

1985

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Recommended Citation

Bertz, Michael A. (1985) "Pursuing a Business Fraud RICO Claim," *California Western Law Review*. Vol. 21 : No. 2 , Article 3.

Available at: <https://scholarlycommons.law.cwsl.edu/cwlr/vol21/iss2/3>

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Pursuing a Business Fraud RICO Claim

MICHAEL A. BERTZ*©

I. Why Pursue a RICO Claim?

Upon initial review of what were once your client's mid-six figure securities accounts,¹ and now, fifteen months later, are only one-quarter that size, you note to the client that there appears to have been extensive churning² of his accounts. Furthermore, the statements made by the broker that he had direct information, not yet in the marketplace, about a pending merger of a company upon which he recommended sizeable stock purchases (resulting in significant losses), appear to have been false. Additionally, the statements by the broker explaining the lack of commission charges on a large number of confirmations, that the brokerage firm was trying to help its customer make up some of his losses by not charging or taking income on those transactions, also appear to be false in that substantial mark-ups were charged and income was taken on those principal trades entered into directly with the firm. Finally, the accountings provided to your client from time to time, of the equity in his accounts, appear to be false. Your client has also brought to your attention a number of large trades toward the end of the existence of his accounts which he states were not authorized by him, the circumstances of which raise questions of whether the broker was "parking" those securities in his customer's accounts as part of broader manipulatory conduct. Additionally, your client has indicated that he is aware of at least two other customers of the same broker who are complaining of similar handling of their accounts.

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1. While the hypothetical facts used as a reference in this Article are those of a pervasive customer securities fraud, the discussion should be equally applicable to any business fraud matter, including those in which infiltration and/or control of an enterprise is involved. It should be noted at the outset, however, that Senator Strom Thurmond, Chairman of the Senate Judiciary Committee has expressed his intent to seek hearings on the proliferation of civil suits of the type discussed here. *See Federal Securities Law Reports*, (CCH) No. 1109 (Jan. 23, 1985).

2. Excessive transactions for the purpose of generating commissions and other charges for the benefit of the broker in disregard of the interest of the customer. *See Miley v. Oppenheimer & Co., Inc.*, 637 F.2d 318, 324 (5th Cir. 1981); *Mihara v. Dean Witter & Co., Inc.*, 619 F.2d 814, 820 (9th Cir. 1980); *Hecht v. Harris, Upham & Co.*, 430 F.2d 1203, 1206-1207 (9th Cir. 1970).

The client reacts emotionally, clarifying for you that these are funds developed over a period of years for retirement purposes, and that he is concerned about "putting good money after bad" in paying the costs of a lawsuit. His major concern, however, is whether, if he does go through the financial and emotional strain of litigation, he will be able to retrieve at least some of his losses after deducting the expenses of the lawsuit.

Knowing that only actual damages are available for charges of fraud under the securities laws, which do not provide for recovery of costs and attorney's fees,³ and that punitive damages awardable under a breach of fiduciary duty claim⁴ are seldom rendered in such cases, you consider whether charging a pattern of unlawful conduct under the Racketeer Influenced and Corrupt Organizations Act (RICO), which allows for payment of costs and attorney's fees as well as for treble damages, may be a means of satisfying your client's concerns and desires.

However, to avoid some of the costly negative results obtained where a RICO claim is just dropped into an otherwise viable action,⁵ consideration must first be given to (1) proper pleading of the facts of the case to the particular elements required by RICO, (2) court developed roadblocks to civil RICO actions, and (3) ethical and practical concerns relevant to deciding whether to proceed with a RICO claim.

This Article will attempt to assist counsel who may pursue a Civil RICO claim in regard to these considerations by focusing upon issues raised in relation to the hypothetical client.

II. GENERAL CONSIDERATIONS IN PLEADING THE ELEMENTS OF RICO

A. *The Importance of Proper Pleading in a RICO Action*

While RICO was intended in significant part "[T]o seek the eradication of organized crime in the United States . . . by providing . . . new remedies to deal with the unlawful activities of those en-

3. Securities Act of 1933 Section 12(2), 15 U.S.C. § 771(2) (1982); and Securities Exchange Act of 1934 Section 28(a), 15 U.S.C. § 78bb(a) (1982).

4. *Mihara*, 619 F.2d at 826; *Miley*, 637 F.2d at 329-32.

5. *See, e.g.*, the Amended Class Action Complaint in *Hokama v. E.F. Hutton & Co.*, 566 F. Supp. 636 (C.D. Cal. 1983) where well-developed pleadings of securities claims were followed by a one page RICO claim with minimal pleading of facts to elements. After correctly noting that Congress had rejected limiting RICO to members of known criminal organizations in order to avoid constitutional problems of grounding liability upon membership in a group, the court nonetheless dismissed this RICO claim upon its conclusion that it was "implausible" that Congress meant to create a treble damage claim against "ordinary" businesses or parties. *Id.* at 643. *See infra* notes 51-53, 66-68 and accompanying text.

gaged in organized crime,"⁶ use of the new "Civil remedies" has been frustrated in part by conflicting court decisions, particularly in actions charging defendants with business fraud.

A review of a number of the complaints upon which RICO claims have been dismissed reflects that an old adage, that weak facts and/or pleadings make bad law, has contributed to negative decisions which are then cited by other courts with the effect of thwarting RICO's express purposes of providing strong remedies to deal with the kinds of conduct Congress sought to attack through RICO.⁷ In addition to the effect weak pleadings have on the devel-

6. The entire quote reads: "[T]o seek the eradication of organized crime in the United States by strengthening the legal tools in the evidence-gathering process, by establishing new penal prohibitions, and by providing enhanced sanctions and new remedies to deal with the unlawful activities of those engaged in organized crime." The Organized Crime Control Act of 1970, Pub. L. No. 91-452, § 904(a), 84 Stat. 923. See *United States v. Turkette*, 452 U.S. 576, 589 (1981).

As noted by Prof. G. Robert Blakey, Professor of Law, Notre Dame Law School, Chief Counsel to the Senate Subcommittee on Criminal Laws and Procedures of the United States Senate in 1969 through 1970, when the Organized Crime Control Act was processed, Senator Hruska introduced a forerunner to what finally became RICO by stating: "The bill, he said, attacked 'the economic power' of organized crime 'on two fronts—criminal and civil,' but that the 'criminal provision . . . [was] intended primarily as an adjunct to the civil provision' which he 'consider[ed] . . . the more important feature' of the bill. Blakey, *The RICO Civil Fraud Action In Context: Reflections on Bennett v. Berg*, 58 NOTRE DAME L. REV. 261 (1982) [hereinafter cited as Blakey, *Reflections*]. For an extensive discussion of the legislative history of the Organized Crime Control Act of 1970, of which RICO is a part, see *id.* at 249-80. See also *In re Catanella and E.F. Hutton and Co., Inc. Securities Litigation*, 583 F. Supp. 1388, 1422-37 (E.D. Pa. 1984).

7. See, e.g., *Rae v. Union Bank*, 725 F.2d 478 (9th Cir. 1984) where the court stated:

The RICO claim in the first amended complaint alleges only

"The scheme to defraud, false claims through fraud and activities by defendants as alleged in the facts of this Complaint, were in violation of the Federal Anti-Racketeering Statute, 18 U.S.C. 1962.

. . . .

"Pursuant to 18 U.S.C. 1964, plaintiffs are entitled to recovery of treble damages, costs of suit and reasonable attorney's fees."

All other allegations of the complaint are incorporated by reference.

Id. at 480.

The court thereupon stated as a basis of affirming dismissal of the RICO claim: "Rae's complaint does not allege that any defendants were associated with or employed by an enterprise, nor does it identify the requisite RICO enterprise." *Id.* at 480-81. The court also stated that: "No predicate offenses are identified in the complaint or exhibits." *Id.* at 481. It appears from the description of the complaint that no pattern of racketeering activity, scienter, or causal relationship between any racketeering activity and damages were alleged.

Therefore, dismissal of the complaint in the *Rae* case was proper upon a review of that complaint as against elements easily identified from the language of RICO without venturing into any issues of elements not found within that language. See *infra* notes 8-45 and accompanying text for a discussion of the elements of RICO.

However, the court additionally stated:

Rae apparently is now arguing that Union Bank was the enterprise with whom the individual appellees interacted. See Appellant's Brief at 25-26. If Union Bank is the enterprise, it cannot also be the RICO defendant. See

opment of a new law such as RICO, a review of complaints containing poorly developed RICO claims also highlights the need for care in the drafting of pleadings in order to avoid dismissal for inadvertent failure to satisfy a required RICO element.

B. Elements Identified in the Text of RICO

The starting point of our analysis is a close look at the statute through which relief will be sought for the client. The pertinent portions of RICO as applied to our hypothetical client provide the framework for relief where a person is injured in his property as a result of a pattern of mail, wire and/or securities fraud which has been engaged in as a part of the conduct of the affairs of an enterprise with which the persons charged are employed or associated. This framework is provided through (1) definitions of "racketeering activity" (a list of criminal acts including "indictable" mail and wire fraud and "punishable" fraud in the sale of securities"), "person," "enterprise," and "pattern of racketeering activity";⁸ (2) iden-

United States v. Computer Sciences Corporation, 689 F.2d 1181, 1182, 1190 (4th Cir. 1982), *cert. denied*, — U.S. —, 103 S. Ct. 729, 74 L.Ed.2d 953 (1983) ("We conclude that 'enterprise' was meant to refer to a being different from, not the same as or part of, the person whose behavior the act was designed to prohibit . . ."). Thus, *Rae* can state no RICO cause of action against Union Bank itself.

Id. at 481.

While the complaint in *Rae* is deficient on its face, this otherwise unnecessary analysis of the "enterprise" issue based upon the *United States v. Computer Sciences Corporation* decision is unfortunate in that the court disregarded the rationale given in *United States v. Computer Sciences Corporation* for that ruling that: "[W]e would not take seriously, in the absence, at least, of very explicit statutory language, an assertion that a defendant could *conspire* with his right arm, which held, aimed and fired the fatal weapon." 689 F.2d at 1190 (emphasis added). This reasoning confuses two entirely different concepts. While as a general rule an entity may not conspire with itself, or with its own subdivision as was charged in *United States v. Computer Sciences Corporation*, that rule should merely apply to cause dismissal of the RICO conspiracy count under section 1962(d) in the indictment in that case. The rule does not, however, aid in identifying the "enterprise" through which parties may violate sections 1962(a), 1962(b), or 1962(c) of RICO. Compare the discussion of whether the same entity may be both the "enterprise" and a defendant in *United States v. Hartley*, 678 F.2d 961, 986-990 (11th Cir. 1982), *cert. denied*, 103 S. Ct. 815 (1983); *Haroco, Inc. v. American Nat'l Bank and Trust Co. of Chicago*, 747 F.2d 384, 399-403 (7th Cir. 1984), *cert. granted*, 53 U.S.L.W. 3437 (U.S. Jan. 14, 1985) (No. 84-822); and *B.F. Hirsch v. Enright Ref. Co., Inc.*, No. 84-5087, slip op. at 10-13 (3d Cir. 1984).

