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Civil RICO - First Amendment - Third Circuit Applies Racketeering Statute to Civil Protestors - Anti-Abortion Protestors Found Liable

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CIVIL RICO—FIRST AMENDMENT—THIRD CIRCUIT APPLIES RACKETEERING STATUTE TO CIVIL PROTESTORS—ANTI-ABORTION PROTESTORS FOUND LIABLE

Northeast Women's Center, Inc. v. McMonagle (1989)

I. INTRODUCTION

In 1970, Congress enacted the Racketeer Influenced and Corrupt Organizations (RICO) provisions,[1] Title IX of the Organized Crime Control Act of 1970.[2] With its enhanced sanctions and remedies, RICO was designed to address the burgeoning problem of organized crime in

1. 18 U.S.C. §§ 1961-1968 (1988).

2. Pub. L. No. 91-452, 84 Stat. 941 (1970) (codified at 18 U.S.C. §§ 1961-1968 (1988)).

the United States.[3] Although RICO is comprised of both criminal[4] and

3. 18 U.S.C. § 1961 note (1988) (Congressional Statement of Findings and Purpose); *see* REPORT OF THE AD HOC CIVIL RICO TASK FORCE OF THE ABA SECTION OF CORPORATION, BANKING AND BUSINESS LAW 1, 70-126 (1985) [hereinafter ABA REPORT] (detailed exposition of legislative history); Blakey & Gettings, *Racketeer Influenced and Corrupt Organizations (RICO): Basic Concepts—Criminal and Civil Remedies*, 53 TEMP. L.Q. 1009, 1014-21 (1980) (same).

Section 1962 of the RICO statute delineates the prohibited activities as follows:

> (a) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in which such person has participated as a principal within the meaning of section 2, title 18, United States Code, to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce. . . .
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> (b) It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.
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> (c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.
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> (d) It shall be unlawful for any person to conspire to violate any of the provisions of subsection (a), (b), or (c) of this section.

18 U.S.C. § 1962(a)-(d) (1988).

Pertinent definitions under the statute include:

> (1) "racketeering activity" means (A) any act or threat involving murder, kidnaping, gambling, arson, robbery, bribery, extortion, dealing in obscene matter, or dealing in narcotic or other dangerous drugs, which is chargeable under State law and punishable by imprisonment for more than one year; (B) any act which is indictable under any of the following provisions of title 18, United State Code: . . . section 1951 [known as the Hobbs Act] (relating to interference with commerce, robbery, or extortion) . . . .
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> . . . .
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> (4) "enterprise" includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity;
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> (5) "pattern of racketeering activity" requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity[.]

Id. § 1961(1), (4) & (5).

4. *See id.* § 1963. The statute provides in pertinent part:

> (a) Whoever violates any provision of section 1962 of this chapter shall be fined under this title or imprisoned not more than 20 years (or for life if the violation is based on a racketeering activity for which the maximum penalty includes life imprisonment), or both[ ], and shall forfeit to the United States, irrespective of any provision of State law —

civil[5] components, the statute's civil provisions were rarely used in the years following their enactment.[6] Prior to 1980, only nine decisions were reported involving actions under civil RICO.[7]

The 1980s, however, have seen "an explosive growth of civil RICO lawsuits."[8] The attraction of treble damages and attorney's fees has transformed civil RICO into " 'the darling of the prosecutor's nursery.' "[9] Additionally, civil RICO's appeal is derived from the potential for stigmatization of the defendant as a racketeer, a circumstance that

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(1) any interest the person has acquired or maintained in violation of section 1962;

(2) any—

(A) interest in;

(B) security of;

(C) claim against; or

(D) property or contractual right of any kind affording a source of influence over;

any enterprise which the person has established, operated, controlled, conducted, or participated in the conduct of, in violation of section 1962 . . . .

Id. (footnote omitted).

5. *See id.* § 1964. The statute provides:

(a) The district courts of the United States shall have jurisdiction to prevent and restrain violations of section 1962 of this chapter by issuing appropriate orders, including, but not limited to: ordering any person to divest himself of any interest, direct or indirect, in any enterprise; imposing reasonable restrictions on the future activities or investments of any person, including, but not limited to, prohibiting any person from engaging in the same type of endeavor as the enterprise engaged in, the activities of which affect interstate or foreign commerce; or ordering dissolution or reorganization of any enterprise, making due provision for the rights of innocent persons.

(b) The Attorney General may institute proceedings under this section. Pending final determination thereof, the court may at any time enter such restraining orders or prohibitions, or take such other actions, including the acceptance of satisfactory performance bonds, as it shall deem proper.

(c) Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefore in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee.

(d) A final judgment or decree rendered in favor of the United States in any criminal proceeding brought by the United States under this chapter shall estop the defendant from denying the essential allegations of the criminal offense in any subsequent civil proceeding brought by the United States.

Id. § 1964(a)-(d).

6. ABA REPORT, *supra* note 3, at 55. There was "one reported decision addressing Civil RICO as early as 1972, but only one other case before 1975 . . . ." *Id.*

7. *Id.*

8. P. DICKINSON, CIVIL RICO: A RESEARCH GUIDE TO CIVIL LIABILITY FOR BUSINESS CRIMES 3 (1989); *see* ABA REPORT, *supra* note 3, at 1-2, 55.

9. Blakey & Gettings, *supra* note 3, at 1011 (quoting Judge Learned Hand's

provides substantial incentive for settlement.[10] During the early 1980s, the great majority of civil RICO actions involved a commercial or business setting, with mail, wire or securities fraud as the predicate,[11] or underlying, offense.[12] Recently, however, in *Northeast Women's Center, Inc. v. McMonagle*,[13] the United States Court of Appeals for the Third Circuit extended the reach of civil RICO beyond such usual areas.[14]

In *McMonagle*, the Third Circuit held anti-abortion activists liable under RICO for their intimidation and harassment of the clients and employees of a women's health center, which included destruction of the center's property.[15] The Third Circuit's application of civil RICO to a group of social protestors greatly expanded the reach of the statute[16]

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comment regarding crime of conspiracy in Harrison v. United States, 7 F.2d 259, 263 (2d Cir. 1925)).

10. Note, *The Enterprise Requirement: Getting to the Heart of Civil RICO*, 1988 WIS. L. REV. 663, 668 & nn.30-31 (discussion of attraction of civil RICO provisions).

11. For a discussion of what constitutes a predicate offense under RICO, see *infra* note 26 and accompanying text.

12. ABA REPORT, *supra* note 3, at 57. The report of the survey noted:

> [The ABA Task Force analyzed] approximately 300 federal civil RICO cases since the statute's inception.
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> . . . .
>
> Forty percent of the cases involve allegations of securities fraud and another 37 percent allege common law fraud in a commercial or business setting. The remaining cases involve . . . antitrust or unfair competition (4 percent), bribery or commercial bribery (4 percent), fraud not related to securities or business transactions (3 percent), labor-related matters (2 percent), theft or conversion (1 percent). . . . [N]ine percent . . . involve allegations of . . . (arson, bribery, commercial bribery, embezzlement, extortion, gambling, theft, [and] political corruption).

Id. at 55-56 (footnote omitted).

13. 868 F.2d 1342 (3d Cir.), *reh'g denied*, No. 88-1333, *cert. denied*, 110 S. Ct. 261 (1989).

14. *See id.* (application of civil RICO to social protestors). For a discussion of *McMonagle*, see *infra* notes 71-137 and accompanying text.

15. *McMonagle*, 868 F.2d at 1357. For a detailed discussion of this holding, see *infra* notes 112-37 and accompanying text. The Third Circuit also held that the justification defense was not available to the anti-abortion activists. *McMonagle*, 868 F.2d at 1350-52. For a discussion of the specific reasoning of the court, see *infra* note 137.

Additionally, the *McMonagle* court held that the unclean hands doctrine should not have been applied to preclude injunctive relief to the Northeast Women's Center. *McMonagle*, 868 F.2d at 1353-55. For the *McMonagle* court's analysis of why the unclean hands doctrine was inapplicable, see *infra* note 137.

Finally, the *McMonagle* court held that it was within the appropriate discretion of the district court to determine that the issue of punitive damages should not have been submitted to the jury. *McMonagle*, 868 F.2d at 1356-57. For a discussion of the reasoning behind this holding, see *infra* note 137.

