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17. On how many occasions have you testified on matrimonial matters?
18. How many times on behalf of husband?
19. On some of those occasions has the trial judge not accepted your appraisal as an accurate one?
20. How many hours did you spend personally valuing the subject matter?
21. Did you make a physical inspection?
22. Whom did you interview?
23. What specific data did you review and formulate in your opinion?
24. Do you consider the other valuation appraiser in this case an expert?
25. In conducting your report, did you know that the husband's son (or other close relative) has been working for the company over the past five years?
26. Do you still apply discount for lack of marketability?
27. Isn't using the valuation process artificial since no sale is intended?
28. Don't you consider the corporate stock in question unique if there is no other stock like it?
29. Do you know if anyone is interested in purchasing the corporate stock?
30. Did you find any fact in the other expert's report that was an error?
31. Do you agree with all the other facts in the other expert's report?
32. Do you call yourself a business valuation expert?
33. Did you get a degree in business valuation?
34. How many courses have you taken in business valuation?
35. What did you major in while at college?
36. When did you start working as a business appraiser?
37. What business appraisal training did you have when you started working?
38. Have you studied accounting?
39. Have you ever been licensed as a business appraiser?
40. What books did you rely upon as authorities?
41. Did you rely on Revenue Ruling 59-60 or other tax cases?
42. Is Revenue Ruling 59-60 the only authority you utilized in valuing this company?

Transfers of property in connection with divorce are not subject to gift tax if they are made pursuant to court decree, in satisfaction of support rights, or in compliance with Section 2516 of the Internal Revenue Code.

L. S. THOMAS, TAX CONSEQUENCES
OF MARRIAGE, SEPARATION, AND DIVORCE
(ALI-ABA, Philadelphia, 1986)

Using Rule 12(b)(6) Motions in Antitrust and RICO Claims (with Form) (Part 2)

Rajiv S. Khanna

Know when to insist on specificity.

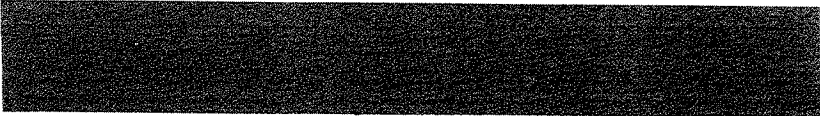
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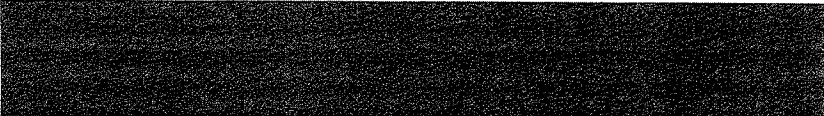
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to the allegations appeared to be too sketchy, so a Rule 12(b)(6) motion immediately came to mind. Since we didn't want to educate the plaintiff by explaining the legal infirmities of the complaint, we chose to base our motion on the complaint's factual shortcomings. In this part of our article, we'll set forth the civil conspiracy and RICO counts of the complaint, as well as our motion in response to them.

A GOOD RESULT • As a result of our motion, the complaint was, after some interim proceedings, dismissed for failure to state a cause of

action. Even if we had not obtained the relief of dismissal, we would ultimately have succeeded in being in a superior pretrial posture because of our Rule 12(b)(6) motion.

The purpose of this discussion is to stimulate lateral thinking in making unconventional use of the motion to dismiss. This is just one example of the effectiveness of Rule 12(b)(6) motions, and by no means an exhaustive commentary on the possibilities. Used appropriately, these motions can be of tremendous help in aggressively shaping the course of litigation involving complicated legal issues.

APPENDIX 1 Civil Conspiracy Count

The civil conspiracy count and the corresponding part of the 12(b)(6) motion demonstrate another technique we used often in the motion. In paragraphs of the motion corresponding to paragraphs 29-31 of the complaint, we introduced the inapplicability of the Hobbs Act, 18 U.S.C. §1951, as well as the nonavailability of private relief under the Hobbs Act. We wanted the plaintiff to start rethinking its complaint seriously. At the same time, we wanted to preserve these purely legal issues for a motion for summary judgment. In short, we wanted to "say it without really saying it."