8. 18 U.S.C. § 1961. Definitions

As used in this chapter —

(1) "racketeering activity" means (A) any act or threat involving murder, kidnapping, gambling, arson, robbery, bribery, extortion, or dealing in narcotic or other dangerous drugs, which is chargeable under State law and punishable by imprisonment for more than one year; (B) any act which is indictable under any of the following provisions of title 18, United States Code: Section 201 (relating to bribery), section 224 (relating to sports bribery), sections 471, 472, and 473 (relating to counterfeiting), section 659 (relating to theft from interstate shipment) if the act indictable under section 659 is felonious, section 664

tification of the unlawful conduct which is deemed "Prohibited activit[y]";⁹ and a statement of the "Civil remedies" available to an injured person.¹⁰

(relating to embezzlement from pension and welfare funds), sections 891-894 (relating to extortionate credit transactions), section 1084 (relating to the transmission of gambling information), *section 1341 (relating to mail fraud)*, *section 1343 (relating to wire fraud)*, section 1503 (relating to obstruction of justice), section 1510 (relating to obstruction of criminal investigations), section 1511 (relating to the obstruction of State or local law enforcement), section 1951 (relating to interference with commerce, robbery, or extortion), section 1952 (relating to racketeering), section 1953 (relating to interstate transportation of wagering paraphernalia), section 1954 (relating to unlawful welfare fund payments), section 1955 (relating to the prohibition of illegal gambling businesses), sections 2314 and 2315 (relating to trafficking in contraband cigarettes), sections 2421-24 (relating to white slave traffic), (C) any act which is indictable under title 29, United States Code, section 186 (dealing with restrictions on payments and loans to labor organizations) or section 501(c) (relating to embezzlement from union funds) or (D) any offense involving fraud connected with a case under title 11, *fraud in the sale of securities*, or the felonious manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in narcotic or other dangerous drugs, *punishable under any law of the United States* [emphasis added];

(3) "person" includes any individual or entity capable of holding a legal or beneficial interest in the property;

(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;

(5) "pattern of racketeering activity" requires at least two acts of racketeering activity, . . . the last of which occurred within ten years . . . after commission of a prior act of racketeering activity;

9. 18 U.S.C. § 1962. Prohibited activities

(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.

Other business frauds may involve conduct which would fall within one or more of the other parts of section 1962, including:

(a) It shall be unlawful for any person who has received any income derived . . . from a pattern of racketeering activity . . . to use or invest . . . any part of such income . . . in acquisition of any interest in, or the establishment or operation of, any enterprise

(b) It shall be unlawful for any person through a pattern of racketeering activity . . . to acquire or maintain . . . any interest in or control of any enterprise. . . .

(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsections (a), (b), or (c) of this section.

One common pleading error has been to include all four subsections when one or more is inapplicable on the facts, resulting in equally careless courts requiring investment of racketeering income and/or control of an enterprise through racketeering activity along with conducting the affairs of the enterprise through a pattern of racketeering activity, while each alone will support civil relief under the statute as written. *See infra* notes 33-41 and accompanying text for discussion of "The 'Enterprise.'"

10. 18 U.S.C. § 1964. Civil remedies

(c) Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States

While many courts require the pleading of additional elements,¹¹ the text of RICO dictates that the following elements must be pled in the context of our particular hypothetical fact pattern in order for a remedy to be available:

- (1) A person, who may be either;
 - (a) an individual; or
 - (b) an entity;
- (2) which person is employed by or associated with any enterprise;
- (3) which enterprise is engaged in, or the activities of which affect, interstate commerce;
- (4) which person conducts or participates in the conduct of the affairs of that enterprise through a pattern of racketeering activity which consists of at least two acts within ten years of each other which are indictable as mail or wire fraud, or which are offenses involving fraud in the sale of securities punishable under the provisions of the federal securities laws; and
- (5) which conduct results in injury to the property of the plaintiff.

C. *Construing the Statute*

In seeking dismissal of RICO claims, many decisions upon which defendants most heavily rely disregard basic rules of statutory construction in applying the statute to the facts at hand. Therefore, consideration of certain rules of construction applicable to our hypothetical client's situation is appropriate before discussing the pleading of particular elements of RICO in greater detail. Since the factual allegations of a complaint must be taken as true in considering a motion to dismiss,¹² the propriety of the client's RICO claim will turn upon the extent to which the factual allegations made in the complaint comply with what Congress provided by way of civil remedies in RICO.

As stated by the Supreme Court in *United States v. Turkette*:¹³ "In determining the scope of a statute, we look first to its language. If the statutory language is unambiguous, in the absence of 'a clearly expressed legislative intent to the contrary, that language must ordinarily be regarded as conclusive' [citations]."

Despite continuous references to RICO as being an "ambiguous" law,¹⁴ in *Ianelli v. United States*, the Supreme Court characterized

district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee.

11. See discussion of "Court Developed Roadblocks to Actions Under RICO—A Disfavored Law," *infra* notes 46-100 and accompanying text.

12. Conley v. Gibson, 355 U.S. 41 (1957).

13. 452 U.S. at 580.

14. See *infra* note 49 and accompanying text.

the Organized Crime Control Act of 1970, of which RICO is a part, as "a carefully crafted piece of legislation"¹⁵ which should be applied according to its text. In interpreting this "carefully crafted piece of legislation," the Supreme Court, in *Diamond v. Chakrabarty*, recently set out the limits of what courts may do:¹⁶

We have emphasized in the recent past that "[o]ur individual appraisal of the wisdom or unwisdom of a particular [legislative] course . . . is to be put aside in the process of interpreting a statute. . . ." Our task, rather, is the narrow one of determining what Congress meant by the words it used in the statute; once that is done our powers are exhausted.

As stated by Justice Frankfurter:¹⁷

A judge must not rewrite a statute, neither to enlarge nor to contract it. Whatever temptations the statesmanship of policy making might wisely suggest, construction must eschew interpolation and evisceration. He must not read in by way of creation. He must not read out except to avoid patent nonsense or internal contradiction. . . . [T]he only sure safeguard against crossing the line between adjudication and legislation is an alert recognition of the necessity not to cross it and instinctive, as well as trained, reluctance to do so.

The Seventh Circuit Court of Appeals appears to have had Justice Frankfurter's admonition in mind when stating in *Schacht v. Brown*:¹⁸

If Congress wishes to avoid the inclusion under RICO's umbrella of "garden variety" fraud claims involving the operations of enterprises through mail and securities fraud, it may easily do so through removing mail and securities fraud from the list of predicate acts enumerated in § 1961. That is not, however, a program which may be undertaken by this court. [Citation to *United States v. Turkette*].

Many decisions which disregard these rules of statutory construction, and the plain language of the RICO statute, have engrafted onto RICO the courts' own notions of what Congress should have written or must have meant based upon personal attitudes toward application of RICO to business frauds.¹⁹

15. 420 U.S. 770, 789 (1975).

16. 447 U.S. 303, 318 (1980).

17. Frankfurter, *Some Reflections on the Pendency of Statutes*, 47 COLUM. L. REV. 527, 533, 535 (1947) [hereinafter cited as *Frankfurter*].

18. 711 F.2d 1343, 1357 (7th Cir. 1983), *cert. denied*, 104 S. Ct. 508 (1984).

19. *See, e.g., Sedima, S.P.R.L. v. Imrex Co., Inc.*, 741 F.2d 482, 487 (2d Cir. 1984), *cert. granted*, 53 U.S.L.W. 3506 (U.S. Jan. 14, 1985) (No. 84-648), where the court referred to applications of RICO to business frauds engaged in by well known businesses as "outrageous." In *Hokama*, 566 F. Supp. at 643, the court referred to an interpretation of the statute which would allow for such applications as "implausible"; and in *Harper v. New Japan Securities Int'l, Inc.*, 545 F. Supp. 1002, 1007-1008 (C.D.

D. Drafting a "Speaking" Complaint

In pleading business fraud under RICO it must be remembered that Rule 9(b) of the Federal Rules of Civil Procedure requires that "the circumstances constituting fraud . . . shall be stated with particularity." Therefore, attention must be given to as much of the detail as your client, the records which are available to you, and any other sources of information at hand, can provide.

However, Rule 9(b) should provide no haven for defendants, as this Rule is to be read in conjunction with Rule 8 which requires only that there be a short and plain statement showing that the plaintiff is entitled to relief.²⁰ Moreover, as stated in *Seville Industrial Machinery Corp. v. Southmost Machinery Corp.*, the Federal Rules of Civil Procedure as a whole were developed at least in part to establish liberal rules of "notice" pleading.²¹

Cal. 1982), the court's personal attitude was that application of RICO to securities fraud was "simply incomprehensible."

In discussing his respect for the approach of Mr. Justice Holmes to matters involving construction of statutes, Mr. Justice Frankfurter stated:

[T]he proof of the pudding is that his private feelings did not lead him to invoke the rule of indefiniteness to invalidate legislation of which he strongly disapproved. . .

Frankfurter, supra note 17, at 531.

20. *Schlick v. Penn-Dixie Cement Corp.*, 507 F.2d 374, 379 (2d Cir. 1974).

21. 742 F.2d 786, (3d Cir. 1984), *petition for cert. filed*, 53 U.S.L.W. 3499 (U.S. Dec. 7, 1984) (No. 84-879).

[T]he Federal Rules of Civil Procedure were designed to eliminate the vagaries of technical pleading that once plagued complainants, and to replace them with the considerably more liberal requirements of so-called "notice" pleading. Under the modern rules, it is enough that a complaint puts the defendant on notice of the claims against him. It is the function of discovery to fill in the details, and of trial to establish fully each element of the cause of action. See 5 C. WRIGHT & A. MILLER, *FEDERAL PRACTICE AND PROCEDURE* 1215 (1969). *Id.*, at 790.

See *Jensen v. E.F. Hutton & Co.*, [1983-1984 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 99,190 (C.D. Cal. 1984) where the court concluded by stating:

Given the unsettled state of the law, the expansive language of the statute, and the legislative history indicating that the statute should be interpreted broadly, the Court finds that it is improper to dismiss the RICO claim under Rule 12(b) (6). The issue of whether plaintiff has a right to recover under RICO will be more properly decided on a motion for summary judgment or after trial. At such a time the underlying facts of the case will be better developed and the question of RICO's applicability can be more fully considered.

Id. at 97,714.

See also *Northern Kentucky Bank Trust v. Rhein*, [1984 Transfer Binder] Fed. Sec. L. Rptr. (CCH) ¶ 91,864 (E.D. Ky. 1984) where the court stated:

While all the pleadings in this case may have been more artfully drawn, the Court is convinced that the particulars of fraud in this case could not have been more specifically pleaded without resorting to specific fact pleading.

Here again, the Court is cognizant that the RICO claims asserted herein are relatively new to the Courts, certainly to this Court. As long as the particulars of the fraud have been pleaded such that the defendants are aware of the circumstances and can respond, the Court is not inclined to dismiss on this ground. In any event, *the clarity of the claims alleged by the Bank have al-*

All things considered, a thorough factual workup and a thoughtful complaint drafted to the facts as they apply separately to each element of RICO should assist in alleviating court derived difficulties in pursuing a RICO claim.

III. PLEADING PARTICULAR RICO ELEMENTS

A. *Injury to Business or Property*

In an effort to limit access to the courts for claims under RICO, some courts speak of the RICO injury requirement as a rule of "standing" through which they engraft onto RICO elements not found in the statute.²²

The language of section 1964(c), however, is clearly a standing rule in itself. It states who "may sue," and contains no limitations beyond "any person" "injured in his business or property" "by reason of a violation of section 1962 of this chapter."²³ The language of RICO sets its own standard for the injury which must be pled by requiring a "pattern of racketeering activity." This pattern involves a defendant who did not just engage in an isolated wrong, but rather in repetitive intentional wrongs. Courts which attempt to read into RICO additional "standing" requirements run afoul of the statutory construction rules discussed above.²⁴

Under section 1964(c) the "person" who may sue need not have suffered any injury other than to his "business or property" as a result of the wrongful conduct. This requirement is stated in clearly disjunctive language, giving injury to property equal stature with injury to business. In the hypothetical presented earlier, the client lost "property" in the form of his investment assets through commission and mark-up charges, losses on securities purchased upon false statements of inside information, and additional losses as might be determined upon further analysis. Attempts by defendants to require a "racketeering enterprise injury" or "commercial injury" involve amending out of the statute an otherwise actionable injury to a person's "property."²⁵

ready grown, and undoubtedly will continue to grow, less blurred as the discovery process continues.