16. The Third Circuit's conclusion that civil RICO was applicable to the abortion protestors in the instant case implicitly rejected the Second and Eighth Circuit's requirement that the RICO enterprise or racketeering activity include a pecuniary motive. *See* United States v. Flynn, 852 F.2d 1045 (8th Cir.), *cert. de-*

and raised important issues regarding the application of civil RICO and first amendment[17] freedoms. The potential impact of the application of civil RICO on the first amendment right of association is the focus of this Casebrief.[18]

II. BACKGROUND

A. *Civil RICO*

RICO was designed as a federal law enforcement weapon to attack

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nied, 488 U.S. 974 (1988); United States v. Ivic, 700 F.2d 51 (2d Cir. 1983); United States v. Anderson, 626 F.2d 1358 (8th Cir. 1980), *cert. denied*, 450 U.S. 912 (1981).

In *Ivic*, the Second Circuit held that financial motivation was a prerequisite for a civil RICO action. *Ivic*, 700 F.2d at 59-60. The *Ivic* court decided that four Croatian Nationalists committed to the separation of Croatia from Yugoslavia could not be held liable under civil RICO for their conspiratorial activities because they were politically, not financially, motivated. *Id.* at 59-64.

In *Anderson*, the Eighth Circuit addressed the statutory interpretation of the word "enterprise" as used in the RICO statute. *Anderson*, 626 F.2d at 1362-72. After examining the language of the statute and its legislative history, the *Anderson* court concluded that a RICO enterprise must be "directed toward an economic goal." *Id.* at 1372.

After the district court had decided *McMonagle*, but prior to the Third Circuit's review, the Eighth Circuit again held that "[a RICO] enterprise must be directed toward an economic goal." *Flynn*, 852 F.2d at 1052 (citing United States v. Anderson, 626 F.2d 1358 (8th Cir. 1980), *cert. denied*, 450 U.S. 912 (1981)).

The Third Circuit's elimination of the pecuniary requirement greatly extends the reach of civil RICO. Yet, the Third Circuit's opinion lacked any discussion regarding this issue. *See McMonagle*, 868 F.2d 1342. The court neither offered its reasons for disregarding the available precedent, nor acknowledged that it was creating a split among the circuits. *See id.*; Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit at 21-22, McMonagle v. Northeast Women's Center Inc., 110 S. Ct. 261 (1989) (No. 88-2137) [hereinafter Petition]. Interestingly, G. Robert Blakey, who was instrumental in the creation of the RICO statute, was a Counsel of Record for the defendants in their petition for certiorari to the Supreme Court, arguing that the elimination of the requirement of economic motivation was contrary to "Congress' plainly stated intent." Petition, *supra*, at 10.

In his dissenting opinion from a denial of certiorari, Justice White acknowledged that the Third Circuit's opinion in *McMonagle* created a split among the circuits regarding the RICO pecuniary motive requirement. McMonagle v. Northeast Women's Center, Inc., 110 S. Ct. 261, 261 (1989) (White, J., dissenting). Justice White "would [have] grant[ed] certiorari to resolve the conflict." *Id.* (White, J., dissenting).

17. U.S. CONST. amend. I. The first amendment states that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." *Id.*

18. For a discussion of the potential impact of *McMonagle* on first amendment freedoms, see *infra* notes 138-55 and accompanying text.

the problem of organized crime.[19] Its purpose was to prevent organized crime from investing in, acquiring, maintaining or operating legitimate businesses with criminal money or through criminal activity.[20] Section 1962 of the RICO provisions delineates four separate causes of action designed to achieve these goals.[21] For each of the defined causes of action, the plaintiff must establish the existence of an "enterprise" and a "pattern of racketeering activity."[22]

Section 1961(4) defines "enterprise" as "any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity."[23] "Racketeering activity" is defined, in part, as any act "chargeable" under certain state laws, any act "indictable" under specific federal criminal provisions, any "offense" involving fraud in bankruptcy or the sale of securities and drug-related activities "punishable" under federal law.[24] Section 1961's definition of racketeering activity lists the particular crimes which can be a part of a pattern of racketeering activity.[25] These enumerated crimes are often called "predicate offenses . . . because they constitute the predicate for a RICO violation."[26] Under section 1961(5), a " 'pattern of racketeering activity' requires at least two acts of racketeering activity, one of which occurred after the effective date of [RICO] and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity."[27]

RICO imposes criminal penalties for violation of section 1962 and also has a civil enforcement scheme which includes a provision for private suits.[28] Any individual may bring a civil RICO action if he alleges that he was " 'injured in his business or property by reason of' the de-

19. *See* 18 U.S.C. § 1961 note (1988) (Congressional Statement of Findings and Purpose).

20. *See id.* § 1962. For the statutory language of section 1962, see *supra* note 3.

21. *See* 18 U.S.C. § 1962(a)-(d) (1988).

22. *See id.* For the text of the pertinent definitions under the statute, see *supra* note 3.

23. 18 U.S.C. § 1961(4) (1988).

24. *Id.* § 1961(1); *see also* Sedima S.P.R.L. v. Imrex Co., 473 U.S. 479, 481-83 (1985) (discussion of "pattern of racketeering activity"). For a discussion of *Sedima*, see *infra* notes 30-34 and accompanying text.

25. *See* 18 U.S.C. § 1961(1) (1988).

26. D. SMITH & T. REED, CIVIL RICO ¶ 2.01, at 2-2 (1989).

27. 18 U.S.C. § 1961(5) (1988). For a discussion of the pattern requirement, see Note, *The Pattern Requirement in Civil Rico is Working: Case Law after* Sedima, 33 VILL. L. REV. 205 (1988). The Supreme Court recently addressed the pattern requirement of RICO. *See* H.J. Inc. v. Northwestern Bell Tel. Co., 109 S. Ct. 2893, 2899-900 (1989) (criminal conduct requires relationship plus threat of continuity to establish pattern).

28. *See* 18 U.S.C. §§ 1963-1964 (1988). For the statutory language of these sections, see *supra* notes 4-5.

fendant's 'pattern of racketeering activity.' "[29]

Limitations on the use of RICO's private civil action was the subject of *Sedima S.P.R.L. v. Imrex Co.*[30] In *Sedima*, the Supreme Court acknowledged the proliferation of civil RICO litigation.[31] It also recognized that civil "RICO is evolving into something different from the original conception of its enactors."[32] Nevertheless, the Court stated that although civil RICO is being used against "legitimate" businesses rather than against the "archetypal, intimidating mobster," it was not the role of the judiciary to correct this issue.[33] Rather, Congress must correct "this defect—if defect it is—[because it] is inherent in the statute."[34]

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29. Lacaovara & Aronow, *The Legal Shakedown of Legitimate Business People: The Runaway Provisions of Private Civil RICO*, 21 NEW. ENG. L. REV. 1, 4 (1985-86) (citing 18 U.S.C. § 1964(c) (1982)).

30. 473 U.S. 479 (1985). The increasing popularity of civil RICO actions resulted in various attempts by the courts to narrow its reach. *See* Note, *supra* note 10, at 668-73. Examples of limitations imposed by courts are the requirement that a plaintiff allege a nexus between the defendant and organized crime; the requirement that there be a "prior conviction" for the predicate RICO acts; and the requirement that there be a distinct "racketeering injury." *Id.* at 668-70. Under the "prior conviction" limitation, "the defendant must have been convicted of the predicate offenses in a prior criminal action." *Id.* at 669. For a discussion of the reasoning of the courts that adopted these limitations, see Abrams, *The Place of Procedural Control in Determining Who May Sue or Be Sued: Lessons in Statutory Interpretation from Civil RICO and* Sedima, 38 VAND. L. REV. 1477, 1513-20 (1985).

Sedima involved a business fraud action brought under civil RICO in which the Supreme Court held that RICO required neither a prior criminal conviction for the predicate acts nor a distinct racketeering injury. *Sedima*, 473 U.S. at 493-97. Although the specific issue of the requirement of a nexus between the defendant and organized crime was not before the Court, the Court, in dicta, also rejected this argument. *Id.* at 496-99. The Court noted:

> Instead of being used against mobsters and organized criminals, [civil RICO] has become a tool for everyday fraud cases brought against "respected and legitimate 'enterprises.' " Yet Congress wanted to reach both "legitimate" and "illegitimate" enterprises. The former enjoy neither an inherent incapacity for criminal activity nor immunity from its consequences. . . .
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> It is true that private civil actions under the statute are being brought almost solely against [respected businesses], rather than against the archetypal, intimidating mobster. Yet this defect—if defect it is—is inherent in the statute as written, and its correction must lie with Congress.