If the plaintiff were to amend the complaint without regard to these legal issues, we could then have struck at the amended complaint with a motion for partial summary judgment. Also, it may have been much more difficult for the plaintiff to then obtain leave to amend a *third* time to correct the legal deficiencies in the complaint. Especially so, because we had previously placed the plaintiff on notice of these legal deficiencies by "saying it without really saying it" in our motion to dismiss.

On the other hand, if the plaintiff were to amend the complaint in accordance with the law, we would have succeeded in having plaintiff commit to a legal theory. That would define issues sharply and confine the scope of this count.

One further point is worthy of comment. Under Rule 11, counsel's signature on the pleading certifies that the allegations are "warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law." Plaintiff's counsel could hence be sanctioned if the allegations lacked sufficient bases in law. Even if counsel had not thought through these legal issues before drafting the complaint, he would be required to do so at this stage or face the probability of Rule 11 sanctions.

Civil Conspiracy Allegations

COUNT II CIVIL CONSPIRACY

26. Plaintiff realleges and adopts each of the allegations previously set forth herein and those set forth from this point on.
27. From on or about May 19, _____, ABC, its owners, Dean Doe and others did knowingly and intentionally combine, conspire, confederate, and agree together to perform various acts which caused substantial damage to plaintiff.
28. As part of said conspiracy, Dean Doe and others did convert and take without right plaintiff's property for their own use and the use of others.
29. It was a further part of said conspiracy that Dean Doe and others would remove and cause to be destroyed in furtherance of the fraudulent scheme through numerous acts of sabotage and taking of plaintiff's property of the value of \$5,000 or more without right in violation of 18 U.S.C. §1951.
30. It was a further part of said conspiracy that Dean Doe and others would remove and cause to be destroyed in furtherance of the fraudulent scheme, through numerous acts of transports and interstate transfers, plaintiff's property of the value of \$5,000 or more, knowing the same to have been stolen, converted, or taken without right in violation of 18 U.S.C. §2314.
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32. It was a further part of said conspiracy that Dean Doe, the owners of ABC Inc. and others would conceal Doe's activities from plaintiff.
33. It was a further part of said conspiracy that, while knowing of Doe's activities, ABC and its owners would take no steps whatsoever to halt Doe's unauthorized and fraudulent conversion of plaintiff's property.
34. It was a further part of said conspiracy that ABC, its owners, and others, notwithstanding their knowledge of Doe's fraudulent conversion and destruc-

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35. It was a part of said conspiracy that ABC and its owners would conceal, cover up, and deny knowledge of Doe's fraudulent activities in order to promote and carry on said conspiracy, its objects, and unlawful purpose.

36. During the relevant time herein, ABC and its owners continually exercised substantial control over the operations and activities of Dean Doe and other employees of ABC.

37. As a consequence of the above, plaintiff seeks to recover from ABC and Dean Doe compensatory and consequential damages, together with the cost of this suit and lawful interest, and further seeks to recover punitive damages as a consequence of ABC's and Doe's intentional, willful, and wanton acts.

Response to Civil Conspiracy Allegations CIVIL CONSPIRACY IS INSUFFICIENTLY ALLEGED

In paragraph 27, the Complaint alleges that "ABC, its owners, Dean Doe, and others" have conspired to "perform various acts which caused substantial damage to plaintiff." A careful review of this count reveals that this count like the rest of the Complaint contains mere conclusory statements and no factual basis to support these allegations. The Complaint, here too, fails to plead with any specificity.

ABC seeks the identity of the "others," the "owners" who allegedly conspired and the facts comprising the "various acts" so that a meaningful response to this allegation might be prepared.

Paragraph 28 suggests that ABC employed unlawful means to take and convert the plaintiff's property. One may only guess that plaintiff is referring to the one and only incident it has mentioned with any degree of particularity, that is, the incident referred to in paragraph 19(i) of the Complaint. The plaintiff should, however, have borne in mind that the purpose of a pleading is to place a defendant on notice, not to leave it guessing. The various paragraphs under Count II of the Complaint make it obvious that the plaintiff is desperately trying to fit that incident into many molds. The alleged unlawful taking has been illustrated in the Complaint in the vaguest possible terms to permit it to be so used.

