appeal, St. Paul primarily presses the sufficiency of its § 1962(a) allegations, based on the motion to dismiss argument that we previously noted as unavailing. The initial brief devotes very little to the district court's conclusion that there was no genuine issue of material fact as to the investment of racketeering income, in the form of the CIGNA checks, into a RICO enterprise. It merely alludes to some evidence indicating that the Williamsons' lacked legitimate income, and therefore, any income derived from a pattern of racketeering activity had to have been invested into the Williamsons' RICO enterprise, purportedly the association-in-fact of Sonya, Robert, and Arlone, in the form of support and maintenance so that the enterprise could pursue the state tort suit against St. Paul. And other than general assertions that the complaint adequately alleges the existence of income from a pattern of racketeering activity, the initial brief does not present an argument that there is evidence substantiating the existence of income, other than the CIGNA checks, that was derived from the predicate acts specifically listed in the complaint. Only in its reply brief does St. Paul directly address the district court's conclusion that the evidence only supports the CIGNA checks as having been generated from a pattern of racketeering activity. In that reply brief, St. Paul notes circumstantial evidence of several settlement checks from a disability insurer, Motors Insurance Corporation ("MIC"), which may have been derived from the predicate acts that were alleged in the complaint and that formed the basis of a pattern of racketeering activity.

By the time the CIGNA checks were sent out starting in 1991, Seahorse Farms had terminated as an entity. The only alleged RICO enterprise that the checks could have been invested in was the association-in-fact of Robert, Sonya, and Arlone. The district court, however, determined that St. Paul had failed to prove investment into a RICO enterprise, notwithstanding evidence suggesting that all three members of the association-in-fact had received the CIGNA checks. It was not persuaded by St. Paul's unsubstantiated allegation that the use of the CIGNA checks to maintain Robert, Sonya, and Arlone during the prosecution of the state tort suit was investment into an enterprise. That was error. Although we recognize and, in a sense, sympathize with the district court's apparent belief that St. Paul should have provided evidence beyond mere allegations that the CIGNA checks helped support the members of an enterprise to demonstrate investment into a RICO enterprise for purposes of a § 1962(a) violation, this Circuit's precedent dictates that a plaintiff "need prove only that illegally derived funds flowed into the enterprise." *Cauble*, 706 F.2d at 1342; *cf.* *United States v. Vogt*, 910 F.2d 1184, 1199 & n. 7 (4th Cir.1990) (applying a broad definition of "use" and acknowledging as sound the government's contention that the depositing of funds into an enterprise constituted a use to operate in violation of § 1962(a)); *United States v. McNary*, 620 F.2d 621, 628 (7th Cir.1980) (finding that § 1962(a) does not require direct or immediate use of illicit income). Assuming, as we must, that Robert, Sonya, and

Arlone comprised the enterprise and that they received the CIGNA checks, we believe a genuine issue of material fact exists as to whether racketeering proceeds were invested in or used to operate a RICO enterprise.

***443**Of course, to state a claim under § 1962(a), a plaintiff must also show that its injuries resulted from the investment or use of racketeering proceeds. *See Parker & Parsley Petroleum*, 972 F.2d at 584. Although the district court did not specifically consider that nexus requirement to rule on the Williamsons' motion for summary judgment, they did raise it in their motion. Because we can affirm a summary judgment on grounds not relied on by the district court so long as those grounds were proposed or asserted in that court by the movant, *see Johnson v. Sawyer*, 120 F.3d 1307, 1316 (5th Cir.1997), we address that requirement. In its complaint, St. Paul asserted that income from a pattern of racketeering activity, arising from mail and wire fraud predicate acts related to certain insurance claims, was invested in or used to operate the Williamsons' RICO enterprise and that the income was then used to support the enterprise as the enterprise proceeded with a lawsuit against St. Paul, thereby resulting in St. Paul's injuries. Among the predicate acts alleged to form a pattern of racketeering activity were instances of conduct directly connected to the filing of the state tort suit, including the filing of that suit.

