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Civil RICO: The Judges' Perspective, and Some Notes on Practice for North Carolina Lawyers

The Honorable David B. Sentelle

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ARTICLES

CIVIL RICO: THE JUDGES' PERSPECTIVE, AND SOME NOTES ON PRACTICE FOR NORTH CAROLINA LAWYERS

THE HONORABLE DAVID B. SENTELLE*

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* Judge Sentelle is a United States Circuit Judge of the United States Court of Appeals for the District of Columbia Circuit. Previously, he was a United States District Judge for the Western District of North Carolina, a North Carolina practitioner, and a North Carolina State District Judge. This article is a revision by him of a paper he originally prepared for presentation as a part of a continuing legal education program under the auspices of the North Carolina Bar Foundation, and copyrighted as a part of the N.C. Bar Foundation's publication *Federal Civil Practice*, 1989.

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I. INTRODUCTION

Former Solicitor General Charles Fried advises that writers on legal topics in which they have personal interest are well advised to begin with a statement of interest alerting the audience to any possible influence on the presenter's viewpoint. As a federal judge presenting the topic of civil RICO, I have to advise that the statement of interest will exceed anything else I have to say. While my own viewpoint may be unusually skewed in a particular direction, the federal judiciary generally, if not universally, inclines in the same direction. The Chief Justice of the United States may well have been speaking for all of us in an piece he wrote for *The Wall Street Journal*.¹ The title of that piece may say it all: "Get RICO Cases Out of My Courtroom."² Other justices have expressed similar sentiments in more formal writing, specifically opinions, especially separate opinions. While I will make some reference to these in the text below, I offer two as illustrations of the depth and universality of the judicial distaste for civil RICO proceedings. In his dissent from *Sedima v. Imrex*,³ Justice Marshall wrote that the

1. *The Wall Street Journal*, May 19, 1989, at A-14, col. 4.

2. *Id.*

3. *Sedima v. Imrex*, 473 U.S. 479 (1985) (Marshall, J., dissenting).

civil RICO statute, as interpreted by the majority in *Sedima*, "validates the federalization of broad areas of state common law of frauds, and it approves the displacement of well-established federal remedial provisions."⁴ Marshall was joined in this dissent by Justices Brennan, Blackmun and Powell.⁵

More recently in his concurrence in *H.J. Inc. v. Northwestern Bell Telephone Co.*,⁶ Justice Scalia quoted with approval the above language from Marshall's *Sedima* dissent and added the concern that "RICO, since it has criminal applications as well, must even in its civil applications, possess the degree of certainty required for criminal laws."⁷ Perhaps most tellingly, he noted that "no constitutional challenge to this law has been raised in the present case That the highest court in the land has been unable to derive from this statute anything more than . . . meager guidance bodes ill for the day when that challenge is presented."⁸ Justice Scalia wrote for himself, the Chief Justice, and Justices O'Connor and Kennedy. By adding up the joiners in the two separate opinions, you may observe that seven present and one former Supreme Court Justice, crossing the Court's entire judicial spectrum, have joined in decidedly negative expressions of the judicial perspective on civil RICO. As you may note, this includes every member of the present Supreme Court except Justices White and Stevens. You might also note that Justice White, joined by Justice Stevens and three others in the majority opinion in *Sedima* entered a less than ringing endorsement of the evolution of civil RICO practice. Their majority opinion recognizes that "RICO is evolving into something quite different than the original conception of its enactors," and expresses a sharing of "the doubts of the Court of Appeals about this increasing divergence."⁹

In the text of my further treatment on judicial perspective, I will endeavor to give you some of the reasons underlying this widely, if not unanimously held, disdain.

4. *Id.* at 501.

5. *Id.*

6. 109 S. Ct. 2893 (1989).

7. *Id.* at 2909 (citing *FCC v. American Broadcasting Co.*, 347 U.S. 284, 296 (1954)).

8. *Id.*

9. *Sedima*, 473 U.S. at 500.

II. THE JUDICIAL PERSPECTIVE

A. The "Mass" of Civil RICO

1. In General

The foundation stone underlying the judicial distaste for the RICO problem is its sheer mass. I choose the word "mass" advisedly, because I do not refer to sheer volume. Volume *per se* is indeed a problem. As Chief Justice Rehnquist noted in *The Wall Street Journal*, "civil filings under the Racketeer-Influenced and Corrupt Organizations law have increased more than eight-fold over the past five years to nearly a thousand cases during 1988."¹⁰ Professor Gerard Lynch of Columbia University Law School, relying in part on the Report of the Ad Hoc Civil RICO Task Force of the ABA Section of Corporation, Banking and Business Law,¹¹ reports a compilation of civil RICO filings revealing that between the effective date of the Act, October 15, 1970, and the end of the decade of the 70's, the number of civil RICO filings was statistically insignificant.¹² In 1984, there were approximately 100 filings; in 1986, over 400; and approximately 1000 in each succeeding year.¹³ There is no doubt that the volume alone, adding to the clutter of already loaded dockets, contributes to the general negative judicial attitude on the subject.

However, volume is neither the beginning nor the end of the "mass" problem. There are many other statutes that contribute large numbers of civil cases. But while you may find individual judges who grumble about Title VIIs or FOIA actions, no other type of action that I know of has generated anything paralleling the reaction to RICO. To underline what has been said by the Supreme Court justices quoted above, every single district judge with whom I have discussed the subject (and I'm talking in the dozens of district judges from across the country) echoes the entreaty expressed in the Chief Justice's title in *The Wall Street Journal*. What I'm talking about under the heading of "mass" is not simply the size of the RICO monster, but its amorphous and seemingly boundless character. This obviously raises the necessity for some brief explanation of what RICO is and what it is that RICO liti-

10. *The Wall Street Journal*, May 19, 1989, at A-14, col. 4.

11. See generally, Lynch, *RICO: The Crime of Being a Criminal*, 87 COLUM. L. REV. 920 (1987).

12. *Id.*

13. *Id.*

gants are doing in our federal courts.

It should be obvious from the above quotation of justices that the judiciary does not perceive RICO to be what Congress envisioned, or at least to be doing, what Congress meant it to accomplish. You may have heard it said that Congress in enacting the RICO statute intended to "get the Mafia." That's not quite the case. Congress no doubt intended to "get the Mafia" when it enacted the Organized Crime Control Act of 1970 (OCCA),¹⁴ of which RICO was a part (Title IX); but its specific purpose in enacting the RICO title requires a slightly longer sentence than "Congress was trying to get the Mafia." In enacting RICO, Congress was trying to get the Mafia out of legitimate business.¹⁵

In 1970, Congress, as it no doubt should have, asked: "What does organized crime do?" The answer was simple: "Whatever has a buck in it." Since organized crime was doing whatever had a buck in it, it had invested the proceeds of its drug sales, prostitution, illegal gambling, extortion, and other criminal undertakings into profit-making enterprises, which were not in themselves illegal or even undesirable. The lords of lawlessness owned or controlled significant segments of such varied enterprises as motel chains, garbage collection businesses, and labor unions. These profit-makers and dues producers were cycling funds back to the true robber barons so that they could expand their illegal activities and further extend their tentacles into the law-abiding sector. This was not a good situation and certainly a threat to interstate commerce.

Congress took the task of empowering the Executive and the courts to deal with this problem through the enactment of the Racketeer Influenced and Corrupt Organizations Act.¹⁶ Along with those empowering provisions was another which drew relatively little attention at the time of enactment, 18 U.S.C. § 1964, which provided civil remedies for nongovernmental plaintiffs. The principal remedy, springing from 18 U.S.C. § 1964(c), provides that "any person injured in his business or property by reason of a violation of section 1962 . . . may sue . . . in any appropriate United States District Court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee."¹⁷

14. Pub. L. No. 91-452, 84 Stat. 922 (1970).

15. See generally, Lynch, *RICO: The Crime of Being a Criminal*, 87 COLUM. L. REV. 920, 972-73 (1987).

16. 18 U.S.C. § 1961 *et seq.* (1982).

17. 18 U.S.C. § 1964 (1982).

The malady that Congress perceived was real. Undoubtedly, Congress acted from the most beneficent of motives in attempting to arm persons injured by the mob with weapons to fight back, and remedies to make their injuries well. The "mass" problem arises from the fact that the remedy is not a specific for the illness in the body politic, nor is the weapon being used by plaintiffs against the enemy Congress perceived.

By 1985, the Supreme Court recognized that the ABA Task Force had found that of the "known civil RICO cases at the trial court level, 40% involved securities fraud, 37%, common law fraud in a commercial or business setting, and only 9% 'allegations of criminal activity of a type generally associated with professional criminals.'"¹⁸ An American institute of certified public accountants study of 132 published decisions "found that 57 involved securities transactions and 38 commercial and contract disputes, while no other category made it into double figures."¹⁹ Or, as Justice White put it for the majority of the Court, "it is true that private civil actions under the statute are being brought almost solely against [legitimate] defendants rather than against the archetypal intimidating mobster."²⁰

2. *The Statutory Overview*

To understand how a weapon Congress envisioned as a rifle to shoot at mobsters became a shotgun pointed at everybody requires an analysis of the RICO statute itself, and the elements it makes sufficient to support a civil cause of action. 28 U.S.C. § 1964(c) provides that

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 the damages he sustains and the cost of the suit, including a reasonable attorney's fee.²¹

This obviously provided the federal courts with jurisdiction over anything which constituted a violation of 18 U.S.C. § 1962.

