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## Some Practical Implications of Civil RICO Cases

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## SOME PRACTICAL IMPLICATIONS OF CIVIL RICO CASES

WILLIAM WOODWARD WEBB\* AND KEVIN P. RODDY\*\*

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Enacted as Title IX of the Organized Crime Control Act of 1970,<sup>1</sup> the Racketeer Influenced and Corrupt Organizations Act<sup>2</sup> (commonly known by the appellation "RICO" or "The RICO Act") was the end product of a lengthy legislative effort to develop new legal remedies to deal with the problem of organized crime.<sup>3</sup> In recent years, however, the statute has become the focus of controversy as plaintiffs, compelled by the possibility of winning treble damages and attorney's fees, have sought to apply the civil remedies provision of the Act<sup>4</sup> to all types of cases, including those involving what might be termed "garden variety" business fraud.

The civil damages provision of the RICO Act has been the subject of much legal commentary.<sup>5</sup> Unfortunately, previous arti-

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1. Racketeer Influenced and Corrupt Organization Act, Pub. L. No. 91-452, 84 Stat. 941 (Oct. 15, 1970).

2. 18 U.S.C. §§ 1961-1968 (1976 & Supp. 1983).

3. An excellent presentation of the legislative history of the RICO Act may be found in Blakey & Gettings, *Racketeer Influenced and Corrupt Organizations (RICO): Basic Concepts—Criminal and Civil Remedies*, 53 TEMP. L.Q. 1009, 1014-21 (1980). As the Supreme Court recently stated, "RICO was an aggressive initiative to supplement old remedies and develop new methods for fighting crime." *Sedima, S.P.R.L. v. Imrex Co.*, 105 S. Ct. 3275, 3286 (1985).

4. 18 U.S.C. § 1964(c) (1976).

5. See, e.g., Pickholz, *The Firestorm Over Civil RICO*, 71 A.B.A. J., Mar. 1985, at 79 (1985); Weissman, *Civil RICO*, 20 TRIAL 54 (1984); Note, *RICO and Securities Fraud: A Workable Limitation*, 83 COLUM. L. REV. 1513 (1983); Tarlow, *RICO Revisited*, 17 GA. L. REV. 291 (1983); Note, *Civil RICO and Parens Patriae: Lowering Litigation Barriers Through State Intervention*, 24 WM. & MARY L. REV. 429 (1982); Nathan, *Doubling the Treble Damage Option: What An Antitrust Practitioner Needs to Know About RICO*, 52 ANTITRUST L.J. 327 (1983); Fricano, *Civil RICO: An Antitrust Plaintiff's Considerations*, 52 ANTITRUST L.J. 361 (1983); Bridges, *Private RICO Litigation Based upon "Fraud in the Sale of*

cles have generally provided the practitioner with little guidance regarding some of the practical aspects of civil RICO litigation, *i.e.*, how to determine when your client has a civil RICO claim, where and when to file the action and, most importantly, how (and hopefully how not) to try a civil RICO case. The purpose of this article is to set forth some approaches to these practical problems.

## I. AN OVERVIEW OF THE RICO ACT

### A. *Statutory Provisions*

The RICO Act provides a potential treble damage remedy to the practitioner who can fit his or her client's business fraud case within its provisions. The civil damages provision of the RICO Act provides as follows:

Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold

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*Securities*", 18 GA. L. REV. 43 (1983); Wexler, *Civil RICO Comes of Age: Some Maturational Problems and Proposals for Reform*, 35 RUTGERS L. REV. 285 (1983); Blakey, *The RICO Civil Fraud Action in Context: Reflections on Bennett v. Berg*, 58 NOTRE DAME LAW. 237 (1982); Note, *Civil RICO: The Temptation and Impropriety of Judicial Restriction*, 95 HARV. L. REV. 1101 (1982); Comment, *Civil RICO Actions in Commercial Litigation: Racketeer or Businessman?*, 36 SW. L.J. 925 (1982); Comment, *Racketeer Influenced and Corrupt Organizations: Distinguishing the "Enterprise" Issues*, 59 WASH. U.L.Q. 1343 (1982); Strafer, Massumi & Skolnick, *Civil RICO in the Public Interest: "Everybody's Darling."* 19 AM. CRIM. L. REV. 655 (1982); Comment, *Reading the "Enterprise" Element Back Into RICO: Sections 1962 and 1964(c)*, 76 NW. U.L. REV. 100 (1981); Long, *Treble Damages for Violations of the Federal Securities Laws: A Suggested Analysis and Application of the RICO Civil Cause of Action*, 85 DICK. L. REV. 201 (1981); Blakey & Gettings, *Racketeer Influenced and Corrupt Organizations (RICO): Basic Concepts—Criminal and Civil Remedies*, 53 TEMP. L.Q. 1009 (1980); Bradley, *Racketeers, Congress, and the Courts: An Analysis of RICO*, 65 IOWA L. REV. 837 (1980); Note, *The Enterprise Element in RICO: A Proposed Interpretation*, 49 GEO. WASH. L. REV. 123 (1980); Note, *Organized Crime and the Infiltration of Legitimate Business: Civil Remedies for "Criminal Activity,"* 124 U. PA. L. REV. 192 (1975); Note, *Enforcing Criminal Laws Through Civil Proceedings: Sec. 1964 of the Organized Crime Control Act of 1970*, 53 TEX. L. REV. 1055 (1975). A number of additional articles are collected in *RICO: Civil and Criminal* (1984). Counsel desiring a more thorough analysis of the RICO Act, its purposes and its legislative history are urged to consult these sources. Counsel's attention is also directed to the thorough bibliography of civil RICO decisions and commentary offered in Milner, *A Civil RICO Bibliography*, 21 CAL. W.L.R. 409 (1985), and *The Report of the Ad Hoc Civil RICO Task Force of the ABA Section of Corporation, Banking and Business Law* (1985).

the damages he sustains and the cost of the suit, including a reasonable attorney's fee.<sup>6</sup>

Because the term "person" is defined in the Act to mean "any individual or entity capable of holding a legal or beneficial interest in property,"<sup>7</sup> it is clear that a wide variety of individuals or entities may maintain civil RICO actions in an appropriate case.

As noted above, the civil damages provision of the RICO Act provides a treble damage remedy to any person who has been damaged in his business or property "by reason of" a violation of § 1962 of the Act.<sup>8</sup> Section 1962 contains four subsections, each of which proscribes different illegal behavior. Section 1962(a) of the Act provides that it is illegal to use income derived from a pattern of racketeering activity to acquire an interest in an enterprise.<sup>9</sup> Section 1962(b) of the Act states that it is illegal to acquire or maintain an interest in an enterprise through a pattern of racketeering activity.<sup>10</sup> Under § 1962(c) of the Act, it is illegal to conduct or participate in the affairs of an enterprise through a pattern of racketeering activity.<sup>11</sup> Finally, § 1962(d) proscribes conspiring

6. 18 U.S.C. § 1964(c) (1976).

7. 18 U.S.C. § 1961(3) (1976).

8. As noted below, a number of federal district and circuit courts have focused upon the "by reason of" language contained in Section 1964(c) of the Act to erect barriers to the maintenance of Civil RICO actions, such as requiring that plaintiffs allege and prove that they have suffered a "racketeering enterprise injury" or a "competitive injury." See *infra* notes 54-67 and accompanying text.

9. Section 1962(a) provides in pertinent part:

It shall be unlawful for any person . . . directly or indirectly, . . . to use or invest . . . any part of [the monies or income from racketeering activity] 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.

18 U.S.C. § 1962(a) (1976).

10. Section 1962(b) provides:

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

18 U.S.C. § 1962(b) (1976).

11. Section 1962(c) provides:

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

to violate subsections (a), (b), or (c) of § 1962.<sup>12</sup>

## B. Definitions

In § 1961 of the Act<sup>13</sup> Congress provided definitions of the terms used in §§ 1962 and 1964 of the Act; these definitions, as fleshed out by the circuit and district courts, are as follows:

### 1. "Person"

It is unlawful for any "person" to carry out the activities proscribed in subsections (a), (b), or (c) of § 1962. As noted above, the Act defines the term "person" to include "any individual or entity capable of holding a legal or beneficial interest in property."<sup>14</sup>

Because of the broad definition of the term "person" provided by Congress, it would seem clear that the scope of civil RICO should not be limited to any particular type of person, such as "mobsters." In an attempt to limit the scope of civil RICO, however, some federal district courts have held that only those activities or persons with some connection to "organized crime" may be the subject of civil RICO actions.<sup>15</sup> The majority of courts, however, including every circuit court which has considered the question,<sup>16</sup> have held that a nexus to organized crime is not necessary.<sup>17</sup>

tivity or collection of an unlawful debt.

18 U.S.C. § 1962(c) (1976). From the author's experience, this subsection of Section 1962 is most frequently utilized by civil RICO plaintiffs.

12. Section 1962(d) provides that "[i]t shall be unlawful to conspire to violate any of the provisions of subsections (a), (b), or (c) of this section." 18 U.S.C. § 1962(d) (1976).

13. 18 U.S.C. § 1961 (1976).

14. 18 U.S.C. § 1961(3) (1976).

15. *See, e.g.,* *Aliberti v. E.F. Hutton & Co.*, 591 F. Supp. 632, 633 (D. Mass. 1984); *Divco Constr. & Realty Corp. v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 575 F. Supp. 712, 714-15 (S.D. Fla. 1983); *Hokama v. E.F. Hutton & Co.*, 566 F. Supp. 636, 643 (C.D. Cal. 1983); *Wagner v. Bear, Stearns & Co.*, 1982-83 FED. SEC. L. REP. (CCH) ¶ 99,032 (N.D. Ill. Sept. 17, 1982); *City of Atlanta v. Ashland-Warren, Inc.*, 1982-1 TRADE CAS. (CCH) ¶ 64,527 (N.D. Ga. Aug. 20, 1982); *Waterman S.S. Corp. v. Avondale Shipyards, Inc.*, 527 F. Supp. 256, 260 (E.D. La. 1981); *Adair v. Hunt Int'l Resources Corp.*, 526 F. Supp. 736, 747 (N.D. Ill. 1981); *Nooan v. Granville-Smith*, 537 F. Supp. 23, 29 (S.D.N.Y. 1981); *Barr v. WUI/TAS, Inc.*, 66 F.R.D. 109, 112-13 (S.D.N.Y. 1975).

