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THE CONTINUING CONFLICT OVER LIMITATIONS ON RICO'S CIVIL INJURY ELEMENT

I. INTRODUCTION

As a result of public outcry in the 1950's, Congress took action to address the effects of organized criminal activity on the national economy. Since then, Congress has conducted many indepth studies and hearings to ascertain the nature and extent of this national problem. Of particular concern to Congress was the effect of organized crime on the business sector as it related to interstate commerce; in response, Congress enacted the Racketeer Influenced and Corrupt Organizations Act (RICO)¹ as Title IX of the Organized Crime Control Act (OCCA) of 1970.²

Under both its criminal and civil provisions,³ RICO proscribes infiltration of business by organized crime.⁴ Put another way, RICO does not proscribe organized crime; rather, it is aimed at organized criminal activity in all its multitudinous forms.⁵ Therefore, RICO's statutory language is necessarily broad.⁶ To provide the courts with

1. 18 U.S.C. §§ 1961-68 (1982).

2. Pub. L. No. 91-452, § 901(a), 84 Stat. 922, 941 (1970) (codified at 18 U.S.C. § 1961 (1982)).

3. The substantive elements of a RICO violation are the same under either the criminal or civil provisions of RICO. The criminal and civil provisions of RICO are distinguishable by their respective remedies. Under criminal RICO, a convicted defendant may be fined no more than \$25,000, or imprisoned up to twenty years, or both and shall forfeit his ill-gotten profits to the United States. 18 U.S.C. § 1963(a) (1982). Under civil RICO, a guilty defendant may be assessed treble damages, attorney fees, and court costs. See *infra* note 57.

4. RICO can also be described as proscribing "enterprise criminality," the infiltration of legitimate commercial enterprises by organized crime elements. See *infra* note 58.

5. In *re Cantanella and E.F. Hutton and Co.*, 583 F. Supp. 1388, 1429 (E.D. Pa. 1984). Congress rejected an amendment limiting RICO to members of the mafia as underinclusive and possibly unconstitutional. *Id.* The concept of organized criminal activity is broad; it "includes any criminal activity collectively undertaken." *Id.* (citing 116 CONG. REC. 35,293 (1970) (statement of Rep. Biaggi)).

6. RICO's broad language causes many interpretational difficulties. At the very least, the courts do not agree whether RICO's broad language is plain or ambiguous. This disagreement can have a significant effect on the attitude with which a court approaches its analysis of RICO; a court may either apply the plain meaning rule or use other interpretational aids. Note, *RICO and the Liberal Construction Clause*, 66 CORNELL L. REV. 167, 171 (1980).

interpretive guidance,⁷ Congress also included a liberal construction clause with RICO.⁸ One practical effect of RICO's broad language is the federalization of a considerable number of fraudulent business transactions.⁹

Remedies under RICO's civil provision include treble damages, attorney fees, and court costs.¹⁰ Noting the treble damage action's deterrent effect in the antitrust context, Congress expressly borrowed antitrust language from the Clayton Act¹¹ when it drafted RICO's civil remedy section. Congress did this to justify RICO's treble damage action as a device to deter organized criminal behavior.¹² By enacting RICO's civil remedy provision, Congress intended to provide a strong weapon against organized criminal behavior.

From the time of its enactment until recently, the federal courts disputed over the type of injury required in order to bring a civil RICO action.¹³ Some courts strictly interpreted RICO's civil remedy section as requiring either a competitive injury or a "racketeering enterprise injury."¹⁴ In contrast, more liberal courts did not interpret

7. Congress maintains some control over the courts' attitude towards a statute through interpretational provisions. *Id.* at 182. Interpretational provisions also encourage statutory construction which reflects the true congressional intent. *Id.* The Supreme Court recognized the force of RICO's liberal construction clause in *United States v. Turkette*, 452 U.S. 576 (1981). Although *Turkette* involved an issue under RICO's criminal provision, the Court clearly supported a liberal interpretation of the statute in accord with its plain meaning. *Id.* at 587.

8. "The provisions of [RICO] shall be liberally construed to effectuate its remedial purposes." Organized Crime Control Act of 1970, Pub. L. No. 91-452, § 904(a), 84 Stat. 922, 947.

9. See, e.g., *Turkette*, 452 U.S. at 587 (noting that Congress deliberately federalized some state law crimes). Many courts feel that this federalization of state law crime creates an opportunity for prosecutorial abuse.

10. See *infra* note 57.

11. See *infra* note 71.

12. *Schacht v. Brown*, 711 F.2d 1343, 1357-58 (7th Cir. 1983) (language, but not objective of RICO is identical to the antitrust law). See also *Furman v. Cirrito*, 741 F.2d 524, 531 (2d Cir. 1984) (noting that concepts borrowed from Clayton Act pertain to remedies and not to elements necessary to establish RICO claim).

13. One court has noted this confusion and described it as "conceptual disarray and schism." *Schacht*, 711 F.2d at 1352 n.7.

14. See, e.g., *Alexander Grant and Co. v. Tiffany Industries, Inc.*, 742 F.2d 408, 413 (8th Cir. 1984) (racketeering enterprise injury); *Moss v. Morgan Stanley, Inc.*, 719 F.2d 5, 17 (2d Cir. 1983) (injury to business or property by reason of § 1962 violation) (emphasis in original); *Willamette Savings and Loan v. Blake and Neal Finance Co.*, 577 F. Supp. 1415, 1430 (D. Or. 1984) (racketeering enterprise injury, which is not necessarily a competitive injury); *Richardson v. Shearson/American Express Co., Inc.*, 573 F. Supp. 133, 137 (S.D.N.Y. 1983) (requiring injury from § 1962 violation, not mere injury from predicate act violation), *disavowed by author*, *Laterza v. American*

RICO as requiring any specific type of injury other than injury to business or property.¹⁵ The United States Supreme Court recently resolved this conflict. In *Sedima v. Imrex*,¹⁶ the Court held that a civil RICO plaintiff need not establish a special type of injury such as a "racketeering enterprise injury."¹⁷ Rather, the Court held that injury to the plaintiff's business or property would be sufficient to state a RICO claim, provided that the plaintiff alleged each element of the substantive RICO violation.¹⁸

While *Sedima* should quiet the conflict in the federal courts, the debate over RICO's civil injury element still exists. The arena of this debate has shifted to Congress, where the possibility of amending RICO and the manner in which to draft the amendment is now under consideration.¹⁹ This congressional study focuses on both the civil injury element and the substantive RICO violation.²⁰ At least in regard to RICO's civil injury element, the arguments of both the proponents and opponents of a RICO amendment are quite similar to those arguments heard in the federal courts prior to the Supreme Court's decision in *Sedima*.²¹ Due to the similarity of these arguments, Congress should not ignore the courts' experience in interpreting RICO's civil injury element. As it now considers amending RICO, Congress should utilize RICO case law in order to achieve a balanced resolution to the continuing civil injury element debate.

Broadcasting Co., 581 F. Supp. 408, 414 (S.D.N.Y. 1984) (rejects racketeering enterprise limitation); *County of Cook v. Midcon Corp.*, 574 F. Supp. 902, 920 (N.D. Ill. 1983) (injury by reason of § 1962 violation requires injury different from injury by predicate act of mail fraud).

15. See, e.g., *Mauriber v. Shearson/American Express, Inc.*, 567 F. Supp. 1231, 1240-41 (S.D.N.Y. 1983) (not requiring any injury above and beyond that injury caused by predicate acts of fraud); *Seville Industrial Machinery Corp. v. Southmost Machinery Corp.*, 567 F. Supp. 1146, 1157 (D.N.J. 1983) (refusing to dismiss for failure to allege racketeering enterprise injury), *aff'd in part and rev'd in part, both on other grounds*, No. 83-5575 (3d Cir. Sept. 6, 1984); *Eisenberg v. Gagnon*, 564 F. Supp. 1347, 1352-53 (E.D. Pa. 1983) (rejecting argument that "something more than injury from racketeering activity must be alleged"); *Windsor Associates, Inc. v. Greenfeld*, 564 F. Supp. 273, 278-79 (D. Md. 1983) (rejecting racketeering enterprise injury limitation).

16. ___ U.S. ___, 105 S.Ct. 3275 (1985). The *Sedima* Court split 5-4. Chief Justice Burger and Justices White, Rehnquist, Stevens, and O'Connor were in the majority. Justices Marshall, Brennan, Blackman, and Powell dissented.

17. *Id.* at 3277.

18. *Id.*

19. See *infra* notes 21 and 170 and accompanying text.

20. See *infra* note 170 and accompanying text.

21. Blakey, *The Act is Neither Anti-Business Nor Pro-Business, It's Pro-Victim*, Nat'l L.J., Aug. 26, 1985, at 26, col. 1 (discussing conflicting reports on RICO produced by two special American Bar Association committees).

A balanced congressional resolution must rest upon an examination of the issues which continue to underlie the conflict over the type of injury required by RICO. This note offers such an examination by first discussing RICO's legislative history and RICO's substantive elements. Subsequently, this note analyzes the civil RICO injury doctrines as established by both the strict and the liberal constructionist courts prior to the Supreme Court's *Sedima* decision.²² Specifically, this note discusses the purposes which supported each view and the resulting scope and impact each view has had upon RICO jurisprudence. Finally, this note suggests that Congress can fashion a balanced resolution to the civil injury conflict not by amending RICO's civil remedy provision but, rather, by amending other substantive provisions of RICO. Such an approach by Congress would circumscribe RICO's breadth without completely sacrificing the effectiveness or utility of the civil RICO cause of action.

II. RICO'S LEGISLATIVE HISTORY AND ITS LANGUAGE

The legislative history of RICO²³ reveals Congress' concern for the unchecked growth of both organized criminal and fraudulent activity in government, business, and unions.²⁴ By enacting RICO, Con-

22. At this point, the labels "strict" and "liberal" must be elaborated. The labels do not necessarily refer to the mode of statutory analysis used by a court. Rather, the labels mean to convey in shorthand form the resultant scope of RICO's civil cause of action under a particular mode of statutory analysis. Specifically, a court adopting the strict approach interprets civil RICO in such a way that a plaintiff must initially allege a special type of injury, such as a competitive or racketeering enterprise injury. Effectively, this requires a plaintiff to allege his injury as another substantive element of a RICO violation and also increases the plaintiff's evidentiary burden at trial. Thereby, the strict approach narrows RICO's scope by precluding an enormous number of plaintiffs from bringing civil RICO suits. See *infra* notes 144-54 and accompanying text. In contrast, a court adopting the liberal approach interprets civil RICO in such a way that no specific type of injury is required. A plaintiff is required to allege only injury to business or property in accordance with the language of § 1964(c). The liberal approach neither imposes special pleading rules with regard to the plaintiff's injury or increases the plaintiff's evidentiary burden at trial. Thereby, the liberal approach permits many more civil RICO plaintiffs to reach court for trial on the merits than does the strict approach. It is submitted that Congress could not have intended such contradictory results, although courts adopting either approach claim to be effectuating congressional intent. This discrepancy in interpretation of the congressional intent and statutory language has created a compelling issue under present RICO jurisprudence.

23. See *supra* note 1. For a comprehensive analysis of RICO's legislative history, see 1 CORNELL INSTITUTE ON ORGANIZED CRIME, MATERIALS ON RICO 1213 (1980-81).

24. The Congressional Statement of Findings and Purpose, in part, states that: The Congress finds that (1) organized crime in the United States is a highly sophisticated, diversified, and widespread activity that annually drains

gress believed that it would serve as a strong deterrent against organized criminal and fraudulent activity.²⁵ Ideally, Congress primarily intended to remove the incentive to engage in unlawful *conduct* and

billions of dollars from America's economy by unlawful conduct and the illegal use of force, fraud, and corruption; (2) organized crime derives a major portion of its power through money obtained from such illegal endeavors as syndicated gambling, loan sharking, the theft and fencing of property, the importation and distribution of narcotics and other dangerous drugs, and other forms of social exploitation; (3) this money and power are increasingly used to infiltrate and corrupt legitimate business and labor unions and to subvert and corrupt our democratic processes; (4) organized crime activities in the United States weaken the stability of the Nation's economic system, harm innocent investors and competing organizations, interfere with free competition, seriously burden interstate and foreign commerce, threaten the domestic security, and undermine the general welfare of the Nation and its citizens; and (5) organized crime continues to grow because of defects in the evidence-gathering process of the law inhibiting the development of the legally admissible evidence necessary to bring criminal and other sanctions or remedies to bear on the unlawful activities of those engaged in organized crime and because the sanctions and remedies available to the Government are unnecessarily limited in scope and impact.

Organized Crime Control Act of 1970, Pub. L. No. 91-452, § 901(a), 84 Stat. 922, 922-23, (codified as amended at 18 U.S.C. §§ 1961-68 (1982)).

25. The Congressional Statement of Findings and Purpose goes on to state: It is the purpose of this Act to seek the eradication of organized crime in the United States by strengthening the legal tools in the evidence-gathering process, by establishing new penal prohibitions, and by providing enhanced sanctions and new remedies to deal with the unlawful activities of those engaged in organized crime.

Id. While Congress endeavored to create a new, strong weapon against certain unlawful conduct, at the same time it was not insensitive to potential constitutional problems that would arise if the statute were not carefully and precisely drafted. This concern is reflected throughout RICO jurisprudence and in scholarly commentaries. For example, one court has observed:

In drafting RICO, however, Congress was confronted with numerous concerns as to the viability of a statute that would be restricted in its application solely to organized criminals. From a constitutional perspective, such a restriction might have been vulnerable to due process attack on vagueness grounds. Additionally, the limitation might have been construed as placing impermissible restraints on the First Amendment right of freedom of association.

Windsor, 564 F. Supp. at 277. See also Note, *Civil RICO: The Temptation and Impropriety of Judicial Restriction*, 95 HARV. L. REV. 1101, 1107-08 (1982). The *Windsor* court also recognized Congress' concern for the practical difficulties in RICO's courtroom application:

[G]iven the inherent difficulties in defining "organized crime," several congressmen voiced the concern that, if RICO were restricted to "organized crime" members, proving a case under the statute would constitute quite a difficult endeavor. Not only would it have to be proven that the defen-

to eradicate its resulting harm, rather than to prohibit organized criminal or racketeer status *per se*.²⁶

Congress has expressed its concern for organized criminal conduct and its injurious effects on the nation's economic and social health for many years. In 1951, the Kefauver Committee,²⁷ the first Senate

dant being sued was affiliated with organized crime, but also the existence of the organized crime, whatever, that might mean.