Section 1962 has four subsections, (a) through (d). Subsection

18. *Sedima*, 473 U.S. at 499, n.16 (citing the ABA task force, *supra*).

19. *Id.* (citing American Institute of Certified Public Accountants, *The Authority to Bring Private Treble Damage Suits under "RICO" Should Be Removed* 13 (October 10, 1984)).

20. *Sedima*, 473 U.S. at 499.

21. 18 U.S.C. § 1964(c) (1982).

(d) simply makes it “unlawful for any person (sic) to conspire to violate any of the provisions of subsections (a), (b), or (c) of [section 1962].”²² Each of the other three subsections provides material for the unchecked flow of the amorphous RICO mass into every corner of federal court. Subsection (a) makes it

unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of any unlawful debt . . . 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.²³

That subsection contains certain limitations which at least appear so far to dam the flow of RICO away from open-market purchases of less than control-size traded securities.

Subsection (b) makes it “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.”²⁴

Finally, subsection (c) makes it “unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce to conduct or participate, directly or indirectly, in the conduct of such enterprise’s affairs through a pattern of racketeering activity or collection of unlawful debt.”²⁵

Simply reading the statutory language of the three subsections without further analysis by itself, raises judicial hackles as to the breadth and generality of RICO’s coverage. But to fully understand the devilry created by this amorphous mass in practice, we must look to separate elements. Subsection (c) is the subsection most used and the one most troublesome. I will focus on that subsection, but remember that troublesome elements, particularly the “pattern” requirement pervade all the subsections. The statute raises at least four critical questions: What is a “pattern”?; What is “racketeering activity”?; What is “participate in the conduct of affairs”?; and What is an “enterprise?”. We will consider these in

22. 18 U.S.C. § 1962(d) (1982).

23. *Id.* at § 1962(a).

24. *Id.* at § 1962(b).

25. *Id.* at § 1962(c).

reverse order.

3. *The Elements*²⁶

a. *What is an "Enterprise"?*

28 U.S.C. § 1961, the definitional section of RICO, states: "‘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."²⁷ In other words, an enterprise is one or more persons doing nearly anything in any form. This might be as good a time as any to remind you of the origin of the word "enterprise." That word comes from the latin by way of middle french and derives from *enter*, meaning to come within and *pendre*, meaning to seize or take. In the context of RICO, "enterprise" has rushed in and seized everything.

Do note that there is one limiting principle: the enterprise must be distinct from the RICO defendant. (More on that under notes on practice.) Aside from that one limiting principle, the concept of RICO enterprise is almost limitless. Courts have obviously held corporations to be enterprises.²⁸ Equally obviously courts have held unions to be enterprises.²⁹ The courts have also found sufficient: a lengthy association between two defendants who on a number of occasions sought to introduce a federal agent and an informant to sources of narcotics;³⁰ a circle of bribed race horse jockeys who were joined through defendant with a circle of informed bettors who profited from the illegal fixing of races;³¹ a group of individuals associated in fact;³² parties involved in the

26. Though the topic of this paper is civil RICO, some of the examples are drawn from criminal cases. This does not detract from the accuracy or the applicability of the quoted or extracted holdings, since all definitions apply to section 1964 civil RICO as well as the various criminal RICO sections.

27. 18 U.S.C. § 1961(4) (1982).

28. *See, e.g., Bennett v. Berg*, 685 F.2d 1053 (8th Cir. 1982), *on reh'g*, 710 F.2d 1361 (en banc), *cert. denied*, 464 U.S. 1008 (1983); *United States v. Gottesman*, 724 F.2d 1517 (11th Cir.), *reh'g denied*, 729 F.2d 1468 (1984).

29. *See, e.g., United States v. Kaye*, 556 F.2d 855 (7th Cir.), *cert. denied*, 434 U.S. 921 (1977).

30. *United States v. DeRosa*, 670 F.2d 889 (9th Cir.), *cert. denied*, 459 U.S. 993, 1014 (1982).

31. *United States v. Errico*, 635 F.2d 152 (2d Cir. 1980), *cert. denied*, 453 U.S. 911 (1981).

32. *United States v. Thevis*, 665 F.2d 616 (5th Cir.), *reh'g denied*, 671 F.2d 1379, *cert. denied*, 459 U.S. 825 (1982).

sale of two lots in a subdivision, claiming joint ownership;³³ the office of a South Carolina State Senator;³⁴ a county sheriff's department;³⁵ a city police department;³⁶ various state and local tax bureaus;³⁷ the county prosecutor's office;³⁸ and various courts;³⁹ and perhaps most surprisingly, a sole proprietorship has been held to be an "enterprise" with which its proprietor can be "associated" within the meaning of RICO.⁴⁰ This list of concepts included within the term "enterprise" is offered only by way of example, and not exhaustion—except possibly the exhaustion of judicial patience and probably of your attention span.

Thus, on the subject of "mass," the concept of "enterprise" has it. It is massive. It is huge, heavy, and without definite form.

b. What is "Participate in the Conduct of Affairs"?

Now that we know precisely what an enterprise is, what does the statute require so far as participating in the conduct of affairs? While the statutory definition of enterprise gave little guidance as to the element of association with the enterprise, the statute provides no definition at all of this concept. Therefore, we must look to the case law for the delineation of this element. As with everything else about RICO, there is no solid agreement as to the proper answer to the instant question. The best I can give you is a rough mix of formulations and holdings as to whether or not particular

33. *J.G. Williams, Inc. v. Regency Properties, Ltd.*, 672 F. Supp. 1436 (N.D. Ga. 1987).

34. *United States v. Long*, 651 F.2d 239 (4th Cir.), *cert. denied*, 454 U.S. 896 (1981); *but see*, *United States v. Thompson*, 685 F.2d 993 (6th Cir.) (holding that the office of Governor of Tennessee is not an "enterprise"), *cert. denied sub nom.*, *Sisk v. United States*, 459 United States 1072 (1982).

35. *United States v. Baker*, 617 F.2d 1060 (4th Cir. 1980); *See also* *United States v. Davis*, 707 F.2d 880 (6th Cir. 1983).

36. *United States v. Kovic*, 684 F.2d 512 (7th Cir.), *cert. denied*, 459 U.S. 972 (1982).

37. *See, e.g.*, *United States v. Burns*, 683 F.2d 1056 (7th Cir. 1982), *cert. denied*, 459 U.S. 1173 (1983); *United States v. Frumento*, 563 F.2d 1083 (3d Cir. 1977), *cert. denied*, 434 U.S. 1072 (1978).

38. *United States v. Altomar*, 625 F.2d 5 (4th Cir. 1980).

39. *United States v. Blackwood*, 768 F.2d 131 (7th Cir. 1985) (county circuit court in Illinois), *cert. denied*, 474 U.S. 1020 (1985); *United States v. Angelilli*, 660 F.2d 23 (2d Cir. 1981), *cert. denied*, 455 U.S. 910, 945 (1982) (N.Y. City Civil Court); *United States v. Bacheler*, 611 F.2d 443 (3d Cir. 1979) (Philadelphia Traffic Court).

40. *McCullough v. Suter*, 757 F.2d 142 (7th Cir. 1985).

connections constitute the requisite participation in the conduct of affairs of the enterprise. *United States v. Field*⁴¹ teaches that "no particular degree of interrelationship is required."⁴² Some courts have required that the defendant participate in the "direction" or "management" of the enterprise,⁴³ or that the predicate acts be "helpful or necessary" to the operation of the enterprise.⁴⁴ The Fourth Circuit requires that the enterprise have "its affairs advanced or benefited in some fashion, direct or indirect, by the pattern of racketeering activity."⁴⁵

The Fourth Circuit's formulation may not sound particularly cabining but the Fifth Circuit finds it to be "unduly restrictive."⁴⁶ That circuit would require only "a relation between the predicate crime and the affairs of the enterprise."⁴⁷ My own circuit (D.C. Circuit), has adopted the same approach as the Fifth Circuit in *Yellow Bus Lines v. Local Union 639*.⁴⁸ Again, in order to completely comply with Solicitor General Fried's advise, I offer a further "statement of interest." When the order was entered denying an *en banc* review of the *Yellow Bus Lines* case, a footnote thereto revealed that I dissented from that denial of *en banc* review along with my then colleague, now Solicitor General, Kenneth Starr.

To give you some flavor of what is sufficient under the more open-ended of these tests,⁴⁹ the Third Circuit found that a magistrate who accepts bribes from a bonding company is sufficiently "associated with" the bonding company enterprises' affairs.⁵⁰ *United States v. Bright*⁵¹ found that bribing and influencing a sheriff qualified as participation in the conduct of the sheriff's office, the "enterprise" in that case.⁵²

41. 432 F. Supp. 55 (S.D.N.Y. 1977), *aff'd*, 578 F.2d 1371 (2d Cir. 1978), *cert. dismissed*, 439 U.S. 801 (1978).