Id. at 499 (citations omitted). For a discussion of the impact of *Sedima*, see Note, *supra* note 10, at 669-73.

Since *Sedima*, the debate regarding the reach of civil RICO has intensified. For a discussion of both sides of this debate, see generally Note, *Congress Responds to* Sedima*: Is There a Contract Out on Civil RICO?*, 19 LOY. L.A.L. REV. 851 (1986).

31. *Sedima*, 473 U.S. at 485-86.

32. *Id.* at 500.

33. *Id.* at 499.

34. *Id.*

Thus, in 1985, the *Sedima* Court gave the RICO statute a broad reading which has greatly expanded its application.

B. *The First Amendment*

Although the United States Constitution does not expressly guarantee a right of association, the Supreme Court has recognized such a right.[35] In 1958, in *NAACP v. Alabama ex rel. Patterson*,[36] the Court recognized "that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the 'liberty' assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech."[37] In *Patterson*, the Alabama Attorney General sought disclosure of NAACP's membership list during an injunction hearing to stop the NAACP from conducting activities within the state.[38] The NAACP refused to comply with the court's production order and was found in contempt.[39] The United States Supreme Court reversed.[40] The Court reasoned "that compelled disclosure of affiliation with groups engaged in advocacy" would "constitute [an] effective restraint on freedom of association."[41] The Court concluded that Alabama was unable to justify "the deterrent effect on the free enjoyment of the right to associate which disclosure of membership lists [was] likely to have."[42]

Five years later, in *NAACP v. Button*,[43] the Court again emphasized that the first and fourteenth amendments protect freedom of expression and association.[44] *Button* involved a Virginia statute which prohibited "the improper solicitation of any legal or professional business."[45] Specifically, the statute made it unlawful for "an agent for an individual or organization [to] retain[] a lawyer in connection with an action to which it [was] not a party and in which it ha[d] no pecuniary right or liability."[46]

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35. *See* Roberts v. United States Jaycees, 468 U.S. 609, 618 (1984) (Constitution guarantees freedom of association for purpose of engaging in first amendment activities); NAACP v. Button, 371 U.S. 415, 428-29 (1963) (first and fourteenth amendments protect expression and association); NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449, 460 (1958) (affirming right "to engage in association for the advancement of beliefs and ideas").

36. 357 U.S. 449 (1958).

37. *Id.* at 460.

38. *Id.* at 452-53. The state alleged that "all such documents were necessary for adequate preparation for the hearing." *Id.* at 453.

39. *Id.*

40. *Id.* at 467.

41. *Id.* at 462. Thus, the Court "recognized the vital relationship between freedom to associate and privacy in one's associations." *Id.*

42. *Id.* at 466.

43. 371 U.S. 415 (1963).

44. *Id.* at 428-29.

45. *Id.* at 419.

46. *Id.* at 423 (citation omitted).

The activities of the NAACP, an organization whose purpose is the elimination of all racial barriers, focused on assisting litigation which promoted this goal.[47] NAACP lawyers were also involved in advising individuals of their legal rights and referring them to attorneys to assist with civil rights litigation.[48] The Virginia Supreme Court of Appeals held that NAACP activities were included within the statutory ban on solicitation.[49] The Supreme Court reversed, holding that the activities of the NAACP were "modes of expression and association protected by the First and Fourteenth Amendments."[50]

In light of the NAACP's objective of social change, the Court reasoned that the means it chose to foster that goal—the process of litigation—was "a form of political expression."[51] Since the statute's thrust was at "curtailing group activity leading to litigation," the statute infringed first amendment freedoms.[52] The Court concluded that the state's interest in regulating professional conduct was not substantial and could not "justify the broad prohibition which it ha[d] imposed."[53]

In 1984, in *Roberts v. United States Jaycees*,[54] the Court refined the concept of freedom of association and distinguished between "freedom of intimate association"[55] and "freedom of expressive association."[56] In *Roberts*, the Supreme Court considered whether the associational rights of the Jaycees, an all male group, were unconstitutionally infringed upon by a Minnesota statute which prohibited discrimination based upon sex.[57] Although the Court recognized that the statute affected the members' freedom of expressive association,[58] the Court also noted that "[t]he right to associate for expressive purposes is not . . . absolute."[59] The Court explained that "[i]nfringements on that right may be justified by regulations adopted to serve compelling state inter-

47. *Id.* at 419-20. The NAACP ordinarily assisted in criminal actions in which there was a question of possible racial discrimination as well as suits seeking fully desegregated public school facilities when the litigant retained an NAACP staff lawyer to represent them. *Id.* at 420.

48. *Id.* at 420-22.

49. *Id.* at 423-26.

50. *Id.* at 428-29.

51. *Id.* at 429.

52. *Id.* at 435-37.

53. *Id.* at 438-39, 444.

54. 468 U.S. 609 (1984).

55. *Id.* at 617-18. The Court defined "freedom of intimate association," as involving one's "choices to enter into and maintain certain intimate human relationships." *Id.*

56. *Id.* at 618. "[F]reedom of expressive association" is "a right to associate for the purpose of engaging in those activities protected by the First Amendment—speech, assembly, petition for the redress of grievances, and the exercise of religion." *Id.*

57. *Id.* at 612-15.

58. *Id.* at 621-22.

59. *Id.* at 623.

ests . . . that cannot be achieved through means significantly less restrictive of associational freedoms."[60] The Court concluded that Minnesota had a "compelling interest in eradicating discrimination against its female citizens [which] justif[ied] the impact . . . of the statute . . . on the male members' associational freedoms."[61] The Court's holding was based on its conclusion that the state had used "the least restrictive means of achieving its ends."[62]

C. *Civil RICO and the First Amendment*

The Supreme Court has not yet addressed the relationship between civil RICO and social activism. In *NAACP v. Claiborne Hardware Co.*,[63] however, it confronted the analogous issue of the preservation of first amendment rights in the context of a conspiracy conviction. In *Claiborne*, a large group of black citizens in Claiborne County boycotted white merchants.[64] The boycott consisted mainly of non-violent picketing, but sporadic acts and threats of violence did occur.[65] The Mississippi Supreme Court held that the entire boycott was unlawful and affirmed the petitioners' liability for all damages resulting from the boycott.[66] The United States Supreme Court reversed the Mississippi high court's decision.[67] The Supreme Court acknowledged that those individual petitioners who participated in violent acts should be held liable for their deeds, but rejected the theory of guilt by association.[68] The Court stated:

> Civil liability may not be imposed merely because an individual belonged to a group, some members of which committed acts of violence. For liability to be imposed by reason of association alone, it is necessary to establish that the group itself possessed

60. *Id.*

61. *Id.*

62. *Id.* at 626. Further, the Court concluded that "the Jaycees ha[d] failed to demonstrate . . . any serious burdens on the male members' freedom of expressive association." *Id.*

63. 458 U.S. 886, *reh'g denied*, 459 U.S. 898 (1982).

64. *Id.* at 888. In March 1966, black citizens of Claiborne County presented white governmental officials with a list of specific demands for racial equality and integration. *Id.* at 889. After the demands were rejected, the black citizens decided to boycott the white merchants. *Id.*

65. *Id.* at 903-06. The unlawful activity included: two incidents of shots being fired at a house, a car windshield being broken and a flower garden being damaged. *Id.* at 904.

66. *Id.* at 888. The Mississippi Supreme Court decided that the entire boycott was unlawful based on evidence that some black individuals were forced to withhold their patronage from white merchants because of fear of reprisals. *Id.*

67. *Id.* at 934. The Supreme Court described the boycott as encompassing "elements of criminality and elements of majesty." *Id.* at 888.

68. *Id.* at 918-19. The Court stated: "The First Amendment . . . restricts the ability of the State to impose liability on an individual solely because of his association with another." *Id.*

> unlawful goals and that the individual held a specific intent to further those illegal aims.[69]

Although the Court approved the punishing of individuals for their unlawful acts, it unequivocally asserted that first amendment protections must be safeguarded.[70] *Claiborne*, along with *Patterson, Button* and *Roberts*, provided the relevant backdrop of constitutional issues against which *McMonagle* was decided.

