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LIMITING THE USE OF THE RICO ACT AS A DEFENSE TO HOSTILE CORPORATE TAKEOVERS

Congress enacted the Racketeer Influenced and Corrupt Organizations Act (RICO) as part of the Organized Crime Control Act of 1970.¹ In addition to providing criminal penalties,² RICO contains a civil remedy for those injured by violations of the statute.³ Although RICO was initially used primarily in criminal prosecutions, the use of the civil remedy has increased dramatically in recent years and has expanded to cases not involving organized criminal activity.⁴ One of the most recent and most controversial expansions of civil RICO occurred in securities litigation.⁵

Corporations recently began using RICO's civil remedy to resist hostile corporate takeovers.⁶ This use of the Act raises fundamental questions about the scope of the statute and the desirability of limiting its application. The use of RICO as a defense to hostile corporate takeovers also raises important questions regarding the interaction between RICO and the federal securities laws. Although several courts and commentators suggest that Congress intended some overlap between RICO and the securities laws, the extent of this overlap is difficult to define.⁷

1. 18 U.S.C. §§ 1961-1968 (1976 & Supp. V 1981).

2. 18 U.S.C. § 1963 (1976).

3. 18 U.S.C. § 1964 (1976).

4. See Barhart, *RICO: A Curse or Blessing?*, Chicago Tribune, April 27, 1983, § 3, at 11, col. 3; see also Sylvester, *Civil RICO's New Punch*, Nat'l L.J., Feb. 7, 1983, at 1, col. 1 (suggesting that the increase in civil RICO actions is due to former federal prosecutors, trained in the use of RICO, who use the advantages of a civil RICO suit for their clients).

5. See MacIntosh, *Racketeer Influenced and Corrupt Organizations Act: Powerful New Tool of the Defrauded Securities Plaintiff*, 31 U. KAN. L. REV. 7, 12 (1982). Some commentators predict that the use of civil RICO in general securities litigation will increase in the future. See Pickholz & Friedman, *Civil RICO Actions*, 14 REV. SEC. REG. 965, 970 (1981). Moreover, some commentators express concern that civil RICO cases are "mushrooming" to such an extent in the securities area that even blue chip financial institutions are threatened by civil RICO actions. See Lewin, *Targets of Racketeering Law*, N.Y. Times, June 27, 1983, § D, at 1, col. 3.

6. See, e.g., *Dan River, Inc. v. Icahn*, 701 F.2d 278 (4th Cir. 1983); *Bayly Corp. v. Marantette*, [1982 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 98,834 (D.D.C. Oct. 19, 1982); *Hanna Mining Co. v. Norcen Energy Resources Ltd.*, [1982 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 98,742 (N.D. Ohio June 11, 1982); *Victory Markets, Inc. v. Nelson*, No. 81-CV-1370, slip op. (N.D.N.Y. March 26, 1982, as amended, April 1, 1982) (available Sept. 28, 1983, on LEXIS, Genfed library, Dist file) (pre-takeover use of the RICO act); *Marshall Field & Co. v. Icahn*, [1982 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 98,603 (S.D.N.Y. Mar. 22, 1982); *Spencer Cos. v. Agency Rent-a-Car*, [1981-1982 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 98,361 (D. Mass. Nov. 17, 1981).

7. See, e.g., *Mauriber v. Shearson/American Express, Inc.*, 546 F. Supp. 391 (S.D.N.Y. 1982). See generally Long, *Treble Damages for Violations of the Federal Securities Laws: A Suggested*

This Note argues that RICO could be a legitimate defense to a hostile corporate takeover pursuant to a cash tender offer if shareholders who retain stock will be harmed by the takeover. Part I of this Note examines the general background of the RICO Act. Part II applies the Act to a hostile cash tender offer and examines each element of a civil RICO action. Part III advocates the use of RICO's injury requirement to limit this application of the Act and analyzes the potential injuries to shareholders and management during a hostile cash tender offer. This limitation upon the use of RICO conforms with the language and scope of the Act, as well as with the policies and current application of the federal securities laws.

I. AN OVERVIEW OF THE RICO ACT

Congress enacted RICO to weaken the economic base of organized crime by specifically attacking its infiltration of legitimate businesses.⁸ Congress also intended to limit the effect of this infiltration on interstate commerce and on free competition in the marketplace.⁹ Although RICO provided new tools for attacking organized crime,¹⁰

Analysis and Application of the RICO Civil Cause of Action, 85 DICK. L. REV. 201, 201-06, 225-28 (1981).

8. In 18 U.S.C. § 1961 (1976), Congress found that "organized crime in the United States is a highly sophisticated, diversified, and widespread activity that annually drains billions of dollars from America's economy by unlawful conduct. . . . [that] this money and power are increasingly used to infiltrate and corrupt legitimate business" (Congressional Statement of Findings and Purpose). Organized crime usually obtains control of legitimate businesses through extortion, investing profits from illegal activities into legitimate enterprises, accepting an interest in a legitimate business in payment of its owner's gambling debts, and foreclosing on usurious loans. Legislative Note, *Organized Crime Control Act of 1970*, 4 U. MICH. J.L. REF. 546, 622-27 (1971). Organized crime seeks control of legitimate businesses for several reasons: to obtain a respectable "cover," to acquire a base through which to deal with public officials, to "wash" illegal income, and to obtain a "hedge against unfavorable conditions in the criminal world." Note, *The Pennsylvania Attack on Racketeers in Legitimate Enterprises*, 78 DICK. L. REV. 176, 176 (1973) (citing PENNSYLVANIA CRIME COMMISSION, REPORT ON ORGANIZED CRIME 49 (1970)); see also Note, *Racketeer Influenced and Corrupt Organizations: Distinguishing the "Enterprise" Issues*, 59 WASH. U.L.Q. 1343, 1355 (1982) [hereinafter cited as *Enterprise Issues*].

9. The introduction to the RICO Act states that "organized crime activities in the United States weaken the stability of the Nation's economic system, harm innocent investors and competing organizations, interfere with free competition, [and] seriously burden interstate and foreign commerce." 18 U.S.C. § 1961 (1976) (Congressional Statement of Findings and Purpose).

10. Congress noted that RICO improves the evidence-gathering process, provides new criminal prohibitions and enhanced sanctions, and establishes new remedies. 18 U.S.C. § 1961 (1976) (Congressional Statement of Findings and Purpose). Before the adoption of RICO, prosecutors faced many barriers to successful prosecution of organized crime's infiltration of legitimate businesses. These barriers included the piecemeal approach of federal law, reliance on ineffective state laws, the difficulty of proving involvement of those in the higher echelons of organized crime's structure, and a replacement effect whereby the conviction of one person merely resulted in the promotion of another syndicate member to take his place. See Legislative Note, *supra*

it has remained the most controversial and most litigated part of the entire Organized Crime Control Act.¹¹

Any action under RICO must establish a pattern of racketeering. RICO defines racketeering as the violation of specific state and federal laws ranging from murder and extortion to mail and wire fraud.¹² A pattern of racketeering is defined as at least two predicate acts of racketeering committed within a period of ten years.¹³ Although courts generally require specific allegations of the predicate acts of racketeering,¹⁴ RICO does not prohibit the racketeering activity itself;

note 8, at 622; Note, *The Racketeer Influenced and Corrupt Organizations Act: An Analysis of the Confusion in its Application and a Proposal for Reform*, 33 VAND. L. REV. 441, 442 (1980).

11. See Note, *Aiding and Abetting the Investment of Dirty Money: Mens Rea and the Nonracketeer Under RICO Section 1962(a)*, 82 COLUM. L. REV. 574, 575 (1982).

12. Racketeering includes acts or threats involving state offenses such as murder, kidnapping, gambling, arson, robbery, bribery, extortion, or dealings in narcotics; acts indictable under the federal laws on bribery, counterfeiting, extortionate credit transactions, mail fraud, wire fraud, or interstate transportation of stolen property; acts indictable under certain federal laws relating to labor organizations; and any offense involving bankruptcy fraud, fraud in the sale of securities, or dealings in narcotics. 18 U.S.C. § 1961(1) (Supp. V 1981).

13. In 18 U.S.C. § 1961(5) (1976), a pattern of racketeering "requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years . . . after the commission of a prior act of racketeering activity."

Courts disagree concerning the degree of interrelationship that must exist between the two predicate acts of racketeering. The majority view follows the literal language of the statute and holds that the two acts need not be related to each other as long as they both relate to the same enterprise whose affairs affect interstate commerce. *E.g.*, *United States v. Weisman*, 624 F.2d 1118, 1122 (2d Cir.), *cert. denied*, 449 U.S. 871 (1980); *United States v. Gibson*, 486 F. Supp. 1230, 1242 (S.D. Ohio 1980); *United States v. DePalma*, 461 F. Supp. 778, 782 (S.D.N.Y. 1978); *see also* Blakey & Gettings, *RICO: Evening Up the Odds*, TRIAL, Oct. 1980, at 58, 59 n.34. Courts following this approach do not require that the pattern consist of two separate illegal schemes but rather find separate acts of racketeering present even if the two predicate acts are a series of steps in achieving one objective. *E.g.*, *United States v. Starnes*, 644 F.2d 673, 678 (7th Cir.), *cert. denied*, 454 U.S. 826 (1981); *United States v. Weatherspoon*, 581 F.2d 595, 601-02 (7th Cir. 1978); *see also* Strafer, Massumi & Skolnick, *Civil RICO in the Public Interest: "Everybody's Darling,"* 19 AM. CRIM. L. REV. 655, 657 n.19 (1982).

On the other hand, a minority of courts do require some interrelationship between the two predicate acts of racketeering in order to constitute a pattern. *E.g.*, *United States v. Ladmer*, 429 F. Supp. 1231, 1245 (E.D.N.Y. 1977) (for a pattern of racketeering the predicate acts must be connected by a common scheme); *United States v. Stofsky*, 409 F. Supp. 609, 614 (S.D.N.Y. 1973) (the predicate acts must have a factual nexus in order to constitute a pattern and must be connected by a common scheme), *aff'd on other grounds*, 527 F.2d 237 (2d Cir. 1975), *cert. denied*, 429 U.S. 819 (1976). Some commentators share this view. *E.g.*, Bradley, *Racketeers, Congress, and the Courts: An Analysis of RICO*, 65 IOWA L. REV. 837, 863-64 (1980); Note, *supra* note 10, at 477.

14. See, *e.g.*, *Bache Halsey Stuart Shields, Inc. v. Tracy Collins Bank & Trust Co.*, 558 F. Supp. 1042 (D. Utah 1983) (dismissing RICO claim because of insufficient allegation of the predicate acts of racketeering); *Mauriber v. Shearson/American Express Inc.*, 546 F. Supp. 391 (S.D.N.Y. 1982) (dismissing civil RICO claim because of insufficient allegation of securities fraud); *Hellenic Lines, Ltd. v. O'Hearn*, 523 F. Supp. 244 (S.D.N.Y. 1981) (dismissing RICO claim because of a lack of particularity regarding the alleged fraud); *Englund v. Mathews*, No. 81 Civ. 3017 (S.D.N.Y. Dec. 30, 1981) (available Sept. 28, 1983, on LEXIS, Genfed library, Dist

it prohibits the impact of racketeering on interstate commerce.¹⁵

Section 1962 of the Act defines the violations of RICO, which include: (a) using income from racketeering to acquire an interest in an enterprise affecting interstate commerce;¹⁶ (b) using racketeering to acquire or maintain an interest in an enterprise affecting interstate commerce;¹⁷ (c) conducting the affairs of an enterprise affecting interstate commerce through a pattern of racketeering;¹⁸ and (d) conspiring to commit any of the above acts.¹⁹ Each violation focuses on the effect of racketeering activity on an interstate enterprise.²⁰

file) (dismissing RICO count for insufficient allegation of securities fraud), *withdrawn*, Mar. 25, 1982; *Green v. Bartholomew*, No. 78 Civ. 3994, slip op. (S.D.N.Y. Jan. 12, 1979) (available Sept. 28, 1983, on LEXIS, Genfed library, Dist file) (dismissing RICO claim because there were no allegations to support racketeering), *cert. denied*, 449 U.S. 868 (1980).