Windsor, 564 F. Supp. at 277 (footnote omitted) (italics in original). In short, the congressional draftsmen did not go beyond proscribing a certain type of unlawful conduct to distinguish between minor and substantial unlawful conduct. The result is that RICO is a broadly-worded statute, just as Congress intended it to be. One law review article has discussed RICO's scope and the concomitant distinction between minor and substantial unlawful conduct by analogy to the "big fish" of organized crime. The authors conclude that RICO could justifiably be used against the "minnows" of crime and remain within the intended scope of the statute. Strafer, Massumi, and Skolnick, *Civil RICO in the Public Interest: "Everybody's Darling,"* 19 AM. CRIM. L. REV. 655, 682 (1982) [hereinafter cited as *Public Interest*]. "Indeed, one congressman argued that the broad reach of RICO is necessary because those who prey upon the small businessman and the consumer, the primary victims of organized crime, are not easily identified as 'big fish.'" *Id.* (footnote omitted).

26. The elusiveness of putting parameters on a concept such as prohibited conduct as opposed to a concept such as prohibited status is a difficulty that Congress knowingly accepted in drafting RICO. See *Public Interest*, *supra* note 25, at 681. By doing so, however, Congress hoped to redress and eradicate the harm caused by such prohibited conduct, as it was documented in various studies of criminal activity, not any particular status. See, e.g., *Organized Crime and Illicit Traffic in Narcotics: Hearings Before the Permanent Subcommittee on Investigations of the Committee on Governmental Operations*, 88th Cong., 1st Sess. (1963); PRESIDENT'S COMM'N ON LAW ENFORCEMENT AND ADMIN. OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY (1967) [hereinafter cited as PRESIDENT'S COMM'N]. See also UNITED STATES CHAMBER OF COMMERCE, WHITE COLLAR CRIME: EVERYONE'S PROBLEM, EVERYONE'S LOSS (1974); GAMBLING IN AMERICA: REPORT OF THE COMM'N ON THE REVIEW OF NAT'L POLICY TOWARDS GAMBLING (1976); and PENNSYLVANIA CRIME COMM'N, 1980 REPORT: A DECADE OF ORGANIZED CRIME. By emphasizing conduct, Congress meant to avoid creating statutory loopholes through which some criminals might slip. See *Schacht*, 711 F.2d at 1354-55 ("In short, Congress chose to provide civil remedies for an enormous variety of conduct, balancing the need to redress a broad social ill against the virtues of tight, but possibly overly astringent, legislative draftsmanship."). Representative Pepper remarked that harm from organized criminal activity "reaches out and takes some of the small amount of money that the poor and underprivileged in our society possesses (sic) . . . it threatens the very economic foundation of our society, since it substitutes threats and violence for free economic competition." *Organized Crime Control: Hearings on S.80 Before Subcomm. No. 5 of the House Comm. on the Judiciary*, 91st Cong., 2d Sess. (1970) (remarks of Rep. Pepper) [hereinafter cited as *House Hearings*].

27. The full name of the Kefauver Committee was Special Committee to Investigate Organized Crime in Interstate Commerce. See generally S. REP. NO. 307, 82d Cong., 1st Sess. (1951); S. REP. NO. 141, 82d Cong., 1st Sess. (1951); S. REP. NO. 2370, 81st Cong., 2d Sess (1950).

committee to study specifically the effects of organized criminal activity, reported that organized criminal activity affected state and local governments as well as legitimate businesses.²⁸ The Kefauver Committee reports focused on ways of strengthening then-existing laws and also led to the realization that "the key to power in the underworld" was money.²⁹ In 1960, the McClellan Committee³⁰ supplemented the Kefauver Committee's findings by exposing the national breadth and structural framework of the mafia as reflected in the labor and management fields.³¹ Congressional concern for the national crime problem was nearing its peak in 1967 when the Katzenbach Commission³² reported findings on and made recommendations for fighting against organized crime's infiltration of business.³³ Equally important was the

28. Some of the infiltrated industries listed by one of the reports include advertising, amusement, banking, boxing, cigarette distribution, communications, florists, garments, import-export, insurance, laundry, liquor, news services, newspapers, radio, real estate, sports, television, theaters, and transportation. S. REP. NO. 307, 82d Cong., 1st Sess. 170-81 (1951).

29. *House Hearings, supra* note 26, at 544 (testimony of ABA president Edward L. Wright). Subsequent to this testimony, one congressional purpose underlying RICO was to eliminate the economic power base of the underworld. The treble damage provision of § 1964(c) embodies this intent.

30. The full name of the McClellan Committee was Senate Select Committee on Improper Activities in the Labor or Management Field. *See generally* S. REP. NO. 1784, 87th Cong., 2d Sess. (1962); S. REP. NO. 621, 86th Cong., 2d Sess. (1960); S. REP. NO. 1417, 85th Cong., 2d Sess. (1958).

31. *See generally* S. REP. NO. 72, 89th Cong., 1st Sess. (1965).

32. The full name of the Katzenbach Commission was the President's Commission on Law Enforcement and Administration of Justice. *See generally* PRESIDENT'S COMM'N, *supra* note 26.

33. The President's Commission found that:

Control of business concerns has usually been acquired through one of four methods: (1) investing concealed profits acquired from gambling and other illegal activities; (2) accepting business interests in payment of the owner's gambling debts; (3) foreclosing on usurious loans; and (4) using various forms of extortion.

Id. at 190. One of the President's Commission's recommendations was to employ regulatory devices against organized criminal infiltration of business. *Id.* at 208. Professors Blakey (the Chief Counsel of the Senate Subcommittee on Criminal Laws and Procedure in 1969-70 when the Organized Crime Control Act of 1970 was processed) and Gettings have noted that the President's Commission recommended using regulatory devices against organized criminal activity due to the easier civil standard of proof, the possibility of discovery, and the value of antitrust-type remedies. Blakey & Gettings, *Racketeer Influenced and Corrupt Organizations (RICO): Basic Concepts—Criminal and Civil Remedies*, 53 TEMP. L.Q. 1009, 1015 n.25 (1980) (citing PRESIDENT'S COMM'N, *supra* note 26, at 208) [hereinafter cited as *Basic Concepts*]. "It was this insight (into the advantages of using regulatory devices) that was the origin of the two-track approach—criminal and civil—of RICO." *Id.*

work of the Brown Commission³⁴ which, between 1966 and 1971, studied federal criminal jurisprudence and characterized significant issues within the area of organized crime.³⁵

Congress first proposed the use of antitrust-type remedies to combat and to deter organized crime in 1967.³⁶ At this time, the Senate introduced bills 2048³⁷ and 2049³⁸ (the Early Bills) as proposed amendments to the antitrust laws. The Early Bills incorporated antitrust-type remedies for use against organized crime's infiltration into business.³⁹ The American Bar Association's Antitrust Section studied the Early Bills and recommended that they be separate criminal statutes, as opposed to being Sherman Act amendments.⁴⁰ The ABA believed that this would avoid a commingling of antitrust and criminal law purposes and would also avoid the imposition of such restrictive antitrust concepts as standing and proximate cause.⁴¹ As a result of

34. The full name of the Brown Commission was National Commission on the Reform of the Federal Criminal Laws. See generally *Consultants Report on Conspiracy and Organized Crime*, I WORKING PAPERS: NAT'L COMM'N ON REFORM OF FED. CRIMINAL LAWS (1970).

35. See Blakey, *The RICO Civil Fraud Action in Context: Reflections on Bennett v. Berg*, 58 NOTRE DAME L. REV. 237, 253 (1982) [hereinafter cited as *RICO in Context*]. Some of the insights gleaned were pertinent to the approximate scope of RICO's predicate offenses, concluding that "'ordinary commercial fraud' and 'crimes of violence' should be included in RICO." *Id.* at 253 n.47 (italics in original).

36. The Justice Department's earlier successes against the spread of criminal infiltration of various unions through the use of antitrust theories probably prompted Congress to utilize antitrust theories in their legislation. See, e.g., *Los Angeles Meat and Provision Drivers Union v. United States*, 371 U.S. 94, 103 (1962) (affirming termination of self-employed grease peddlers' union membership for illegal conspiracy to violate antitrust laws); *United States v. Pennsylvania Refuse Removal Ass'n*, 357 F.2d 806, 809 (3d Cir. 1966) (affirming jury instruction in prosecution for antitrust violations by refuse removers with respect to activity required to bring defendants within interstate commerce); *United States v. Bitz*, 282 F.2d 465, 468 (2d Cir. 1960) (charge of conspiracy to prevent shipment of newspapers and magazines in interstate commerce to suburban distributors refusing to pay financial tribute to conspirators held sufficient to charge antitrust violation).

37. S. 2048, 90th Cong., 1st Sess. (1967).

38. S. 2049, 90th Cong., 1st Sess. (1967).

39. S. 2048 prohibited the investment or business use of unreported income while S. 2049 focused upon "'investment' of proceeds from 'criminal activity' in a 'business enterprise.'" Blakey, *supra* note 35, at 254. S. 2049 also made actions for treble damages, as modeled upon the antitrust laws, available as remedies to victims of the proscribed activity. *Basic Concepts*, *supra* note 33, at 1016 n.27.

40. *House Hearings*, *supra* note 26, at 149.

41. The ABA suggested that the antitrust purposes of protecting free competition was not well suited to furthering the goal of eradicating organized crime's influence in the Nation's economy. *Id.* Antitrust standing is limited by the courts for three basic policy reasons. First, a successful antitrust claim could impose ruinous

these concerns, Congress took no action on either of these Early Bills.⁴²

Congress nevertheless continued its effort to produce new and stronger anti-racketeering legislation. In 1969, the Senate introduced Senate Bill 30, the Organized Crime Control Act of 1969 (OCCA).⁴³ OCCA provided for a broad variety of methods by which to attack organized criminal activity's influence on society; it did not, however, have any provision which could specifically be used against organized crime's infiltration into business. This was remedied two months later when Senator Hruska introduced Senate Bill 1623.⁴⁴ Senator Hruska's replacement bill supplanted the two Early Bills by combining the concepts of each, namely, the prohibition of organized crime's infiltration of business (enterprise criminality) and also the provision for private equitable relief and treble damages.⁴⁵ Congress specifically intended the treble damage provision to deter enterprise criminality. After hearings on both OCCA and Senator Hruska's bill, Senators McClellan and Hruska drafted another bill, apart from OCCA, which replaced

liability on a defendant through its award of treble damages; this increased liability could frustrate the promotion of free competition if antitrust standing is easily obtained. Second, limiting antitrust standing avoids speculative damages. The final policy reason for limiting antitrust standing to direct purchasers is to avoid the imposition of multiple liability upon a single defendant. Tannenbaum & Molo, *State and Local Governments' Use of the Treble Damages Remedy Under Civil RICO: A Means of Redressing the Economic Effects of Unlawful Conduct*, 35 BAYLOR L. REV. 1, 15 (1983) [hereinafter cited as *Government's Use of Civil RICO*]. The policy reasons supporting the restriction of antitrust standing do not justify the restriction of RICO standing. *Id.*

42. At the ABA's suggestion, Congress subsequently redrafted the Early Bills outside the antitrust context. See *infra* note 45 and accompanying text.

43. S. 30, 91st Cong., 1st Sess., 115 CONG. REC. 679 (1969). Various titles of the Act include: special grand juries (Title I), 18 U.S.C. §§ 3321-28 (1982); witness immunity (Title II), 18 U.S.C. §§ 6001-05 (1982); contempt (Title III), 28 U.S.C. § 1826 (1982); false statements (Title IV), 18 U.S.C. § 1623 (1982); protected housing facilities for government witnesses (Title V), Pub. L. No. 91-452 §§ 501-04, 84 Stat. 922, 933-34 (1970) (reproduced but not codified preceding 18 U.S.C. § 3481 (1982)); depositions (Title VI), 18 U.S.C. § 3503 (1982); special rule for litigation concerning sources of evidence (Title VII), 18 U.S.C. § 3504 (1982); enhanced sentencing for organized crime offenders (Title X), 18 U.S.C. § 3575 (1982). See *Basic Concepts*, *supra* note 33, at 1017.

44. The Criminal Activities Profits Act, S. 1623, 91st Cong., 1st Sess., 115 CONG. REC. 6995-96 (1969).

45. See *Basic Concepts*, *supra* note 33, at 1017; and *RICO in Context*, *supra* note 35, at 258-61. Senator Hruska commented that the "criminal provision . . . [was] intended primarily as an adjunct to the civil provision," which he "consider[ed] . . . the more important feature of the bill." *Id.* at 261. Further commenting on the use of the antitrust procedures in the organized crime context, Senator Hruska remarked that "the time has arrived for innovation in the organized crime fight . . . experts on organized crime will be able to conceive of additional applications of the law. The potential is great." *Id.* at 261 n.65.

both the Early Bills and Senator Hruska's earlier replacement bill. This jointly-drafted bill, Senate Bill 1861,⁴⁶ was RICO's immediate predecessor.

The jointly-drafted bill of Senators McClellan and Hruska produced significant additions and deletions to organized crime legislation in comparison to previous anti-racketeering legislation. The jointly drafted bill expanded the list of "racketeering activities"⁴⁷ in order to broaden the scope of proscribed activity, but it excluded both victim treble damages and injunctive actions. The Senate made these changes in order to streamline the legislation and to ease its passage by avoiding complex legal issues.⁴⁸ However, the inclusion of a mandatory liberal statutory construction clause did strengthen the jointly-drafted bill.⁴⁹ The mandatory construction clause, which is specifically directed to the courts, states that "[t]he provisions of [RICO] shall be liberally construed to effectuate its remedial purposes."⁵⁰ A redrafted version of OCCA incorporated the jointly-drafted bill along with the liberal construction clause, as Title IX, RICO, which the Senate passed before sending it to the House.⁵¹

After being sent to the House, the House Judiciary Committee both widened and narrowed the scope of OCCA.⁵² One particular House amendment to Title IX was significant, because it provided for private treble damage actions.⁵³ By narrowing the list of racketeering activities, Congress also narrowed OCCA's scope. The House then returned its version of OCCA to the Senate.