16. *Owl Construction Co. v. Ronald Adams Contractor, Inc.*, 727 F.2d 540, 542 (5th Cir. 1984), *cert. denied*, 105 S. Ct. 118 (1984); *Sutliff, Inc. v. Donovan Co. Inc.*, 727 F.2d 648, 654 (7th Cir. 1974); *Moss v. Morgan Stanley, Inc.*, 719 F.2d 5 (2d Cir. 1983), *cert. denied*, 104 S. Ct. 1280 (1984); *Bunker Ramo Corp. v. United*

## 2. "Enterprise"

Under § 1962 of the Act, it is unlawful for a person to use income received from a pattern of racketeering activity to acquire an interest in an "enterprise;"<sup>18</sup> to acquire or maintain an interest in an "enterprise" through a pattern of racketeering activity;<sup>19</sup> or to conduct or participate in the affairs of an "enterprise" through a pattern of racketeering activity.<sup>20</sup> The term "enterprise" is defined in the Act to include "any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity."<sup>21</sup> Hence, as the

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Business Forms, Inc., 713 F.2d 1272, 1287 n.6 (7th Cir. 1983); Cenco, Inc. v. Seidman & Seidman, 686 F.2d 449, 457 (7th Cir. 1982), *cert. denied*, 459 U.S. 880 (1982); Bennett v. Berg, 685 F.2d 1053, 1063 (8th Cir. 1982), *aff'd en banc*, 710 F.2d 1361 (8th Cir.), *cert. denied sub nom.* Prudential Insurance Co. v. Bennett, 104 S. Ct. 527 (1983).

17. State *ex rel.* Dep't of Human Services v. Children's Shelter, Inc., 604 F. Supp. 867, 869 (W.D. Okla. 1985); Roche v. E.F. Hutton & Co., 603 F. Supp. 1411, 1417 (M.D. Pa. 1984); Finn v. Davis, 602 F. Supp. 801, 805 (S.D. Fla. 1985); McClendon v. Continental Group, Inc., 602 F. Supp. 1492, 1512-13 n.16 (D.N.J. 1985); Berg v. First American Bankshares, Inc., 599 F. Supp. 500, 504 (D.D.C. 1984); Ora Corp. v. Vinson, 596 F. Supp. 1546, 1548 n.1 (D.S.C. 1984); Lopez v. Richards, 594 F. Supp. 488, 490-91 (S.D. Miss. 1984); Maxwell v. Southwest National Bank, 593 F. Supp. 250, 255-56 (D. Kan. 1984); Joseph v. Algemene Bank Nederland, N.V., 592 F. Supp. 141, 146 (W.D. Pa. 1984); Lopez v. Dean Witter Reynolds, Inc., 591 F. Supp. 581, 589 n.6 (N.D. Cal. 1984); Wilcox v. Ho-Wing Sit, 586 F. Supp. 561, 568-69 (N.D. Cal. 1984); Morosani v. First National Bank of Atlanta, 581 F. Supp. 945, 953-54 (N.D. Ga. 1984); Gerace v. Utica Veal Co., 580 F. Supp. 1465, 1468 (N.D.N.Y. 1984); Jensen v. E.F. Hutton & Co., 1983-84 FED. SEC. L. REP. (CCH) ¶ 99,674 at 97,713 (C.D. Cal. Jan. 26, 1984); Swanson v. Wabash, Inc., 577 F. Supp. 1308, 1318 (N.D. Ill. 1983); Dakis v. Chapman, 574 F. Supp. 757, 761 (N.D. Cal. 1983); Kitchens v. U.S. Shelter Corp., [Current Binder] FED. SEC. L. REP. (CCH) ¶ 91,838 at 90,202 (D.S.C. Oct. 26, 1984).

Two federal district courts in North Carolina have held that the provisions of civil RICO are not limited to those defendants who are in some way connected with organized crime. *See* Gilbert v. Bagley, 1983-84 FED. SEC. L. REP. (CCH) ¶ 99,483 at 96,794 (M.D.N.C. Sept. 17, 1982); Lindner v. Durham Hosiery Mills, Inc., Civil Action No. 81-1087-CIV-5 (E.D.N.C. Feb. 27, 1984), *aff'd*, 761 F.2d 162 (4th Cir. 1985); Hanover Trail, Inc. v. Jackson, Civil Action No. 82-10-CIV-5 (E.D.N.C. 1982).

An excellent discussion of the "organized crime" requirement and an impressive list of citations was offered by Judge Giles in *In re Catanella and E.F. Hutton & Co. Securities Litigation*, 583 F. Supp. 1388, 1426-30 (E.D. Pa. 1984).

18. 18 U.S.C. § 1962(a) (1976).

19. 18 U.S.C. § 1962(b) (1976).

20. 18 U.S.C. § 1962(c) (1976).

21. 18 U.S.C. § 1961(4) (1976).

Supreme Court recognized in *United States v. Turkette*,<sup>22</sup> both legitimate business entities and completely illegal organizations can qualify as "enterprises" for RICO purposes.<sup>23</sup>

The courts have indicated that an enterprise is particularly likely to be found where the enterprise alleged is a legal entity rather than an "associational enterprise," and the courts have uniformly held that such entities are appropriately alleged as RICO enterprises.<sup>24</sup>

22. *United States v. Turkette*, 452 U.S. 576 (1981).

23. *Turkette*, 452 U.S. at 581-82.

24. See, e.g., *Battlefield Builders, Inc. v. Swango*, 743 F.2d 1060, 1064 (4th Cir. 1984) (joint real estate venture as enterprise); *Alcorn County, Mississippi v. U.S. Interstate Supplies, Inc.*, 731 F.2d 1160, 1168 (5th Cir. 1984) (association of corporation and two employees as enterprise); *Bennett v. Berg*, 685 F.2d 1053, 1060-61 (8th Cir. 1982), *aff'd en banc*, 710 F.2d 1361 (8th Cir. 1983), *cert. denied sub nom. Prudential Insurance Co. v. Bennett*, 104 S. Ct. 527 (1983) (retirement village properly named as enterprise); *Lopez v. Richards*, 594 F. Supp. 488, 491 (S.D. Miss. 1984) (association of corporation and individuals); *Joseph v. Algemene Bank Nederland, N.V.*, 592 F. Supp. 141, 146 (W.D. Pa. 1984) (corporations and associations of individuals may constitute RICO enterprises); *Umstead v. Durham Hosiery Mills, Inc.*, 578 F. Supp. 342, 347 (M.D.N.C. 1984) (corporation, officers and directors may be collectively deemed an enterprise); *Kimmel v. Peterson*, 565 F. Supp. 476, 496-97 (E.D. Pa. 1983) (brokerage business as enterprise); *Gilbert v. Bagley*, 1983-84 FED. SEC. L. REP. (CCH) ¶ 99,483 at 96,795 (M.D.N.C. Sept. 17, 1982) (corporate management and corporation as enterprise).

The Fourth Circuit Court of Appeals has held that an entity or individual cannot be both the culpable "person" and the "enterprise" which is operated through a pattern of racketeering activity. *United States v. Computer Sciences Corp.*, 689 F.2d 1181, 1190 (4th Cir. 1982), *cert. denied*, 459 U.S. 1105 (1983). Although the *Computer Sciences* decision was criticized by Professor G. Robert Blakey, the author of the RICO Act, see Blakey, *The Civil RICO Fraud Action in Context: Reflections on Bennett v. Berg*, 58 NOTRE DAME LAW. 237, 325 n.181 (1983) ("*Computer Sciences* was wrongly decided, and other courts should not follow it"), it remains the law in the Fourth Circuit. See *Umstead v. Durham Hosiery Mills, Inc.*, 592 F. Supp. 1269, 1271-72 (M.D.N.C. 1984); *Grantham & Mann, Inc. v. American Safety Products, Inc.*, Civil Action No. C-83-126-D (M.D.N.C. Oct. 1, 1984). A similar rule obtains in the Ninth Circuit, see *Rae v. Union Bank*, 725 F.2d 478, 481 (9th Cir. 1984), the Third Circuit, see *B.F. Hirsch v. Enright Refining Co.*, 751 F.2d 628, 633-34 (3d Cir. 1984); *Shared Diagnostic Services Inc. v. Henningsen*, 602 F. Supp. 428, 429-30 (E.D. Pa. 1984); *Chambers Development Co. v. Browning-Ferris Industries, Inc.*, 590 F. Supp. 1528, 1541 (W.D. Pa. 1984), and the Seventh Circuit, see *Haroco, Inc. v. American Nat'l Bank & Trust Co. of Chicago*, 747 F.2d 384, 400 (7th Cir. 1984), *aff'd on other grounds* 105 S. Ct. 3291 (1985); *Ideal Stencil Machine & Tape Co. v. Merchiori*, 600 F. Supp. 185, 190 (S.D. Ill. 1985). This precedent may have a dramatic impact on a civil RICO case if the corporate defendant is the only potential defendant with the proverbial and desired "deep pocket."



### 3. "Pattern of Racketeering Activity"

Section 1962(c) of the Act, which by the authors' experience is the most frequently used subsection in civil RICO litigation, provides that it is unlawful for any person employed by or associated with an enterprise to conduct the enterprise's affairs "through a pattern of racketeering activity."<sup>25</sup> The term "pattern of racketeering activity" is defined in the Act to require "at least two acts of racketeering activity," one of which occurred after October 15, 1970 (the effective date of the statute) and the last of which occurred within ten years after the commission of a prior act of racketeering activity.<sup>26</sup> The term "racketeering activity" is defined in the Act to mean "any act which is indictable" under a laundry list of federal statutes, including mail fraud, wire fraud, interstate transportation of stolen property<sup>27</sup> and "any offense" involving "fraud in the sale of securities."<sup>28</sup>

In most business fraud cases, the alleged predicate acts will consist of mail fraud<sup>29</sup> and wire fraud.<sup>30</sup> Under the federal statutes

On the other hand, in *United States v. Hartley*, 678 F.2d 961, 988 (11th Cir. 1982), *reh'g. denied*, 688 F.2d 852 (11th Cir. 1982), *cert. denied*, 459 U.S. 1170 (1983), *cert. denied sub. nom. Treasure Isle, Inc. v. U.S.*, 459 U.S. 1183 (1984), the Eleventh Circuit held that a corporation may simultaneously be the RICO "enterprise" and the "person" who violates the Act. A solution to this dichotomy was offered by the district court in *Bernstein v. IDT Corp.*, 582 F. Supp. 1079 (D. Del. 1984), where it concluded that two corporate officers could violate § 1962(c) of the Act by conducting the affairs of an enterprise (the corporation itself) through a pattern of racketeering activity and that the corporation could be liable for their acts under Section 1962(c) on a theory of respondeat superior or agency. *Id.* at 1083.

25. 18 U.S.C. § 1962(c) (1976).

26. 18 U.S.C. § 1961(5) (1976).

27. 18 U.S.C. § 1961(1)(B) (1976).

28. 18 U.S.C. § 1961(1)(D) (1976).

29. The federal mail fraud statute provides:

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious coin, obligation, security or other article, . . . for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or takes or receives therefrom, any such matter or thing, or know-

proscribing such conduct, the elements are (1) a scheme designed to defraud or to obtain money or property by false pretenses; and (2) use of the mails or interstate wires (including interstate telephone calls) in furtherance of the fraudulent scheme.<sup>31</sup> The mailing or the interstate wire communications must be for the purpose of executing the scheme to defraud but it is not necessary that the scheme contemplate the use of mails or wires as an essential element.<sup>32</sup> Under these statutes defendants must use the mails or wires or *cause* those instrumentalities to be used; they need not, however, be directly involved themselves in their actual use.<sup>33</sup> Moreover, these statutes do not require that the mailing or the

ingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than \$1,000 or imprisoned not more than five years, or both.