The Complaint alleges in paragraph 29, that "it was a further part of said conspiracy that Dean Doe and others" would take property in violation of 18 U.S.C. §1951 (Hobbs Act). ABC respectfully draws the attention of this honor-

able court to the statute cited by the plaintiff. The Hobbs Act deals with "Interference with Commerce by Threats or Violence." Obviously, no allegations threats or violence have been made by the plaintiff.

Paragraphs 30 and 31 merely recite the language of 18 U.S.C. §§2314 and 2315, respectively, in an attempt to satisfy the jurisdictional amount of the statute.

ABC respectfully submits that 18 U.S.C. §§1951, 2314, and 2315, as a matter of law, do not confer a right to bring a private suit for alleged violation. Although these provisions are enumerated as predicate RICO offenses, in and of themselves, they do not bestow on plaintiff the right to bring a suit for damages.

Paragraphs 32 through 37, similar to the pattern throughout the Complaint state no cause of action. As a matter of law, these paragraphs cannot support an action for civil conspiracy.

APPENDIX 2 RICO Count

The general treatment of the RICO count was the same as that of the other counts in the complaint. We took the position that the complaint was based entirely on inflated claims and hyperbole and that claims of ordinary business torts should not be permitted to mutate into RICO claims.

One problem we faced in this context was that most RICO actions involve some element of fraud (typically mail or wire fraud). As a result of that, pursuant to Fed. R. Civ. P. 9(b), courts can insist upon specificity in pleading a cause of action under RICO. We anticipated that a question regarding where the court may find similar authority for nonfraud situations would be raised. Thus, we found precedents that based the specificity requirement in pleading RICO actions on Rule 11. Additionally, to facilitate issuance of a RICO case statement, we attached samples of the case statements and accompanying orders from various circuits. Care was taken to pick out those sample orders that clearly indicated that the orders were based on Rule 11.

We also tentatively formulated some questions for the RICO case statement: Who is the person? Who is the enterprise? What is the pattern of racketeering activity? and Is defendant ABC being sued principally or vicariously under the doctrine of respondeat superior? You may also note that we further reinforced the gentle suggestions of sanctions raised in the antitrust part of the motion. Although these suggestions of Rule 11 may not appear to accomplish very much; nonetheless, they should make any party and their counsel a little cautious and accordingly less aggressive in litigation, and may even prompt a sua sponte imposition of sanctions by the court.

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RICO Allegations

COUNT III

PATTERN OF UNLAWFUL RACKETEERING ACTIVITY

38. Plaintiff realleges and adopts each of the allegations previously set forth herein.

39. ABC Inc., is a "person" within the meaning of 18 U.S.C. §1961(3).

40. Defendant Dean Doe is a "person" within the meaning of 18 U.S.C. §1961(3).

41. ABC Inc. is an "enterprise" within the meaning of 18 U.S.C. §1961(4) and §1962(a),(b),(c), and (d), which enterprise was engaged and continues to be engaged in activities which affected interstate commerce during the relevant times.

42. Defendant Dean Doe was employed by or associated with an enterprise, that is, ABC Inc., and did conduct or participate, directly or indirectly, in the conduct of the affairs of ABC Inc., through a pattern of racketeering activities within the meaning of 18 U.S.C. §§1961(1)(B), 1961(5), and 1962(a), (b), (c), and (d), to wit:

(a) Multiple instances of interference with commerce in violation of 18 U.S.C. §1951;

(b) Multiple instances of interstate transportation of property stolen, unlawfully converted, or taken in violation of 18 U.S.C. §2314; and

(c) Multiple instances of interstate concealment, destruction, and possession of property stolen, unlawfully converted, or taken in violation of 18 U.S.C. §2315.