This is troubling, in light of St. Paul's other claims under § 1962(c) that it was essentially injured by the defendants' pattern of racketeering activity, i.e., the predicate acts.[FN10] In discussing the investment injury[FN11] requirement of § 1962(a), this Circuit, like virtually all the other circuits who have reviewed this issue, has intimated that such an injury cannot just flow from the predicate acts themselves. *See Parker & Parsley Petroleum*, 972 F.2d at 584; *see also Vemco, Inc. v. Camardella*, 23 F.3d 129, 132 (6th Cir.1994); *Nugget Hydroelec. L.P. v. Pacific Gas & Elec. Co.*, 981 F.2d 429, 437-38 (9th Cir.1992); *Danielsen v. Burnside-Ott Aviation Training Ctr., Inc.*, 941 F.2d 1220, 1229-30 (D.C.Cir.1991); *Ouaknine v. MacFarlane*, 897 F.2d 75, 82-83 (2d Cir.1990); *Grider v. Texas Oil & Gas Corp.*, 868 F.2d 1147, 1150 (10th Cir.1989). *But see Busby v. Crown Supply, Inc.*, 896 F.2d 833, 836-40 (4th Cir.1990). That is, injuries due to predicate acts cannot form the basis of an investment injury for purposes of § 1962(a). We must ask whether the injuries were a result of the predicate acts or a result of the investment of racketeering proceeds into a RICO enterprise. Otherwise, "it would be difficult to understand why Congress enacted § 1962(a)." *Danielsen*, 941 F.2d at 1230. If allegations sufficient to base a § 1962(c) action meet all the requirements of a § 1962(a) allegation, then there is no real rationale for Congress having passed both. *See id.* Here, St. Paul has come close to improperly conflating § 1962(a) and (c), by asserting that those acts related to the filing and prosecution of the state tort suit were mail and wire fraud predicates and that they caused it injuries.

> FN10. St. Paul also alleged that those predicate acts injured it by violating state fraud law.

> FN11. For simplicity's sake, we use the term "investment injury" to refer to an injury from the use or investment of racketeering income in a RICO enterprise.

In its response to the Williamsons' motion for summary judgment and in its initial brief, however, St. Paul argues in a roundabout way that the investment injury it suffered was not from the predicate acts related to the filing of the state tort suit, but rather from the predicate acts associated with the Williamsons' claims with other insurance companies.[FN12] It maintains that its injuries are cognizable because they were the result of the Williamsons' investment of racketeering income from a prior pattern of racketeering activity. *See Newmyer v. Philatelic Leasing, Ltd.*, 888 F.2d 385, 396 (6th Cir.1989).

> FN12. We find this argument odd because, as previously noted, the district court did not discuss or base its summary judgment order on the investment injury requirement.

***444** In *Newmyer*, the plaintiffs had placed some money into an investment plan dealing with stamps, which the defendants had marketed. *See id.* at 386-91. The plaintiffs' complaints alleged that the defendants had been acting in concert over a period of five years, defrauding hundreds of individuals, many of them prior to the plaintiffs' own deception. *See id.* at 396. In furtherance of their scheme, the defendants allegedly committed mail and wire fraud, which constituted a pattern of racketeering activity. *See id.* Based on those allegations, the Sixth Circuit found that the plaintiffs

had made out a § 1962(a) claim. *See id.* It observed that if the allegations were true and if the defendants had used the income derived from earlier racketeering activity against other victims to establish and operate the alleged scam into which the plaintiffs placed their own money, then it was not impossible for the plaintiffs to demonstrate a § 1962(a) injury. *See id.*

The present situation closely parallels the *Newmyer* case except that we encounter uncertainty as to whether St. Paul has alleged and established more than one pattern of racketeering activity. St. Paul's complaint grouped all the predicate acts together, implying that they composed one pattern of racketeering. In addition, of the predicate acts specifically listed in the complaint, almost all of them related to the Williamsons' actions to obtain monetary compensation from insurance claims arising out of Sonya's July 1989 electrocution. Indeed, the CIGNA checks that purportedly constitute the investment into the RICO enterprise were received as a result of Sonya's electrocution, the event that also spurred the Williamsons' predicate acts associated with the filing of the state court suit. The commonality in the source of those predicate acts suggests that the predicate acts that led to the CIGNA checks and the predicate acts connected to the filing of the lawsuit were related and formed one pattern of racketeering activity. If we were to discern only one pattern of racketeering activity, then this case would not fit easily within the *Newmyer* holding.[FN13]

> FN13. Part of the problem also rests with St. Paul's failure to allege properly as predicate acts a host of allegations about the Williamsons's insurance claims from the early 1980s to 1989, which were purportedly a part of a prior pattern of racketeering activity. *See supra* note 9. If St. Paul had established those predicate acts, then the prior pattern of racketeering activity would have been much more evident.