Id. at 90,296-90,297 [emphasis added].

22. See, e.g., *Sedima*, 741 F.2d at 494; *Harper*, 545 F. Supp. at 1007-1008; *Johnsen v. Rogers*, 551 F. Supp. 281 (C.D. Cal. 1982); and *Landmark Savings & Loan v. Rhoades*, 527 F. Supp. 206, 208 (E.D. Mich. 1981).

23. See *supra* note 10 and accompanying text.

24. See *supra* notes 13-18 and accompanying text.

25. As stated by Judge Duffy in *Mauriber v. Shearson/American Express, Inc.*, 567 F. Supp. 1231, 1240 (S.D.N.Y. 1983) (A brokerage churning-misrepresentation case):

[A]n examination of the statute's [RICO's] language reveals no basis for the "racketeering injury" requirement. Part (b) [sic], for instance, of section 1962,

In regard to our hypothetical client, pleading only the injury to property,²⁶ identifying the injured property as the plaintiff's investment assets, and summarizing the sources of that injury, including the drain of the client's investment assets into the defendant's pockets, may assist in overcoming recent efforts of defendants and courts to focus on the injury requirement as an area in which to engraft new elements onto RICO.²⁷

B. *By Reason of a Violation of Section 1962*

Some courts consider RICO as being aimed solely "at curtailing the infiltration of business enterprises by organized crime," and therefore require some allegation of infiltration and/or control of an enterprise by racketeering activity or infusion of racketeering income into an enterprise.²⁸ However, section 1962 identifies "Prohibited activities" in three separate and distinct subsections, each of which independently identifies a type of prohibited activity without reference to, or reliance upon, the other subsections.²⁹ Section 1962(c), which applies to our hypothetical client outlined above, states only that: "It shall be unlawful for any person . . . to conduct [an] enterprise's affairs through a pattern of racketeering activity." Sections 1962(a) and 1962(b) make unlawful the infiltration and infusion of capital and the control to which these courts refer.³⁰

simply makes it unlawful to conduct the affairs of an enterprise engaged in interstate commerce through a pattern of racketeering injury. A brokerage enterprise infiltrated by organized crime and engaged in defrauding its customers through acts like those alleged here might injure no one but the customers of the enterprise. There would be no injury above and beyond that caused by the predicate acts of fraud forming the "pattern of racketeering activity." Such conduct, however, would violate RICO and would lie near the center of Congress' concern. In addition, § 1962(c) simply provides that "any person . . . injured by reason of a violation of section 1962" may invoke RICO's civil remedies. I can imagine no construction of those words which would exclude from their coverage the primary victims of such a scheme and which would render such defendants immune from civil sanctions.

26. Wherever RICO identifies an element in the disjunctive, pleading only that alternative element which counsel feels reasonably confident is applicable on the facts should aid in avoiding the common error found in RICO decisions requiring all of what are in fact alternative elements. Therefore, injury to business should only be pled where the facts warrant such a claim, as against injury to non-business property only.

27. See, "Court Developed Roadblocks to Actions Under RICO—A Disfavored Law", *infra* notes 46-100 and accompanying text.

28. *Harper*, 545 F. Supp. at 1004. See also *Johnsen v. Rogers*, 551 F. Supp. at 285; and *Van Schaick v. Church of Scientology of California, Inc.*, 535 F. Supp. 1125, 1136-1137 (D. Mass. 1982). In *Landmark Sav. & Loan*, 527 F. Supp. at 208-209, the court used the "infusion of money from a pattern of racketeering activity into the enterprise" as its example of when a "racketeering enterprise injury" might occur." See "Imposing an 'Injury of a Type RICO Was Intended to Prevent' Test," *infra* notes 84-88 and accompanying text.

29. See *supra* note 9 and accompanying text.

30. *Id.*

To require the client to plead "infiltration," "infusion" of racketeering income, or "control," would be to absorb section 1962(c) into sections 1962(a) and 1962(b), or in effect, to amend out an explicit provision of the RICO statute. As section 1962(c) stands on its own, and contains no direct or indirect reference to infiltration, infusion or control, by properly pleading only the prohibited activities identified in section 1962(c) the client need not plead any infiltration, infusion, or control. He merely needs to plead injury from the "conduct" of the "affairs" of an "enterprise" "through a pattern of racketeering activity."³¹

After holding that "a civil RICO plaintiff need not allege injury beyond any injury to business or property resulting from the underlying acts of racketeering," the Seventh Circuit Court of Appeals went on to state in *Haroco, Inc. v. American National Bank and Trust Company of Chicago*:³²

This holding by no means renders superfluous the requirement in section 1964(c) that the plaintiff be injured by "reason of" a violation of section 1962. As we read this "by reason of" language, it simply imposes a proximate cause requirement on plaintiffs. The criminal conduct in violation of section 1962 must, directly or indirectly, have injured the plaintiff's business or property.

C. The "Enterprise"

The prohibited activities identified by section 1962(c), under which our hypothetical client will proceed, are those activities which are engaged in as part of the conduct of "any" enterprise. The word "enterprise" is defined in section 1961(4) of RICO as follows: "'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*."³³

The language of the statute *includes*, expansively, each identified type of person, entity or grouping within the common usage of the word "enterprise." Therefore, "include," in the context of the definition of "enterprise" makes that definition an illustrative, not exhaustive, definition.³⁴ As such, we must go to the dictionary to define the common usage within which illustrations of the word "enterprise" fall. For example:

31. See discussion in *Sutliff, Inc. v. Donovan Companies, Inc.*, 727 F.2d 648, 653-54 (7th Cir. 1984). See also *O'Brien v. Dean Witter Reynolds, Inc.*, [1984 Transfer Binder] Fed. Sec. L. Rptr. (CCH) ¶ 91,509 at 98,561 (D. Ariz. 1984).

32. 747 F.2d 384 (7th Cir. 1984), cert. granted, 53 U.S.L.W. 3437 (U.S. Jan. 14, 1985) (No. 84-822).

33. 18 U.S.C. § 1961(4) (1982) [emphasis added].

34. *United States v. Haber*, 603 F.2d 387, 394 (2d Cir. 1979), cert. denied, 445 U.S. 927 (1980).

1. A design of which the execution is attempted; a piece of work taken in hand, an undertaking; chiefly, any now exclusively, a bold, arduous, or momentous undertaking. 2. Disposition or readiness to engage in undertakings of difficulty, risk, or danger; daring spirit. 3. The action of taking in hand; management, superintendence.³⁵

The definition of "enterprise" also includes "1. An undertaking especially one of some scope, complication, and risk . . . 2. A business. 3. Industrious effort, especially when directed toward making money";³⁶ "a plan or design for a venture or undertaking . . ." "any systematic purposeful activity or type of activity";³⁷ and "an undertaking an Affair, Business or Concern, an Attempt or Design."³⁸

The particular "undertaking," "systematic purposeful activity," or "piece of work taken in hand" involved in our hypothetical brokerage situation is the enterprise of providing broker-dealer and investment advisory services to customers, including our hypothetical client.³⁹

As stated in *Jensen v. E.F. Hutton & Co.*:⁴⁰

A RICO enterprise exists apart from the pattern of racketeering in which it engages; it is a separate element of a RICO claim. [Citation to *United States v. Turkette*]. . . . There is a dispute in the circuits as to just how distinct the enterprise and pattern of racketeering must be. . . .⁴¹

The court need not resolve this conflict in the instant case because the complaint can be construed to allege that the enterprise had a discrete existence from the alleged racketeering acts.

35. THE COMPACT EDITION OF THE OXFORD ENGLISH DICTIONARY (1971).

36. THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (1969).

37. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (1971). See also WEBSTER'S SECOND NEW INTERNATIONAL DICTIONARY (1940).

38. A NEW GENERAL ENGLISH DICTIONARY (2d ed. 1737).

39. The "enterprise" in *United States v. Turkette* similarly identified a particular "undertaking," "systematic purposeful activity," and "piece of work taken in hand." *United States v. Turkette*, 452 U.S. at 579. See also *Northern Kentucky Bank & Trust*, [1983-1984 Transfer Binder] Fed. Sec. L. Rptr. (CCH) at 90,296, where the court stated:

F.R.Civ.P. 9(b)'s particularity requirements, moreover, do not apply in this Court's mind to the pleading of the *Structure* of an "enterprise" in the RICO context. F.R.Civ.P. 9(b) by its own terms is limited to the "circumstances constituting the fraud" and does not therefore require the plaintiff to particularly allege the nature or structure of the RICO "enterprise."

40. *Jensen*, [1984 Transfer Binder] Fed. Sec. L. Rptr. (CCH) at 97,713-97,714.

41. The court compared *Bennett v. Berg*, 685 F.2d 1053, 1060 (1983), *aff'd en banc*, (1983), where the Eighth Circuit Court required that evidence proving the existence of a pattern and proving the enterprise be distinct, with *Moss v. Morgan Stanley*, 719 F.2d 5, 22-23 (1983), *cert. denied*, 104 S. Ct. 1280 (1984), where the Second Circuit Court stated that the enterprise need be no more than the sum of the predicate racketeering acts. See discussion of *Rae v. Union Bank*, *supra* note 7.

The Complaint alleges that Hutton and Fuhrer were engaged in the enterprise of "providing broker-dealer and investment advisory services and managing investments." This "association in fact" is related to the pattern of racketeering alleged (the alleged acts of fraud occurred in the course of providing such services). It can also be inferred that the enterprise also engaged in distinct acts of providing legitimate services to investors. Therefore, plaintiff has pleaded the elements of an enterprise required by the statute.

D. The Broker as a Person Associated With the Enterprise

As the securities brokerage firm in our hypothetical is an "entity capable of holding legal or beneficial interest in property," it is a "person" capable of conducting the affairs of an enterprise through a pattern of racketeering activity against which relief may be sought.⁴² Aside from other injury to the client's property, this "person" obtained, for itself, property directly from the accounts of its customer in the form of commissions and mark-up income through the pattern of activity described above.⁴³

E. Pattern of Racketeering Activity—Criminal Conduct

Pleading the pattern of racketeering activity with specificity in a business fraud case should involve an effort (a) to characterize each fraudulent scheme factually, and identify the particular racketeering activity in section 1961(1) which is being pursued, (b) to plead the various fraudulent schemes in separate paragraphs and show their interrelationship,⁴⁴ (c) to separately plead the criminal intent standard by which the mail and wire frauds charges are "indictable" and the securities frauds offenses are "punishable",⁴⁵ and (d) to plead the RICO claim only against those particular defendants who may satisfy this criminal intent standard regarding the pattern of conduct charged.

IV. COURT DEVELOPED ROADBLOCKS TO ACTIONS UNDER RICO—A DISFAVORED LAW

Many courts have derived roadblocks to civil RICO actions involving business fraud which are as varied as the imaginations of defense counsel who attack RICO claims, and of judges who seem

42. See 18 U.S.C. §§ 1961(3) & 1962(c) (1982).

43. See *supra* notes 1-2 and accompanying text.

44. "The term 'pattern' itself requires the showing of a relationship . . ." 116 CONG. REC. 18940 (1970) (comments of Sen. McClellan).