43. During the relevant times, defendants did agree and conspire with others to devise and participate in a plan of deceit and deception, whereby they would and did destroy plaintiff's property and sabotage plaintiff's business, all so as to unlawfully, intentionally, and willfully interfere with commerce and impede competition in order to cause financial gain to themselves and detriment to plaintiff and its customers.

44. The scheme to defraud and destroy plaintiff's business evolved over time as a pattern of racketeering activities that inflicted discrete harms on plaintiff. Plaintiff suffered discrete losses as a result of the unlawful patterns of racketeering activities of defendants.

45. From on or about January 19 _____, ABC, Dean Doe, and others did knowingly and intentionally combine, conspire, confederate, and agree to conceal, take without right, convert, and destroy Plaintiff Newspaper for

almost two years, and they would have continued to engage in such criminal activities but for their detecting by plaintiff and the _____ Police Department.

46. From on or about January 19_____, ABC, Dean Doe, and others did knowingly and intentionally combine, conspire, confederate, and agree to conceal, take without right, convert, and destroy Plaintiff Newspaper for almost two years, and they would have continued to engage in such criminal activities but for their success in driving plaintiff out of print media business in the relevant market.

47. Every day, from on or about January 19_____, through December 19_____, ABC, Dean Doe, and others did knowingly and intentionally, repeatedly, and continually, combine, conspire, confederate, and agree to conceal, take without right, convert, and destroy plaintiff's property and business in violation of 18 U.S.C. §1962(a), (b), (c), and (d).

48. The activities of defendants in the formation and execution of the scheme to defraud had a pervasive, debilitating, and ultimately fatal impact on Plaintiff Newspaper and on plaintiff's efforts to function as a publisher in the relevant market. As a result, in December 19_____, Plaintiff Newspaper had to cease doing business and initiate liquidation proceedings.

49. In connection with the activities giving rise to this action, defendants acted with malice, insult, intent, and knowledge, and with a wanton and reckless disregard of the rights of Plaintiff and others.

50. During the relevant times, the "enterprise," that is, ABC Inc., was engaged in interstate commerce, in that it purchased, used, or sold advertising space and other materials and services, in Maryland, Virginia, and the District of Columbia.

51. During the relevant times, in connection with the activities giving rise to this action the defendants conspired with each other, and with others unknown, to engage in the various activities set forth herein and aided and abetted one another in these activities, all as proscribed by 18 U.S.C. §§1962(a),(b),(c), and (d).

52. During the relevant times, and in furtherance of and for the purpose of executing the scheme and artifice to interfere with plaintiff's interstate business, the defendants took or obtained personal property of the plaintiff from Maryland, Virginia, and the District of Columbia and transported it among these states with the intent to conceal or destroy plaintiff's property and business in violation of 18 U.S.C. §§1951, 2314, and 2315. The conduct of the enterprise affected commerce.

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53. On _____, 19____, the defendants made use of a truck, Pennsylvania Tag 920-555, and a van, Montana Tag 867-004, to transport interstate, conceal, and destroy more than seven hundred copies of Plaintiff Newspaper, which were stolen, unlawfully converted, and taken without right in violation of 18 U.S.C. §§1951, 2314, and 2315.

54. The aggregate market value of the property stolen, unlawfully converted, or taken by defendants and their co-conspirators since January 19____, was well in excess of the minimum requirements of \$5,000.

55. As a consequence of the conduct of the enterprise through a pattern of racketeering behavior, involving a number of people and the use of the motor vehicles, interstate transportation, and conspiracy, plaintiff sustained substantial economic damage, loss, and injury.

56. As set forth more fully above, the owners of ABC continually have exercised substantial control over the operation of ABC. Such control and domination by the owners of Defendant Newspaper has rendered Defendant Newspaper a mere instrumentality of its owners, thereby rendering its owners liable for the wrongful acts of Defendant Newspaper and its employees.

57. By reason of the violation of 18 U.S.C. §1962(a), (b), (c), and (d) committed by defendant ABC and defendant Dean Doe, plaintiff was injured in an as yet undetermined amount, believed to be not less than approximately \$500,000, within the meaning of 18 U.S.C. §1964(c).