Despite the problems, we believe that St. Paul has sufficiently distinguished and established a genuine issue of material fact as to the existence of a prior pattern of racketeering activity, which may have produced income that was invested into a RICO enterprise, causing injuries to St. Paul in the form of legal costs. Although St. Paul may have confusingly included those predicate acts that formed the prior pattern of racketeering activity with those predicate acts that injured St. Paul pursuant to § 1962(c), it is apparent from the complaint and other documents that St. Paul was asserting that it was injured by the investment of prior racketeering proceeds into the Williamsons' RICO enterprise. And while the CIGNA checks and the predicate acts related to the filing of the lawsuit all arose from Sonya's electrocution, that commonality does not mean that no § 1962(a) claim can be asserted. The CIGNA checks were procured as a result of Sonya's electrocution, but they dealt with racketeering activity connected to the Williamsons' actions with other insurance companies. The predicate acts associated with the filing of the lawsuit, which formed the basis of the pattern of racketeering activity under § 1962(c), concerned racketeering activity primarily related to the Williamsons' dealings with St. Paul. Thus, while the predicate acts connected to the CIGNA checks and to the filing of the lawsuit all sprang from the same root, those predicate acts were the bases of different patterns of racketeering activity. Hence, we find that St. Paul has asserted and created a genuine issue of ***445** material fact as to the existence of an investment injury. Accordingly, we vacate the district court's summary judgment in favor of the Williamsons' as to the § 1962(a) claim with respect to the CIGNA checks.

As for the income from the MIC settlement checks, which were received by the Williamsons and which St. Paul raises in its reply brief as evidence of other racketeering income having been invested into a RICO enterprise, we affirm the district court. Generally, we deem abandoned those issues not presented and argued in an appellant's initial brief, nor do we consider matters not presented to the trial court. *See Webb v. Investacorp Inc.*, 89 F.3d 252, 257 n. 2 (5th Cir.1996). In its initial brief, St. Paul tangentially referred to the Williamsons' receipt of disability checks in general, but any reference to those checks were in the context of its general allegations concerning the Williamsons' fraudulent RICO scheme. St. Paul did not challenge the district court's ruling that there was no genuine issue of material fact as to the lack of racketeering income other than the CIGNA checks. Likewise, St. Paul's response to the Williamsons' summary judgment motion was deficient with respect to any argument that there was evidence supporting the receipt of income, in the form of the MIC settlement checks, from a pattern of racketeering activity.[FN14] Accordingly, we believe that St. Paul has abandoned any argument regarding the existence of evidence pertaining to income derived from a pattern

of racketeering activity.

> FN14. St. Paul submitted evidence of those checks, but it did not connect that evidence to any argument regarding the existence of income, in the form of those checks, derived from a pattern of racketeering activity.

2. *Section 1962(c)*

As previously noted, § 1962(c) prohibits "any person employed by or associated with any enterprise" from participating in or conducting the affairs of that enterprise through a pattern of racketeering activity. *See* 18 U.S.C. § 1962(c). Like the overwhelming majority of our sister circuits, we have held that subsection (c) requires that the RICO person be distinct from the RICO enterprise. *See Bishop v. Corbitt Marine Ways, Inc.*, 802 F.2d 122, 122-23 (5th Cir.1986) (collecting cases); *see also Crowe*, 43 F.3d at 206 ("[A] RICO person cannot employ or associate with himself under [§ 1962(c)]".); *In re Burzynski*, 989 F.2d at 743 (citing *Bishop*). Here, St. Paul identified Robert, Sonya, and Arlone as defendants, and thus as RICO persons. Moreover, it alleged that the enterprise was essentially the association-in-fact of Robert, Sonya, and Arlone.

The district court viewed those allegations as failing to establish any distinction between the RICO defendants and the RICO enterprise, and it dismissed St. Paul's § 1962(c) claim. The two primary bases for the district court's determination were the *Burzynski* and *Crowe* decisions from this Circuit. In *Burzynski*, the plaintiff, a doctor who operated a research institute, sued Aetna Life Insurance Company ("Aetna"), a litigation consultant hired by Aetna, the company started by that litigation consultant, and Aetna's outside law firm for violating, among other things, § 1962(c). *See In re Burzynski*, 989 F.2d at 742. The plaintiff charged that the enterprise was an association-in-fact comprised of the defendants. *See id.* at 743. The *Burzynski* panel found that this contravened the person/enterprise distinction as required by § 1962(c) and by *Bishop*. *See id.* In *Crowe*, the plaintiff, Larry Crowe, sued his lawyer, Sam Henry, under the RICO statutes, including § 1962(c). *See Crowe*, 43 F.3d at 201. The RICO enterprise was allegedly an association-in-fact of Crowe and Henry. *See id.* at 206. Citing *Burzynski*, a different panel of this Court concluded that Crowe's claim failed to demonstrate a sufficient ***446** distinction between the person and the enterprise. *See id.*

