

RICO: THE NEWEST LITIGATION GAMBIT IN CORPORATE TAKEOVER BATTLES *

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1. Introduction

Hostile corporate takeovers are synonymous with litigation. Indeed, almost whenever an unfriendly corporate takeover is launched, the corporation targeted for takeover dashes to the courthouse, intent on charging the raiding corporation with every impropriety that counsel can muster [1]. The newest gambit that targets' counsel have stumbled upon, which seems to have escaped their ingenuity for over a decade [2], is a suit based on the Racketeer Influenced and Corrupt Organizations Act ("RICO") [3], a federal statute enacted in 1970.

At the outset of this article, we set forth the basic structure of the RICO statute and describe how target management has utilized RICO to thwart a hostile, and allegedly unlawful, takeover attempt. We then review the cases in which targets have embarked on such a litigation course in order to examine the mixed judicial endorsement and resistance that they have encountered and inspect some of the vexing questions that have arisen. In the next section of the article we suggest the framework and the likely underpinnings for an as yet untested RICO suit, one instituted by a bidder for corporate control. Finally, we make an overall assessment of RICO's use in takeover battles. In subscribing to the notion – which underlies the decisions of many courts that have heard RICO cases – that it is the function of Congress, not the courts, to impose restrictions on RICO's use, we conclude (1) that in the absence of such restrictions, RICO is a potent and significant litigation strategy; and (2) that if Congress, when it drafted RICO, had been aware of the effect RICO could have, it would have formulated a statute that substantially curtailed the use of RICO in corporate takeover battles. Accordingly, we recommend that Congress act with all due speed to solve what could prove to be an intractable problem.

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2. The RICO act and how targets have used it

RICO, enacted as Title IX of the Organized Crime Control Act of 1970 [4], seeks to halt organized crime's infiltration of the American economy by creating sanctions and remedies against those who engage in racketeering activity to operate or gain control of business enterprises [5]. For example, RICO's Section 1964(c) grants a private right of action for treble damages, a reasonable attorney's fee, and arguably a private right of action for equitable relief, to "any person injured in his business or property by reason of a violation of [RICO's] section 1962" [6]. Section 1962 enumerates three principal violations: Section 1962(a) makes it unlawful to invest funds derived from a pattern of racketeering activity in an enterprise [7] engaged in interstate or foreign commerce [8]; Section 1962(b) makes it unlawful to operate or acquire an interest in any such enterprise through a pattern of racketeering activity [9]; and Section 1962(c) makes it unlawful to conduct the affairs of any such enterprise through a pattern of racketeering activity [10]. Finally, RICO's Section 1961 defines a "pattern of racketeering activity" as at least two occurrences (within ten years) of any of several predicate criminal offenses [11], including "any offense involving ... fraud in the sale of securities ... punishable under any law of the United States" [12] and indictable violations of the federal mail [13] and wire fraud [14] statutes.

Counsel representing target management whose tenure has been threatened by a takeover bid have ostensibly been able to tailor the syntax and substance of the RICO statute to their clients' purposes. A RICO suit could allege, for example, that (1) the raider intentionally effected two fraudulent transactions that violated the federal securities laws or the federal mail and wire fraud statutes; (2) these criminal transgressions facilitated the raider's acquisition of the target's stock; and (3) the acquisition caused injury to the target's business or property. The threat of a massive RICO award can deter the raider from proceeding with the takeover, and the RICO claim for equitable relief can serve as a delaying tactic that could stymie the takeover indefinitely. Mere initiation of RICO litigation, therefore, can have the seemingly unintended effect of saving target management from displacement [15].

3. The judicial response to RICO in takeover battles

RICO claims similar to the ones described above have been brought by target management in five takeover attempts [16]. In each case, the RICO count was based on one or more of the three major subsections of Section 1962, and in each case the pattern of racketeering activity was predicated on alleged violations of the federal securities laws, the federal mail and wire fraud statutes, or both. Each RICO claim, which sought damages or equitable relief

(or in some instances both remedies), was accompanied by claims seeking like remedies for violations either of the underlying predicate offenses themselves or of other statutory provisions. None of the five RICO cases ever reached trial. In two of the cases the RICO decisions arose on motions to dismiss, and the RICO charges survived the defendants' motions, but the cases were thereafter settled [17]. In the other three, the RICO decisions arose on motions for equitable relief, and in each the RICO allegations were unsuccessful in affording the target the relief it had sought [18].

One caveat is in order before we turn to a discussion of these five cases. Our narrative of the two suits in which the RICO charges survived encompasses the entire history of the case from complaint to settlement and not only explores the RICO aspects of the litigation but touches on the other claims as well. The purpose of this extended discussion is to place the RICO claim in the context of the entire lawsuit so as to facilitate our analysis of the effect of the RICO claim both on the outcome of the litigation and on the takeover battle itself. Our discussion of the three cases in which the RICO counts were unsuccessful, on the other hand, is comparatively brief and focuses instead on the salient features of each court's treatment of the RICO cause of action.

3.1. The successful RICO suits

3.1.1. An overview of the litigations

Spencer Companies v. Agency Rent-A-Car, Inc. [19] and *Hanna Mining Co. v. Norcen Energy Resources Ltd.* [20] are the two cases in which courts have tacitly approved of a target's invocation of the RICO statute to fend off a hostile takeover. The takeovers involved in *Spencer* and *Hanna* followed a common pattern: relatively sizeable open market purchases of the target's stock by the raider followed by an announcement of a cash tender offer to acquire a majority interest in the target.

In *Spencer*, the target (Spencer) brought suit, long before the tender offer was launched, against Agency, its chairman of the board, and its president, alleging that Agency's open market purchases of Spencer stock were made in contravention of Sections 9(a) (2) [21] and 13(d) [22] of the Securities Exchange Act of 1934 [23] ("Exchange Act") and of RICO [24]. Spencer sought a preliminary injunction and permanent equitable relief for the Exchange Act violations, and treble damages for the RICO claim [25]. Agency, for its part, moved to dismiss all counts [26]. The court granted Agency's motion to dismiss the Section 9(a) (2) count [27] but denied the motion as to the Section 13(d) allegation, rejecting Agency's contention that a target does not have standing to seek an injunction under Section 13(d) [28]. With the Section 13(d) count still alive, the court denied Agency's subsequent motion to dismiss the RICO count, holding that Spencer's complaint was sufficient to support a civil RICO claim for treble damages [29], but stayed all discovery proceedings until

Spencer could demonstrate that the defendants' alleged RICO violation had caused Spencer "legally compensable injury" [30].

While Spencer's motion for a preliminary injunction to redress the Section 13(d) violations was under consideration, Agency made the tender offer and some shares were tendered. At that point, Spencer filed an action to enjoin preliminarily and permanently the tender offer itself, alleging that Agency's tender offer had been effected in violation of Exchange Act Sections 14(d) [31] and 14(e) [32]. Several months later, the court ruled on both of Spencer's motions for preliminary injunctive relief [33]. Applying one of the traditional federal standards for granting a preliminary injunction [34], the court found both that Spencer had a reasonable likelihood of establishing violations of Sections 13(d), 14(d) and 14(e) and that Spencer and its shareholders would be likely to suffer irreparable harm if Agency were permitted to gain control of Spencer through the tender offer [35]. Accordingly, the court ordered disenfranchisement of the shares Agency had purchased allegedly in violation of Section 13(d) and enjoined Agency from accepting stock tenders unless the tenderors were individually served with supplementary information remedying the alleged violations of Sections 14(d) and 14(e) [36].

Before the litigation proceeded to a trial on the merits for a determination of the appropriate permanent equitable relief for the Exchange Act claims, Spencer was able to revive its RICO damage claim by demonstrating to the court's satisfaction that the defendants' alleged RICO violations had caused it "legally compensable injury" [37]. Shortly thereafter, the litigants entered into an all-encompassing settlement agreement in which the defendants represented that they had sold all their Spencer stock to an investment banking firm and agreed that they would not acquire or hold directly or indirectly any Spencer stock for ten years [38]. The tender offer had indeed been unsuccessful.

In *Hanna Mining Co. v. Norcen Energy Resources, Ltd.*, the target (Hanna) filed suit against Norcen, two members of its board, and its president, within an hour of the tender offer announcement to enjoin Norcen's tender offer on the grounds that Norcen's open market acquisition of Hanna stock and proposed tender offer violated Sections 10(b) (and rule 10b-5 thereunder) [39], 13(d) and 14(e) of the Exchange Act, and the Ohio takeover statute [40]. Hanna requested a temporary restraining order, preliminary and permanent injunctions, and divestiture of the shares Norcen had acquired on the open market [41]. That day, the court issued the requested temporary restraining order, which was extended by stipulation until a decision was reached on Hanna's motion for a preliminary injunction [42]. Hanna filed an amended complaint soon thereafter, seeking additional injunctive relief for alleged violations of the Hart-Scott-Rodino Antitrust Improvements Act of 1976 and damages and injunctive relief for alleged violations of the RICO statute [43].

The court's initial dispositions of Hanna's various claims are contained in three separate decisions [44]. In the opinion addressing Hanna's allegations

under the Exchange Act, the court held, as the *Spencer* court had, that a target corporation has standing to maintain a private right of action for equitable relief under Section 13(d) [45] and the court noted that private rights of action under Sections 14(e) and 10(b) and rule 10b-5 are unquestioned [46]. Furthermore, the court concluded that Hanna had demonstrated a substantial probability of success on the merits of its Exchange Act claims [47] and had shown it would suffer irreparable injury in the absence of a preliminary injunction [48]. Accordingly, the court issued the requested preliminary injunction restraining the defendants from carrying out their proposed tender offer and indicated that, although the formulation of an appropriate remedy would have to await a final hearing on a permanent injunction, Hanna's preliminary evidence supported the requested remedy of divestiture [49]. With respect to Hanna's claim under the Ohio takeover statute, the court held that the statute was unconstitutional [50]. In the third opinion, the court granted the defendants' motion to dismiss Hanna's claim under the Hart–Scott–Rodino Act, holding that the statute did not create a private right of action in favor of anyone [52]. The court refused to dismiss Hanna's RICO claim, however, finding unsound and unpersuasive the several contentions Norcen had advanced in support of its motion to dismiss [52]. The court reserved further ruling on the RICO claim and permitted discovery to proceed.

Norcen promptly responded to the court's rulings by requesting an expedited appeal of the preliminary injunction restraining the tender offer [53]. The court permitted this appeal, but Hanna and Norcen settled the litigation before the appeal was heard [54]. Under the terms of the settlement agreement, Norcen was able to increase its holdings of Hanna common stock to twenty percent but agreed not to acquire directly or indirectly any additional shares for eight years [55]. Although the settlement agreement did not restore the *status quo ante* as completely as it has done in *Spencer*, Norcen's tender offer nonetheless was withdrawn.