45. Section 24 of the Securities Act of 1933, 15 U.S.C. § 77x; Section 32 of the Securities Exchange Act of 1934, 15 U.S.C. § 77ff. See *O'Brien*, [1983-1984 Transfer Binder] Fed. Sec. L. Rep. at 98,562.

to find new elements to engraft onto RICO almost as fast as prior derived elements are discredited.⁴⁶ Therefore, in advising a client, counsel should consider (1) which of these engrafted elements have substance upon which other courts may tend to rely, (2) which are merely straws which should fall upon proper analysis, and (3) which may be satisfied upon detailed pleading of the particular facts of the case at hand

The discussion above regarding the Supreme Court's characterization of the Organized Crime Control Act of 1970 as "a carefully crafted piece of legislation" to be applied according to its text, and the rules of construction as applied to such a law,⁴⁷ should be kept in mind as this Article discusses some of the more notable court derived "roadblocks" to civil RICO actions.

A. Rationale Used by Courts to Derive Roadblocks to Civil RICO Claims

1. *Interpreting RICO as an Ambiguous Law.*—Despite the Congressional mandate written into the preamble of RICO⁴⁸ that "the provisions of . . . [RICO] shall be liberally construed to effectuate its remedial purposes," many courts refer to RICO as an "ambiguous" law. These courts use this label to construe RICO strictly by writing unstated elements into the law in an effort to limit access to the courts for RICO claimants.⁴⁹

In light of the varied, and sometimes seemingly contrived, rulings by some courts which deprive plaintiffs of forums in which to pursue substantial business frauds appearing to be within the RICO purview,⁵⁰ it may be more appropriate to refer to RICO as a "disfavored" law. This is so particularly as applied to white collar business persons who attempt to drape themselves in the gown of legitimacy, but who are nonetheless willing to engage in fraudulent

46. In commenting on the recent Second Circuit decision in *Sedima, S.P.R.L. v. Imrex Co., Inc.*, 741 F.2d 482 (2d Cir. 1984) requiring a "racketeering enterprise injury," the Seventh Circuit looked closely at the language of the *Sedima* decision focusing on organized crime, *Sedima's* dismay at RICO's application to so-called "respected and legitimate" businesses as a basis of saying that the law is "ambiguous," and *Sedima's* numerous references to "mobsters," and concluded that: "On the basis of these statements, it appears that *Sedima* has revived the discredited 'organized crime nexus' requirement without quite saying so. Cf. *Alexander Grant & Co. v. Tiffany Industries*, 742 F.2d 408, 413 (8th Cir. 1984)." *Haroco*, 747 F.2d at 394. See also *In re Catanella*, 583 F. Supp. at 1430-37.

47. See *supra* notes 12-21 and accompanying text.

48. The Organized Crime Control Act of 1970, Pub. L. No. 91-452, § 904(a), 84 Stat. 947.

49. *Sedima*, 741 F.2d at 486, 488, 500.

50. See discussion of facts and the dissent in *Bankers Trust Co. v. Rhoades*, 741 F.2d 511, 512-515, 518 (2d Cir. 1984), *petition for cert. filed*, 53 U.S.L.W. 3367 (U.S. Oct. 24, 1984) (No. 84-657).

conduct for which they may be held criminally accountable under the laws of the United States.

2. *Labeling Business Fraud as "Garden Variety Fraud".*—The decisions dismissing business fraud-RICO claims on the ground that they involve only "garden variety fraud," can, in general, be viewed as an attempt to raise technical issues while seeking to re-draft RICO to insulate businessmen from the reach of RICO regardless of their conduct. By doing this, courts rendering these decisions disregard the means by which Congress stated it would go about the "eradication of organized crime," particularly the "providing [of] new remedies" to deal with the type of conduct Congress determined was being engaged in by members of organized crime.⁵¹

The section 1961(1) definition of "racketeering activity," and the remedies found in section 1964(c), carry out that purpose by stating, in effect, that if you engage in the type of conduct engaged in by organized crime as defined by Congress in sections 1961(1) and 1962, you are subject to RICO liability no matter who you are. As was stated in *United States v. Carter*:⁵²

The fact that the alleged perpetrators are presumably respectable and entrusted with responsibility . . . by stockholders does not suggest . . . that they are incapable of engaging in organized criminal activity. We all stand equal before the bar of criminal justice, and the wearing of a white collar, even though it is starched, does not preclude the organized pursuit of unlawful profit.

Moreover, as stated in *Sutliff v. Donovan Companies, Inc.*⁵³

Congress deliberately cast the net of liability wide, being more concerned to avoid opening loopholes through which the minions of organized crime might crawl to freedom than to avoid making garden-variety frauds actionable in federal treble damage proceedings—the price of eliminating all possible loopholes.

Those courts which have raised their voices in abhorrence over the thought of a plaintiff pursuing enhanced remedies under RICO for "garden variety fraud" provide no standards upon which to de-

51. Blakey, *Reflections, supra* note 6; wherein there is a discussion of objections of the Association of the Bar of the City of New York and of the ACLU to the breadth of S. 30 as of May, 1970, which then included fraud within the list of predicate acts, and the acknowledgment during hearings in the House and in statements by Sen. McClellan that the bill was not limited to organized crime figures, but rather dealt with conduct which was characteristic of organized crime, whomever might engage in that conduct. *Id.* at 272-73 and nn.111-112.

52. 493 F.2d 704, 708 (2d Cir. 1974). *See also* *United States v. Campanale*, 518 F.2d 352, 363 (9th Cir. 1975), *cert. denied sub nom.*, *Mathews v. United States*, 423 U.S. 1050 (1976); *United States v. Aleman*, 609 F.2d 298, 303-304 (7th Cir. 1979), *cert. denied*, 445 U.S. 946 (1980); Blakey, *Reflections, supra* note 6, at 261, 271, 275-76 n.75, n.78 and accompanying text, n.87, and n.112 and accompanying text.

53. *See supra* note 31, at 654.

termine what falls within their personal view of non-actionable, garden variety fraud, as opposed to actionable fraud which is explicitly included in section 1961(1)(B) and (D) of RICO.⁵⁴

Congress left no such ambiguity. For mail fraud and wire fraud the conduct must be "indictable"; that is, satisfy all elements of the mail and wire fraud statutes, including intentional conduct. For securities fraud the conduct must be "punishable" under the federal securities laws; thus, requiring willful conduct.⁵⁵

B. Specific Roadblocks Derived by the Courts

1. *Refusing to Allow RICO Where Other Remedies Exist for the Predicate Acts Charged.*—RICO claims have been dismissed by a number of courts citing the following language from *Harper v. New Japan Securities International, Inc.*:⁵⁶

[T]here is no evidence that [RICO] was meant to preempt or supplement the remedies already provided by those statutes which define a predicate RICO offense.

While there is no pre-emption, RICO clearly supplements other laws. A review of the acts listed as "racketeering activity" in section 1961(1) reflects a number of predicate acts which are civilly actionable under federal, state and/or common law. In fact, RICO was designed at least in part to deal with the prior ineffectiveness of other laws in rooting out onerous patterns of conduct;⁵⁷ thus evidencing Congress' knowledge that other remedies existed for at least some of the predicate acts.

Moreover, the existence of other civil remedies no more preempts the availability of a RICO remedy than a remedy for false statements in a securities registration statement under Section 11 of the Securities Act preempts a remedy under Section 10(b) of the Securities Exchange Act, which was discussed by the Supreme Court in *Herman & MacLean v. Huddleston*.⁵⁸ Rather, the cumulative construction of remedies under the securities laws and RICO furthers the broad remedial purposes of both laws.⁵⁹ In fact, Securities Exchange Act section 28(a) explicitly provides that: "The rights and remedies provided by this title shall be in addition to any and all other rights and remedies that may exist at law or in equity."⁶⁰

54. See *Sedima*, 741 F.2d at 488.

55. See 15 U.S.C. § 77x (1976) and 15 U.S.C. § 78ff (1976).

56. See *supra* note 19, at 1008.

57. See *supra* note 8. See also *Turkette*, 452 U.S. at 586; and Blakey, *Reflections*, *supra* note 6 at 266.

58. 103 S. Ct. 683, 687-90 (1983). See also Blakey, *Reflections*, *supra* note 6, at n.92.

59. See *discussion*, 103 S. Ct. at 689-90.

60. 15 U.S.C. § 78bb(a) (1982).

This provision existed in 1970 when RICO was enacted, and was retained during amendments to the Securities Exchange Act adopted in 1975 and 1982 when RICO provided its own remedy in the event of a pattern of conduct punishable as fraud in the sale of securities.⁶¹ “These provisions confirm that the remedies in each Act were to be supplemented by ‘any and all’ additional remedies.”⁶²

The RICO claim which might be pursued on behalf of our hypothetical client would seek remedies under a statute addressing a pattern of conduct, which is not addressed in the Securities Exchange Act or the Securities Act. Further, as in *Herman & MacLean v. Huddleston*, while different recovery is provided for under RICO than under the Securities Exchange Act, different elements must be proven, including (1) a pattern of activity, and (2) intent.⁶³

The approach of those courts following *Harper* also disregards the fact that no civil remedies exist for mail or wire fraud.⁶⁴ Moreover, a civil remedy for fraud under Section 17 of the Securities Act of 1933 was only recognized by the Ninth Circuit after RICO remedies existed and has yet to be recognized elsewhere.⁶⁵

2. *Requiring a Nexus to Organized Crime.*—Although defendants continue to argue that there is a nexus to organized crime requirement, and some trial courts continue to require such a nexus,⁶⁶ RICO was drafted in the constitutional mold of statutes that deal with conduct, rather than with status. Therefore, adding an “organized crime” or “racketeering” element to RICO by requiring the pleading of a “racketeering enterprise” or a “racketeering injury” element, adds unstated language to the text contrary to the rules of construction in a manner which raises constitutional questions Congress purposefully attempted to avoid.⁶⁷

61. See also Securities Act, Section 16, 15 U.S.C. § 77p (1982).

62. *Herman & MacLean*, 103 S. Ct. at 688.

63. See, *supra* note 58. See also *supra* notes 44, 45 and accompanying text regarding the pleading of “indictable” acts and acts involving offenses “punishable” under the federal securities laws. Compare the Securities Exchange Act, which requires only one misrepresentation for a civilly actionable violation, and where recklessness satisfies the scienter requirement of *Ernst & Ernst v. Hochfelder*, 425 U.S. 185 (1976). *Mihara*, 619 F.2d at 821.

64. *Napper v. Anderson, Henley, Shields, Bradford, and Pritchard*, 500 F.2d 634, 636 (5th Cir. 1974), *reh’g denied*, 507 F.2d 723, *cert. denied*, 423 U.S. 837 (1975); *Oppenheim v. Sterling*, 368 F.2d, 516, 518-19 (10th Cir. 1966), *cert. denied*, 386 U.S. 1011 (1967).

65. *Stephenson v. Calpine Conifers II, Ltd.*, 652 F.2d 808, 815 (1981). *Contra*, *Shull v. Dain, Kalman & Quail, Inc.*, 561 F.2d 152, 155, 159 (8th Cir. 1977) *cert. denied* 434 U.S. 1086 (1978).

66. *Aliberti v. E.F. Hutton & Co., Inc.* [1984 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 91,661 (D. Mass. 1984).

67. See *Blakey, Reflections, supra* note 6, at 276-79.

In *Schacht v. Brown*, a case representing the majority rule on this issue, the court provided a compilation of cases to support its statement that “most courts” which have considered this issue have concluded that RICO is not restricted to members of organized crime, and applies as well to “otherwise ‘legitimate’ business people.”⁶⁸

3. *Applying the “But-For” Test.*—In their zeal to thwart the granting of RICO relief in business fraud cases, some courts have established a test whereby a plaintiff must show that he would not have suffered injury “but-for” a pattern of racketeering conduct beyond the predicate acts.