15. See, e.g., *United States v. Frumento*, 563 F.2d 1083, 1088 (3d Cir. 1977), *cert. denied*, 434 U.S. 1072 (1978). Although the racketeering must have an effect on interstate commerce, the effect need not be significant. Cf. *United States v. Angelilli*, 660 F.2d 23, 35 (2d Cir. 1981) (jurisdictional requirement of the Hobbs Act is satisfied by a slight effect on interstate commerce), *cert. denied*, 455 U.S. 910 (1982). But see *United States v. Karas*, 624 F.2d 500, 504 (4th Cir. 1980) (impact on interstate commerce is irrelevant in a criminal RICO prosecution), *cert. denied*, 449 U.S. 1078 (1981).

16. 18 U.S.C. § 1962(a) (1976) provides that "[i]t shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity . . . to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce."

17. 18 U.S.C. § 1962(b) (1976) provides that "[i]t shall be unlawful for any person through a pattern of racketeering activity . . . to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce."

18. 18 U.S.C. § 1962(c) (1976) provides that "[i]t 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 . . ." One court has held that the racketeering must benefit or advance the affairs of the enterprise. *United States v. Webster*, 639 F.2d 174, 184-85 (4th Cir.), *cert. denied*, 454 U.S. 857 (1981). Most courts, however, do not impose this requirement. E.g., *United States v. Welch*, 656 F.2d 1039, 1060-62 (5th Cir. 1981), *cert. denied*, 456 U.S. 915 (1982). In addition, a plaintiff in a § 1962(c) RICO action must show that defendants conducted the affairs of the enterprise through racketeering as opposed to an individual using the enterprise to conduct racketeering in his individual capacity. See, e.g., *United States v. Nerone*, 563 F.2d 836, 851-52 (7th Cir. 1977) (although defendants used a trailer park [the alleged enterprise] as the location for their gambling operation [the alleged racketeering activity], there was insufficient evidence of how the affairs of the enterprise were conducted through racketeering), *cert. denied*, 435 U.S. 951 (1978).

19. 18 U.S.C. § 1962(d) (1976).

20. An "enterprise" includes "any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity." 18 U.S.C. § 1961(4) (1976). The "enterprise" element has caused controversy, however, in situations where it is difficult to separate the enterprise from the pattern of racketeering. This would occur, for example, when defendants are prosecuted under RICO for conducting an arson ring (the "enterprise"). To handle such cases, some courts impose additional requirements before finding the presence of an enterprise. See, e.g., *United States v. Lemm*, 680 F.2d 1193 (8th Cir. 1982) (members of an enterprise must have a common or shared purpose; the enterprise

A criminal prosecution for a violation of section 1962 is not contingent upon prosecutions for the predicate acts of racketeering.²¹ A conviction under RICO subjects the offender to severe penalties, including fines up to \$25,000, imprisonment up to twenty years, or both.²² The offender may also be forced to forfeit any interest that was acquired or maintained in violation of the Act.²³

Apart from criminal sanctions, RICO provides a civil remedy for those injured by a violation of section 1962.²⁴ Civil RICO actions provide procedural advantages,²⁵ as well as the possibility of broad injunctive relief,²⁶

must have continuity of structure and personnel; and the structure of the enterprise must be distinct from the pattern of racketeering), *cert. denied*, 103 S. Ct. 739 (1983); *United States v. Bledsoe*, 674 F.2d 647, 665 (8th Cir.) (an enterprise requires continuity of structure beyond that necessary for the pattern of racketeering and participants must maintain a common purpose), *cert. denied*, 103 S. Ct. 456 (1982); *United States v. Anderson*, 626 F.2d 1358, 1372 (8th Cir. 1980) (an enterprise must have an ascertainable structure, maintain operations toward an economic goal, and have an existence apart from the pattern of racketeering), *cert. denied*, 450 U.S. 912 (1981). For a discussion of the enterprise issue, see generally MacIntosh, *supra* note 5, at 48; *Enterprise Issues*, *supra* note 8; Comment, *Reading the "Enterprise" Element Back Into RICO: Sections 1962 and 1964(c)*, 76 Nw. U.L. REV. 100 (1981).

21. *E.g.*, *United States v. Parness*, 503 F.2d 430, 441 (2d Cir. 1974), *cert. denied*, 429 U.S. 820 (1975).

22. 18 U.S.C. § 1963(a) (1976).

23. *Id.* The RICO Act is the first federal criminal statute to apply forfeiture directly against a convicted person rather than use a subsequent in rem proceeding. See *United States v. Huber*, 603 F.2d 387, 396 (2d Cir. 1979), *cert. denied*, 445 U.S. 927 (1980); see also Note, *RICO Forfeitures and the Rights of Innocent Third Parties*, 18 CAL. W.L. REV. 345 (1982).

24. 18 U.S.C. § 1964(c) (1976) provides that "[a]ny 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 district court . . ." Because RICO's broad civil remedies were considered more threatening and damaging to a defendant than a criminal RICO prosecution, some early commentary suggested that Congress intended that only the government bring a civil RICO action. See, e.g., Wilson, *The Threat of Organized Crime: Highlighting the Challenging New Frontiers in Criminal Law*, 46 NOTRE DAME LAW. 41, 52 (1970). The prevailing view, however, is that a private party may also maintain a civil RICO action. See, e.g., Comment, *Title IX of the Organized Crime Control Act of 1970: An Analysis of the Issues Arising in its Interpretation*, 27 DE PAUL L. REV. 89, 90 (1977). Professor Blakey, one of the principal drafters of the Act, shares this view and explains that RICO's civil remedy was patterned after the antitrust civil remedy because of the effectiveness of the civil remedy as a complement to criminal prosecutions in that area. Blakey & Gettings, *Racketeer Influenced and Corrupt Organizations (RICO): Basic Concepts — Criminal and Civil Remedies*, 53 TEMP. L.Q. 1009, 1040 (1980); see also Blakey, *The RICO Civil Fraud Action In Context: Reflections on Bennett v. Berg*, 58 NOTRE DAME L. REV. 237, 348 (1982) (treble damage remedy included to encourage private actions); Legislative Note, *supra* note 8, at 625 (predicting that RICO's civil remedy would ultimately have a greater impact than its criminal penalties). The drafters of RICO hoped that the civil remedy would be used as frequently as the civil remedy provided by the antitrust laws. *E.g.*, Barhart, *supra* note 4, at col. 3.

25. 18 U.S.C. § 1965 (1976) provides broad authorization for venue and service of process.

26. 18 U.S.C. § 1964(a) (1976) provides for divestiture of a violator's interest in an enterprise, restrictions on his future activities, and dissolution or reorganization of any enterprise. Because of the seriousness of these remedies, courts exercise care in granting injunctive relief to avoid prejudice to the rights of innocent third parties. See, e.g., *USACO Coal Co. v. Carbomin Energy, Inc.*, 539 F. Supp. 807, 815 (W.D. Ky.) (freezing the assets of the defendant pursuant to a civil RICO action), *aff'd*, 689 F.2d 94 (6th Cir. 1982).

treble damages,²⁷ and recovery of attorneys fees.²⁸ Furthermore, a civil RICO action does not require a criminal RICO conviction.²⁹

Given the broad language of the Act and the relative ease with which a plaintiff can add a RICO count to any action,³⁰ some courts express concern about the excessive expansion of civil RICO.³¹ Although the use of civil RICO requires some restriction,³² any limitation on its use should not preclude actions by legitimate victims of racketeering.³³ As this Note illustrates, the use of civil RICO as a defense to a hostile corporate takeover can appropriately be limited by considering the Act's injury requirement and the interaction between RICO and the federal securities laws.

II. APPLYING THE RICO ACT AS A DEFENSE TO A HOSTILE CORPORATE TAKEOVER

A corporate takeover occurs when the purchase of a percentage of

The structure of RICO has caused some confusion regarding the availability of private injunctive relief. Section 1964(a) grants authority for injunctive relief to federal district courts. Section 1964(b) authorizes the Attorney General to bring a civil RICO action. Section 1964(c) describes the damages remedy and authorizes "any person" to bring suit. Some courts suggest that this statutory structure may authorize only the Government to obtain injunctive relief. *See, e.g., Dan River, Inc. v. Icahn*, 701 F.2d 278, 290 (4th Cir. 1983); *Trane Co. v. O'Connor Sec.*, 561 F. Supp. 301, 306-07 (S.D.N.Y. 1983); *Moss v. Morgan Stanley, Inc.*, 553 F. Supp. 1347, 1360 (S.D.N.Y.), *aff'd*, 52 U.S.L.W. 2183 (2d Cir. Sept. 9, 1983). This relatively new interpretation of the Act is not shared by the majority of the courts or commentators. *See, e.g., Blakey & Gettings, supra* note 24, at 1014; *Blakey & Gettings, supra* note 13, at 60.

27. 18 U.S.C. § 1964(c) (1976).

28. *Id.*

29. *See, e.g., Heinold Commodities, Inc. v. McCarty*, 513 F. Supp. 311, 314 (N.D. Ill. 1979). At least one court disagrees with this application of the statute and suggests that a civil RICO action be conditioned on a criminal conviction or indictment. *Kleiner v. First Nat'l Bank*, 526 F. Supp. 1019, 1022 n.2 (N.D. Ga. 1981).

30. *See, e.g., Erlbaum v. Erlbaum*, [1982 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 98,772, at 93,923 (E.D. Pa. July 13, 1982) (in dismissing a RICO claim in which a woman sued her ex-husband for fraudulently depriving her of ownership of stock, the court said Congress did not intend to federalize common law fraud and create a RICO action in every case of fraud); *Spencer Cos. v. Agency Rent-a-Car*, [1981-1982 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 98,361, at 92,217 (D. Mass. Nov. 17, 1981) ("It is not too difficult to allege sufficient facts to add a RICO count to many kinds of civil cases, thus greatly expanding [sic] the scope of litigation.").

31. For example, civil RICO claims have appeared in cases far removed from Congress's probable intent. *See, e.g., Gunther v. Dinger*, 547 F. Supp. 25 (S.D.N.Y. 1982) (civil RICO claim allowed where plaintiff sued her father's widow for fraud upon her father's estate).

32. *See, e.g., Cenco, Inc. v. Seidman & Seidman*, 686 F.2d 449 (7th Cir.), *cert. denied*, 103 S. Ct. 177 (1982); *Moss v. Morgan Stanley, Inc.*, 553 F. Supp. 1347 (S.D.N.Y.), *aff'd*, 52 U.S.L.W. 2183 (2d Cir. Sept. 9, 1983); *Landmark Sav. & Loan v. Rhoades*, 527 F. Supp. 206 (E.D. Mich. 1981). Although courts wish to limit the scope of civil RICO, the difficulty of accomplishing this has led one court to conclude that it is impossible to establish fixed rules for RICO's application and that each case must be decided individually. *United States v. Huber*, 603 F.2d 387, 395-96 (2d Cir. 1979), *cert. denied*, 445 U.S. 927 (1980).