3.1.2. The RICO counts: the violations

The RICO count in *Spencer* is paradigmatic because it involves properly alleged violations of the three major subsections of Section 1962. First, Spencer claimed that Agency had violated Section 1962(a) by acquiring an interest in Spencer with funds derived from a pattern of racketeering activity [56]. The pattern alleged by Spencer consisted of intentional violations of Section 13(d) of the Exchange Act and the federal mail and wire fraud statutes [57]. These violations, according to Spencer, stemmed from a series of misleading public statements (Schedules 13D) filed with the Securities and Exchange Commission (the "SEC") in connection with the purchase of stock in another company, the sale of which, a year later, provided the funds for the acquisition of the Spencer stock [58]. Second, Spencer alleged that Agency had violated Section 1962(b) by acquiring an interest in Spencer through a pattern of

racketeering activity that consisted of Agency's intentional filing of misleading Schedules 13D with the SEC in connection with the open market acquisition of the Spencer stock, in violation of Section 13(d) and the federal mail and wire fraud statutes [59]. Spencer claimed that the allegedly improper Schedules 13D were deliberately filed with misleading statements to permit Agency to continue its systematic acquisition of Spencer stock [60]. These misleading Schedules 13D were the basis for Spencer's concurrent claim under Section 13(d) [61]. Finally, Spencer contended that the individual defendants had contravened Section 1962(c) by conducting Agency's affairs through these two alleged patterns of racketeering activity [62]. Although the RICO count was sustained, the court disregarded Spencer's allegations under Section 10(b) and the mail and wire fraud statutes, finding them conclusory and without sufficient averment of supporting facts [63]. The Section 13(d) violations thus stood as the sole foundation for the alleged pattern of racketeering activity.

The RICO claim in *Hanna* is similar to the Section 1962(b) claim in *Spencer*. Hanna alleged that Norcen and the individual defendants had violated Section 1962(b) by acquiring and maintaining an interest in Hanna through a pattern of racketeering activity consisting of intentional violations of Sections 10(b), 13(d) and 14(e) and rule 10b-5 of the Exchange Act, and the federal mail and wire fraud statutes [64]. The alleged Section 13(d) predicate offense was the defendants' intentional filing with the SEC, in connection with the open market purchases of Hanna stock, of Schedules 13D that were materially false, misleading, and deceptive [65]. The alleged predicate offenses under Sections 10(b) and 14(e) and rule 10b-5 were based on defendants' intentional ongoing unlawful conduct from the inception of its acquisition plan up to its announcement of the tender offer, namely a willful failure to disclose material facts and intentional manipulation of the trading market in Hanna's stock [66]. The alleged predicate offenses supporting the RICO claim were the gravamen of Hanna's Sections 13(d) and 14(e) claims discussed above [67]. The court never even mentioned the predicate offense bottomed on the mail and wire fraud statutes. Therefore, the Sections 10(b), 13(d) and 14(e), and rule 10b-5 claims remained as the basis of Hanna's successful RICO count.

3.1.3. *The RICO counts: the issues*

Civil RICO litigation in the last few years has raised many thorny issues regarding the proper application and scope of the RICO statute. Some of the issues have been eschewed entirely by the federal courts; others have generated a mounting controversy among the courts that the Supreme Court has not yet had occasion to mediate. As a consequence, it seems fair to say that most of the troublesome issues remain essentially unresolved. The RICO portions of the *Spencer* and *Hanna* litigations provide fertile ground for a discussion of three such issues which are particularly relevant to tender offer litigation. Stated briefly, the three issues – which shade into each other at the edges – are

first, what is meant by RICO's predicate offense of "fraud in the sale of securities ... punishable under any law of the United States", and how does this offense interrelate with the other RICO predicate fraud offenses, indictable federal mail and wire fraud? Second, is RICO limited to activities involving organized crime? And third, what type of injury is cognizable under RICO?

3.1.3.1. "RICO fraud" and RICO mail and wire fraud. The drafters of RICO failed to supply either a definition of "fraud" or a reference to other federal laws contemplated by the predicate offense of "fraud in the sale of securities ... punishable under any law of the United States". Furthermore, the legislative documents do not evince any unequivocal congressional intent, and the federal courts deciding RICO cases have not explicitly delineated a definition. The Court of Appeals for the Second Circuit recently voiced concern about this lack of legislative and judicial guidance but acknowledged that defining RICO fraud is a "complex and far-reaching" problem [68].

By and large, the federal court decisions fall into two camps. The majority of the courts have simply assumed that the offense takes its coloration, in large measure, from the federal securities laws and that a RICO claim can thus be predicated on traditional securities fraud [69]. Other courts have rejected this approach in an attempt to filter out many RICO claims, maintaining that the statute does not embrace ordinary violations of the federal securities laws [70]. As we shall demonstrate below, this latter view is more more a manifestation of the conviction that RICO should be limited to organized crime activities or that RICO should only compensate certain types of injury, than it is an attempt to grapple with the statute's conception of fraud.

Spencer and Hanna are typical of the former approach. Both courts held *sub silentio* that the alleged intentional violations of the Exchange Act were RICO fraud. Regarding the RICO claims, grounded on violations of Section 13(d), the court's unarticulated analysis most likely took the following path: Section 13(d) requires a corporation, whenever it becomes the beneficial owner of more than five percent of a class of equity securities of another corporation, to file a Schedule 13D with the SEC disclosing, among other things, the purpose of the acquisition [71]. And because *Spencer* and *Hanna* had alleged that each of the Schedules 13D filed by Agency and Norcen, respectively, did not disclose that they were contemplating a takeover, not only had *Spencer* and *Hanna* adequately alleged a violation of Section 13(d), but at the same time they had also adequately alleged fraud. Furthermore, since it was alleged that Agency and Norcen had intentionally filed fraudulent Schedules 13D, their conduct would support a finding of scienter and therefore would be punishable under Section 32(a) of the Exchange Act [72]. Accordingly, this conduct of Agency and Norcen constituted fraud under RICO. With respect to the RICO claims based on Sections 10(b) and 14(e) and rule 10b-5 in *Hanna*, the logic ran in a similar

vein. Both Section 10(b) (and rule 10b-5) and Section 14(e) outlaw fraud. Specifically, Section 10(b) and rule 10b-5 prohibit false or misleading statements and deceptive or manipulative acts in connection with the purchase or sale of a security [73]; and Section 14(e) proscribes the same conduct in connection with a tender offer [74]. And since Hanna's complaint alleged that Norcen had disguised its true intentions in acquiring Hanna stock so that it could pursue its strategy to obtain control of Hanna for less than the free market price, the complaint adequately described conduct violative of Sections 10(b) and 14(e) and rule 10b-5. The alleged conduct was therefore fraud. Finally, because Hanna had alleged that this conduct was willful, and involved scienter, it was likewise punishable under Section 32(a), and once again constituted fraud under RICO.

Because ordinary securities fraud under the federal securities laws falls within the letter of the RICO statute, we suggest that the definition of fraud that underlies the *Spencer* and *Hanna* decisions should and will be adopted uniformly by the federal courts, once it is fully developed. With the benefit of such an expansive definition, a target alleging either a Section 1962(a) or Section 1962(c) violation should be able to employ as predicate offenses virtually every securities transaction that violates an antifraud or reporting-disclosure provision of the federal securities laws. For a Section 1962(b) violation, however, the array of possible predicate offenses available to a target will necessarily be limited by the facts. Indeed, Hanna seems to have utilized the principal candidates, alleging a pattern of racketeering activity based on violations of Sections 10(b), 13(d) and 14(e) and rule 10b-5 [75].

One terminological difficulty remains. Since the phrase "fraud in the sale of securities" employs only the word "sale", the question naturally arises whether a fraudulent purchase of securities falls within RICO's coverage. Indeed, this issue arose in both *Spencer* and *Hanna* since Agency and Norcen were purchasers, not sellers, of securities. Unable to discover a judicial precedent interpreting the phrase, the *Spencer* court relied on the declaration by Congress that RICO's provisions should be "liberally construed to effectuate its remedial purposes" and concluded that the statute "would appear to encompass fraud committed by the purchaser of securities, as well as by the seller" [76]. The *Hanna* court found that reasoning persuasive and adopted the *Spencer* court's analysis [77].

The results in *Spencer* and *Hanna* on this issue seem sound. Although the statute appears to be limited expressly by its terms to fraudulent acts in connection with the sale of securities, it is common sense that every sale involves a corresponding purchase. Moreover, even though there is no telling piece of legislative history on this point, it would appear that RICO's pervasive concern with deterring certain acquisitions by "racketeers" is inconsistent with any construction of the phrase "fraud in the sale of securities" that excludes purchases. Such a narrow construction would seriously restrict the scope of

Section 1962(b)'s prohibition of the acquisition of an interest in an enterprise through a pattern of racketeering activity. Indeed, it is by the purchase, not by the sale, of securities that an interest in an enterprise is customarily acquired.

Congress was more explicit in defining the other major RICO predicate offenses involving fraud. Mail and wire fraud are defined as indictable violations of the federal mail and wire fraud statutes, respectively, and specific references to the U.S. Code sections are provided [78]. Notwithstanding the plain words of the statute, a handful of federal courts seem inclined to limit the use of mail and wire fraud in civil RICO cases. These courts note that private rights of action have never been implied under the federal mail and wire fraud statutes, and therefore feel that the inclusion of mail and wire fraud in RICO has the potential to federalize common law fraud – a result Congress could never have intended [79]. Other courts, however, have been receptive to the seemingly plain inclusion of mail and wire fraud in RICO [80].

In tender offer litigation, targets have predicated RICO suits on mail or wire fraud, but no court has squarely passed on the claim [81]. Furthermore, the *Spencer* and *Hanna* courts' attitude toward the plaintiffs' mail and wire fraud charges is not really discernable. The allegations of mail and wire fraud in these cases were skeletal at best, and had the complaints laid out, in sufficient detail with sufficient supporting facts, the scheme to defraud that had been devised, the various occasions on which the mails or the telephones had been utilized to further the scheme, and an allegation of scienter, the mail and wire fraud claims might not have been disregarded [82].

It might seem that if a plaintiff has a viable RICO claim based on securities fraud, then an analogous RICO claim based on mail or wire fraud would be superfluous. But, if there has been a series of fraudulent purchases but no sales and a court interprets "fraud in the sale of securities" to exclude purchases, or if fraud can be alleged but there has been no sale or purchase of securities with which to connect the fraud, the mail and wire fraud claims under RICO may be the only way for the plaintiff to side-step the absence of a "sale".