42. *Id.* at 58.

43. *See, e.g.*, *Bank of Am. Nat'l Trust & Sav. Ass'n v. Touche Ross & Co.*, 782 F.2d 966, 970 (11th Cir. 1986), *Bennett v. Berg*, 710 F.2d 1361, 1364 (8th Cir. 1983), *cert denied sub nom. Prudential Ins. Co v. Bennett*, 464 U.S. 1008 (1983).

44. *United States v. Ladmer*, 429 F. Supp. 1231, 1244 (E.D.N.Y. 1977).

45. *United States v. Webster*, 639 F.2d 174, 186 (4th Cir. 1981).

46. *United States v. Welch*, 656 F.2d 1039, 1061 (5th Cir. 1981), *reh'g denied*, 663 F.2d 101 (5th Cir. 1981), *cert. denied*, 456 U.S. 915 (1982).

47. *Id.* at 1061.

48. 839 F.2d 782, 793 (D.C. Cir. 1988).

49. *United States v. Forsythe*, 560 F.2d 1127, 1136 (3d Cir. 1977).

50. *Id.*

51. 630 F.2d 804, 830 (5th Cir. 1980).

52. *Id.*; *See also United States v. Lee Stoller Enters.*, 652 F.2d 1313, 1320-21

In sum, the most I can tell you about this element is that, at least in my circuit, though not in yours, if you do something that in some fashion effects something that the enterprise is doing, you may be participating in the conduct of its affairs.

c. What is Racketeering?

If the definition of "enterprise" was broad in its brevity, the definition of "racketeering activity" in 18 U.S.C. § 1961 is virtually boundless in its specificity.⁵³ The statutory definition reads as follows:

(1) "racketeering activity" means (A) any act or threat involving murder, kidnaping, gambling, arson, robbery, bribery, extortion, dealing in obscene matter, or dealing in narcotic or other dangerous drugs, which is chargeable under State law and punishable by imprisonment for more than one year; (B) any act which is indictable under any of the following provisions of title 18, United States Code: Section 201 (relating to bribery), section 224 (relating to sports bribery), sections 471, 472, and 473 (relating to counterfeiting), section 659 (relating to theft from interstate shipment) if the act indictable under section 659 is felonious, section 664 (relating to embezzlement from pension and welfare funds), sections 891-894 (relating to extortionate credit transactions), section 1029 (relating to fraud and related activity in connection with access devices), section 1084 (relating to the transmission of gambling information), section 1341 (relating to mail fraud), section 1343 (relating to wire fraud), sections 1461-1465 (relating to obscene matter), section 1503 (relating to obstruction of justice), section 1510 (relating to obstruction of criminal investigations), section 1511 relating to the obstruction of State or local law enforcement), section 1512 (relating to tampering with a witness, victim, or any informant), section 1513 (relating to retaliating

(7th Cir.), *cert. denied*, 454 U.S. 1082 (1981)(businessman paying kickbacks to sheriff in exchange for contract held to participate in sheriff's office affairs); *United States v. Blackwood*, 768 F.2d 131, 137-38 (7th Cir.), *cert. denied*, 474 U.S. 1020 (1985)(allowing section 1962(c) RICO charge against a police officer charged with soliciting bribes to influence disposition of the case in the county court—the enterprise); *United States v. Yonan*, 800 F.2d 131, 137-38 (7th Cir.), *cert. denied*, 479 U.S. 1055 (1985)(reversing dismissal of a RICO count against a defense attorney charged with participation in the affairs of the State Attorney's Office by attempted bribery). In *Yellow Bus*, my own circuit held that a union striking a company was participation in the conduct of the company's affairs. *Yellow Bus*, 839 F.2d 782 (D.C. Cir. 1988).

53. See 18 U.S.C. § 1961 (1982).

against a witness, victim, or an informant), section 1951 (relating to interference with commerce, robber, or extortion), section 1952 (relating to racketeering), section 1953 (relating to interstate transportation of wagering paraphernalia), section 1954 (relating to unlawful welfare fund payments), section 1955 (relating to the prohibition of illegal gambling businesses), section 1956 (relating to the laundering of monetary instruments), section 1957 (relating to engaging in monetary transactions in property derived from specified unlawful activity), section 1958 (relating to use of interstate commerce facilities in the commission of murder-for-hire), sections 2251-2252 (relating to sexual exploitation of children), sections 2312 and 2313 (relating to interstate transportation of stolen motor vehicles), sections 2314 and 2315 (relating to trafficking in certain motor vehicles or motor vehicle parts), sections 2341-2346 (relating to trafficking in contraband cigarettes), sections 2421-24 (relating to white slave traffic), (C) any act which is indictable under title 29, United States Code, section 186 (dealing with restrictions on payments and loans to labor organizations) or section 501(c) (relating to embezzlement from union funds), (D) any offense involving fraud connected with a case under title 11, fraud in the sale of securities, or the felonious manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in narcotic or other dangerous drugs, punishable under any law of the United States, or (E) any act which is indictable under the Currency and Foreign Transactions Reporting Act[.]⁵⁴

I will not attempt a point-by-point analysis of the definition. I will merely suggest that it is difficult to imagine how any act of Congress could be both as niggling in its specificity and as totally encompassing in its scope as this definition. We are all familiar with the maxim of statutory construction "inclusio uno exclusio alter."⁵⁵ In this case, Congress has obviated its possible use by leaving almost nothing conceivably excluded.

To understand fully the impact of that broad definition of racketeering, it must be understood that in order to bring a civil RICO action, it is not necessary that a plaintiff allege that the defendant has been convicted or even indicted, or for that matter, criminally investigated or suspected of the nefarious activities set forth in the definition of racketeering; only that he, she, or it has committed such an act.⁵⁶ The plaintiff knows, of course, that he, she, or it will never have to prove beyond a reasonable doubt that

54. 18 U.S.C. § 1961(1)(1982).

55. *Denhurst v. Feilden*, 7 Man & G 182 at 186 (1845).

56. *See Sedima*, 473 U.S. at 499-500.

the defendant has committed any such act. A civil burden of proof would apply.⁵⁷ Indeed, in order to make the allegation and have the desired effect, the allegation need not meet even that burden, but only the liberal standards of Rule 12(b)(6) that the allegations of the complaint state a claim for relief.⁵⁸ In fact, to achieve the genuinely desired effect, plaintiff's counsel need only satisfy his personal standards as to the application of Rule 11 of the Civil Rules of Procedure that to the best of his "knowledge, information, and belief formed after reasonable inquiry, it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law and that it is not interposed for any improper purpose"⁵⁹

Passing Rule 11 may not meet the ultimate desired effect of obtaining legal fees and treble damages, not obtainable in an ordinary civil action in a state court where most of these civil RICO cases really belong, but it does achieve the leverage effect that most plaintiffs' attorneys really want in civil RICO cases. Not only do civil RICO plaintiffs obtain the leverage of a treble damages and attorney fees recovery, but they confront usually legitimate business with the prospect that the day after the filing of complaint a local newspaper will headline "ABC Corporation and its President Charged with Racketeering in Federal Court."

d. What is a "Pattern"?

The short answer is that nobody knows. Nobody knows, even though the Supreme Court in *H.J. Inc.*⁶⁰ labored manfully at the task of educating us. To fully understand the inadequacy of our current knowledge on this subject, even in the face of *H.J. Inc.*, we must look first to the text of section 1961. That section, the definitions section, purports to contain in subsection (5) a definition of "pattern of racketeering activity."⁶¹ However, what it says is "'pattern of racketeering activity' requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter, and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a

57. *Id.*

58. *Id.*

59. FED. R. CIV. P. 11.

60. *H.J. Inc. v. Northwestern Bell Tel. Co.*, 109 S. Ct. 2893 (1989).

61. 18 U.S.C. § 1961(5) (1982).

prior act of racketeering activity.”⁶² The first obvious problem with that “definition” was pointed out by Justice White in the famous footnote 14 of *Sedima v. Imrex*.⁶³ It is not a definition. As Justice White put it, “it states that a pattern [of activity] ‘requires at least two acts of racketeering activity,’ . . . not that it ‘means’ two such acts.”⁶⁴ As he further stated in the same footnote, “in common parlance two of anything do not generally form a ‘pattern.’”⁶⁵ So that “pattern” under *Sedima* required at least two and probably three acts of “racketeering activity.” While the legislative history⁶⁶ supports a view that a pattern requires not just isolated activity, but rather a relationship, district courts and the courts of appeal, even after *Sedima*, were still floundering as to what “pattern” really means.