18 U.S.C. § 1341 (1976).

30. The federal wire fraud statute provides:

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined not more than \$1,000 or imprisoned not more than five years, or both.

18 U.S.C. § 1343 (1976).

31. 18 U.S.C. §§ 1341, 1343 (1982). *See, e.g.*, *United States v. Blecker*, 657 F.2d 629, 636 (4th Cir. 1981), *cert. denied*, 454 U.S. 1150 (1982); *Bennett v. E.F. Hutton Co.*, 597 F. Supp. 1547, 1560 (N.D. Ohio 1984); *Maxwell v. Southwest National Bank*, 593 F. Supp. 250, 257 (D. Kan. 1984); *B.F. Hirsch, Inc. v. Enright Refining Co.*, 577 F. Supp. 339, 347 (D.N.J. 1983), *aff'd in part and vacated in part*, 751 F.2d 628 (3d Cir. 1984); *Austin v. Merrill Lynch, Pierce, Fenner & Smith*, 570 F. Supp. 667, 669 (W.D. Mich. 1983).

Because both §§ 1341 and 1343 outlaw the use of such facilities for the purpose of executing the scheme or artifice to defraud, the courts have indicated that the statutes are *in pari materia* and are to be given similar construction. *See, e.g.*, *United States v. Cusino*, 694 F.2d 185, 187 n.1 (9th Cir. 1982), *cert. denied*, 461 U.S. 932 (1983).

32. *Pereira v. United States*, 347 U.S. 1, 8 (1954). A helpful overview of the federal mail and wire fraud statutes may be found in Buckley, *Corporate Criminal Liability: A Primer for Corporate Counsel*, 40 BUS. LAW. 129, 149-50 (Nov. 1984).

33. *United States v. Roemer*, 703 F.2d 805, 806 n.1 (5th Cir.), *reh'g denied*, 707 F.2d 515 (5th Cir.), *cert. denied*, 104 S. Ct. 341 (1983); *United States v. Johnson*, 700 F.2d 163, 177 (5th Cir.), *aff'd in part, rev'd in part*, 718 F.2d 1317 (5th Cir. 1983).

wire communication be made directly to the victim of the scheme.<sup>34</sup>

Finally, it should be noted that for purposes of the RICO Act, each act of criminal activity committed by defendants is counted as an act of racketeering activity, even if numerous acts arose out of the same criminal episode.<sup>35</sup>

Until recently, the courts had uniformly permitted civil RICO plaintiffs to bring suit without requiring proof that defendants had previously been convicted of the underlying predicate act of offenses.<sup>36</sup> In *Sedima, S.P.R.L. v. Imrex Co.*,<sup>37</sup> a panel of the Second Circuit Court of Appeals held that a prior criminal conviction is a prerequisite to the maintenance of a civil RICO action. District court decisions after *Sedima* were split on whether its reasoning is persuasive,<sup>38</sup> and the Supreme Court, reversing *Sedima*, held that

34. *United States v. Johnson*, 700 F.2d at 177. If, as part of their scheme to defraud, defendants caused mailings to be sent to persons other than the plaintiffs in the civil RICO case, evidence of such other mailings should be admissible at trial under the provisions of FED. R. EVID. 404(b):

*Other crimes, wrongs, or acts.* Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

*See, e.g., United States v. Roylance*, 690 F.2d 164, 168 (10th Cir. 1982); *United States v. Kovic*, 684 F.2d 512, 515 (7th Cir.), *cert. denied*, 459 U.S. 972 (1982).

35. *United States v. Weatherspoon*, 581 F.2d 595, 601-02 (7th Cir. 1978) (each mailing in furtherance of a scheme to defraud counts as an act of racketeering activity); *In re Action Industries Tender Offer*, 572 F. Supp. 846, 849 (E.D. Va. 1983); *Noland v. Gurley*, 566 F. Supp. 210, 217 (D. Colo. 1983); *Harper v. New Japan Securities Int'l*, 545 F. Supp. 1002, 1004 (C.D. Cal. 1982).

36. *Bunker Ramo Corp. v. United Business Forms, Inc.*, 713 F.2d 1272, 1287 (7th Cir. 1983); *USACO Coal Co. v. Carbomin Energy*, 689 F.2d 94, 95 n.1 (6th Cir. 1982); *United States v. Cappelto*, 502 F.2d 1351, 1356-57 (7th Cir. 1974), *cert. denied*, 420 U.S. 925 (1975); *In re Longhorn Securities Litigation*, 573 F. Supp. 255, 270 (W.D. Okla. 1983); *State Farm Fire & Casualty Insurance Co. v. Estate of Caton*, 540 F. Supp. 673, 675 (N.D. Ind. 1982); *Parnes v. Heinold Commodities, Inc.*, 487 F. Supp. 645, 647 (N.D. Ill. 1980); *Farmers Bank of Delaware v. Bell Mortgage Corp.*, 452 F. Supp. 1278, 1280 (D. Del. 1978).

37. *Sedima, S.P.R.L. v. Imrex Co.*, 741 F.2d 482 (2d Cir. 1984), *rev'd*, 105 S. Ct. 3275 (1985).

38. The Second Circuit's decision in *Sedima* was followed in *Rooney Pace, Inc. v. Reid*, [Current Binder] FED. SEC. L. REP. (CCH) ¶ 91,984 at 90,894 (S.D.N.Y. Mar. 22, 1985); *McCarthy v. Pacific Loan, Inc.*, 600 F. Supp. 137, 140 (D. Hawaii 1984); *Gardner v. Surnamer*, 599 F. Supp. 477, 479 (E.D. Pa. 1984); *Bernstein v. Bank Leumi Le-Israel B.M.*, 598 F. Supp. 922, 925 (E.D. Pa. 1984); *Viola v. Bensalem Township*, 601 F. Supp. 1086, 1091 (E.D. Pa. 1984); *Berg v.*

a prior criminal conviction is not a necessity.<sup>39</sup>

In a civil RICO action the plaintiff is required to plead and prove the existence of both an "enterprise" and a "pattern of racketeering activity."<sup>40</sup>

### C. Available Remedies

#### 1. Treble Damages and Attorney's Fees

As noted above, § 1964(c) of the RICO Act expressly provides a treble damage remedy to any person injured in his business or property by reason of a violation of § 1962 of the Act. Further, in

First American Bankshares, Inc., 599 F. Supp. 500, 505-06 (D.D.C. 1984); Terre du Lac Ass'n v. Terre du Lac, Inc., 601 F. Supp. 257, 261 (E.D. Mo. 1984) and Atlantic Fed. Sav. & Loan Ass'n v. Dade Savings & Loan Ass'n, 592 F. Supp. 1089, 1093 (S.D. Fla. 1984). District court decisions in which *Sedima* was rejected include Ross v. Omnibusch, Inc., 607 F. Supp. 835, 840-41 (W.D. Mich. 1984); James v. Meinke, 606 F. Supp. 125, 127 (N.D. Tex. 1984); Witt v. Merrill Lynch, Pierce, Fenner & Smith, 602 F. Supp. 867, 868-69 (W.D. Pa. 1985); Poling v. Morgan, 598 F. Supp. 686, 690 (D. Ariz. 1984); Bennett v. E.F. Hutton Co., 597 F. Supp. 1547, 1556-58 (N.D. Ohio 1984); Kitchens v. U.S. Shelter Corp., [Current Binder] FED. SEC. L. REP. (CCH) ¶ 91,838 at 90,202 (D.S.C. Oct. 26, 1984); Grado v. Gross, 1984 FED. SEC. L. REP. (CCH) ¶ 91,660 at 99,336 (D. Mass. Aug. 20, 1984) and Ora Corp. v. Vinson, 596 F. Supp. 1546, 1548 (D.S.C. 1984).

39. *Sedima, S.P.R.L. v. Imrex Co.*, 105 S. Ct. 3275, 3281-84 (1985).

40. *Kimmel v. Peterson*, 565 F. Supp. 476, 495-96 (E.D. Pa. 1983). As the Supreme Court observed in the criminal RICO context, "[t]he 'enterprise' is not the 'pattern of racketeering activity;' it is an entity separate and apart from the pattern of activity in which it engages. The existence of an enterprise at all times remains a separate element which must be prove[n] . . ." *United States v. Turkette*, 452 U.S. 576, 583 (1981). See also *Bennett v. E.F. Hutton Co., Inc.*, 597 F. Supp. 1547, 1559 (N.D. Ohio 1984); *Mazza v. Kozel*, 591 F. Supp. 432, 439 (N.D. Ohio 1984).

An example of how this requirement is interpreted is provided by *Kimmel*, a civil RICO action brought by plaintiffs against various defendants, including a brokerage firm, the alleged predicate acts being securities fraud. The court held that the complaint, which alleged that the brokerage firm was the "enterprise" and that the "pattern of racketeering activity" was an ongoing scheme of securities fraud perpetrated by the various individual defendants, all of whom were associated with the brokerage firm, sufficiently alleged the existence of a distinct "enterprise." Judge Giles noted that "if the predicate acts of securities fraud were eliminated, [the brokerage] still had an ongoing structure as a brokerage house . . ." *Kimmel v. Peterson*, 565 F. Supp. at 497.

In some cases, however, the courts have recognized that the proof used to establish the pattern of racketeering activity may "coalesce" with the proof offered to establish the enterprise element of RICO. See, e.g., *United States v. Mazzei*, 700 F.2d 85, 89 (2d Cir. 1983), cert. denied, 461 U.S. 945 (1983).

addition to treble damages the injured person is entitled to recover the cost of the suit, including a reasonable attorney's fee.<sup>41</sup>

## 2. Equitable Relief

The federal courts are divided on the issue of whether a federal court may award equitable relief in the form of an injunction in a civil RICO case. Section 1964(b) of the Act provides that the Attorney General may institute RICO proceedings and that subsection also provides that a district court "may at any time enter such restraining order and prohibition or take such other actions, including the acceptance of satisfaction performance bonds, as it shall deem proper."<sup>42</sup> In contrast, § 1964(c) of the Act, which grants private parties a civil RICO action, is silent as to injunctive relief.<sup>43</sup> Because of this contrasting language, several courts have opined that injunctive relief is not available to private claimants under the RICO Act.<sup>44</sup> The opposite view of § 1964(c), however,

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41. 18 U.S.C. § 1964(c) (1976). In *Aetna Casualty & Surety Co. v. Liebowitz*, 730 F.2d 905 (2d Cir. 1984), the Second Circuit held that attorney's fees could not be awarded to a party in a civil RICO action which had obtained a preliminary injunction and then favorably settled the case. The court noted that the RICO Act was patterned in part after the antitrust laws and that when RICO was enacted in 1970 it was well settled that attorney's fees could not be awarded in antitrust actions in which injunctive relief was sought. It further noted that although Congress subsequently chose to amend Section 4 of the Clayton Act to include a fee-shifting provision it did not similarly amend Section 1964(c) of the RICO Act. The court found that it was bound by the legislative intent that existed when RICO was enacted and would not speculate as to what the current Congress would do. *Id.* at 909. In *James v. Meinke*, [Current Binder] FED. SEC. L. REP. (CCH) ¶ 91,933 at 90,648 (N.D. Tex. Dec. 28, 1984), a proceeding to set attorney's fees in a civil RICO case, the court, because of the highly complex nature of such litigation, increased the hourly rate of plaintiff's counsel by a contingency multiplier of two and further enhanced the fee award by a factor of 1.5. *Id.* at 90,649-50.