3.1.3.2. Organized crime. Much ink has been spilled, albeit neatly, in discussing whether a RICO count must be premised on proof or allegations of a connection with organized crime. Two points of view have emerged from the courts' deft pens. For a time many courts scoffed at the use of RICO in cases far removed from the context envisioned by Congress when it enacted the statute. These courts were inclined to screen out most civil RICO claims based on federal securities law violations and common law fraud by requiring the plaintiff to point to a factual basis that the defendant had some tie to a structured criminal organization or organized criminal activity [83]. This interpretation, though, seems to have been effectively overruled by what is now a virtual consensus among the courts of appeals that have considered the issue that such a requirement of an organized crime involvement is neither war-

ranted by the terms of the statute nor supported by RICO's legislative history [84].

Spencer and *Hanna* were two of the early federal district court decisions espousing this latter and preferable view. Although the *Spencer* court failed to justify adequately its conclusion that "RICO's sanctions were not limited to members of organized crime" [85], the decision in *Hanna* examines the problem of RICO's intended scope fairly thoroughly. In brief, the court observed that even though the overriding purpose of Congress in enacting RICO was to combat organized crime, the legislative history conclusively demonstrated that Congress intentionally refused to limit RICO to organized crime because such a restriction could raise doubts as to the statute's constitutional validity and would permit some organized crime members to evade the statute's sanctions by suppressing evidence of their unlawful associations [86].

In view of this history, RICO takeover litigation should not founder for lack of allegations or proof of the raider's ties to organized crime. Although Congress had planned to attack the problem of organized crime and not of corporate control, when it drafted RICO it was forced to cut a wide swath, one that could reach not only organized crime but securities fraud and other white-collar crime as well.

3.1.3.3. Type of injury cognizable under RICO. RICO's Section 1964(c) civil remedies provision grants recovery to those injured by "reason of a violation of section 1962" [87]. The federal courts, in interpreting this provision, have construed it in two diametrically opposite ways. Some courts, based on their own view of the plain language of the provision, have imposed a standing or causation requirement by requiring plaintiffs to show that they seek relief for an injury that resulted from a violation of Section 1962 and not simply from Section 1961 racketeering activity [88]. By positing that Congress did not intend to pre-empt or supplement the remedies already provided by the statutes that define the predicate offenses [89], these courts accordingly insist on a demonstration of competitive injury or infiltration, whether it be genuine or metaphysical [90]. The alternative approach permits a plaintiff to recover under Section 1964(c) for injury resulting from the Section 1961 racketeering activity alone [91]. Courts advocating this approach contend that the more restrictive view is contrary to the language of the statute and does not comport with the legislative history [92].

Under either view, a target should confront no barriers in stating a claim under Section 1964(c) because the target will ordinarily be the victim of the alleged Section 1962 violation. In both *Spencer* and *Hanna*, for example, the targets were allegedly victims under Section 1962. Nonetheless, both the *Spencer* and *Hanna* courts considered the intended meaning of Section 1964(c). Without deciding the issue, *Spencer* followed the restrictive construction, whereas *Hanna* definitely adopted the broader approach. In *Spencer*, the court

found that since Agency had infiltrated Spencer through an alleged pattern of racketeering activity, Spencer's alleged injury – to its business relationships with present and future suppliers, contractors, and customers – stemmed from the proscribed Section 1962 violations and was sufficient to state a claim under Section 1964(c) [93]. This holding suggests that had the claimed injury been caused solely by the racketeering activities, Spencer's RICO claim might not have been viable. In *Hanna*, the court declined to follow *Spencer*, at least to the extent that it could be read as imposing any infiltration requirement as a restriction on standing [94]. Rather, the court authorized *Hanna's* RICO suit under Section 1964(c) based on the alleged predicate acts of securities fraud alone [95].

3.2. *The unsuccessful RICO suits*

In the three cases in which the RICO counts were unsuccessful, the target requested treble damages and preliminary and permanent injunctions. Moreover, the target *moved* for the requested injunctive relief [96]. Hence, these decisions, arising on a motion for a preliminary injunction, had a procedural posture different from *Spencer* and *Hanna*. Those cases, it will be recalled, arose in the context of the defendant's motion to dismiss, and thus the courts were required to determine only whether the allegations, as a matter of law, were sufficient to state a claim under RICO. In the three unsuccessful RICO cases, however, the court was obliged to consider not only the relevant law but also the target's proof of the likelihood of success on the merits at the trial for the permanent injunction. Under this more stringent standard, the motions for injunctive relief under RICO were denied – for want of sufficient proof. In one of the cases, however, the court expressed substantial doubt whether RICO grants private parties a right to equitable relief.

In *Marshall Field & Co. v. Icahn* [97], the court addressed a Section 1962(a) RICO claim brought by Marshall Field, a company targeted for takeover by Carl Icahn. The complaint alleged that Icahn had acquired an interest in Marshall Field with money derived from fraudulent sales of securities [98]. As proof of the fraud, Marshall Field relied first on civil settlements and stipulations entered into by Icahn with the SEC in earlier administrative proceedings unrelated to the litigation under discussion, and second on evidence adduced in those proceedings [99]. The court assumed without discussion that private injunctive relief was available under RICO, but found that the settlements and stipulations themselves revealed no violations and were not admissible, and that the evidence adduced was not sufficient to show a likelihood of success on the merits with respect to establishing a pattern of fraudulent sales of securities [100].

Bayly Corp. v. Marantette [101] involved an alleged attempt to seize control of Bayly by a group of individuals headed by David Marantette. Bayly claimed

that the Marantette group had violated RICO Section 1962(b) in connection with this attempted takeover by acquiring and maintaining an interest in Bayly through a pattern of violations of Exchange Act Section 13(d), the proxy rules under Exchange Act Section 14(a), and the mail and wire fraud statutes [102]. As in *Marshall Field*, the court assumed the availability of injunctive relief but found that the evidence did not support violations of any of the predicate offenses [103]. The court expressed its reservations about the use of RICO in this context, however, and opined in *dictum* that even if it had found violations of the predicate offenses that “the RICO provisions have no application as a federal common law fraud, or as an alternative or cumulative remedy for private plaintiffs alleging securities fraud” [104].

In *Dan River, Inc. v. Icahn* [105] Carl Icahn faced another attempt by target management to enjoin one of his takeovers. Dan River’s RICO count, which was quite in vogue by the time of the lawsuit, undoubtedly did not startle Icahn or his counsel. The court focused on Dan River’s Section 1962(a) RICO claim that Icahn acquired Dan River shares, prior to the announcement of the tender offer, with proceeds traceable to earlier Icahn takeovers in which Icahn had used funds from one of his companies that had failed to register as an “investment company” as required by the Investment Company Act of 1940 [106]. Dan River contended that Icahn’s use of the funds amounted to a pattern of securities and mail fraud because his company had been unregistered [107]. At the outset, the court considered whether private injunctive relief was available under Section 1964(c). Pointing to the contradistinction between Section 1964(c), which mentions a private right of action for treble damages but says nothing explicitly about private equitable relief, and Section 1964(b), which authorizes governmental equitable proceedings, the court concluded that an express right of action for injunctive relief was doubtful and an implied right of action uncertain [108]. Assuming *arguendo* that RICO does afford private equitable relief, however, the court turned to the merits of the RICO claim and held that Dan River was unlikely to succeed on the merits [109]. First, the court found that the “investment company” status of the company under consideration was not clear and hinged on sophisticated questions of real estate valuations [110]. Second, the court observed the difficulty Dan River faced in proving scienter (with regard to Icahn’s failure to register the company), a necessary ingredient of both RICO securities fraud and mail fraud [111]. And last, the court noted the controversy in the federal courts over the use of RICO in cases not involving organized crime, a fray the court chose not to enter [112].

The question that the courts in *Marshall Field*, *Bayly* and *Dan River* did not reach – whether private party injunctive relief is available under RICO – is another of the many perplexing questions that surface throughout the statute. Although several courts, such as *Marshall Field* and *Bayly*, have assumed a private right to injunctive relief might be available under RICO while other

courts, such as *Dan River*, have expressed uncertainty [113], only three courts have directly ruled on the issue. One court granted injunctive relief without providing any analysis [114]. Another flatly held that there was no express or implied right of action for injunctive relief in the RICO statute; and, although conceding that the language of the statute was “arguably ambiguous”, the court found that the legislative history militated against granting equitable remedies to private RICO plaintiffs [115]. The third court to address the issue interpreted the legislative history similarly and refused to grant a permanent injunction, expressly stating, however, that its ruling did “not reach the issue whether preliminary injunctive relief would be available to a private RICO plaintiff in extraordinary circumstances” [116]. Even though these last two courts’ exegesis of the legislative records is instructive, it is not as conclusive as they believed. The legislative history on the question is no less ambiguous than the statute [117]. In sum, the propriety of granting private equitable relief under RICO has not been satisfactorily resolved and is the most significant question facing targets instituting RICO litigation.

4. The untested raider RICO suit

To be sure, David Marantette and Carl Icahn did not relish being called “racketeers”. They did not realize, however, that they too could have hurled their own RICO thunderbolts. For just as ingenious counsel for target management have parsed the RICO statute to suit their clients’ purposes, counsel for prospective raiders should be able to do the same. Would not a complaint that adequately alleged that target management was conducting the affairs of the target through a pattern of securities, mail, or wire fraud give the raider a sufficient claim under RICO Section 1962(c)? And when the pattern of alleged predicate offenses relates to the target’s attempt to thwart the takeover, should not the raider be able to plead injury by reason of the violation of Section 1962(c), thereby invoking RICO’s civil remedies?

Consider the litigation in *Bayly* and *Marshall Field*. The *Bayly* court, in addressing allegations in a counterclaim filed by Marantette, held that Bayly and its directors had violated Section 13(e) and rule 13e-4 of the Exchange Act by engaging in a series of transactions, the purpose of which was to make an issuer tender offer, without filing a Schedule 13E-4 with the SEC [118]. These allegations could have supported a RICO claim [119]. The transactions involved a contract to sell Bayly securities, so an allegation of the predicate act of “fraud in the sale of securities” could have been made, and if a contract to sell is not a “sale” for purposes of the RICO statute, allegations of the predicate acts of mail and wire fraud should have sufficed. And in either case, allegations of a “pattern” of offenses and scienter should have presented no difficulty.