Response to RICO Allegations

COMPLAINT FAILS TO ESTABLISH A PATTERN OF UNLAWFUL RACKETEERING ACTIVITY

Courts all over the country have grown increasingly leery of plaintiffs endeavoring to convert ordinary business torts into RICO claims. *See, e.g., HMK Corp. v. Walsey*, 828 F.2d 1072 (4th Cir. 1987), *cert. denied*, 108 S.Ct. 706 (1988). Over the last decade, it has been generally accepted that RICO claims must be set out with particularity. *See, e.g., Bennett v. Berg*, 685 F.2d 1053, 1062, *modified en banc*, 710 F.2d 1361 (8th Cir. 1983), *cert. denied*, 464 U.S. 1008 (1983); *Philan Ins. Ltd. v. Frank B. Hall & Co.*, 712 F. Supp. 339 (S.D. N.Y. 1989); *Saine v. A.I.A., Inc.*, 582 F. Supp. 1299 (D.Colo. 1984); *Slattery v. Costello*, 586 F. Supp. 162 (D.D.C. 1983).

One consideration that has prompted specificity in RICO pleading is protection of defendants. For instance, in *Carbone, Inc. v. Proctor Ellison Company*, 102 F.R.D. 951, 953 (D.Mass. 1984), the court dismissed a RICO claim noting that it was unfair to expect defendants to proceed on

the basis of the conclusory allegations of fraud contained in the complaint, and furthermore, that the expense and considerable discovery generated in RICO cases called for specific pleading.

Another consideration prompting specificity is the possibility of distortion of the RICO statute. In *Ralston v. Capper*, 569 F. Supp. 1575 (E.D. Mich. 1983), the court held that the elements of the statute had to be specifically pleaded to limit RICO to its statutory purpose. "[I]t is imperative that the court and the defendants be placed on clear notice as to what is being alleged, and what the substance of the claim is . . ." *Id.*, at 1581.

Mail and wire frauds being the most commonly used RICO predicates, most of the cases cited above were based upon Fed. R. Civ. P. 9(b). Various courts, deriving authority from Fed. R. Civ. P. 11, have required that not only fraud, but all RICO allegations be pleaded with Rule 9 specificity. *Philan, supra.*; *Sigmond v. Brown*, 645 F. Supp. 243 (C.D. Cal. 1986); *Acampora v. Boise Cascade Corp.*, 635 F. Supp. 66 (D.N.J. 1986); *Schnitzer v. Oppenheimer & Co.*, 633 F. Supp. 92 (D.Or. 1985); *Hunt v. American Bank and Trust Co.*, 606 F. Supp. 1348 (N.D. Ala. 1985), *aff'd*, 783 F.2d 1011 (11th Cir. 1986); *Doxie v. Ford Motor Credit Company*, 603 F. Supp. 624 (S.D. Ga. 1984); *Ralston v. Capper*, 569 F. Supp. 1575 (E.D. Mich. 1983). There is some precedent requiring RICO plaintiffs to set out their claims with a degree of specificity sufficient to indicate the defendants' "indictability." The rationale for this high standard of pleading has been articulated as the underlying criminality of the predicate acts which amount to "racketeering." *See, e.g., Grant v. Union Bank*, 629 F. Supp. 570 (D.Utah 1986).

ABC respectfully draws the attention of this honorable court to the fact that the Complaint appears to have been deliberately drafted with the least possible specificity. Perhaps the plaintiff hoped to cast a wide net in fishing for factual bases to build its claim. A comparison of the original complaint as filed and the Amended Complaint is illustrative of this intent. The original Complaint paragraph 30 described the alleged offense of participating in or conducting the affairs of Defendant Newspaper as a violation of only §1962(c). In the Amended Complaint, the plaintiff has included every section in the books (§1962(a), (b), (c), and (d)) as having been violated based on the same allegation. All the other sections are obviously inapplicable. The court will find similar exaggeration in comparing paragraph 9 of the original complaint and paragraph 41 of the Complaint, paragraph 36 of the original complaint and paragraph 51 of the Complaint; and paragraph 40 of the original complaint and paragraph 57 of the Complaint.