Upon the return of OCCA to the Senate, Senator McClellan argued for its immediate passage. Senator McClellan noted that the House amendments had a "clarifying and strengthening" effect on OCCA.⁵⁴ Upon Senators McClellan and Hruska's suggestions that a

46. The Corrupt Organizations Act of 1969, S. 1861, 91st Cong., 1st Sess., 115 CONG. REC. 9568-71 (1969).

47. The list of "racketeering activities" is a list of those state and federal crimes which are commonly committed by racketeers. See *infra* note 60 for a list of RICO's "racketeering activities." The racketeering activities are also called "predicate acts."

48. *Basic Concepts*, *supra* note 33, at 1017-18.

49. *Id.* Senator McClellan & Hruska's jointly-drafted bill further strengthened pre-existing proposed bills by the added provisions for civil investigative demands, criminal forfeitures, use immunity, and divestiture of assets. See also Bradley, *Racketeers, Congress, and the Courts: An Analysis of RICO*, 65 IOWA L. REV. 837, 841-43 (1980).

50. See *supra* note 8.

51. *Basic Concepts*, *supra* note 33, at 1019.

52. *Id.* at 1020.

53. See H.R. 19,586, 91st Cong., 2d Sess., 116 CONG. REC. 35,242 (1970).

54. *RICO in Context*, *supra* note 35, at 280. See 116 CONG. REC. 36,293 (1970).

conference was not necessary,⁵⁵ the Senate waived a conference study of the House amendments and accepted them. OCCA, with RICO as Title IX, became law on October 15, 1970.⁵⁶

The statutory language of civil RICO requires a plaintiff to allege injury to his "business or property by reason of a violation of section 1962."⁵⁷ Under section 1962,⁵⁸ a plaintiff is required to allege the ex-

55. Besides approval of the amendments there are other factors which also might have affected the suggestion not to hold conferences on the House-amended bill which might consequently have had a significant effect on judicial examination of RICO's legislative history. Specifically, when the Senate was considering holding a conference, both the end of that congressional session and upcoming elections were nearing. Both factors could tend to encourage hasty completion of pending legislative duties. See *Basic Concepts*, *supra* note 33, at 1021. See also *Sedima, S.P.R.L. v. Imrex Company, Inc.*, 741 F.2d 482, 492 (2d Cir. 1984) ("The clanging silence of the legislative history [pertaining to the scope of the House's private treble damage action amendment]").

56. 116 CONG. REC. 37,264 (1970).

57. The civil remedy section of RICO reads: "Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefore in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee." 18 U.S.C. § 1964(c) (1982).

58. Prohibited activities

(a) It shall be unlawful for any person who has received any income derived, directly or indirectly from a pattern of racketeering activity or through collection of an unlawful debt in which such person has participated as a principal within the meaning of section 2, title 18 United States Code, to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce. A purchase of securities on the open market for purposes of investment, and without the intention of controlling or participating in the control of the issuer, or of assisting another to do so, shall not be unlawful under this subsection if the securities of the issuer held by the purchaser, the members of his immediate family, and his or their accomplices in any pattern or racketeering activity or the collection of an unlawful debt after such purchase do not amount in the aggregate to one percent of the outstanding securities of any one class, and do not confer, either in law or in fact, the power to elect one or more directors of the issuer.

(b) It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

istence of seven elements: "(1) that the defendant (2) through the commission of two or more acts (3) constituting a 'pattern'⁵⁹ (4) of 'racketeering activity'⁶⁰ (5) directly or indirectly invests in, or maintains an interest in, or participates in (6) an 'enterprise'⁶¹ (7) the activities of which affect interstate or foreign commerce."⁶² Unfortunately, this

(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsections (a), (b), or (c) of this section. 18 U.S.C. § 1962 (1982) (note that civil RICO has the same elements as criminal RICO). RICO makes the collective, on-going activity, the type usually associated with organized crime, an offense separate from the underlying predicate act violations. *Catarella*, 583 F. Supp. at 1423.

59. "'Pattern of racketeering activity' requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity." 18 U.S.C. § 1961(5) (1982).

60. "Racketeering activity" means (A) any act or threat involving murder, kidnaping, gambling, arson, robbery, bribery, extortion, or dealing in narcotic or other dangerous drugs, which is chargeable under State law and punishable by imprisonment for more than one year; (B) any act which is indictable under any of the following provisions of title 18, United States Code: Section 201 (relating to bribery), section 224 (relating to sports bribery), sections 471, 472, and 473 (relating to counterfeiting), section 659 (relating to theft from interstate shipment) if the act indictable under section 659 is felonious, section 664 (relating to embezzlement from pension and welfare funds), sections 891-894 (relating to extortionate credit transactions), section 1084 (relating to the transmission of gambling information), section 1341 (relating to mail fraud), section 1343 (relating to wire fraud), section 1503 (relating to obstruction of justice), section 1510 (relating to obstruction of criminal investigations), section 1511 (relating to the obstruction of State or local law enforcement), section 1951 (relating to interference with commerce, robbery, or extortion), section 1952 (relating to racketeering), section 1953 (relating to interstate transportation of wagering paraphernalia), section 1954 (relating to unlawful welfare fund payments), section 1955 (relating to the prohibition of illegal gambling business), sections 2314 and 2315 (relating to interstate transportation of stolen property), sections 2341-2346 (relating to trafficking in contraband cigarettes), section 2421-24 (relating to white slave traffic), (C) any act which is indictable under title 29, United States Code, section 186 (dealing with restrictions on payments and loans to labor organizations) or section 501(c) (relating to embezzlement from union funds), or (D) any offense involving fraud connected with a case under title 11, fraud in the sale of securities, or the felonious manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in narcotic or other dangerous drugs, punishable under any law of the United States.

18 U.S.C. § 1961(1) (1982). These are the predicate acts of RICO.

61. "'Enterprise' includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity." 18 U.S.C. § 1961(4) (1982).

62. *Moss*, 719 F.2d at 17.

elemental breakdown of the terms of a substantive RICO violation had not proved to be clear to the courts when they interpreted and applied the statutory language of RICO.

For guidance in construing the terms of RICO's statutory language, the legislative history reveals several matters pertaining to congressional intent which deserve emphasis. First, Congress assiduously avoided any status-based limitations, such as "organized crime" or "racketeer."⁶³ Second, Congress enacted RICO apart from the antitrust laws to avoid the imputation of the antitrust laws' restrictive standing requirements and proximate cause precedent.⁶⁴ Third, Congress' deliberate extension of RICO to general commercial and other fraud and its awareness of the significance of this decision is also substantiated by the legislative history.⁶⁵ Finally, Congress intended the private treble damage provision to deter enterprise criminality and to provide relief for substantive RICO violations.⁶⁶

RICO's statutory language and the congressional intent which RICO embodies work together to create a statute of broad scope. Originally, Congress perceived the organized crime problem as one of great magnitude and as one which could permeate all aspects of everyday affairs. Congress subsequently drafted RICO broadly to encompass the range of activities susceptible to organized criminal involvement, to encompass all the participants of such unlawful activity, and to separate those convicted defendants from their ill-gotten gains. The statute's breadth is established through the wide-ranging list of predicate acts which partially constitute a RICO claim.⁶⁷ Such predicate offenses as mail and wire fraud, bribery, and fraud in the sale of securities allows the use of RICO against those not normally identified as "racketeers," since these offenses are commonly committed in business fraud and "white collar crime" cases.⁶⁸ Perceiving exactly

63. See *supra* notes 25 and 26 and accompanying text for a discussion of Congress' rejection of status-based limitations.

64. The policy reasons which support limiting antitrust standing and their inapplicability in the RICO context are discussed *supra* notes 41 and 42 and accompanying text.

65. Congress drafted RICO so that the Act would cover a broad range of unlawful conduct, including general fraud cases, because Congress perceived the organized crime problem itself to be pervasive. See *supra* notes 24 and 25 and accompanying text.

66. See *supra* notes 12, 36, 41, 45 and accompanying text.

67. See *supra* note 60 for a list of RICO's predicate acts.

68. The way in which the federal courts gain jurisdiction over racketeering claims under RICO is by the requirement that the enterprise's affairs affect interstate commerce. Patton, *Civil RICO: Statutory and Implied Elements of the Treble Damage*

how broad Congress intended RICO's scope to be, however, was not an inference necessarily available to the courts either from RICO's or OCCA's legislative history or from RICO's statutory language itself. The strict interpretational approach did provide one view of how broad Congress intended RICO's scope to be.

III. STRICT INTERPRETATION OF CIVIL RICO'S INJURY ELEMENT

Some federal district and appellate courts believed a broad use of RICO was unwarranted since, in their view, a broad use of RICO was based on a strained interpretation of the statutory language.⁶⁹ Objections to a broad use of RICO also arose from the effective imposition of federal liability in addition to existing state liability for business fraud claims.⁷⁰ Courts expressing concern over RICO's breadth typically emphasized the modeling of RICO's treble damage provision after the enforcement provision of the antitrust laws and, by analogy, imputed to RICO the same restrictive standing requirements as exist under the antitrust laws.⁷¹ The courts expressly imposed these restrictive requirements to narrow RICO's breadth and to decide RICO

Remedy, 14 TEX. TECH. L. REV. 377, 413 (1983). See Miller & Olson, *Recent Developments in Civil RICO*, 8 CORP. L. REV. 35, 36 (1985) (under RICO, almost any kind of business fraud claim can be pleaded as a racketeering activity). See RICO's list of predicate acts, *supra* note 60.

69. Comment, *Civil RICO Actions in Commercial Litigation: Racketeer or Businessman?*, 36 SW. L.J. 925, 949 (1982) (arguing that a broad use of RICO causes courts to diverge from the statutory purpose of uprooting organized crime; noting RICO's applicability to common securities fraud claims).

70. See *Seville Indus. Mach.*, 567 F. Supp. at 1157. For the view that RICO is not meant to impose duplicate federal liability but rather to ruin racketeers economically, see Note, *supra* note 8, at 1113. For a discussion of double jeopardy issues as they relate to RICO, see *United States v. Sutton*, 700 F.2d 1078 (6th Cir. 1983) (consecutive jail terms for RICO and predicate act violations do not violate double jeopardy clause); and *United States v. Frumento*, 563 F.2d 1083 (3d Cir. 1977) (federal RICO indictments are not barred by double jeopardy clause when defendants have previously been acquitted of predicate act violations in state court). See also Note, *Multiple Prosecutions and Punishments Under RICO: A Chip off the Old "Blockburger,"* 52 CIN. L. REV. 467 (1983) (arguing that double jeopardy clause does not allow multiple RICO prosecutions if predicate acts are common to all RICO charges but does permit multiple punishment: state and federal liability); and Note, *RICO and the Predicate Offenses: An Analysis of Double Jeopardy and Verdict Consistency Problems*, 58 NOTRE DAME L. REV. 382 (1982) (analyzing relationship between substantive RICO offense and predicate acts for double jeopardy and verdict consistency purposes).

71. The justification for this limitation is not derived solely from the language of the statute. Instead, many courts focus on the fact that the "by reason of" language is drawn directly from section four of the Clayton Act. In that Act the language has been construed to require plaintiffs to allege and prove an "antitrust injury," *e.g.*, [citation omitted] which

claims in conformity with assumed congressional intent.⁷² The purpose, scope, and impact of the strict interpretational approach is relevant to any consideration of a civil RICO amendment.

A. *Purposes of the Strict Interpretation Requirements*

The purposes which motivated some courts to restrict the breadth of RICO's civil injury provision were varied. Basically, these courts claimed to do either one of two things: adhere to the plain meaning of the statutory language or construe the Act in light of its perceived ambiguity.⁷³ This purpose was not dispositive, because the liberal interpretational courts claimed to follow almost the same method of interpretation. Specifically, the liberal interpretational courts claimed to adhere to the plain language of RICO or to construe RICO according to its broad terms.⁷⁴ Aside from a purpose based

the Supreme Court has defined as an "injury of the type the antitrust laws were intended to prevent." [citation omitted] By analogy, then, the "by reason of" language of section 1964(c) is intended to limit standing to those injured by a "racketeering injury," by an injury of the type RICO was designed to prevent.

Sedima, 741 F.2d at 494-95 (footnote omitted). The relevant antitrust language reads "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefore . . . and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee." Clayton Act § 4, 15 U.S.C. § 15(a) (1982).

72. "But there is simply no evidence that in creating RICO, Congress intended to create the broad civil cause of action that the reading of the statute given by its proponents would allow." *Sedima*, 741 F.2d at 487. "Both of these [injury] restrictions represent an attempt by the courts to narrow the application of RICO when used in situations the courts perceive as not within the intended application of RICO. . . ." Pray, *Application of the Racketeer Influenced and Corrupt Organizations Act (RICO) to Securities Violations*, 15 SEC. L. REV. 373, 399 (1983).

73. The *Sedima* circuit court argued that the Act's ambiguous language caused the court to construe the statute in light of Congress' purposes for enacting RICO. The court went on to cite *United States v. American Trucking Ass'ns*, 310 U.S. 534, 543 (1940), for the proposition that even where the plain language produces merely an unreasonable, but not necessarily absurd, result and one that varied with the general policy of the statute, that the court follow that purpose rather than the literal words. *Sedima*, 741 F.2d at 488 n.17. See also *Bankers Trust Co. v. Rhoades*, 741 F.2d 511, 517 (2d Cir. 1984) ("We regard [the distinct RICO injury requirement] as the plain meaning of section 1964(c)."). But c.f. *Turkette*, 452 U.S. at 580 (noting that there is no certain and errorless test for recognizing or labeling statutory language as plain or unambiguous). Apart from the ambiguousness or plain meaning of a statute, this note argues that the judicial process of disregarding the statutory language to follow the perceived general policy of the statute was not achieved by those courts which restricted RICO. RICO's general policy is one of broad scope. The courts did not follow this general policy for breadth when they restrictively construed RICO's treble damage provision.

74. "There are some ambiguities, to be sure, but the fact that RICO has been

upon the statutory language itself, those courts which restricted the breadth of RICO's civil injury element were also motivated by concerns beyond the statutory language.