St. Paul does not dispute the district court's reading of the *Burzynski* and *Crowe* holdings. It concedes that those decisions seem to hold that members of an association-in-fact enterprise cannot also be RICO persons for purposes of a § 1962(c) claim. But St. Paul responds that recent case law casts doubt on the validity of *Burzynski*'s and *Crowe*'s interpretation of the person/enterprise distinction and that those two cases actually conflict with earlier Fifth Circuit case law. Referring to *Khurana v. Innovative Health Care Sys., Inc.*, 130 F.3d 143 (5th Cir.1997), St. Paul argues that there is a difference between the naming of a corporation as an alleged member of an association-in-fact enterprise and the naming of individuals as alleged members of an association-in-fact enterprise when determining the person/enterprise distinction. In addition, St. Paul asserts that *Khurana* comports with even earlier circuit precedent, *United States v. Elliott*, 571 F.2d 880 (5th Cir.1978), which perceived the person/enterprise distinction differently than *Burzynski* and *Crowe*.

First off, we note that the Supreme Court vacated the judgment in *Khurana*. *See Teel v. Khurana*, 525 U.S. 979, 119 S.Ct. 442, 142 L.Ed.2d 442 (1998). Second, even if *Khurana* altered the landscape of the person/enterprise distinction in our circuit, we are bound to the holdings in *Burzynski* and *Crowe*, assuming that those are our earliest pronouncements on this issue. *See United States v. Texas Tech Univ.*, 171 F.3d 279, 285 n. 9 (5th Cir.1999), *cert. denied*, 530 U.S. 1202, 120 S.Ct. 2194, 147 L.Ed.2d 231 (2000) (observing that when two prior panel decisions conflict, the first decision controls); *see also Luna v. United States Dep't of Health & Human Servs.*, 948 F.2d 169, 172 (5th Cir.1991).

Nonetheless, reviewing *Elliott* and some of the other decisions that led to the *Burzynski* and *Crowe* decisions, we believe that St. Paul makes a meritorious argument. In *Elliott*, the government prosecuted six individuals for RICO violations.[FN15] *See Elliott*, 571 F.2d at 895. Those six individuals comprised the association-in-fact enterprise. *See id.* at 898 n. 18. Of the six, two were charged as defendants for violating § 1962(c). *See id.* at 896. Notwithstanding the fact that both individuals charged with violating § 1962(c) were named as RICO persons and as members of the association-in-fact, the *Elliott* panel affirmed their

convictions. *See id.* at 900.

> FN15. Although *Elliott* involved a criminal prosecution as opposed to a civil suit, the substantive requirements of § 1962(c) are the same. *Cf. Alcorn County v. U.S. Interstate Supplies, Inc.*, 731 F.2d 1160, 1170-71 (5th Cir.1984), *abrogated on other grounds*, *United States v. Cooper*, 135 F.3d 960 (5th Cir.1998) (construing criminal RICO cases as relevant for purposes of determining whether a violation occurred); *see also United States v. Shifman*, 124 F.3d 31, 35 n. 1 (1st Cir.1997) ("[I]t is appropriate to rely on civil RICO precedent when analyzing criminal RICO liability.").

Thus, when *Bishop*, the decision to which the *Burzynski* court cited for support, held that to state a § 1962(c) claim, a plaintiff had to distinguish between the RICO person and the RICO enterprise, it was not making the sweeping generalization that any congruence between a RICO person and a member of an association-in-fact, which constituted a RICO enterprise, violated the person/enterprise distinction. Instead, *Bishop* merely concurred with the vast majority of the circuits that held that a § 1962(c) claim requires a distinction between the RICO person and the RICO enterprise. Those circuits were discussing the person/enterprise distinction where the plaintiffs were alleging a corporate entity as both a RICO defendant and a RICO enterprise. *Bishop* itself involved a plaintiff who sought a § 1962(c) claim against a single corporate defendant, which was also named as the RICO enterprise. *See Bishop*, 802 F.2d at 122.