53. On _____, 19____, the defendants made use of a truck, Pennsylvania Tag 920-555, and a van, Montana Tag 867-004, to transport interstate, conceal, and destroy more than seven hundred copies of Plaintiff Newspaper, which were stolen, unlawfully converted, and taken without right in violation of 18 U.S.C. §§1951, 2314, and 2315.

54. The aggregate market value of the property stolen, unlawfully converted, or taken by defendants and their co-conspirators since January 19____, was well in excess of the minimum requirements of \$5,000.

55. As a consequence of the conduct of the enterprise through a pattern of racketeering behavior, involving a number of people and the use of the motor vehicles, interstate transportation, and conspiracy, plaintiff sustained substantial economic damage, loss, and injury.

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In paragraph 42, the Complaint alleges that defendant Dean Doe participated in or conducted the affairs of Defendant Newspaper through a pattern of racketeering activity within the meaning of 18 U.S.C. §§1961(1)(B), 1961(5), and 1962(a), (b), (c), and (d).

The plaintiff well understands that §1962(a), (b), and (d) has no application to the allegations made under paragraph 42 of the Complaint. The Complaint takes a "shotgun" approach to pleading, hoping to hit something. As with the other counts in this Complaint, however, this approach leaves ABC with nothing more than conjecture about what it has done or not done to violate the anti-racketeering laws. The Complaint states that ABC is engaged in a pattern of racketeering merely by restating the statutory language. This provides no information to this honorable court or to ABC. The Complaint fails to allege any supporting facts, which leaves ABC without fair notice to defend.

Defendant ABC respectfully submits that the RICO allegations in the Complaint range from incomprehensible through legally impermissible. A brief overview of the activities prohibited by the RICO statute should be instructive in assessing the worth of plaintiff's allegations.

Section 1962(a) proscribes the use of any income, received by a person through a pattern of racketeering activity, to acquire an interest in an enterprise. In other words, a "person" may not invest in any "enterprise" any income that the person has received elsewhere by means of the predicate acts of racketeering. This provision is primarily directed toward the investment of "dirty money" into clean businesses. The Complaint fails to identify the "person" described, the "pattern," and the racketeering activity from which the prohibited income was derived. It is unclear whether the clean business, the "enterprise," is ABC itself.

Section 1962(b) makes it unlawful for a person to acquire or maintain any interest in an enterprise through a pattern of racketeering activity. That is, whereas subdivision (a) prohibits the otherwise legal acquisition of an interest in an enterprise with "dirty money," subdivision (b) is directed against the use of a pattern of the predicate offenses to acquire an interest in an enterprise. This section addresses the use of "dirty tactics" to take over, control, or participate in clean businesses. Surely, the Complaint cannot suggest that ABC acquired or maintained an interest in itself through a pattern of racketeering activity.

Section 1962(c) prohibits any person employed by or associated with an enterprise from conducting the affairs of that enterprise through a pattern of racketeering activity. In paragraph 42, the Complaint attempts to in-

voke this subsection of section 1962. As stated above, however, the allegations are devoid of any supporting fact. The Complaint merely recites the statutory language.

Section 1962(d) makes it unlawful for any person to conspire to violate any of the preceding sections. Any inquiry into conspiracy is meaningless if there is no appearance of illegality apparent from the pleading.

In addition to the foregoing legal infirmities, the Complaint fails to maintain any distinction between "person" and "enterprise" and perpetrator and victim. In paragraphs 41 and 50 of the Complaint, ABC has been identified as the "enterprise" as defined in the statute. In paragraph 31 the defendant has been identified as "person" within the meaning of the statute. Thus, the Complaint defines ABC as both the "enterprise" and the "person."

The RICO Count of the Complaint is particularly egregious in its overbreadth. The result is confusion and uncertainty. Some of the questions raised are: Who is the person? Who is the enterprise? What is the pattern of racketeering activity? and, Is ABC being sued principally or vicariously under the doctrine of respondeat superior?