The strict interpretational courts looked beyond the language to effectuate the perceived congressional intent as revealed in the legislative history.⁷⁵ The legislative history shows that the general intent behind RICO was to eradicate and to provide redress for acts of enterprise criminality, or the infiltration of organized crime elements into legitimate corporate enterprises.⁷⁶ At least two courts, however, noted the deficiencies of the legislative history in revealing congressional intent as regards the scope of RICO's civil injury element.⁷⁷ After noting the increased use of RICO's civil cause of action outside the organized crime context,⁷⁸ at least one court justified its restriction of civil RICO on this deficiency of the legislative history.⁷⁹ In short, the strict interpretational courts perceived no express congressional intent pertaining to the treble damage provision and, thereby, used this to justify their court-imposed limitations.

The strict interpretational courts also justified their court-imposed limitations on concerns for federalism or comity. Since many of RICO's predicate acts⁸⁰ are based on violations of state law, RICO has the potential to increase dramatically the workload of the federal

applied in situations not expressly anticipated by Congress does not demonstrate ambiguity. It demonstrates breadth." *Haroco, Inc. v. American National Bank and Trust Co. of Chicago*, 747 F.2d 384, 398 (7th Cir. 1985).

75. See, e.g., *Sedima*, 741 F.2d at 488 (finding it necessary to look at the congressional intent behind RICO to construe its ambiguous terms); *United States v. Ivic*, 700 F.2d 51, 60 (2d Cir. 1983) (finding it necessary to look beyond the mere isolated words of the Act and to the drafters' expressed intentions).

76. See Congressional Statement of Findings and Purpose, *quoted supra*, at note 24. See also *Sedima*, 741 F.2d at 487 (RICO "was an attempt to deal with organized crime as an economic phenomenon"); *Ivic*, 700 F.2d at 63 (stating that core purpose of RICO is elimination of infiltration of business by organized crime elements; essential to determination of RICO's applicability is presence of mercenary motive by perpetrators of the unlawful acts).

77. *Sedima*, 741 F.2d at 492 (implying that silence of legislative history and use of RICO in cases not involving organized crime should require courts to impose limitations to best effectuate congressional intent); *Bankers Trust*, 741 F.2d at 517 (finding that silence of legislative history and adaptation of antitrust remedy to RICO plainly requires courts to impose limitations on RICO's civil injury element).

78. The *Sedima* circuit court was concerned about damaging the reputation of respected and legitimate businesses such as American Express, E.F. Hutton & Co., and Lloyd's of London, "to name a few." 741 F.2d at 487.

79. *Sedima*, 741 F.2d at 492.

80. See *supra* note 60.

courts.⁸¹ Some courts expressed their concern over the propriety of this alteration of the federal-state court balance. These federalism concerns and the lack of any clear statement,⁸² in either OCCA or the legislative history, to federalize "garden variety" fraud cases⁸³ caused some courts to infer that Congress did not intend to federalize so many state law claims. These courts consequently restricted the scope of RICO's civil injury provision based upon this inferred congressional intent⁸⁴ and limited the types and number of cases to which RICO would be applicable.

81. *Bennett v. Berg*, 685 F.2d 1053, 1064 (8th Cir. 1982) (finding that refusal to restrict RICO may cause extension of RICO's use to cases where redressability was previously available in state courts only), *aff'd en banc*, 710 F.2d 1361 (8th Cir. 1983). This extension of federal jurisdiction alters the balance between the federal and state court systems by reducing the state courts' jurisdictional authority and by increasing the federal courts' jurisdictional authority. Hence, the federal docket is increasingly burdened and concerns for federalism arise.

82. One commentator has recently discussed the significance of the "clear statement" of congressional intent to federalize issues which were traditionally under the states' authority. He argues that such a statement is necessary to prevent federal intrusion into state affairs by forcing legislative debates on the issue of whether such federalization should occur. Comment, *Reading the "Enterprise" Element Back Into RICO: Sections 1964 and 1964(c)*, 76 Nw. L. REV. 100, 123-24 (1981). The Supreme Court, however, impliedly has not adopted this view:

Congress nonetheless proceeded to enact the measure, knowing that it would alter somewhat the role of the Federal Government in the war against organized crime and that the alteration would entail prosecutions involving acts of racketeering that are also crimes under state law. There is no argument that Congress acted beyond its power in so doing. That being the case, the courts are without authority to restrict the application of the statute.

Turkette, 452 U.S. at 587. Another court has adopted the view that the judiciary should defer to Congress on this issue. *Bennett*, 685 F.2d at 1064 ("we are cautioned by the Supreme Court that broad congressional action should not be restricted by the courts in the name of federalism."). See also *Schacht*, 711 F.2d at 1355 (finding that federalism arguments are nothing more than a dispute with RICO's design and not with its mere application).

83. The courts using the term "garden variety" to describe certain fraud cases do not explicitly define this term. Apparently, "garden variety" is a term of art meant to distinguish ordinary or commonplace fraud cases from more sophisticated fraud cases. Presumably, a sophisticated fraud case would involve many people, both perpetrators and victims, and a complex scheme; it would require a lot of time, and a lot of money would be at stake. Conversely, a "garden variety" fraud case would apparently be small-scale and not involve extremely high stakes.

84. One court is of the opinion that, while RICO does bring some common law claims within its purview, not all common law fraud claims are encompassed by it, contrary to the arguments of RICO opponents. The specific types of common law fraud claims within RICO's scope are those involving an enterprise which engages in or effects interstate commerce. *Bennett*, 685 F.2d at 1064.

B. Scope of Strict Interpretation Requirements

Courts which desired to restrict the scope of civil RICO through its injury element commonly employed one of two means to accomplish this goal. One method was to require that the plaintiff allege a competitive injury.⁸⁵ The other method was to require that the plaintiff allege a racketeering enterprise injury.

1. The Competitive Injury Limitation

The competitive injury limitation required that the plaintiff be indirectly injured in his capacity as a competitor.⁸⁶ In other words, a plaintiff who was harmed *directly* by a pattern of racketeering committed by or through an enterprise would not be able to recover damages for his injury.⁸⁷ For example, Business A, whose purchasing clerk regularly made kickback payments to one of the company's suppliers, would not be able to file a RICO claim against the clerk and the supplier, because the net loss of money would directly affect the business' finances. However Business B, which bought the same supplies from the same supplier but which did not pay the lower rates for the goods (assuming Business B is not paying kickbacks) would be indirectly injured. Theoretically, Business B's ability to compete with Business A would be lessened, and so, Business B would be able to bring a civil RICO suit against the supplier, Business A's supply clerk and possibly Business A if it could be proven that Business A's intent was to participate in the scheme to weaken Business B's competitive ability. Evidence incriminating Business A would probably not be available where, as this hypothetical assumes, Business A was unaware of its supply clerk's activities. In short, both Businesses A and B would have suffered harm to their business or property by the supplier and supply clerk's scheme. However, only Business B, as the indirectly-injured party, would have been able to file a civil RICO claim and have the opportunity to collect costs, attorney fees, and treble damages.

The justifying rationale for the competitive injury requirement is based upon an analogy between one of RICO's stated purposes and

85. North Barrington Development, Inc. v. Fanslow, 547 F. Supp. 207, 211 (N.D. Ill. 1980), was one of the first cases to require a competitive injury under civil RICO.

86. *Catanela*, 583 F. Supp. at 1431. The *Catanela* case has a good analysis and discussion of both the competitive injury and racketeering enterprise injury limitations.

87. *Id.* (noting that competitive injury limitation borrows indirect injury requirement from antitrust law and incorporates it into RICO context).

RICO's language to the purpose and language of section four of the Clayton Act.⁸⁸ One purpose of RICO is to prevent any interference with free competition.⁸⁹ The purpose of the antitrust laws is to promote free competition. Moreover, the language of RICO's treble damage provision is virtually parallel to the language of the antitrust laws' enforcement provisions.⁹⁰ The strict constructionist courts used these similarities to construe RICO's treble damage provision in what appeared to be the most logical fashion⁹¹ and to incorporate the restrictive antitrust standing concepts into the RICO context. This approach to judicial construction of RICO'S treble damage provision resulted in the court-imposed limitation of the competitive injury requirement.⁹²

Not all courts which adopted the competitive injury requirement agreed on its essential nature. One court additionally required a causal connection between the injury sustained and the section 1962 violation.⁹³ Another court explicitly rejected the competitive injury requirement but did require a "commercial" racketeering enterprise injury, which arguably more closely resembled a competitive injury than a racketeering enterprise injury.⁹⁴ In spite of this disagreement, most

88. *North Barrington*, 547 F. Supp. at 210-11 (concentrating on RICO's express purposes); *Harper v. New Japan Securities Int'l, Inc.*, 545 F. Supp. 1002, 1008 (C.D. Cal. 1982) (concentrating on similarity of language between RICO and antitrust laws). While the *North Barrington* rationale was later rejected by the Seventh Circuit in *Schacht*, 711 F.2d at 1358, the *North Barrington* rationale has continued to be expressed in one form or another by other courts. Shortcomings of the *North Barrington* analysis must be noted here. While the *North Barrington* court validly stated that one purpose of RICO was to prevent interference with free competition, the court neglected to distinguish between different types of interference, *i.e.*, economic, criminal, political, etc. The *North Barrington* court also inferred and asserted, without supporting authority, that another purpose of RICO was not to transform state law violations into federal violations. *North Barrington*, 547 F. Supp. at 210. The problem with this court-inferred purpose is that the court confused a possible objectionable side effect of RICO prosecutions with implied congressional intent. The two are not necessarily identical and should not be relied upon in deciding cases. See *supra* notes 65-68 and accompanying text.

89. See Congressional Statement of Findings and Purpose, *supra* note 24.

90. See *supra* notes 57 and 71.

91. *Catanella*, 583 F. Supp. at 1431 (citing *New Japan Securities*, 545 F. Supp. at 1007, 1008).

92. *Id.*

93. *New Japan Securities*, 545 F. Supp. at 1008. The causal connection requirement of the *New Japan Securities* court is probably more in the nature of a racketeering enterprise injury. *Catanella*, 583 F. Supp. at 1431.

94. *Van Schaick v. Church of Scientology of Cal., Inc.*, 535 F. Supp. 1125, 1137 n.11 (D. Mass. 1982). This case is very often cited in connection with the competitive injury limitation.

courts either rejected the competitive injury limitation⁹⁵ or strictly construed the treble damage provision through other means.⁹⁶

2. The Racketeering Enterprise Injury Limitation

The other method by which courts attempted to narrow the scope of civil RICO was to require that the plaintiff allege a "racketeering enterprise injury." Those courts which imposed the racketeering enterprise injury limitation implicitly assumed that there was a substantive difference between an injury caused by the predicate act violation and an injury caused by the civil RICO violation. The resulting problem was that these courts did not state what that substantive difference was. These courts subsequently required a plaintiff to allege "something more" than that injury caused merely by the predicate act violations.⁹⁷ The "something more" was what was commonly defined as a separate, distinct racketeering enterprise injury.⁹⁸

The courts also attempted to define racketeering enterprise injury by way of illustration. For example, one court described it as a "loss of control over an ongoing enterprise due to infiltration by use of two concerted prohibited offenses . . . or a competitive injury to a legitimate enterprise by that racketeering activity."⁹⁹ This attempted definition seemingly blurred any distinctions between the competitive injury and racketeering enterprise injury requirements.¹⁰⁰

95. See, e.g., *Schacht*, 711 F.2d at 1358 (stating a reluctance to undermine RICO's deterrent effect by imposing competitive injury requirement); *Bennett*, 685 F.2d at 1059 (finding that RICO does not require competitive injury); *Mauriber*, 567 F. Supp. at 1240-41 (noting that competitive injury requirement is not consistent with RICO's legislative history); *Hellenic Lines, Ltd. v. O'Hearn*, 523 F. Supp. 244, 248 (S.D.N.Y. 1981) (finding neither express nor implied requirement for competitive injury).

96. See, e.g., *In re Action Industries Tender Offer*, 572 F. Supp. 846, 851-52 (E.D. Va. 1983) (racketeering injury); *Guerrero v. Katzen*, 571 F. Supp. 714, 720 n.6 (D.D.C. 1983) (RICO injury); *Barker v. Underwriters at Lloyd's, London*, 564 F. Supp. 352, 358 (E.D. Mich. 1983) (racketeering enterprise injury); *Landmark Savings & Loan v. Rhoades*, 527 F. Supp. 206, 208-09 (E.D. Mich. 1981) (racketeer enterprise injury).

97. Evidently, the greatest difficulty with the racketeering enterprise injury limitation is that it defies definition. *Laterza*, 581 F. Supp. at 414. A few courts have even gone so far as to paraphrase Justice Stewart's famous remark in *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1963), to state that "courts recognize a racketeering enterprise injury when they see it." See *Willamette Savings and Loan*, 577 F. Supp. at 1430; *Waste Recovery Corp. v. Mahler*, 566 F. Supp. 1466, 1468 (S.D.N.Y. 1983).

98. *Furman*, 741 F.2d at 527; *Seville Indus. Mach.*, 567 F. Supp. at 1157.

99. *Dakis v. Chapman*, 574 F. Supp. 757 (N.D. Cal. 1983).

100. *Catanella*, 583 F. Supp. at 1435 (noting that the *Schacht* court impliedly suggested that the two civil injury limitations were synonymous). See *Schacht*, 711 F.2d at 1356-58. See also *Swanson v. Wabash*, 577 F. Supp. 1308, 1319 (N.D. Ill. 1983) (noting that some authorities consider the two civil injury limitations to be essentially the same thing).

This attempted definition further indicates the difficulties courts encountered in establishing and describing the nature of the racketeering enterprise injury limitation.