In *Marshall Field*, the target's defensive tactic was not an issuer tender offer, but certain lock-up arrangements with a white knight that had already launched a tender offer to gain control of the target. The first of these arrangements was a stock purchase agreement committing Marshall Field to sell treasury stock to the white knight, and the second was an agreement by which Marshall Field granted a right of first refusal to the white knight for the purchase of Marshall Field's most valuable properties. Icahn alleged, in that case, that these lock-up arrangements constituted manipulative practices in connection with a tender offer in violation of Section 14(e) of the Exchange Act [120]. To the extent that allegations could have been made that these lock-ups contained elements of fraud or deception, they would also have supported fraud claims under RICO. The stock purchase agreement should have supported a claim of a pattern of mail and wire fraud or RICO securities fraud (assuming once again that the stock purchase agreement constituted a RICO "sale"), and the second lock-up would seem to have sustained a claim of a pattern of mail and wire fraud (but not RICO securities fraud because no securities were involved) [121].

The raider RICO suits that could have derived from the *Bayly* and *Marshall Field* litigations by no means exhaust the plausible RICO claims that could be alleged by a raider in takeover litigation. A careful scrutiny of a target's activities to forestall the success of the takeover attempt may reveal other types of conduct that could sustain a claim under RICO [122]. Oddly, however, no reported decision reflects the use of RICO by a raider.

5. Conclusion

As we have indicated, some district courts, expressing alarm at the proliferation of RICO suits in contexts seemingly far removed from that originally contemplated by Congress, have devised ways to avoid applying RICO's broad civil remedies when the statute produces a result not to their liking [123]. But as we have also pointed out, the courts of appeals have generally rejected these attempts, recognizing both that the RICO statute expressly grants victims a new remedy and that the legislative history evinces a congressional intent to extend RICO's reach to garden variety commercial crime committed by white-collar businesspersons [124]. In our view, these latter decisions reflect the proper function of the judiciary in the interpretation and application of the RICO statute. In general, attempts to restrict RICO's scope constitute an inappropriate and unworkable usurpation of legislative power by the judiciary; problems with the scope of RICO should be solved by Congress rather than by the courts [125].

Even if the judiciary follows that recommendation and refuses to impose restrictions on RICO's application, some observers still may not believe that RICO can have a potentially enormous and destructive impact on corporate

takeover battles. It is our position that such a view is ill-founded because it overlooks several important considerations that emanate from our previous discussion of the five decisions in which RICO was used, none of which imposed restrictions that directly affected the viability of the RICO claim [126].

In both *Spencer* and *Hanna*, it should be recalled, the court granted the target's motion for a preliminary injunction to redress alleged violations of the Exchange Act. In *Spencer* the court allowed the tender offer to proceed but required corrective disclosures. In *Hanna* the court preliminarily enjoined the tender offer, but because the offeror was granted an expedited appeal, the preliminary injunction (which usually amounts to a conclusive determination of the litigation) [127] did not doom the tender offer. Yet, even though the success of their tender offers was still possible, the offerors in both *Spencer* and *Hanna* settled their cases and agreed to withdraw the offers. It would seem that the threat of a massive RICO damages award catalyzed the settlements.

First, the targets had established more than just a prima facie RICO damages claim; by dint of the courts' rulings that the targets had a reasonable likelihood of proving at trial the Exchange Act securities fraud allegations – which were at the same time the alleged underlying predicate offenses for the RICO claims – the targets, in effect, had also established a likelihood of proving the RICO damages claims at trial. Second, in *Spencer*, the target had satisfied the court that the alleged RICO violation had caused it “legally compensable injury”. The RICO claim for damages was thus far from spurious. Moreover, RICO was the only legal theory available to the targets in either case on which they could base a damages claim against the raiders. A damages claim for the alleged Section 13(d) violation in *Spencer* and *Hanna* would not have been cognizable since no court has implied a right of action for damages for a target under Section 13(d) [128]. And in *Hanna* a claim for damages for the alleged violations of Section 10(b) (and similarly rule 10b–5) would have been barred since only purchasers or sellers of securities may bring a suit for damages under Section 10(b) [129] – and the target was neither a purchaser nor seller. Similarly, in light of recent Supreme Court cases signaling dissatisfaction with the implication of private rights of action – especially for damages – under the federal securities laws [130], the target in *Hanna* would have almost definitely lacked standing to sue for damages for the alleged Section 14(e) violations [131]. The RICO damages suit was indeed a potent weapon for the targets.

A RICO damages claim can potentially assume even greater significance than it did in the *Spencer* and *Hanna* litigations. Although the targets were granted standing to seek injunctive relief for claims under the Exchange Act in these two cases, standing under Section 13(d) is not yet a settled question, and thus cannot be counted upon in every court. In a desire to keep in step with the Supreme Court's recent reluctance to imply rights of action, many courts have

felt compelled to deny standing under Section 13(d) even to targets seeking only injunctive relief [132]. And even though *Hanna* held that a target's standing for injunctive relief under Section 14(e) was unquestioned and *Spencer* assumed standing for injunctive relief under both Sections 14(d) and 14(e), the issue of the target's standing to seek an injunction under these two sections would not seem to be entirely settled. Furthermore, as *Hanna* acknowledged, some cases hold that a target does not have standing to maintain an action for an injunction under Section 10(b) (and rule 10b-5) because of the purchaser-seller requirement [133]. There is likewise no certainty that a target will be able to obtain injunctive relief for violations of other provisions of either the Exchange Act or other statutes. Recall, for example, the target's unsuccessful attempts in *Hanna* to obtain an injunction under Exchange Act Section 9(a)(2), certain federal antitrust legislation, and the Ohio takeover statute. In sum, if the judicial hostility to injunctive remedies against raiders continues, a RICO suit for treble damages may turn out to be the target's sole litigation weapon, thus assuming overwhelming significance in takeover litigation.

We have neglected, of course, the possibility of the target suing for an injunction under the RICO statute itself. Although the availability of RICO's equitable remedies to a private party is not clear, if a court interprets RICO's provisions liberally, the RICO statute may do double duty for the target, providing both injunctive relief and a damages remedy. In such event, RICO will assume a primary role in takeover litigation.

Comparing the two successful RICO cases (in which the targets sought damages) with the three unsuccessful RICO cases (in which the target moved for a preliminary injunction) may lead one to conclude, however, that although a target is able to state a RICO claim for damages that can survive a motion to dismiss, RICO is not as useful to the target seeking the coveted preliminary injunction, which requires the target to establish a likelihood of success on the merits. It cannot be gainsaid that in *Marshall Field*, *Bayly* and *Dan River*, where standing to obtain injunctive relief under RICO was not even at issue, the RICO claim foundered because the targets were not able to offer sufficient proof of the underlying predicate offenses. Obviously, however, one cannot conclude that every future target will suffer from a similar inability. Indeed, had the targets in *Spencer* and *Hanna* moved for a preliminary injunction to redress the RICO violation and the courts in those cases found that injunctive relief was available to private parties, the injunctions would have issued. The targets had satisfied the courts' requirements – likelihood of success on the merits and a showing of irreparable harm – for the grant of a preliminary injunction for the Exchange Act claims. Since the Exchange Act claims were the underlying predicate offenses for the RICO suit and since there is no basis for establishing stricter requirements for the grant of a preliminary injunction under RICO [134], the target, *a fortiori*, had satisfied the requirements for a preliminary injunction under RICO.

The potency and significance of civil RICO in corporate takeover litigation seems plain. Given the increasing judicial recognition of the impropriety of imposing restrictions on RICO's use, it requires no great leap of imagination to suppose that the availability of RICO's remedies in corporate warfare will result in some tender offers being withdrawn and may deter others from ever being made. There is no indication in the legislative history of RICO that Congress was aware that a statute admittedly designed primarily to combat organized crime could have such an unanticipated side-effect. Would Congress have countenanced such an effect had Congress been more prescient? On the one hand, Congress certainly would have approved of RICO's use in corporate takeover litigation insofar as the statute had the potential to halt organized crime's acquisition of corporate entities. On the other hand, Congress clearly would not have approved if RICO was being used solely to discourage takeovers. Indeed, two years before RICO was enacted, Congress, recognizing that corporate takeovers served important societal interests by providing a method for ousting uninventive and inefficient entrenched management, incorporated into the Exchange Act the Williams Act (Sections 13(d), 13(e), 14(d), 14(e) and 14(f)), which had the preservation of the viability of corporate takeovers as one of its major objectives. Without doubt, the RICO Congress' creation of an expansive tool for combatting organized crime contrasts, and thus is in some tension, with Congress' earlier action in adopting the Williams Act.

RICO has been on the books for fourteen years. A great deal of evidence has developed on how civil RICO can be and ordinarily is utilized. It is time for Congress to evaluate that evidence and to assess RICO's costs and benefits in the corporate takeover arena. In this assessment, we trust that one compelling fact will be evident: organized crime rarely infiltrates businesses through mail, wire and securities fraud. It is thus not surprising that, in the realm of takeover litigation, these RICO predicate offenses have been used in a purported attempt to ensnare white-collar crime rather than organized crime. As a result, in practice, civil RICO fraud suits have served solely as litigation weapons for corporations targeted for takeover and, as such, can only discourage legitimate and socially useful corporate acquisitions.

With these considerations in mind, we recommend that Congress act quickly to curtail these uses of RICO in takeover litigation. Specifically, we recommend that Congress amend RICO to preclude the utilization of the RICO predicate offenses of mail, wire and securities fraud in litigation involving any corporate acquisition governed by the Williams Act [135]. Such an amendment would eliminate what could develop into an enormously potent tool to discourage takeover attempts, but would at the same time not diminish RICO's effectiveness in its area of primary concern – organized crime. Although Congress is to be commended for creating a statute with teeth, RICO will bite more evenly if one of those teeth is removed.

Notes

[1] See, e.g., E. Aranow, H. Einhorn & G. Berstein, *Developments in Tender Offers for Corporate Control 199–202* (1977); Easterbrook & Fischel, *The Proper Role of a Target's Management in Responding to a Tender Offer*, 94 Harv. L. Rev. 1161 (1981). Judge Friendly described the inevitable stream of litigation from a hostile tender offer in this way:

Drawing Excalibur from a scabbard where it would doubtless have remained sheathed in the face of a friendly tender offer, the target typically hopes to obtain a temporary injunction which may frustrate the acquisition since the offering company may well decline the expensive gambit of a trial or, if it persists, the long lapse of time could so change conditions that the offer will fail even if, after a full trial and appeal, it should be determined that no ... violation has been shown.

Missouri Portland Cement Co. v. Cargill, Inc., 498 F.2d 851, 854 (2d Cir.), cert. denied, 419 U.S. 883 (1974).

Targets, however, are not the only parties who can bring suit. See, e.g., 1 A. Fleischer, *Tender Offers: Defenses, Responses, and Planning* 298 (2d ed. 1983) (noting that “bidders have been using the courts offensively” to block defensive tactics such as self-tender offers).