The reason for differentiating in the § 1962(c) context between cases where a ***447** corporation is identified as both the enterprise and the defendant and cases where it is not was aptly noted in the *Haroco* decision, to which *Bishop* heavily deferred. *See Haroco, Inc. v. American Nat'l Bank & Trust Co.*, 747 F.2d 384, 399 (7th Cir.1984). The RICO statute distinguishes between a corporation and an association-in-fact with respect to the "person" element. *See id.* According to the *Haroco* court:

> Where persons associate "in fact" for criminal purposes, ... each person may be held liable under RICO for his, her or its participation in conducting the affairs of the association in fact through a pattern of racketeering activity. But the nebulous association in fact does not itself fall within the RICO definition of "person[ ]".... In the association in fact situation, each participant in the enterprise may be a "person" liable under RICO, but the association itself cannot be. By contrast, a corporation obviously qualifies as a "person" under RICO and may be subject to RICO liability.

Id. at 401. Thus, courts have routinely required a distinction when a corporation has been alleged as both a RICO defendant and a RICO enterprise, but a similar requirement has not been mandated when individuals have been named as defendants and as members of an association-in-fact RICO enterprise. FN16

> FN16. To get around having a corporation named as both a RICO defendant and a RICO enterprise, many plaintiffs have charged the corporation as being part of an association-in-fact enterprise and also as a RICO defendant. Courts have roundly criticized this formulation. *See, e.g., Brittingham v. Mobil Corp.*, 943 F.2d 297, 300-302 (3d Cir.1991). In some ways, that formulation parallels the situation where individuals are named as defendants and as being part of an association-in-fact, and accordingly, the criticism has fed the notion that no defendant can be a part of the association-in-fact enterprise or it would violate the person/enterprise distinction. But the criticism pertaining to having corporations listed as being a part of the association-in-fact is due to the fact that a "§ 1962(c) enterprise must be more than an association of individuals or entities conducting the normal affairs of a defendant corporation." *Id.; see also Old Time Enters. v. International Coffee Corp.*, 862 F.2d 1213, 1215 (5th Cir.1989). The criticism is generally unwarranted where corporations are not involved.

Indeed, " '[a] collective entity is something more than the members of which it is comprised.' " *United States v. Fairchild*, 189 F.3d 769, 777 (8th Cir.1999) (quoting *Atlas Pile Driving Co. v. DiCon Fin. Co.*, 886 F.2d 986, 995 (8th Cir.1989)). "Although a defendant may not be both a person and an enterprise, a defendant may be both a person and a part of an enterprise.

In such a case, the individual defendant is distinct from the organizational entity." *Id.* Otherwise, an individual member of a collective enterprise, such as an association-in-fact, could not be prosecuted for violating § 1962(c) because he or she would not be considered distinct from the enterprise. *See id.* Accordingly, we vacate the district court's award of summary judgment in favor of the Williamsons' on St. Paul's § 1962(c) claim.

3. *Section 1962(d)*

Under § 1962(d), a person cannot conspire to violate subsections (a) or (c). *See* 18 U.S.C. § 1962(d). With respect to a conspiracy to violate subsection (c), this Circuit has previously stated that just as a RICO person cannot employ or associate with itself, it cannot conspire to employ or associate with itself. *See Ashe*, 992 F.2d at 544. As a result, the district court dismissed the § 1962(d) claim based on an agreement to violate subsection (c) because it concluded that St. Paul had failed to distinguish the RICO persons from the RICO enterprise. But in light of our holding that St. Paul has established a distinction between the RICO persons and the RICO enterprise, we vacate the district court's ruling with respect to St. Paul's § 1962(d) claim charging a conspiracy to violate subsection (c). Moreover, we remand the case back to the district court so that it may address St. Paul's § 1962(d) ***448** claim based on an agreement to violate subsection (a), which the district court failed to do in its order.[FN17]

> FN17. As we previously noted, St. Paul has established a genuine issue of material fact with respect to the § 1962(a) claim.

* * * * *

As for St. Paul's RICO claims, we vacate and remand the following for proceedings consistent with this opinion: 1) the judgment in favor of the Williamsons with respect to St. Paul's § 1962(a) claim, insofar as it pertains to the CIGNA checks; 2) the judgment in favor of the Williamsons concerning the § 1962(c) claim; and 3) the judgment in favor of the Williamsons with respect to the § 1962(d) claim for conspiracy to violate § 1962(c). Furthermore, we remand to the district court for consideration St. Paul's § 1962(d) claim for conspiracy to violate § 1962(a).

* * * *

C.A.5 (La.),2000.