42. 18 U.S.C. § 1964(b) (1976).

43. 18 U.S.C. § 1964(c) (1976).

44. *Dan River, Inc. v. Icahn*, 701 F.2d 278, 290 (4th Cir. 1983) (injunctive relief probably not available to private plaintiffs); *DeMent v. Abbott Capital Corp.*, 589 F. Supp. 1378, 1382-84 (N.D. Ill. 1984) (injunctive relief not available); *Miller v. Affiliated Fin. Corp.*, 600 F. Supp. 987, 994 (N.D. Ill. 1984) (same). See also *Trane Co. v. O'Connor Securities*, 718 F.2d 26, 28-29 (2d Cir. 1983) (provisional relief available if likelihood of irreparable harm demonstrated, but the court doubts the propriety of a private party receiving final injunctive relief under the Act); *Bennett v. Berg*, 685 F.2d 1053, 1064 (8th Cir. 1982), *aff'd en banc*, 710 F.2d 1361 (8th Cir.), *cert. denied sub nom. Prudential Ins. Co. of Am. v. Bennett*, 104 S. Ct. 527 (1983) ("we do not reach the difficult question whether, under such

has been taken by several other courts.<sup>45</sup>

### 3. *Divestiture and Dissolution*

If a violation of § 1962 of the RICO Act is found, defendants may be divested of any interest which they hold in the enterprise.<sup>46</sup> Those businesses under the ownership or control of the defendants may be enjoined from further business activity,<sup>47</sup> including possi-

facts as may be developed in this case, this equitable relief is available to private plaintiffs pursuant to 18 U.S.C. § 1964 and, if not, whether such relief may be granted under the court's general equitable powers").

45. See, e.g., *Aetna Casualty & Surety Co. v. Liebowitz*, 730 F.2d 905, 909 (2d Cir. 1984) (availability of preliminary injunctive relief for private plaintiff not questioned); *USACO Coal Co. v. Carbomin Energy*, 689 F.2d 94, 96 (6th Cir. 1982) (provisional equitable relief permissible); *Chambers Development Co. v. Brown-Ferris Industries, Inc.*, 590 F. Supp. 1528, 1540-41 (W.D. Pa. 1984) (equitable relief is available to private parties under RICO).

In a few civil RICO cases the federal courts have exercised their inherent equitable powers and granted injunctive relief to a private claimant. See, e.g., *Vietnamese Fishermen's Ass'n v. Knights of Ku Klux Klan*, 518 F. Supp. 993 (S.D. Tex. 1981). This view has also been advanced by several commentators. See generally, J. Fricano, *Civil RICO—An Antitrust Plaintiff's Considerations*, 1 CURRENT PROBLEMS IN FEDERAL CIVIL PRACTICE 827-28 (Prac. Law. Inst. 1983); Blakey & Gettings, *Racketeer Influenced and Corrupt Organizations: Basic Concepts—Criminal and Civil Remedies*, 53 TEMPLE L.Q. 1009, 1038 n.133 (1980). An excellent discussion of both sides of this issue was recently offered by Judge Sarokin in *McClendon v. Continental Group, Inc.*, 602 F. Supp. 1492, 1518-19 (D.N.J. 1985) See also Note, *The Availability of Equitable Relief in Civil Causes of Action in RICO*, 59 NOTRE DAME LAW. 945 (1984).

46. 18 U.S.C. § 1964(a) (1976 & Supp. 1983). This statutory provision states: The district courts of the United States shall have jurisdiction to prevent and restrain violations of section 1962 of this chapter by issuing appropriate orders, including, but not limited to: ordering any person to divest himself of any interest, direct or indirect, in any enterprise; imposing reasonable restrictions on the future activities or investments of any person, including, but not limited to, prohibiting any person from engaging in the same type of endeavor as the enterprise engaged in, the activities of which affect interstate or foreign commerce; or ordering dissolution or reorganization of any enterprise, making due provision for the rights of innocent persons.

See, e.g., *United States v. Cappelto*, 502 F.2d 1351, 1359 (7th Cir. 1974), cert. denied, 420 U.S. 925 (1975); *United States v. Barber*, 668 F.2d 778 (4th Cir.), cert. denied, 459 U.S. 829 (1982).

In one civil RICO case where the authors represented plaintiffs and sought divestiture and dissolution, however, they encountered strong judicial resistance to the notion that the corporate "enterprise" should be dissolved.

47. 18 U.S.C. § 1964(a) (1976 & Supp. 1983). See, e.g., *Aetna Casualty &*

ble dissolution or reorganization.<sup>48</sup>

## II. APPLICABILITY OF CIVIL RICO TO BUSINESS ORIENTED CASES

Because of its broad language and potentially broad applicability, it is not surprising that practitioners have brought civil RICO claims in a wide variety of cases. Among the areas of the law in which civil RICO has been alleged are breaches of corporate fiduciary duty,<sup>49</sup> commercial fraud,<sup>50</sup> securities fraud,<sup>51</sup> real estate

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Surety Co. v. Liebowitz, 730 F.2d 905, 909 (2d Cir. 1984); Trane Co. v. O'Connor Securities, 718 F.2d 26, 28 (2d Cir. 1983); USACO Coal Co. v. Carbomin Energy, 689 F.2d 94, 96 (6th Cir. 1982); Marshall Field & Co. v. Icahn, 537 F. Supp. 413, 418 (S.D.N.Y. 1982); Ashland Oil, Inc. v. Gleave, 540 F. Supp. 81, 85 (W.D.N.Y. 1981); Vietnamese Fishermen's Ass'n v. Knights of Ku Klux Klan, 518 F. Supp. 993, 1014 (S.D. Tex. 1981).

48. 18 U.S.C. § 1964(a) (1976 & Supp. 1983). See, e.g., Bennett v. Berg, 685 F.2d 1053, 1064 (8th Cir. 1982), *aff'd en banc*, 710 F.2d 1361 (8th Cir.), *cert. denied sub nom.* Prudential Ins. Co. of Am. v. Bennett, 104 S. Ct. 527 (1983); County of Cook v. Lynch, 560 F. Supp. 136, 139 (N.D. Ill. 1982).

49. See, e.g., Bernstein v. Bank Leumi Le-Israel, B.M., 598 F. Supp. 922 (E.D. Pa. 1984) (action by shareholders); Berg v. First American Bankshares, Inc., 599 F. Supp. 500 (D.D.C. 1984) (corporate merger); Umstead v. Durham Hosiery Mills, Inc., 592 F. Supp. 1269 (M.D.N.C. 1984) (minority shareholder squeeze-out); Joseph v. Algemene Bank Nederland, N.V., 592 F. Supp. 141 (W.D. Pa. 1984) (corporate merger); Swanson v. Wabash, Inc., 577 F. Supp. 1308 (N.D. Ill. 1983) (tender offer).

50. See, e.g., Haroco, Inc. v. Am. Nat'l Bank & Trust Co. of Chicago, 747 F.2d 384 (7th Cir. 1984), *aff'd*, 105 S. Ct. 3291 (1985) (lending discrimination); Alexander Grant & Co. v. Tiffany Industries, Inc., 742 F.2d 408 (8th Cir. 1984) (audit fraud); Seville Indus. Mach. Corp. v. Southmost Mach. Corp., 742 F.2d 786 (3d Cir. 1984) (breach of contract); Sedima, S.P.R.L. v. Imrex Co. Inc., 741 F.2d 482 (2d Cir. 1984), *rev'd*, 105 S. Ct. 3275 (1985) (import fraud); Bankers Trust Co. v. Rhoades, 741 F.2d 511 (2d Cir. 1984) (bankruptcy fraud); Alcorn County, Miss. v. U.S. Interstate Supplies, Inc., 731 F.2d 1160 (5th Cir. 1984) (office supply contract bidding fraud); Owl Construction Co. v. Ronald Adams Contractor, Inc., 727 F.2d 540 (5th Cir. 1984), *cert. denied*, 105 S. Ct. 118 (1984) (breach of construction contract); Bunker Ramo Corp. v. United Business Forms, Inc., 713 F.2d 1272 (7th Cir. 1983) (false purchase order fraud); Poling v. Morgan, 598 F. Supp. 686 (D. Ariz. 1984) (fraud in sale of mobile home); Ora Corp. v. Vinson, 596 F. Supp. 1546 (D.S.C. 1984) (dispute between competitors); Maxwell v. Southwest Nat'l Bank, 593 F. Supp. 250 (D. Kan. 1984) (action against bank for allegedly defrauding heirs and legatees out of estate); Wilcox Dev. Co. v. First Interstate Bank of Oregon, 590 F. Supp. 445 (D. Or. 1984) (prime rate lending discrimination); Slattery v. Costello, 586 F. Supp. 162 (D.D.C. 1983) (executive employment agency fraud); Morosani v. First National Bank of Atlanta, 581 F. Supp. 945 (N.D. Ga. 1984) (prime rate lending discrimination); Gerace v. Utica Veal Co., 580 F. Supp. 1465 (N.D.N.Y. 1984) (slaughterhouse operation).

fraud<sup>52</sup> and antitrust.<sup>53</sup>

### A. *Judicially-Imposed Limitations on Civil RICO Actions*

Perhaps in response to these widespread attempts to apply the civil damage provisions of the RICO Act to all types of business fraud, a number of federal courts have attempted to erect barriers to such actions. These barriers have taken the form of requiring plaintiffs to plead and prove what has been termed a "racketeering enterprise injury" or a "competitive injury."

#### 1. *"Racketeering Enterprise Injury"*

As noted above, § 1964(c) of the Act requires a civil RICO plaintiff's injuries to be "by reason of" a violation of § 1962 of the Act in order to be compensable.<sup>54</sup> Relying on this statutory language, a number of courts had reasoned that civil RICO plaintiffs should be required to plead and prove that they have sustained a "racketeering enterprise injury," that is, an injury beyond defen-

51. See, e.g., *Moss v. Morgan Stanley, Inc.*, 719 F.2d 5 (2d Cir. 1983), *cert. denied sub nom. Moss v. Newman*, 104 S. Ct. 1280 (1984) (tender offer); *Bennett v. E.F. Hutton & Co.*, 597 F. Supp. 1547 (N.D. Ohio 1984) (commodities fraud and grand theft); *Lopez v. Dean Witter Reynolds, Inc.*, 591 F. Supp. 581 (N.D. Cal. 1984) (churning); *Mazza v. Kozel*, 591 F. Supp. 432 (N.D. Ohio 1984) (joint venture); *Wilcox v. Ho-Wing Sit*, 586 F. Supp. 561 (N.D. Cal. 1984) (stock option trading); *Hulse v. Hale Farms Dev. Corp.*, 586 F. Supp. 120 (D. Conn. 1984) (limited partnerships); *In re Catanella and E.F. Hutton & Co. Sec. Litig.*, 583 F. Supp. 1388 (E.D. Pa. 1984) (churning); *Warner Communications, Inc. v. Murdoch*, 581 F. Supp. 1482 (D. Del. 1984) (corporate takeover); *Yancoski v. E.F. Hutton & Co.*, 581 F. Supp. 88 (E.D. Pa. 1983) (churning); *Eacho v. N.D. Resources, Inc.*, 1983-84 FED. SEC. L. REP. (CCH) ¶ 99,690 (D.D.C. Feb. 2, 1984) (gold and silver investments); *Jensen v. E.F. Hutton & Co.*, 1983-84 FED. SEC. L. REP. (CCH) ¶ 99,674 (C.D. Cal. Jan. 26, 1984) (churning).