III. *NORTHEAST WOMEN'S CENTER, INC. V. MCMONAGLE*

In *McMonagle*, evidence at trial established that twenty-six anti-abortion activists (the defendants)[71] unlawfully entered the plaintiff-Northeast Women's Center (the Center) on four separate occasions.[72] In

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69. *Id.* at 920 (footnote omitted). The Court also noted:

> In litigation of this kind the stakes are high. Concerted action is a powerful weapon. . . .
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> . . . .
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> The taint of violence colored the conduct of some of the petitioners. . . . The burden of demonstrating that it colored the entire collective effort, however, is not satisfied by evidence that violence occurred . . . . The burden of demonstrating that fear rather than protected conduct was the dominant force in the movement is heavy.

Id. at 932-34.

70. *Id.* The Court explained:

> The First Amendment does not protect violence. . . . When such conduct occurs in the context of constitutionally protected activity, however, "precision of regulation" is demanded. Specifically, the presence of activity protected by the First Amendment imposes restraints on the grounds that may give rise to damages liability and on the persons who may be held accountable for those damages.

Id. at 916-17 (citation and footnote omitted).

71. The defendants were anti-abortion activists who had participated in various protest activities both inside and outside the Northeast Women's Center. *McMonagle*, 868 F.2d at 1345. Initially, there were 42 persons sued. *Id.* n.2. The plaintiff, however, dismissed its claims against 11 defendants. *Id.* Further, the court directed a verdict for four defendants. *Id.* Although the jury found 27 defendants liable, the court granted a judgment n.o.v. for one defendant, leaving 26 defendants on appeal. *Id.*

72. *Id.* at 1345. The Northeast Women's Center is a Pennsylvania corporation which provides pregnancy testing, abortions and other gynecological services. *Id.* On December 8, 1984, 50 protestors, including 12 of the defendants, rushed into the Center, knocked down employees and threw medical supplies on the floor. *Id.* Based on this incident, the then acting administrator of the Center hired security guards to protect the safety of the Center's employees and patients. *Id.*

On August 10, 1985, 12 defendants forced their way into the Center's premises. *Id.* at 1346. One employee was injured. *Id.* Another employee testified that after the protestors locked themselves in an operating room, she observed that machinery had been disassembled and damaged. *Id.*

On October 19, 1985, 24 of the defendants and others were arrested when they attempted to again enter the Center. *Id.* On May 23, 1986, a fourth trespass occurred. *Id.* This incident was the subject of the subsequent federal suit. *Id.*

August 1985, the Center filed a civil suit in the United States District Court for the Eastern District of Pennsylvania.[73] The Center alleged "that [the] Defendants had agreed among themselves and others to disrupt the Center's business and injure its property by . . . harassing the Center's clients and employees, unlawfully entering on its property, and destroying and damaging medical equipment."[74] Using violation of the Hobbs Act as a predicate offense, the Center sought damages and relief under RICO, in addition to claims under the Sherman Anti-Trust Act,[75] the Clayton Act[76] and the common law torts of trespass and intentional interference with contractual relations.[77] The defendants' motion to dismiss was denied.[78]

The Center then sought preliminary injunctive relief which was also denied.[79] This denial was vacated, however, by the Court of Appeals for the Third Circuit which remanded with the suggestion that the parties agree to convert the action into a final injunction hearing.[80] The parties

73. *Id.* at 1347.

74. *Id.*

75. 15 U.S.C. §§ 1-7 (1988). This claim resulted in a directed verdict for the defendants. *McMonagle*, 868 F.2d at 1347. For a discussion of this outcome, see *infra* notes 85-86 and accompanying text.

76. 15 U.S.C. § 15 (1988).

77. *McMonagle*, 868 F.2d at 1347.

78. *Id.* The defendants argued that the court lacked subject matter jurisdiction under Rule 12(b)(1) of the Federal Rules of Civil Procedure, that the complaint failed to state a claim under Rule 12(b)(6) and that the court should not hear the plaintiff's pendent state law claims in view of the absence of any valid federal claims. Northeast Women's Center, Inc. v. McMonagle, 624 F. Supp. 736, 737 (E.D. Pa. 1985).

Judge Kelly looked at the complaint in the light most favorable to the pleader. *Id.* He concluded that the set of facts pled could possibly result in liability for the defendants under both RICO and federal anti-trust laws and should not be dismissed. *Id.* at 738, 741. Since the complaint sufficiently alleged two federal claims, the defendants' request to dismiss the plaintiff's state law claim for lack of a surviving federal claim was also dismissed. *Id.* at 741.

79. *McMonagle*, 868 F.2d at 1347. The Center contended that the defendants had intensified their harassment of patients and staff, that they were acting to prevent the Center from moving to its new location and that since the complaint had been filed, the defendants had forcibly entered the Center on two occasions. *Id.*

80. *Id.* The district court had held a hearing in which it heard testimony and viewed videotapes of the protests. Northeast Women's Center, Inc. v. McMonagle, 813 F.2d 53, 54 (3d Cir. 1987). The appellate court noted that although the district court determined that the Center had failed to demonstrate irreparable harm as a consequence of the defendants' activities, it had made no such factual findings in its opinion or its order. *Id.* Furthermore, the court asserted that the district court had not evaluated the testimony. *Id.* The court found this "contrary to the mandate of [Federal Rule of Civil Procedure] 52(a) which requires, inter alia, that in granting or refusing interlocutory injunctions, the court 'shall similarly set forth the findings of fact and conclusions of law which constitute the grounds for its action.' " *Id.* The absence of factual findings made it impossible for the appellate court to discharge its appellate function under the required clearly erroneous standard. *Id.*

complied and the final injunction hearing was consolidated with the trial on the merits.[81] At trial, the Center presented to the jury the testimony of ten witnesses and two hours of video tape.[82] When the Center rested, the defendants moved for directed verdicts.[83]

Due to the complexity of the issues and the "disjointed presentation of the evidence," the court decided to hold "an extended hearing on the defendants' motions."[84] The court directed a verdict in favor of the defendants on the action brought under the Sherman Act because the Center failed to state a prima facie claim.[85] The court stated that since the plaintiff had failed to meet its burden of proof, it need not decide whether the first amendment would have denied the Center recovery had the burden been met.[86]

Turning to the alleged RICO violation, the court noted that recovery under RICO was being sought under sections 1962(c) and (d).[87] Thus, the plaintiff was required to "establish the existence of an 'enterprise' [and] 'a pattern of racketeering activity' composed of the commission of at least two predicate acts . . . within a ten-year period."[88] The Center alleged both robbery and Hobbs Act extortion as the predicate acts.[89] The Center argued that it had proven robbery by showing that on August 10, 1985, a number of defendants, "through the use of physical force, [had] removed property from [the Center's] offices."[90] The Center's extortion claims rested on its "characteriz[ation of] the defend-

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The court, in an opinion handed down March 11, 1987, expressed concern over the fact that the action had been commenced on August 1, 1985, but had not yet reached the final hearing stage. *Id.* at 53-54. Therefore, it recommended converting the action into a final injunction hearing. *Id.* at 54-55. The availability of injunctive relief would then depend on the Center's success on the merits of the case rather than on "the difficult factual issue of whether [the Center would] suffer irreparable harm pending final adjudication." *Id.* at 55.

81. Northeast Women's Center, Inc. v. McMonagle, 665 F. Supp. 1147, 1151 (E.D. Pa. 1987), *aff'd in part, remanded in part*, 868 F.2d 1342 (3d Cir.), *reh'g denied*, No. 88-1333, *cert. denied*, 110 S. Ct. 261 (1989).

82. Northeast Women's Center, Inc. v. McMonagle, 670 F. Supp. 1300, 1303 (E.D. Pa. 1987).

83. *Id.*

84. *Id.*

85. *Id.* at 1305. The court concluded that the plaintiff had failed to state a prima facie claim under 15 U.S.C. § 1. According to the court, in order to prove an anti-trust violation, the plaintiff had to demonstrate an actual anti-competitive impact on the provision of abortion services within the relevant product and geographic market. *Id.* at 1304-05. The Center, however, had not introduced such evidence. *Id.* at 1305.

86. *Id.* at 1305-06. The court stated that "[t]he First Amendment does limit the application of the Sherman Act." *Id.* at 1306 n.8 (citing Eastern R.R. President's Conference v. Noerr Motor Freight, Inc., 365 U.S. 127 (1961)).