33. *See, e.g., Strafer, Massumi & Skolnick, supra* note 13, at 707.

corporate stock enables the purchaser to take control of the corporation and effect significant changes in its management, operations, or policy.³⁴ Target corporations vulnerable to takeovers typically have stock with a book value greater than the market price, a broad base of shareholders without strong ties to the corporation, and weak or unaggressive management.³⁵ Although takeovers can occur by a variety of methods,³⁶ they most often occur through a tender offer for the target's stock.³⁷ Cash tender offers are most frequently used,³⁸ and are subject to extensive regulation by federal³⁹ and state securities laws.⁴⁰

34. See R. JENNINGS & H. MARSH, *SECURITIES REGULATION CASES AND MATERIALS* 626 (5th ed. 1982). Due to widespread stock ownership and stockholder inertia in a large public corporation, ownership of less than 50% of the outstanding stock can mean de facto control of the corporation. See, e.g., Blustein, *Let Us Now Consider Carl Icahn*, Wall St. J., Dec. 22, 1982, § 1, at 14, col. 3 (suggesting that ownership of 25-30% of stock can mean control of the target); Greenhill, *Structuring an Offer*, 32 BUS. LAW. 1305, 1307 (1977) (suggesting that ownership of 40% can mean effective control of the target).

35. See A. FLEISCHER, *TENDER OFFERS: DEFENSES, RESPONSES, AND PLANNING* 1-2 (1981); Fischel, *Efficient Capital Market Theory, the Market for Corporate Control, and the Regulation of Cash Tender Offers*, 57 TEX. L. REV. 1, 1-2 (1978). Target corporations are also often characterized by a low price/earnings ratio, a low debt/capital ratio, high liquidity or excessive cash reserves, a strong record of earning stability, absence of strong state antitakeover statutes in the target's state of incorporation, and limited insider control. See, e.g., Comment, *Antitakeover Maneuvers: Developments in Defense Tactics and Target Actions for Injunctive Relief*, 35 SW. L.J. 617, 619 (1981).

36. A purchaser may effect a takeover by purchasing shares of stock through private transactions, through brokers in the open market, or through a public offer to shareholders. See Lip-ton, *Open Market Purchases*, 32 BUS. LAW. 1321 (1977).

37. See R. JENNINGS & H. MARSH, *supra* note 34, at 626. A "tender offer" has the following characteristics: solicitation of public shareholders in which a bidder attempts to purchase a substantial percentage of stock by offering a price significantly above the market price, fixed terms of the offer, completion of the offer is contingent on the bidder acquiring a stated percentage of shares, a fixed period of time during which the offer is held open and public shareholders may be pressured to sell, and a public announcement of the purchasing program. H. BLOOMENTHAL, 1982 *SECURITIES LAW HANDBOOK* 293-94 (1982). Although the federal securities laws do not define a tender offer, most courts require that these factors be present before a tender offer is found. *Id.* In some circumstances these factors may be broadly construed. See, e.g., *S-G Sec., Inc. v. Fuqua Inv. Co.*, 466 F. Supp. 1114, 1124-25 (D. Mass. 1978) (tender offer provisions of the federal securities laws applied when there was a public announcement of an intent to control the target corporation followed by the rapid purchase of large blocks of stock through the open market and privately negotiated transactions).

38. See W. T. GRIMM & Co., 1978 *MERGER SUMMARY* 17 (1979) (cash was the medium of payment in 57% of the public takeovers occurring in 1978); see also Fischel, *supra* note 35, at 2 (the cash tender offer is the most effective and most favored means of obtaining corporate control); Note, *The Williams Amendments: An Evaluation of the Early Returns*, 23 VAND. L. REV. 700, 702 (1970) (the cash tender offer is the most effective takeover method).

As an alternative to paying cash for the shares of the target corporation, a tender offeror may use an exchange offer and offer shares of stock in the takeover corporation. R. JENNINGS & H. MARSH, *supra* note 34, at 626. Cash tender offers are currently used more frequently than exchange offers. *Id.*

39. Until the passage of the Williams Act in 1978, cash tender offers were essentially unregulated. H. BLOOMENTHAL, *supra* note 37, at 276. The Williams Act amended the Securities Exchange Act (SEA) of 1934, 15 U.S.C. §§ 78a-78kk (1982). See *infra* notes 64-65.

40. By 1979, thirty-seven states had enacted statutes regulating tender offers. R. JENNINGS

A hostile takeover pursuant to a tender offer frequently operates as a useful check on inefficient incumbent management of the target corporation.⁴¹ Nonetheless, incumbent management often utilizes a variety of methods to resist the tender offer.⁴² Although such resistance

& H. MARSH, *supra* note 34, at 631. The constitutionality of these statutes is questionable, however, in light of the Supreme Court's decision in *Edgar v. Mite Corp.*, 457 U.S. 624 (1982). The Court declared the Illinois takeover statute unconstitutional because it imposed a substantial burden on interstate commerce that outweighed any local benefits. *Id.* at 643-46.

41. Many commentators suggest that because target corporations are characterized by inefficient and less successful management, the threat of a takeover provides an incentive for improved management. *See, e.g.*, Brudney, *A Note on Chilling Tender Solicitations*, 21 *RUTGERS L. REV.* 609, 627 (1967) (incumbent target management is usually less successful than would be expected); Easterbrook & Fischel, *The Proper Role of a Target's Management in Responding to a Tender Offer*, 94 *HARV. L. REV.* 1161, 1169-74 (1981) (prospective tender offerors look for targets whose management can be improved) [hereinafter cited as Easterbrook & Fischel, *Proper Role*]; Easterbrook & Fischel, *Takeover Bids, Defensive Tactics, and Shareholders' Welfare*, 36 *BUS. LAW.* 1733, 1745 (1981) (incumbent management is frequently replaced after a successful tender offer) [hereinafter cited as Easterbrook & Fischel, *Takeover Bids*]; Fischel, *supra* note 35, at 7 (the empirical evidence supports the view that targets are poorly managed). Other commentators disagree, however, and suggest that even if the true value of the target's shares is greater than the market price, this may be caused by factors other than inefficient target management. *See, e.g.*, Gelfond & Sebastian, *Reevaluating the Duties of Target Management in a Hostile Tender Offer*, 60 *B.U.L. REV.* 403, 455-56 (1980) (a takeover does not necessarily lead to increased efficiency in the management of the target if the acquiring corporation had motives other than increased productivity); Lowenstein, *Pruning Deadwood in Hostile Takeovers: A Proposal for Legislation*, 83 *COLUM. L. REV.* 249, 306 (1983) (undervaluation of the target's stock may be beyond management's control). Although the effect of takeovers on managerial efficiency remains controversial, a recent Securities and Exchange Commission (SEC) report on tender offers acknowledged that, in certain cases, the tender offer is a discipline on inefficient target management. SEC ADVISORY COMMITTEE ON TENDER OFFERS, REPORT OF RECOMMENDATIONS, FED. SEC. L. REP. SPECIAL REPORT (CCH) 8 (July 15, 1983) [hereinafter cited as SEC ADVISORY COMMITTEE].

42. In resisting a takeover attempt, a target corporation may (1) amend the shareholder voting procedure to make shareholder-initiated changes more difficult; (2) reincorporate in a state with a strict antitakeover statute; (3) issue additional shares in friendly hands to increase the percentage of stock needed for control; (4) acquire another corporation that would pose antitrust problems for the tender offeror; (5) pressure shareholders not to sell to the takeover corporation; (6) issue stock splits or dividends as an inducement for shareholders to retain their stock; (7) litigate under federal or state securities laws to obtain an injunction against the takeover or at least to delay the takeover; (8) attempt a counter-takeover of the takeover corporation itself; or (9) seek a friendly bidder (a "white knight") who then issues a competing tender offer. W. CARY & M. EISENBERG, *CASES AND MATERIALS ON CORPORATIONS* 1594-96 (5th ed. 1980); *see also* Fischel, *supra* note 35, at 30-40; Fleischer, *Defensive Tactics in Tender Offers*, 9 *REV. SEC. REG.* 853 (1976). Some commentators suggest that target management's resistance to a takeover attempt may be so strong that management may be willing to do "almost anything" to oppose the takeover. *E.g.*, Lowenstein, *supra* note 41, at 250. Moreover, some of the methods used to resist the takeover have opportunity costs for the target corporation. For example, the resources spent to oppose the takeover could be used for new plants, new equipment, or shareholder dividends Blustein, *supra* note 34.

Some tender offerors may forego a takeover attempt if faced with hostile target management. A hostile takeover consumes more time, increases legal costs, and may increase the price ultimately paid for the stock if the target company enlists a competing bidder. *See* P. STEINER, *MERGERS* 175 (1975) (contested tender offers may double the cost of effecting the takeover); Troubh, *Characteristics of Target Companies*, 32 *BUS. LAW.* 1301, 1303 (1977) (during a hostile takeover, a tender offeror's legal fees alone can exceed \$2 million).

sometimes protects the best interest of the target corporation's shareholders,⁴³ it is frequently an effort merely to preserve management's position and control of the corporation.⁴⁴ Recently, target corporations have used RICO to resist hostile tender offers.⁴⁵ This use of the Act poses serious practical, analytical, and policy problems.⁴⁶ One of the initial problems in this application of RICO is whether the Act can apply in an action not involving organized crime.⁴⁷

43. Resistance to the takeover may be appropriate if the target's shareholders who retain their stock will be worse off after the takeover because of the tender offeror's actions upon obtaining control. Such situations do occur, albeit infrequently. See *infra* notes 100-20 and accompanying text.

Some commentators suggest that resistance will increase the likelihood of enlisting a competing bidder and thus benefit the target's shareholders. The premium offered for the target's shares reflects the difference between the market value of the shares and the value which would be attained if the tender offeror controlled the target. The tender offeror, however, will seek to pay less than the "true" value of the shares in order to maximize this anticipated profit. The target's resistance to the takeover puts other potential tender offerors on notice, and may induce them to offer a higher price, and thus increase the benefit to shareholders who tender. Moreover, if the new tender offeror, who is willing to pay a higher premium, acquires control, the target's assets will then be in the hands of a higher-value utilizer which should increase the appreciation of the investment of the shareholders who do not tender. Thus, by stimulating a competing bidder, the target's resistance actually benefits its shareholders. See, e.g., Bebchuk, *The Case for Facilitating Competing Tender Offers: A Reply and Extension*, 35 STAN. L. REV. 23 (1982); Bradley, *Interfirm Tender Offers and the Market for Corporate Control*, in *ECONOMICS OF CORPORATION LAW AND SECURITIES REGULATION* 222 (R. Posner & K. Scott eds. 1980); Gilson, *Seeking Competitive Bids Versus Pure Passivity in Tender Offer Defense*, 35 STAN. L. REV. 51 (1982); Herzel, Schmidt & Davis, *Why Corporate Directors Have a Right to Resist Tender Offers*, 61 CHI. B. REC. 152 (1979). *Contra* Easterbrook & Fischel, *Auctions and Sunk Costs in Tender Offers*, 35 STAN. L. REV. 1 (1982) (arguing that allowing target resistance to raise the premium does not benefit shareholders).

44. See, e.g., R. JENNINGS & H. MARSH, *supra* note 34, at 643, 673; Easterbrook & Fischel, *Proper Role*, *supra* note 41, at 1175; Gelfond & Sebastian, *supra* note 41, at 438; Herzel, Schmidt & Davis, *supra* note 43, at 145; McIntyre, *Shareholders' Recourse Under Federal Securities Law Against Management for Opposing Advantageous Tender Offers*, 34 BUS. LAW. 1283, 1283-84 (1979).