[2] See, e.g., Morrison, *Old Bottle – Not So New Wine: Treble Damages in Actions Under the Federal Securities Laws*, 10 Sec. Reg. L.J. 67, 68 (1982; Note, *RICO and Securities Fraud*, 83 Colum. L. Rev. 1513, 1517 (1983).

[3] 18 U.S.C. §§ 1961–1968 (1982).

[4] Pub. L. No. 91–452, § 901–904, 84 Stat. 922, 941–47 (1970) (codified as amended in scattered sections of 18 & 28 U.S.C. (1982)).

[5] The Congressional Statement of Findings and Purpose of the Organized Crime Control Act stated that:

It is the purpose of this Act ... to seek the eradication of organized crime in the United States by strengthening 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. § 901, 84 Stat. at 923 (reproduced but not codified following 18 U.S.C. § 1961 (1982)) (annotation entitled “Congressional Statement of Findings and Purpose”) (emphasis added).

[6] 18 U.S.C. § 1964(c) (1982). Section 1964(c) also provides for recovery of “the cost of the suit”. The issue of the propriety of private injunctive relief under RICO will be discussed *infra* at notes 113–17 and accompanying text.

[7] An enterprise is defined in § 1961 to include “any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity”. *Id.* § 1961(4) (1982).

[8] *Id.* § 1962(a). The section also applies to income derived “through collection of an unlawful debt”, as do all the other subsections.

[9] *Id.* § 1962(b).

[10] *Id.* § 1962(c). In addition, § 1962(d) makes it unlawful to conspire to violate any of the three previous subsections. *Id.* § 1962(d).

[11] *Id.* § 1961(1), (5).

[12] *Id.* § 1961(1)(D).

[13] *Id.* § 1961(1)(B). Mail fraud is indictable under 18 U.S.C. § 1341 (1982).

[14] *Id.* § 1961(1)(B). Wire fraud is indictable under 18 U.S.C. § 1343 (1982).

[15] *But cf.* 1 A. Fleischer, *supra* note 1, at 299 (“A well-prepared raider ... is not likely to be thwarted merely by the burden, expense, or potential delay which litigation may cause. Unless the bidder has seriously underestimated its legal exposure or overestimated its steadfastness, a target cannot necessarily expect a vigorous litigation campaign to cause the bidder to abandon its offer”).

[16] *See Dan River, Inc. v. Icahn*, 701 F.2d 278 (4th Cir. 1983); *Bayly Corp. v. Marantette*, [1982 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 98,834 (D.D.C. Oct. 19, 1982); *Hanna Mining Co. v. Norcen Energy Resources Ltd.*, [1982 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 98,742 (N.D. Ohio June 11, 1982); *Marshall Field & Co. v. Icahn*, 537 F. Supp. 413 (S.D.N.Y. 1982); *Spencer Companies v. Agency Rent-A-Car, Inc.*, [1981–1982 Transfer Binder] Fed. Sec. L. Rep. ¶ 98,361 (D. Mass. Nov. 17, 1981).

[17] *Hanna Mining Co. v. Norcen Energy Resources Ltd.*, *supra* note 16; *Spencer Companies v. Agency Rent-A-Car, Inc.*, *supra* note 16.

[18] *Dan River, Inc. v. Icahn*, *supra* note 16; *Bayly Corp. v. Marantette*, *supra* note 16; *Marshall Field & Co. v. Icahn*, *supra* note 16.

[19] The litigation in *Spencer* comprises numerous decisions and a variety of issues. The reported decisions, in chronological order, address the following: the major non-RICO courts, *Spencer Companies v. Agency Rent-A-Car, Inc.*, [1981–1982 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 98,301 (D. Mass. Sept. 21, 1981) [hereinafter cited as *Spencer I*]; the RICO count, *Spencer Companies v. Agency Rent-A-Car, Inc.* [1981–1982 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 98,361 (D. Mass. Nov. 17, 1981) [hereinafter cited as *Spencer II*]; Agency’s motion for a preliminary injunction enjoining enforcement of the Massachusetts takeover statute, *Agency Rent-A-Car, Inc. v. Connolly*, 542 F. Supp. 231 (D. Mass.) (preliminary injunction issued; takeover statute preempted by the Williams Act), *rev’d*, 686 F.2d 1029 (2nd Cir. 1982); and Spencer’s motion for a preliminary injunction based on a non-RICO count, *Spencer Companies v. Agency Rent-A-Car, Inc.*, 542 F. Supp. 237 (D. Mass. 1982) [hereinafter cited as *Spencer III*].

There are four unreported opinions: *Spencer Companies v. Agency Rent-A-Car, Inc.*, No. 81-2097-S, slip op. (D. Mass. Jan. 4, 1982) (available June 1, 1982, on LEXIS, Genfed library, Dist file); *Spencer Companies v. Agency Rent-A-Car, Inc.*, No. 81-2097-S, slip op. (D. Mass. Dec. 7, 1981) (available June 1, 1982, on LEXIS, Genfed library, Dist file); *Agency Rent-A-Car, Inc. v. Spencer Companies*, No. 81-2542-S, slip op. (D. Mass. Oct. 15, 1981) (available June 1, 1982, on LEXIS, Genfed library, Dist file); *Spencer Companies v. Agency Rent-A-Car, Inc.*, No. 81-2097-S, slip op. (D. Mass. Oct. 7, 1981) (available June 1, 1982, on LEXIS, Genfed library, Dist file).

[20] There are two reported decisions in the *Hanna* litigation which address the following: the major non-RICO counts, *Hanna Mining Co. v. Norcen Energy Resources Ltd.*, [1982 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 98,878 (N.D. Ohio June 11, 1982) [hereinafter cited as *Hanna I*]; and the RICO count, *Hanna Mining Co. v. Norcen Energy Resources Ltd.*, [1982 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 98,742 (N.D. Ohio June 11, 1982) [hereinafter cited as *Hanna II*]. There is one unreported decision: *Hanna Mining Co. v. Norcen Energy Resources Ltd.*, No. C82-959 (N.D. Ohio June 11, 1982). *See infra* note 50 and accompanying text.

[21] 15 U.S.C. § 78i(a)(2) (1982).

[22] *Id.* § 78m(d) (1982).

[23] *Id.* §§ 78a–78kk (1982).

[24] *Spencer I*, *supra* note 19, at 91,894. Spencer also alleged a violation of § 14(d) of the Exchange Act, 15 U.S.C. § 78n(d) (1982), which the court mentioned but did not discuss. *Id.* Finally, Spencer alleged that Agency had violated § 14(e) of the Exchange Act, 15 U.S.C. § 78n(e) (1982), but the court did not mention this allegation. First Amended Complaint at 1 & 11, *Spencer I*, *supra* note 19.

[25] First Amended Complaint at 12–14, *Spencer I*, *supra* note 19.

[26] *Spencer I*, *supra* note 19, at 91,894. Actually, the defendant’s motion to dismiss only encompassed the allegations under §§ 9(a)(2) and 13(d) and under RICO. *Id.*; *see also supra* note 24 (pointing out that Spencer alleged violations of §§ 14(d) and 14(e) of the Exchange Act as well).

[27] *Spencer I*, *supra* note 19, at 91,896.

[28] *Id.* at 91,895 (“an issuer’s standing to seek injunctive relief under § 13(d) is the settled practice in this circuit”).

[29] *Spencer II*, *supra* note 19, at 92,216–17.

[30] *Id.* at 92,217.

[31] 15 U.S.C. § 78n(d) (1982).

[32] *Id.* at § 78n(e) (1982); *see Spencer III*, *supra* note 19, at 237–38.

[33] *Spencer III*, *supra* note 19, at 237–38.

[34] The Supreme Court has noted that at least two factors are relevant in determining whether to grant a preliminary injunction: “first, the [plaintiff’s] possibilities of success on the merits; and second, the possibility that irreparable injury would have resulted, absent interlocutory relief”. *Brown v. Chote*, 411 U.S. 452, 456 (1973). The Court of Appeals for the Ninth Circuit has asserted that “[t]he traditional equitable criteria for granting preliminary injunctive relief are (1) a strong likelihood of success on the merits, (2) the possibility of irreparable injury to plaintiff if the preliminary relief is not granted, (3) a balance of hardships favoring the plaintiff, and (4) advancement of the public interest (in certain cases)”. *Los Angeles Memorial Coliseum Comm’n v. National Football League*, 634 F.2d 1197, 1200 (9th Cir. 1980). *See generally* 11 C. Wright & A. Miller, *Federal Practice and Procedure* §2948 (1973).

[35] *Spencer III*, *supra* note 19, at 237–38.

[36] *Id.* at 238.

[37] No record of the court order was made on the docket sheet. This information was obtained from written communications with counsel for the litigants (on file with the *Journal of Comparative Business and Capital Market Law*).

[38] Joint Motion for Voluntary Dismissal With Prejudice, *Spencer III*, *supra* note 19.

[39] 15 U.S.C. § 78j(b) (1982); 17 C.F.R. § 240.10b–5 (1984). *See infra* note 73.

[40] Ohio Rev. Code Ann. § 1707.041(B)(2) (Page 1979). *See Hanna I*, *supra* note 20, at 94,570.

[41] Verified Complaint at 13–14, *Hanna I*, *supra* note 20.

[42] *Hanna I*, *supra* note 20, at 94,583.

[43] Supplemental and Amended Complaint at 18–20, 22–23, *Hanna II*, *supra* note 20. Although the complaint reflects various requests for injunctive relief, the target (Hanna) never moved for an injunction.

[44] *See supra* note 20.

[45] *Hanna I*, *supra* note 20, at 94,588.

[46] *Id.*

[47] *Id.* at 94,589.

[48] *Id.* at 94,591. The court also considered “whether issuance of a preliminary injunction would cause substantial harm to others”, and “whether the public interest would be served by issuing a temporary injunction”. *Id.* at 94,588, 94,591.

[49] *Id.* at 94,596.

[50] *See supra* note 20. This unreported decision is on file with the *Journal of Comparative Business and Capital Market Law*.

[51] *Hanna II*, *supra* note 20.

[52] *Id.* at 93,738–39.

[53] *Hanna I*, *supra* note 20, *appeal docketed*, No. 82-3386 (6th Cir. June 28, 1982), *dismissed per stipulation*.

[54] Agreement Among Norcen Energy Resources Limited, The Hanna Mining Company, Conrad M. Black and G. Montegu Black (July 7, 1982) (on file with the *Journal of Comparative Business and Capital Market Law*).

[55] *Id.* at 7. This covenant was binding, however, only if Hanna allowed three Norcen representatives to be seated on Hanna’s board of directors. *Id.* at 8.

[56] *Spencer II*, *supra* note 19, at 92,215.