87. *Id.* at 1306 n.9. For the text of section 1962, see *supra* note 3.

88. *McMonagle*, 670 F. Supp. at 1306 (citations omitted).

89. *Id.* at 1306-07.

90. *Id.*

ants' protest activities as violative of the Hobbs Act."[91]

The court began its analysis of the Center's Hobbs Act claims by stating that "in assessing the applicability of the Hobbs Act to the defendants' conduct, the precepts of the Constitution must be kept in mind."[92] Acknowledging that "[a]ttempts to persuade another to action are clearly within the scope of the First Amendment," the court began its analysis of the specific details of the defendants' activities.[93] The court found that the purpose behind the defendants' speech—"to persuade patients to forego their abortions or employees to leave their employment"—did not "diminish its protection under the Constitution."[94] Further, peaceful picketing and leafletting were also protected "provided that the manner of expression retained its peaceful nature."[95] The court stated, however, that "[t]he First Amendment will not . . . offer a sanctuary for violence."[96] The court underscored that the Center had the burden of proof regarding such unlawful conduct in order to establish extortionate behavior.[97] The Center "must prove more than the offensive or coercive nature of a defendant's protest activities [and] more than a defendant's intent that the Center cease providing abortions, that its employees resign their abortion-related posts, or that its patients cancel their appointments."[98]

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91. *Id.* at 1307. The court explained that a Hobbs Act violation occurs if a person "induces his victim to part with property through the use of fear [which] adversely affects interstate commerce." *Id.* (citation omitted). According to the court, the Hobbs Act also applies "to attempted extortions and conspiracies to commit extortion." *Id.* (citing 18 U.S.C. § 1951(a) (1982)). Additionally, under the Hobbs Act "property" includes intangible property interests, for example, "the right to make business decisions free from wrongfully imposed outside pressures." *Id.* (citation omitted). Thus, the Center argued:

> [T]he defendants, through the use of fear instilled by their protest activities, attempted and conspired to induce (1) the Center, (2) its employees, and (3) its patients to part with intangible property interests. Specifically, the defendants allegedly attempted and conspired to extort from the Center its property interest in continuing to provide abortion services, from the employees their property interest in continuing their employment at the Center, and from the patients their property interest in entering into a contractual relationship with the Center.

Id. (footnote omitted).

The defendants, in their petition for certiorari to the Supreme Court, argued that the *McMonagle* court's use of the language "to part with property," rather than to "obtain property," in the definition of extortion, was "an unwarranted and unprecedented expansion of the scope of the Hobbs Act." Petition, *supra* note 16, at 25.

92. *McMonagle*, 670 F. Supp. at 1307.

93. *Id.* at 1308 (citation omitted).

94. *Id.* (citation omitted).

95. *Id.* (citing NAACP v. Claiborne Hardware Co., 458 U.S. 886, 911, *reh'g denied*, 459 U.S. 898 (1982)).

96. *Id.*

97. *Id.*

98. *Id.*

The court concluded that the Center had presented evidence sufficient to establish four predicate acts: "the August 10 robbery, the extortion of the Center, the extortion of its employees, and the extortion of its patients."[99] Further, the court concluded that the "enterprise" element had been established.[100] Since the "enterprise" and "pattern of racketeering activity" elements had been established, the RICO claim under section 1962(c) was allowed to go to the jury.

The court then began its examination of the Center's RICO claim under section 1962(d) which makes it "unlawful for any person to conspire to violate section 1962(c) [of RICO]."[101] The court acknowledged two legal concerns regarding this claim.[102] First, section 1962(d) applied only to those defendants who "conspired intentionally, not just to trespass inside the Center's offices, but also to commit two acts of robbery or extortion."[103] Second, the free assembly clause placed a heavy burden on the Center's conspiracy theory.[104] The court stated that "liability imposed for one's involvement with others—'guilt *for* association'—conflicts sharply with the precepts of the First Amendment."[105] Thus, the court concluded that the Center "bears the burden of proving that *each* defendant . . . specifically intended to accomplish those illegal aims."[106] Therefore, the court found that "[t]he only defendants the jury could possibly find liable under this section are those . . . who actually entered the Center" and two defendants who actively participated in preventing persons from gaining access to the Center.[107] The court directed a verdict for four other defendants who did not meet the criteria for liability under this section 1962(c) claim.[108]

Upon completion of the hearing on the defendants' motions for di-

99. *Id.* at 1309. The Center also argued that a claim for extortion had been established with respect to those defendants who had protested at the homes of Center employees. *Id.* at 1308-09 n.12. The court rejected this claim, however, stating that "because there were no time, place, and manner limitations on the defendants and because the plaintiff has introduced no evidence that the picketing was otherwise unlawful, this picketing cannot, consistent with the First Amendment, constitute evidence of extortion." *Id.* (citation omitted).

100. *Id.* at 1308-09.

101. *Id.* at 1310 (citing 18 U.S.C. § 1962(d) (1982)).

102. *Id.*

103. *Id.*

104. *Id.*

105. *Id.* (citing NAACP v. Claiborne Hardware Co., 458 U.S. 886, 925, *reh'g denied*, 459 U.S. 898 (1982)).

106. *Id.*

107. *Id.* at 1309 nn.13 & 14, 1310. The court allowed section 1962(d) claims against two defendants who were never placed inside the Center, but who allegedly were involved in either "blockad[ing]" the Center's front door or "barricad[ing]" the only entrance to the Center's parking lot. *Id.* The court viewed this conduct as sufficient evidence to establish the Center's extortion theory. *Id.* at 1309-10 & n.13. For a discussion of the Center's extortion theory, see *supra* note 91.

108. *McMonagle*, 670 F. Supp. at 1310.

rected verdicts, the remaining RICO, trespass and intentional interference with contract claims were sent to the jury.[109] The jury found twenty-seven defendants liable under RICO.[110] Both the Center and the defendants appealed.[111]

Judge Sloviter, writing on behalf of a unanimous Third Circuit panel, began her review by addressing the general issue of the applicability of civil RICO to the instant case.[112] Relying on *Sedima S.P.R.L. v. Imrex Co.*,[113] as well as Third Circuit precedent in *Gilbert v. Prudential-Bache Security Inc.*,[114] the court emphasized that the Supreme Court has signaled that civil RICO should be read broadly; it is available to all

109. *Id.* at 1313.

110. *McMonagle*, 868 F.2d at 1347. The damages on the RICO claim were assessed at $887.28, which reflected the cost of repairing certain medical equipment. *Id.* Pursuant to section 1964(c) of RICO, the district court trebled these damages. *Id.*

The jury also found that three defendants had interfered with the Center's contracts with its employees but awarded no damages because there was no finding of proximate loss. *Id.* The jury found 24 defendants liable for trespass and awarded compensatory and punitive damages. *Id.* Compensatory damages were assessed at $42,087.95, while punitive damages were assessed at $2,000 per defendant for a total of $48,000. *Id.*

Defendants' motions for a new trial and judgment n.o.v. were denied. *Id.* The court, however, did grant judgment n.o.v. on the punitive damages award. *Id.* It reasoned "that the Center had substantially prejudiced [the] Defendants by failing to request punitive damages in a timely and consistent manner." *Id.* The court concluded that this had "successfully preclud[ed the] Defendants from presenting evidence of motive that would have been relevant on the punitive damages issue." *Id.*

Additionally, the court declined to give the Center any injunctive relief on its successful RICO and interference with contract claims, relying on the unclean hands doctrine. *Id.* Evidence had been offered showing that a Center physician had failed to comply with a fetal tissue inspection provision of the Pennsylvania Abortion Control Act. *Id.* (citing 18 PA. CONS. STAT. ANN. § 3214(c) (Purdon 1983)).

The court did, however, grant injunctive relief on the trespass claim. *Id.* The defendants were enjoined "from entering the Center's premises, entering the parking lot adjacent to the Center for the purpose of protesting there, blocking or attempting to block the entrances to the Center or parking lot" and from restricting the ingress and egress to or from the Center or parking lot. *Id.* at 1347-48.

111. *Id.* at 1348. The Center challenged the district court's use of the unclean hands doctrine to limit the injunctive relief as well as the court's order setting aside the jury's punitive damage award. *Id.* at 1345. For a discussion of these challenges, see *infra* note 137.