In contrast, some courts held that "competitive injury" was not synonymous with "racketeering enterprise injury." One court noted that the two civil injury limitations might frequently overlap but also argued that the two injury limitations were not necessarily identical.¹⁰¹ Others argued that the racketeering enterprise injury limitation was probably broader than or was perhaps "a more elaborate version" of the competitive injury limitation.¹⁰²

No matter how courts dealt with this elusive concept, the racketeering enterprise injury apparently seemed to require some form of indirect injury. The necessity of proving an indirect injury arose from the strict constructionist courts' requirement of an injury that was "something more" than injury from the predicate acts themselves. "To hold that the injuries must be something more or different from those flowing from the predicate acts is to imply that the damages must be *indirect*. This direct versus indirect distinction harkens back to the antitrust analogy."¹⁰³ The advantage of this analysis, moreover, was that, while it harkened back to the antitrust analogy, it did not explicitly adopt the antitrust analogy. The racketeering enterprise injury limitation seemed to be the answer for those courts which desired to limit civil RICO, yet which were reluctant to adopt the antitrust analogy rationale. The only shortcoming of this approach was that sometimes courts requiring a racketeering enterprise injury did explicitly rely upon the antitrust analogy to justify their court-imposed limitation.¹⁰⁴

Judicial discomfort with the scope of RICO's civil cause of action was the most common justification for the racketeering enterprise injury limitation. One court evidenced its discomfort with RICO's breadth when it noted that imposition of RICO liability on top of an already compensable injury was not within Congress' intent.¹⁰⁵ Those courts which acknowledged the shortcomings of the antitrust analogy and which expressed discomfort with RICO's scope could skirt the

101. *Willamette Savings and Loan*, 577 F. Supp. at 1429.

102. *See Public Interest*, *supra* note 25, at 707.

103. *Catarella*, 583 F. Supp. at 1434-35 (emphasis in original).

104. *Barker*, 564 F. Supp. at 358 (court noted that other cases "have used the same analogy to the antitrust laws to interpret [the civil damage section] as requiring that plaintiff suffer 'racketeering enterprise injury'").

105. *Johnson v. Rogers*, 551 F. Supp. 281, 285 (C.D. Cal. 1982) (finding that Congress did not intend § 1964(c) to provide an additional remedy for an injury already compensable under the securities laws).

more tenuous antitrust arguments and still restrict the use of civil RICO through the racketeering enterprise injury limitation.¹⁰⁶ The racketeering enterprise injury limitation, as well as the competitive injury limitation, effectively narrowed the scope of the civil RICO cause of action and the correlative opportunity to assess treble damages against a defendant. However, these court-imposed limitations impacted upon federal jurisprudence in additional ways.

C. Impact of the Strict Interpretation Requirements

The strict interpretational approach affected many diverse groups within the legal system. The primary beneficiaries of a strict approach to RICO were potential RICO defendants. The strict interpretational courts narrowed civil RICO in order to check prosecutorial abuse in business fraud cases; consequently, the use of RICO outside the business fraud area was also curtailed. Specifically, in those cases not involving pure business fraud, such as cases where organized criminal involvement was apparent from the pleadings, a defendant would likely not have to have been concerned about defending against a RICO charge when the court required the plaintiff to allege a competitive or racketeering enterprise injury.¹⁰⁷ The defendant would be practically free of worry about a RICO defense due to the low probability that a plaintiff would successfully plead either of these court-imposed limitations.¹⁰⁸

Alternatively, the strict interpretational approach decreased the deterrent effect of the treble damage provision. These court-imposed limitations effectively created loopholes through which some defendants could slip.¹⁰⁹ Even if a defendant had engaged in the very type of unlawful activity proscribed by RICO, a plaintiff's failure to plead successfully either a competitive or racketeering enterprise injury

106. *Catanella*, 583 F. Supp. at 1434.

107. For a case in which the court explicitly refused to impose a competitive injury requirement precisely because of this implication, see, e.g., *Hellenic Lines*, 523 F. Supp. at 248 (rejecting competitive injury requirement where plaintiffs suffered harm to business and property and where pleadings sufficiently established the enterprise and pattern of racketeering activity through allegations of bribery, kickbacks, and fraud).

108. See *supra* note 33; see also *infra* notes 151-53 and accompanying text.

109. An argument addressing the issue of this RICO loophole concerns the possibility of frivolous private RICO actions and the escape valve which this loophole provides. If Congress was as concerned with vexatious litigation as it was with deterring and punishing unlawful activity, it would also have provided a cause of action to stem frivolous civil RICO suits. Congress, however, did not do this. Note, *supra* note 25, at 1116-17.

would disallow any seemingly valid RICO claim against the defendant.¹¹⁰ A statutory construction which would allow targeted defendants to escape liability is contrary to the aim of vigorous law enforcement.

The strict interpretational approach adversely affected that group of victims who were directly injured by racketeering activity. They were adversely effected by the strict limitations since they were denied standing to sue and were, thereby, left without the remedy Congress specifically intended to provide.¹¹¹ The strict constructionist approach inhibits at least this one aim of RICO: to provide "new remedies to deal with the unlawful actions of those engaged in organized crime."¹¹²

The roles of both Congress and the judiciary were also adversely effected by the implications of the strict constructionist approach. The resultant loopholes for certain defendants and the denial of relief to racketeering's direct victims frustrated the congressional intent underlying RICO.¹¹³ The resultant loopholes and denial of direct victim relief, by limiting the opportunity to assess treble damages against certain defendants, did not further the congressional intent of eradicating the economic base of those defendants who allegedly violated RICO.¹¹⁴ Consequently, the strict interpretational approach also frustrated the legislative intent reflected in the statutory language by the liberal construction clause.¹¹⁵ The role of the judiciary was

110. See *infra* notes 151-53.

111. "[The court] can imagine no construction of [the treble damage provision] which would exclude from [its] coverage the primary victims of such [racketeering activity] and which would render such defendants immune from civil sanctions." *Mauriber*, 567 F. Supp. at 1240. See also *Parnes v. Heinold Commodities, Inc.*, 487 F. Supp. 645 (N.D. Ill. 1980) (person who suffered direct injury after investing in fraudulent commodities investment scheme has standing to sue under RICO).

112. Congressional Statement of Findings and Purpose, *supra* note 25.

113. The multi-faceted intent of RICO encompasses both the detection and deterrence of individual criminals and the eradication of the illegal profits the criminals acquire. *Turkette*, 452 U.S. at 593. The strict constructionist courts seemed to overlook this dual purpose when they focused upon the express purpose of avoiding interference with free competition, as noted in the Congressional Statement of Findings and Purpose, when they borrowed from the antitrust laws to limit RICO's use to only indirectly injured victims.

114. "The aim [of RICO] is to divest the association of the fruits of its ill-gotten gains." *Turkette*, 452 U.S. at 585.

115. The liberal construction clause should be used as a guide to discern and carry out, not frustrate, the legislative will as reflected in the statutory language. To do otherwise would obstruct expressly-adopted social policy. Note, *Liberal Construction of Title IX of the Organized Crime Control Act of 1970: Section 904(a) v. The Doctrine of Strict Construction*, 12 *RUTGERS L.J.* 69, 74-77 (1980) [hereinafter cited as

similarly altered when the courts imposed a strict construction upon civil RICO. Those cases requiring special injury limitations established a body of precedent which allowed for judicial law-making.¹¹⁶ The strict constructionist approach, therefore, effectively diminished the power of Congress to make certain decisions and simultaneously expanded the judiciary's power to make those same decisions.¹¹⁷

The competitive injury and racketeering enterprise injury limitations do effectively limit the potential for prosecutorial abuse which is inherent under RICO. Notwithstanding the difficulties these limitations place before individual plaintiffs, though, the underlying rationales of the strict interpretational courts increased rather than decreased the uncertainties already pertaining to this relatively new statute. The more liberal courts, however, provided an alternative perspective and approach by which RICO's civil injury element could be construed.

IV. LIBERAL INTERPRETATION OF CIVIL RICO'S INJURY ELEMENT

Those courts which liberally interpreted RICO's civil injury element did not develop any concepts analogous to either the competitive injury or racketeering enterprise injury concepts. The liberal interpretational courts typically focused upon the specific elements of a substantive RICO violation, as required by section 1962. Assuming those specific elements were pleaded, the liberal interpretational courts did not go further and require that an injured plaintiff plead a specific type of injury.¹¹⁸ The liberal interpretational courts objected to the

Liberal Construction of Title IX]. "The clause, however, is not an invitation to the courts to expand the scope of RICO to the outer limits of imagination; rather, it is an instruction to the courts not to narrowly construe a statute meant to have broad application." *Id.* at 77. "Because no constitutional impediments deny Congress' ability to provide interpretational clauses, courts have no basis for refusing to obey the express liberal construction mandate in civil RICO." Note, *supra* note 6, at 184.

116. Note, *RICO: Are the Courts Construing the Legislative History Rather Than the Statute Itself?*, 55 NOTRE DAME LAW. 777 (1980).

117. *Cf. Haroco*, 747 F.2d 384 at 399 (7th Cir. 1985) (such judicial activism would be warranted if the safety or stability "of the Republic" demanded it). The courts tended to confuse the aspect of the occasion for enacting RICO (organized crime) with the statute's scope (enterprise criminality). *Basic Concepts*, *supra* note 33, at 1019 n.55.

118. One reaches this conclusion by examining the method of analysis used by the liberal courts. The liberal courts typically analyze the competitive and racketeering enterprise injury limitations and advance their arguments for rejection of the limitations. The liberal courts then concentrate their analysis upon each of the substantive elements required by section 1962 to determine whether the plaintiff's claim should be dismissed at the pleading stage. The result is that sufficient compliance in alleging

seemingly apparent frustration of congressional intent and misapplication of the statute's plain language which, they felt, a narrow use of civil RICO would cause.¹¹⁹ Therefore, those courts which construed RICO broadly did so primarily in reliance upon the statute's plain meaning, the liberal construction clause, the concern to prevent the creation of statutory loopholes, and the reluctance to engage in judicial law-making. The insights acquired by examining the purpose, scope, and impact of the liberal interpretational approach are also relevant to the issue of whether Congress should amend RICO's civil remedy provision.

A. *Purposes of the Liberal Interpretational Approach*

The threefold purposes of those courts which broadly construed civil RICO focused upon the statutory language, congressional intent, and the role of the judiciary. The liberal constructionist courts first looked at the statute's language to determine the scope of congressional intent behind it.¹²⁰ These courts based their statutory analysis upon a principle of statutory construction which provides that "absent clear evidence of a contrary, legislative intention, a statute should be interpreted according to its plain language."¹²¹ This principle requires an examination of the statutes for words of express limitation and for words which are logically and reasonably subject to a restrictive limitation.¹²² The Supreme Court, in *United States v. Turkette*,¹²³

RICO's substantive elements saves the complaint from dismissal, and the case is allowed to proceed. For a thorough list of cases which follow this method in rejecting the competitive injury limitation and for a persuasive argument rejecting the racketeer enterprise limitation, see *Cantanella*, 583 F. Supp. at 1431-32, 1434-37.

119. See, e.g., *Bunker Ramo Corp. v. United Business Forms, Inc.*, 713 F.2d 1272, 1288 (7th Cir. 1983) (narrow reading disagrees with RICO's plain meaning and congressional intent); *Eisenberg*, 564 F. Supp. at 1353-54 (bound by the *Turkette* Court's broad reading of statute and by underlying federal policy); *Windsor*, 564 F. Supp. at 279 (restrictive reading of RICO violates liberal meaning of statute and congressional intent).

120. See, e.g., *Turkette*, 452 U.S. at 580 (first look to statutory language to determine statute's scope); *Bankers Trust*, 741 F.2d at 518 (Cardamone, J., dissenting) (determining statute's scope logically requires first looking at its language).

121. *Bankers Trust*, 741 F.2d at 518 (citing *United States v. Apfelbaum*, 445 U.S. 115, 121 (1980)). The *Turkette* Court has similarly phrased this doctrine of statutory construction. 452 U.S. at 580 (citing *Consumer Product Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980)) ("[Notwithstanding] a clearly expressed legislative intent to the contrary, [the statute's] language must ordinarily be regarded as conclusive.").

122. The mechanics of this doctrine of statutory construction implicitly require this form of analysis, *Bankers Trust*, 741 F.2d at 519.

123. 452 U.S. 576.

began its analysis of criminal RICO's¹²⁴ enterprise element with this doctrine of statutory construction. The *Turkette* Court held RICO's "enterprise" element encompassed both legitimate and illegitimate enterprises.¹²⁵ The *Turkette* Court found no express restrictions upon the various associations encompassed by RICO's statutory definition of "enterprise"¹²⁶ and rejected the lower court's rationale for limiting the term to encompass only legitimate enterprises as being inadequate. The Court neither found any uncertainty in the language or structure of RICO's statutory definition nor did it find that any internal inconsistencies were created when the enterprise element was construed broadly.¹²⁷ Consequently, the *Turkette* Court refused to limit the scope of the enterprise element.

The arguments of those courts which broadly construed RICO's treble damage provision are analogous to the arguments supporting a liberal construction of RICO's enterprise element advanced by the *Turkette* Court.¹²⁸ The treble damage provision authorizes "any person" injured in his "business or property" by a violation of section 1962 to sue and "recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee."¹²⁹ The liberal constructionist courts found no express terms of limitation in this language.¹³⁰ The liberal view also found no implicit restrictive limitations discernible within the statutory language.¹³¹ Civil RICO requires

124. See *supra* note 3.

125. 452 U.S. at 580.

126. *Id.*

127. *Id.* at 581, 585.

128. Three Second Circuit cases reflect an amalgam of the arguments advanced by other liberal courts and also cite to opinions of those courts. See *Sedima*, 741 F.2d at 508-10 (Cardamone, J., dissenting) (advances various policy arguments for not restricting RICO which are analogous to those policy arguments advanced by the *Turkette* Court; cannot sanction a veiled attempt to limit RICO to organize crime; legislative history does not support limited reading; judicial creativity produces inconsistency and confusion); *Bankers Trust*, 741 F.2d at 518-20 (Cardamone, J., dissenting) (analyzes explicit and implicit meaning of statutory language and examines legislative history); *Furman*, 741 F.2d at 527-30 (analyses both RICO's language and legislative history concluding that narrow reading is contrary to a correct interpretation). The *Furman* case is interesting for holding that a special RICO injury is required but also for expressing the opinion that a special injury should not be required. The reason for this inconsistency is that the *Furman* court felt bound by the precedent established by *Sedima* and *Bankers Trust*, cases which were decided by different panels of the court.

129. See *supra* note 57 for the full quote of the treble damage provision.

130. See, e.g., *Haroco*, 747 F.2d at 392, 398 (Congress chose broad terms to ensure the effectiveness of both the criminal and civil provisions; language is extraordinarily broad, not ambiguous).