Justice Scalia further expanded on the guidance offered by the *Sedima* opinion in his separate concurrence in *H.J. Inc.*:

Four Terms ago, in *Sedima, S. P. R. L. v. Imrex Co.*, 473 U.S. 479 (1985), we gave lower courts the following four clues concerning the meaning of the enigmatic term “pattern of racketeering activity” in the Racketeer Influenced and Corrupt Organizations Act (RICO of the Act), Pub. L. 91-452, Title IX, 84 Stat. 941, as amended, 18 U.S.C. §§ 1961-1968 (1982 ed. and Supp. V). First, we stated that the statutory definition of the term in 18 U.S.C. § 1961(5) implies “that while two acts are necessary, they may not be sufficient.” *Sedima*, 473 U.S., at 496, n. 14. Second, we pointed out that “two isolated acts of racketeering activity,” “sporadic activity,” and “proof of two acts of racketeering activity, without more” would not be enough to constitute a pattern. *Ibid.* Third, we quoted a snippet from the legislative history stating “[i]t is this factor of *continuity plus relationship* which combines to produce a pattern.” *Ibid.* Finally, we directed lower courts’ attention to 18 U.S.C. § 3573(e), which defined the term “pattern of conduct which was criminal” used in a different title of the same Act, and instructed them that “[t]his language may be useful in interpreting other sections of the Act.”⁶⁷

Justice Scalia went on to note the degree of helpfulness of

62. *Id.* (emphasis added).

63. *Sedima*, 473 U.S. at 496 (emphasis added), 714.

64. *Id.*

65. *Id.*

66. Organized Crime Control Act of 1970, Pub. L. No. 91-452, 91 Stat. 4032 (1970).

67. *H.J. Inc.*, 109 S. Ct. at 2906.

these four clues to judges laboring on the inferior courts in applying the pattern requirement, "thus enlightened, the district and circuit courts set out 'to develop a meaningful concept of "pattern,"' [citing *Sedima* at 500] and promptly produced the widest and most persistent circuit split on the issue of federal law in recent memory"⁶⁸

To describe for you the width and persistence of that circuit split, I can do no better than set forth a footnote from the majority opinion in *H.J. Inc.* adopted by Justice Scalia in his separate opinion.

See *Roeder v. Alpha Industries, Inc.*, 814 F.2d 22, 30-31 (CA1 1987) (rejecting multiple scheme requirement; sufficient that predicates relate to one another and threaten to be more than an isolated occurrence); *United States v. Indelicato*, 865 F.2d 1370, 1381-1384 (CA2 1989) (en banc) (rejecting multiple scheme requirement; two or more interrelated acts with showing of continuity ore threat of continuity sufficient); *Barticheck v. Fidelity Union Bank/First National State*, 832 F.2d 36, 39-40 (CA3 1987) (rejecting multiple scheme requirement; adopting case-by-case multifactor test); *International Data Bank, Ltd. v. Zepkin*, 812 F.2d 149, 154-155 (CA4 1987) (rejecting any mechanical test; single *limited* scheme insufficient, but a large continuous scheme should not escape RICO's enhanced penalties); *R. A. G. S. Couture, Inc. v. Hyatt*, 774 F.2d 1350, 1355 (CA5 1985) (two related predicate acts may be sufficient); *United States v. Jennings*, 842 F.2d 159, 163 (CA6 1988) (two predicate acts potentially enough); *Morgan v. Bank of Waukegan*, 804 F.2d 970, 975-976 (CA7 1986) (refusing to accept multiple scheme requirement as the general rule; adopting multifactor test, but requiring that predicates constitute "separate transactions"); *Sun Savings and Loan Assn. v. Dierdorff*, 825 F.2d 187, 193 (CA9 1987) (rejecting multiple scheme test; requiring two predicates, separated in time, which are not isolated events); *Torwest DBC, Inc. v. Dick*, 810 F.2d 925, 928-929 (CA10 1987) (holding single scheme from which no threat of continuing criminal activity may be inferred insufficient); *Bank of America National Trust & Savings Assn. v. Touche Ross & Co.*, 782 F.2d 966, 971 (CA11 1986) (rejecting multiple scheme test; requiring that predicates be interrelated and not isolated events); *Yellow Bus Lines, Inc. v. Drivers, Chauffeurs & Helpers Local Union 639*, 268 U.S. App. D.C. 103, 110, 839 F.2d 782, 789 (1988) (requiring related acts that are not isolated events).⁶⁹

68. *Id.* at 2906-07.

69. *Id.* at 2898, n.2.

H.J. Inc. repromulgates the four clues from *Sedima* elevating them from the footnote status they previously occupied to the body of the text.⁷⁰ To this, *H.J. Inc.* adds the helpful suggestion “that Congress intended to take a flexible approach . . .”⁷¹

Beyond that, *H.J. Inc.* expands on the requirement of “continuity plus relationship,” building on the base view that Congress envisioned “a concept of sufficient breadth that it might encompass multiple predicates within a single scheme that were related and that amounted to, or threatened the likelihood of, continued criminal activity,”⁷² as well as multiple schemes that evidenced the requisite “continuity plus relationship.”

Thus, the Supreme Court had delineated our task of defining “pattern” largely in terms of defining “continuity” and “relationship.” What are they? With all due respect to the Higher Authority that produced *H.J. Inc.*, I suggest that nobody knows that either. As the *H.J. Inc.* opinion recognizes, it is “difficult to formulate in the abstract any general test for continuity.”⁷³ However, in beginning to delineate the requirement, the Court helpfully tells us that “‘continuity’ is both a closed and an open ended concept, referring either to a closed period of repeated conduct, or to past conduct that by its nature projects into the future with a threat of repetition.”⁷⁴ As to relationship, the Court suggests that we can borrow that concept from 18 U.S.C. § 3575(e) which reflected a pattern requirement, but one requiring only relationship and not continuity, using the following language: “criminal conduct forms a pattern if it embraces criminal acts that have the same or similar purposes, results, participants, victims, or methods of commission, or otherwise are interrelated by distinguishing characteristics and are not isolated events.”⁷⁵ That definition was not much help even before it threw in the word “otherwise.” With that addition, it is no help at all.

For a full treatment of the remaining vague, amorphous, undefined and generally unknown meaning of “pattern” in the light of the Supreme Court’s holding in *H.J. Inc.*, I can do no better than refer you to Justice Scalia’s separate opinion. I suggest that any

70. *See Id.* at 2900.

71. *Id.*

72. *Id.*

73. *Id.* at 2901.

74. *Id.*, (citing *Barticeck v. Fidelity Bank/First Nat’l State*, 832 F.2d 36, 39 (3d Cir. 1987)).

75. 18 U.S.C. § 3575(e) (1982).

lawyer interested in RICO read that separate opinion for its information on this subject and that all other lawyers read it because it is one of the most entertaining and amusing pieces of legal writing to appear in any published opinion in recent years. However, after demonstrating in six short pages (slip opinion pagination) that the majority's opinion accomplishes effectively nothing at all, Justice Scalia candidly admits that given the statute with which the Court is working he would be unable to do any better.⁷⁶ He and the three Justices joining him then agree with the majority "that nothing in the statute supports the proposition that predicate acts constituting part of a single scheme (or single episode) can never support a cause of action under RICO."⁷⁷

If the other three elements had not sufficiently demonstrated that RICO is an amorphous mass, "pattern" would, I submit, do so even if it were coupled with companion elements of pristine clarity and rigidly walled definition.

B. The Voraciousness of Civil RICO

The judicial hatred of RICO arises not only from its amorphous mass, but also from the fact that this amorphous mass is a voracious monster. RICO devours traditional and basic concepts of American jurisprudence, including: (1) federalism, (2) separation of powers, (3) First Amendment rights of free speech and association, (4) labor law, and (5) repose of actions.

1. Federalism

Whatever the phrase "pattern of racketeering activity" and the other language in 18 U.S.C. §§ 1964 and 1962 means, certainly they mean that an awful lot of activity that previously could have generated at most a state court suit for common law fraud or often just a breach of contract will today involve a federal court action labelling a probably legitimate business, union, or association as racketeers. In addition to hanging the label, those actions will potentially generate, or at least threaten to generate, treble damages and the award of counsel fees.

As noted in the introduction, Justice Marshall in his dissent in *Sedima* expressed grave concerns for the impact of RICO on our

76. *H.J. Inc.*, 109 S. Ct. at 2908.

77. *Id.* at 2909.

bifederal system.⁷⁸ As least three of the four Justices of this dissent are hardly known as rabid champions of States' rights. Yet they express great concerns about the implication of RICO to our federalism. As Justice Marshall noted,

prior to RICO, no federal statute had expressly provided a private damages remedy based upon the violation of the mail or wire fraud statutes, which make it a federal crime to use the mail or wires in furtherance of a scheme to defraud . . . Moreover, the Courts of Appeals consistently had held that no implied federal private causes of action accrue to victims of these federal violations.⁷⁹

Thus, the victims found civil relief in State common law fraud actions. This has not been the case since the enactment of RICO and its discovery by enterprising counsel.

As was also noted in the introduction, Justice Scalia and his three joining Justices adopt Justice Marshall's concerns in the *H.J. Inc.* concurrence. Well might all these Justices express concerns about the effect of RICO on our federalism. I suggest very strongly that it is doing violence to the underlying principle of federalism. The Framers simply did not contemplate in enacting Article III, creating the federal judiciary, that they were displacing the state courts from purely local disputes between business competitors, contracting parties, and other enterprises, let alone arming plaintiffs in such actions with an arsenal of immunized libel and legalized extortion. The legitimacy of this exercise of power by the federal Congress and this use of the federal jurisdiction in displacement of the states is questionable.

