

814.44 CIVIL RICO - ATTEMPT.

The (*state number*) issue reads:

“Did the [defendant] [defendants] attempt
[to engage in a pattern of racketeering activity]
[to, [through a pattern of racketeering activity] [through proceeds
derived from a pattern of racketeering activities],
[acquire] [maintain], directly or indirectly, any
[interest in] [control of] any
[enterprise] [real property] [personal property of
any nature, including money]]
[to, through a pattern of racketeering activity, [conduct] [participate
in], directly or indirectly, any enterprise]?¹

The burden of proof on this issue is on the plaintiff. This means that the plaintiff must prove, by the greater weight of the evidence, five things:

First, that the [defendant] [defendants] attempted to
[engage in a pattern of racketeering activity]
[, [through a pattern of racketeering activities] [through proceeds
derived from a pattern of racketeering activities],
[acquire] [maintain], directly or indirectly, any
[interest in] [control of] any
[enterprise] [real property] [personal property of
any nature, including money]]
[, through a pattern of racketeering activity, [conduct] [participate
in], directly or indirectly, any enterprise].

An attempt is the performance of an act which was designed to bring about (*state crime*) [but which fell short of the completed offense] [and which in the ordinary and likely course of things the defendant would have completed the crime had the defendant not been stopped or prevented from completing the defendant's apparent course of action].² (Mere preparation or mere planning is not enough to constitute such an attempt. But the act need not be the last act required to complete the crime.)

"Racketeering activity" means to [commit] [attempt to commit] [[solicit] [coerce] [intimidate] another person to commit] [an act] [acts] which would be chargeable by indictment for (*state crime(s)*).³

"Pattern of racketeering activity" means engaging in at least two incidents of racketeering activity that have the same or similar purposes, results, accomplices, victims, or methods of commission or otherwise are interrelated by distinguishing characteristics and are not isolated and unrelated incidents, provided at least one of such incidents occurred after October 1, 1986, and that at least one other of such incidents occurred within a four-year period of time of the other, excluding any periods of imprisonment, after the commission of a prior incident of racketeering activity.

Second, that at least one of the incidents of racketeering activity [involved] [would have involved] an act other than mail fraud, wire fraud or fraud in the sale of securities.⁴

Third, that as a result of such attempt, the plaintiff suffered [injury] [damage] to *his* [business] [property].⁵

Fourth, that the [defendant] [defendants] attempted to obtain pecuniary gain.

And Fifth, that the plaintiff is an innocent person.⁶

Finally, as to this issue on which the plaintiff has the burden of proof, if you find, by the greater weight of the evidence, that the [defendant] [defendants] attempted

[to engage in a pattern of racketeering activity]

[to, [through a pattern of racketeering activity] [through proceeds derived from a pattern of racketeering activities],

[acquire] [maintain], directly or indirectly, any

[interest in] [control of] any

[enterprise] [real property] [personal property of any nature, including money]

[to, through a pattern of racketeering activity, [conduct] [participate in], directly or indirectly, any enterprise],

that at least one of the incidents of racketeering activity [involved] [would have involved] something other than mail fraud, wire fraud, or fraud in the sale of securities,

that as a result of such attempt, the plaintiff suffered [injury] [damage] to *his* [business] [property],

that the [defendant] [defendants] attempted to obtain pecuniary gain, and that the plaintiff is an innocent person, then it would be your duty to answer this issue "Yes," in favor of the plaintiff. If you do not so find, then it would be your duty to answer this issue "No," in favor of the [defendant] [defendants].

1 N.C. Gen. Stat. § 75D-4(a) provides that a person shall not:

- (1) Engage in a pattern of racketeering activity or, through a pattern of racketeering activities or through proceeds derived therefrom, acquire

or maintain, directly or indirectly, any interest in or control of any enterprise, real property, or personal property of any nature, including money; or

- (2) Conduct or participate in, directly or indirectly, any enterprise through a pattern of racketeering activity whether indirectly, or employed by or associated with such enterprise; or
- (3) Conspire with another or attempt to violate any of the provisions of subdivision (1) or (2) of this subsection.

Because commission of an act prohibited by North Carolina RICO constitutes a civil offense only and not a crime, "a mens rea or criminal intent is not an essential element of any of the civil offenses set forth in this section." N.C. Gen. Stat. § 75D-4(b).

² See *State v. Miller*, 344 N.C. 658, 667, 477 S.E.2d 915, 921 (1996).

³ The crimes which may be considered are:

- a. Article 5 of Chapter 90 of the North Carolina General Statutes;
- b. Chapter 14 of the General Statutes except Articles 9, 22A, 38, 40, 43, 46, 47, 59; and N.C. Gen. Stat. §§ 14-78.1, 14-82, 14-86, 14-145, 14-146, 14-147, 14-177, 14-178, 14-179, 14-183, 14-184, 14-186, 14-190.9, 14-195, 14-197, 14-201, 14-202, 14-247, 14-248, 14-313; and
- c. Any conduct involved in a "money laundering" activity.

NOTE WELL: The meaning of "racketeering activity" also includes the description found in 18 U.S.C. § 1961(1). N.C. Gen. Stat. § 75D-3(c).

⁴ N.C. Gen. Stat. § 75D-8(c).

⁵ See *Gilmore v. Gilmore*, 229 N.C. App. 347, 357, 748 S.E.2d 42, 49 (2013), citing *In re Bostic Constr., Inc.*, 435 B.R. 46, 67 (M.D.N.C. 2010).

⁶ N.C. Gen. Stat. § 75D-8(c) ("Any innocent person who is injured or damaged in his business or property by reason of any violation of G.S. 75D-4 involving a pattern of racketeering activity shall have a cause of action for three times the actual damages sustained and reasonable attorneys fees. . . .")

[*NOTE WELL:* The statute does not define "innocent person." The counterpart federal statute, 18 U.S.C. § 1964(c), does not contain the word "innocent." Noting the difference, the North Carolina Court of Appeals has said that "no legally significant distinction between . . . these provisions" exists (albeit with respect to a different question). See *Kaplan v. Prolife Action League of Greensboro*, 123 N.C. App. 720, 729, n.3, 475 S.E.2d 247, 254 (1996), *aff'd per curiam*, 347 N.C. 342, 493 S.E.2d 416 (1997). For discussion of burden of proof, see endnote 8 to CIVIL RICO—ENGAGING IN A PATTERN OF RACKETEERING ACTIVITY (814.41).]