A primary statement of what this “but-for” test is, and how it is supposed to be met, can be found in *Bankers Trust Company v. Rhoades*.⁶⁹ This case involves such a pervasive business fraud that the majority made note of the trial court’s findings “that ‘based solely upon the language of the statute, one could hardly contend that [*Bankers*] has not adequately alleged a violation of § 1962. . . . ,’ ”⁷⁰ and Judge Cardamone in dissent exclaimed, “If civil RICO does not provide a remedy on the facts of this totally outrageous case, it never will.”⁷¹

In moving from agreement with the trial court that a violation of section 1962 had been pled, to the conclusion that no actionable RICO injuries had been suffered, the court erroneously concluded that:⁷²

[T]here is a violation of section 1962 *only* if there are present both (1) the pattern of racketeering activity, and (2) the use of that pattern to invest in, control, or conduct, a *RICO* enterprise. . . .

The import of this analysis is that if a complaint alleges a proprietary injury that is caused by the defendant’s predicate acts, rather than by its use of a pattern of racketeering activity in connection with a *RICO* enterprise, the injury cannot be said to have been caused by “a violation of section 1962.”

The error of this analysis is that section 1962 involves acquisition of an interest in “*any* enterprise” with proceeds from a pattern of racketeering activity,⁷³ acquisition or maintenance of an interest in

68. *Schacht*, 711 F.2d at 1356. See also *Bennett*, 685 F.2d at 1063; *Campanale*, 518 F.2d at 363-64; *Moss*, 719 F.2d at 21; *United States v. Thordarson*, 646 F.2d 1323, 1328 n.10 (9th Cir. 1981); *Jensen*, [1984 Transfer Binder] Fed. Sec. L. Rptr. (CCH) at 97,713; and *Crocker Nat’l Bank v. Rockwell Int’l Corp.*, 555 F. Supp. 47, 49 (N.D. Cal. 1982).

69. See *supra* note 50 and accompanying text. *Bankers Trust*, 741 F.2d at 512-15, 518.

70. *Id.* at 515.

71. *Id.* at 518.

72. *Id.* at 516.

73. 18 U.S.C. § 1962(a) (1982); see *supra* note 9 [emphasis added].

“any enterprise,”⁷⁴ conduct of the affairs of “any enterprise” through a pattern of racketeering activity,⁷⁵ or conspiracy to do any of the above.⁷⁶ Therefore, the effort in *Bankers Trust* to support a court developed requirement of some showing of injury beyond that to a person’s business or property, from a pattern of racketeering activity charged involves an attempted resurrection of the discredited “racketeer”-“organized crime” element under a new guise.⁷⁷

Despite the erroneous underlying basis of the court’s analysis, the *Bankers Trust* court, unlike other courts which require some injury beyond that resulting directly from the pattern of racketeering activity with no statement of what that something more consists of, attempted to give litigants some direction. In doing so, the court stated:

Bankers argues that it is conceptually impossible to make any distinction between injury flowing from the predicate acts and injury flowing from a pattern of racketeering activity, because a plaintiff injured by the predicate acts is *ipso facto* injured by the pattern. We disagree. If a plaintiff’s injury is that caused by the predicate acts themselves, he is injured regardless of whether or not there is a pattern; hence he cannot be said to be injured by the pattern, and the pattern cannot be said to be the but-for cause of the injury. Further, we can envision a number of circumstances in which injury could be attributable to a pattern but not to the individual predicated acts. For example, a plaintiff who is victimized by a defendant enterprise’s multiple acts of arson may thereafter be denied fire insurance as a result of his fire history; such a plaintiff whose property subsequently suffers innocent fire damage would be unable to obtain reimbursement for the damage, and his monetary loss would be the result of the pattern of predicate acts of the enterprise, rather than any of the individual acts. . . . [T]he plaintiff would have suffered an injury to his business or property by reason of the defendants’ use of a RICO enterprise and a pattern of racketeering acts; the individual racketeering acts, however, could not be said to have caused the same injury.⁷⁸

One fallacy in this reasoning is that recovery under RICO still depends upon causation; and under California and other state laws the innocent fire could be recovered for in a simple property damage case against the arsonist as a part of all the “detriment proximately caused” by the wrong, once the same causation proof is made.⁷⁹ Moreover, it is an emasculation of the purpose of “eradi-

74. 18 U.S.C. § 1962(b) (1982); see *supra* note 9 [emphasis added].

75. 18 U.S.C. § 1962(c) (1982); see *supra* note 9 [emphasis added].

76. 18 U.S.C. § 1962(d) (1982); see *supra* note 9 [emphasis added].

77. See *supra* note 46. See also, *supra* notes 48-50, 66-68 and accompanying text.

78. *Bankers Trust*, 741 F.2d at 517.

79. See CAL. CIV. CODE § 3333.

cating” wrongful conduct if the only plaintiffs who could use the “new remedies [established] to deal with the unlawful activities” identified in RICO are those who fortuitously suffer extra injury beyond that injury caused by the particular wrongs identified in section 1961(1).⁸⁰

While *Bankers Trust*, in setting forth the “but-for” rule, defined one test of additional injury which might satisfy those courts adding elements to RICO, one might then ask: What will satisfy this new test? In the closing section of its opinion the court in *Bankers Trust* again attempted to give some direction when it stated:

The fact that later actions by the defendants may have prevented Bankers from remedying the injury caused it in 1976 does not mean that Bankers was injured by the “pattern” of the bankruptcy fraud and the later acts. Similarly, Banker’s forced expenditures of legal fees in connection with frivolous and corruptly conducted lawsuits occurred as a result of the defendants’ distinct conduct in pursuing those lawsuits; Bankers expenses would have been incurred regardless of any other predicate acts performed by the defendants.⁸¹

Through this language the court appears to have stated that lulling conduct, which itself may involve the predicate act of mail fraud,⁸² will not suffice if all that is caused by the lulling is a prevention or delay in pursuing remedies or additional legal expenses. However, the direct inference is that the “but-for” test would be satisfied if the lulling conduct resulted in new damages. One example of this would be in the instance of a false accounting resulting in our hypothetical brokerage customer continuing to utilize the services of the broker to his further injury. Any additional injury would not have occurred but-for the lulling conduct which contributed to the continued relationship with the customer whereby the broker could engage in additional predicate acts, and thereby continue to drain our hypothetical client’s investment assets through additional commissions and mark-up income to the benefit of the broker.

Query, could our hypothetical client then pursue an action under RICO for his injuries resulting from that racketeering activity

80. The key purpose of RICO’s civil remedy is to “divest the association of the fruits of its ill-gotten gains.” *United States v. Turkette*, 452 U.S. 576, 585 (1981). This purpose would be severely undermined if persons who suffered direct harm from racketeering activity as defined by the statute could not recover in the absence of a showing of some “special” harm. . . . Such a rule would leave money derived from actions prohibited by RICO precisely where Congress did not intend it to remain, in the hands of RICO violators.

Crocker Nat’l Bank v. Rockwell Int’l Corp., 555 F. Supp. at 49-50. See also the “causation” discussion in *Haroco*, 747 F.2d at 398.

81. *Bankers Trust*, 741 F.2d at 518.

82. See *United States v. Love*, 535 F.2d 1152, 1159 (9th Cir. 1976); and *United States v. Ashdown*, 509 F.2d 793, 800 (5th Cir. 1975).

which occurred after the lulling conduct only? Since the “racketeering injury” element is being used by courts as a standing requirement only, there is no reason for such a limitation. Once a plaintiff has standing there should be no impediment to his ability to proceed to recover for all damages suffered by conduct which falls within the statute. We are again left, however, with a strictly fortuitous result as to which injured persons may proceed, and for which injuries. The fortuitous nature of this result would seem to conflict with the certainty needed for prospective defendants to know that if they engage in conduct proscribed by Congress they are liable to suit, with enhanced damages geared to eradicating that conduct.

In pleading a Civil RICO claim, so long as some courts apply this “but-for” test, it will remain important for counsel to review the facts of each business fraud closely to determine whether at least a portion of the injuries suffered by the plaintiff followed some lulling conduct, or whether the injuries can otherwise be construed as injuries which would not have occurred but-for a pattern of conduct, and to clearly plead that construction of the facts.⁸³

4. *Imposing an “Injury of a Type RICO was Intended to Prevent” Test.*—A number of other courts, including the Second Circuit Court of Appeals in *Sedima, S.P.R.L. v. Imrex Company, Inc.*,⁸⁴ have engrafted an element onto the civil remedies provision which would require damages from only the kinds of wrongs with which those courts think RICO was meant to deal. The fallacy in this reasoning is that, having no factual base of reference, these courts simply apply their own unstudied policy decisions contrary to the Supreme Court’s dictates in *Diamond v. Chakrabarty*.⁸⁵ Moreover, while business fraud is conveniently excluded from the reasoning these courts apply, they do not state what they would then include under “mail,” “wire,” and “securities” fraud.⁸⁶

These courts conveniently disregard references in the legislative history to Congress’ concern for losses suffered by investors.⁸⁷ As

83. See *Alexander Grant & Co.*, 742 F.2d at 413, where the Eighth Circuit Court stated that:

Grant’s complaint does not simply allege injury from the underlying predicate acts. It contends that Tiffany was conducted through a pattern of mail and wire fraud that enabled it to remain in business. As a result of this extended life, Grant continued to provide its accounting services to Tiffany for a time greater than it would have had the fraud not occurred. This also increased the harm resulting to Grant’s business reputation. We conclude that these allegations sufficiently plead an injury “by reason of” a RICO violation.

84. *Sedima*, 741 F.2d at 501. See also *Harper*, 545 F. Supp. at 1007.

85. See *supra* note 16 and accompanying text.

86. 18 U.S.C. § 1961(1) (1982), *supra* note 8 and accompanying text.

87. As stated in *Crocker Nat’l Bank v. Rockwell Int’l Corp.*:

exemplified in a study of continuous securities violators engaging in patterns of unlawful conduct,⁸⁸ Congress might very well have meant to deal with such securities violators through RICO. Furthermore, under the language of RICO there is no way to distinguish between the brokerage people described in that study and brokerage defendants in RICO actions so long as those defendants are willing to engage in conduct which Congress proscribed under the statute, particularly a pattern of mail, wire and securities fraud with willful intent such that they are indictable and punishable for their conduct.

5. *Requiring a Prior Conviction.*—On July 25, 1984, the Second Circuit Court of Appeals in the *Sedima* case enunciated a requirement that a defendant be convicted before a civil RICO action would lie against him.⁸⁹

However, applying the rules of statutory construction discussed above, section 1964(c) unambiguously provides that:⁹⁰ “[A]ny person injured in his business or property by reason of a violation of Section 1962 of this chapter may sue therefor. . . .” As applied to our hypothetical client, section 1962(c) provides that “It shall be unlawful for any person . . . to conduct or participate, . . . in the conduct of [an] enterprise’s affairs through a pattern of racketeering activity” The definition of “pattern of racketeering activity” requires “at least two acts of racketeering activity” within ten years of each other.⁹¹ The definition of “racketeering activity” as applied to our hypothetical client, includes any mail or wire fraud which is “indictable” and any fraud in the sale of securities which is an offense “punishable” under the federal securities laws.⁹²

We then consider what constitutes “indictable” acts or “punishable” securities law offenses. Under the doctrine stated by the Supreme Court in *Russello v. United States*, these words must be defined according to their “ordinary meaning.”⁹³ The starting

[T]he legislative history indicates that harm to individual legitimate businesses such as the plaintiffs’ alleged investment losses . . . was a congressional concern. Organized Crime Control Act of 1970, Pub. L. No. 91-452, Sec. 904(a), 84 Stat. 922, 947.

Crocker National Bank, 555 F. Supp. at 49. See also Blakey, *Reflections*, *supra* note 6, at n.48; and Pub. L. No. 91-452, 84 Stat. 923 which states: “The Congress finds that . . . (4) organized crime activities in the United States weaken the stability of the Nation’s economic system, [and] harm innocent investors. . . .”