To further understand the degree to which this displacement from the proper role of the state judiciaries is occurring, it should be understood that in virtually all of the civil RICO cases that I have seen and have discussed with federal district judges from around the country, the principal jurisdictional tag is RICO. Plaintiffs then hang on that jurisdictional peg a variety of state claims in tort or contract by way of pendant jurisdiction. In *Sedima* itself, the underlying action rose out of a contract where a buyer was ordering parts from the plaintiff.⁸⁰ Defendant was to obtain the parts in this country and ship them to Sedima's purchasers in Eu-

78. *Sedima*, 473 U.S. at 500 (Justice Marshall wrote for himself and Justices Brennan, Blackmun, and Powell).

79. *Sedima*, 473 U.S. at 501 (Marshall, J., dissenting).

80. *Id.* at 484.

rope.⁸¹ Plaintiff and defendant were to split the net proceeds.⁸² Sedima thought that it had been cheated by inflated bills, under which defendant was collecting for nonexistent expenses.⁸³ Plaintiff sued for unjust enrichment, conversion, breach of contract and fiduciary duty, and a constructive trust.⁸⁴ However, since the mails were the vehicle for transmitting the bills, it alleged two acts of mailing as mail fraud and brought the RICO claim.⁸⁵ While in that particular case federal jurisdiction probably existed by way of diversity or alienage, the underlying principle is the same. Had these two corporations been next door to each other, the action would still have been brought in federal jurisdiction under civil RICO, dragging in by their tails all the state claims as to which the federal courts should have no part. All the civil RICOs I saw as a district judge and virtually all of those related to me by my brethren around the country partook of that same nature. They were essentially common law breach of contract or at most fraud cases elevated by ingenious pleading into mail fraud cases which then were the predicates of racketeering activity which then lead to the invasion of state jurisdiction by the federal courts.

To heighten these concerns of the effect of RICO on federalism, look back to the language of section 1961(1) defining "racketeering activity."⁸⁶ In addition to the incredible compass already noted above, pay especial attention to (1)(A) which adopts wholesale great areas of State law encompassing "any act or threat involving murder, kidnapping, gambling, arson, robbery, bribery, extortion, dealing in obscene matter, or dealing in narcotic or other dangerous drugs, which is chargeable under *State* law and punishable by imprisonment for more than one year."⁸⁷

Thus, I suggest, the voracious RICO monster eats at federalism.

2. *Separation of Powers*

I will touch only briefly on what I perceive to be a troubling effect of RICO on the constitutional doctrine of separation of pow-

81. *Id.*

82. *Id.*

83. *Id.*

84. *Id.*

85. *Id.*

86. See 18 U.S.C. § 1961(1) (1982).

87. 18 U.S.C. § 1961(1)(A) (1982) (emphasis added).

ers. I know of little case law on this subject, and also note that it is principally a concern in criminal, not civil RICO, and therefore technically outside the scope of the present undertaking. Nonetheless, I cannot resist this occasion to note that any criminal statute requiring construction of as many unbounded terms as RICO, invites, perhaps requires, the Article II Executive in the form of the prosecutor and the Judiciary in the form of Article III Judges to undertake the Article I Legislative role of defining federal crimes. While plaintiffs' attorneys in civil RICO work much mischief by their definition of civil causes of action, at least they do not define federal crimes. As to the criminal implications of RICO, I would echo the concerns expressed by Judge Winter in his dissent from the Second Circuit's interpretation of the mail and wire fraud statutes, 18 U.S.C. §§ 1341-43, before the Supreme Court's at least temporary rectification of that anomaly in *McNalley v. United States*.⁸⁸ Judge Winter's concern was that "the only restraining influence on the 'inexorable expansion of the mail and wire fraud statutes' . . . has been the prudent use of prosecutorial discretion."⁸⁹

As you might gather from the citation form, this is a concern adopted by Justice Marshall in his *Sedima* dissent.⁹⁰ While Justice Marshall directed it specifically, at the incorporation of the mail and wire fraud statute among the definitional predicates for RICO violation, I think the concern is a general one, and that prosecutorial discretion is sufficient to define the whole nature of federal offense as evidence of an invasion of Article I power by the Article II Branch, or perhaps an abdication of Article I responsibility in favor of Article II exercise.

3. *First Amendment Rights of Free Speech and Association*

Sanctity of the rights of expression and expressive association requires no particular citation of authority.⁹¹ I know of no existing caselaw dealing with the incursion of judicial power into the expression/association sanctum under RICO, but that does not mean that the danger does not exist. First, I have heard anecdotally of

88. 483 U.S. 350 (1987).

89. *Sedima*, 473 U.S. at 502 (Marshall, J., dissenting) (quoting *United States v. Siegel*, 717 F.2d 9, 24 (2d Cir. 1983) (Winter, J., dissenting in part)).

90. *See Id.*

91. *See generally* *Roberts v. United States Jaycees*, 468 U.S. 609 (1984), and authorities collected therein, especially *NAACP v. Alabama*, 357 U.S. 449 (1952).

cases being brought against Right to Life anti-abortion organizations. The popular press has reported that defendants in these civil RICO actions have included a person or persons whose only involvement was the publication of a newsletter announcing the alleged acts of racketeering by the defendant organizations. Given the breadth of the associative elements in RICO, if this hasn't occurred, it surely will soon. The danger of a resulting chill is obvious.

*Yellow Bus*⁹² and other civil RICO cases directed at unions already illustrate the potential for the erosion of the associative rights or at least the full exercise of such rights created by the civil RICO remedy.⁹³ *Lyng v. International Union UAW*⁹⁴ recognizes that the right of union members to associate in and with their union for the purpose of conducting a strike is a protected exercise of the freedom of expressive association.⁹⁵ That is precisely what the union was doing in *Yellow Bus*.⁹⁶ Concededly, the allegations of the plaintiff company included assertions of a "pattern" of violence on the picket line in *Yellow Bus*.⁹⁷ I do not defend the use of violence by unions or anyone else, but I do question the legitimacy of a statutory remedy that includes as an essential element First Amendment protected association, where the other elements are as vague, nebulous, and as easily subject to creative allegation as the elements of civil RICO.

Whether my fears of unconstitutional chill are evidence of paranoia or realism, only time and continued practice under the civil RICO statute will tell. Nonetheless, this is a concern shared by many members of the judiciary and a further reason why we may join in the Chief Justice's plea to get this monster out of our courtrooms.⁹⁸

4. Labor Law

Once again, *Yellow Bus* provides the backdrop to another scene in the drama of the RICO monster eating jurisprudence. As

92. *Yellow Bus Lines, Inc. v. Local Union 639*, 839 F.2d 782 (D.C. Cir. 1988).

93. See, e.g., *United States v. Local 560, Teamsters*, 780 F.2d 267 (3d Cir. 1985); *United States v. International Bd. of Teamsters*, 708 F. Supp. 1388 (S.D.N.Y. 1989).

94. 108 S. Ct. 1184 (1988).

95. *Id.* at 1189.

96. *Yellow Bus*, 839 F.2d at 794.

97. *Id.* at 789.

98. See *supra*, note 2.

my colleague, Judge Harry T. Edwards, wrote in concurring separately in that decision

I have nagging doubts about our holding that "the strike and organizational effort were 'affairs' of Yellow Bus,' . . . and that, consequently, plaintiff might be able to state a cause of action under § 1962(c) of RICO. This result seems strangely at odds with certain fundamental precepts of labor law and collective bargaining.⁹⁹

While I do not pretend to equal Judge Edwards' acknowledged expertise in the area of labor law, I certainly share his pause at invasion of that well-ordered area of jurisprudence by civil RICO action. A complex statutory structure governs federal regulation of labor management relations. More specifically, in reference to *Yellow Bus*, section 6 of the Norris Laguardia Act governs the liability of officers or members of labor organizations and of the associations themselves for unlawful acts of individual officers, members, or agents.¹⁰⁰ While *Yellow Bus* pays lip service to conforming to the principles of the Norris Laguardia Act,¹⁰¹ Congress showed no evidence in the enactment of RICO that it intended substantially to rewrite the law of labor-management relations.¹⁰² As carefully balanced as is the structure of federal labor law, I suggest that Judge Edwards and I, along with other federal judges, share a legitimate concern for the potentially drastic erosion by civil RICO of yet another whole area of our traditional federal jurisprudence.

5. *Repose of Actions*

Finally, RICO does violence to traditional principles of repose of actions. I do not speak here to the fact that RICO contains no statute of limitations,¹⁰³ nor any statutory provision for determining what statute of limitations governs civil RICO actions.¹⁰⁴ This is not an uncommon omission from federal statutes, and there is much authority on how the courts should fill this gap. Traditionally, "the courts apply the most closely analogous statute of limitations under state law."¹⁰⁵ But, "when a rule from elsewhere in fed-

99. *Yellow Bus*, 839 F.2d at 795 (Edwards, J., concurring).

100. 29 U.S.C. § 106 (1982).

101. 839 F.2d at 786.