45. See *supra* note 6.

46. Using RICO in this context presents serious consequences given the broad remedies of the Act and the large number of hostile tender offers in which RICO may be involved. See W. T. GRIMM & Co., *supra* note 38, at 16; see also Brudney, *supra* note 41, at 609 (use of the cash tender offer is increasing); Flom, *The Role of the Takeover in the American Economy*, 32 BUS. LAW. 1299 (1977) (a growing number of companies are willing to use takeovers); R. JENNINGS & H. MARSH, *supra* note 34, at 626 (tender offers have become increasingly popular as a method of obtaining control of a corporation); Jorden & Woodward, *An Appraisal of Disclosure Requirements in Contests for Control Under the Williams Act*, 46 GEO. WASH. L. REV. 817, 817 (1978) (the tender offer is an increasingly popular and acceptable method of acquiring control).

47. In one of the recent hostile takeover cases involving RICO, the court questioned this use of the RICO Act because there was no evidence of organized crime. *Dan River, Inc. v. Icahn*, 701 F.2d 278, 291 (4th Cir. 1983) ("Congress was out to attack the problem of organized crime, not the problems of corporate control and risk arbitrage."). *But see* *Hanna Mining Co. v. Norcen Energy Resources Ltd.*, [1982 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 98,742 (N.D. Ohio June 11, 1982) (no involvement with organized crime is necessary to use a civil RICO action as a defense to a hostile corporate takeover; any restriction of this kind should come from Congress and not the courts).

Although RICO's legislative history contains many references to organized crime,⁴⁸ the actual language of the Act omits any requirement of an affiliation with organized crime.⁴⁹ Some courts, however, rely on the legislative history rather than the statutory language and require proof of the defendant's affiliation with organized crime.⁵⁰ Still, most courts⁵¹ and several commentators,⁵² including one of the principal drafters of the Act,⁵³ reject this view.

Courts and commentators offer several reasons to support the majority position that a RICO action does not require involvement of

48. See, e.g., H.R. REP. NO. 1549, 91st Cong., 2d Sess. 57, reprinted in 1970 U.S. CODE CONG. & AD. NEWS 4007, 4033; S. REP. NO. 617, 91st Cong., 1st Sess. 76 (1979); see also 116 CONG. REC. 530, 585-86, 591-92, 602-03, 607, 953 (1970) (Senate debates); *id.* at 35,196, 35,200, 35,206, 35,295-96, 35,304, 35,319, 35,361-62 (House debates). For a detailed description of RICO's legislative history, see Blakey, *supra* note 24, at 249-80.

49. 18 U.S.C. §§ 1961-1968 (1976 & Supp. V 1981).

50. Because the legislative history contains many references to organized crime, some courts require involvement of organized crime as part of the true purpose or spirit of RICO. Thus, even though a cause of action may fall within the literal language of the statute, these courts hold that, because of the lack of involvement of organized crime, the case does not fall within the purpose of the statute. See, e.g., *Wagner v. Bear, Stearns & Co.*, [1982-1983 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 99,032 (N.D. Ill. Sept. 17, 1982); *Pepsi Cola Bottling Co. v. LeBlanc*, No. 80-1583-5, slip op. (D.S.C. May 19, 1982) (available Sept. 28, 1983, on LEXIS, Genfed library, Dist file); *Adair v. Hunt Int'l Resources Corp.*, 526 F. Supp. 736 (N.D. Ill. 1981); *Noonan v. Granville-Smith*, 537 F. Supp. 23 (S.D.N.Y. 1981); *Waterman S.S. Corp. v. Avondale Shipyards*, 527 F. Supp. 256 (E.D. La. 1981). Moreover, at least one court has dismissed a RICO claim because of the damage to a defendant's reputation by being labeled a "racketeer" and the resulting connotation of involvement with organized crime. *Barr v. WUI/TAS, Inc.*, 66 F.R.D. 109 (S.D.N.Y. 1975).

51. See, e.g., *Schact v. Brown*, [1982-1983 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 99,160, at 95,604 (7th Cir. Apr. 8, 1983); *Cenco, Inc. v. Seidman & Seidman*, 686 F.2d 449 (7th Cir.), *cert. denied*, 103 S. Ct. 177 (1982); *Bennett v. Berg*, 685 F.2d 1053 (8th Cir. 1982); *United States v. Welch*, 656 F.2d 1039 (5th Cir. 1981), *cert. denied*, 456 U.S. 915 (1982); *United States v. Forsythe*, 560 F.2d 1127 (3d Cir. 1977); *United States v. Campanale*, 518 F.2d 352 (9th Cir. 1975), *cert. denied*, 423 U.S. 1050 (1975); *Hellenic Lines, Ltd. v. O'Hearn*, 523 F. Supp. 244 (S.D.N.Y. 1981); *Engl v. Berg*, 511 F. Supp. 1146, 1155 (E.D. Pa. 1981); *United States v. Gibson*, 486 F. Supp. 1230 (S.D. Ohio 1980); *Heinold Commodities, Inc. v. McCarty*, 513 F. Supp. 311 (N.D. Ill. 1979); *United States v. Chovanec*, 467 F. Supp. 41 (S.D.N.Y. 1979); *United States v. Vignola*, 464 F. Supp. 1091, 1095 (E.D. Pa.), *aff'd*, 605 F.2d 1199 (3d Cir. 1979), *cert. denied*, 444 U.S. 1072 (1980).

52. See, e.g., *MacIntosh*, *supra* note 5, at 31; *Strafer, Massumi & Skolnick*, *supra* note 13, at 665-88. The RICO Act applies to all who commit the enumerated offenses regardless of any involvement with organized crime. See, e.g., *Atkinson, "Racketeer Influenced and Corrupt Organizations," 18 U.S.C. §§ 1961-68: Broadest of the Federal Criminal Statutes*, 69 J. CRIM. L. & CRIMINOLOGY 1, 3 (1978); *McClellan, The Organized Crime Act (S. 30) Or Its Critics: Which Threatens Civil Liberties?*, 46 NOTRE DAME LAW. 55 (1970); *Wilson*, *supra* note 24, at 48-50; *Comment*, *supra* note 24, at 112; *Note, Civil RICO: The Temptation and Impropriety of Judicial Restriction*, 95 HARV. L. REV. 1101, 1106-09 (1982).

53. Professor Blakey, one of the authors of the RICO Act, states that although the infiltration of legitimate business by organized crime was the manifest purpose of the RICO Act, this was not the Act's only purpose. Blakey & Gettings, *supra* note 24, at 1011-14. Moreover, RICO's title refers to racketeer influenced (i.e., enterprises affected by racketeering) as distinct from corrupt organizations (i.e., traditional organized criminal activity). *Id.* at 1025 n.91.

organized crime. First, requiring an affiliation with organized crime contradicts the plain and unambiguous language of the statute.⁵⁴ Second, RICO does not make organized crime unlawful, but instead prohibits certain activities without regard to who engages in them.⁵⁵ Third, the legislative history indicates that Congress recognized that RICO would apply to situations not involving organized crime.⁵⁶ Indeed, Congress recognized that the term "organized crime" defies precise definition.⁵⁷ Finally, Congress directed that RICO be "liberally

54. The Supreme Court has consistently ruled that the plain language of a statute offers the primary evidence of congressional intent. *See, e.g.*, *United States v. American Trucking Ass'ns*, 310 U.S. 534 (1940); *see also* Note, *RICO and the Liberal Construction Clause*, 66 CORNELL L. REV. 167, 169 (1980) (suggesting that RICO's plain and unambiguous language should govern). However, the Supreme Court has also stated that if the plain meaning of the statutory language is at variance with the policy of the statute, then the policy should be followed rather than the literal language. *American Trucking Ass'ns*, 310 U.S. at 543. Before this principle can be applied to the RICO Act, however, a court must first determine whether the policy behind RICO is limited to the explicit references to organized crime in the legislative history or to the explicit omission of any such requirement in the statutory language.

In addition, courts usually hold that, when the language of a statute contains no ambiguities, legislative history should not be examined because the function of legislative history is to solve rather than to create ambiguities. *E.g.*, *United States v. Rone*, 598 F.2d 564 (9th Cir. 1979), *cert. denied*, 445 U.S. 946 (1980). For example, in *United States v. Culbert*, 435 U.S. 371 (1978), the Court held that a conviction under the Hobbs Act did not require a showing that the defendant was involved with "racketeering" because no such requirement was present in the language of the statute. The Court declined to infer such a requirement because of the absence of any indication in the language of the statute that it was to be limited to "racketeering," the recognition that a requirement of "racketeering" would pose constitutional problems by creating a status offense, the lack of any precise definition of "racketeering," and the absence of any indication that Congress did not intend to punish those whose conduct fell within the reach of the statutory language.

55. *See, e.g.*, *United States v. Forsythe*, 560 F.2d 1127, 1136 (3d Cir. 1977); *United States v. Campanale*, 518 F.2d 352, 363 (9th Cir. 1975), *cert. denied*, 423 U.S. 1050 (1975); *see also* Atkinson, *supra* note 52, at 3. Furthermore, limiting the application of the Act to members of organized crime would create a status offense and jeopardize the constitutionality of the Act. *See* McClellan, *supra* note 52, at 60-62.

56. During the Congressional debates, several critics of RICO recognized and vigorously argued against the potential application of the Act beyond traditional organized crime. *See generally* Strafer, Massumi & Skolnick, *supra* note 13, at 681-85. These critics proposed an amendment to RICO which would have limited the Act to traditional organized crime (i.e., the "Mafia" or "La Cosa Nostra"). *Id.* Congress rejected the amendment because of the potential Constitutional problems posed by the creation of a status offense. *Id.*

In addition, the late Senator John McClellan, one of the sponsors of the Organized Crime Control Act, which included RICO, acknowledged that "those who are not engaged in organized crime . . . nonetheless are within the incidental reach of provisions primarily intended to affect organized crime." McClellan, *supra* note 52, at 62. "Unless an individual not only commits such a crime but engages in a pattern of such violations, and uses that pattern to obtain or operate an interest in an interstate business, he is not made subject to proceedings under [RICO]." *Id.* at 144. Thus, the sponsors of the RICO Act recognized that "[i]t is impossible to draw an effective statute which reaches most of the commercial activities of organized crime, yet does not include offenses commonly committed by persons outside organized crime as well." *Id.* at 143.

57. Atkinson, *supra* note 52, at 9-10; Strafer, Massumi & Skolnick, *supra* note 13, at 675-80; Wilson, *supra* note 24, at 47. Although some courts attempt to define organized crime, these

construed."⁵⁸ These considerations lead most courts and commentators to interpret broadly the term "organized crime" as it appears in RICO's legislative history.⁵⁹ These factors also indicate that any limitation on civil RICO as a defense to a hostile corporate takeover should not be based on a requirement of organized crime. Rather, RICO can be appropriately limited by examining the three elements necessary to sustain a civil RICO action: a pattern of racketeering activity, a violation of section 1962, and an injury due to the violation of section 1962.