To discourage the type of confusion exhibited in the Complaint, many federal courts now require RICO plaintiffs to file detailed explanations of their RICO allegations in documents that have come to be known as "RICO case statements." A RICO case statement typically contains the plaintiff's response to questions propounded by the court. RICO case statements have proved to be tremendously useful in weeding out meritless claims at an early stage in litigation. This prevents wastage of judicial resources and protects defendants from clearly unnecessary expenditures of time and money.

RICO case statements have been employed by numerous courts, either as standing orders of the court or as standing orders for the entire judicial district. See, e.g., *Elliott v. Foufas*, 867 F.2d 877, 879 (5th Cir. 1989); *Norris v. Wirtz*, 703 F. Supp. 1322 (N.D. Ill. 1989); *Kurz v. Mairone*, 198 W.L. 8870 (E.D. Pa. 1989); *Jae-Soo Yang Kim v. Pereira Enterprises, Inc* 694 F. Supp. 200 (E.D. La. 1988), *aff'd*, 873 F.2d 295 (5th Cir. 1989); *Sop v. Tsagaris*, 1987 W.L. 15117, RICO Business Disputes Guide (CCH) ¶6713, 85 Civ. 0215 (S.D. N.Y. 1987); *In Re Micro Pro Securities Litigation*, No. C-85-7428 EFL (N.D. Cal. 1987); *Mulligan v. Prudential-Bach Securities, Inc., et al.*, RICO Business Disputes Guide (CCH), ¶6522, Ci 70856 (E.D. Mich. 1986); *Robinson v. Mount Vernon Realty, Inc.*, 198 W.L. 22212, RICO Business Disputes Guides (CCH), ¶6484 (D.D.C.

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CONCLUSION

For the reasons set forth above, plaintiff's Complaint should be dismissed pursuant to Rule 12(b)(6) for failure to state a claim upon which relief can be granted. Plaintiff's entire pleading lacks the specificity required by law to place ABC on notice of the alleged wrongs committed.

Without detracting from the merits of the foregoing submissions, the defendant respectfully requests that at a minimum, the plaintiff should be required to provide a more definite statement pursuant to Fed. R. Civ. P. 12(e), and a RICO Case Statement, pursuant to Rule 11, *inter alia*, to provide ABC with sufficient information upon which it may formulate an answer and defense.

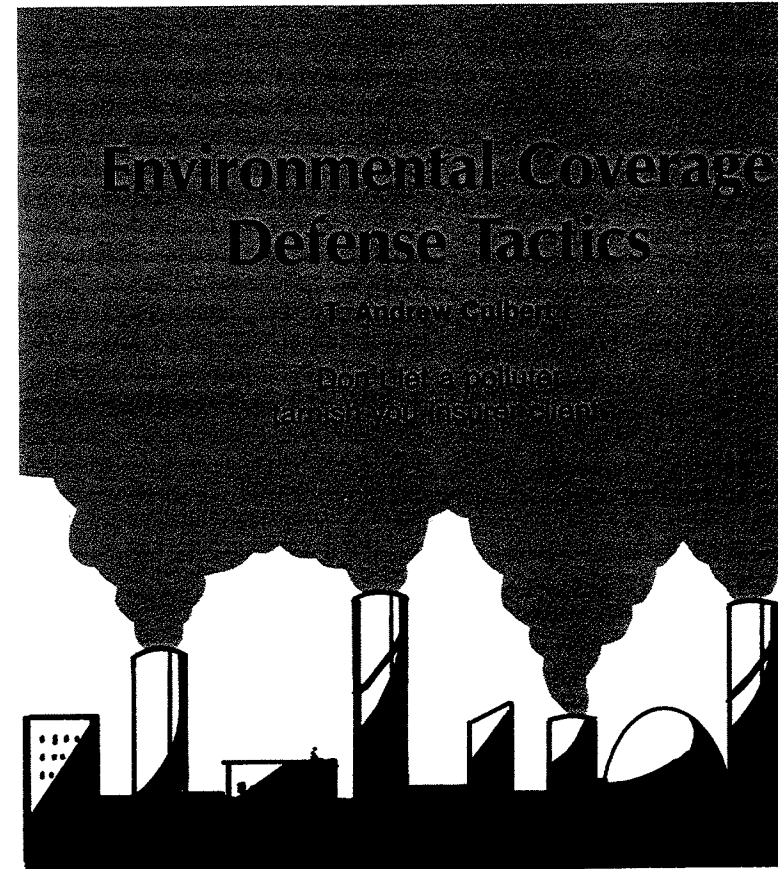
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Rule 12(b)(6) motions to dismiss for failure to state a claim upon which relief can be granted share some of the salient characteristics of nondilatory motions. If granted, the Rule 12(b)(6) motion does not result merely in the minor delays attendant upon the fragmentary recasting of the pleadings as might result from a dilatory motion, such as a motion to make more definite or a motion to strike redundant matter. As its name clearly indicates, the Rule 12(b)(6) motion to dismiss for failure to state a claim can result in the entire case being forceably ejected from court. The motion is a hybrid, however, one that simultaneously possesses characteristics of the dilatory, as well as the nondilatory, ruling. Unlike the summary judgment, the granting of a 12(b)(6) motion is not a final ruling on the merits.