102. See generally, 29 A.L.R. FED. 826, 826-834 (1976).

103. See 18 U.S.C. § 1961 *et seq.* (1982).

104. *Id.*

105. *Del Costello v. Teamsters*, 462 U.S. 151, 158 (1983).

eral law clearly provides a closer analogy than available state statutes, and when federal policies are at stake and the practicalities of litigation make that rule a significantly more appropriate vehicle for interstitial lawmaking,"¹⁰⁶ the courts have not hesitated to borrow an appropriate statute of limitations from other federal sources. This is precisely what the Supreme Court has done with reference to civil RICO.¹⁰⁷ In *Agency Holding Corp. v. Malley-Duff and Assoc.* the Supreme Court borrowed the four year statute of limitations from the Clayton Act¹⁰⁸ and applied it to civil RICO, which in the view of the Court closely tracked the Clayton Act as to remedial purpose and structure.¹⁰⁹

Nonetheless, this adoption of a specific period of limitations does nothing to protect fundamental principles relating to the repose actions against RICO erosion. "Statutes of limitations . . . represent a pervasive legislative judgment that it is unjust to fail to put the adversary on notice to defend within a specified period of time and that 'the right to be free of stale claims in time comes to prevail over the right to prosecute them.'"¹¹⁰ Limitations of action "are not simply technicalities. On the contrary, they have long been respected as fundamental to a well-ordered judicial system."¹¹¹ Though the civil RICO statute is now blessed by judicial discovery of an applicable statute of limitations, the purpose of requiring plaintiffs to bring their actions within a reasonable time in order to "protect defendants and the courts from having to deal with cases in which the search for truth may be seriously impaired by loss of evidence, whether by death or disappearance of witnesses, fading memories, disappearance of documents or otherwise,"¹¹² is ill-served by the structure of RICO.

The definition of "pattern of racketeering activity" quoted above,¹¹³ permits the use of "at least two acts of racketeering activity, one of which occurred after the effective date of this chapter

106. *Id.* at 172.

107. *See, e.g., Agency Holding Corp v. Malley-Duff and Assoc.*, 483 U.S. 143 (1987).

108. 15 U.S.C. § 15(b) (1982).

109. 483 U.S. at 152 (1987).

110. *United States v. Kubrick*, 444 U.S. 111, 117 (1979) (quoting *Railroad Telegraphers v. Railway Express Agency*, 321 U.S. 342, 349 (1944)).

111. *Board of Regents of the Univ. of the State of New York v. Tomanio*, 446 U.S. 478, 487 (1980).

112. *United States v. Kubrick*, at 117.

113. *See supra*, note 87.

and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity."¹¹⁴ Hypothetically then, a RICO plaintiff could bring an action as to which his claim had ripened (by injury or otherwise) within the four year period of limitations. That injury could have been caused by an act occurring anytime after 1970, coupled with an act ten years before (or longer if there had been an intervening imprisonment) and civil RICO would still be available.

In other words, civil RICO creates an essentially perpetual cause of action alien to our traditional jurisprudence. Traditionally, our courts have recognized that "even if one has a just claim it is unjust not to put the adversary on notice to defend within the period of limitations"¹¹⁵ Congress, of course, has the power to make determinations as to the period of limitations. Nonetheless, one must wonder if Congress in the civil RICO statute really made a conscious decision to create a perpetual cause of action or simply unwittingly unleashed a monster hungry for a repast of limitations of actions spiced by all the other traditional concepts of jurisprudence it could eat.

III. NOTES ON CIVIL RICO PRACTICE

A. *General Considerations*

I recognize that despite the knowledge that you are about to irritate if not infuriate the Judge in whose court you are planning to appear, some of the readers of this paper are likely to determine to file civil RICO cases anyway. Others of you may be defending civil RICO cases, whether you like it or not. There are certain matters of professionalism and ethical practice that I particularly commend to plaintiffs' attorneys, not because defense attorneys are unbound by professional and ethical strictures, but because the decision as to whether or not to bring the case is the role of the plaintiff's attorney.

I know that the considerations in favor of couching at least one count of a complaint in civil RICO terms may be strong ones. In the first place, as referenced above, RICO provides for treble

114. *Id.*

115. *Railroad Telegraphers v. Railway Express Agency*, 321 U.S. 342, 349 (1944).

damages¹¹⁶ and the recovery of counsel fees¹¹⁷ not normally available in common law fraud, breach of contract, or other state law claim lawsuits. Additionally, some of you may have decided that the old adage frequently cited by defense attorneys, asserting questionable counter claims that "he who comes to court without a claim is automatically suspect," is now amended to add "he who comes to federal court without a RICO claim is automatically suspect."

Be that as it may, before you decide to sign a RICO complaint, I first suggest that you read Rule 11 of the Federal Rules of Civil Procedure. I am sure that you are familiar with the terms of that rule, but I would remind you that your signature on a complaint

constitutes a certificate by the signer that the signer has read the pleading, motion, or other paper; that to the best of the signer's knowledge, information, and belief, formed after reasonable inquiry it is well-grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.¹¹⁸

Not only the rule, but traditional standards of honest dealing and professionalism, should require that you are able to make such a certificate in good faith when you sign the complaint. If your true motive in couching your complaint in part in RICO terms is to establish a ground on which you can blackmail a defendant out of an otherwise undeservedly large settlement by the threat that they will continue to see themselves written up as "racketeers," then I suggest that the pleading may have been "interposed for [an] improper purpose such as "to harass."¹¹⁹ In addition to your personal ethical obligation to live up to this standard, I recognize the ethical rule that "a lawyer shall not intentionally fail to seek the lawful objectives of his client through reasonably available means permitted by law . . ."¹²⁰ But I also remind you that "in his representation of a client, a lawyer shall not file a suit, assert a position, con-

116. 18 U.S.C. § 1964(c) (1982).

117. *Id.*

118. FED. R. CIV. P. 11.

119. *Id.*

120. RULES OF PROFESSIONAL CONDUCT OF THE NORTH CAROLINA STATE BAR Rule 7.1(A)(1) (1985); MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-101(A)(1) (1980).

duct a defense, delay a trial, or take other action on behalf of his client when he knows or whether it is obvious that such action would serve merely to harass or maliciously injure another."¹²¹

If ethical considerations and respect for the letter and spirit of the Federal Rules of Civil Procedure counsel against the filing of a civil RICO claim, even in an otherwise valid lawsuit, don't do it. In addition to the ethical propulsion for the decision not to file a civil RICO claim for purposes of harassment, don't forget the further provisions of Rule 11 that

if a pleading, motion, or other paper is signed in violation of this rule, the Court, upon motion, or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee.¹²²

In other words, an overzealous effort to obtain a fee award for yourself to the benefit of your client and from the other party could backfire to the extent of subjecting not only you, but also the client whose interest you are sworn to represent, to the burden of bearing the fees of the other side of the lawsuit.

There are, of course, many other considerations to bear in mind in making the decision as to whether or not to file the case, to which I will elude in the other notes on practice below.

*B. Jurisdictional Considerations*¹²³

I have operated throughout this paper on the assumption that you will bring your civil RICO case in United States district court. Most plaintiff's attorneys, relying on the language of § 1964(a) to the effect that "the district courts of the United States shall have jurisdiction,"¹²⁴ to award injunctive relief, and § 1964(c) that "any

121. RULES OF PROFESSIONAL CONDUCT OF THE NORTH CAROLINA STATE BAR Rule 7.2(A)(1) (1985); MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-102(A)(1) (1980).

122. FED. R. CIV. P. 11.

123. Between the preparation of this article and its publication in final form, the Supreme Court rendered this subsection largely obsolete by its decision in *Tafflin v. Levitt*, 58 U.S.L.W. 4157 (U.S. Jan. 23, 1990) (No. 88-1650). It is now established that state courts do enjoy concurrent jurisdiction with federal district courts over civil RICO claims and the reader may happily omit further pursuit of this portion of the article, unless particularly interested in historical context.

124. 18 U.S.C. § 1964(a) (1982).

person injured in his business or his property by reason of a violation of a § 1962 of this chapter may sue therefor in any appropriate United States district court,"¹²⁵ bring their actions in United States district court.

However, the courts are not unanimous on the exclusivity of this jurisdiction. Some courts have held that state trial courts possess concurrent jurisdiction to hear private actions for damages under the civil RICO statute.¹²⁶ Other cases have held that the jurisdiction of the federal district courts is exclusive.¹²⁷ You will note that none of these cases were decided either way by a controlling authority on North Carolina law, and I know of no North Carolina authority on the subject. You therefore run the risk that should you bring your RICO case in a North Carolina state court, the courts of North Carolina will agree with those of New York and Texas and your RICO case will be out on a dismissal order under Rule 12(b)(1)¹²⁸ for lack of jurisdiction over the subject matter.

If for tactical reasons you desire to be in state court, I suggest that you look to *Lou v. Belzberg*,¹²⁹ for collected arguments that a state court does have concurrent jurisdiction with the federal courts over civil RICO claims. As that case notes, federal law presumes "that state courts have subject matter jurisdiction over cases arising under federal laws."¹³⁰ There are three ways in which this presumption can be rebutted: (1) by explicit statutory directive; (2) by unmistakable implication from legislative history, or; (3) by clear incompatibility between federal interests and state court jurisdiction.¹³¹ *Lou v. Belzberg* holds, consequently that you

125. 18 U.S.C. § 1964(c) (1982).