131. E.g., *Bankers Trust*, 741 F.2d at 519 (Cardamone, J., dissenting) (finding neither express words of limitation nor language susceptible of restrictive limitation).

an "injury" which, the liberal courts argued, logically included *any* injury by reason of a section 1962 violation.¹³² The meaning of "business" was taken to mean any commercial undertaking;¹³³ "property" was taken to mean "'anything of material value owned or possessed,' including the presently possessed right to receive something of material value in the future."¹³⁴ These courts also used the mandate of the liberal construction clause to justify a broad construction of civil RICO's treble damage provision.¹³⁵ These courts, consequently, did not dismiss the RICO claim at the pleading stage for failure to allege a special type of injury, as the strict constructionist courts would have done. Instead, if the complaint adequately alleged all the substantive elements of a section 1962 violation, the liberal interpretational courts found civil RICO's injury language to be broad and allowed the RICO claim to proceed.

Additionally, the liberal interpretational courts also examined RICO's legislative history for evidence of intent which was contrary to a broad construction of the statutory language.¹³⁶ The legislative history revealed the extent of the national crime problem and its effect on the national economy.¹³⁷ Congress reacted to this problem by commissioning studies of the crime problem and by proposing various bills aimed at the eradication of this problem and its effects on the economy. The liberal courts noted that RICO's legislative history showed Congress' concern for the potential constitutional problems inherent with status-based legislation, laws proscribing organized crime *per se*, and the impossibility of defining a generic term such as "organized crime."¹³⁸ To avoid these problems, Congress refused to proscribe any particular group of persons or organizations but, rather, chose to proscribe that type of conduct affecting the national economy

132. RICO was designed to protect both direct and second-order victims of organized crime infiltration. *Schacht*, 711 F.2d at 1358. Since RICO grants civil relief for "injury," this logically includes *any* injury to business or property. *Furman*, 741 F.2d at 528.

133. "Business" also includes a person's employment. *Public Interest*, *supra* note 25, at 690.

134. *Id.* at 691. For another author's view that the meaning of "business or property" should be interpreted broadly, see *Government's Use of Civil Rico*, *supra* note 41, at 15.

135. See *supra* text accompanying notes 49-51.

136. This step in the analysis of RICO's civil injury element is required by the doctrine of statutory construction which the liberal courts utilize. See *supra* text accompanying note 121 for a statement of this doctrine of statutory construction.

137. See *supra* notes 23-35 and accompanying text for a more detailed discussion of the national crime problem and its effects on the economy.

138. See *supra* note 25.

typically committed by organized criminals.¹³⁹ The liberal constructionist courts found that the congressional intent underlying this legislative decision was to rid society of commercial criminal activities regardless of the group committing them. The basic congressional goal, as the liberal courts read the legislative history, was to encompass a wide range of criminal business activities, notwithstanding the fact that many persons not associated with a criminal organization would be liable under RICO for their own illegal conduct. Since an additional congressional goal was to remove the financial power base accruing from such criminal activity, the liberal courts viewed a broad construction of the treble damage provision as a means of furthering this goal and a proper application of the statutory language.¹⁴⁰

To stay within the proper judicial boundaries, the liberal courts also felt obliged to construe civil RICO's injury element broadly, since the plain meaning of the statute's language and its legislative history supported such a construction. The liberal courts typically noted the potential expanse of civil RICO but also disavowed any judicial duty to reassess the costs and benefits of civil RICO litigation.¹⁴¹ These courts considered that duty as more properly belonging to the legislature.¹⁴² The liberal courts argued that doing otherwise, by imposing restrictive limitations on civil RICO's injury element, would constitute both judicial activism and a usurpation of legislative functions.¹⁴³ The liberal courts further justified a broad interpretation of the injury element, therefore, as part of their judicial duty to construe RICO in accord with the overall broad congressional strategy

139. *E.g.*, *Haroco*, 747 F.2d at 391 (noting that Congress' concerns extended much farther than preventing injury to free competition in the market place). In order to cover the wide range of activities dominated by organized crime, Congress deliberately drafted RICO broadly in spite of the risk that others not associated with organized crime would come within RICO's purview. *See* Bradley, *supra* note 49, at 845.

140. *See* *Russello v. United States*, 464 U.S. 16, 28 (1983) (Congress enacted RICO primarily to attack the sources of organized crime's economic power). The assessment of treble damages would financially ruin some defendants. Arguably, putting some types of defendants out of business would advance RICO's goals. *Basic Concepts*, *supra* note 23, at 1042.

141. It is not the "[judiciary's] role to reassess the costs and benefits associated with the creation of a dramatically expansive . . . tool for combatting organized crime." *Moss*, 719 F.2d at 21, quoting *Schacht*, 711 F.2d at 1361, citing *Turkette*, 452 U.S. at 586-87.

142. *Turkette*, 452 U.S. at 588 ("[C]ourts are without authority to restrict the application of the statute.").

143. *See id.* at 586-87; *Schacht*, 711 F.2d at 1355 (court cannot "reassess the balance struck" by Congress); *Haroco*, 747 F.2d at 399 (limiting RICO disturbs "the policy choices Congress has made"). Since the pleading stage involves small stakes, such as legal fees and the sensibilities of defendants alleged to be "racketeers," the courts cannot reject Congress' policy choices by restrictively limiting RICO. *Id.*

as expressed in the statute. In light of the *Sedima* Court's ratification of the liberal interpretational approach, the scope of civil RICO's injury element is very broad.

B. Scope of the Liberal Interpretational Approach

The scope of civil RICO's injury element under the liberal interpretational approach is so broad that almost any type of injury to the plaintiff's business or property is sufficient to grant standing. The liberal interpretational courts found that no specialized type of injury was warranted under RICO due to the nature of a substantive RICO violation as established by section 1962.¹⁴⁴ Consequently, the liberal courts focused upon the sufficiency of the allegations of RICO's substantive elements in deciding whether to grant dismissal of the RICO claim. Any injury caused by RICO's predicate act violations was held sufficient to grant standing, assuming all the other RICO elements were properly alleged. Since the scope of RICO's predicate act violations is broad, including violations as diverse as kidnapping, obstruction of justice, and fraud in the sale of securities, the scope of injuries recognized by the liberal courts was also broad.¹⁴⁵

More specifically, racketeering under RICO is comprised of predicate acts which are described by reference to other federal and state law crimes.¹⁴⁶ RICO does not therefore, proscribe the federal and state law violations *per se*.¹⁴⁷ However, two or more of these violations can constitute a pattern of racketeering activity under RICO if the pattern of racketeering activity is connected to an enterprise which affects interstate commerce.¹⁴⁸ The *Turkette* Court has described

144. The acts which RICO proscribes relate to the interaction between an interstate enterprise and a pattern of racketeering. *Seville*, 567 F. Supp. at 1149. Consequently, a plaintiff must allege the existence of an interstate enterprise and the defendant's participation in both the pattern of racketeering activity and the enterprise. *Id.* at 1150.

145. RICO is a remedial statute; its purpose is to remedy the evil of the infiltration and corruption of legitimate organizations. Note, *supra* note 115, at 77. Therefore, RICO's civil remedy is applicable to an enormous variety of conduct. *Schacht*, 711 F.2d at 1354.

146. One court which has discussed this observation of RICO has stated that RICO proscribes "racketeering," not the state offenses which are listed as the predicate acts under section 1961(1). RICO uses these enumerated offenses for definitional purposes only. *Frumento*, 563 F.2d at 1087. Consequently, RICO can provide a successful plaintiff a remedy which is either alternate or cumulative to remedies available under other laws.

147. *Id.*

148. 18 U.S.C. § 1961(5) (1982) states the conditions under which two or more predicate acts may constitute a pattern of racketeering activity. 18 U.S.C. § 1962 (1982)

an enterprise to be any formal or informal group of individuals or an organization which functions as a continuing entity.¹⁴⁹ In short, a substantive violation of section 1962 involves the commission of a pattern of racketeering activity which affects the operation of or participation in the affairs of an interstate enterprise.¹⁵⁰

The character of a substantive RICO violation is also understood in terms of the plaintiff's evidentiary burden at trial. Evidentiary proof of a RICO violation requires not only proof of all the elements of the predicate act violations themselves but also requires proof of the enterprise's existence, proof of the enterprise's continuity, proof of a pattern of racketeering activity, and proof of the connection between the pattern of racketeering activity and the enterprise.¹⁵¹ The plaintiff's increased burden of proving the enterprise and pattern of racketeering elements is what distinguishes a RICO violation from the predicate state law violations.¹⁵² Recognizing this substantial evidentiary burden which the RICO plaintiff must carry, the liberal courts refused to increase this burden by requiring either a competitive or racketeering enterprise injury.¹⁵³ Apparently, the liberal courts justified this decision on the basis that since the enterprise and pattern of racketeering activity elements, and not the injury element, distinguish a RICO violation from the predicate state law violations, the courts were not free to increase the burden already imposed by the statute.

proscribes that pattern of racketeering activity which is connected to an enterprise affecting interstate commerce. The different subsections of section 1962 list the different ways in which a pattern of racketeering activity connected to an enterprise are made illegal.

149. 452 U.S. at 583.

150. *Catanella*, 583 F. Supp. at 1434.

151. *Turkette*, 452 U.S. at 583. The enterprise is proved by evidence of an organization or group of persons and by evidence that the organization or group acts as an on-going entity. The connected pattern of racketeering activity is proved by evidence of at least two predicate acts committed by the participants of the acts who are affiliated with the enterprise. *Id.* The plaintiff is *not* required to prove that either the defendants' conduct or the racketeering acts themselves affect interstate commerce; only the enterprise itself or its activities must affect interstate commerce. Patton, *supra* note 68, at 414.

152. RICO prohibits the predicate state law violations only insofar as an enterprise is involved. *Bennett*, 685 F.2d at 1060 (proof of "enterprise" is proof of an additional fact not required to prove predicate acts).

153. The decision not to increase the civil RICO plaintiff's evidentiary burden with regard to the injury elements is the practical effect of the liberal courts rejection of a specialized type of civil RICO injury. The liberal courts discuss the issue of the plaintiff's evidentiary burden only implicitly, however. Typically, the liberal courts view the injury suffered by the civil RICO plaintiff as essentially that injury caused by the predicate act violations. Moreover, the enterprise element is the means by which the injury is inflicted, and the pattern of racketeering element is the precise

The liberal courts also contended that a civil RICO violation, in most cases, could not cause an injury which would be necessarily different from the injury caused by the predicate act violations.¹⁵⁴ The liberal courts viewed the enterprise merely as the means by which the predicate act violations were committed. The liberal courts did not view this functional aspect of the enterprise and pattern of racketeering activity elements as substantively altering the character of the injury suffered by the plaintiff. The liberal courts also did not view the imposition of restrictive limitations on the civil injury element as logically compatible with RICO's structural framework. Therefore, the types of civil RICO injuries recognized by the liberal courts were as wide-ranging and diverse as those injuries caused by the predicate act violations. Aside from this, other implications result from the liberal interpretational approach.

C. *Impact of the Liberal Interpretational Approach*

One implication of the liberal approach was an interpretation which complied with the mandate of the liberal construction clause. Specifically, many of the liberal courts cited RICO's liberal construction clause as partial justification for their view of the civil injury element.¹⁵⁵ These courts perceived the liberal construction clause as a means by which Congress emphasized its intention to draft a statute of broad scope.¹⁵⁶ Besides the term "injury," these courts also perceived

way in which the enterprise involvement causes the injury. Thus, the liberal courts did not perceive a need for the plaintiff's evidentiary burden to be increased by way to the civil injury element. See *Furman*, 741 F.2d at 529 (requiring greater proof is tantamount to sterilizing civil RICO against the conduct Congress proscribed). See also, *Laterza*, 581 F. Supp. at 414 (court is hard-pressed to say what type of injury is satisfactory if courts require specialized injury). Additionally, some liberal courts view the specialized injury requirement, especially in RICO cases based on business fraud, as a veiled attempt to reimpose the rejected link to organized crime. Since Congress expressly refused to make RICO status-based legislation for constitutional reasons, the liberal courts likewise refuse to transform RICO into a status-based law and, thereby, reject the specialized injury requirements. See *Schacht*, 711 F.2d at 1356 (express link to organized crime is the only way to distinguish RICO cases based on predicate acts of business fraud from "garden variety" fraud cases).

154. "[RICO's broad] reach expressly included the 'garden variety' businessman and commercial practices, so long as the activity satisfied the operative elements of the statute." *Public Interest*, *supra* note 25, at 680-81 (emphasis in original).

155. This is in contrast to those courts which require additional particularity of the injury in the pleadings. The strict courts feel such particularity is necessary when a civil complaint charges criminal fraudulent activity. *Miller & Olson*, *supra* note 68, at 38.

156. Congress included the liberal construction clause so that RICO's remedial purpose would not be undermined by the doctrine of strict construction. *Liberal Construction of Title IX*, *supra* note 115, at 76.

such terms as "person," "enterprise," "conduct," and "participate" to offer no significant means by which RICO could be legitimately restricted.¹⁵⁷ Since these courts found RICO to be of broad scope and since the liberal construction clause reinforces the intent for a statute of broad scope, these courts could partly justify a liberal view of the civil injury element. By this means, the mandate of the liberal construction clause was given full effect, as it pertained to the civil injury element.

Many of the congressional purposes expressed in the statute and in RICO's legislative history were also given effect by a liberal interpretation. If no standing requirements were imposed, direct victims of racketeering could avail themselves of the remedies which RICO offers.¹⁵⁸ In this way, the racketeering victim could recover his losses and could also divest the RICO violators of the economic power base which accrued to them and which provided them continued financial support for their illegal activities. Additionally, adoption of the liberal view effectively complied with Congress' decision to avoid status-based legislation by proscribing a certain type of conduct, as Congress defined it in the statute.¹⁵⁹ Since the liberal view did not entail a specialized

157. *Haroco*, 747 F.2d at 391 (noting that RICO's broad terms offer few toe-holds to narrow RICO's application).