88. See Appendix A.

89. *Sedima*, 741 F.2d at 496-504.

90. See *supra* note 10 and accompanying text.

91. 18 U.S.C. § 1961(5) (1982), see *supra* note 8 and accompanying text.

92. 18 U.S.C. § 1961(1)(B) & (D) (1982), see *supra* note 8 and accompanying text.

93. 104 S. Ct. 296, 299 (1983). The rule of statutory construction is that: “[A]bsent clear evidence of contrary legislative intention, a statute must be interpreted

place is the dictionary.⁹⁴

The suffix “-able, -ible” is defined as “Susceptible, capable, or worthy of, . . . for example, debatable, eatable, adducible, collapsible. . .”⁹⁵ and “capable of or worthy of (being acted upon)”⁹⁶.

If Congress had wanted to require a civil defendant charged with mail or wire fraud to first be “indicted,” let alone “convicted,” or a civil defendant charged with fraud in the sale of securities to first be “convicted” or “punished,” section 1961(1) itself indicates that Congress knew how to state what it wanted.⁹⁷ Congress explicitly used different modifying words in section 1961(1) to apply to different types of activity,⁹⁸ and when Congress did intend to require a

according to its plain language.” *United States v. Apfelbaum*, 445 U.S. 115, 121 (1980).

The Second Circuit Court of Appeals analyzed the statutory language as follows:

As for the language “any act which is indictable” (or “chargeable”), conceivably Congress meant by the choice of these words to suggest either that indictments or, in the case of state felonies, informations are not required, since the acts need only be “indictable” or “chargeable” (emphasis added). But a plausible alternative view of the words “indictable” and “chargeable” found in RICO’s definitional section, is that Congress did not intend to give civil courts power to determine whether an action is “indictable” in the absence of a properly returned indictment or “chargeable” absent an information.

Sedima, 741 F.2d at 499-500.

However, “a plausible alternative” is not *clear evidence* of a Congressional intent to give these words meaning outside of the plain language used. This is all the more clear as the Court gives no indication that this “plausible alternative” derives from anything stated by Congress or even from dictionaries. On what basis is this purported “alternative” plausible other than in the mind’s eye of the court? See the discussion of *Diamond v. Chakrabarty*, *supra* note 16 and accompanying text.

94. *Russell*, 104 S. Ct. at 299.

95. THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (1969).

96. WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY (1971); see also WEBSTER’S SECOND NEW INTERNATIONAL DICTIONARY (1940); and WEBSTER’S NINTH NEW COLLEGIATE DICTIONARY (1983). THE COMPACT EDITION OF THE OXFORD ENGLISH DICTIONARY (1971) refers to the suffix “-able” as a special form of the word “able,” the definition of which includes “2. suitable, fit, appropriate; suited, adapted, fitted.” A NEW GENERAL ENGLISH DICTIONARY (2d ed. 1737) defines “able” as “Sufficient, or capable to do a particular Act or Thing.”

97. Nowhere does the history of RICO indicate that a RICO victim’s ability to assert rights created by the statute should rest at the mercy of the local prosecutor’s office. A prosecutor may for good reason choose on occasion not to prosecute RICO violators, but the legislative history does not suggest that the private victims of the violator should forego remedy because a prosecutor has decided not to press charges. Neither does the legislative history show that the private victims of RICO violators should lose their RICO rights just because a prosecutor has lost his RICO case. As I see it, the legislative history shows just the opposite. . . .

Grado v. Gross, [1983-1984 Transfer Binder] Fed. Sec. L. Rptr. (CCH) ¶ 91,660, at 99,336 (D. Mass. 1984).

98. See 18 U.S.C. § 1961(1)(A) (1982) (acts which are “chargeable under state law and punishable by imprisonment for more than one year”); 18 U.S.C. § 1961(1)(B) (acts which are “indictable” under any of the following provisions of Title 18, United States Code,” including mail and wire fraud); 18 U.S.C. § 1961(1)(C) (acts which are “indictable” under Title 29, United States Code); and 18 U.S.C. § 1961(1)(D) (“any offense

conviction as a part of the legislative scheme of the Organized Crime Control Act, of which RICO is a part, it simply said so.⁹⁹ Nowhere does the word "convicted," however, appear in sections 1961, 1962 or 1964(c) under which counsel may proceed on behalf of our hypothetical client.

This element, engrafted onto the statute by the Second Circuit, has been rejected by the Sixth and Seventh Circuits.¹⁰⁰

V. ETHICAL/PRACTICAL CONSIDERATIONS IN PURSUING A RICO CLAIM

Some attorneys justify pursuing all claims, defenses, contentions and motions possible upon the rationalization that they have an ethical obligation to pursue every possible course of action on behalf of their clients. However, the courses of action to be taken upon consultation with the client which will best serve the client's interests may be those which are tempered by considerations regarding good faith pleadings and a cost/benefit analysis. With regard to civil RICO pleadings, these considerations include (1) the substantiality of the fraud and of the intent of the defendant as discussed above; (2) potential negative effects a charge of "racketeer" may have upon settlement possibilities in a particular case, especially where certain defendants may bristle at such a label with the effect of severing lines of communication; and (3) the cost of aggressively pursuing a RICO claim, which is extensive in light of the unsettled nature of this area of the law.

Consideration should particularly be given to Rule 11 of the Federal Rules of Civil Procedure, which states in pertinent part:

Every pleading, motion, and other paper of a party represented by an attorney shall be signed by at least one attorney of record in his individual name. . . . The signature of an attorney . . . constitutes a certificate by him that he has read the pleading, motion, or other paper; that to the best of his knowledge, information, and belief formed after reasonable inquiry it is well

involving . . . fraud in the sale of securities . . . [and other conduct], punishable under any law of the United States." As an even clearer indicator of Congress' intention to be explicit as to what modifiers would apply to which types of "racketeering activity," consider the following language found in section 1961(B) listing acts which are "racketeering activity" if they are "indictable": "section 659 (relating to theft from interstate shipment) *if the act indictable under section 659 is felonious.* . . ." (Emphasis added). No other predicate act contains limiting language of this type.

99. See 18 U.S.C. § 3575,(e),(g), 3576 and 3577. See also 18 U.S.C. § 1863(c) which provides that: "Upon conviction of a person under this section [dealing with RICO criminal penalties], the court shall authorize . . . seizures and forfeitures of property." (Emphasis added).

100. See *USACO Coal Co. v. Carbomin Energy, Inc.*, 689 F.2d 94, 95 n.2 (6th Cir. 1982); *Bunker Ramo Corp. v. United Business Forms, Inc.*, 713 F.2d 1272, 1286-87 (7th Cir. 1983); *Haroco*, 747 F.2d at 393 n.12.

grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. . . . If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee."¹⁰¹

In the matter of *Financial Federation, Inc. v. Ashkenazy*,¹⁰² a financial institution brought suit against shareholders in anticipation of a shareholder's suit for breach of fiduciary duty, charging the shareholders with RICO and other securities law violations. Upon findings of no proof to support the RICO claim, the court held pursuant to Rule 11 that:¹⁰³ "Ashkenazy and AEI are entitled to recover attorney's fees from FFI by virtue of its bad faith in commencing and maintaining an improper RICO claim against them without reasonable basis for belief that its allegations could be established." Of the total award of \$500,000.00 for attorney's fees, \$150,000.00 applied explicitly "with respect to the RICO claim," while the balance applied with respect to the bad faith of Financial Federation, Inc. in bringing other claims against the shareholders.

Counsel considering commencing civil RICO claims would do well to keep in mind that if current appeals challenging court derived RICO elements¹⁰⁴ are successful, courts may be more inclined to turn to Rule 11 to discourage improper cases from being brought under RICO.

While historically Rule 11 was not effective in deterring abuse,

The amended rule attempts to deal with the problem by building upon and expanding the equitable doctrine permitting the court to award expenses, including attorney's fees, to a litigant whose

101. FED. R. CIV. P. 11. As amended effective August 1, 1983. See also Section 1927 of Title 28 of the United States Code which states:

Any attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorney's fees reasonably incurred because of such conduct.

102. [1984 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 91,489 (C.D. Cal. 1983).

103. *Id.* at 98,441.

104. *Sedima, S.P.R.L. v. Imrex Co., Inc.*, 741 F.2d 482 (2d Cir. 1984), cert. granted, 53 U.S.L.W. 3506 (U.S. Jan. 14, 1985) (No. 84-648); *Bankers Trust Co. v. Rhoades*, 741 F.2d 511 (2d Cir. 1984), petition for cert. filed, 53 U.S.L.W. 3367 (Oct. 24, 1984) (No. 84-657); and *Furman v. Cirrito*, 741 F.2d 524 (2d Cir. 1984), petition for cert. filed, — U.S.L.W. — (U.S. 1984) (No. 84-604).

opponent acts in bad faith in instituting or conducting litigation. [Citations omitted] Greater attention by the district courts to pleading and motion abuses and the imposition of sanctions when appropriate, should discourage dilatory or abusive tactics and help to streamline the litigation process by lessening frivolous claims or defenses.¹⁰⁵

Furthermore,

The text of the amended rule seeks to dispel apprehensions that efforts to obtain enforcement will be fruitless by insuring that the rule will be applied when properly invoked. The words "sanctions" in the caption, for example, stresses a deterrent orientation in dealing with improper pleadings, motions or other papers. . . . And the words "shall impose" in the last sentence focus the court's attention on the need to impose sanctions for pleading and motion abuses.¹⁰⁶

Moreover,

The amended rule should eliminate any doubt as to the propriety of assessing sanctions against the attorney.

Even though it is the attorney whose signature violates the rule, it may be appropriate under the circumstances of the [particular] case to impose a sanction on the client.¹⁰⁷

The question then becomes how to satisfy the requirements of Rule 11 in bringing a RICO claim. In this regard:

The new language stresses the need for some prefiling inquiry into both the facts and the law to satisfy the affirmative duty imposed by the rule. The standard is one of reasonableness under the circumstances.¹⁰⁸

However, with regard to the potential negative effects this rule could have on the bringing of a RICO claim where the conduct to be charged falls within the statute:

The rule is not intended to chill an attorney's enthusiasm or creativity in pursuing factual or legal theories. The court is expected to avoid using the wisdom of hindsight and should test the signer's conduct by inquiring what was reasonable to believe at the time the pleading, motion, or other paper was submitted [based upon reasonable inquiry by the signator].¹⁰⁹

Note that if inquiry and analysis is made of those facts which are available from the client and any other sources, and of the law as it currently applies, prior to filing a RICO claim, and that analysis supports a decision to pursue that claim, not only will Rule 11 have been satisfied, but counsel will also have at hand the detail neces-

105. Notes of Advisory Committee on Rules.

106. *Id.*

107. *Id.*

108. *Id.*

109. *Id.*

sary to draft a speaking complaint which will assist in overcoming the court developed roadblocks to that RICO claim.

CONCLUSION

Just as private civil actions for damages are acknowledged to be an important facet of enforcement of the securities laws,¹¹⁰ private civil actions under section 1964(c) are an important facet of enforcement of RICO in its purposes of eradicating racketeering from the fibre of our society.¹¹¹ This effect follows whether those civil actions are pursued directly against racketeers; are pursued against those business people who are willing to engage in intentional fraudulent conduct which racketeers will emulate if it is helpful to them and condoned by the court; or are pursued against those business people who racketeers seek to use because of their willingness to engage in patterns of intentional fraudulent conduct.¹¹²

However, counsel pursuing civil RICO actions must accept the responsibility of exercising good judgment and a willingness to do a thorough job, lest their conduct encourage the courts to overaggressively apply Rule 11 to the personal detriment of the client as well as counsel in dealing with disfavored applications of RICO to business frauds.