The defendants "raise[d] more than twenty issues on their cross-appeals, including the applica[bility] of civil RICO, the availability of the justification defense, and various claims of prejudicial error at trial." *McMonagle*, 868 F.2d at 1345. For a discussion of the challenges addressing civil RICO, see *infra* notes 112-37 and accompanying text. For a discussion of the challenges addressing the justification defense, see *infra* note 137.

112. *McMonagle*, 868 F.2d at 1345, 1348.

113. For a discussion of *Sedima*, see *supra* notes 30-34 and accompanying text.

114. 769 F.2d 940 (3d Cir. 1985). In this securities fraud action, the Third

private plaintiffs who are able to allege and prove the elements under the statute's provisions.[115] The Third Circuit pointed out that the Center had pled, and the jury had found, "a RICO violation based on a pattern of extortionate acts."[116] The court found this pattern sufficient to invoke the civil provisions of RICO.[117]

After finding that the requirements for a civil RICO action had been met, the court then examined the defendants' argument that civil RICO should not be applicable upon these particular facts because the defendants' actions were motivated by their political beliefs.[118] Analyzing this proposition, the court referred to its own decision in *United States v. Dickens*.[119] *Dickens* involved the conviction of seventeen Black Muslim defendants who committed numerous robberies in violation of RICO to finance their religious organization.[120] Quoting the *Dickens* court, the Third Circuit asserted that "[t]he First Amendment . . . does not shield from governmental scrutiny practices which imperil public safety, peace or order."[121]

After rejecting the idea of RICO immunity based on political motivation,[122] the *McMonagle* court next discussed the defendants' contention that the Center had failed to show that it suffered a RICO injury.[123] The court conceptualized this argument as encompassing two related issues: (1) whether a separate and distinct racketeering injury was re-

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Circuit relied upon *Sedima* and refused to require that the plaintiff "allege a nexus between the defendants and organized crime." *Id.* at 942.

115. *McMonagle*, 868 F.2d at 1348. For a discussion of the requirements of a civil RICO action, see *supra* notes 3 & 5.

116. *McMonagle*, 868 F.2d at 1348.

117. *Id.* For a discussion of the civil provisions of RICO, see *supra* notes 3 & 5.

118. *McMonagle*, 868 F.2d at 1348-49. For a discussion of whether the court misconstrued the defendants' argument, see *infra* note 122.

119. 695 F.2d 765 (3d Cir. 1982), *cert. denied*, 460 U.S. 1092 (1983).

120. *Id.* at 769.

121. *McMonagle*, 868 F.2d at 1348 (quoting United States v. Dickens, 695 F.2d 765, 772 (3d Cir. 1982), *cert. denied*, 460 U.S. 1092 (1983)). Upon analysis of the *McMonagle* court's reasoning regarding the defendants' argument of immunity based upon political motivation, it is apparent that the court found the first amendment irrelevant to these facts due to the presence of unlawful activity. The court pointed out that the presence of unlawful activity distinguished the instant case from a situation *where protected first amendment activities are at issue. McMonagle*, 868 F.2d at 1348-49. For a discussion of the opposing point of view, i.e., that the first amendment was implicated on these facts, see *infra* notes 138-49 and accompanying text.

122. *McMonagle*, 868 F.2d at 1348-49. In their petition for a writ of certiorari, the protestors argued that the Third Circuit misconstrued their challenge. Petition, *supra* note 16, at 22. Petitioners argued that they were not claiming any special immunity, but rather, since they had not appropriated any economic benefit unto themselves, civil RICO was inapplicable. *Id.* For a discussion of the issue of whether a civil RICO enterprise or racketeering activity requires a pecuniary motive, see *supra* note 16.

123. *McMonagle*, 868 F.2d at 1349.

quired, and (2) whether the Hobbs Act covers extortion of intangible rights. Relying on *Sedima*, in addition to its own precedent in *Malley-Duff & Associates v. Crown Life Insurance Co.*[124] and *Zap v. Frankel*,[125] the Third Circuit rejected the notion of conditioning liability upon a showing of distinct racketeering injury.[126] The court concluded that the RICO injury requirement was sufficiently met by the tangible injury to the Center's medical equipment.[127]

Next, the court scrutinized the second part of the defendants' RICO injury challenge, examining whether economic motivation is a necessary element of the crime of extortion under the Hobbs Act.[128] The defendants argued that the use of the Hobbs Act to provide the predicate acts in the instant case was inappropriate because the element of economic motivation was absent.[129] The Third Circuit summarily dismissed this argument, asserting that such a contention ignored "well-established precedent" which held that "lack of [an] economic motive does not constitute a defense to Hobbs Act crimes."[130]

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124. 792 F.2d 341 (3d Cir. 1986), *aff'd on other grounds*, 483 U.S. 143 (1987). The *McMonagle* court cited *Malley-Duff* for the proposition that "delay, added expenses and inconvenience caused by defendants' interference with a lawsuit [were] sufficient to meet [the RICO] injury requirement." *McMonagle*, 868 F.2d at 1349 (quoting Malley-Duff & Assocs. v. Crown Life Ins. Co., 792 F.2d 341, 355 (3d Cir. 1986), *aff'd on other grounds*, 483 U.S. 143 (1987)).

125. 770 F.2d 24 (3d Cir. 1985). The *McMonagle* court cited *Zap* for the proposition that a "RICO plaintiff need allege 'no independent "racketeering injury" apart from injury caused by predicate acts.'" *McMonagle*, 868 F.2d at 1349 (quoting Zap v. Frankel, 770 F.2d 24, 26 (3d Cir. 1985)).

126. *McMonagle*, 868 F.2d at 1349. For a discussion of the requirement of a distinct and separate "racketeering injury," see *supra* note 30. In *Sedima*, the Supreme Court had rejected the notion that it was necessary for the plaintiff to show that it suffered "a competitive injury." *McMonagle*, 868 F.2d at 1349 (citing Sedima S.P.R.L. v. Imrex Co., 473 U.S. 479, 497 n.15 (1985)). For a discussion of *Sedima*, see *supra* notes 30-34 and accompanying text.

127. *McMonagle*, 868 F.2d at 1349.

128. *Id.* at 1349-50.

129. *Id.*

130. *Id.* at 1350. The "well-established precedent" to which the court referred included: United States v. Anderson, 716 F.2d 446, 447 (7th Cir. 1983) (upholding Hobbs Act conviction of anti-abortion protestors who abducted and threatened doctor in attempt to induce him to cease performing abortions); United States v. Cerilli, 603 F.2d 415, 420 (3d Cir. 1979) (extorted payments went to political party's coffers), *cert. denied*, 444 U.S. 1043 (1980); United States v. Starks, 515 F.2d 112, 124 (3d Cir. 1975) (no exception to Hobbs Act when extorsive solicitations made for religious purpose).

The court misapplied these cases because each of these cases are examples of economic motivation, not the lack thereof. *Cerilli* involved the extortion conviction of state officials who required political contributions as a condition for a lessor's equipment being used on state jobs. *Cerilli*, 603 F.2d at 418. *Starks* involved the extortion of money from a tavern owner for religious purposes. *Starks*, 515 F.2d at 115. Although the defendants in *Cerilli* and *Starks* did not personally benefit from their extortion, they were economically motivated on behalf of a third party.

Anderson involved the Hobbs Act conviction of anti-abortion activists who

The defendants also maintained that economic injury is an essential element of extortion when it is used as a predicate offense under RICO.[131] The defendants reasoned that the claimed extortion of the Center's intangible right to continue to operate its business was inadequate to state a cause of action as a RICO predicate offense.[132] The court rejected this theory[133] pointing out that in *United States v. Local 560 of the International Brotherhood of Teamsters*[134] the Third Circuit had considered the same issue and had extended the Hobbs Act to protect intangible as well as tangible property.[135] The *McMonagle* court asserted that "[r]ights involving the conduct of business are property rights" and therefore were the proper subject of an extortion action.[136] The Third Circuit thus concluded that the defendants' challenges of the RICO convictions were all without merit and upheld the jury's findings.[137]

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kidnapped and threatened a doctor in an attempt to convince him to cease performing abortions. *Anderson*, 716 F.2d at 447. In the course of this attempt, however, the defendants obtained three hundred dollars from the doctor. *Id.* Therefore, *Cerilli, Starks* and *Anderson* do not support the Third Circuit's conclusion that economic motivation is not a necessary element of Hobbs Act extortion. *See* Petition, *supra* note 16, at 27.

131. *McMonagle*, 868 F.2d at 1350.