158. *Swanson*, 577 F. Supp. at 1320 (when direct victims cannot recover, purpose of divesting racketeers from their profits is undermined). *Accord Schacht*, 711 F.2d at 1357-58 (purpose of attacking property interests undermined by competitive injury requirement); *Catanella*, 583 F. Supp. at 1436 (citing *Crocker National Bank v. Rockwell International Corp.* 555 F. Supp. 47, 49-50 (N.D. Cal. 1982)) (requiring "special" harm or anticompetitive effect undermines key purpose of RICO: divestment of ill-gotten gains from racketeers). The argument for allowing direct-victim recovery is also supported by the Congressional Statement of Findings and Purpose, *supra* note 24. Specifically, the Congressional Statement cited several findings which arguably encompass direct victims of racketeering: that organized crime derives its money from various forms of "social exploitation"; victims include "innocent investors"; the "general welfare of the nation and its citizens" is undermined by racketeering activity. *Id.*

159. *See supra* notes 25 and 26 for a discussion of Congress' decision not to draft RICO as status-based legislation. Many courts have clearly decided not to limit RICO's application to members of organized crime. *See, e.g., Schacht*, 711 F.2d at 1353 (adhering to earlier rejection of organized crime requirement); *Cenco, Inc. v. Seidman & Seidman*, 686 F.2d 449, 457 (7th Cir. 1982) (RICO forbids pattern of racketeering activity whether or not organized crime is involved); *Bennett*, 685 F.2d at 1063 (RICO not limited to context where ties to organized crime alleged); *Hellenic Lines*, 523 F. Supp. at 247 (no requirement that defendants be members of a group operating outside law); *United States v. Gibson*, 486 F. Supp. 1230, 1240-41 (S.D. Ohio 1980) (statute not restricted to organized crime). The liberal courts viewed any arguments to limit civil RICO's use through the injury element as an attempt to distinguish general business fraud or "garden variety" fraud cases from those cases where an organized crime syndicate infiltrates a corporation and subsequently commits fraud to loot the

examination of the type of injury suffered, the court's attention thereby concentrated upon the defendant's alleged illegal conduct. This scrutiny of the defendant's acts was, in any case, ultimately necessary to determine whether the defendant violated RICO. In short, the resultant emphasis on the defendant's conduct as opposed to the plaintiff's injury effectively precluded the creation of statutory loopholes through which some defendants might otherwise have been able to slip.¹⁶⁰ Thus, the liberal view arguably advanced the policy choices Congress made when it drafted RICO.

A liberal construction of RICO's civil injury element also advanced the policy for liberality in pleadings.¹⁶¹ Rule 9(b) of the Federal Rules of Civil Procedure requires specificity of pleading with regard to the "circumstances constituting fraud."¹⁶² In those RICO cases based upon various predicate acts of fraud, the liberal courts did not seem to find the civil injury element as one of the circumstances constituting the fraud. The liberal courts argued that requiring the plaintiff to go beyond alleging an injury to plead a specific *type* of injury would be tantamount to requiring proof of the RICO violation before getting to trial.¹⁶³ These courts considered such a stringent standard to be contrary to the policy for liberality in pleading.¹⁶⁴

corporation's assets for the syndicate's benefit. The *Schacht* court argued that the only way in which to make such a distinction between these types of fraud cases is to require an organized crime nexus. 711 F.2d at 1356. The liberal courts refused to incorporate an organized crime nexus in order to distinguish "garden variety" fraud cases from more sophisticated fraud cases. This reasoning has the practical effect of avoiding status-based legislation by forcing the courts to concentrate on the defendant's allegedly illegal conduct.

160. "Congress deliberately cast the net of liability wide, being more concerned to avoid opening loopholes through which the minions of organized crime might crawl to freedom than to avoid making garden-variety frauds actionable in federal treble-damage proceedings—the price of eliminating all possible loopholes." *Sutliff, Inc. v. Donovan Companies*, 727 F.2d 648, 654 (7th Cir. 1984).

161. *Murphy v. White Hen Pantry Co.*, 691 F.2d 350, 353 (7th Cir. 1982) (liberal pleading policy of Federal Rules of Civil Procedure prevents dismissal of valid actions for formal or technical reasons). For the argument that a court should construe the pleadings in the plaintiffs favor, see *Schnell v. City of Chicago*, 407 F.2d 1084, 1086 (7th Cir. 1969). A court may also grant leave to correct even substantive errors in the pleadings, if it assists the rendering of a decision on the merits and if no prejudice results to the defendants. See 3 J. MOORE, *MOORE'S FEDERAL PRACTICE*, ¶¶ 15.08, 15.10 (2d ed. 1985); 6 C. WRIGHT & A. MILLER, *FEDERAL PRACTICE AND PROCEDURE*, §§ 1474, 1487 (1971).

162. "In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity." FED. R. CIV. P. 9(b).

163. *Haroco*, 747 F.2d at 404 (greater specificity in alleging injury not required).

164. One court has stated that a description of the fraudulent scheme, its participants, and a statement of when and where the fraud occurred satisfies Rule 9(b).

In contrast to the purposes and policies advanced by the liberal approach, an adverse impact of the liberal view manifested itself in the consequent opportunity for a plaintiff to circumvent other complete bodies of law.¹⁶⁵ This point is best exemplified through consideration of the effect of two of RICO's enumerated predicate acts, mail fraud and wire fraud, upon the federal securities law. The federal securities laws and the underlying case precedent reflect a complex matrix of substantive prohibitions, regulatory guidelines, legislative policy decisions, and judicial standards. A plaintiff alleging fraud under the securities laws faces a substantial burden of proof in establishing such elements as standing and causation.¹⁶⁶ The same plaintiff could circumvent this burden imposed by the securities laws by utilizing RICO's predicate acts of mail fraud and wire fraud.¹⁶⁷ These two

Tomera v. Galt, 511 F.2d 504, 509 (7th Cir. 1975). The *Swanson* court expressly adopted this standard in the RICO context. 577 F. Supp. at 1321. See also *Mauriber*, 567 F. Supp. at 1236 (complaint alleges requisite specificity for Rule 9(b) without relying on conclusory allegations of fraud); *Seville*, 567 F. Supp. at 1156 (failure to describe date, place, or time of any forms of interstate communication did not meet standard of particularity for predicate acts of mail and wire fraud). The policy for particularity of Rule 9(b) must be read in conjunction with the policy for a short and plain statement of the claim for relief of Rule 8(a) and the general policy for simplicity and flexibility in pleading. *Windsor*, 564 F. Supp. at 280. This balancing requires the plaintiff to give adequate notice for the defendant to answer the complaint; particulars of the fraudulent scheme, the defendant's acts pursuant to the scheme, and the result of the scheme are sufficient. *Id.*

165. The opportunity to circumvent other areas of the law is the primary aspect of RICO which may lead to prosecutorial abuse. Even the courts adopting the liberal view note this possibility for abuse. See, e.g., *Mauriber*, 567 F. Supp. at 1240 (noting that plaintiff's use of RICO allows avoidance of damage provisions under the securities laws); *Gagnon*, 564 F. Supp. at 1351 (recognizing that RICO could be used as an alternate or cumulative remedy to securities fraud). A major premise underlying the *Sedima* circuit court's restrictive reading of civil RICO is based upon this aspect of RICO. The *Sedima* circuit court posited: "If Congress had intended to provide an alternate and more attractive scheme for private parties to remedy violations of the securities law—involving decades of statutes, regulations, commentaries, and jurisprudence—it would at least have mentioned it." 741 F.2d at 492. The significance of this opportunity to circumvent other bodies of law is better understood in light of one advantage which the plaintiff acquires. Specifically, under RICO the plaintiff gains access, through discovery, to every aspect of the defendant's business for a period of ten years. *Spencer Companies, Inc. v. Agency Rent-a-Car, Inc.*, [1981 Transfer Binder] FED. SEC. L. REP. (CCH) § 98,361 at 92,217 (D. Mass. 1981).

166. For example, an action under Section 10(b) of the Securities Exchange Act of 1934 requires that a plaintiff be an actual "purchaser" or "seller" of securities. See *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723 (1975).

167. For example, establishing a RICO claim based on predicate acts of mail fraud alone is relatively simple, because each mailing of a letter can constitute a separate mail fraud violation. Any person who thinks deceitfully and mails two letters while associated with an interstate enterprise has violated RICO. Horn, *Civil RICO Action: Weapon for Business Victims*, Legal Times of Washington, Jan. 19, 1981, at 39, col. 1.

predicate offenses present a plaintiff with a greater chance for success in pursuing a RICO claim than he might have under the securities laws. This observation is not meant to suggest that all plaintiffs who might have a claim for a securities law violation will also have a RICO claim. Only those plaintiffs who can establish RICO's enterprise and pattern of racketeering elements in addition to proving the predicate act violations will be able to forego bringing a claim under the securities laws. The liberal courts argued that since mail fraud and wire fraud are two of RICO's enumerated predicate acts, the legitimacy of this option was not to be frustrated by the courts through imposition of limitations upon the civil injury element.¹⁶⁸

On the whole, the liberal interpretational approach significantly broadened the scope of RICO's treble damage provision in comparison to the strict interpretational approach. In *Sedima*, the Supreme Court held that the federal courts must construe RICO's civil injury element under the liberal interpretational approach.¹⁶⁹ Effectively, *Sedima* resolves the interpretational conflict among the federal courts. However, the Supreme Court's decision did not remove the potential opportunity under civil RICO for a plaintiff to circumvent other bodies of substantive law. Issues remaining unanswered after *Sedima* include whether a civil RICO plaintiff's ability to circumvent other bodies of law should be deemed undesirable and, if so, the proper manner by

168. The *Haroco* court noted that Congress was aware of existing criminal and civil provisions for racketeering activity and also noted that Congress considered these provisions inadequate against organized crime. 747 F.2d at 392 (citing *Schacht*, 711 F.2d at 1355-56). See *Turkette*, 452 U.S. at 586-87 (Congress enacted RICO knowing it would alter the role of the federal government in war against organized crime). See Congressional Statement of Findings and Purpose, *supra* note 24, for the finding that organized crime grows in the face of defects in the evidence-gathering process of the law and the finding that existing sanctions and remedies are limited in scope and impact. Congress enacted RICO to supplement, not supplant, existing remedies. *Haroco*, 747 F.2d at 392.

One commentator has also argued that the civil RICO plaintiff functions as a private attorney general. The civil RICO plaintiff assumes a burden analogous to that of the public attorney general since the criminal elements are incorporated into the civil statute. The benefit of this function of the civil RICO plaintiff is apparent in cases where no criminal prosecution has been or will be commenced. Often, due to lack of resources, many criminal activities go uninvestigated and unprosecuted. However, the civil RICO plaintiff can bring such activity to the attention of public authorities and, thereby, save expenditure of public funds and still promote vigorous law enforcement. Wexler, *Civil RICO Comes of Age: Some Maturational Problems and Proposals for Reform*, 35 RUTGERS L. REV. 285, 325 (1983). The treble damage provision encourages the private attorney general function of the civil RICO plaintiff and reflects congressional awareness of the efficacy and validity of this antitrust remedy in the civil RICO context. Patton, *supra* note 68, at 427.

169. ____ U.S. at ____, 105 S. Ct. at 3277.

which to remove this tactic from a plaintiff's arsenal of strategies. Congress now has the task of resolving the issues which the federal courts could not. To maintain RICO's force without sacrificing its utility, Congress must provide a balanced resolution to these issues.

V. COMMENTS AND PROPOSED RESOLUTION

Congress must enact an amendment to RICO if the conflict over its civil provisions is to be resolved once and for all. Members of both the House of Representatives and Senate have already come to this realization and have introduced at least three proposed amendments.¹⁷⁰ Basically, these proposed amendments would affect both the substantive elements of a RICO violation and the civil injury element as it pertains to a plaintiff's standing. Any of these proposed amendments would not adequately resolve the issues still surrounding RICO. For purposes here, the most significant issue arguably is disallowing a plaintiff the ability to circumvent other areas of substantive law without sacrificing all of RICO's force and utility.¹⁷¹ Before forming a resolution to this issue, Congress must first consider a fundamental characteristic of RICO's statutory structure and some basic generalizations about its underlying congressional intent.

A fundamental characteristic of RICO's statutory structure is one of separate treatment, as illustrated in the statutory language. Section 1962¹⁷² is the section which delineates the substantive RICO violations.¹⁷³ Section 1962 pertains to the conduct of the defendant and also establishes the elements on which the plaintiff has the burden of proof. On the other hand, section 1964¹⁷⁴ is the section which provides civil relief. Section 1964 would seem to aim at helping the plaintiff by offering such relief; it would not seem to aim at hindering the plaintiff with restricted standing requirements.¹⁷⁵ In other words, section 1962

170. These proposed amendments are reproduced in the appendix to this note.

171. *Sedima*, 741 F.2d at 486 (noting that broad interpretation of civil RICO allows a plaintiff to bypass other remedial schemes created by Congress, most significantly, in the securities area).

172. *See supra* note 58.

173. Section 1962 proscribes the basic substantive RICO violation. Section 1961 also provides substantive insight into section 1962. Section 1961 is the definitional section for RICO, providing definitions for such terms as "racketeering activity," "enterprise," and "pattern of racketeering activity." 18 U.S.C. § 1961 (1982).

174. *See supra* note 57.

175. *Sedima*, ___ U.S. at ___, 105 S. Ct. at 3285 ("If the defendant engages in a pattern of racketeering activity in a manner forbidden by [RICO], and the racketeering activities injure the plaintiff in his business or property, the plaintiff has a claim under § 1964(c). There is no room in the statutory language for an additional, amorphous 'racketeering injury' requirement.").

puts a burden of proof on the plaintiff while section 1964 provides the plaintiff the benefit of relief. Such separate treatment of burden and benefit in the statutory structure emphasizes the distinct purpose and function of each of these sections. The reasons behind this separate treatment are related to the original congressional intent behind RICO.