52. See, e.g., *Battlefield Builders, Inc. v. Swango*, 743 F.2d 1060 (4th Cir. 1984) (extortion); *Lopez v. Richards*, 594 F. Supp. 488 (S.D. Miss. 1984) (land purchase option fraud); *Serig v. South Cook County Service Corp.*, 581 F. Supp. 575 (N.D. Ill. 1984) (joint development venture).

53. *Chambers Dev. Co. v. Browning-Ferris Indus., Inc.*, 590 F. Supp. 1528 (W.D. Pa. 1984) (attempt to monopolize); *Wilcox Dev. Co. v. First Interstate Bank of Oregon*, 97 F.R.D. 440 (D. Or. 1983) (horizontal and vertical price-fixing); *Waterman Steamship Corp. v. Avondale Shipyards, Inc.*, 527 F. Supp. 256 (E.D. La. 1981) (attempt to monopolize); *Municipality of Anchorage v. Hitachi Cable, Ltd.*, 547 F. Supp. 633 (D. Alaska 1982) (Robinson-Patman Act violations); *City of Atlanta v. Ashland-Warren, Inc.*, 1981-82 TRADE CAS. (CCH) ¶ 64,527 (N.D. Ga. Aug. 20, 1981) (same).

54. 18 U.S.C. § 1964(c) (1976).



dant's predicate acts, in order to have standing to assert a claim for damages. The courts requiring a "racketeering enterprise injury" relied upon the theory that Congress could not have intended to provide treble damage causes of action to persons whose only injury stems directly from the predicate acts alone, and that it is simply incomprehensible that a plaintiff suing under the securities laws would receive one-third the damages of a plaintiff suing under RICO for the same injury.<sup>55</sup> The courts which adopted this standing requirement, however, did not present a clear definition of exactly what it is,<sup>56</sup> and a number of courts refused to recognize it because it cannot be defined.<sup>57</sup> Other courts rejected this standing barrier because they find its imposition to be unsupported by the language of the statute.<sup>58</sup> The issue was resolved when the Su-

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55. In an often-quoted remark, the court stated in *Landmark Sav. & Loan Ass'n v. Loeb Rhoades, Hornblower & Co.*, 527 F. Supp. 206, 208 (E.D. Mich. 1981), that the civil RICO injury must be "something more or different than injury from the predicate acts." See also *Lopez v. Dean Witter Reynolds, Inc.*, 591 F. Supp. 581, 586-88 (N.D. Cal. 1984); *Harper v. New Japan Securities International, Inc.*, 545 F. Supp. 1002, 1007-08 (C.D. Cal. 1982). District court decisions in which it was squarely held that a plaintiff must prove "something more" or a "racketeering enterprise injury" were collected by the Seventh Circuit in *Haroco, Inc. v. American Nat'l Bank & Trust Co. of Chicago*, 747 F.2d 384, 388 n.4 (7th Cir. 1984), *aff'd*, 105 S. Ct. 3291 (1985).

56. Indeed, instead of defining a "racketeering enterprise injury" at least two district courts have refused to do so, insisting only that they would know a "racketeering enterprise injury" if they saw one and citing by analogy Justice Stewart's now classic definition of pornography, see, *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring). *Willamette Savings & Loan Ass'n v. Blake & Neal Finance Co.*, 577 F. Supp. 1415, 1430 (D. Or. 1984); *Waste Recovery Corp. v. Mahler*, 566 F. Supp. 1466, 1468-69 (S.D.N.Y. 1983).

57. See, e.g., *Seville Industrial Machinery Corp. v. Southmost Machinery Corp.*, 567 F. Supp. 1146, 1157 (D.N.J. 1983), *aff'd in part and rev'd in part, both on other grounds*, 742 F.2d 786 (3d Cir. 1984), *cert. denied*, 105 S. Ct. 1179 (1985); *McClendon v. Continental Group, Inc.*, 602 F. Supp. 1492, 1512-16 (D.N.J. 1985); *Eisenberg v. Gagnon*, 564 F. Supp. 1347, 1352-53 (E.D. Pa. 1983); *Crocker Nat'l Bank v. Rockwell Int'l Corp.*, 555 F. Supp. 47, 49-50 (N.D. Cal. 1982); *American Nursing Care of Toledo, Inc. v. Leisure*, [Current Binder] FED. SEC. L. REP. (CCH) ¶ 91,978 at 90,870 (N.D. Ohio Nov. 15, 1984). In *Slattery v. Costello*, 586 F. Supp. 162, 166-67 (D.D.C. 1983), a particularly enlightening opinion, Judge Sirica explored the many possible definitions of a "racketeering enterprise injury" and effectively refuted each permutation.

58. See, e.g., *Bennett v. Berg*, 685 F.2d 1053, 1064 (8th Cir. 1982), *aff'd en banc*, 710 F.2d 1361 (8th Cir.), *cert. denied sub nom.* *Prudential Insurance Co. v. Bennett*, 104 S. Ct. 527 (1983) ("Insofar as the door of the federal courthouse is similarly opened by RICO in a civil context, we are cautioned by the Supreme Court that broad Congressional action would not be restricted by the courts in

preme Court ruled in *Sedima*<sup>59</sup> that standing to bring a civil RICO action is not conditioned upon the showing that plaintiff has suffered a "racketeering injury" separate from the injury caused by the predicate acts.<sup>60</sup>

## 2. "Competitive Injury"

Similarly, several federal courts have used the "by reason of" language of § 1964(c) of the Act to create another standing restriction by requiring that a plaintiff plead and prove a "competitive" or "commercial" injury. In order to interpret the phrase "by reason of," these courts have looked to the antitrust laws and relied heavily upon the Supreme Court's decision in the *Brunswick Corp. v. Pueblo Bowl-o-Mat, Inc.* case.<sup>61</sup> In *Brunswick* the Supreme Court construed the statutory language "by reason of anything forbidden in the antitrust laws"<sup>62</sup> to mean that plaintiff must prove "anti-

the name of federalism. It is beyond our authority to restrict the reach of the statute."); *Butler Mfg. Co. v. Convey-All, Inc.*, 605 F. Supp. 1203, 1205 (N.D. Ala. 1985); *Berg v. First American Bankshares, Inc.*, 599 F. Supp. 500, 505 (D.D.C. 1984); *Bennett v. E.F. Hutton & Co.*, 597 F. Supp. 1547, 1558 (N.D. Ohio 1984); *Ora Corp. v. Vinson*, 596 F. Supp. 1546, 1549 (D.S.C. 1984); *Joseph v. Algemene Bank Nederland, N.V.*, 592 F. Supp. 141, 147 (W.D. Pa. 1984); *Chambers Dev. Co. v. Browning-Ferris Industries, Inc.*, 590 F. Supp. 1528, 1540 (W.D. Pa. 1984); *Hulse v. Hale Farms Development Corp.*, 586 F. Supp. 120, 121-22 (D. Conn. 1984) ("there is simply no basis for imposing a judicially-created standing requirement limiting recovery under § 1964(c) to businessmen, or those suffering from an undefined 'racketeering enterprise' injury, since nothing in the statute or legislative history authorizes such a limitation.").

Counsel's attention is directed to the excellent analysis of the "racketeering enterprise injury" requirement and the reasons why it should not be imposed offered by Judge Mazzone in *Econo-Car International, Inc. v. Agency Rent-a-Car, Inc.*, 589 F. Supp. 1368, 1373-78 (D. Mass. 1984). See also *In re Catanella and E.F. Hutton & Co. Sec. Litig.*, 583 F. Supp. 1388, 1434-37 (E.D. Pa. 1984).

59. *Sedima, S.P.R.L. v. Imrex Co.*, 105 S. Ct. 3275 (1985).

60. *Id.* at 3284-87. In so holding, the Supreme Court noted the difficulty which the lower courts had had defining and applying the concept of a "racketeering injury." Justice White commented that "[t]he evident difficulty in discerning just what the racketeering injury requirement consists of would make it rather hard to apply in practice or explain to a jury." *Id.* at 3285 n.12.

61. *Brunswick Corp. v. Pueblo Bowl-o-Mat, Inc.*, 429 U.S. 477 (1977).

62. Section 4 of the Clayton Act, 15 U.S.C. § 15(a) (1976), provides:

[A]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained,

trust injury."<sup>63</sup> Following by analogy the *Brunswick* Court's requirement of antitrust injury and examining the legislative history of the RICO Act, several district courts in civil RICO cases have restricted the reach of the statute to those plaintiffs that have been "competitively" injured by the pattern of racketeering activity.<sup>64</sup>

Under the majority view, however, the imposition of such a standing barrier is contrary to the purpose of the statute. These courts reject the analogy to the antitrust laws and observe that by relying on the antitrust statutes, the courts imposing the competitive injury barrier have ignored RICO's overriding objective, which is to strike "a mortal blow against the property interest of organized crime."<sup>65</sup> Further, while the purpose of the antitrust laws is the promotion of competition, the RICO Act was designed to cause the economic ruin of an enterprise which operates through a pattern of racketeering activity.<sup>66</sup> Accordingly, most courts consider-

and the cost of suit, including a reasonable attorney's fee . . . .

63. The *Brunswick* Court stated that:

[For] plaintiffs to recover treble damages on account of § 7 violations, they must prove more than injury causally linked to an illegal presence in the market. Plaintiffs must prove *antitrust* injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful. The injury should reflect the anticompetitive effect either of the violation or of anticompetitive acts made possible by the violation.

429 U.S. at 489 (original emphasis).

64. See, e.g., *Van Schaick v. Church of Scientology of California*, 535 F. Supp. 1125, 1135-37 (D. Mass. 1982); *North Barington Development v. Fanslow*, 547 F. Supp. 207, 211 (N.D. Ill. 1980); *Harper v. New Japan Securities Int'l Inc.*, 545 F. Supp. 1002, 1007-08 (C.D. Cal. 1982); *Miller v. Affiliated Financial Corp.*, 600 F. Supp. 987, 993-94 (N.D. Ill. 1984); *Banowitz v. State Exchange Bank*, 600 F. Supp. 1466, 1470 (N.D. Ill. 1985); *O'Donnell v. Kuser*, 602 F. Supp. 619, 622 (N.D. Ill. 1985); *Platsis v. E.F. Hutton & Co.*, [Current Binder] FED. SEC. L. REP. (CCH) ¶ 91,963 at 90,805 (W.D. Mich. Jan. 11, 1985); *Kitchens v. U.S. Shelter Corp.*, [Current Binder] FED. SEC. L. REP. (CCH) ¶ 91,838 at 90,198 (D.S.C. Oct 26, 1984). See also *Bridges, RICO Litigation Based on Fraud in the Sale of Securities*, 18 GA. L. REV. 43, 69 (1983) (bond between RICO Act and antitrust remedies is fundamental and broad).