A. Pattern of Racketeering

RICO defines a pattern of racketeering as at least two predicate acts of racketeering committed within a period of ten years.⁶⁰ A target corporation, using RICO as a defense to a hostile tender offer, may easily allege two predicate acts of racketeering. Because of the complex federal statutory requirements with which a tender offeror must comply, a target corporation could almost always allege that violations of the federal securities laws constitute predicate acts of racketeering.⁶¹

definitions present as many new interpretative issues as they purport to solve. For an example of this, see *Moss v. Morgan Stanley, Inc.*, 553 F. Supp. 1347 (S.D.N.Y.), *aff'd*, 52 U.S.L.W. 2183 (2d Cir. Sept. 9, 1983). In contrast, other courts define organized crime "as that term is commonly used and understood." *Wagner v. Bear, Stearns & Co.*, [1982-1983 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 99,032, at 94,913 (N.D. Ill. Sept. 17, 1982). Furthermore, some commentators suggest that any definitional requirements would place an unreasonable evidentiary burden on prosecutors in proving an affiliation with organized crime because of the ability of organized crime to camouflage its existence. See *McClellan*, *supra* note 52, at 60; see also *Comment*, *supra* note 24, at 112.

58. 18 U.S.C. § 1961 (1976) provides that "[t]he provisions of this title . . . shall be liberally construed to effectuate its remedial purposes." (Congressional Statement of Findings and Purpose). Courts repeatedly follow this directive. See, e.g., *United States v. Pray*, 452 F. Supp. 788 (M.D. Pa. 1978); see also *Note*, *supra* note 54.

59. See, e.g., *Bennett v. Berg*, 685 F.2d 1053, 1057 (8th Cir. 1982) (RICO focuses on any effect of racketeering on the free market system); *United States v. Elliott*, 571 F.2d 880, 911 (5th Cir.) (RICO is primarily concerned with group crime rather than individual crime), *cert. denied*, 439 U.S. 953 (1978); *United States v. Cappelto*, 502 F.2d 1351, 1358 (7th Cir. 1974) (RICO prohibits any racketeering activity which affects commerce), *cert. denied*, 420 U.S. 925 (1975); *United States v. Barber*, 476 F. Supp. 182, 189 (S.D. W. Va. 1979) (RICO prohibits any business takeover effected through illegal activity); *United States v. Chovanec*, 467 F. Supp. 41, 44 (S.D.N.Y. 1979) (organized crime as used in the RICO Act is broadly defined); *Blakey & Gettings*, *supra* note 24, at 1017 n.45, 1018 n.55 (because RICO was directed toward racketeering committed by enterprises as well as the effect of racketeering on these enterprises, the Act applies to all types of "enterprise criminality"); *Strafer, Massumi & Skolnick*, *supra* note 13, at 688 (RICO applies to virtually all corporate crime and white collar crime).

60. See *supra* note 13.

61. This is particularly true with regard to the statements of intent and other information which must be filed with the SEC. *Weinberg, Mother of God, Is This the End of RICO?*, 69 A.B.A. J. 130 (1983); see also *Electronic Specialty Co. v. International Controls Corp.*, 409 F.2d 937 (2d Cir. 1969) (because there is no such thing as a "perfect" tender offer, courts must be vigilant and not allow trivial charges to stop a legitimate tender offer).

For example, most target corporations can allege that violations of the securities laws constitute racketeering in a hostile tender offer under RICO's prohibition of "fraud in the sale of securities."⁶² Although the courts have not determined the scope of this phrase, they have held that it encompasses fraud committed by the purchaser of securities (the tender offeror) as well as fraud committed by the seller.⁶³ Violations of the disclosure requirements of the federal securities laws, particularly sections 14(e)⁶⁴ and 13(d),⁶⁵ present the most likely basis for the alleged fraud.⁶⁶

62. 18 U.S.C. § 1961(1)(D) (Supp. V 1981).

63. See, e.g., *Spencer Cos. v. Agency Rent-a-Car*, [1981-1982 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 98,361, at 92,215 (D. Mass. Nov. 17, 1981); see also *MacIntosh*, *supra* note 5, at 27-37.

64. A tender offeror must comply with §§ 14(d)-(e) of the federal securities laws. Section 14(d) requires that a tender offer that will result in an ownership of more than 5% of the total outstanding stock cannot be issued unless the tender offeror provides certain information to the SEC and to each offeree. 15 U.S.C. § 78n(d) (1982). The tender offeror must disclose his background and identity, the source of the funds used in making the purchase, the purpose of the purchase, any plans the offeror has to liquidate the assets of the company or to make major changes in the company's structure, and the extent of the offeror's current holdings in the target company. 15 U.S.C. § 78n(d)(1) (1982) (expressly incorporating the disclosure requirements of § 78m(d)(1), also known as § 13(d)). Section 14(e) makes it unlawful to provide misleading information or engage in fraudulent or deceptive practices in connection with a tender offer. 15 U.S.C. § 78n(e) (1982); see also *Jorden & Woodward*, *supra* note 46, at 819; Note, *supra* note 38, at 709.

65. Section 13(d) requires that after a purchaser acquires more than 5% of the stock of a company, certain information must be disclosed to the SEC and to the issuer of the securities. 15 U.S.C. § 78m(d) (1982). For a listing of this information, see *supra* note 64. See also *Jorden & Woodward*, *supra* note 46, at 820-21; Note, *supra* note 38, at 705-09.

66. A philosophy of full disclosure underlies all the federal securities laws. Full disclosure eliminates certain abuses in the securities industry, provides a high standard of business ethics, preserves public confidence in the industry, and supports its economic health. E.g., *SEC v. Capital Gains Research Bureau*, 375 U.S. 180 (1963). Courts still perceive the laws as maintaining standards of basic honesty and fair dealing. *Victory Markets, Inc. v. Nelson*, No. 81-CV-1370, slip op. (N.D.N.Y. March 26, 1982, as amended, April 1, 1982) (available Sept. 28 1983, on LEXIS, Genfed library, Dist file).

A target corporation may allege that the tender offeror committed securities fraud upon the shareholders by withholding information required by the federal securities laws to be disclosed. Nondisclosure violates the purposes of sections 13(d) and 14(d)-(e) which "were to give protection to shareholders in shifts of corporate control, to require prior disclosure if the shift occurred through a tender offer, and to require a post acquisition 13(d) filing if the shift occurred otherwise." *Wellman v. Dickinson*, 475 F. Supp. 783, 817 (S.D.N.Y. 1979), *aff'd*, 682 F.2d 355 (2d Cir. 1982), *cert. denied*, 103 S. Ct. 1522 (1983). Section 14 was specifically designed to provide shareholders faced with a tender offer the information and time necessary to make an informed investment decision. E.g., *Lynch & Steinberg, The Legitimacy of Defensive Tactics in Tender Offers*, 64 CORNELL L. REV. 901, 910 (1979).

Although disclosure violations constitute securities fraud, some commentators question the utility of the federal disclosure requirements. If the securities market is economically efficient, then the market price of the target's stock reflects all publicly available information. Thus, the disclosure requirements provide investors with no information which is not already available. E.g., Note, *The Efficient Capital Market Hypothesis, Economic Theory and the Regulation of the Securities Industry*, 29 STAN. L. REV. 1031 (1977); see also *Jorden & Woodward*, *supra* note

A target could allege that the tender offeror's failure to disclose an intention to acquire control of the target — or the true plans upon obtaining control — violates sections 13(d) and 14(e) of the federal securities laws.⁶⁷ Most courts hold that such violations can also constitute predicate acts of racketeering.⁶⁸ Because resistance to a hostile tender offer usually involves some alleged violations of sections 13(d) and 14(e),⁶⁹ a target corporation can easily use these violations to establish predicate acts of racketeering and append a RICO action to a claim.⁷⁰

In addition to using violations of the federal securities laws to establish predicate acts of racketeering, a target corporation may allege mail or wire fraud to fulfill RICO's pattern requirement.⁷¹ Because a hostile

46. Other commentators disagree with the proposition that the securities market operates at a level of total economic efficiency. *See, e.g.,* Lowenstein, *supra* note 41, at 254.

67. The disclosure requirements of §§ 13(d) and 14(e) are designed to provide investors, faced with a tender offer, all the information necessary to decide whether to tender their shares. *See, e.g.,* *General Aircraft Corp. v. Lampert*, 556 F.2d 90 (1st Cir. 1977) (suggesting that violations of the disclosure requirements harm the shareholders of the target corporation who are unable to estimate accurately the value of their shares). Nondisclosure of certain information, such as a tender offeror's plans for the target, violates the securities laws if a reasonable investor would consider the information important in deciding whether to tender the shares. *See, e.g.,* *General Host Corp. v. Triumph Am., Inc.*, 359 F. Supp. 749 (S.D.N.Y. 1973). Because an informed investment decision requires information regarding potential changes in corporate control, the tender offeror's failure to disclose the intent to obtain control, or the plans upon obtaining control, violates the disclosure requirements of the securities laws. *See, e.g.,* *Gulf & W. Indus. v. Great Atl. & Pac. Tea Co.*, 476 F.2d 687, 697 (2d Cir. 1973) (failure to disclose an intent to acquire control of a corporation constitutes a violation of §§ 14(d)-(e)); *see also* Cohen, *A Note on Takeover Bids and Corporate Purchases of Stock*, 22 *BUS. LAW.* 149, 151 (1966).

68. *See, e.g.,* *Hanna Mining Co. v. Norcen Energy Resources Ltd.*, [1982 Transfer Binder] *FED. SEC. L. REP. (CCH)* ¶ 98,742 (N.D. Ohio June 11, 1982) (implying that violations of § 14(e) can constitute racketeering); *Marshall Field & Co. v. Icahn*, [1982 Transfer Binder] *FED. SEC. L. REP. (CCH)* ¶ 98,603 (S.D.N.Y. Mar. 22, 1982) (implying that violations of § 13(d) can constitute racketeering); *Spencer Cos. v. Agency Rent-a-Car*, [1981-1982 Transfer Binder] *FED. SEC. L. REP. (CCH)* ¶ 98,361 (D. Mass. Nov. 17, 1981) (violations of § 13(d) can constitute a pattern of racketeering). *But see* *Bayly Corp. v. Marantette*, [1982 Transfer Binder] *FED. SEC. L. REP. (CCH)* ¶ 98,834 (D.D.C. Oct. 19, 1982) (emphasizing that, although there was insufficient evidence of any securities law violation, §§ 13(d) and 14(e) should not be used to establish a pattern of racketeering); *MacIntosh*, *supra* note 5, at 32 (questioning whether a § 13(d) violation can constitute fraud in the sale of securities).

69. *R. JENNINGS & H. MARSH*, *supra* note 34, at 671; *see also* *Fischel*, *supra* note 35, at 14, 36; *Fleischer*, *supra* note 42, at 863; *Jorden & Woodward*, *supra* note 46, at 822.

70. Some courts express the concern that a civil RICO action may become an alternative or cumulative remedy for securities fraud. *See, e.g.,* *Moss v. Morgan Stanley, Inc.*, 553 F. Supp. 1347 (S.D.N.Y. 1983) (the RICO Act is not a remedy for an ordinary securities violation), *aff'd*, 52 U.S.L.W. 2183 (2d Cir. Sept. 9, 1983); *Bayly Corp. v. Marantette*, [1982 Transfer Binder] *FED. SEC. L. REP. (CCH)* ¶ 98,834 (D.D.C. Oct. 19, 1982) (the RICO Act is not an alternative or cumulative remedy for securities fraud). Although the limitation of civil RICO claims is a valid concern, courts should not refuse to allow violations of §§ 13(d) and 14(e) to establish predicate acts of racketeering given the clear case law and the language of the RICO Act. Furthermore, the principal drafter of RICO maintains that Congress was aware that RICO went beyond traditional common law fraud and actually intended the Act to apply to ordinary commercial fraud. *Blakey*, *supra* note 24, at 280, 305.