126. See, e.g., *County of Cook v. Midcon Corp.*, 574 F. Supp. 902 (N.D. Ill. 1983); *Morely v. Cohen*, 610 F. Supp. 798 (D. Md. 1985); *Contemporary Servs. Corp. v. Universal City Studios*, 655 F. Supp. 885 (C.D. Cal. 1987); *Lou v. Belzberg*, 834 F.2d 730 (9th Cir. 1987); and *Jae-soo Yang Kim v. Pereira Enters.*, 694 F. Supp. 200 (E.D. La. 1988).

127. See, e.g., *Cullen v. Margiotta*, 811 F.2d 698 (2d Cir. 1987); *Hampton v. Long*, 686 F. Supp. 1202 (E.D. Tex. 1988); *Intel Corp. v. Hartford Acc. Ind. Co.*, 662 F. Supp. 1507 (N.D. Cal. 1987); *Broadway v. San Antonio Shoe* 643 F. Supp. 584 (S.D. Tex. 1986); *Greenview Trading Co. v. Hershman & Leicher, PC*, 489 N.Y.S.2d 502, 108 A.D.2d 468 (1985).

128. FED. R. CIV. P. 12.

129. *Lou v. Belzberg*, 834 F.2d 730 (9th Cir. 1987).

130. *Id.* at 735 (citing *Gulf Offshore Co. v. Mobil Oil Corp.*, 453 U.S. 473, 477-78 (1981)).

131. *Id.* at 735-36; *Gulf Offshore Co. v. Mobil Oil Corp.*, 453 U.S. at 478.

must argue that none of these three is present.¹³²

If you are defending, and wish to attack the jurisdiction of the state court, I recommend *County of Cook v. Midcon Corp.*¹³³ In that case, the district court noted the parallelism of RICO with the Clayton Act.¹³⁴ The court further noted that it has long "been recognized that 15 U.S.C. § 15 gives federal courts exclusive jurisdiction over federal antitrust claims."¹³⁵ Since the legislative history indicates that the parallelism between 18 U.S.C. § 1964(c) and 15 U.S.C. § 15 is the result of conscious patterning after the antitrust prototype, the court reasoned that

Legislators must have known that courts have construed virtually identical language as giving the federal courts exclusive jurisdiction over antitrust claims. It would be anomalous for this court to hold that the jurisdictional grant in the RICO statute did anything other than create exclusive federal jurisdiction over civil claims by persons injured by violations of 18 U.S.C. § 1962.¹³⁶

It appears that either argument can be made without doing violence to the obligations of either plaintiffs or defense attorneys under the ethical standards referenced above, and therefore I expect that you will make them when plaintiff brings a RICO claim in the North Carolina state court. However, since the question is unsettled, plaintiffs may wish to bring civil RICO claims in federal district court.

This does not however mean that there are no jurisdictional problems to be considered when you bring a civil RICO claim in federal court. As I mentioned above, the RICO claim is often the only jurisdictional peg holding in federal court a multi-count complaint setting forth common law or other state claims. Certainly under the expanded pendent jurisdiction doctrine of *United Mine Workers of America v. Gibbs*¹³⁷ and its progeny,¹³⁸ the federal court has jurisdiction to decide those non-federal claims. However, the exercise of that jurisdiction is discretionary with the district

132. *LOU v. Belzberg*, 834 F.2d at 738.

133. 574 F. Supp. 902 (N.D. Ill. 1983).

134. *Id.* at 912.

135. *Id.* (citing, *inter alia* *Blumenstock Bros. ADV Agency v. Curtis Pub. Co.*, 252 U.S. 436 (1920)).

136. *Id.*

137. 383 U.S. 715 (1966).

138. See cases collected in 13 B WRIGHT, MILLER & COOPER, FEDERAL PRACTICE AND PROCEDURE, § 3567.1 (1984).

judge.¹³⁹ While *Gibbs* sets forth for the exercise of that discretion, "considerations of judicial economy, convenience, and fairness to the litigants"¹⁴⁰ do not assume that U.S. district courts are going out of their way to help you bring one more RICO action with its state spawned hand maidens into their courts.

Remember also that "if the federal claim is too insubstantial to be the basis for federal jurisdiction, there can be no pendent jurisdiction of other claims."¹⁴¹ More importantly, "if the federal claims are dismissed before trial, even though not insubstantial in a jurisdictional sense, the state claims should be dismissed as well."¹⁴² In a number of cases, federal courts have continued to exercise pendent jurisdiction over state claims, in spite of dismissal of the federal claim, and in spite of the language from *Gibbs*.¹⁴³ However, plaintiffs' counsel should not rely on the possibility that a U.S. district judge will run very far out on a jurisdictional limb in order to keep in his court a case that he has already ruled should not have been brought there in the first place.

While you must weigh all of these jurisdictional considerations as to whether and where to bring your civil RICO claim, I would counsel (though reminding you of my interest in the subject) that if your civil RICO claim is that questionable, you may not wish to bring it at all. This is particularly true where your state law claims are strong, since the tenuous possibility of collecting treble damages and counsel fees may well not outweigh the very real possibility of delay, dismissal and subsequent stale evidence or limitations problems that a more prudent course might have avoided.

C. *The Elements Revisited*

Because I have discussed the elements at some length under the heading of judicial perspective, my further discussion as to notes on practice will be deliberately abbreviated. However, since your perspective as practitioners is different than your perspective as audience to a complaining judge, I will attempt some further discussion. Various courts have outlined the elements of a civil

139. *Gibbs*, 383 U.S. at 726.

140. *Id.*

141. 13 B WRIGHT, MILLER & COOPER, 3567.1 (1984); See authorities collected in n.4.

142. *Gibbs*, 383 U.S. at 726.

143. See, e.g., *Ingram Corp. v. J. Ray McDermott & Co.*, 698 F.2d 1295 (5th Cir. 1983); *Lentino v. Fringe Emp. Plans, Inc.*, 611 F.2d 474 (3d Cir. 1979).

RICO action in various ways. The Supreme Court in *Sedima* set forth the following elements: "(1) conduct, (2) of an enterprise, (3) through a pattern, (4) of racketeering activity."¹⁴⁴ In addition to the outlined elements, *Sedima* treats "injury" as a predicate for standing, holding that "the plaintiff only has standing if, and can only recover to the extent that, he has been injured in his business or property by the conduct constituting the violation."¹⁴⁵ I think a more useful outline for the practitioner can be drawn from the careful analysis by U.S. district judge Dale Saffels in *Maxwell v. Southwest National Bank*.¹⁴⁶ To paraphrase Judge Saffels analysis, a plaintiff in a civil RICO must prove (1) an injury to his business or property, by reason of a violation of section 1962, as to which he must prove, (2) "the existence of an enterprise which affects interstate or foreign commerce, (3) that the defendant was employed by or associated with the enterprise, (4) that the defendant participated in the conduct of the enterprise's affairs, and (5) that the participation was through a pattern of racketeering activity."¹⁴⁷ This outline of the elements is in no way inconsistent with the Supreme Court's formulation, and does a better job of setting forth what the plaintiff must really allege and prove.

1. Injury

The injury element is not a particularly demanding one. Prior to the Supreme Court's decision in *Sedima*, various circuits had sought to require some specific sort of "racketeering injury." For example, the Second Circuit in the decision reversed by the Supreme Court in *Sedima* had required the plaintiff to show "injury caused by [the] kind of harm" that Congress intended to address in the enactment of the RICO statute.¹⁴⁸ In this formulation, the Second Circuit referred the congressional intent

to eradicate organized crime because '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, seriously burden interstate and for-

144. 473 U.S. at 496 (footnote omitted).

145. *Id.*

146. 593 F. Supp. 250 (D. Kan. 1984).

147. *Id.* at 256 (quoting *Alcorn County v. U.S. Interstate Supplies*, 731 F.2d 1160 (5th Cir. 1984)).

148. *Sedima, S.P.R.L. v. Imrex Co. Inc.*, 741 F.2d. 482 (2d Cir. 1984), *rev'd*, 473 U.S. 479 (1985).

sign commerce, threaten the domestic security, and undermine the general welfare of the Nation and its citizens."¹⁴⁹

Marshall, in dissent, in the Supreme Court review of the Second Circuit's *Sedima* decision would have affirmed. While three other Justices agreed with Marshall, as noted above, five disagreed and they, of course, stated the law. Under the opinion of the Court in *Sedima*, "the compensable injury necessarily is the harm caused by predicate acts sufficiently related to constitute a pattern . . ." ¹⁵⁰ Thus, the difficulty lies, not with the element of injury, but only with the element of pattern.

However, Fourth Circuit practitioners should pay particular attention to the injury element with respect to at least one type of RICO action. Where the predicate acts consist of violations of SEC Rule 10(b)(5)¹⁵¹ prohibiting fraud "in connection with the purchase or sale of any security," the Fourth Circuit has delineated additional restrictions.¹⁵² In *International Data Bank Ltd. v. Zepkin*,¹⁵³ a post-*Sedima* decision, the Fourth Circuit noted that "only actual purchasers or sellers of securities have standing to bring a private action for Rule 10b-5 violations."¹⁵⁴ The Fourth Circuit applies this same limitation to RICO actions founded on Rule 10b-5 violations as predicate acts and therefore recognizes no other injury as affording standing to bring such a civil RICO case. Plaintiff's attorneys would therefore be well advised to use caution in attempting to bring civil RICO actions predicated on Rule 10b-5 violations. Defense attorneys might also wish to consider whether the same reasoning might lead to some limitations on civil RICO actions based on predicate acts violating other specific statutes or rules.