65. *Schacht v. Brown*, 711 F.2d 1343, 1357-58 (7th Cir.), cert. denied, 104 S. Ct. 509 (1983) (quoting 116 CONG. REC. S602 (1970) (remarks of Sen. Hruska)).

66. The Eighth Circuit Court of Appeals has observed that the purpose of the antitrust statutes is conceivably in direct conflict with that of the RICO Act because "to ruin an antitrust defendant, usually a legitimate businessman, would generally lessen competition and increase concentration in a particular industry." *Bennett v. Berg*, 685 F.2d 1053, 1059 (8th Cir. 1982), aff'd en banc, 710 F.2d 1361 (8th Cir.), cert. denied sub nom. *Prudential Insurance Co. v. Bennett*, 104 S. Ct.

ing the question have rejected the imposition of a "competitive injury" barrier.<sup>67</sup>

### III. PLEADING AND PRACTICE IN CIVIL RICO CASES

Bringing a civil RICO claim involves a number of problems which practitioners do not face in "ordinary" business or commercial fraud cases. Among these problems is that of settlement; from the authors' experience the effect of lodging a civil RICO claim is to end, for all intents and purposes, any reasonable expectation of settlement.<sup>68</sup> Moreover, civil RICO litigation imposes numerous pleading and practice barriers as set forth below.

#### A. *Pleading Civil RICO*

Counsel drafting complaints in civil RICO actions in which mail fraud, wire fraud and fraud in the sale of securities compose the alleged predicate acts must be mindful of Rule 9(b),<sup>69</sup> which requires that in all averments of fraud the circumstances constitut-

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527 (1983). See also *Econo-Car International, Inc. v. Agency Rent-a-Car, Inc.*, 589 F. Supp. 1368, 1373-78 (D. Mass. 1984) ("RICO has the opposite purpose [from the antitrust laws]. It is primarily designed to *ruin* those individuals and enterprises it is aimed at. It is not designed to increase their efficiency or protect them from insolvency. Thus, the rationale behind the antitrust standing concerns have no applicability here.") (emphasis in original).

67. See, e.g., *Bunker Ramo Corp. v. United Business Forms, Inc.*, 713 F.2d 1272, 1288 (7th Cir. 1983); *Bennett v. Berg*, 685 F.2d 1053, 1059 (8th Cir. 1982), *aff'd en banc*, 710 F.2d 1361 (8th Cir.), *cert. denied sub nom. Prudential Insurance Co. v. Bennett*, 104 S. Ct. 527 (1983); *Econo-Car International, Inc. v. Agency Rent-a-Car, Inc.*, 589 F. Supp. 1368, 1373-78 (D. Mass. 1984) (setting forth excellent and thorough refutation of the supposed analogy between the RICO Act and the antitrust laws); *Slattery v. Costello*, 586 F. Supp. 162, 166 (D.D.C. 1983); *Crocker National Bank v. Rockwell Int'l Corp.*, 555 F. Supp. 47, 49 (N.D. Cal. 1982); *In re Catanella and E.F. Hutton & Co. Sec. Litig.*, 583 F. Supp. 1388, 1431-34 (E.D. Pa. 1984) (collecting cases).

The requirement of a "competitive injury" was not before the Supreme Court in *Sedima*, 105 S. Ct. 3275. While the district court had held that plaintiff's complaint was defective because of its failure to allege either some sort of distinct "racketeering injury" or a "competitive injury," *Sedima*, 574 F. Supp. 963, 965 (S.D.N.Y. 1983), the Second Circuit based its holding on the failure to allege a "racketeering injury." *Sedima*, 741 F.2d 482, 494 (2d Cir. 1984).

68. While counsel representing plaintiffs in civil RICO cases may derive some understandable pleasure from labeling defendants "racketeers," it is equally evident that many defendants will refuse to settle with plaintiffs who have brought such a claim against them.

69. FED. R. CIV. P. 9(b).

ing fraud "shall be stated with particularity." Courts applying Rule 9(b) in civil RICO cases have indicated that the complaint must contain assertions regarding the "time, place and contents of false representations" as well as the identity of the person making the representation and what was obtained or given up thereby.<sup>70</sup>

### B. Civil RICO Statute of Limitations

Because the RICO Act does not contain a statute of limitations, the limitations period to be applied in a civil RICO action is that applicable to the most analogous state law cause of action.<sup>71</sup> Reference to North Carolina law reveals three statutes of limitations which might be deemed applicable to civil RICO actions: the five-year limitations period in actions where fraud is alleged,<sup>72</sup> the three-year limitations period applicable to actions brought under statutes,<sup>73</sup> or the two-year limitations period provided in the North

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70. *Chambers Development Co. v. Browning-Ferris Industries, Inc.*, 590 F. Supp. 1528, 1537 (W.D. Pa. 1984); *Eaby v. Richmond*, 561 F. Supp. 131, 136 (E.D. Pa. 1983). See also *Bennett v. Berg*, 685 F.2d 1053, 1062 (8th Cir. 1982), *aff'd en banc*, 710 F.2d 1361 (8th Cir.), *cert. denied sub nom. Prudential Insurance Co. v. Bennett*, 104 S. Ct. 527 (1983); *Lopez v. Dean Witter Reynolds, Inc.*, 591 F. Supp. 581, 585 (N.D. Cal. 1984); *Sellers v. General Motors Corp.*, 590 F. Supp. 502, 505 (E.D. Pa. 1984); *Hulse v. Hale Farms Dev. Co.*, 586 F. Supp. 120, 121-22 (D. Conn. 1984).

It is generally held that allegations pleaded "upon information and belief" do not satisfy the particularity requirements of FED R. CIV. P. 9(b). 2A J. MOORE, W. TAGGART & J. WICKER, *MOORE'S FEDERAL PRACTICE* ¶ 9.03 (1984). The courts have relaxed this rule, however, if the general allegations are accompanied by a statement of facts upon which the claims are founded. *Chambers Dev. Co. v. Browning-Ferris Industries, Inc.*, 590 F. Supp. 1528, 1538 (W.D. Pa. 1984); *Kimmel v. Peterson*, 565 F. Supp. 476, 482 (E.D. Pa. 1983). The rule may also be relaxed as to matters within the knowledge of the adverse party, although some courts have required an accompanying statement of facts as well. *Kimmel v. Peterson*, 565 F. Supp. at 482.

71. *Bennett v. Berg*, 685 F.2d 1053, 1062 (8th Cir. 1982), *aff'd en banc*, 710 F.2d 1361 (8th Cir.), *cert. denied sub nom. Prudential Insurance Co. v. Bennett*, 104 S. Ct. 527 (1983); *Umstead v. Durham Hosiery Mills, Inc.*, 578 F. Supp. 342, 347 (M.D.N.C. 1984).

72. N.C. GEN. STAT. § 1-52(9) (Supp. 1984) provides that actions "[f]or relief on the ground of fraud" shall be brought within three years. The three-year limitations period begins to run when the aggrieved party discovers the facts constituting the fraud or when, in the exercise of due diligence, such facts should have been discovered. *Shepherd v. Shepherd*, 57 N.C. App. 680, 684, 292 S.E.2d 169, 171 (1982).

73. N.C. GEN. STAT. § 1-52(2) (Supp. 1984), provides that actions based "[u]pon a liability created by statute, either state or federal," shall be brought

Carolina Securities Act.<sup>74</sup> It is not clear, however, which limitations period is applicable. In one RICO case where the predicate acts were alleged to be violations of federal labor laws<sup>75</sup> the court applied the three-year limitations period for actions brought under statute.<sup>76</sup> In a second case from the same court,<sup>77</sup> the issue was not decided but the decision implies that either of the other two limitations periods are applicable.<sup>78</sup> In cases from other jurisdictions the courts have taken varying approaches to the problem.<sup>79</sup>

### C. Venue in Civil RICO Actions

The RICO Act contains its own venue provision, which provides that:

Any civil action or proceeding under this chapter against any person may be instituted in the district court of the United States for any district in which such person resides, is found, has an agent, or transacts his affairs.<sup>80</sup>

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within three years. This statute of limitations has been applied to civil rights actions arising under 42 U.S.C. § 1983 (1976). *See, e.g.,* *Cole v. Cole*, 633 F.2d 1083, 1092 (4th Cir. 1980). The limitations period begins to run from defendants' last actionable act. *Wilson v. Continental Group, Inc.*, 451 F. Supp. 1, 2 (M.D.N.C. 1978).

74. N.C. GEN. STAT. § 78A-56(f) (1982) provides that "[n]o person may sue under this section more than two years after the sale or contract of sale of a security."

75. *Seawell v. Miller Brewing Co.*, 576 F. Supp. 424 (M.D.N.C. 1983).

76. N.C. GEN. STAT. § 1-52(2). *See supra* note 73.

77. *Umstead v. Durham Hosiery Mills, Inc.*, 578 F. Supp. 342 (M.D.N.C. 1984).

78. *Id.* at 348. *See also* *Gilbert v. Bagley*, [1983-84 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 99,483 at 96,971 (M.D.N.C. Sept. 17, 1982) (applying two-year securities fraud statute).

79. *See, e.g.,* *Durante Bros. & Sons, Inc. v. Flushing Nat'l Bank*, 755 F.2d 239, 249 (2d Cir. 1985) (applying New York's three-year statute for "an action to recover upon a liability, penalty or forfeiture created or imposed by statute"); *Compton v. Ide*, 732 F.2d 1429, 1433 (9th Cir. 1984) (applying analogous California statute); *Creamer v. General Teamsters Local Union 326*, 579 F. Supp. 1284, 1290 (D. Del. 1984) (three-year limitations period for actions involving civil conspiracy applied); *Kirschner v. Cable/Tel Corp.*, 576 F. Supp. 234, 241 (E.D. Pa. 1983) (six-year limitations period for common law fraud actions); *Eisenberg v. Gagnon*, 1983-84 FED. SEC. L. REP. (CCH) ¶ 99,475 at 96,739 (E.D. Pa. May 26, 1983) (same); *D'Ivorio v. Adonizio*, 554 F. Supp. 222, 232 (M.D. Pa. 1982) (same); *State Farm Fire & Casualty Co. v. Estate of Caton*, 540 F. Supp. 673, 685 (N.D. Ind. 1982) (same).

80. 18 U.S.C. § 1965(a) (1976).