The motion is not basically a challenge to the accuracy of the plaintiff's factual contentions but constitutes an assertion that even if the plaintiff's factual claims were true, he has still not stated a legal theory that entitles him to relief.

It is a challenge to the legal sufficiency of the complaint. Since it is basically an attack on the legal theory of the plaintiff's case, it accepts, for purposes of the motion only, the allegations of the plaintiff's complaint as true.

R. C. McCULLOUGH AND J. L. UNDERWOOD, CIVIL TRIAL MANUAL 2, 528-29 (ALI-ABA, Philadelphia, 1987)



EVER SINCE Congress brought the Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. §9601 et seq. ("CERCLA" or "Superfund") in December 1980, a more or less constant river of environmental liability actions has flowed into the courts.

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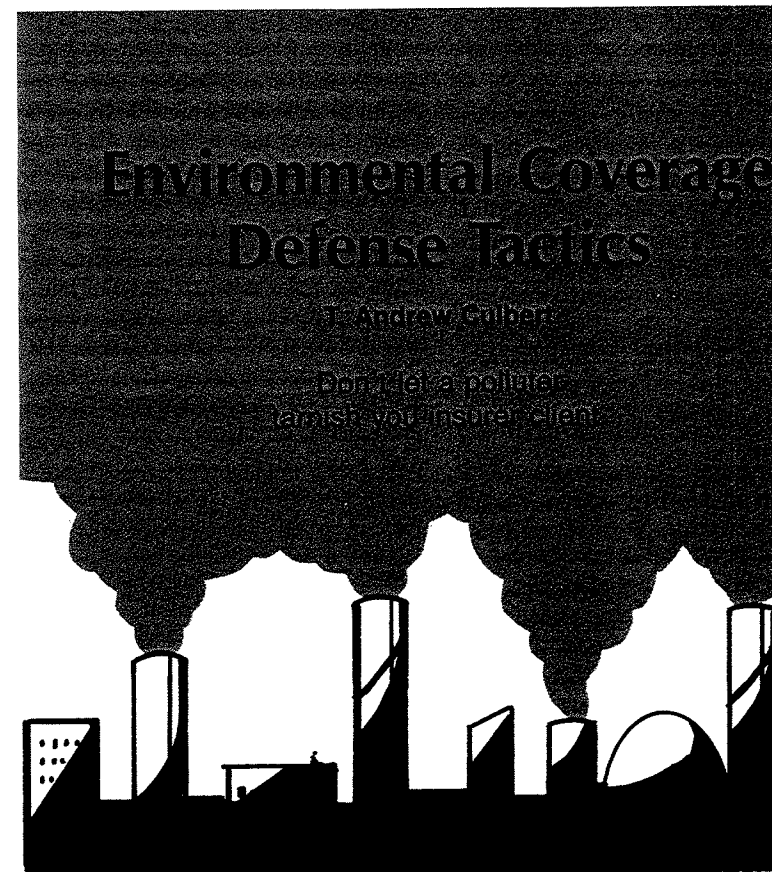
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