2. *Enterprise*

As to the enterprise element, I can add little to what I stated *supra*.¹⁵⁵ Happily, I can subtract a little. As I noted there, there is

149. *Id.* at 495 (quoting from the legislative history of the Act).

150. *Sedima*, 473 U.S. at 497.

151. 17 C.F.R. § 240.10b-5 (1988).

152. *See, e.g., International Data Bank Ltd. v. Zepkin*, 812 F.2d 149 (4th Cir. 1987).

153. 812 F.2d 149 (4th Cir. 1987).

154. *Id.* at 152 (relying on *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723 (1975)).

155. *See supra* notes 28-41 and accompanying text.

one limiting principle: the enterprise must be distinct from the RICO defendant. Given the statutory requirement for association, "logic . . . dictates that one entity may not serve as the enterprise and the person associated with it because, as Judge Posner of the Seventh Circuit has stated, 'you cannot associate with yourself.'"¹⁵⁶ The Eleventh Circuit may still constitute a minority of one to the contrary.¹⁵⁷ The Fourth Circuit does not.¹⁵⁸ Therefore, if you are attempting to sue, for example, a corporation in a civil RICO action based on predicate acts committed through individual officers of the corporation, you might consider making the officers the defendants and the corporation the enterprise, or you might otherwise find yourself out of court. Defense attorneys obviously would be well advised to carefully view civil RICO complaints with the idea in mind of finding an identity between the enterprise and the defendant.

Obviously, you should not forget that this statutory element also requires that the enterprise be one "engaged in or the activities of which affect interstate or foreign commerce."¹⁵⁹ You must allege such a "nexus" with interstate commerce and you must be prepared to prove it, but the required nexus is "minimal."¹⁶⁰ Also, it is the enterprise that must have the necessary interstate nexus. It is not necessary that either the defendant,¹⁶¹ or the predicate acts¹⁶² have such a nexus.

3. *Employment or Association*

Next, the plaintiff must be prepared to allege and prove that the defendant is a "person employed by or associated with" the enterprise.¹⁶³ Not much is required as to this element beyond its

156. *Yellow Bus Lines, Inc. v. Local Union 639*, 839 F.2d 782, 790 (D.C. Cir. 1988) (quoting *McCullough v. Sutter*, 757 F.2d 142, 144 (7th Cir. 1985)).

157. *United States v. Hartley*, 678 F.2d 961, 989-90 (11th Cir. 1982).

158. *See generally United States v. Webster*, 639 F.2d 174, 186 (4th Cir.), *cert. denied*, 456 U.S. 935 (1981), *modified in part*, 669 F.2d 185 (1982).

159. 18 U.S.C. § 1962(c) (1982).

160. *See, e.g., R.A.G.S. Couture, Inc. v. Hyatt*, 774 F.2d 1350 (5th Cir. 1985); *United States v. Robinson*, 763 F.2d 778 (6th Cir. 1985); *United States v. Conn*, 769 F.2d 420 (7th Cir. 1985).

161. *United States v. Groff*, 643 F.2d 396 (6th Cir.), *cert. denied*, 454 U.S. 828 (1981).

162. *Shared Network Technologies, Inc. v. Taylor*, 669 F. Supp. 422 (N.D. Ga. 1987).

163. 18 U.S.C. § 1962(c) (1982).

terms. RICO practitioners should note that the requirement of association and the attendant need for a separation of identity may be circumvented by alleging § 1962(a) rather than subsection (c). Since that section speaks in terms of "any person who has received any income derived . . . from a pattern of racketeering activity,"¹⁶⁴ some courts have held that a corporation-enterprise may be held liable under subsection (a) where the corporation is also a perpetrator and not merely an instrument as under subsection (c).¹⁶⁵ But be careful that you allege the proper section and the proper predicates if you wish to follow this route. Obviously, if you are defending you should determine whether opposing counsel has done that, if so you may be able to succeed on motions.

4. *Participation in the Conduct of the Enterprise's Affairs*

As I noted in the presentation of the judge's perspective,¹⁶⁶ the Fourth Circuit, which encompasses North Carolina, reads the language of section 1962(c) literally, and I think correctly. *United States v. Webster*,¹⁶⁷ requires proof that the defendant "advanced or benefitted" the affairs of the enterprise not merely that they were in some fashion connected.¹⁶⁸ The Fourth Circuit in *Webster* rejected the sufficiency of acts of racketeering which were furthered through the enterprise, since the language of the statute requires that the relationship be the reverse of that.¹⁶⁹ I have no quarrel with the Fourth Circuit's decision on that point. I suggest that RICO counsel on both sides remember the requirement, for formulating complaints, or deciding not to, and for framing motions to dismiss, or for summary judgment.

In *Webster*, the Fourth Circuit also reiterated the view that

164. *Id.*

165. *See, e.g.,* Schofield v. First Commodity Corp. of Boston, 793 F.2d 28, 31 (1st Cir. 1986); Schreiber Distrib. Co. v. Serv-Well Furniture Co., 806 F.2d 1393, 1398 (9th Cir. 1986); Haroco, Inc. v. American Nat'l. Bank & Trust Co., 747 F.2d 384, 402 (7th Cir. 1984).

166. *See supra* notes 41-52 and accompanying text. (Section IIa3b)

167. 639 F.2d 174 (4th Cir. 1981).

168. *Id.* at 184; *but see*, Yellow Bus Line v. Local Union 639, 839 F.2d 782, 793 (D.C. Cir.), *cert. denied*, 109 S. Ct. 309 (1988). (in which the D.C. Circuit merely required a "relation between the predicate offenses and the affairs of the enterprises," so that allegations of acts of racketeering antipathetic to the goals of the enterprise was deemed sufficient.)

169. *United States v. Webster*, 639 F.2d 174, 184 (4th Cir.), *cert. denied*, 456 U.S. 435 (1981), *modified in part*, 669 F.2d 185 (1982).

the enterprise's affairs must be furthered *through* a racketeering activity.¹⁷⁰ It is not enough, therefore, that the acts of racketeering occur, and that furthering of the enterprise occur, the former must be the means for the latter.¹⁷¹ Again, I find this most logical and commend it to appropriate use by counsel for both sides in RICO litigation.

5. *Pattern of Racketeering Activity*

Again, I can add little to my prior discussion of the pattern problem *supra*.¹⁷² I would add further emphasis to a point mentioned in passing in that section. Under the Supreme Court's decision in *H.J. Inc.*, it is now clear that a single scheme can constitute a pattern, provided it includes multiple acts of racketeering having the necessary continuity plus relationship.¹⁷³ So far as what constitutes the predicate acts, I can only recommend that you reread section 1961(1). During your rereading, remember the caution from *Webster* that the conduct of the enterprises affairs must be furthered *through* the racketeering activity.¹⁷⁴ With those cautions in mind, attorneys should be able to determine whether or not a specific fact situation will support proper allegation of a RICO claim, applying ethical and legal standards.

CONCLUSION

Since Congress has unleashed civil RICO, and does not appear likely to corral its creature in the near future, and since the prospect that the Supreme Court may do the corraling, while decidedly real, is at best remote in time, judges and lawyers must live with the beast at large. Therefore, I express, on behalf of myself, and at least a major part of my colleagues, the hope that you will ride the beast in a professional manner and only along ethical trails. While RICO may be expanding into areas never dreamed of by the Congress, please do not be party to expanding it to the destruction of all traditional concepts of federalism and jurisprudence. If your client has a valid RICO claim, then by all means bring it. But frame your complaint carefully and according to such guidance, scant though it may be at times, as the case law pro-

170. *Id.* at 184-85.

171. *Id.*

172. *See supra* notes 60-77 and accompanying text. (Section II A 3 d)

173. *H.J. Inc. v. Northwestern Bell Telephone Co.*, 109 S. Ct. 2893 (1989).

174. *Webster*, 639 F.2d at 184.

vides. If your client does not have a valid RICO claim, be a professional. Don't engage in legalized blackmail. Don't let your desire for enhanced damages and an award of counsel fees cause you to sell out your ethical standards. No matter how much you received in return, the price would be too low. Again, if your client's case is a sound one, bring it. If it is unsound, don't let the RICO temptations cause you to cloud and perhaps endanger good state law, tort contract or other common law actions with the fog of jurisdictional battles and the problems of evidentiary aging that such battles can cause.

If your client is a defendant in a RICO case, as in any other case, it is your duty to know the law. Yes, RICO is hard law to know. But it is your duty to either learn it well enough to represent your client competently or see that he is represented by someone who can.¹⁷⁵ That, of course, is nothing new. It is simply a new context for the continuing duty of professional counsel.

175. See NORTH CAROLINA BAR RULES OF PROFESSIONAL CONDUCT Rule 6; MODEL CODE OF PROFESSIONAL RESPONSIBILITY Canon 6 and DR 6-101 (1980).