[57] First Amended Complaint at 8, *Spencer II*, *supra* note 19. The definition of a “pattern of racketeering activity” has troubled some courts, perhaps because “[t]he critical statutory word – pattern – ‘is relatively new to the legislative criminal lexicon’”. *United States v. Dean*, 647 F.2d 779, 788 (8th Cir. 1981), *rev’d en banc on other grounds*, 667 F.2d 729 (8th Cir.), *cert. denied*, 456 U.S. 1006 (1982) (quoting *United States v. Stofsky*, 409 F. Supp. 609, 613 (S.D.N.Y. 1973), *aff’d*, 527 F.2d 237 (2d Cir. 1975), *cert. denied*, 429 U.S. 819 (1976)). One element of doubt has been whether two or more predicate acts committed during the course of a single transaction can constitute a “pattern of racketeering activity” under RICO. Most courts that have addressed this issue seem to have concluded that acts that are separately chargeable or punishable are separate predicate offenses, and that when two separate predicate offenses have occurred a “pattern of racketeering activity” has been established. *See, e.g., United States v. McManigal*, 708 F.2d 276, 282 (7th Cir.), *vacated and remanded on other grounds*, 104 S. Ct. 419 (1983); *United States v. Weatherspoon*, 581 F.2d 595, 601–02 (7th Cir. 1978); *United States v. Parness*, 503 F.2d 430, 438 (2d Cir. 1974), *cert. denied*, 419 U.S. 1105 (1975). *But see United States v. Weisman*, 624 F.2d 1118, 1120–21 (2d Cir.), *cert. denied*, 449 U.S. 871 (1980).

[58] *Spencer II*, *supra* note 19, at 92,215.

[59] *Id.* at 92,214.

[60] *Id.*

[61] *See supra* text accompanying notes 21–38.

[62] *Spencer II*, *supra* note 19, at 92,216.

[63] *Id.* at 92,214 n.2. *Spencer* did not allege that its claims under §§ 14(d) and 14(e) constituted racketeering activity under RICO. *Id.* at 92,215 n.3.

[64] *See Hanna II*, *supra* note 20, at 93,733. The case itself made no mention of the mail and wire fraud allegations. Reference to these allegations can be found in Memorandum of Plaintiffs in Opposition to Defendant’s Motion to Dismiss Counts Four and Five of the Supplemental and Amended Complaint at 10–13, *Hanna II*, *supra* note 20.

[65] Supplemental and Amended Complaint at 15–16, *Hanna II*, *supra* note 20.

[66] *Id.* at 14–15.

[67] *See supra* notes 39–55 and accompanying text.

[68] *Moss v. Morgan Stanley, Inc.*, 719 F.2d 5, 18 n.14 (2d Cir. 1983).

[69] Most of these cases seem to accept implicitly the notion that “garden variety” securities fraud will serve as a RICO predicate offense. *See, e.g., Schact v. Brown*, 711 F.2d 1343, 1353–57 (7th Cir.), *cert. denied*, 104 S. Ct. 508 (1983); *Katz v. David W. Katz & Co.*, [1983–1984 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 99,669, at 97,690 (S.D.N.Y. Feb. 14, 1984); *In re Catanella & E.F. Hutton & Co. Sec. Litig.*, 583 F. Supp. 1388 (E.D. Pa. 1984); *Gilbert v. Bagley*, [1983–1984 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 99,483, at 96,795 (M.D.N.C. Sept. 17, 1983); *Mauriber v. Shearson /American Express, Inc.*, 567 F. Supp. 1231 (S.D.N.Y. 1983); *Gunther v. Dinger*, 547 F. Supp. 25 (S.D.N.Y. 1982); *Engl v. Berg*, 511 F. Supp. 1146 (E.D. Pa. 1981).

[70] *See, e.g., Mon-Shore Management, Inc. v. Family Media, Inc.*, No. 83 Civ. 2013-CLB, slip op. (S.D.N.Y. Mar. 29, 1984) (available May 1, 1984, on LEXIS, Genfed library, Dist file); *Moss v. Morgan Stanley, Inc.*, 553 F. Supp. 1347, 1358–64 (S.D.N.Y.), *aff’d on other grounds*, 719 F.2d 5 (2d Cir. 1983); *Noonan v. Granville-Smith*, 537 F. Supp. 23, 29 (S.D.N.Y. 1981).

[71] Under § 13(d), a purchaser or beneficial owner of more than five percent of a corporation’s stock must file with the SEC a report indicating, *inter alia*, the purpose of the acquisition “if the purpose of the purchases ... is to acquire control of the business of the issuer”. 15 U.S.C. § 78m(d) (1) (C) (1982). The specific items that must be disclosed are governed by Schedule 13D, 17 C.F.R. § 240.13d–101 (1984).

[72] Section 32(a) provides that “[a]ny person who willfully violates any provision of [the Exchange Act] ... or any rule or regulation thereunder ... or ... who willfully and knowingly makes, or causes to be made, any statement in any [required report that is] ... false or misleading with respect to any material fact” is subject to criminal fines and/or imprisonment. 15 U.S.C. § 78ff(a) (1982) (emphasis added). Thus, a violation of the Exchange Act is criminally punishable –

and hence a potential RICO predicate offense – only if it is willful. This clearly corresponds to the definition of scienter, a “term [that] is frequently used to signify the defendant’s guilty knowledge”. Black’s Law Dictionary 1207 (rev. 5th ed. 1979). In the context of the securities laws – specifically, in reference to § 10(b) and rule 10b-5 of the Exchange Act – the Supreme Court has defined scienter as “a mental state embracing intent to deceive, manipulate, or defraud”. *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 194 n.12 (1976). Although an allegation of scienter is necessary to base a RICO claim on a violation of the federal securities laws, a prior criminal conviction for the securities violation should not be necessary. Two new cases in the Court of Appeals for the Second Circuit, however, have sparked a debate over whether a criminal conviction is, in fact, necessary to support a private civil RICO action. See *Sedima, S.P.R.L. v. Imrex Co.*, [Current Binder] Fed. Sec. L. Rep. (CCH) ¶ 91,599 (2d Cir. July 25, 1984); *Bankers Trust Co. v. Rhoades* [Current Binder] Fed. Sec. L. Rep. (CCH) ¶ 91,600 (2d Cir. July 26, 1984). These cases held that private civil RICO actions may be pursued only after the defendant has been convicted of the predicate criminal offenses. After rehearing en banc was denied, Judge Cardamone, who had dissented in each of the two opinions, joined a unanimous panel in reluctantly following the two precedents. *Furman v. Cirrito*, [Current Binder] Fed. Sec. L. Rep. (CCH) ¶ 91,663 (2d Cir. July 27, 1984). The panel in *Furman* did, however, express strongly its disagreement with *Sedima* and *Bankers Trust*. The *Furman* analysis (although not the result) follows what had been thought to be the correct position – that no criminal conviction is necessary. See, e.g., *USACO Coal Co. v. Carbonium Energy, Inc.*, 689 F.2d 94, 95 n.1 (6th Cir. 1982) (citing cases).

[73] Section 10(b) proscribes the use of “any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe”, if the device or contrivance was “in connection with the purchase or sale of any security”. 15 U.S.C. § 78j(b) (1982). Under the rulemaking authority in that section, the SEC adopted rule 10b-5, which states somewhat more broadly that it shall be unlawful, in connection with the purchase or sale of any security,

- (1) to employ any device, scheme, or artifice to defraud,
- (2) to make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading, or
- (3) to engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person.

17 C.F.R. §240.10b-5 (1984).

Nevertheless, the Supreme Court has held that the scope of rule 10b-5 “cannot exceed the power granted the Commission by Congress under § 10(b)”. *Ernst & Ernst v. Hochfelder*, *supra* note 72, at 214.

[74] Section 14(e) (enacted as part of the Williams Act in 1968) tracks the language of § 10(b) (enacted in 1934) and rule 10b-5 very closely, but contains some important differences. Section 14(e) makes it unlawful “for any person to make any untrue statement of a material fact or [to] omit to state any material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading, or to engage in any fraudulent, deceptive, or manipulative acts or practices, in connection with any tender offer ...”. 15 U.S.C. § 78n(e) (1982).

[75] A target might also allege that the raider intentionally violated § 14(d) of the Exchange Act and the rules thereunder, which prescribe the procedural requirements for a tender offer. See 15 U.S.C. § 78n(d) (1982); see also note 63.

[76] *Spencer II*, *supra* note 19, at 92,215.

[77] *Hanna II*, *supra* note 20, at 93,738. See also *In re Cantaella & E.F. Hutton & Co. Sec. Litig.*, *supra* note 69, at n.56.

[78] See U.S.C. § 1961(1)(B) (1982).

[79] “The sweep of the statute does not embrace ordinary violators charged in common law fraud actions or federal securities law violations as the predicate offenses for RICO relief

The supporting civil remedies of the statute were designed against organized criminals and terrorists as an additional weapon in the crime fighters’ arsenal.” *Moss v. Morgan Stanley, Inc.*, *supra* note 70, at 1361. The district court in *Moss* felt that the judiciary should “filter out many RICO claims that are just efforts to claim treble damages for ordinary violations of criminal or tort laws”. *Id.* at 1360. To accomplish this, the court would have limited injuries cognizable under RICO to those caused by a RICO violation and not simply by the commission of a predicate offense, such as mail fraud or federal securities fraud. *Id.* at 1361. The Court of Appeals for the Second Circuit sympathized with the district court’s concern about overbroad applications of RICO, but declared in dicta that courts must apply RICO as it is written, and not as they would wish that it had been written. *Id.* at 21. See also *Furman v. Cirrito*, 578 F. Supp. 1535 (S.D.N.Y. 1984), *aff’d*, [Current Binder] Fed. Sec. L. Rep. (CCH) ¶ 91,663 (2d. Cir. July 27, 1984); *Haroco v. American Nat’l Bank & Trust Co.*, 577 F. Supp. 111 (N.D. Ill. 1983); *County of Cook v. Midcon Corp.*, 574 F. Supp. 902 (N.D. Ill. 1983); *Guerrero v. Katzen*, 571 F. Supp. 714 (D.D.C. 1983).

[80] One example is *Schact v. Brown*, *supra* note 69, in which the RICO count was based solely on the predicate offense of mail fraud. The court noted the defendants’ argument that a broad reading of RICO would federalize common law business fraud, providing treble damage actions for all securities-related mail fraud. *Id.* at 1353. The court felt, however, that the “defendants’ profession of alarm at the expansion of federal jurisdiction over business fraud through RICO amounts to nothing less than a dispute with the very design, and not the mere application, of the statute”. *Id.* at 1355. The court agreed

that the civil sanctions provided under RICO are dramatic, and will have a vast impact upon the federal-state division of substantive responsibility for redressing illegal conduct, but, like most courts who have considered the issue, we believe that such dramatic consequences are necessary incidents of the deliberately broad swath Congress chose to cut in order to reach the evil it sought; we are therefore without authority to restrict the application of the statute.