110. See *Aaron v. Securities and Exchange Commission*, 446 U.S. 680, 689 (1980).

111. *Turkette*, 452 U.S. at 585. See Sen. Hruska's statements in introducing a forerunner of what became RICO, *supra* note 6.

112. See Appendix A.

APPENDIX A

Circuit Judge Oakes in *Sedima, S.P.R.L. v. Imrex Company, Inc.*, states that since Congress did not consider the breadth to which RICO applies on its face the courts may consider what Congress would have done had it considered RICO's application to business frauds. He then proceeds to state his own unstudied conclusion that Congress would not have included business fraud matters within the ambit of RICO had Congress given this matter any consideration.¹

Whatever problems this reasoning has as against rules of statutory construction, and the fact that mail, wire and securities frauds are explicitly included within the ambit of RICO, the record which could be placed before Congress raises significant questions of whether Judge Oakes' unstudied personal conclusions are correct.

Contrary to Judge Oakes' conclusion, there are numerous securities fraud violators who often associate together, who sometimes associate with persons considered to be members of organized crime, and who will use brokerage and other professionals who are willing to engage in fraudulent conduct.

The following is a report of a limited study of continuous securities violators.² This report indicates that if Congress desires to verify whether there is a factual basis for inclusion of mail, wire and securities frauds within RICO by requesting the appropriate federal law enforcement agencies to catalog continuous securities, postal and wire fraud perpetrators, there may very well be support for use of RICO as a weapon against whomever engages in continuous violative conduct, even if Judge Oakes might find this use abhorrent when otherwise "legitimate" businessmen are involved.³

The results of this study are reported here in the form of summaries from public documents relating principally to five individuals, each of whom engaged in a pattern of fraudulent conduct. Also reflected in the report of this study is the extent to which other fraud violators work with one or another principal party. Finally, this report reflects how business and professional people sometimes engage in patterns of fraudulent conduct as principals, or in participation with other continuous violators.

1. *Sedima, S.P.R.L. v. Imrex Co., Inc.*, 741 F.2d 482, 501 (2d Cir. 1984), cert. granted, 53 U.S.L.W. 3506 (U.S. Jan. 14, 1985) (No. 84-648).

2. In addition to time limitations, the cumbersome nature of the cross referencing of public records on securities violators imposed its own constraints upon this study. The effect of these constraints is that this report reflects but a fraction of the continuous violators who would fall within the objectives of this study. However limited, the results reported here provide their own documentation of the breadth of this situation.

3. See *Sedima*, 741 F.2d at 487.

A. MICHAEL GARDNER

1. *Gardner Securities Corporation*:⁴ December 9, 1969 — Entry of temporary restraining order regarding the fraud, registration and net capital provisions of the federal securities laws against Gardner and Gardner Securities Corporation, a registered broker-dealer of which Gardner was the president and sole shareholder.

2. *Radio Hill Mines Co., Ltd.*:⁵ July 30, 1970 — Complaint filed charging violations of the fraud and registration provisions of the federal securities laws against Sidney Stein, Albert Feiffer, Norman Rubinson, Michael Gardner, and others. September 16, 1971 — Indictment returned charging Stein and Rubinson with perjury during investigation. February 5, 1973 — Guilty plea entered for Stein. March 17, 1973 — Rubinson convicted. February 20, 1973 — Rubinson convicted of criminal contempt of preliminary injunction entered November 5, 1970.

3. *Stern-Haskell, Inc., Diston Industries, Inc., Mobile Home Ventures, Inc.*:⁶ September 30, 1970 — Complaint filed charging violation of the fraud and registration provision of the federal securities laws against seventeen defendants including Sidney Stein, Albert Feiffer, Norman Rubinson, Michael Gardner, Lawrence Levine, William K. Chester, Alpha Securities, Inc., C.K.W. Securities, Inc. and Zenith Securities, Ltd. May 19, 1975 — Guilty plea of Stein and sentencing of Stein, Feiffer, Rubinson, Levine, Chester and others reported.

4. *Control Metals Corporation*:⁷ October 13, 1970 — Complaint filed charging violations of the fraud and registration provisions of the federal securities laws against nineteen defendants including Seymour Pollack, Paul Sachs, Stanley M. Kaiser, Harold Rothman, Robert Rapp, J.H. Rapp Co., and registered broker-dealer, Michael Gardner, William Cudd, P.J. Gruber Co., Inc., a registered broker-dealer, and Martin Ciment, d/b/a Crown Trading Co., a registered broker-dealer. June 21, 1973 — Indictment returned against Pollack, Sachs, Kaiser, Rothman and Cudd. December 17, 1973 — Pollack, Sachs and Cudd convicted, Kaiser having pled guilty to charges brought through filing of an information.

4. SEC Litig. Release No. 4497. All SEC releases cited in this Appendix are public documents available for inspection at the regional offices of the Securities and Exchange Commission.

5. SEC Litig. Release Nos. 4710, 5169, 5759, 5769 and 5855.

6. SEC Litig. Release Nos. 4768, 4781 and 6891.

7. SEC Litig. Release Nos. 4780, 5951 and 6183.

5. *Spectrum, Ltd.*:⁸ April 2, 1971 — Complaint filed charging violations of fraud and registration provisions of the federal securities laws against twelve defendants including Louis Israel Marder, James Morse, Michael Gardner, Michael Karfunkel,⁹ Stuart Schiffman,¹⁰ and Quido Benigno.¹¹ June 21, 1981 — Permanent injunction entered against Marder and Gardner. August 11, 1972 — Broker-dealer registration of Gardner Securities Corp. revoked and Michael Gardner barred from associating with any broker-dealer.

6. *Vendotronics Corporation*:¹² October 12, 1973 — Convictions entered on charges of securities fraud and conspiracy, among other charges, against nine defendants including Anthony Sano, Ronald Kazdin, Murray Levine, Anthony DeBenedetto, Michael Gardner, Fred Hesse and Louis Kaye. James Morse was reported as not being prosecuted further on the indictment in this matter upon his guilty plea to conspiracy to violate the federal securities laws in regard to the securities of Fleurette, Inc. (See B.9 below).

7. *Patterson Corporation*:¹³ November 21, 1974 — Indictment, brought by the Los Angeles Organized Crime Strike Force in conjunction with the United States Attorney for the Southern District of California, returned charging mail and securities fraud and conspiracy against eight defendants including Dalton Smith, Richard B. Anderson, a former bank and securities broker-dealer officer, Cleo H. Bullard, Edward A. Zuber and securities salesman Lawrence D. Share. Michael Gardner was identified as a co-conspirator. January 28, 1976 — Announcement of convictions and sentencing of Anderson, Bullard, Zuber and Share, Dalton Smith

8. SEC Litig. Release Nos. 4965 and 5057; SEA Release No. 9724.

9. On August 31, 1970 a complaint was filed charging violations of the fraud and registration provision of the federal securities laws in the sale of securities of Select Enterprises, Inc. against Michael Karfunkel, Joe T. Boyd, Alan I. Segal, Joseph Azzarone dba Karen Co., Economic Planning Corp., a registered broker-dealer, and Emerson Titlow, a state senator from Nevada, among others. On September 27, 1971 the broker-dealer registration of Azzarone was revoked, and Azzarone and Karfunkel were barred from being associated with any broker-dealer in administrative proceedings related to Select Enterprises, Inc. and Spectrum, Ltd. SEC Litig. Release No. 4742; SEA Release No. 9346.

10. On December 16, 1971, a complaint was filed against Stuart Schiffman, vice-president of Kelly, Andrews & Bradley, Inc., a registered broker-dealer, and others, charging securities fraud in the sale of securities of All-State Metal Stamping Corp. through Kelly, Andrews & Bradley, Inc. SEC Litig. Release No. 5268.

11. On October 29, 1976, Quido Benigno pled guilty to conspiracy to commit securities fraud upon an indictment brought by the New York Organized Crime Strike Force against six defendants regarding sales of securities through Seed Capital Corporation, a registered broker-dealer. SEC Litig. Release Nos. 7491 and 7623.

12. SEC Litig. Release Nos. 5778 and 6226.

13. SEC Litig. Release Nos. 6316, 6563, 6624 and 7253; Indictment, CR 74-2277-G.T., U.S.D.C., S.D. Cal.

having died prior to trial. August and September, 1974 — Injunctions entered against further violations of the fraud and registration provisions of the federal securities laws against, among others, Dalton Smith (identified as an undisclosed principal of Patterson Corporation), Anderson, Bullard, Nationwide Registrar Transfer Agency, attorney Stanley T. Traska, and former stock broker Joseph Cono Caggiano.

B. FRED HESSE, aka FREDERICK VON HESSE, aka FRED WILLIAM FUCHSHUBER HESSE

1. *Texas Building Company*:¹⁴ April 22, 1960 — Indictment returned against five defendants including Fred Hesse charging securities and mail fraud and conspiracy.

2. *Monarch Asbestos Co., Ltd.*:¹⁵ June 21, 1960 — Indictment returned against twenty-eight defendants including Stanley Ira Younger, Fred William Fuchshuber Hesse, Louis Michael de Filippo, Arnold Naidich and Louis Michael Tortorello charging securities and mail fraud, sale of unregistered securities and conspiracy.

3. *Atlas Gypsum Corporation*:¹⁶ October 21, 1960 — Plea of guilty or nolo contendere by twenty-four defendants regarding charges of securities and mail fraud and sale of unregistered securities through J.C. Graye Company, a registered broker-dealer. Defendants included Stanley Ira Younger, Louis Michael de Filippo, Murray Taylor, Fred William Fuchshuber Hesse, Arthur Tortorello, Carmine Lombardozzi and Robert Amer.

4. *Federated Holding Co., Inc.*:¹⁷ July 17, 1963 — Permanent injunction against further securities fraud entered against Fred William Fuchshuber Hesse in an action involving securities sold through a registered broker-dealer.

5. *Douglas Precision Parts, Inc.*:¹⁸ January 21, 1964 — Indictment returned on charges of securities fraud against Fred William Fuchshuber Hesse, Lewis Mayo,¹⁹ Arnold Naidich, Arthur

14. SEC Litig. Release No. 1657.

15. SEC Litig. Release No. 1711.

16. SEC Litig. Release No. 1813.

17. SEC Litig. Release Nos. 2260 and 2694.

18. SEC Litig. Release No. 2837

19. On April 3, 1979 a jury convicted Louis M. Mayo and James H. Dondich, aka Harold James, of conspiracy and securities fraud arising out of sales of securities of Reclamation District No. 2090 through Benchmark Securities, Inc., a registered broker-dealer. On June 17, 1976 a complaint had been filed against twenty-one defendants for

Tortorello, and Frank Sacco.

6. *American Beryllium & Oil Corporation*:²⁰ May 15, 1968 — Complaint filed charging securities fraud, among other charges, against Frederick von Hesse, aka Frederick Fuchshuber, aka Fred Hesse, Vito Davanzo, Lawrence Gottlieb and others. July, 1970 — Permanent injunctions entered against Hesse and Gottlieb.

7. *Underwriters Investment Co.*:²¹ November 29, 1971 — Report of convictions of Arthur Tortorello and John E. Dennett for securities and mail fraud and conspiracy. Guilty pleas were entered by Fred Hesse, Louis Kaye and Edward Zuber,²² among others. Indictment brought by the New York Organized Crime Strike Force.

8. *Securities Data Center, Inc., Unidat Corp., Convan Corp., Zenitron Corp., General Time Sharing, Inc., United States Computer Corp.*:²³ February 2, 1972 — Permanent injunction entered against attorney Emanuel Fields, Frederick Von Hesse and Louis Kaye, and others regarding securities fraud and sale of unregistered securities.