The first part of this four-part test ("any district in which such person resides") is self-explanatory. The second clause ("any district in which such person . . . is found") is fulfilled if the corporate defendant is present in the district by its officers and agents carrying on the business of the entity.<sup>81</sup> The meaning of the third clause ("any district in which such person . . . has an agent") is evident, while the fourth venue clause ("any district in which such person . . . transacts his affairs") is derived from the antitrust laws.<sup>82</sup> A corporation will be deemed to have met this test if it carries on business of "a substantial and continuous character" within the district.<sup>83</sup> It should be noted that venue as to *each* defendant must be established in a civil RICO action.<sup>84</sup>

Where multiple defendants are involved and venue is inappropriate as to *some* of them in the forum district, that court may order that other parties be brought before the court. Section 1965 (b) of the Act provides:

In any action under section 1964 of this chapter in any district court of the United States in which it is shown that the ends of justice require that other parties residing in any other district be brought before the court, the court may cause such parties to be summoned, and process for that purpose may be served in any judicial district of the United States by the marshal thereof.<sup>85</sup>

Additionally, the general venue provision<sup>86</sup> has a supplemental

81. *DeMoss v. First Artists Productions, Ltd.*, 571 F. Supp. 409, 411 (N.D. Ohio 1983), *appeal dismissed*, 734 F.2d 14 (6th Cir. 1984); *Van Schaick v. Church of Scientology of California*, 535 F. Supp. 1125, 1132 (D. Mass. 1982).

82. *Bulk Oil USA, Inc. v. Sun Oil Trading Co.*, 584 F. Supp. 36, 39 (S.D.N.Y. 1983); *DeMoss v. First Artists Productions Co., Ltd.*, 571 F. Supp. 409, 411 (N.D. Ohio 1983), *appeal dismissed*, 734 F.2d 14 (6th Cir. 1984). Section 12 of the Clayton Act, 15 U.S.C. § 22 (1976), provides that any antitrust action brought against a corporation "may be brought not only in the judicial district whereof it is an inhabitant, but also in any district wherein it may be found or transacts business." *Id.*

83. *DeMoss v. First Artists Productions Co., Ltd.*, 571 F. Supp. 409, 411 (N.D. Ohio 1983), *appeal dismissed*, 734 F.2d 14 (6th Cir. 1984); *King v. Vesco*, 342 F. Supp. 120, 124 (N.D. Cal. 1972).

84. *Eaby v. Richmond*, 561 F. Supp. 131, 139 (E.D. Pa. 1983).

85. 18 U.S.C. § 1965(b) (1976). See *Grantham & Mann, Inc. v. American Safety Products, Inc.*, Civil Action No. C-83-126-D (M.D.N.C. Oct. 1, 1984); *Bernstein v. IDT Corp.*, 582 F. Supp. 1079, 1087 (D. Del. 1984).

86. 28 U.S.C. § 1391(b) (1976) provides in pertinent part that "a civil action wherein jurisdiction is not founded solely on diversity of citizenship may . . . be brought only in the judicial district where all defendants reside, or in which the

application in civil RICO cases.<sup>87</sup> In other words, where venue is improper under the provisions of § 1965(a) of the RICO Act,<sup>88</sup> the court should inquire whether the action can be maintained under the general venue statute.<sup>89</sup>

Applying the general venue statute, the court must usually determine where the claim "arose"<sup>90</sup> by using what is termed a "weight of contacts" analysis. Under this approach, the place where a claim "arose" is ascertained by "advertence to events having operative significance in the case" and a "common sense appraisal of the implications of those events for accessibility to witnesses and records."<sup>91</sup> Federal courts applying this analysis in civil RICO cases have held that the claim "arose" where the predicate act communications by defendants (i.e., mail and wire fraud) originated.<sup>92</sup>

#### D. Service of Process

The RICO Act contains its own service of process provision<sup>93</sup> which provides that "[a]ll other process<sup>94</sup> in any action or proceeding under this chapter may be served on any person in any judicial

claim arose . . . ."

87. *Ideal Stencil Machine & Tape Co. v. Merchiori*, 600 F. Supp. 185, 190 (S.D. Ill. 1985); *Clement v. Pehar*, 575 F. Supp. 436, 443 (N.D. Ga. 1983); *Lightner v. Tremont Auto Auction, Inc.*, 564 F. Supp. 1112, 1118 (N.D. Ill. 1983).

88. 18 U.S.C. § 1965(a) (1976). See *supra* text accompanying notes 80-84.

89. 28 U.S.C. § 1391(b) (1976). See *Clement v. Pehar*, 575 F. Supp. 436, 443 (N.D. Ga. 1983). The demonstrated absence of a single forum wherein venue would be proper as to all defendants is one factor which likely would cause a court to utilize this provision. *Soltex Corp. v. Fortex Industries, Inc.*, 590 F. Supp. 1453, 1459 (E.D.N.Y. 1984).

90. 28 U.S.C. § 1391(b) (1976).

91. *Sharp Electronics Corp. v. Hayman Cash Register Co.*, 655 F.2d 1228, 1229 (D.C. Cir. 1981). See generally 15 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 3806 (1976 & Supp. 1984).

92. See *Grantham & Mann, Inc. v. American Safety Products, Inc.*, Civil Action No. C-83-126-D (M.D.N.C. Oct. 1, 1984) (venue would be properly laid in Tennessee, from which defendants had mailed letters and instituted telephone calls); *Clement v. Pehar*, 575 F. Supp. 436, 439-40 (N.D. Ga. 1983) (venue proper in California, from which defendants had "by both telephone and mail, transmitted false and misleading statements"); *Medical Emergency Service Associates v. Duplis*, 558 F. Supp. 1312, 1314 (N.D. Ill. 1983) (venue properly laid in district from which operative notices of contract termination had been mailed).

93. 18 U.S.C. § 1965(d) (1976).

94. The "other" provision dealing with service of process is in 18 U.S.C. § 1965(b). See *supra* text accompanying note 85.



district in which such person resides, is found, has an agent, or transacts his affairs." This provision provides for nationwide service of process, which is in turn governed by Rule 4(e).<sup>95</sup> The RICO Act contains no provision stating the manner in which service may be made, hence service is governed by the general provisions of Rule 4.<sup>96</sup>

The propriety of process issuing from a federal court sitting in a civil RICO case is not tested by the same constitutional limitation as process issuing from state courts.<sup>97</sup> In other words, the state-oriented "minimum contacts" test stated by the Supreme Court in *International Shoe Co. v. Washington*<sup>98</sup> is not controlling.<sup>99</sup> Rather, where nationwide service of process is authorized pursuant to a federal statute, due process requires only that a defendant have minimum contacts with the United States.<sup>100</sup>

### E. Discovery

From the authors' experience, discovery in a civil RICO case proceeds in a manner similar to that in any other case brought under the Federal Rules of Civil Procedure. Counsel defending civil RICO cases, however, should educate themselves on the application of the Fifth Amendment privilege against self-incrimination<sup>101</sup> in *civil* cases.<sup>102</sup> Because information provided in discovery

95. FED. R. CIV. P. 4(e) provides:

Summons: Service Upon Party Not Inhabitant of or Found Within State. Whenever a statute of the United States or an order of court thereunder provides for service of a summons, or of a notice, or of an order in lieu of summons upon a party not an inhabitant of or found within the state in which the district court is held, service may be made under the circumstances and in the manner prescribed by the statute or order, or, if there is no provision therein prescribing the manner of service, in a manner stated in this rule . . . .

96. FED. R. CIV. P. 4. See *Grantham v. Mann, Inc. v. American Safety Products, Inc.*, Civil Action No. C-83-126-D (M.D.N.C. Oct. 1, 1984).

97. *Hogue v. Milodon Engineering, Inc.*, 736 F.2d 989, 991 (4th Cir. 1984).

98. *International Shoe Co. v. Washington*, 326 U.S. 310 (1945).

99. *Fulk v. Bagley*, 88 F.R.D. 153, 167 (M.D.N.C. 1980).

100. *FTC v. Jim Walter Corp.*, 651 F.2d 251, 256 (5th Cir. 1981); *Grantham & Mann, Inc. v. American Safety Products, Inc.*, Civil Action No. C-83-126-D (M.D.N.C. Oct. 1, 1984); *Clement v. Pehar*, 575 F. Supp. 436, 439 (N.D. Ga. 1983); *Gilbert v. Bagley*, 492 F. Supp. 714, 717 (M.D.N.C. 1980).

101. The fifth amendment to the United States Constitution provides that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself." U.S. CONST. amend. V (1982).

102. The fifth amendment privilege against self-incrimination not only pro-

in a civil RICO case could conceivably form the basis of a subsequent criminal prosecution for violation of the RICO Act or for commission of the predicate offenses, defense counsel must give careful consideration to their discovery responses.<sup>103</sup>

#### IV. TRYING A CIVIL RICO CASE

As noted above, civil RICO litigation presents some unusual problems in business and commercial litigation. Assuming that counsel can survive the problems of pleading the predicate acts and overcome the numerous motions which will inevitably be filed by defendants, the trial of a civil RICO action can present the greatest barrier to recovery.<sup>104</sup>

Courts addressing the issue have held that the plaintiff's burden of proof in a civil RICO case is the same as in most civil cases.<sup>105</sup> That is, the plaintiff is required to prove, by the greater weight of the evidence (sometimes referred to as "the preponderance of the evidence"), the existence of those facts which constitute the predicate acts. As the court will instruct the jury, the greater weight of the evidence does not refer to the quantity but rather to the quality and convincing force of the evidence. The jury, in order to find for the plaintiff, must be persuaded, consider-

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pects the individual against being involuntarily called as a witness against himself in a criminal prosecution but also privileges him not to answer official questions put to him in any other proceeding, civil or criminal, formal or informal, where the answers might incriminate him in future proceedings. *See, e.g., Lefkowitz v. Turley*, 414 U.S. 70, 77 (1973); *Slochower v. Board of Higher Education*, 350 U.S. 551, 557 (1956), *reh. denied*, 351 U.S. 944 (1956). An excellent discussion of the operation of the fifth amendment privilege may be found in Project, *White-Collar Crime: Fifth Annual Survey of the Law*, 22 AM. CRIM. L. REV. 279, 559-77 (1984).

103. *See generally* O'Neill, *Civil Discovery and the Fifth Amendment*, 11 LITIGATION 32 (1985).

104. The authors have represented plaintiffs in two civil RICO actions tried to a jury.

105. *See, e.g., Haroco v. American Nat'l Bank & Trust Co. of Chicago*, 747 F.2d 384, 404-05 (7th Cir. 1984), *aff'd*, 105 S. Ct. 3291 (1985); *Lindner v. Durham Hosiery Mills, Inc.*, Civil Action No. 81-1087-CIV-5 (E.D.N.C. 1984), *aff'd*, 761 F.2d 162 (4th Cir. 1985); *United States v. Local 560, Int'l Brotherhood of Teamsters*, 581 F. Supp. 279, 328 (D.N.J. 1984); *Eaby v. Richmond*, 561 F. Supp. 131, 133-34 (E.D. Pa. 1983); *State Farm Fire & Cas. Co. v. Estate of Caton*, 540 F. Supp. 673, 676 (N.D. Ind. 1982). *See generally* Matz, *Determining the Standard of Proof in Lawsuits Brought Under RICO*, Nat'l L. J., Oct. 10, 1983, at 21.