132. *Id.* "The Center's extortion claim was that Defendants used force, threats of force, fear and violence in [an attempt] to force the Center out of business." *Id.* The district court instructed the jury:

> Specifically, defendants are charged with attempting and conspiring to extort from the Center its property interest in continuing to provide abortion services, from its employees, their property interest in continuing their employment with the Center, and from patients, their property interest in entering into a contractual relationship with the Center.

Id. (citation omitted).

133. *Id.*

134. 780 F.2d 267 (3d Cir. 1985), *cert. denied*, 476 U.S. 1140 (1986).

135. *McMonagle*, 868 F.2d at 1350 (citing United States v. Local 560 of the Int'l Bhd. of Teamsters, 780 F.2d 267, 281 (3d Cir. 1985), *cert. denied*, 476 U.S. 1140 (1986)). In *Local 560*, the intangible property rights included the union membership's rights to vote, speak and assemble. *Local 560*, 780 F.2d at 271.

136. *McMonagle*, 868 F.2d at 1350.

137. *Id.* The Third Circuit then addressed the defendants' argument that the justification defense should have been available to them. *Id.* at 1350-52. The court began by rejecting the general defense of good faith motive. *Id.* at 1350-51. Acknowledging that the justification defense was available in Pennsylvania, the court discussed *Commonwealth v. Capitolo*. *Id.* at 1351 (citing 508 Pa. 372, 498 A.2d 806 (1985)). In *Capitolo*, the Pennsylvania Supreme Court posited a four-part test to determine the availability of such a defense. *Id.* (citing Commonwealth v. Capitolo, 508 Pa. 372, 378, 498 A.2d 806, 809 (1985)). The Third Circuit stated:

> [T]he justification defense rests on a defendant's ability to show: "(1) that the actor was faced with clear and imminent harm . . . ; (2) that the actor could reasonably expect that [his/her] actions would be effective in avoiding this greater harm; (3) that there [was] no legal alternative [that would have been] effective in abating the harm; and (4) that the Legislature has not acted to preclude the defense by a clear and deliberate choice regarding the values at issue."

IV. ANALYSIS

The Third Circuit's decision in *McMonagle* demonstrated the court's

Id. (quoting Commonwealth v. Capitolo, 508 Pa. 372, 378, 498 A.2d 806, 809 (1985)).

The Third Circuit stated that this four-part test had been applied in *Commonwealth v. Wall* in which the defendants were convicted of criminal trespass during an abortion protest. *Id.* at 1351-52 (citing 372 Pa. Super. 534, 539 A.2d 1325 (1988)). The Third Circuit explained that the defense was precluded in *Wall* because none of the *Capitolo* requirements were met. *Id.* at 1352 (citing Commonwealth v. Wall, 372 Pa. Super. 534, 543, 539 A.2d 1325, 1328-29 (1988)). The Third Circuit found the same analysis applicable in the instant case. *Id.* The court concluded that the justification defense was not available to the defendants because the defendants had "numerous legal alternatives . . . to pursue their goal of persuading women not to have abortions. For example, they could continue to march, go door-to-door to proselytize their views, distribute literature, personally or through the mails, and contact residents by telephone, short of harassment." *Id.*

After rejecting the availability of the justification defense in the case at hand, the court then reviewed the plaintiff's challenge of the district court's denial of injunctive relief under the unclean hands doctrine. *Id.* at 1353-56. Judge Sloviter began her review by noting that the unclean hands doctrine is only appropriate when applied to matters immediately impacting upon the lawsuit. *Id.* at 1354-55. The district court found the plaintiffs guilty of unclean hands due to a violation of the Pennsylvania Abortion Control Act relating to the examination of fetal tissue by one of the physicians practicing at the Center. *Id.* at 1353-54. Judge Sloviter reasoned that even if such a violation had occurred, it was "at most collateral to the matter involved in this lawsuit," because it had "no connection at all to the Defendants' actions which the jury found violated both federal and state law." *Id.* at 1354. Thus, the court concluded that the district court had erred in applying the unclean hands doctrine in this situation. *Id.* at 1355. Because all of the injunctive relief sought could be granted under the state law claim of interference with contractual relationships, the court declined to reach the defendants' alternative argument that injunctive relief is not available to private parties under RICO's civil provisions. *Id.* Although the defendants argued that such injunctive relief must be limited to the three defendants found liable under the interference with contractual relationship claim, the court rejected this argument. *Id.* at 1355-56. Relying on Pennsylvania case law and Federal Rule of Civil Procedure 65(d), the court reasoned that since the defendants were part of an enterprise, such evidence of concerted conduct would allow the injunction to be entered against all of the defendants. *Id.*

The Center argued that the district court had not granted it effective relief. *Id.* at 1356. For a discussion of the relief granted, see *supra* note 110.

Therefore, the Center argued that the Third Circuit should enter its proposed injunction, or alternatively, direct the district court to do so in clear terms. *Id.* at 1356. The Third Circuit concluded, however, that "the district court [was] in [a] better position . . . to set the terms of an appropriate injunction." *Id.* Thus, the court remanded the matter of adequacy of the injunction to the district court. *Id.* The district court's final decision regarding the terms of the injunction was not reached until August 27, 1990. *See* Northeast Women's Center, Inc. v. McMonagle, No. 85-4845 (E.D. Pa. Aug. 27, 1990) (1990 WL 126529).

Lastly, the Third Circuit reviewed the district court's denial of punitive damages. *McMonagle*, 868 F.2d at 1356-57. Using the abuse of discretion standard of review, the Third Circuit concluded that the district court had not erred in entering the judgment n.o.v. on the issue of punitive damages. *Id.* It reasoned that the defendants were prejudiced because they were not put on notice

reluctance to fully explore the first amendment implications of the application of civil RICO to the facts before it. Rather, the Third Circuit rejected first amendment immunity for civil protestors without fully discussing the constitutional implications of its actions.[138] Asserting that the first amendment was not a sanctuary for illegal activities, the court concluded that the first amendment was not implicated on these facts because of the presence of illegal activity. The Third Circuit's reasoning that the presence of unlawful activity renders a first amendment inquiry unnecessary is unsound because it omits any analysis of impermissible guilt by association, an analysis which is necessitated by the United States Supreme Court's decision in *NAACP v. Claiborne Hardware Co.*[139]

Claiborne stands for the proposition that a careful first amendment analysis is indicated whenever liability is imposed for a combination of lawful and unlawful social protest activity.[140] *Claiborne* restricts the government from imposing liability on an individual for conspiracy solely because the individual associates with another who participates in unlawful acts.[141] Instead, the *Claiborne* doctrine mandates that liability can only be imposed after establishing that "the group itself possessed unlawful goals and that the individual held a specific intent to further those illegal aims."[142]

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that punitive damages were at issue in the trial. *Id.* at 1356. As evidence of the defendants' lack of notice, the court cited three examples: (1) the Center failed to mention punitive damages in its pretrial memorandum as was required by local rule; (2) it failed to object to the court's pretrial order specifying the elements of damages, which excluded punitive damages; and (3) the court's preclusion of evidence on motive in response to the Center's motion *in limine*. The Third Circuit concluded that it was within the district court's discretion to rule that the Center should not have been granted a jury charge on punitive damages. *Id.* at 1356-57.

138. *McMonagle*, 868 F.2d at 1348-49. For a discussion of the court's rejection of immunity based on political motivation, see *supra* notes 118-22 and accompanying text.

139. 458 U.S. 886, *reh'g denied*, 459 U.S. 898 (1982). After the Third Circuit's decision in *McMonagle*, the defendants petitioned for a rehearing in banc, arguing that the court should have applied *Claiborne* to the facts before it. Petitioners' Reply Brief in Support of Petition and Appendix at 3, McMonagle v. Northeast Women's Center, Inc., 110 S. Ct. 261 (1989) (No. 88-2137). This argument was rejected by the Third Circuit in an unreported decision. *Id.* For a discussion of the *Claiborne* decision, see *supra* notes 63-70 and accompanying text.

140. *Claiborne*, 458 U.S. at 916. The Court stated: "When [unlawful conduct] occurs in the context of constitutionally protected activity . . . 'precision of regulation' is demanded." *Id.* (citation and footnote omitted).