71. 18 U.S.C. §§ 1341, 1343 (1976), as incorporated into 18 U.S.C. § 1961(1) (Supp. V 1981). *See, e.g.,* *Eaby v. Richmond*, 561 F. Supp. 131 (E.D. Pa. 1983); *see also supra* note 13.

tender offer involves extensive use of the mails and wires,⁷² the application of this provision potentially may convert every mail or wire fraud claim into a RICO claim, and may also increase the use of federal actions for state common law fraud claims.⁷³ This potential for abuse has led some courts to dismiss RICO claims based in part on mail or wire fraud.⁷⁴ Nonetheless, the mail and wire fraud provisions of the Act offer another way to establish predicate acts of racketeering and thus facilitate the use of RICO as a defense to a hostile tender offer.

Finally, courts express concern over the often limited connection between the predicate acts of racketeering and the alleged RICO violation. The predicate acts may only indirectly relate to the RICO violation in either time or purpose. For example, even though a hostile tender offer may involve no disclosure violations of the federal securities laws, a target corporation may still use RICO to resist the tender offer by alleging, as predicate acts of racketeering, the tender offeror's past behavior. Although this past behavior may have resulted in illegalities, the nexus between these illegalities and the tender offer may prove tenuous at best.⁷⁵ Although this strategy technically conforms to the literal language of RICO's pattern requirement, it raises serious policy questions because it confers an additional weapon upon the target corporation to fight a hostile takeover. The potential for abuse in this area is significant given the increasing overlap between civil RICO and federal securities claims.⁷⁶

The ease with which a target corporation can establish predicate acts to constitute a pattern of racketeering indicates that this element of

72. The tender offeror may submit the offer to the target's shareholders through a newspaper advertisement, a general mailing to all shareholders, a telephone solicitation, or any combination of the above. See R. JENNINGS & H. MARSH, *supra* note 34, at 633.

73. See, e.g., Bradley, *supra* note 13, at 866 (every mail fraud case has the potential to be a RICO case); MacIntosh, *supra* note 5, at 13, 18 (the inclusion of mail fraud increases the ease with which RICO can be used); Tarlow, *RICO: Someone Loaded the Dice*, 17 TRIAL, Feb. 1981, at 54, 57 (the inclusion of mail fraud in RICO could federalize all torts involving business transactions).

74. See, e.g., United States v. Mandel, 591 F.2d 1347 (4th Cir. 1979) (expressing concern about the expanding use of the federal mail fraud statute in the application of the RICO Act); Pit Pros, Inc. v. Wolf, 554 F. Supp. 284 (N.D. Ill. 1983) (dismissing a RICO claim based in part on a mail fraud violation because use of the mails during one act of common law fraud does not create a federal mail fraud violation). *But see* Eaby v. Richmond, 561 F. Supp. 131 (E.D. Pa. 1983) (mail fraud can be the basis of a civil RICO action).

75. See, for example, Dan River, Inc. v. Icahn, 701 F.2d 278 (4th Cir. 1983), where the target corporation alleged that the tender offeror purchased shares using income from an investment company which was not properly registered with the SEC and thus violated the Investment Company Act of 1940. This alleged violation together with mail fraud constituted the primary basis for the alleged pattern of racketeering. The court dismissed the RICO claim for insufficient evidence of any violation.

76. See, e.g., Morrison, *Old Bottle—Not So New Wine: Treble Damages in Action Under the Federal Securities Laws*, 10 SEC. REG. L.J. 67, 83 (1982) (suggesting that "RICO may well prove to be to the 1980s what Rule 10b-5 was in its day").

a civil RICO action cannot significantly limit the use of the Act to resist a hostile tender offer.⁷⁷ Thus, any significant limitation on this new use of RICO must be found in the other elements of a RICO claim.

B. Violation of Section 1962

Once the target corporation establishes a pattern of racketeering, it must demonstrate a violation of section 1962. The target may establish the violation in four different ways. Each violation of section 1962 can be applied to hostile tender offers.

First, the target may allege a violation of section 1962(a) — the investment of income from racketeering in an enterprise which affects interstate or foreign commerce.⁷⁸ The courts broadly interpret this provision to apply to any indirect investment of income or the proceeds of such income.⁷⁹ Although the problem of tracing the income from the racketeering activity to the enterprise may make this provision difficult to apply in securities cases,⁸⁰ one target corporation successfully alleged this violation in using RICO to resist a hostile takeover.⁸¹ The problem of tracing, however, raises the issue of the directness of the connection between the racketeering activity that produced the income and the hostile tender offer. If the connection is too attenuated, the use of RICO may defeat a tender offer that legal constraints would otherwise leave untouched.⁸²

Second, the target corporation may allege a violation of section 1962(b) — the use of racketeering to acquire an interest in an enterprise affecting interstate or foreign commerce.⁸³ This provision can easily apply to general securities litigation and to hostile tender offers.⁸⁴ At least one target corporation successfully alleged a section 1962(b) violation in resisting a hostile takeover.⁸⁵ This provision is easier to use

77. See, e.g., MacIntosh, *supra* note 5, at 67.

78. See *supra* note 16.

79. See, e.g., United States v. McNary, 620 F.2d 621 (7th Cir. 1980).

80. See Long, *supra* note 7, at 229; MacIntosh, *supra* note 5, at 38; Note, *Investing Dirty Money: Section 1962(a) of the Organized Crime Control Act of 1970*, 83 YALE L.J. 1491 (1974).

81. Spencer Cos. v. Agency Rent-a-Car, [1981-1982 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 98,361 (D. Mass. Nov. 17, 1981) (allegation that Agency filed misleading § 13(d) statements following purchases of Gateway stock; Agency then used income from the sale of the Gateway stock to purchase shares of Spencer in a takeover attempt). *But see* Dan River, Inc. v. Icahn, 701 F.2d 278, 291 (4th Cir. 1983) (dismissing RICO claim based on § 1962(a) violation because of, *inter alia*, insufficient evidence of the predicate acts); Marshall Field & Co. v. Icahn, [1982 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 98,603 (S.D.N.Y. Mar. 22, 1982) (dismissing RICO claim based in part on § 1962(a) violation because of insufficient evidence of the predicate acts of racketeering).

82. See *supra* note 75.

83. See *supra* note 17.

84. Long, *supra* note 7, at 230.

85. Spencer Cos. v. Agency Rent-a-Car, [1981-1982 Transfer Binder] FED. SEC. L. REP. (CCH)

than section 1962(a), because the alleged racketeering provides the direct means of acquiring an interest in an enterprise.⁸⁶ Thus, alleging a section 1962(b) violation eliminates the need to trace the income from the racketeering activity to the enterprise.⁸⁷

Third, the target may allege a violation of section 1962(c) — conducting an interstate enterprise through a pattern of racketeering.⁸⁸ RICO litigation frequently includes this allegation, because, in contrast with the preceding provisions, a plaintiff does not have to establish the acquisition of an interest in an enterprise.⁸⁹ Section 1962(c) violations have been successfully alleged in resisting a hostile tender offer.⁹⁰ A target corporation's use of this provision may be limited in the future, however, if the tender offeror is a corporation. Some courts have held that a corporate defendant cannot constitute both the "person" violating section 1962(c), and the "enterprise" operated through racketeering.⁹¹

Finally, a target corporation may allege a violation of section 1962(d) — conspiring to violate any of the preceding subsections.⁹² No target corporation has successfully alleged RICO's conspiracy provision in a hostile takeover.⁹³ Moreover, because any application of RICO as a defense to a hostile tender offer would likely include violations of the other provisions of section 1962, this provision will probably not have a significant impact.

Establishing a violation of section 1962 is not a major barrier to using RICO to resist a hostile takeover. Nonetheless, courts must carefully

¶ 98,361 (D. Mass. Nov. 17, 1981) (allegation that defendant filed false § 13(d) statements during the purchase of Spencer stock). *But see* Bayly Corp. v. Marantette, [1982 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 98,834 (D.D.C. Oct. 19, 1982) (dismissing RICO claim based in part on § 1962(b) violation on several grounds including insufficient evidence of racketeering); Marshall Field & Co. v. Icahn, [1982 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 98,603 (S.D.N.Y. Mar. 22, 1982) (dismissing RICO claim based in part on § 1962(b) violation for insufficient evidence of racketeering).

86. Long, *supra* note 7, at 230.

87. *Id.*

88. *See supra* note 18.

89. Long, *supra* note 7, at 231.

90. Spencer Cos. v. Agency Rent-a-Car, [1981-1982 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 98,361 (D. Mass. Nov. 17, 1981) (allegation that filing false § 13(d) statements during a purchase of stock is a violation of § 1962(c)). *Contra* Bayly Corp. v. Marantette, [1982 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 98,834 (D.D.C. Oct. 19, 1982) (dismissing RICO claim based in part on a violation of § 1962(c)).

91. *E.g.*, United States v. Computer Sciences Corp., 689 F.2d 1181, 1190 (4th Cir. 1982), *cert. denied*, 103 S. Ct. 729 (1983); Bennett v. Berg, 685 F.2d 1053, 1061 (8th Cir. 1982); Van Schaick v. Church of Scientology, 535 F. Supp. 1125, 1135 (D. Mass. 1982). *Contra* United States v. Hartley, 678 F.2d 961, 990 (11th Cir. 1982) (a corporate defendant can be both the person and the enterprise under § 1962(c)), *cert. denied*, 103 S. Ct. 815 (1983); *see also* Blakey, *supra* note 24, at 286-325.

92. *See supra* note 19.

93. The only hostile takeover case where a target corporation attempted to use a violation of § 1962(d) resulted in a dismissal of all the RICO claims. Bayly Corp. v. Marantette, [1982 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 98,834 (D.D.C. Oct. 19, 1982).

scrutinize alleged section 1962 violations to ensure the presence of all elements of the violation as well as the sufficiency of the connection between the violation and the tender offer.⁹⁴ Rigorous judicial scrutiny of alleged violations will ensure that the target's use of the Act conforms to the statutory language of section 1962.

C. *Injury By Reason of a Violation of Section 1962*

Finally, the plaintiff in a civil RICO action must demonstrate an injury to his business or property because of the violation of section 1962.⁹⁵ Many courts, using this injury requirement to limit the application of RICO, require a certain type of injury to support a civil RICO claim.⁹⁶ Although the limitation of civil RICO actions is a valid concern, this judicially-created requirement finds no support in either the statutory language or the legislative history.⁹⁷ Moreover, such judicial

94. For example, in *Hanna Mining Co. v. Norcen Energy Resources Ltd.*, [1982 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 98,742 (N.D. Ohio June 11, 1982), the court allowed the use of the RICO Act as a defense to a hostile tender offer without an explanation of what specific § 1962 violations were alleged or the evidence which supported these allegations.

95. See *supra* note 24. It is important to note that RICO requires an injury due to the § 1962 violation and not due to the predicate acts of racketeering as defined in § 1961. See *supra* note 12.

96. See, e.g., *United States v. Cappetto*, 502 F.2d 1351 (7th Cir. 1974), cert. denied, 420 U.S. 925 (1975) (holding that RICO requires an injury to the public inherent in the conduct made unlawful); *Liston v. USLIFE Corp.*, [1982-1983 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 99,033 (C.D. Cal. Dec. 9, 1982) (holding that RICO requires a business or commercial injury); *Johnsen v. Rogers*, 551 F. Supp. 281 (C.D. Cal. 1982) (holding that RICO requires a racketeering enterprise injury, defined as a commercial injury caused by conducting an enterprise's affairs through a pattern of racketeering); *Harper v. New Japan Sec. Int'l*, 545 F. Supp. 1002 (C.D. Cal. 1982) (holding that RICO requires an injury of the type the Act was intended to prevent); *Erlbaum v. Erlbaum*, [1982 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 98,772 (E.D. Pa. July 13, 1982) (holding that RICO requires a marketplace injury); *Van Schaick v. Church of Scientology*, 535 F. Supp. 1125 (D. Mass. 1982) (holding that RICO requires a commercial injury); *Landmark Sav. & Loan v. Rhoades*, 527 F. Supp. 206 (E.D. Mich. 1981) (holding that RICO requires a racketeering enterprise injury); *North Barrington Dev., Inc. v. Fanslow*, 547 F. Supp. 207 (N.D. Ill. 1980) (holding that RICO requires a competitive injury); cf. *Spencer Cos. v. Agency Rent-a-Car*, [1981-1982 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 98,361 (D. Mass. Nov. 17, 1981) (holding that RICO applies to an injury in business relationships).