Four generalizations, as documented in the legislative history, reflect the original congressional intent behind RICO. First, RICO proscribes a certain type of conduct, enterprise criminality, and not status, such as organized crime affiliation.¹⁷⁶ Second, Congress originally borrowed the treble damage remedy from the antitrust area for deterrent purposes and not for the purpose of incorporating restrictive standing and proximate cause limitations.¹⁷⁷ Third, Congress intended RICO to be a means by which ill-gotten profits would be taken from RICO violators.¹⁷⁸ Last, the statutory language is broad; therefore, the plain meaning of the statute manifests a broad scope.¹⁷⁹

These generalizations seem to have been determinative of RICO's statutory structure. As one example, RICO's list of predicate acts¹⁸⁰ encompasses diverse types of illegal conduct. A congressional amendment to RICO's civil remedy provision would most likely materially alter RICO's statutory structure by making the standing requirements more stringent.¹⁸¹ More stringent standing requirements would consequently alter the allocation of burden and benefit as presently established in the statutory structure by increasing the plaintiff's burden. Rather than proving mere injury to business or property, the plaintiff would have to prove something like a competitive injury. Congress must thoroughly consider the desirability of such a dramatic alteration in RICO's statutory structure. The discussion of the strict interpretational approach illustrated how requirements such as a competitive injury or a racketeering enterprise injury effectively barred the plaintiff from proceeding past the pleading stage.¹⁸² Congress could amend RICO without imposing this type of increased burden on the plaintiff.

The better solution would be for Congress to limit any amendment to the sections pertaining to the substantive elements of a RICO

176. See *supra* notes 25 and 26.

177. See *supra* notes 33, 36, and 41.

178. See *supra* notes 76 and 114.

179. *Haroco*, 747 F.2d at 398 (arguing that broad language is necessary to effectuate statute with broad goals).

180. See *supra* note 60.

181. See *supra* notes 170 and 171.

182. See *supra* text accompanying notes 97-98, 107-10, and 151-54.

violation. In this way, Congress can more precisely define the concept of enterprise criminality without imposing burdensome standing requirements. Initially, Congress must consider the terms "racketeer" and "racketeering activity" to be terms of a generic nature,¹⁸³ just as the terms "organized crime" and "white-collar crime" are considered to be generic. Congressional re-examination of the "racketeer" and "racketeering activity" concepts will force Congress to specify further what it intends to be included within the meaning of these terms. Such greater specification should thereby suggest the changes Congress could make to RICO's statutory language.

In RICO's legislative history, repeated references are made to "organized crime," "the syndicate," and the mafia.¹⁸⁴ Such evidence suggests that Congress was essentially concerned about the activities of "organized crime," as that term is colloquially known. However, Congress did not want to create status-based legislation; so it rejected an organized crime link under RICO. As a result, Congress extended RICO beyond what is colloquially thought of as "organized crime." Nevertheless, Congress did not go beyond this legislative decision to determine, in explicit terms, how far the "racketeer" concept extended. Rather, Congress determined to define the racketeer concept in terms of conduct. In turn, this focus on conduct led to the proscription of enterprise criminality as manifested through certain forms of "racketeering activity."

The problem with the "racketeering activity" concept is that it is based upon a series of predicate act violations; this list is so expansive that no outer limit to the "racketeer" concept is ascertainable. A better way of identifying the problem of enterprise criminality would be to omit some of the offenses which are presently included in the list of predicate acts.¹⁸⁵ Specifically, the offenses which Con-

183. By assuming that "racketeer" and "racketeering activity" are terms of a generic nature, this note suggests that these terms connote broad, but not precise, concepts. Such an assumption requires further consideration of these terms by Congress so that the legislative intent behind RICO is more precisely established.

184. Much of the interpretational conflict over civil RICO depends upon whether RICO's scope extends beyond offenses characteristic of organized crime to include white collar crime offenses. In its reading of the legislative history, the *Sedima* circuit court strongly emphasized the repeated references to "organized crime," as that term is colloquially used. 741 F.2d at 487. Finding that RICO's use extended beyond organized crime in the colloquial sense, the *Sedima* circuit court held this to be an improper use of civil RICO. *Id.* (arguing that the general purpose of RICO did not support the "outrageous" uses to which civil RICO had been put). The *Sedima* circuit court consequently required both a special injury limitation and a prior criminal conviction for the predicate act violation to curb outrageous uses of civil RICO. *Id.*

185. Comments and conclusions in an ABA report suggest altering civil RICO's predicate act requirements. See *American Bar Association—Section of Criminal Justice*,

gress could remove are mail fraud and wire fraud.¹⁸⁶ Alternatively, Congress would not have to remove these offenses if it were to require that one act other than these fraud offenses was required to constitute the two predicate acts necessary to form a pattern of racketeering activity. At least any one of the other specified predicate acts would be satisfactory, or Congress could choose only specific predicate acts to go with mail and wire fraud. In this way, the "racketeering activity" concept, in terms of conduct, would be better delineated. Such a limitation would also necessarily give sharper form to the concept of "racketeer," and thereby narrow RICO's scope to those activities more commonly associated with "organized crime" as it is known in the colloquial sense. By this process, Congress can effectively prevent RICO's encroachment into other bodies of law. Therefore, Congress should either eliminate mail and wire fraud from the list of predicate acts or alter the pattern of racketeering activity requirements.

Enactment of either of these proposals would affect only the substantive violation provisions of RICO and not its civil remedy provision. In this way, the amendment would not materially alter the allocation of burden and benefit as it exists in RICO's statutory structure. Practically speaking, such an amendment would more precisely define the concept of enterprise criminality, thereby affecting only the plaintiff's burden of proof in regard to the substantive RICO violation. This effect would be to circumscribe the range of illegal conduct

Report to the House of Delegates (August 1982) (reproduced in INDIANA CONTINUING LEGAL EDUCATION FORUM (ICLEF), RICO—USE OF THE CIVIL STATUTE IN BUSINESS AND SECURITIES FRAUD CASES IV-44 (1984)). While the ABA report strictly focused upon reform of criminal RICO, many of the ABA's concerns are equally applicable to civil RICO. The ABA's primary concern was to present a means by which to prevent misapplication of criminal RICO.

186. After studying actual cases, the ABA found that abuses of criminal RICO resulted from indictments based solely upon mail fraud, wire fraud, and the interstate transportation of stolen property. The ABA recommended that RICO's pattern of racketeering should include one offense other than mail fraud, wire fraud, the interstate transportation of stolen goods, and the sale and receipt of stolen goods to prevent misuse of RICO. *Id.* at IV-50. As this recommendation bears upon civil RICO, the ABA noted specifically:

When RICO is combined with mail fraud predicate offenses, the effect is to federalize all torts involving business transactions in which a party thinks deceitfully and uses the mails. This result is undesirable in two respects: (1) the efficient operation of the federal courts will be significantly impaired, if not crippled, by a tidal wave of civil RICO actions when plaintiffs become aware of the attractions of treble damages and recovery of attorney's fees; and (2) the balance between state and federal power will be substantially disrupted.

Id. at IV-51.

to which RICO could apply without imposing restrictive standing requirements. Conversely, RICO's utility would be virtually destroyed by an amendment which both decreased the types of predicate acts allowed and imposed restrictive standing requirements.

Moreover, enactment of either proposal would be enough to prevent a plaintiff from circumventing other areas of substantive law. Either proposal would not allow the plaintiff to rely entirely on allegations of mail or wire fraud to establish the requisite pattern of racketeering activity. In short, Congress can resolve the conflict over civil RICO, but it should do so by amending only RICO's substantive violation section and not its civil relief section.

VI. CONCLUSION

RICO is the broad means by which Congress attempted to reach an admirable goal, the elimination of all the ways in which enterprise criminality could undermine our national economy. Encountering much difficulty in applying RICO, the federal district and appellate courts employed conflicting interpretational approaches to RICO. The strict interpretational courts imposed the competitive injury and racketeering enterprise injury limitations to prevent any prosecutorial abuse of RICO. The liberal interpretational courts refused to restrict RICO in this manner, because the liberal courts found no justification for these limitations in either the statutory language or RICO's legislative history. The Supreme Court resolved one aspect of this dispute by holding that the civil injury element was to be liberally construed. However, the Supreme Court has left Congress the task of deciding issues which still cause controversy over civil RICO.

If there is to be a better expression of RICO's intended scope, Congress must re-examine the substantive violation provisions of RICO. Congress can do this by identifying the concept of enterprise criminality more explicitly than it already has. RICO's enterprise criminality concept can be further delineated either by the elimination of mail fraud and wire fraud from the list of predicate acts or by alteration of the pattern of racketeering activity requirements. If Congress were to do this, RICO's intended scope would be circumscribed without destroying RICO's intended utility for both direct and indirect victims of racketeering. Furthermore, this proposal would keep plaintiffs from circumventing other areas of substantive law. Enactment of this proposal would best ensure that the legislative means effectuate RICO's intended goals.

BETTY GLOSS

APPENDIX

The three proposed amendments read as follows:

H.R. 2517

Mr. Conyers introduced the following bill; which was referred to the Committee on the Judiciary [:]

A Bill

To amend chapter 96 of title 18, United States Code.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. DEFINITIONAL AMENDMENTS.

Section 1961 of title 18, United States Code, is amended—

(1) in paragraph (1), by striking out “racketeering” and inserting “predicate criminal” in lieu thereof;

(2) so that paragraph (4) reads as follows:

“(4) ‘enterprise’ means a business or other similar business-like undertaking by an association of persons, whether organized for legitimate or illegitimate purposes, and includes a government or government agency;”;

(3) so that paragraph (5) reads as follows:

“(5) ‘pattern of criminal activity’ means two or more acts of predicate criminal activity, separate in time and place—;

“(A) each of which occurred not more than five years before the indictment is found, or information is instituted, that names such acts as predicate criminal activity;

“(B) all of which are not violations of the same provision of law, if that provision of law is

“(i) the second undesignated paragraph of section 2314 (relating to the transportation of stolen goods, securities, moneys, fraudulent state tax stamps, or articles used in counterfeiting) of this title;-

“(ii) section 1341 (relating to mail fraud) of this title;

or
“(iii) section 1342 (relating to wire fraud) of this title;

and
“(C) that are interrelated by a common scheme, plan, or motive, and are not isolated events;”;

(4) by striking out “and” at the end of paragraph (9)

- (5) by striking out the period at the end of paragraph
- (10) and inserting “;and” in lieu thereof; and
- (6) by adding at the end the following:

“(11) ‘criminal syndicate’ means an enterprise of five or more persons, a significant purpose of which is to engage on a continuing basis in a pattern of criminal activity, other than a pattern of criminal activity consisting solely of conduct constituting a felony under section 1084 of this title or under the law of a State relating to engaging in a gambling business.”.

SEC. 2. OFFENSE AMENDMENTS.

Section 1962 of title 18, United States Code, is amended—

(1) by inserting after the heading of such section the following new subsection:

“(a) It shall be unlawful for any person knowingly to organize, own, control, finance, or otherwise participate in a supervisory capacity in a criminal syndicate.”;

(2) by redesignating subsections (a), (b), and (c) as subsections (b), (c), and (d), respectively;

(3) in the subsection redesignated as subsection (b) by paragraph (2)—

(A) by striking out “racketeering activity” each place it appears and inserting “criminal activity” in lieu thereof; and

(B) by inserting “knowingly” before “to use or invest”;

(4) in the subsection redesignated as subsection (c) by paragraph (2)—

(A) by striking out “racketeering activity” and inserting “criminal activity” in lieu thereof; and

(B) by inserting “knowingly” before “to acquire or maintain”;

(5) in the subsection redesignated as subsection (d) by paragraph (2)—

(A) by striking out “racketeering activity” and inserting “criminal activity” in lieu thereof; and

(B) by inserting “knowingly” before “to conduct or participate”; and

(6) by striking out the subsection designated (d) without regard to the redesignations made by paragraph (2).

SEC. 3. SECTION 1963 AMENDMENTS.

Section 1963(a) of title 18, United States Code, is amended—;

- (1) by striking out "any provision of section 1962 of this chapter" and inserting "section 1962" in lieu thereof;
- (2) by inserting "in the case of a violation of a subsection other than subsection (a) of such section" after "shall" the first place it appears; and
- (3) by inserting "and in the case of a violation of subsection (a) of such section be fined not more than \$250,000 or imprisoned not more than 30 years, or both," after "or both,".

SEC. 4. CLERICAL AMENDMENTS

HEADING FOR CHAPTER.—The heading of chapter 96 of title 18, United States Code, is amended by striking out "RACKETEER INFLUENCED AND CORRUPT ORGANIZATIONS" and inserting "CRIMINAL ENTERPRISES AND CORRUPTION OF ENTERPRISES" in lieu thereof.

(b) **TABLE OF CHAPTERS.**—The table of chapters at the beginning of part I of title 18, United States Code, is amended so that the item relating to chapter 96 is amended to read as follows:
 "96. Criminal enterprises and corruption of enterprises1961".

H.R. 2517, 99th Cong., 1st Sess. (1985).

H.R. 2943

Mr. Boucher introduced the following bill, which was referred to the Committee on the Judiciary [:]

A Bill

To amend section 1964 of title 18, United States Code, with respect to certain civil remedies for persons injured by racketeering activity.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section 1964(c) of title 18, United States Code, is amended—

- (1) by striking out "a violation" and inserting "conduct in violation" in lieu thereof;
- (2) by striking out "therefor" and inserting "any person who engaged in that conduct and, with respect to such conduct, was convicted of racketeering activity or of a violation of section 1962" in lieu thereof;
- (3) by inserting a comma after "district court"; and

by adding at the end the following: "A civil action under this subsection may not be commenced against a defendant later than one year after the entry of the latest judgment of conviction against the defendant for racketeering activity or a violation of section 1962 with respect to the conduct out of which such action arises."

H.R. 2943, 99th Cong., 1st Sess. (1985).

S. 1521

Mr. Hatch introduced the following bill, which was referred to the Committee on the Judiciary [:]

A Bill

To clarify the intent of the Racketeer Influenced and Corrupt Organizations Act with respect to private civil actions.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That subsection (c) of section 1964 of title 18, United States Code, is amended to read as follows:

"(c)(1) Any person suffering competitive, investment, or other business injury as a result of a violation of section 1962 of this chapter involving a pattern of racketeering activity may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including reasonable attorney's fees.

"(2) For purposes of this subsection, 'pattern of racketeering activity' shall require that at least one act of racketeering activity shall be an act of racketeering activity other than—

"(i) an act indictable under section 1341 (mail fraud) of title 18, United States Code;

"(ii) an act indictable under section 1343 (wire fraud) of title 18, United States Code; or

"(iii) an act which is an offense involving fraud in the sale of securities.

(3) If the court determines that a suit brought under this subsection was frivolous and without merit, the court may, at its discretion, award the cost of the suit including reasonable attorney's fees to the defendant."

S. 1521, 99th Cong., 1st Sess. (1985).