Id. at 1353. The court affirmed the district court’s denial of a motion to dismiss the RICO count. See also *United States v. Greenleaf*, 692 F.2d 182 (1st Cir. 1982), *cert. denied*, 103 S. Ct. 1522 (1983) (allowing consecutive sentences for criminal violations of mail fraud and RICO, where mail fraud constituted the RICO predicate offense).

[81] See, e.g., First Amended Complaint at 8, *Spencer I*, *supra* note 19; Complaint for Violations of the Securities Exchange Act of 1934 and Racketeer Influenced and Corrupt Organizations Act at 20–21, *Bayly Corp. v. Marantette*, *supra* note 16.; Complaint at 27, *Dan River, Inc. v. Icahn*, *supra* note 16.

[82] See *supra* note 63 and accompanying text; see also *Eisenberg v. Gagnon*, 564 F. Supp. 1347, 1352–53 (E.D. Pa. 1983) (“repeated acts of mail fraud and wire fraud would constitute a pattern of racketeering activity under the statute, and the plaintiffs have alleged at least that much”).

[83] One court stated that

Congress did not intend that RICO encompass garden variety securities fraud, without any alleged nexus to organized criminal activity as that term is used and understood, for which investors and others might seek ample recourse pursuant to a pervasive statutory and regulatory scheme that was in place long before Congress decided to add a new weapon to the fight against organized crime.

Wagner v. Bear, Stearns & Co., [1982–1983 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 99,032, at 94,913 (N.D. Ill. Sept. 17, 1982). It has also been suggested that “Congress [when it enacted RICO] had no intention of enacting a new substantive securities law”. *Divco Constr. & Realty Corp. v.*

Merrill Lynch, Pierce, Fenner & Smith, Inc., 575 F. Supp. 712, 714 (S.D. Fla. 1983). Using these arguments, then, these courts have required plaintiffs “to muster an allegation of involvement in organized crime”. *Id.* at 715. *Accord Gilbert v. Prudential-Bache Sec., Inc.*, No. 83–1513, slip op. at 4 (E.D. Pa. Jan. 10, 1984) (available May 1, 1984, on LEXIS, Genfed library, Dist file); *Hokama v. E.F. Hutton & Co.*, 566 F. Supp. 636, 643 (C.D. Cal. 1983); *Noonan v. Granville-Smith*, *supra* note 70, at 29; *Waterman Steamship Corp. v. Avondale Shipyards, Inc.*, 527 F. Supp. 256, 260 (E.D. La. 1981); *Adair v. Hunt Int’l Resources Corp.*, 526 F. Supp. 736, 747–48 (N.D. Ill. 1981); *Kleiner v. First Nat’l Bank*, 526 F. Supp. 1019, 1022 (N.D. Ga. 1981).

[84] “[T]he overwhelming majority of cases have rejected the organized crime limitation.” *In re Catanella & E.F. Hutton & Co. Sec. Litig.*, *supra* note 69. As the text indicates, the courts of appeals have uniformly agreed that the organized crime limitation does not accord with the statutory language, legislative history, or congressional intent. *See, e.g., Sutliff, Inc. v. Donvon Co.*, No. 83–1308, slip op. at 7 (7th Cir. Feb. 9, 1984) (available May 1, 1984, on LEXIS, Genfed library, Dist file); *Moss v. Morgan Stanley*, *supra* note 68, at 21; *Schact v. Brown*, *supra* note 69, at 1353; *Bennett v. Berg*, 685 F.2d 1053, 1063 (8th Cir. 1982), *rev’d in part, aff’d in part on rehearing en banc*, 710 F.2d 1361, 1364 (8th Cir.), *cert. denied*, 104 S. Ct. 527 (1983). *See also In re Catanella*, *supra* note 69 (citing an exhaustive list of cases on this point).

[85] *Spencer II*, *supra* note 19, at 92,214.

[86] *Hanna II*, *supra* note 20, at 93,734–36.

[87] 18 U.S.C. § 1964(c) (1982).

[88] *See, e.g., Furman v. Cirrito*, *supra* note 79; *Haroco v. American Nat’l Bank & Trust Co.*, *supra* note 79; *Dakis v. Chapman*, 574 F. Supp. 757 (N.D. Cal. 1983); *Richardson v. Shearson/American Express Co.*, 573 F. Supp. 133 (S.D.N.Y. 1983); *Bankers Trust Co. v. Feldesman*, 566 F. Supp. 1235 (S.D.N.Y. 1983); *Erlbaum v. Erlbaum*, [1982 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 98,772 (E.D. Pa. July 13, 1982), *dismissed*, 709 F.2d 1491 (3d Cir.), *cert. denied*, 104 S. Ct. 486 (1983).

[89] A violation of a provision of the federal securities laws involving fraud in the sale of a security, however, will not *ipso facto* constitute a “pattern of racketeering activity”. First, under RICO there must be at least two violations of the federal securities laws. Second, RICO requires scienter even when the securities laws (such as Exchange Act §§ 13(d) and 14(e) (first prong)) do not. Furthermore, the measure of recovery in a RICO damages suit – notwithstanding the treble damages feature of § 1964(c) – should be different from the measure of recovery under the securities laws. For example, in an action for damages for securities fraud the measure of recovery would be based either the so-called loss-of-bargain rule or out-of-pocket rule. On the other hand, in a § 1964(c) suit, the measure of recovery would be based on the damages to plaintiff’s business stemming from the § 1962 activity – a measure similar to that utilized in awarding damages in a suit brought under the antitrust laws.

[90] *See, e.g., Bankers Trust Co. v. Feldesman*, *supra* note 88, at 1241 (“it seems appropriate to limit the extraordinary private remedy of § 1964 to the class of plaintiffs who have suffered a competitive injury by reason of the defendant’s racketeering activities”).

[91] *See, e.g., Bunker Ramo Corp. v. United Business Forms, Inc.*, 713 F.2d 1272 (7th Cir. 1983); *Schact v. Brown*, *supra* note 69; *Bennett v. Berg*, *supra* note 84; *In re Catanella*, *supra* note 69; *In re Longhorn Sec. Litig.*, 573 F. Supp. 255 (W.D. Okla. 1983); *Ralston v. Capper*, 569 F. Supp. 1575 (E.D. Mich. 1983).

[92] *See, e.g., Bunker Ramo Corp. v. United Business Forms*, *supra* note 91, at 1288.

[93] *Spencer II*, *supra* note 19, at 92,216.

[94] *Hanna II*, *supra* note 20, at 93,737–38.

[95] *Id.* at 93,739.

[96] In *Hanna*, the plaintiff (*Hanna*) requested injunctive relief, Supplemental and Amended Complaint, *Hanna II*, *supra* note 20, but never moved for injunctive relief.

[97] 537 F. Supp. 413 (S.D.N.Y. 1982).

[98] Complaint, *Marshall Field & Co. v. Icahn*, *supra* note 16.

[99] *Supra* note 16, at 420.

[100] *Id.* Marshall Field had alleged that Icahn violated Exchange Act § 13(d) and that these violations constituted RICO predicate offenses. The court did not discuss this claim, however, because the court had already found that there had not yet been a conclusive determination that Icahn had violated § 13(d) and that Marshall Field would have difficulty in proving these violations. *Marshall Field & Co. v. Icahn*, *supra* note 16, at 418–19.

[101] *Bayly Corp. v. Marantette*, *supra* note 16.

[102] Complaint for Violations of the Securities Exchange Act of 1934 and the Racketeer Influenced and Corrupt Organization Act at 20–22, *Bayly Corp. v. Marantette*, *supra* note 16.

[103] *Bayly Corp. v. Marantette*, *supra* note 16, at 94,291–92.

[104] *Id.* at 94,291. In addition, the court found that Bayly had not made the showing of irreparable injury necessary to secure injunctive relief and thus that corrective disclosure would be the only relief to which Bayly would be entitled. *Id.*

[105] 701 F.2d 278, *supra* note 16. The issue on appeal in *Dan River* was the propriety of the district court's Solomon-like ruling, sterilizing Icahn's shares in Dan River but permitting Icahn to proceed with his tender offer for additional Dan River stock. *See id.* at 282.

[106] *Id.* at 289–90. The Investment Company Act of 1940, 15 U.S.C. §§ 80a–1 to –62 (1982), governs the structure, operations, and reporting requirements of certain companies which invest in securities.

[107] 701 F.2d at 290.

[108] *Id.*

[109] *Id.* at 290–91.

[110] *Id.* at 291.

[111] “Criminal intent is, of course, necessary to either mail fraud or securities fraud ... [and] it appears that Carl C. Icahn acted pursuant to bona fide legal opinions In the face of such evidence, it would seem extremely unlikely that Dan River will be able to prove the predicate acts of mail or securities fraud.” *Id.*

[112] *Id.* In dissent, Judge Butzner asserted that Dan River had indeed proven that Icahn had violated the federal securities laws and suggested that the court should have affirmed the district court's order because it struck an equitable balance. *Id.* at 291–95 (Butzner, J., dissenting).

[113] Compare *Vietnamese Fishermen's Ass'n v. Knights of the Ku Klux Klan*, 518 F. Supp. 993, 1014 (S.D. Tex. 1981) (assuming, without discussion, that preliminary injunctive relief would be available to private plaintiffs under RICO but refusing to issue a preliminary injunction because plaintiff failed to show a substantial likelihood it would succeed on the merits), with *Trane v. O'Connor Sec.*, 718 F.2d 26, 28–29 (2d Cir. 1983) (expressing doubt “as to the propriety of private party injunctive relief, especially in a case of this nature alleging at most ... garden-variety securities law violations as predicates for the RICO violation”). In a very recent case, however, the Court of Appeals for the Second Circuit, which decided *Trane*, seemed to accept a district court's award of injunctive relief to a private party under RICO. *See Aetna Casualty & Sur. Co. v. Liebowitz*, No. 83–7728, slip op. (2d Cir. Mar. 26, 1984) (available May 1, 1984, on LEXIS, Genfed library, Dist file), *aff'g*, 570 F. Supp. 908 (E.D.N.Y. 1983). *See infra* note 114.