Other courts, however, which have specifically addressed the injury issue, do not require any particular type of injury to maintain a civil RICO action. See, e.g., *Schact v. Brown*, [1982-1983 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 99,160 (7th Cir. Apr. 8, 1983); *Bennett v. Berg*, 685 F.2d 1053 (8th Cir. 1982); *Hanna Mining Co. v. Norcen Energy Resources Ltd.*, [1982 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 98,742 (N.D. Ohio June 11, 1982); *Crocker Nat'l Bank v. Rockwell Int'l Corp.*, 555 F. Supp. 47 (N.D. Cal. 1982); *Prudential Lines, Inc. v. McKeon*, No. 80 Civ. 5853, slip op. (S.D.N.Y. Apr. 21, 1982) (available Sept. 28, 1983, on LEXIS, Genfed library, Dist file); *Hellenic Lines, Ltd. v. O'Hearn*, 523 F. Supp. 244 (S.D.N.Y. 1981).

97. It has been suggested that because the language of RICO's civil remedy is similar to that of the antitrust laws, the antitrust case law interpreting this language should be applied to RICO's injury requirement. Most courts, however, reject this notion and refuse to apply the antitrust injury precedent to RICO. See, e.g., *Schact v. Brown*, [1982-1983 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 99,160, at 95,607 (7th Cir. Apr. 8, 1983). Moreover, Professor

additions to the Act lead to inconsistent requirements for civil RICO actions and confuse rather than clarify the application of the Act. Any limitation upon the type of injury necessary for a civil RICO action should come from Congress rather than the courts.⁹⁸

The injury requirement could, however, limit the application of civil RICO if courts carefully scrutinized RICO claims for the presence of any injury due to the violation of section 1962. The presence of an injury to the shareholders of the target corporation is the critical factor in determining whether RICO should be allowed as a defense to a hostile corporate takeover.

III. LIMITING THE USE OF RICO: THE INJURY REQUIREMENT

After a target corporation alleges a pattern of racketeering and a violation of section 1962, it must then demonstrate an injury to its business or property.⁹⁹ Determining the presence of an injury during a hostile corporate takeover requires an examination of possible injury to three groups: the target's shareholders who tender their stock, the target's shareholders who retain their stock, and the target's management. In addition, the target's use of RICO to resist a hostile takeover must conform to the policies and application of the federal securities laws. This analysis of RICO's injury requirement indicates that the target should be allowed to use RICO as a defense to a hostile cash tender offer only if it can demonstrate that the shareholders who retained their stock will be injured by the takeover.

During most hostile cash tender offers, shareholders of the target corporation who tender their stock do not suffer any economic injury. Rather, these shareholders obtain an economic benefit by selling their stock at a price significantly above the current market price.¹⁰⁰ If the

Blakey states that the drafters of RICO did not intend the antitrust injury precedent to apply to the Act because the policies and purposes of RICO differ significantly from those of the antitrust laws. Blakey, *supra* note 24, at 253-56, 263; Blakey & Gettings, *supra* note 13, at 60. Furthermore, although RICO was originally conceived as an addition to the antitrust laws, an American Bar Association study group, noting that the underlying theory of the antitrust laws did not conform to the purposes of RICO, suggested that RICO be removed from the antitrust area and included instead in the more comprehensive organized crime control legislation. Blakey, *supra* note 24, at 254-56.

98. See, e.g., Blakey, *supra* note 24, at 285 (suggesting that courts are redrafting rather than reading RICO); Note, *supra* note 54, at 191 (suggesting that any problems with the RICO Act should be addressed by Congress and not by judicial redrafting).

99. 18 U.S.C. § 1964(c) (1976).

100. See, e.g., Easterbrook & Fischel, *Proper Role*, *supra* note 41, at 1173. A target corporation may allege that tendering shareholders are injured because the premium offered by the tender offeror is less than the "true" value of the shares. See *supra* note 43. Even in this case, however, courts should not recognize an injury for the purpose of using the RICO Act. Although tendering shareholders may not be as well off as they theoretically could be, they still receive more

target management defeats the tender offer against the best interest of the shareholders, the shareholders may have a cause of action against management for the lost opportunity to receive this profit.¹⁰¹ Thus, these shareholders suffer no injury which could satisfy the injury requirement of the RICO Act.¹⁰²

In most hostile cash tender offers, shareholders of the target corporation who retain their stock also suffer no injury. These shareholders typically enjoy an appreciation in their investment because the tender offeror will presumably better manage the target.¹⁰³ A tender offeror generally purchases a target's stock in order to receive the profit to be gained from improved management of the target.¹⁰⁴ Apart from better management, the synergy created by the consolidation of the two corporations increases the value of the stock of the nontendering shareholders.¹⁰⁵ For both reasons, shareholders who retain stock suffer no injury which can satisfy the injury requirement of the RICO Act.¹⁰⁶

for their shares than the current market price and thus they are not "injured." See Easterbrook & Fischel, *Proper Role*, *supra* note 41, at 1175.

101. See, e.g., *GAF Corp. v. Milstein*, 453 F.2d 709 (2d Cir. 1971), *cert. denied*, 406 U.S. 910 (1972); see also Fischel, *supra* note 35, at 2; Fleischer, *supra* note 42, at 865; Gelfond & Sebastian, *supra* note 41, at 449. See generally McIntyre, *supra* note 44. Shareholders may, however, find it difficult to maintain such suits. See, e.g., Easterbrook & Fischel, *Proper Role*, *supra* note 41, at 1163.

102. Many authorities accept the theory that corporate takeovers are generally beneficial because they move the target's assets to a higher-value utilizer, encourage investment, and thus benefit shareholders of both the target and the tender offeror. See, e.g., Easterbrook & Fischel, *Proper Role*, *supra* note 41, at 1182-88; Easterbrook & Fischel, *Takeover Bids*, *supra* note 41, at 1741, 1745. But see Lipton, *Takeover Bids in the Target's Boardroom*, 35 BUS. LAW. 101 (1979); Lowenstein, *supra* note 41. Moreover, although a recent SEC report characterized takeovers as a valid method of capital allocation but found insufficient evidence of their economic benefit, the report did conclude that, at least in certain cases, takeovers disciplined inefficient target management and led to increased productivity. SEC ADVISORY COMMITTEE, *supra* note 41, at 7-8. Thus, the advisory committee found insufficient reason to either discourage or promote takeovers. *Id.* at 9.

103. See, e.g., Easterbrook & Fischel, *Proper Role*, *supra* note 41, at 1174; Easterbrook & Fischel, *Takeover Bids*, *supra* note 41, at 1741.

104. See, e.g., P. STEINER, *supra* note 42, at 136. This anticipated profit balances the costs incurred by the tender offeror to effect the takeover. E.g., Easterbrook & Fischel, *Proper Role*, *supra* note 41, at 1174, 1178. Other motives, however, may prompt a hostile tender offer. A tender offeror may seek to control the target for investment or tax reasons, to force the sale of the target's assets, or to force the merger of the two corporations. See P. STEINER, *supra* note 42, at 136-40; Bebchuk, *supra* note 43, at 34; Brudney, *supra* note 41, at 610; Gelfond & Sebastian, *supra* note 41, at 456; Lowenstein, *supra* note 41, at 265.

105. See, e.g., Bradley, *supra* note 43, at 223; Gelfond & Sebastian, *supra* note 41, at 457. This is based on the theory that takeovers are generally beneficial. See *supra* note 102.

106. A target corporation may allege that nontendering shareholders are injured if the tender offeror offers a premium which is less than the "true" value of the shares. See *supra* note 43. This reduced premium would indicate that the target's assets would be controlled by a lower-value utilizer, reducing the appreciation in the investment of the shareholders who retain their stock. *Id.* Courts should not recognize this difference between the tender offer premium and the "true value" as an injury for the purpose of the RICO Act because the nontendering shareholders are still better off than they would have been without the tender offer. Although

In some circumstances, however, the takeover will injure shareholders of the target who retain their stock. This may occur, for example, if the tender offeror does not plan to improve the target corporation, but rather intends to acquire personal gain at the expense of the target. Tender offerors could have many motives which may not be beneficial to target shareholder welfare. The tender offeror may seek to acquire the power and prestige of controlling the target, to obtain tax benefits, to force a merger or sale of the target's assets, or to liquidate the target corporation.¹⁰⁷ Thus, the shareholders who retain their stock may be economically harmed by this type of takeover.¹⁰⁸ This shareholder injury could satisfy the injury requirement of RICO and justify the target corporation's use of RICO to resist the takeover.

Similarly, a tender offeror who purchases enough shares to threaten a full takeover, and who then sells these shares back to the target corporation at a significant profit over the tender offer price, may injure those shareholders who retain their stock.¹⁰⁹ This tactic, increasing in frequency,¹¹⁰ occurred in at least two of the recent takeover cases involving RICO.¹¹¹ In this situation, the target's shareholders who retain their stock suffer an injury because the repurchase of the shares consumes the target's resources and thereby decreases the value of the

nontendering shareholders may not be as well off as they theoretically could be, the value of their investment will usually increase and thus they are not injured. See *supra* note 100.

107. See, e.g., P. STEINER, *supra* note 42, at 136, 140; Bebchuk, *supra* note 43, at 34; Brudney, *supra* note 41, at 610; Gelfond & Sebastian, *supra* note 41, at 456; Lowenstein, *supra* note 41, at 265-66.

108. If the tender offeror obtains control and acts to the detriment of the target corporation, the nontendering shareholders may be injured if the value of their investment decreases. See, e.g., P. STEINER, *supra* note 42, at 140 (suggesting that, in certain circumstances, a tender offeror may force an economically unsound merger which does not maximize shareholder welfare); Gelfond & Sebastian, *supra* note 41, at 454-58 (suggesting that some takeovers may not encourage economic efficiency).

109. For example, Carl Icahn has used this approach with at least six targets. According to one estimate, he has "successfully dislodged over \$83 million from various American corporations." N.Y. Times, Oct. 14, 1982, § D, at 4, col. 1; see also Bus. Wk., May 24, 1982, at 91.

110. N.Y. Times, Oct. 14, 1982, § D, at 4, col. 1; Bus. Wk., May 24, 1982, at 91. An increasing number of tender offerors succeed in selling the tendered shares back to the target corporation. See, e.g., Lowenstein, *supra* note 41, at 310. One commentator suggests that this tactic is reaching epidemic proportions. Blustein, *supra* note 34. In addition, if a tender offeror's history includes this strategy, nondisclosure of this information may be considered a violation of the securities laws. See, e.g., General Host Corp. v. Triumph Am., Inc., 359 F. Supp. 749 (S.D.N.Y. 1973) (holding that nondisclosure of the tender offeror's past history may constitute a material omission). If, however, the public is sufficiently aware of the information, then a court may not find a disclosure violation. See, e.g., Marshall Field & Co. v. Icahn, [1982 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 98,603 (S.D.N.Y. Mar. 22, 1982).