9. *Fleurette, Inc.*:²⁴ April 4, 1973 — Indictment, brought by the New York Organized Crime Strike Force in conjunction with the United States Attorney for the Eastern District of New York, returned against sixteen parties including Dennis Carroll, Louis Kaye, Raymond Monacelli, James Morse, Norman Rubinson, Murray Taylor,²⁵ Arthur Tortorello aka Artie Todd, Alex Alexander and Equity Financial Trading Corporation. Named co-conspirators included Frederick Von Hesse, aka Fred Hesse. May 17, 1984 — Announcement of sentencing of Dennis Carroll, James Morse, Norman Rubinson and Equity Financial Trading. Monacelli and

injunction against further violations of the securities laws. SEC Litig. Release Nos. 7460 and 8717.

20. SEC Litig. Release Nos. 4013, 4668 and 4689.

21. SEC Litig. Release No. 5230.

22. In January, 1975 sentences were imposed upon Edward Zuber, Burney Acton, Michael Clegg, Joseph Azzarone, aka Karen Co., a registered broker-dealer, Anthony Scardino and Alan Segal upon guilty verdicts or pleas to an indictment charging securities fraud, mail fraud and conspiracy in the sale of securities of Pioneer Development Corporation. SEC Litig. Release Nos. 4892 and 6869.

23. SEC Litig. Release No. 5332.

24. SEC Litig. Release Nos. 5837, 6354 and 6699.

25. On November 18, 1970 an indictment was returned charging Murray Taylor, Vincent Lombardo, John Dioguardi, Philip Bonodono, Carmine Tramunti and others with conspiracy, securities and mail fraud, and racketeering regarding sales of the securities of Imperial Investment Corporation. Named as co-conspirators were Sidney Stein and Anthony Soldano. SEC Litig. Release No. 4826.

Tortorello pled guilty and were sentenced in conjunction with other matters. Alexander was reported as being a fugitive. January 28, 1975 — Announcement of sentencing of Murray Taylor and Louis Kaye.

10. *Vendotronics Corporation*: See A.6 above, involving Michael Gardner, Ronald Kazdin, Murray Levine and Louis Kaye.

C. *LESLIE T. ZACHARIAS, aka LEE ZACHARIAS, aka LEE ZAHARIAS*

1. *Texas Uranium Corporation*:²⁶ May 7, 1969 — Complaint filed charging twenty-nine defendants with violating the fraud and registration provisions of the federal securities laws including Francis C. Lund²⁷ and John Taylor. Charged with violating the registration provision only were: Leslie T. Zacharias, R.F.S. & Associates, Inc. and Maurice Benjamin, aka Medwin Benjamin,²⁸ among others.

2. *Continental Investment Corporation and Pan American Industries, Inc.*:²⁹ August 5, 1969 — Complaint filed charging violations of the fraud and registration provision of the federal securities laws against Vern G. Ryan, Donald Tarzwell, aka Michael J. O'Shea, James W. Brewer, Houston Securities Corporation, a registered broker-dealer, George K. Waki, president of HSC, Pedro Jose Torres Velasquez, Leslie T. Zacharias, aka Lee Zaharias, R.F.S. Associates, Inc., and Wesley J. Moffatt, among others. Permanent injunctions entered against Ryan, Zacharias, Velasquez, Tarzwell, Brewer, R.F.S. Associates, Inc., Waki and HSC. October 23, 1971 — Tarzwell convicted of securities fraud in the sale of securities of Pan American Industries, Inc. February 13, 1973 — With regard to sales of securities of CIC, James W. Brewer pled guilty to a charge of criminal contempt of an October 18, 1968 injunction aris-

26. SEC Litig. Release No. 4310.

27. On October 3, 1975 Francis C. Lund was found guilty along with others, of securities fraud in the sale of securities of Rio de Oro Mining Company. SEC Litig. Release No. 7120. On April 27, 1973 permanent injunctions were entered against Francis C. Lund and Robert Bryson, among others, from further violations of the fraud and registration provisions of the securities laws in an action involving securities of Northwest Pacific Enterprises, Inc. SEC Litig. Release No. 5890.

28. On May 7, 1971 Medwin Benjamin pled guilty to one securities fraud count following the indictment of seven defendants in regard to the sale of securities of VTR, Inc. SEC Litig. Release Nos. 4265 and 5001. On August 4, 1973 an injunction was entered against nine defendants, including Medwin (Maurice) Benjamin, from further violations of the fraud and registration provisions of the securities laws in an action regarding securities of four companies sold through a registered broker-dealer. SEC Litig. Release Nos. 5118 and 6017.

29. SEC Litig. Release Nos. 4389, 4609, 4614, 5000, 5204 and 6285.

ing out of sales of securities of W.I.D.E., Inc.³⁰

3. *Capitol Holding Corporation*:³¹ October 9, 1969 — Complaint filed charging violations of the fraud and registration provisions of the federal securities laws variously against twenty-three defendants including David A. Wooldridge, Daniel E. Manning, attorney Robert A. Eisenberg,³² William G. Louzzo, aka William G. London, Irwin Schwartz, aka Steve Schwartz, Leslie Zacharias, aka Lee Zacharias, Bernard Klavir, Charles Murano, Robert M. Bryson³³ and R.F.S. Associates, Inc. Between October 10, 1969 and May 8, 1980 permanent injunctions were entered against these parties.

4. *Les Studs Corporation*:³⁴ July 9, 1970 — Complaint filed charging violations of the fraud and registration provision of the federal securities laws against J.H. Rapp Co., a registered broker-dealer, and Robert Rapp, the secretary-treasurer of J.H. Rapp Co., and charging violations of the registration provisions of those laws only against Leslie T. Zacharias, aka Lee Zacharias and John Elwood Dennett, among others. Permanent injunctions were entered against these parties between August 25, 1970 and June 16, 1971.

5. *Picture Island Computer Corporation*:³⁵ July 21, 1971 — Indictment brought by the New York Organized Crime Strike Force in conjunction with the United States Attorney for the Southern District of New York against John Lombardozi, Peter Francis Crosby, Hilmer Burdette Sandine and Leslie T. Zacharias, among others, involving violation of the fraud and registration provisions of the federal securities laws, mail fraud and conspiracy. Named co-conspirators included Francis P. O'Neill and Byron E. Prugh. On June 9, 1972 Lombardozi, Sandine and Zacharias were convicted; Crosby failed to appear for trial and was deemed a fugitive.

30. SEC Litig. Release Nos. 4141, 5182, 5775 and 5784.

31. SEC Litig. Release Nos. 4434, 4448, 4496 and 4693.

32. On February 22, 1972 Robert Eisenberg was enjoined from further violations of the securities laws in the matter of Majestic Capital Corporation. SEC Litig. Release No. 5334.

33. On August 14, 1974 Robert Bryson was enjoined, along with Ted England, from further violations of the fraud and registration provisions of the securities laws in an action against eighteen defendants involving Royal Airlines, Inc. SEC Litig. Release Nos. 6361 and 6523.

34. SEC Litig. Release Nos. 4675, 4792, 4793 and 5062.

35. SEC Litig. Release Nos. 5096 and 5434.

D. PETER FRANCIS CROSBY

1. *Texas Adams Oil Co., Inc.*:³⁶ May 24, 1970 — Conviction of Peter Francis Crosby, among others, on charges of mail fraud, violation of the registration provisions of the federal securities laws, and conspiracy.

2. *Jefferson Research Foundation, Inc. and Jefferson Custodian Fund, Inc.*:³⁷ November 1, 1960 — Plea of guilty by Peter Francis Crosby to violating the fraud provisions of the federal securities laws in managing the assets of Jefferson Custodian Fund, Inc. which he controlled through acquisition of Jefferson Research Foundation, Inc.

3. *American Continental Industries, Inc.*:³⁸ December 2, 1968 — Complaint filed charging violations of the fraud and registration provision of the federal securities laws in the sales of securities against Michael LaMarca, Robert L. Taylor, Baptist Foundation of America, Inc., World Timberland Financial Corporation, Peter Francis Crosby, James Dondich, Nathan Rosenberg, Alessandrini & Co., Inc., a registered broker-dealer, Louis B. Meadows & Co., Inc., a registered broker-dealer, Philip S. Budin and Philip S. Budin & Co., a registered broker-dealer, among others. Permanent injunctions were entered against BFA, World Timberland, Crosby, Dondich, Rosenberg and Alessandrini & Co., Inc., among others. Undertakings not to engage in further violations were entered into by Budin and Budin & Co. November 20, 1972 — Indictment returned against Michael LaMarca, Robert L. Taylor and others.

4. *Picture Island Computer Corporation*: See C.5 above (1971-1972). Indictment of Crosby along with John Lombardozzi, Hilmer Burdette Sandine and Leslie Zacharias.

E. LOWELL M. BIRRELL

1. *Swan-Finch Oil Corp.*:³⁹ April 15, 1957 — Complaint filed charging violations of the registration provision of the federal securities laws against Lowell M. Birrell, Gerard A. Re, Sr., a specialist on the floor of the American Stock Exchange, Girard F. Re, Jr., Birnbaum & Co., a registered broker-dealer, Nahum Birnbaum, a partner in Birnbaum & Co., Norris Adams, Ltd., a Canadian broker-dealer, Josephthal & Co., a New York Stock Exchange and

36. SEC Litig. Release No. 1709.

37. SEC Litig. Release No. 1825.

38. SEC Litig. Release Nos. 4173, 4184, 4296, 5597 and 5636.

39. SEC Litig. Release Nos. 1101, 1112, 1127, 2234, 2689 and 2741.

American Stock Exchange firm, Anthony J. Cordano, a partner in Josephthal & Co., Steven Randall & Co., Inc., a registered broker-dealer, Frank M. Naft, president of Steven Randall & Co., Inc., Tannen & Co., a registered broker-dealer, and Philip Tannen, president of Tannen & Co. April 2, 1962 — Indictment returned charging Gerardo A. Re, aka Jerry A. Re, Gerard F. Re, Lowell M. Birrell and others with conspiracy to violate the fraud and registration provisions of the federal securities laws. Gerardo A. Re and Gerard F. Re were convicted on July 11, 1963; Lowell Birrell was a fugitive.

2. *United Dye & Chemical Corporation*:⁴⁰ August 26, 1959 — Indictment returned against Alexander L. Guterma, Virgil D. Dardi, Lowell M. Birrell and others charging violations of the fraud and reporting provisions of the federal securities laws and conspiracy in regard to the sale of securities and in the exercise of proxies represented by those securities.

3. *Doeskin Products, Inc.*:⁴¹ March 2, 1961 — Indictment returned charging thirteen defendants including Lowell M. Birrell, Samuel T. Smiley and Fred Tabah with violation of the fraud provisions of the federal securities laws and mail fraud, among other charges. As of April 19, 1961, a plea of guilty had been entered by Smiley and Tabah to certain of the fraud charges; Birrell was a fugitive.

4. *American Leduc Petroleum, Ltd.*:⁴² July 20, 1961 — Indictment returned charging fourteen defendants including Lowell M. Birrell, J.A. Winston & Co., Inc., a registered broker-dealer, Joel Alfred Winston and eight securities salesmen with violations of the fraud and registration provisions of the federal securities laws, mail fraud and conspiracy. December 28, 1967 — Conviction of Birrell upon trial by jury.

5. *Jeanette Minerals Limited*:⁴³ October 3, 1961 — Indictment returned charging Lowell M. Birrell, and all of the defendants who were also charged in the indictment involving American Leduc Petroleum, Ltd., (see E.4 above) with conspiracy to violate the fraud and registration provisions of the federal securities laws, and mail and wire fraud statutes.

40. SEC Litig. Release No. 1485.

41. SEC Litig. Release Nos. 1929 and 1991.

42. SEC Litig. Release Nos. 2062 and 3897.

43. SEC Litig. Release No. 2112.