141. *Id.* at 908. The court noted that "[t]he right to associate does not lose all constitutional protection merely because some members of the group may have participated in conduct or advocated doctrine that itself is not protected." *Id.*

142. *Id.* at 920 (footnote omitted). In addition to placing severe restraints on the imposition of liability, the *Claiborne* Court also established guidelines for the imposition of damages. *Id.* at 916-20. Only damages which are proximately

The *Claiborne* Court presented an available framework for review; the Court explained:

> A massive and prolonged [social and political change] effort . . . cannot be characterized as a violent conspiracy simply by reference to the ephemeral consequences of a relatively few violent acts. Such a characterization must be supported by findings that adequately disclose the evidentiary basis for concluding that specific parties agreed to use unlawful means, that carefully identify the impact of such unlawful conduct, and that recognize the importance of avoiding the imposition of punishment for constitutionally protected activity.[143]

Applying the *Claiborne* framework, the Third Circuit might have analyzed the jury's verdict to insure a finding *that each defendant* possessed the necessary specific intent to further the RICO predicate acts of extortion and robbery, not simply trespass.[144] Such a review would have comported with *Claiborne*, while providing a conceptual framework for district court judges, faced in the future with similar civil RICO claims against protestors, to fully and fairly apply the law while avoiding an impermissible infringement of first amendment rights.

In addition to a *Claiborne* analysis to determine *who* can be held liable for unlawful acts committed by a few individuals in the context of group protest activities, the first amendment also requires a less restrictive means analysis to determine the appropriateness of the *means* employed to hold such individuals liable.[145] In *Roberts v. United States Jaycees*, the Court explained that "[t]he right to associate for expressive purposes is not . . . absolute. Infringements on that right may be justified by . . . compelling state interests, unrelated to the suppression of ideas . . . that cannot be achieved through means significantly less restrictive of associational freedoms."[146]

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caused by the unlawful conduct, not those which result from the lawful activity, can be awarded. *Id.* at 920-21.

143. *Id.* at 933-34.

144. Although the Third Circuit did not conduct a *Claiborne* analysis, the district court was aware of the first amendment implications of the fact situation which had been presented to it. For a discussion of the district court's analysis of the first amendment implications of *McMonagle*, see *supra* notes 86, 92-98 and accompanying text.

Given the district court's acknowledgment of the first amendment implications of the case and the district court's concern over the "disjointed presentation of the evidence," the Third Circuit should have conducted a *Claiborne* inquiry. *McMonagle*, 670 F. Supp. at 1303. An evaluation of the "detailed series of interrogatories prepared by the district court" for the jury should have been performed to insure the sufficiency of the findings. *McMonagle*, 868 F.2d at 1347.

145. *See* Roberts v. United States Jaycees, 468 U.S. 609, 622-29 (1984). For a discussion of *Roberts*, see *supra* notes 54-62 and accompanying text.

146. *Roberts*, 468 U.S. at 623.

In *McMonagle*, the government's interest in the elimination of organized crime, law enforcement and public safety were compelling government interests. But, the interest in the elimination of organized crime does not appear to be furthered by the application of civil RICO to social protestors. Also, the interests in law enforcement and public safety could be advanced through means significantly less restrictive of associational freedoms than the imposition of civil RICO treble damages because the Center had ample state law remedies.[147] The *McMonagle* defendants conceded that the Center was entitled "to recover damages for nuisance, civil trespass, or destruction of property to the extent [the damages were] proven and flow[ed] directly from any activities . . . not protected by the First Amendment."[148] Therefore, the imposition of civil RICO penalties on the *McMonagle* protestors may have constituted an impermissible infringement of first amendment rights. The imposition of treble damages, the possibility of stigmatization as a racketeer, if convicted, and the potential for a finding of "guilt by association" may serve to chill the exercise of first amendment freedoms in the future. This proposition finds support in the Supreme Court's reasoning in *NAACP v. Button*, where the Court stated that "[t]he threat of sanctions may deter [the exercise of first amendment freedoms] almost as potently as the actual application of sanctions."[149]

McMonagle raises the specter of first amendment freedoms effectively chilled by the application of civil RICO to social protestors.[150] Moreover, the right to civil protest has historically been at the core of our democratic society:[151]

> Violation of the law for the purpose of protest in this country is a practice which stretches back through the sit-ins of the Civil Rights movement, the labor strikes, Thoreau, and the Boston Tea Party, to the early eighteenth century when a group of Quaker citizens in Pennsylvania refused to pay taxes to support [the] war against the Indians.[152]

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147. *See* Petition, *supra* note 16, at 17; *see also* Note, *Limiting Political Expression by Expanding Racketeering Laws: The Danger of Applying a Commercial Statute in the Political Realm*, 20 RUTGERS L.J. 201, 224 (1988) (arguing protestors should be liable only under state law).

148. Petition, *supra* note 16, at 17.

149. NAACP v. Button, 371 U.S. 415, 433 (1963). For a discussion of *Button*, see *supra* notes 43-53 and accompanying text.

150. *See* Melley, *The Stretching of Civil RICO: Pro-Life Demonstrators Are Racketeers?*, 56 UMKC L. REV. 287, 309 n.153 (1988) (suggesting that animal rights, anti-nuclear and anti-apartheid activists may now fall under RICO); Note, *supra* note 147, at 203, 216 (broad interpretation of RICO threatens constitutional rights).

151. *See Claiborne*, 458 U.S. at 913. "This Court has recognized that expression on public issues 'has always rested on the highest rung of the hierarchy of First Amendment values.'" *Id.* (quoting Carey v. Brown, 447 U.S. 455, 467 (1980)).

152. Recent Development, *Civil Disobedience — Protests Beyond the Law*, 14 ST.

Regular utilization of the RICO statute in the area of social protest may serve as a disincentive for individuals who might otherwise join activist causes.[153] Similarly, the fear of exposing themselves to a RICO prosecution may dissuade citizens from advocating beliefs that they have a right to encourage.[154]

Civil rights advocates and Vietnam War protestors are just two examples of civil protest groups which impacted upon the policies and law of this nation. If civil RICO had been available in the sixties, it is possible that the social forces brought to bear by these and other groups may have been weakened or snuffed out at their inception. Although the squelching of efforts directed at social change may not have been the intent of the Third Circuit, it may nevertheless be the effect of the court's opinion.

V. CONCLUSION

Prior to *McMonagle*, the majority of civil RICO actions had involved a commercial or business setting.[155] Yet, the Third Circuit affirmed the application of civil RICO to a group of protestors who were motivated by a desire for social change, not economic gain. This elimination of the requirement of a pecuniary motive for a civil RICO action,[156] coupled with the use of civil RICO in the area of civil protest, may greatly extend the reach of civil RICO.

Equally significant is the Third Circuit's conclusion that the first amendment was irrelevant to the facts before it because of the presence of illegal activity. This conclusion raises the concern that civil RICO may become a tool of oppression used to dissuade advocates of social change and to quash unpopular viewpoints.

The *McMonagle* decision is important because it applied civil RICO in an area where it had not previously been applied and, arguably, was never meant to be applied. It is unfortunate that the court declined the opportunity to set forth a strong constitutional standard desperately

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LOUIS U.L.J. 719, 719 (1970). *See generally* Comment, *Civil Disobedience and the First Amendment*, 32 UCLA L. REV. 904 (1985) (discussion of accommodation of civil disobedience within first amendment).

153. *See* NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449, 463 (1958) (disclosure of NAACP membership list may chill freedom of association by dissuading others from joining because of fear of consequences of disclosure). For a discussion of *Patterson*, see *supra* notes 36-42 and accompanying text.

154. *See Patterson*, 357 U.S. at 462-63 (disclosure of membership list likely to adversely affect members' ability to foster and advocate beliefs).

155. For a discussion of the types of cases brought under civil RICO, see *supra* note 12.

156. For a discussion of the requirement that the RICO enterprise have a pecuniary motive, and the Third Circuit's implicit rejection of this requirement, see *supra* note 16.

needed to guide Third Circuit courts in the future,[157] while safeguarding the first amendment right of association.

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157. A bill presently before Congress proposes that RICO be amended so that " 'racketeering activity' does not include any conduct consisting of nonviolent protest." H.R. 3522, 101st Cong., 1st Sess. (1989). A case which includes both nonviolent and violent protest activities, however, might still fall within the purview of RICO. Thus, a strong judicial standard is required to ensure that nonviolent protestors are not held liable under RICO simply because of their association with a group of individuals, a few of whom participate in violent activities.