111. Dan River, Inc. v. Icahn, 701 F.2d 278 (4th Cir. 1983); Marshall Field & Co. v. Icahn, [1982 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 98,603 (S.D.N.Y. Mar. 22, 1982); see also Memorandum of Spencer Companies In Opposition to Motion to Dismiss at 24, Spencer Cos. v. Agency Rent-a-Car, [1981-1982 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 98,361 (D. Mass. Nov. 17, 1981).

corporation and the value of the shareholders' investment.¹¹² This harm to the shareholders could satisfy RICO's injury requirement and validate the target's use of RICO to resist the takeover.¹¹³

Limiting the use of RICO to hostile cash tender offers in which the target's shareholders who retain stock suffer an injury conforms to the policies of the federal securities laws. The federal securities laws disfavor any interference in contests for corporate control.¹¹⁴ Nonetheless, courts recognize an exception to this principle if it will protect the shareholders' interest. For example, courts allow target corporations to obtain injunctive relief to enforce the disclosure requirements of the securities laws.¹¹⁵ Full disclosure benefits the target's

112. See, e.g., Easterbrook & Fischel, *Proper Role*, *supra* note 41, at 1175. The money paid to tender offerors to repurchase the tendered shares wastes corporate assets and could be better spent investing in new plants or equipment for the target corporation. E.g., Blustein, *supra* note 34. In a few instances, however, the repurchase of tendered shares may benefit retaining stockholders by enlisting a competing bidder who may offer a higher premium. See Easterbrook & Fischel, *Takeover Bids*, *supra* note 41, at 1738-39; see also *supra* note 43.

113. Courts may not, however, recognize an injury for the purpose of the RICO Act in two circumstances. First, there should be no RICO injury if the repurchase of the shares was not in the shareholders' best interest, and thus violated management's fiduciary duty. W. CARY & M. EISENBERG, *supra* note 42, at 1594; see also Fleischer, *supra* note 42, at 859; Gelfond & Sebastian, *supra* note 41, at 433. During a hostile takeover, target management can resist only if resisting will benefit the shareholders; management cannot resist if their motivation is merely to preserve their own jobs. E.g., Lynch & Steinberg, *supra* note 66, at 914-15. Thus, if management repurchases the tendered shares merely to preserve their own jobs and not because a takeover would harm the nontendering shareholders, there is no threat to shareholders which justifies using the RICO Act.

Second, the injury analysis under the RICO Act may lead to different results if the tender offeror utilizes an exchange offer rather than a cash tender offer. See *supra* note 38. In an exchange tender offer, shareholders of the target corporation exchange their shares for shares of the corporate tender offeror. If the target corporation then brings a RICO action against the tender offeror, any judgment in the target's favor will harm its former shareholders who are now shareholders of the tender offeror. This may conflict with the policy of the federal securities laws which is to protect shareholders of the target. See, e.g., Aranow, Einhorn & Berstein, *Standing to Sue to Challenge Violations of the Williams Act*, 32 BUS. LAW. 1755 (1977).

114. See *Rondeau v. Mosinee Paper Corp.*, 422 U.S. 49, 58 (1975), in which the Court commented on the neutral position of the Williams Act:

The Congress expressly disclaimed an intention to provide a weapon for management to discourage takeover bids or prevent large accumulations of stock which would create the potential for such attempts. Indeed, the Act's draftsmen commented upon the "extreme care" which was taken "to avoid tipping the balance of regulation either in favor of management or in favor of the person making the takeover bid."

(citations omitted); see also *supra* notes 39 & 64-65.

115. Courts recognize an implied private right of action of target corporations to enforce the disclosure requirements of § 14(d). See, e.g., *Gulf & W. Indus. v. Great Atl. & Pac. Tea Co.*, 476 F.2d 687 (2d Cir. 1973); *Electronic Specialty Co. v. International Controls Corp.*, 409 F.2d 937 (2d Cir. 1969). Target corporations also may obtain equitable relief under § 14(e). See, e.g., *Butler Aviation Int'l, Inc. v. Comprehensive Designers, Inc.*, 425 F.2d 842 (2d Cir. 1970); see also *supra* note 64. In addition, courts recognize an implied private right of action of target corporations to enforce the disclosure requirements of § 13(d). See, e.g., *Dan River, Inc. v. Unitex, Ltd.*, 624 F.2d 1216, 1224 (4th Cir. 1980); *GAF Corp. v. Milstein*, 453 F.2d 709 (2d Cir. 1971); *Wellman v. Dickinson*, 475 F. Supp. 783 (S.D.N.Y. 1979), *aff'd*, 682 F.2d

shareholders without favoring either the target management or the tender offeror.¹¹⁶ This fulfills the neutral position of the securities laws, neither encouraging nor discouraging hostile tender offers.¹¹⁷ Similarly, allowing the target to bring a RICO action when shareholders who retain stock are injured also benefits the target's shareholders and accords with this neutrality.

Even if the target's shareholders suffer no injury, target management might allege a possible injury to itself because it may lose control of the corporation. Nonetheless, because courts do not recognize loss of control as an injury under the federal securities laws,¹¹⁸ courts should not recognize this injury as falling within the provisions of the RICO Act. During many takeovers, target management's interest in defeating the takeover to retain its position and control may conflict with the shareholders' interest in receiving the benefits of a successful takeover.¹¹⁹ If the injury to management's control satisfied RICO's

355 (2d Cir. 1982), *cert. denied*, 103 S. Ct. 1522 (1983); *see also supra* note 65. Courts allow target corporations to enforce these disclosure requirements because this benefits the target's shareholders, the shareholders are the class for whom the federal securities laws were enacted, Congress intended such private rights of action, and this remedy is consistent with the federal legislative scheme and with actions based on state law. *See Cort v. Ash*, 422 U.S. 66 (1975).

116. *See Rondeau v. Mosinee Paper Corp.*, 422 U.S. 49, 58 (1975) ("The purpose of the Williams Act is to ensure that public shareholders who are confronted by a cash tender offer for their stock will not be required to respond without adequate information regarding the qualifications and intentions of the offering party.") (footnote omitted); *see also supra* notes 114-15. Moreover, a target corporation is in the best position to enforce the disclosure requirements of the federal securities laws by acting as a private attorney general to supplement action by the SEC. *See, e.g., Gulf & W. Indus. v. Great Atl. & Pac. Tea Co.*, 476 F.2d 687, 699 (2d Cir. 1973); *GAF Corp. v. Milstein*, 453 F.2d 709, 719 (2d Cir. 1971); *Berman v. Metzger*, [1981 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 97,857, at 90,294 (D.D.C. Feb. 9, 1981); *see also S-G Sec., Inc. v. Fuqua Inv. Co.*, 466 F. Supp. 1114 (D. Mass. 1978); *Humana, Inc. v. American Medicorp, Inc.*, [1977-1978 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 96,298 (S.D.N.Y. Jan. 27, 1978); Note, *supra* note 38, at 715.

117. In an effort to maintain a neutral position during contests for corporate control, courts frequently express the view that effective relief is best given as an injunction to enforce the disclosure requirements of the securities laws. *See, e.g., Electronic Specialty Co. v. International Controls Corp.*, 409 F.2d 937, 947 (2d Cir. 1969). An award of damages, on the other hand, may deter future corporate takeovers. *See, e.g., Mobil Corp. v. Marathon Oil Co.*, 669 F.2d 366 (6th Cir. 1981); *Berman v. Metzger*, [1981 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 97,857, at 90,294 (D.D.C. Feb. 9, 1981). Thus, a target corporation may sue for damages only if its shareholders will benefit. *See, e.g., Wellman v. Dickinson*, 475 F. Supp. 783, 816 (S.D.N.Y. 1979), *aff'd*, 682 F.2d 355 (2d Cir. 1982), *cert. denied*, 103 S. Ct. 1522 (1983).

118. For example, in *Piper v. Chris-Craft Indus.*, 516 F.2d 172, 190 (2d Cir. 1975), a defeated tender offeror sued the target corporation for violations of the federal securities laws and was awarded \$25 million in damages for loss of opportunity to obtain control of the target. Aranow, Einhorn & Berstein, *supra* note 113, at 1756-57. The Supreme Court reversed the judgment, stating that a defeated tender offeror lacked standing to sue for damages under the Williams Act because such a suit would not benefit the target's shareholders. *Piper v. Chris-Craft Indus.*, 430 U.S. 1 (1977). The Court also stated that, although the tender offeror could pursue its remedy under state law for damages due to lost opportunity for control, such a remedy could not derive from the federal securities laws. *Id.*

119. *See, e.g., P. STEINER, supra* note 42, at 131, 145.

injury requirement, this would increase the likelihood that management would use RICO against the best interests of its shareholders. Moreover, recognition of management's loss-of-control injury under the RICO Act may actually harm shareholders by discouraging hostile takeovers.¹²⁰

Furthermore, recognition of management's loss-of-control injury for the purposes of the RICO Act conflicts with the policies of the federal securities laws which were designed to protect only shareholders.¹²¹ Because Congress intended consistency between RICO and the securities laws, and because a target corporation can bring a cause of action under the federal securities laws only if it will benefit its shareholders,¹²² a target corporation should be allowed to use RICO to resist a hostile cash tender offer only in instances of shareholder injury.

CONCLUSION

As the use of the RICO Act's civil remedy continues to expand, it will undoubtedly appear with increasing frequency as a defense to hostile corporate takeovers.¹²³ The critical factor in analyzing this use of RICO is the Act's injury requirement. In most hostile cash tender offers, the target's shareholders who tender their stock suffer no injury but, instead, enjoy economic benefits from the premium paid for their shares. The target's shareholders who retain their stock also receive economic benefits, because the tender offeror will improve the economic position of the target and increase the value of the shareholders' investment. Thus, in the typical hostile cash tender offer, no shareholder injury occurs to fulfill RICO's injury requirement. In some instances, however, the tender offeror may intend to act to the disadvantage of the target's shareholders who retained their stock, and they may suffer an economic injury from the takeover. This injury may justify the use of RICO by the target corporation to resist the takeover. Because such an injury will occur in only a small number of takeovers, a target corporation will be limited in its use of RICO to resist a takeover.

Although most hostile cash tender offers injure the target's management insofar as it loses control of the corporation, this loss-of-control injury should not fulfill RICO's injury requirement. Allowing manage-

120. See *supra* note 117.

121. See *supra* notes 114 & 116.

122. See *supra* note 115.

123. Some commentators fear that this new use of RICO may actually reduce the number of hostile corporate takeovers. *E.g.*, *A New Ploy to Fight Takeovers*, *Bus. Wk.*, May 24, 1982, at 91. Moreover, some commentators express concern that RICO claims will continue to appear as defenses in hostile corporate takeovers merely for their embarrassment and intimidation value. *E.g.*, *N.Y. Times*, Oct. 14, 1982, § D, at 4, col. 1.

ment to use RICO for loss of corporate control would favor target management during takeovers and conflict with the neutrality of the federal securities laws. This use of RICO would also reduce the effectiveness of hostile takeovers as a check against inefficient target management.

As RICO litigation continues to expand into new and unexpected areas, courts will continue to face the problem of limiting the use of the Act to appropriate circumstances. The use of RICO as a defense to hostile corporate takeovers illustrates many of the problems encountered in limiting RICO's application. Courts can avoid some of these difficulties by strictly applying the language of the statute and by considering the impact of RICO on other federal laws. In limiting RICO as a defense to a hostile corporate takeover, this involves careful judicial scrutiny for the presence of an injury to the target shareholders, and an examination of the interaction between RICO and the federal securities laws.

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