In *Sedima*, the Supreme Court recognized that the legislative history of the RICO Act supports this conclusion. *Sedima, S.P.R.L. v. Imrex Co.*, 105 S. Ct. at 3282-83 (1985).

ing all of the evidence, that the necessary facts are more likely than not to exist.<sup>106</sup>

The principal practical problem in trying a civil RICO case to a jury is that the action tends to take on a criminal patina. This is so for several reasons not the least of which is the title and terminology of the Act which denotes and connotes the most nefarious type of criminal conduct. Moreover, the need to prove criminal violations (i.e., the predicate acts) simply serves to reinforce the criminal aspects of such litigation. Additionally, defense counsel will, in many instances, advance the notion that his client is a victim of a criminal prosecution (or persecution).

The dynamic process likely to emerge from the pervasive "criminality" of this civil proceeding is the jury's elevation, albeit subliminal, of the plaintiff's burden of proof from "the greater weight of the evidence" to "beyond a reasonable doubt." When that happens, the case, unless it involves defendants who are perceived as "criminals" or who have engaged in morally outrageous conduct, is in deep trouble from the perspective of the plaintiff. Civil RICO jury instructions are so long, convoluted, confusing and complicated<sup>107</sup> (and replete with references to criminal statutes/conduct), that even the most clear and simple charge setting forth the correct burden of proof is likely to go unheeded by the jury. Furthermore, if the jury determines that the defendant has not violated civil RICO (i.e., is not a "racketeer"), the plaintiff's other pendent claims are also endangered. Would a jury find unfair or deceptive trade practices or a breach of fiduciary duty or fraud after concluding that there were no RICO violations? The odds are palpably diminished.<sup>108</sup>

Overcoming the practical problems of trying a civil RICO case to a jury begins with the selection of jurors. In a federal court, of

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106. See 2 E. DEVITT & C. BLACKMAR, *FEDERAL JURY PRACTICE AND INSTRUCTIONS* § 71.14 (3d ed. 1977).

107. See S. Buffone, *Model Civil RICO Instructions*, ABA SEC. LITIG. (1983).

108. In *Lindner v. Durham Hosiery Mills, Inc.*, Civil Action No. 81-1087-CIV-5 (E.D.N.C. 1984), *aff'd*, 761 F.2d 162 (4th Cir. 1985), the jury found that defendants were not liable for violations of the RICO Act or breach of fiduciary duty. In another trial arising out of the same corporate reorganization and merger, *White v. Durham Hosiery Mills, Inc.*, Civil Action No. 81-912-CIV-5 (E.D.N.C. 1983), *aff'd per curiam*, No. 83-2023 (4th Cir.), *cert. denied*, 105 S. Ct. 2360 (1985), the jury found the same defendants guilty of two violations of Rule 10b-5, 17 C.F.R. § 240.10b-5 (1983), and common law fraud and awarded compensatory damages of \$29,500 and punitive damages of \$50,000.

course, the judge will conduct the *voir dire* of prospective jurors, sometimes asking them certain questions posed by the attorneys for the parties. To every extent possible, counsel for plaintiff should be warned of the "businessman" juror, for whom the words "business ethics" may be mutually exclusive terms. It is not too farfetched to suggest that these "businessmen" are on occasion somewhat lenient or tolerant of what passes for business "gamesmanship." This "gamesmanship" may, in fact, be the pattern of racketeering activity complained of. Hence, asking this type of juror to sit in judgment in a civil RICO trial is akin to requesting a fox to review the propriety of another fox's gastronomic delight at guarding the chicken coop.

Experience indicates that a jury comprised of women or minorities may be more receptive to a plaintiff's case. Perhaps this is because of the relatively pure point of view these jurors bring to their fact finding duties. In any event, no jury will look favorably upon a legitimate business dispute which ends up in litigation being transformed into a civil RICO case simply because plaintiff can prove two predicate acts occurring within a ten year period. Not all business cases are RICO actions, and to attempt to make them RICO actions is professionally irresponsible. No one will grasp that quicker than a conscientious juror. For these reasons, North Carolina counsel who can do so are urged to also bring a pendent claim for damages under the North Carolina Unfair Trade Practices Act.<sup>109</sup>

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109. N.C. GEN. STAT. § 75-1.1 (1981) provides that "unfair or deceptive acts or practices in or affecting commerce" are unlawful; the Act also offers a private right of action to injured persons, including treble damages and attorney's fees. N.C. GEN. STAT. § 75-16 (1981). The North Carolina courts have held that the Act is applicable in actions arising out of business transactions. See, e.g., ITCO Corp. v. Michelin Tire Corp., 722 F.2d 42 (4th Cir. 1983), *aff'd on rehearing*, 742 F.2d 170 (4th Cir. 1984), *cert. denied*, 105 S. Ct. 1191 (1985) (tire distributor determination); Grantham & Mann, Inc. v. American Safety Products, Inc., Civil Action No. C-83-126-D (M.D.N.C. April 17, 1984) (breach of distribution contract); Hunt v. Wachovia Bank & Trust Co., 1981-82 FED. SEC. L. REP. (CCH) ¶ 98,210 (M.D.N.C. June 24, 1981) (securities); Johnson v. Phoenix Mutual Life Ins. Co., 300 N.C. 247, 266 S.E.2d 610 (1980) (shopping center financing); Ellis v. Smith-Broadhurst, Inc., 48 N.C. App. 180, 268 S.E.2d 271 (1980) (insurance agents' commission dispute). In Lindner v. Durham Hosiery Mills, Inc., 761 F.2d 162 (4th Cir. 1985), however, the court recently held that § 75-1.1 is not applicable in securities fraud cases, hence, this option is not available in civil RICO cases where the predicate acts include "any offense" involving "fraud in the sale of securities," 18 U.S.C. § 1961(1)(D) (1982).

Assuming that a meritorious civil RICO claim is to be tried before a jury, plaintiff's counsel will need to make a studied decision regarding his or her trial style and strategy. While a prosecutorial style and strategy may be appropriate in some cases, it can carry with it the problem of converting, in the minds of the jury, a civil proceeding into a criminal prosecution. On the other hand, a non-prosecutorial style and strategy may suggest to the jury that the case does not really involve a pattern of racketeering activity. The nature of the racketeering activity at issue (marginal to pervasive) should determine the style and strategy of the plaintiff's attorney during the course of the trial.

In a case of "marginal" racketeering activity, some consideration should be given to the question of when is it prudent to dismiss the RICO claim in favor of advancing the other causes of action (almost all civil RICO cases will probably warrant other pendent claims). First, it is obviously improper to pursue a claim which has insufficient evidence to support it. Secondly, to pursue a civil RICO claim to a conclusion may harm the rest of plaintiff's case. Attempting to transform a traditional business dispute into a civil RICO case is not only professionally unacceptable but unproductive (and maybe counterproductive) as well.<sup>110</sup>

The authors submit that a civil RICO claim should be dismissed as soon as it becomes obvious that the evidence necessary to meet the burden of proof does not exist or is patently inadequate.<sup>111</sup> Plaintiff's counsel should not wait to make this determination until the jury is enpanelled and listening to the evidence. In the final analysis, the plaintiff in a RICO case has called the defendant a racketeer and, in order to recover, the plaintiff must prove this allegation. The jury will not, in all likelihood, take kindly to the indiscriminate use of such a disparaging term which is precisely how it will be perceived if the RICO claim is dropped during the trial. There is a premium on categorizing the type of action to

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110. Under the Department of Justice's *Guidelines for the Institution of RICO Prosecutions*, for example, the Government will not bring a criminal RICO action where the predicate acts consist solely of state offenses or where the indictment would be based upon a pattern of racketeering activity growing out of a single criminal episode or transaction (Guideline Nos. 3 and 4).

111. Under the provisions of FED. R. CIV. P. 15(a) or 41(a), court approval must be obtained prior to voluntary dismissal of fewer than all claims in an action. 5 J. MOORE, W. TAGGART & J. WICKER, *MOORE'S FEDERAL PRACTICE* ¶ 41.06-1 (1984). See, e.g., *Smith, Kline & French Laboratories v. A.H. Robins Co.*, 61 F.R.D. 24, 28-29 (E.D. Pa. 1973).

be tried to the jury as soon as possible consistent with the development of the evidence. If a plaintiff's lawyer is successful in getting a traditional business case to the jury on a civil RICO claim he or she will no doubt hear a version of the following closing argument from opposing counsel:

Does my client, a simple businessman, look like a racketeer? Has anything you have heard or seen during this trial reminded you of the Godfather, or Al Capone, or Jimmy Hoffa? The Plaintiff has not put on any evidence of illegal gambling, or prostitution, or drug peddling, or anything like that. Yet, he calls my client a racketeer and accuses him of engaging in racketeering activity. I ask you, is this Defendant, a local businessman, a racketeer?

This type of argument, when accepted by the jurors, may well inflame their passions against the plaintiff to such a degree that they will reject the other pendent claims as well, even if they are well founded and proven by a preponderance of the evidence.

While dismissing a RICO claim at any juncture may prompt a scornful attack on the part of the defendant's lawyer, it is certainly better litigation strategy to be rid of a weak or proofless claim as soon as that status is ascertained. The plaintiff's attorney who expects that opposing counsel will constantly refer to the injustice of having had his client called a racketeer in public only to have the cause of action dismissed before trial, before he could vindicate himself in court, might be well advised to consider filing an appropriate motion *in limine* to preclude such references during trial.

## V. CONCLUSION

Civil damage actions brought under the RICO Act provide plaintiff's counsel with a powerful weapon for use in business and commercial litigation. The Supreme Court's recent endorsement of a liberal reading of the Act in its *Sedima*<sup>112</sup> and *Haroco*<sup>113</sup> decisions will in all likelihood result in another flurry of civil RICO case filings.<sup>114</sup> Its utilization, however, presents complications

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112. *Sedima, S.P.R.L. v. Imrex Co.*, 105 S. Ct. 3275 (1985).

113. *American Nat'l Bank & Trust Co. of Chicago v. Haroco*, 105 S. Ct. 3291 (1985).

114. The recently published *Report of the Ad Hoc Civil RICO Task Force*, ABA SECTION OF CORP. BANKING AND BUS. LAW (1985) reveals that of the 270 federal district court RICO decisions prior to 1985, only 3% (nine cases) were decided throughout the entire decade of the 1970's; 2% were decided in 1980; 7% were decided in 1981, 13% were decided in 1982; 33% were decided in 1983; and

which will undoubtedly delay and render more difficult pleading and pre-trial preparation. Because of these burdens and because bringing a civil RICO claim might threaten the likelihood of the jury returning a verdict for plaintiff, counsel must carefully weigh the advantages and disadvantages thereby presented. The authors submit that unless there is compelling evidence to support a civil RICO case, it may be better trial strategy to go forward on the other causes of action alone. Where there is such compelling evidence, the case should be tried like a criminal prosecution. Between these two points, plaintiff's counsel will have to draw his or her own conclusions.

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43% were decided in 1984. *Id.* at 55. It is clear, therefore, that civil RICO is a recent phenomenon. This report also includes the following statistical breakdown of civil RICO cases:

Securities Transactions: 40% of cases decided

Commercial or Business Fraud: 37%

Antitrust or Unfair Competition: 4%

Commercial Bribery: 4%

Labor-related: 2%

Other types of suits: 13%

*Id.* at 55-56.