[114] *Aetna Casualty & Sur. Co. v. Liebowitz*, No. 81 Civ. 2616 (E.D.N.Y. Dec. 8, 1981). Although a preliminary injunction was granted under RICO in *Aetna Casualty & Sur. Co.*, an unreported decision, the issue whether RICO grants private parties injunctive relief was not contested and therefore was not discussed. After the case was settled, however, the court half-heartedly defended its grant of injunctive relief when the plaintiff sought attorney's fees under § 1964(c). *Aetna Casualty & Sur. Co. v. Liebowitz*, 570 F. Supp. 908 (E.D.N.Y. 1983), *aff'd*, No. 83–7728, slip op. (2d Cir. Mar. 26, 1984) (available May 1, 1984, on LEXIS, Genfed library, Dist file). In that case, the court denied the plaintiff's request for attorney's fees because such awards are only available to the “prevailing party”, and injunctive relief does not operate as a determination on the merits. *Id.* at 912–13. The court noted that § 1964(a) gives the judiciary the power to issue “appropriate orders”, that “[n]othing in the statute indicates that a preliminary injunction

would not be an ‘appropriate order’ within the meaning of § 1964(a)” and that Congress’ failure to pass an earlier version of RICO that included a provision for private equitable relief “was by no means a clear indication that Congress intended to deprive the district court of its traditional equity jurisdiction to grant preliminary injunctive relief to a plaintiff who could show irreparable injury resulting from a defendant’s alleged violation of § 1962”. *Id.* at 910. The court thus concluded that “whether a preliminary injunction is available to a private party under § 1964 appears at least to be an open question”, *id.* at 911, a rather meek and qualified statement in light of the fact that the court had already granted precisely the equitable relief that it now could justify as no clearer than “an open question”.

The Court of Appeals for the Second Circuit affirmed the district court’s opinion on the question of attorney’s fees, but seemed to suggest that the district court’s earlier grant of the injunction was proper. See *Aetna Casualty & Sur. Co. v. Liebowitz*, *supra* note 113 (framing the issue as “whether a plaintiff who obtains a preliminary injunction in a civil action under [RICO] ... and then settles the case, is entitled to an attorney’s fee award”).

[115] *Kaushal v. State Bank of India*, 556 F. Supp. 576, 583 (N.D. Ill. 1983). Actually, the court said that “[at] most the statute is arguably ambiguous”. *Id.* (emphasis added).

As an interesting aside, the authors are only too painfully aware that law review articles – even this one – will never reach the best sellers’ list. It is gratifying to note, however, that law review articles are not entirely ignored. In its discussion of private equitable relief under RICO, the *Kaushal* court deplored the lack of quality law review articles on the subject. See *id.* at 581 n.16 (declaring that it is “distressing ... that the academic community, blessed with more time for reflection and extended treatment than the judiciary, has not served us well”). One hopes that Judge Shadur, the author of the *Kaushal* opinion, will provide a more favorable review of this article if the occasion arises.

[116] *DeMent v. Abbott Capital Corp.*, 589 F. Supp. 1378, 1383 n.3 (N.D. Ill. 1984).

[117] See Tyson & August, *The Williams Act After RICO: Has the Balance Tipped in Favor of Incumbent Management?*, 35 *Hastings L.J.* 53, at 81–82 n.143 (providing an in-depth discussion of the legislative history on this issue).

[118] *Bayly Corp. v. Marantette*, *supra* note 16, at 94,293.

[119] See *In re Action Indus. Tender Offer*, 572 F. Supp. 846 (E.D. Va. 1983), in which shareholders who sold their stock in response to an alleged fraudulent issuer tender offer sued under RICO utilizing violations of § 13(e) as predicate offenses.

[120] *Marshall Field & Co. v. Icahn*, *supra* note 16, at 420–21. The facts in the *Marshall Field* case expose one troubling problem regarding the proper construction of RICO’s provisions, a problem that is seemingly endemic to § 1962(c): can a corporation be both the named defendant in a RICO suit and the “enterprise” whose affairs are conducted through a pattern of racketeering activity? Placed in the context of a raider RICO suit, can a raider bring suit under § 1962(c), against both the target corporation and its individual managers who are conducting its affairs unlawfully, or is the raider limited to a suit against the individual managers? This question is of more than academic importance to a raider considering such a suit, because the possibility of a full recovery is enhanced if the corporation (a “deep pocket” adversary) can be joined as a defendant. Cases addressing the point suggest that if a corporation “is the enterprise, it cannot also be the RICO defendant”. *Rae v. Union Bank*, 725 F.2d 478, 481 (9th Cir. 1984); see also *United States v. Computer Sciences Corp.*, 689 F.2d 1181, 1190 (4th Cir. 1982), *cert. denied*, 103 S. Ct. 729 (1983) (same); *In re Action Indus. Tender Offer*, *supra* note 119, at 849 (same).

[121] In *Marshall Field* the court refused to grant a temporary restraining order for the alleged violations of § 14(e), holding that Icahn had not shown irreparable harm, likelihood of success on the merits or a balance of hardships. A RICO suit for damages, based on the alleged violations of § 14(e), however, might have survived a motion to dismiss. The viability of such a RICO suit would necessarily hinge on a court’s finding that the lock-ups in question constituted not only a violation of § 14(e) but also RICO fraud. In *Mobil Corp. v. Marathon Oil Co.*, 669 F.2d 366 (6th Cir. 1981), the court applied a broad definition of § 14(e) “manipulation” in holding that certain lock-up

arrangements used by a target company to thwart a tender offer constituted a violation of § 14(e). The lockups in *Mobil* (which gave a white knight an option to purchase treasury stock and the most coveted asset of the target) were admittedly more egregious than those involved in *Marshall Field* (which did not involve options but a firm agreement and a right of first refusal). Assuming that a court found the lock-ups in *Marshall Field* to be manipulative acts in violation of § 14(e), a court would then have to be persuaded that such manipulative acts constituted fraud within the meaning of RICO. Since the lock-ups in *Mobil* and *Marshall Field* may not have involved fraud or deception as a matter of law, a court may find that this type of violation of § 14(e) is not RICO fraud. In this regard, see *Data Probe Acquisition Corp. v. Datab, Inc.*, 722 F.2d 1 (2d Cir. 1983), which held that a lock-up was not even a violation of § 14(e) because there was no misrepresentation – an essential element, in the court's view, of a § 14(e) cause of action. Thus, because the ability of a raider to employ a target's lock-up agreement with a white knight as a basis for a suit under § 14(e) is still not settled, the viability of an analogous RICO suit is *a fortiori* an open question.

[122] See Tyson & August, *supra* note 117, at 108–09.

[123] See *supra* notes 70, 83, 88 & 90 and accompanying text.

[124] See *supra* notes 69, 84 & 91 and accompanying text.

[125] There is, however, one situation in which it would be appropriate for the courts to intervene and restrict the scope of RICO. See Tyson & August, *supra* note 117, at 107–14 (arguing that a well-established doctrine of statutory construction should permit a court to preclude the use of violations of the Williams Act (Exchange Act §§ 13(d), 13(e), 14(d), 14(e) & 14(f)) as RICO predicate offenses because such RICO litigation causes a conflict in the goals of two federal statutes to surface).

[126] It will be recalled that the infiltration requirement imposed by the *Spencer* court had no real effect on the viability of the RICO claim. See *supra* note 93 and accompanying text. Although the plaintiffs were unsuccessful in *Marshall Field*, *Bayly* and *Dan River*, their failure seems traceable to the weakness of their cases rather than to any findings on RICO. See *supra* text accompanying notes 96–117.

[127]

Obviously (although, if it is obvious to the courts, they have not mentioned it), no offeror can afford to spend hundreds of thousands of dollars litigating for two or three years when he can't have the slightest idea whether he will still have any desire at the end of that time to continue with the offer under then prevailing market conditions.

R. Jennings & H. Marsh, *Securities Regulation – Cases and Materials* 672 (5th ed. 1982) (footnote omitted).

[128] See W. Painter, *The Federal Securities Code and Corporate Disclosure* § 10.08(b), at 79–80 (Supp. 1982).

[129] *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723 (1975).

[130] See, e.g., *Transamerica Mortgage Advisors v. Lewis*, 444 U.S. 11 (1979); *Touche Ross & Co. v. Redington*, 442 U.S. 560 (1979); *Sante Fe Indus. v. Green*, 430 U.S. 462 (1977); *Piper v. Chris-Craft Indus.*, 430 U.S. 1 (1977); *Ernst & Ernst v. Hochfelder*, *supra* note 72. See generally Pitt & Ain, "Dirks" Deals Blow to SEC Insider Trading Program, *Legal Times of Wash.*, July 11, 1983, at 10, col. 1.

[131] See *Wellman v. Dickinson*, 475 F. Supp. 783, 816 (S.D.N.Y. 1979), *aff'd* 647 F.2d 163 (2d Cir. 1981), *cert. denied*, 103 S. Ct. 1522 (1983).

[132] See, e.g., *Equity Oil Co. v. Consolidated Oil & Gas*, [1983–1984 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 99,425 (D. Utah June 24, 1983); *Liberty Nat'l Ins. Holding Co. v. Charter Co.*, [1982 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 98,797 (N.D. Ala. Aug. 13, 1982); *American Bakeries Co. v. Pro-Met Trading Co.*, [1981 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 97,925 (N.D. Ill. Mar. 27, 1981); *Gateway Indus. v. Agency Rent-A-Car, Inc.*, 495 F. Supp. 92 (N.D. Ill.

1980); *Sta-Rite Indus. v. Nortek, Inc.*, 494 F. Supp. 358 (E.D. Wis. 1980); *Stromfield v. Great Atl. & Pac. Tea Co.*, 456 F. Supp. 1084 (S.D.N.Y. 1980); *Liptok v. Central Cartage*, [1981 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 98,034 (E.D. Mich. 1979). *But see Indiana Nat'l Corp. v. Rich*, 712 F.2d 1180 (7th Cir. 1983) (granting standing for injunctive relief under § 13(d)); *Dan River, Inc. v. Unitex Ltd.*, 624 F.2d 1216 (4th Cir. 1980) (same), *cert. denied*, 449 U.S. 1101 (1981); *Chromalloy Am. Corp. v. Sun Chem. Corp.*, 611 F.2d 240 (8th Cir. 1979) (same).

[133] *Hanna II*, *supra* note 20, at 94,592.

[134] It is possible, however, that injunctions should be awarded more easily under RICO than in other situations. *See* Blakey, *The RICO Civil Fraud Action in Context: Reflections on Bennett v. Berg*, 58 Notre Dame L. Rev. 237, 338 n.217 (1982) (arguing that when a federal statute authorizes an injunction, neither inadequacy of the remedy at law nor irreparable injury need be shown, whether the government or a private party is seeking the injunction).

[135] Sections 13(d), 13(e) and 14(d) of the Williams Act apply only to acquisitions of, or tender offers for, a class of equity security that is registered under Exchange Act § 12, 15 U.S.C. § 78I (1982). Section 14(e) of the Williams Act, in contrast, applies to *any* tender offer.

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